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 | European Fund and Asset Management Association (EFAMA) |
| Activity | Asset management company |
| Are you representing an association? |[x]
| Country / Region | Belgium |

# 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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_4>

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

<ESMA\_QUESTION\_SETD\_5>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

With respect to the proposed 5 circumstances not considered as trading:

1. EFAMA welcomes ESMA’s proposal to **exempt (d) the creation and redemption of fund units** on the primary market, meaning the technical creation and redemption of fund units (except for ETFs). In CSD-settling markets, the technical subscription and redemption of fund units settle via the fund custodian and the relevant CSDs and can therefore never contribute to any settlement fails. Such an exemption enhances the legal certainty for the asset managers and make the settlement discipline rules better tailored to the diversity of market operations and transactions that can potentially be subjected to the regime.

ETF primary market transactions are explicitly not included in the exemption. We agree with this given that there would be a direct challenge to the immunization principle for Authorised Participants on ETF redemptions: i.e where a selling counterparty fails into the AP who then fails into the issuer. Therefore no exemption should apply to the create/redeem between AP and issuer.

We note, however, that the ETF create/redeem on the primary market **between the issuer and CSD should be excluded**, and we understand that is exemption is already reflected in 19.c. “process of technical creation of securities”.

1. EFAMA would welcome greater clarity on what is meant by **(a)** ‘**free of payment security transfers’’**. We can think of different scenarios involving a tri-party collateral model (where the triparty collateral agent can be a CSD or a broker/custodian) or a third party model.

It would be useful to know which transactions exactly ESMA intends to scope into the exemption before reflecting on its adequacy.

In the proposal, we also fail to see recognition of a scenario where the FoP collateral transfer is used to settle an ongoing transaction. In such cases, an exemption would break the immunisation principle. For example, in cases of late recalling of a securities lending transaction due to a sale, the cash claiming process vis-à-vis the lending counterparty could no longer be carried out. Both lending instructions and transactions for bilateral collateralization are mainly transmitted as FoP transactions via SWIFT.

It is also unclear why this should only apply to FoP securities collateral transfers and not cash collateral transfers. We believe that these should be treated the same.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

An appeal system at a CSD level (ex-post) does not work as a filtering mechanism and should not be chosen as part of a systematic exemption process. Appeals should only be used for true CSD appeals.

For investment managers and their clients, they will hold their securities at a custodian, which is then sometimes further delegated to a sub-custodian for the ultimate holding at the CSD. This means that if an investment manager or their client need to appeal a cash penalty, they will need to appeal to the custodian who may then have to appeal to another sub-custodian before this is sent on to the CSD. Given CSDR will not dictate how the appeals process will work at a custodian/sub-custodian level, or even in CSD standardisation, this would create a very large additional operational burden.

A further factor is that some custodians, prime brokers and counterparts will apply a “de-minimis” at which they will accept claims for incorrectly paid cash penalties or to investigate further. This is commonly set at EUR 500 in line with guidelines produced by AFME and adopted by the wider industry but can commonly be greater. If these exemptions are applied through a CSD appeals model, some smaller entities who act through these entities may be unable to make CSD appeals as they must act through custodians who will not allow for appeals in line with the adopted de-minimis.

We strongly believe that any exemptions must be applied as ex-ante filtering and that ex-post exemptions through an appeals process will merely make the cash penalty system more complicated and incur additional costs. The current challenge with cash penalties, whether credits or debits, are that the operational cost of performing any manual claim or reimbursement can often be greater than the value of the penalty itself.

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_15>