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:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. 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.

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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 Banking Federation |
| Activity | Other |
| Are you representing an association? |  |
| Country / Region | Europe |

# 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>

On a general level, the EBF has long emphasized that CSDR cash penalties (“CPs”) significantly increase awareness of the importance, as well as economic incentives, of timely settlement, thereby attracting and focusing resources and investment to improve settlement efficiency and contributing to a reduction of the settlement fails. Since its go-live phase launched in February 2022, the CSDR cash penalties mechanism has had a positive impact on settlement efficiency. EBF Members generally believe that many of the basic features of the penalty mechanism are well-designed, as they create financial incentives for timely settlement. The current CSDR penalty mechanism is deterrent and proportionate, and it does discourage settlement fails and incentivises timely settlement.

In this context, it is crucial that the scope of CSDR penalties remains appropriate and is not reduced beyond settlement instructions where failures are not due to transaction participants or related to trading activity. The full application of the immunisation principle should also be ensured, where a party in the middle of a chain of failed settlement instructions is "immunised," meaning the penalty paid by the party is offset by the penalty they receive.

It is important that the CPs framework remains straightforward and avoids unnecessary complexity. A simple process for determining and applying exemptions should be in place. Exemptions should ideally be applied ex-ante by the CSD to prevent the need for manual intervention and the costly, burdensome appeals process. To ensure efficiency and avoid overloading CSDs, the appeals process should be reserved for exceptional cases, given the already tight timelines.

Furthermore, It is important to note that, with regards the two conditions object of the questionnaire (not attributable, not trading), cash penalties (CPs) and mandatory buy-ins (MBIs) share the same scope of exemptions, albeit with some specific additions for MBIs. However, the current approach of applying the same conditions to both CPs and MBIs is problematic, as certain settlement instructions such as the buy-in itself, should be penalized but excluded from the scope of MBIs, as the buy-in would have no reason to be performed. Against this background. Therefore, whereas answers below largely reference the scope of CPs, they should not be understood as agreement to having the same scope for MBIs, for which, in the event of MBIs being reconsidered by regulators, a separate ad-hoc consultation on their range of application and exemption should be foreseen.

Having said that, the EBF generally welcomes the proposal by ESMA to include in the forthcoming L2 the range of exemptions from the application of settlement discipline rules as previously recognized in L3. We agree with the outlined proposal regarding the six underlying causes of settlement fails to be considered as not attributable to the participants in the transactions.

Against this background, however, it is important to note that implementation challenges could be posed by the proposed exemption for situations where settlement failure is due to the suspension of ISIN trading (e.g., under Art. 32(2), Art. 52(1), Art. 69(2) MIFID II, or Art. 40(1) MIFIR). This is due to reliance by CSDs on the FIRDS database. Once an ISIN appears in the FIRDS database, T2S/CSDs are mandated by CSDR to apply penalties. In case of latency for the suspension of trading of one ISIN to be picked up by the FIRDs database (or reflected to all trading venues), T2S/CSDs would continue to apply penalties.<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>

Benefits: Improved clarity and certainty on the scope of application of CPs due to officialization of L3 guidance.

Indirect costs: if full ex-ante filtering out is not possible, it could lead to an increase in appeals to CSDs, resulting in additional manual processing and work for all stakeholders, as well as higher costs.

<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>

While some T2S and non-T2S CSDs allow "Partial Settlement" (PS) by default—requiring participants to opt-out or disallow PS for the partial settlement indicator to be excluded—the EBF understands that the underutilization of PS is a key factor contributing to instances of settlement fails. As mentioned in previous public consultations, ESMA should consider making "Partial Settlement" mandatory, as this would help reduce the nominal outstanding value basis upon which settlement fail penalties are calculated.

Additionally, another source of settlement fail not attributable to the transaction participants relates to the use of CSD or country-specific fields/codes in cross-border settlement instructions, as well as inconsistent cut-off times that are not fully harmonized. This issue is particularly prevalent in ETFs. ESMA should consider supporting the migration toward real-time, standardized management of these processes by CSDs.<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>

The EBF recognizes that exempting certain settlement transactions from the scope of application of CPs may lead to increased risk of breaking the immunization principle in rare and exceptional cases.

Namely, these situations may arise when multiple CSDs are involved in the settlement process, creating potential for inconsistencies in how exemptions are interpreted or applied. This risk is particularly relevant in cases of settlement suspensions, technical issues affecting only one CSD, and differing interpretations of sanctions or legal orders.

