



European Securities and  
Markets Authority

# Consultation Paper

**Guidelines on the Access to a CCP or a Trading Venue by a CSD**



## **Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific question included in the paper. 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 **19 February 2015**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations' using the [reply form](#).

### **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 publically 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 [Legal Notice](#).

### **Who should read this paper**

This document will be of interest especially to central securities depositories (CSDs), central counterparties (CCPs), trading venues and their competent authorities, in the context of access to a CCP or a trading venue by a CSD in accordance with Article 53 of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (CSDR).

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## Acronyms

CCP	Central counterparty
EC	European Commission
CP	Consultation Paper
CSD	Central Securities Depository
CSDR	Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012
ESMA	European Securities and Markets Authority
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
EU	European Union
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012
MS	Member State
NCA	National Competent Authority
OJ	The Official Journal of the European Union
RTS	Regulatory Technical Standards
TV	Trading venue

# 1 Executive Summary

## Reasons for publication

On 7 March 2012 the European Commission (EC) proposed a Regulation on improving securities settlement in the European Union (EU) and on central securities depositories (CSDs) and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (CSDR). On 18 December 2013, the European Parliament and the Council of the European Union agreed the CSDR text. On 26 February 2014, the Permanent Representatives Committee, on behalf of the Council of the European Union, confirmed the agreement with the European Parliament (EP). On 15 April 2014, CSDR was formally adopted by the EP. On 16 July 2014 the EP and the Council published the agreed text, ready for publication in the OJ. Finally, the CSDR was published in the OJ on 28 August 2014 and entered into force in 17 September 2014.

Under Article 53 of CSDR, ESMA is required to elaborate draft RTS to specify the risks to be taken into account by CSDs when carrying out a comprehensive risk assessment, and by competent authorities when assessing the reasons for refusal in accordance with paragraph 3 of Article 53 of CSDR, and the elements of the procedure referred to in paragraph 3 of Article 53 of CSDR. Article 53 of CSDR foresees access by other market infrastructures to CSDs, as well as access by CSDs to other market infrastructures. Given the fact that the RTS under Article 53 of CSDR only refer to access by a CCP and a trading venue to a CSD, and not to access by a CSD to a CCP or a trading venue, ESMA considers that there will be a gap in the regulatory treatment of access between CSDs, CCPs and trading venues, especially as this type of access between infrastructures is not covered under MIFID II/ MIFIR either.

Therefore, ESMA has prepared this Consultation Paper (CP) in order to consult interested parties for the purpose of elaborating guidelines on the access to a CCP or a trading venue by a CSD, in order to clarify the application of Article 53 of CSDR. Respondents to this consultation are encouraged to provide the relevant background information and qualitative and quantitative data on costs and benefits, as well as concrete redrafting proposals, to support their arguments where alternative ways forward are called for. If respondents envisage any technical difficulties in implementing the proposed requirements, they are encouraged to provide details regarding the specific technical and operational challenges and specify the costs involved, which are important for the performance of a cost-benefit analysis.

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This CP covers the risks to be taken into account by a CCP or a trading venue when carrying out a comprehensive risk assessment following a request for access by a CSD, as well as when the competent authority of the CCP or the competent authority of the trading venue assesses the reasons for refusal to provide services by the CCP or by the trading venue, in accordance with Article 53 of CSDR.

## **Next Steps**

ESMA will consider the responses it receives to this CP, in conjunction with the responses received to the CP on the draft technical standards on access elaborated by ESMA under CSDR. ESMA will finalise and publish the guidelines in correlation with the entry into force of the regulations regarding the technical standards on access under CSDR to be adopted by the EC.

ESMA will finalise the cost-benefit analysis regarding the proposed measures, to be included in the Final Guidelines. The limited information available did not allow ESMA to produce a quantitative impact study for the purpose of this CP. The input from stakeholders will help ESMA in finalising the guidelines and the relevant cost-benefit analysis. Therefore, respondents to this consultation are strongly encouraged to provide solutions for any problems raised and support these drafting proposals with the relevant data.

