Reply Form

**to the Consultation Paper on Technical Advice on the Scope of CSDR Settlement Discipline**

Responding to this Consultation Paper

ESMA invites comments on all matters in this Consultation Paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **9 September 2024.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

• Insert your responses to the questions in the Consultation Paper in this reply form.

• Please do not remove tags of the type < ESMA\_QUESTION\_SETD\_0>. Your response to each question has to be framed by the two tags corresponding to the question.

• If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.

• When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_ SETD\_nameofrespondent.

 For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_ SETD\_ABCD.

• Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at *www.esma.europa.eu* under the heading *‘Your input - Consultations’.*

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘[Data protection](https://www.esma.europa.eu/about-esma/data-protection)’.

**Who should read this paper?**

All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites market infrastructures (CSDs, CCPs, trading venues), their members and participants, other investment firms, credit institutions, issuers, fund managers, retail and wholesale investors, and their representatives to provide their views to the questions asked in this paper.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Italian Banking Association |
| Activity | Other |
| Are you representing an association? |[x]
| Country / Region | Italy |

# Questions

1. Do you agree with ESMA’s proposal regarding the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions? Please specify which cases you agree with and which cases you don’t agree with (if applicable). Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_1>

We agree with ESMA’s proposal regarding the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions. We also agree with the proposal to incorporate in the forthcoming Level-2 (L2) legal text the answer that ESMA has provided to one of its Q&A on this matter. Coming to the second part of Q.1, there are no cases which we do not agree with, but, as described partly in this answer and partly in our answer to Q.15, on the basis of the feedback gathered by our members, ABI is of the view that the list of exemptions should be complemented by a few further cases.

Within this consultation paper there seems to be **no residual open questions** (besides Q.15) about further topics considered important to stakeholders, so ABI regards it significant, on the basis of its members’ feedback, to highlight under this question the potential misstatement reported under paragraph 11 on page 10 on “portfolio transfers” as it regards what it may potentially be out of scope of the settlement discipline regime. Indeed, ESMA states that “*some stakeholders argued that portfolio transfers where* ***the parties delivering and receiving securities are the same*** *should be exempted, (…)*”. However, such statement is a source of potential misunderstanding. Indeed, a substantial number of Portfolio Transfers’ transactions are those where the “parties” are the custodian banks liaising with each other in order to complete successfully the transfer which is relevant to a client further down the custody / intermediation chain. As it is evident, such (custodian) parties cannot be the same (as it is stated above) when a portfolio of financial instruments is transferred by an investor from a bank to another with “No Change of Beneficial Ownership” (NCBO, the business case of a client’s portfolio transfer from a bank to another, where the property and the beneficial ownership do not change). **ABI takes the opportunity of this public consultation to reiterate that PORT/NCBOs should be excluded from the settlement discipline scope**. Should such exclusion not being accepted, the more likely scenario in cases of penalties to be debited and credited for portfolio transfers with NCBO would be the following: the delivering custodian bank (being late, i.e. to justify the activation of the penalty system) would be notified on settlement date +1 (SD+1) but the debit confirmation and allocation of the penalty to the relevant client would occur according to the so-called Penalties Calendar (i.e. after the middle of the month which follows the detection of the penalty), so at time when the cash account of the relevant (transferred) client would already be “nil balance” or even closed. Hence, the debited penalty would not be appropriately booked. Looking now at the side of the Receiving Bank, the cash account of the relevant (transferred) client would be in place by that time and, hence, the (undue) credit of the penalty would occur, creating a breach in the “immunization principle” also recalled by ESMA in this consultation paper.

Aside from this, we agree with ESMA’s statement under paragraph 13 when the Authority “*…acknowledges that only transactions that can be classified by CSDs applying straight through processing (STP) should be declared out of scope*”. ABI also shares the consideration, under par. 14, that “…*discerning whether a given circumstance qualifies as trading, often hinges on comprehending the rationale behind the operation*”. However, **when ESMA asks** (at the end of par. 14) for stakeholders’ views “…*on* ***which transaction types*** *based on the* ***codes allowed by T2S*** *(or potentially other codes such as ISO transaction codes)* ***should be exempted*** *from settlement discipline measures*”, **ABI suggests a set of codes presented under Q.15**. Aside from this, and equally importantly, in our opinion “(…) *the 41 codes allowed by T2S specifying the type of transaction from which the instruction stems* (…)” **should be qualified as “mandatory” or “conditional” matching fields**.

In fact, currently, T2S is not considering the “transaction code” as a matching field/condition (even when populated) and having it as a “matching condition” for a very specific set of cases would substantially help to define a proper perimeter for exempted transactions. The fact that the very same transaction code should be used in both the legs of a transaction is a **necessary precondition** to save the immunization principle (i.e. both the delivery and the receiving agent will use the transaction code in order to have the same treatment of the transaction, say for instance PORT or MKUP). For sure, prior to setting as “conditional” a sub-set of transaction code(s), the matching criteria would require those codes having the same meaning across CSDs.