However, the low likelihood and limited number of potential occurrences help mitigate this risk. Additionally, the establishment of clear, workable solutions for the effective identification of exempt failed settlement instructions between parties and across CSDs will further reduce this risk. Please see answer to Q.15.<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>

EBF members generally believe that automated ex-ante filtering of exemptions is possible for cases a, c and d . EBF members strongly prefer that exemptions be applied ex-ante to minimize the number of appeals sent to CSDs.

In the case of b: suspension of ISIN trading (e.g., under Art. 32(2), Art. 52(1), Art. 69(2) MIFID II, or Art. 40(1) MIFIR), automation may be harder to achieve in exceptional cases, particularly in situations where CSDs are unlikely to be aware of recent judicial orders or potential latency in suspension of trading being picked up by FIRDS database or across trading venues. These cases would likely need to be addressed through the appeals process, but this should remain manageable as such instances are expected to be infrequent. <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 prefer to implement such filters as they serve the function of market infrastructure, and such filtering could be implemented and run only by their side.

We would like to add that CSDs generally proactively remove penalties for current exemptions where these could not be applied immediately/by the penalties calculation engine. E.g., when CSDs have experienced system issues that have caused delays in matching or settlement, CSDs have not requested CSD participants to appeal such penalties and have instead removed them as quickly as possible.<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>

The EBF generally agrees with ESMA’s proposal per paragraph 19, regarding the five circumstances in which operations are not considered as trading:

A) free-of-payment (FoP) securities transfers to securities accounts at CSDs in the context of the (de)mobilisation of collateral.

The movement of collateral between market participants is a crucial risk management function, requiring timely settlement. ESMA mentions in the consultation paper that this point was suggested by the ECB, which we assume pertains to specific ECB operations rather than collateral movements in general. This distinction should be clarified, and the ECB should be asked to provide a more precise definition, including the relevant transaction types. Further details are discussed in response to Question 10.

B) 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).

C) the process of technical creation of securities, meaning the transfer from the CSD’s issuance account to the issuer’s CSD account.

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-sensical to apply settlement fail penalties.

D) creation and redemption of fund units on the primary market, meaning the technical creation and redemption of fund units (except for ETFs).

E) realignment operations.

We believe these should be limited to movements between CSD mirror accounts, such as "technical T2S realignments" as defined by T2S. These are already exempt from penalties under the ECSDA methodology, which all CSDs follow. It would be beneficial to formalize this in Level 2 regulations.

Having said that, concerning clarifications 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”) the EBF invites careful consideration.

Indeed, 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), 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.<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>

Benefits: Improved clarity and certainty on the scope of application of CPs due to officialization of L3 guidance.

Indirect costs: if full ex-ante filtering out is not possible, it could lead to an increase in appeals to CSDs, resulting in additional manual processing and work for all stakeholders, as well as higher costs.<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>

The EBF believes that CSDR cash penalties (CPs) play a crucial role in raising awareness and economic incentive of timely settlement. Therefore, the scope of exemptions from CPs should remain limited. Exemptions should only apply to cases where imposing penalties on settlement failures lacks a clear rationale. Additionally, it is essential to weigh the costs of implementing such exemptions against the frequency of failures they would cover.

Having said that, we agree with ESMA’s statement under paragraph 13 when it “…acknowledges that only transactions that can be classified by CSDs applying straight through processing (STP) should be declared out of scope”. EBF 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”, EBF suggests a set of codes presented under Q.15.

Generally, in relation to settlement transaction types (and codes) EBF members agree that settlement instructions not related to trading can be broadly categorized into two groups:

• “**Technical**” settlement instructions: These are often automatically generated by the CSD, such as T2S automatic realignments.

• “**Administrative**” settlement instructions: This category covers a wide range of settlement instructions initiated by counterparties for operations like custody, inventory management, and asset servicing. An example includes instructions for portfolio transfers.

Both categories are further detailed in the EBF’s response to question 15.

In short, EBF members believe that, beyond the exemptions proposed in the consultation paper, there are additional cases where excluding certain settlement instructions from CSDR penalties is appropriate. These instructions, related to non-trading operations, should be clearly defined in Level 2 regulations.

Specifically, EBF members suggest that:

• **Technical** settlementinstructions, being automatically generated for internal CSD operations and not linked to trading or any economic rationale for penalties, should be exempt from CPs.