## 2 Guidelines on the Access to a CCP or a Trading Venue by a CSD

### 2.1 Scope

#### Who?

1. These guidelines are addressed to competent authorities of CCPs and trading venues.

#### What?

2. These guidelines apply in relation to risks to be taken into account by a CCP or a trading venue when carrying out a comprehensive risk assessment following a request for access by a CSD, as well as when the competent authority of the CCP or the competent authority of the trading venue assesses the reasons for refusal to provide services by the CCP or by the trading venue, in accordance with Article 53 of CSDR.

#### When?

3. These guidelines apply from [the date of entry into force of Regulation (EU) No .... (RTS on Access and Links) under CSDR].

### 2.2 Definitions

4. Unless otherwise specified, terms used in Regulation (EU) No 909/2014 (CSDR) and in Regulation (EU) No.... [RTS on Access and Links] have the same meaning in these guidelines.

### 2.3 Purpose

5. The purpose of these guidelines is to ensure common, uniform and consistent application of the provisions of Article 53 of CSDR. In particular, they specify the risks to be taken into account by a CCP or a trading venue when carrying out a comprehensive risk assessment following a request for access by a CSD, as well as when the competent authority of the CCP or the competent authority of the trading venue assesses the reasons for refusal to provide services by the CCP or by the trading venue.

## 2.4 Compliance and reporting obligations

### 2.4.1 Status of the guidelines

6. This document contains guidelines issued under Article 16 of the ESMA Regulation. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.
7. Competent authorities to whom the guidelines are addressed, should comply by incorporating them into their supervisory practices.

### 2.4.2 Reporting requirements

8. Competent authorities to which these guidelines are addressed must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA to [email address]. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.
9. CCPs and trading venues are not required to report whether they comply with these guidelines.

## 2.5 Guidelines

10. Where, in accordance with Article 53(3) of Regulation (EU) No 909/2014, a CCP or a trading venue carries out a comprehensive risk assessment following a request for access by a CSD, as well as when the competent authority of the CCP or of the trading venue assesses the reasons for refusal to provide services by the CCP or by the trading venue, they should take into account the following risks resulting from such a provision of services:
  - (a) the legal risks;
  - (b) the financial risks;
  - (c) the operational risks.
11. When assessing the legal risks, the CCP or the trading venue, and its competent authority should take into account at least the following criteria:
  - (a) The CSD does not provide the information needed to assess its compliance with the rules and legal requirements for access of the the receiving party, including the legal opinions or any relevant legal arrangements that demonstrate the ability of the requesting party to meet its obligations towards the receiving party;
  - (b) In the case of a CSD established in a third country, the CSD is not subject to a regulatory and supervisory framework comparable to that of the home Member State of the receiving party, and the rules of the CSD concerning settlement finality referred to in Article 39 of Regulation (EU) No 909/2014 are not enforceable in the jurisdiction of the CSD;

- (c) The CSD does not provide the information, including the legal opinions or any relevant legal arrangements, needed to assess its ability to ensure, in accordance with the rules applicable in the Member State of the receiving party, the confidentiality of information provided through the transaction feed.
12. When assessing the financial risks, the CCP or the trading venue, and its competent authority should take into account at least the following criteria:
- (a) Whether the CSD holds sufficient financial resources to fulfil its obligations towards the receiving party;
  - (b) The CSD is not willing or able to finance any customised component required to enable access in accordance with Article 53(1) of Regulation (EU) No 909/2014, to the extent that this is not a discriminatory access condition.
13. When assessing operational risks, the CCP or the trading venue, and its competent authority should take into account at least the following criteria:
- (a) The CSD is not able to demonstrate that it can adhere to and comply with the existing risk management rules of the receiving party or it lacks expertise the necessary expertise in that regard;
  - (b) The CSD has not put in place business continuity policies and disaster recovery plans;
  - (c) The granting of access requires the receiving party to undertake significant changes of its operations that would affect the risk management procedures of the receiving party;
  - (d) Access should not create additional operational risks for the receiving party, in particular access does not require the receiving party to implement on-going manual processing, increasing the risk of human error.
14. Where a CCP or a trading venue, intends to refuse access to its transaction feed to a CSD, it should justify such a refusal on the basis of reasons that should be supported by adequate and detailed explanations that would enable the CSD and the competent authority of the CCP or of the trading venue to properly understand the risks resulting from the provision of services to the CSD. The reasons for refusal should be objective, demonstrable and non-discriminatory.
15. The CSD should comply on an on-going basis with the requirements concerning access. The CCP or the trading venue should be able to withdraw access where the CSD no longer complies with the relevant access requirements. The CCP or the trading venue should justify in writing such a withdrawal of access in accordance with Article 3 of Regulation (EU) No.... [RTS on Access and Links].