The above would grant having a clean and consistent identification of the exemption rational, as it would imply **having both parties to agree on the transactions type ID.** Conversely, if this field remained out of the matching process, then we would witness misalignment(s) in the transaction type and, worse, a breach in the immunization principle mentioned above (what we have addressed as a “misstatement”).

There could be the case of one CSD having quoted the transaction type in the message exempting, and a receiving one/CSD calculating penalties due to a transaction type ID not present in the exemption list.

In our answer to Q.15, it follows a list of “candidate” transaction codes that, in ABI’s opinion, should be considered for the exemption from the scope of “trading” qualification, as well as exempted from the scope of the settlement discipline measures, and that should be qualified for “conditional matching”. All of them are characterized by being independent from trading parties.

<ESMA\_QUESTION\_SETD\_1>

1. ESMA would like to ask for the stakeholders’ views on the costs and benefits of the implementation of the respective exemptions from settlement discipline (based on the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions). Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **ESMA’s proposal - underlying causes of settlement fails that are considered as not attributable to the participants in the transactions** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_2>

Unfortunately, due to time constrains, it was not possible to gather sufficient (qualitative) views on the costs and benefits of the implementation of the respective exemptions from settlement discipline.

<ESMA\_QUESTION\_SETD\_2>

1. Do you have other suggestions regarding the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_3>

Based on the analysis presented by our members, ABI regards it important that ESMA considers complementing the list of exemptions, provided under paragraphs 17 and 18, with five further cases, i.e. those listed in point a), b), c), d) and e) under par. 19. The latter ones are presented in the CP as the “*circumstance deserving to be considered not as ‘trading’* “. Our members have reasons to support the inclusion of these 5 elements also under the list of “*causes of settlement fails not attributable to participants to a transaction*”. More in detail:

* as far as it concerns **point a)**, i.e. “*free-of-payment (FoP) securities transfers to securities accounts at CSDs in the context of (de)mobilisation of collateral*” (point ‘a’ under par. 19), ABI suggests adding it to list of causes underlying settlement fails not attributable to the participants to a transaction (hence to be excluded by the application for the cash penalties’ regime), and making the relevant matching fields (i.e. collateral-in (COLI) and collateral-out (COLO)) as “***conditional matching fields***”;
* as it regards **point b)** under par. 19, i.e. “*market claims, corporate actions on stock, such as cash distributions (e.g. cash dividend, interest payment), securities distributions (e.g. stock dividend; bonus issue), reorganisations (e.g. conversion, stock split, redemption, tender offer)”*, our members support their inclusion within the list of causes underlying settlement fails not attributable to the participants to a transaction (hence to be excluded by the application for the cash penalties’ regime) as they represent circumstances not born directly from trading and not attributable directly to participants (amongst other, we are referring to matching fields and flags such as “CLAI”, “TRAN”, “MARK UP”, MARK DOWN”, “ISSU”, “CORP”).

Further to the above, on the basis of our members’ feedback, ABI understands that the lack of usage of “Partial Settlement” is one of the causes underlying a number of settlement fail instances/circumstances. As we already mentioned in occasion of previous public consultations, ESMA should consider making the “Partial Settlement” qualifier a default setting, as this would contribute to reducing the nominal outstanding values on which settlement fail penalties would be computed.

Besides this, a further source of settlement fails whose causes are not attributable to participants to the transactions depends on CSDs’ cross border activities on which ESMA should liaise with CSDs in order to make them migrate to a real-time standardised management of such activities. Indeed, one further main cause due to which operations do not settle on time (especially in the case of ETFs) depends on CSDs’ lack of a standardised communication template (and relevant cut-off times associated to it) for their cross-border activities.

<ESMA\_QUESTION\_SETD\_3>

1. If you have answered yes to the previous question, please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **Respondent’s proposal** (if applicable) |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_4>

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<ESMA\_QUESTION\_SETD\_4>

1. Do any of the exemption proposed above breaks the immunization principle? Please provide arguments.

<ESMA\_QUESTION\_SETD\_5>

In ABI’s opinion none of the exemptions proposed above by ESMA, and by ABI under Q1, Q3 and Q15, break the immunization principle, under the condition that “transaction types” will be part of Change Requests (CR) to amend T2S’ logics, aimed at introducing those transaction types’ identification codes among **conditional** matching fields. It is understood that the immunization principle seeks to guarantee that “*when a counterparty fails to deliver due to the failure to receive from a different counterparty, the former will be credited the same penalties it will be debited*”, as explained by ESMA under par.12.