• **Administrative** instructions, although not linked to trading, cover diverse functions initiated by participants. Determining whether they should be exempt from CPs is more complex and requires case-by-case evaluation. Therefore, **the EBF plans to present a detailed analysis to the authorities in the coming weeks**.

<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>

Again, the EBF emphasizes that the full application of the immunisation principle should be ensured, where a party in the middle of a chain of failed settlement instructions is "immunised," meaning the penalty paid by the party is offset by the penalty they receive.

Having said that, there may be situations where applying certain proposed exemptions could potentially violate the immunisation principle, especially in trades involving cross-CSD settlements (i.e., point c). When multiple CSDs are involved in the settlement process, there is a risk of differing interpretations or applications of these exemptions.

However, the low likelihood and limited number of potential occurrences mitigate the risk.<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>

EBF Members reiterate a strong EBF preference for exemptions to be applied ex-ante to minimize the number of appeals sent to CSDs.

Having said that, Case D (creation and redemption of fund units in the primary market, excluding ETFs) presents a more complex implementation challenge, as it requires monitoring both the type of transaction and the type of instrument. An alternative approach could involve utilizing the future ISIN list that ESMA will be required to maintain (as per Article 7(6) of the CSDR Refit). This would also help prevent scenarios where a subscription or redemption is exempted, while other transactions, such as securities movements, incur charges.

We emphasize that the «appeal process» should be seen as a last resort measure since it is manual, costly, takes time (and even too much time due to the current cut-off that are already tight for a payment in time). The only case were the appeal process is acceptable is when the cost for an ex-ante or fully automated ex-post is really disproportionate compared to the frequency of the underlying case. <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>

1. Solutions for the clear determination of the scope of application of CSDR CPs.

Pursuant to the response in Q.10, the EBF emphasizes that the design of an appropriate, easily implementable and machine-readable solution for the clear determination of the scope of application of CSDR CPs to specific settlement transaction types (both parties must agree on the exempt transaction type) is key to foster STPs, reduce impact on settlement efficiency and avoid high implementation costs (for T2S, CSDs, and internal systems), late matches, and discrepancies. Said solution should be enabled by the current capabilities / features of the T2S environment and ensure consistency for the creation of a well-defined scope for exempted transactions.

Clearly, use of settlement transaction type codes offers considerable potential for the consistent identification of exempt operations. In this respect, harmonization would be essential. Before any sub-set of transaction type codes is considered exempt, they must have the same meaning across all CSDs. There is a potential risk of misalignment if one CSD exempts a transaction, while another applies penalties due to different interpretations of the transaction type code.

Having said that, while different solutions are being considered by EBF Members, the majority of which based on transaction type codes (e.g., leveraging use of T2S restriction types; addition of a new ‘’subject/not subject to” trade type), it is important to emphasize that any mechanism adopted should not negatively impact settlement efficiency or create additional issues, such as increased implementation costs for T2S, CSDs, or internal processes.

**Therefore, further analysis is required**. **The EBF plans to provide regulators with more detailed considerations, to be completed in the coming weeks**.

**B. List of additional “candidate” transaction type codes under consideration for exemption from of the scope of application of CPs (technical/administrative)**

**I. Technical transactions type codes (RECOMMENDED EXEMPTION)**

|  |  |  |
| --- | --- | --- |
| AUTO | AutoCollateralisation | Relates to an auto-collateralisation movement. |
| CLAI | Market Claim | Transaction resulting from a market claim. |
| CONV | DR Conversion | Relates to a depository receipt conversion. |
| 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). |
| PLAC | Placement | Relates to the placement/new issue of a financial instrument. |
| 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. |
| SUBS | Subscription (Funds) | Relates to a subscription to funds (Funds Industry ONLY). |
| SYND | Syndicate of Underwriters | Relates to the issue of financial instruments through a syndicate of underwriters and a Lead Manager. |

1. Administrative transactions type codes (ANALYSIS ONGOING)

|  |  |  |
| --- | --- | --- |
| 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. |
| OWNI | Internal account Transfer | Relates to an account transfer involving one instructing party (message sender) to one account servicer (messages receiver). |
| OWNE | External Account Transfer | Relates to an account transfer involving more than one instructing party (messages sender) and/or account servicer (messages receiver). |
| PORT | 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. |
| SBRE | Borrowing Reallocation | Internal reallocation of a borrowed holding from one safekeeping account to another. |

<ESMA\_QUESTION\_SETD\_15>