**Q1: What are your views on the proposed Guidelines?**

## 3 Annex: Cost-benefit analysis

### 3.1 Introduction

16. Article 16 of the ESMA Regulation requires ESMA, where appropriate, to analyse the potential costs and benefits relating to proposed guidelines. It also states that cost-benefit analyses must be proportionate in relation to the scope, nature and impact of the proposed guidelines.
17. The objective of performing a cost-benefit analysis is to assess the costs and benefits of the various policy or technical options which were analysed during the process of drafting the guidelines.
18. The guidelines included in this CP are of an optional nature, i.e. they are not envisaged in any Regulation, but are issued in line with Article 16 of ESMA Regulation in order to ensure uniform, consistent and coherent application of Union Law.
19. The choices or options envisaged by ESMA while drafting these guidelines were therefore limited to whether to issue these guidelines and ensure a consistent application of CSDR within the Union (which is one of ESMA's tasks) or not issuing them.
20. There are directly applicable provisions in CSDR that would not apply in a uniform, consistent and coherent way within the Union in the absence of a clarification from ESMA on the risks to be taken into account by a CCP or a TV when carrying out a comprehensive risk assessment following a request for access by a CSD, as well as when the competent authority of the CCP or the competent authority of the trading venue assesses the reasons for refusal to provide services by the CCP or by the TV, in accordance with Article 53 of CSDR. These directly applicable obligations relate to the fact a CCP and a TV shall provide transaction feeds on a non-discriminatory and transparent basis to a CSD upon request by the CSD. The CCP and the TV shall deny access only where such access would affect the smooth and orderly functioning of the financial markets or cause systemic risk. It shall not deny a request on the grounds of loss of market share. A CCP or a TV that refuses access to a CSD shall provide the CSD with full written reasons for such refusal based on a comprehensive risk assessment.
21. The costs implied by these guidelines can be summarised as the cost of changing current market practices, where necessary. These costs could be associated and would be to an extent similar to the costs of implementation of the CSDR provisions on access, which have already been analysed when the EC proposal on CSDR was published.
22. As proved by the impact assessment of the EC on CSDR, the benefits brought by the proposal significantly outweigh the costs. These guidelines aim at ensuring the uniform, consistent and coherent application of CSDR across the Union, which is an essential component of an EU Regulation that by its nature is directly applicable in all MS. The absence of guidelines on the risks to be taken into account by a CCP or a TV when carrying out a comprehensive risk assessment following a request for

access by a CSD, as well as when the competent authority of the CCP or the competent authority of the TV assesses the reasons for refusal to provide services by the CCP or by the TV, would have the following consequences:

(a) An un-level playing field between entities subject to CSDR established in different MS;

(b) A lack of clarity among stakeholders on the risks to be taken into account by a CCP or a TV when carrying out a comprehensive risk assessment following a request for access by a CSD, as well as when the competent authority of the CCP or the competent authority of the TV assesses the reasons for refusal to provide services by the CCP or by the TV, and

(c) Legal risks for stakeholders in view of the uncertainty resulting from the absence of a clear and consistent description of risks.

23. On the basis of the analysis above, ESMA concludes that the benefits of issuing guidelines on the risks to be taken into account by a CCP or a TV when carrying out a comprehensive risk assessment following a request for access by a CSD, as well as when the competent authority of the CCP or the competent authority of the TV assesses the reasons for refusal to provide services by the CCP or by the TV outweigh the costs.