<ESMA\_QUESTION\_SETD\_5>

1. Which of the exemptions proposed above do you think can be filtered out before penalties are applied in an automated way? And which ones can only be exempted ex-post, as part of the already existing appeal mechanism at CSDs?

**Please provide details regarding the cost for ex-ante filtering compared to ex-post exemption via the appeal mechanism.**

<ESMA\_QUESTION\_SETD\_6>

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<ESMA\_QUESTION\_SETD\_6>

1. For exemptions that can be filtered out in advance, do you think that a CSD would prefer to implement this filter or not? Also considering the very large number of appeals they might have to deal with and also the costs it will entail.

<ESMA\_QUESTION\_SETD\_7>

Yes, we believe that CSDs / ICSDs should strive to implement such filters as they serve the function of market infrastructure, and such filtering could be implemented and run only by their side.

<ESMA\_QUESTION\_SETD\_7>

1. Do you agree with ESMA’s proposal regarding the circumstances in which operations are not considered as trading? Please specify which cases you agree with and which cases you don’t agree with (if applicable). Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_8>

ABI agrees with ESMA’s proposal regarding the five circumstances in which operations are not considered as trading. However, it disagrees with the statement and rational under paragraph 20, (Quote “*ESMA does not think that a failed delivery on a market sale transaction caused by the delay in issuing the instrument on the primary market or restrictions during a corporate action should be considered as excluded from the application of both cash penalties and the mandatory buy-in regime*”). Indeed, on the basis of our members’ feedback, a failed delivery on a market sale transaction caused by **a)** the delay in issuing the instrument on the primary market or **b)** restrictions during a corporate action, should be excluded from the application of both the cash penalties and the mandatory buy-in regime. Such fail would be due to slow process in reconciliations or confirmation from Participant Paying Agent(s) (PPA) etc, and it would consist in any case in a fail not generated by inaccuracy by the parties to the transaction. In this scope, it could be assessed whether providing for some additional rules for trading venues requesting to list and/or quote only financial instruments that are already issued and confirmed.

Further on this topic of circumstances in which operations should not be considered as “trading”, also claims or transformations *strictu sensu* should be excluded from that scope as these are the result of a transaction (instructed by the client) that was failing and on which a penalty has been already applied, it then generates a claim or transformation that is a “technical realignment of the corporate action in T2S” but it is instructed by the CSD and not by the client that has been charged already once on the parent trade.

Likewise, also portfolio transfers (PORT) should be excluded from the scope of circumstances qualifiable as trading, specifically in cases of transfers with no change in the final Beneficial Owner (NCBO). ABI is aware, based on its members feedback, that in other Member States some stakeholders argue that applying penalties on portfolio transfers would be neutral for the retail client (because such client would not “see” the penalty for a delayed or failed portfolio transfer debited on its account) and, in force of such “client-penalty-neutrality”, penalties should be applied to PORT, even in cases where there is NCBO. However, such penalties would not be “neutral” for the two banks involved in that portfolio transfer with NCBO. Indeed, the Bank A (from which the PORT would originate, the bank left by the retail client) would be debited the penalty on a PORT transfer delay or fail, and it would never be in a position to transfer to the retail client that, by the time penalty collection would occur, it would have already closed any contractual relation with the PORT’s originating bank. On the other side, though, the receiving bank would absorb the credit penalties not debited to retail client who, on its turn, would almost likely not understand them. So, ABI believes there are valid arguments not to consider PORT with NCBO as “trading” especially in cases where, as it occurs in Italy, T2S’ PORT indicator carries along information on the identity of the final beneficiary owner and its related fiscal / taxation information.

Eventually, issuances, primary market instructions, instructions linked to a payment of a corporate action, or a redemption, are all nor client-driven, nor trading-driven trades but typically technical trades on which it would be non-sense applying settlement fail penalties.

<ESMA\_QUESTION\_SETD\_8>

1. ESMA would like to ask for the stakeholders’ views on the costs and benefits of the implementation of the respective exemptions from settlement discipline (based on the circumstances in which operations are not considered as trading). Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **ESMA’s proposal - circumstances in which operations are not considered as trading** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_9>

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<ESMA\_QUESTION\_SETD\_9>

1. Do you have other suggestions regarding circumstances in which operations are not considered as trading? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_10>

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<ESMA\_QUESTION\_SETD\_10>

1. If you have answered yes to the previous question, please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **Respondent’s proposal** (if applicable) |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_11>

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<ESMA\_QUESTION\_SETD\_11>

1. Do any of the exemption proposed above breaks the immunization principle? Please provide arguments.

<ESMA\_QUESTION\_SETD\_12>

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<ESMA\_QUESTION\_SETD\_12>

1. Which of the exemptions proposed above do you think can be filtered out before penalties are applied in an automated way? And which one can only be exempted ex-post, as part of the already existing appeal mechanism at CSDs?

**Please provide details regarding the cost for ex-ante filtering compared to ex-post exemption via the appeal mechanism.**

<ESMA\_QUESTION\_SETD\_13>

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<ESMA\_QUESTION\_SETD\_13>

1. For exemptions that can be filtered out in advance, do you think that a CSD would prefer to implement this filter or not? Also considering the very large number of appeals they might have to deal with and also the costs it will entail.

<ESMA\_QUESTION\_SETD\_14>

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<ESMA\_QUESTION\_SETD\_14>

1. Which transaction types based on the codes allowed by T2S (or potentially other codes such as ISO transaction codes) should be exempted from settlement discipline measures? Please provide the codes, their definition and arguments to justify the exemption.

<ESMA\_QUESTION\_SETD\_15>

For the reasons explained under Q.1 and Q.3, in ABI’s opinion the following transaction type codes allowed by T2S should also be exempted from the settlement discipline measures (as well as excluded from the qualification of “trading” as referred to under Q.1). Such exclusion is supported by ABI as these codes do not represent operations stemming directly from trading, but they are the result of an event born at a later stage compared to the time at which the trading occurred on the relevant transaction. Among them, COLI, COLO, CORP, ISSU, MKDW, MKUP, OWNE, OWNI, PORT should in our opinion have a slightly higher priority than the rest of the list.

|  |  |  |
| --- | --- | --- |
| AUTO | AutoCollateralisation | Relates to an auto-collateralisation movement. |
| BSBK | Buy Sell Back | Relates to a buy sell back transaction. |
| BYIY | Buy In | The transaction relates to a buy-in by the market following a delivery transaction failure. |
| CLAI | Market Claim | Transaction resulting from a market claim. |
| CNCB | Central Bank Collateral Operation | Relates to a collateral delivery/receipt to a National Central Bank for central bank credit operations. |
| COLI | Collateral In | Relates to a collateral transaction, from the point of view of the collateral taker or its agent. |
| COLO | Collateral Out | Relates to a collateral transaction, from the point of view of the collateral giver or its agent. |
| CONV | DR Conversion | Relates to a depository receipt conversion. |
| CORP | Corporate Action | Relates to a corporate action. |
| ETFT | Exchange Traded Funds | Relates to an exchange traded fund (ETF) creation or redemption. |
| ISSU | Issuance | Relates to the issuance of a security such as an equity or a depository receipt. |
| MKDW | Mark-Down | Relates to the decrease of positions held by an ICSD at the common depository due to custody operations (repurchase, pre-release, proceed of corp. event realigned). |
| MKUP | Mark-Up | Relates to the increase of positions held by an ICSD at the common depository due to custody operations (repurchase, pre-release, proceed of corporate event realigned). |
| OWNI | Internal account Transfer | Relates to an account transfer involving one instructing party (message sender) to one account servicer (messages receiver). |
| PLAC | Placement | Relates to the placement/new issue of a financial instrument. |
| PORT/OWNEIf qualifier is BENE and Data Source Scheme is not present, Indicator must contain one of the following codes:NBEN/NCBO | Portfolio Move | Relates to a portfolio move from one investment manager to another and/or from an account servicer to another. It is generally charged differently than another account. |
| REAL | Realignment | Relates to a realignment of positions. |
| REDM | Redemption (Funds) | Relates to a redemption of Funds (Funds Industry ONLY). |
| RELE | DR Release/Cancellation | Relates to a release (into/from local) of Depository Receipt operation. |
| REPU | Repo | Relates to a repurchase agreement transaction. |
| VPO | Reverse Repo | Relates to a reverse repurchase agreement transaction. |
| SBBK | Sell Buy Back | Relates to a sell buy back transaction. |
| SBRE | Borrowing Reallocation | Internal reallocation of a borrowed holding from one safekeeping account to another. |
| SECB | Securities Borrowing | Relates to a securities borrowing operation. |
| SECL | Securities Lending | Relates to a securities lending operation. |
| SLRE | Lending Reallocation | Internal reallocation of a holding on loan from one safekeeping account to another. |
| SUBS | Subscription (Funds) | Relates to a subscription to funds (Funds Industry ONLY). |
| SWIF | Switch From | Transaction is a change of an investment from one sub-fund to another sub-fund (redemption-leg). |
| SWIT | Switch To | Transaction is a change of an investment from one sub-fund to another sub-fund (subscription-leg). |
| SYND | Syndicate of Underwriters | Relates to the issue of financial instruments through a syndicate of underwriters and a Lead Manager. |
| TRPO | Triparty Repo | Relates to a triparty repurchase agreement. |
| TRVO | Triparty Reverse Repo | Relates to a triparty reverse repurchase agreement. |

<ESMA\_QUESTION\_SETD\_15>