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Targeted consultation on the review of the Regulation on improving securities settlement in the European Union and on central securities depositories

Fields marked with * are mandatory.

Introduction

1. Background to this consultation

Central Securities Depositories (CSDs) are systemically important institutions for financial markets. They operate the infrastructure (so-called securities settlement systems (SSS)) that enables securities settlement. CSDs also play a crucial role in the primary market, by centralising the initial recording of newly issued securities. Furthermore, they ensure the maintenance of securities accounts that record how many securities have been issued by whom and each change in the holding of those securities. CSDs also play a crucial role for the financing of the economy. Apart from their role in the primary issuance process, securities collateral posted by companies, banks and other institutions to raise funds flows through securities settlement systems operated by CSDs. CSDs also play an essential role for the implementation of monetary policy by central banks as they settle securities in central bank monetary policy operations.

Regulation (EU) No 909/2014 on central securities depositories (CSDR) aims to increase the safety and improve settlement efficiency as well as provide a set of common requirements for CSDs across the EU. It does this by introducing:

- shorter settlement periods
- cash penalties and other deterrents for settlement fails
- strict organisational, conduct of business and prudential requirements for CSDs
- a passport system allowing authorised CSDs to provide their services across the EU
- increased prudential and supervisory requirements for CSDs and other institutions providing banking services that support securities settlement
- increased cooperation requirements for authorities across Member States with respect to CSDs providing their services in relation to financial instruments constituted under the law of a Member State other than that of their authorisation and to CSDs establishing a branch in another Member State

Thus, CSDR plays a pivotal role in the post-trade harmonisation efforts in the EU, enhancing the legal and operational conditions in particular for cross-border settlement in the Union, while promoting cross-border competition within the single market. There have been diverging interpretations and application of the requirements related to cross-border activity. The Commission expects to be able to assess if there has been any evolution in the provision of CSDR core services on a cross-border basis and whether the objective of improving this activity is being reached.

2. Report on the Regulation

Article 75 of CSDR requires the Commission to review and prepare a general report on the Regulation and submit it to the European Parliament and the Council by 19 September 2019. However, a comprehensive review of CSDR is not possible at this point in time considering that some CSDR requirements did not apply until the entry into force of the relevant regulatory technical standards in March 2017 and that some EU CSDs were only recently authorised under CSDR.

Nevertheless, the forthcoming Commission report should consider a wide range of specific areas where targeted action may be necessary to ensure the fulfilment of the objectives of CSDR in a more proportionate, efficient and effective manner. Recent developments, in particular the pressure put on markets by the COVID-19 pandemic, have brought a lot of attention to the implementation of rules emerging from CSDR. For example, certain stakeholders argue that mandatory buy-ins would have been disproportionate as they would have heavily impacted market making and liquidity for certain asset classes (in particular the non-cleared bond market).

Furthermore, under Article 81(2c) of Regulation (EU) No 2010/10 establishing a European Supervisory Authority (European Securities and Markets Authority), the Commission is required, after consulting all relevant authorities and stakeholders, to conduct a comprehensive assessment of the potential supervision of third-country CSDs by ESMA exploring certain aspects, including recognition based on systemic importance, ongoing compliance, fines and periodic penalty payments.

The Commission 2021 work programme and the 2020 Capital Markets Union action plan already announce the Commission's intention to come forward with a legislative proposal to simplify CSDR and contribute to the development of a more integrated post-trading landscape in the EU. Enhanced competition among CSDs would lower the costs incurred by investors and companies in cross-border transactions and strengthen cross-border investment. The legislative proposal will also contribute to achieving an EU-rulebook in this area. Moreover, in its resolution on further development of the Capital Markets Union, the European Parliament has invited the Commission to review the settlement discipline regime under CSDR in view of the COVID-19 crisis and Brexit (European Parliament resolution of 8 October 2020 on further development of the Capital Markets Union (CMU): improving access to capital market finance, in particular by SMEs, and further enabling retail investor participation (2020/2036(INI)), para. 21.).

In the preparation of its report on the CSDR review, the Commission objective is to consult as wide a group of stakeholders as possible. In September 2020, the Commission held a Member States' Expert Group meeting, with the participation also of the ECB and the European Securities and Markets Authority (ESMA), where the issues to be examined within the context of the CSDR review were discussed.

In addition, under Article 74 of CSDR, ESMA is required to submit a number of reports to the Commission on the implementation of the Regulation annually. A first set of reports on: (a) internalised settlement and (b) the cross-border provision of services by CSDs and the handling of applications to provide notary and central maintenance services on a cross-border basis, were submitted to the Commission on 5 November 2020. Given the lack of available and meaningful data until a sufficient number of CSDs was authorised, which was considered to have been reached in 2020, no reports were submitted to the Commission before that point in time. Input from the ESMA reports will also feed into the forthcoming Commission report.

3. Responding to this consultation

The purpose of this document is to consult all stakeholders on their views and experiences in the implementation of CSDR to date. Interested parties are invited to respond by 2 February 2021 to the present online questionnaire. The responses to this consultation will provide important guidance to the Commission services in preparing their final report.

Responses to this consultation are expected to be of most use where issues raised in response to the questions are supported with quantitative data or detailed narrative, and accompanied by specific suggestions for solutions to address them. Such suggestions may relate to either the Regulation or to relevant delegated and implementing acts. Supplementary questions providing for free text responses may appear depending on the response to a multiple choice question.

All interested stakeholders are invited to respond to the questions set out below; please note that some questions indicate that feedback is sought only from specific types of stakeholders.

As mentioned above, it is acknowledged that certain core requirements and procedures provided for under CSDR are yet to be implemented. In particular, at this stage the settlement discipline regime is not yet in force. Nonetheless, the Commission services welcome the views of stakeholders as to any identified issues with respect to the implementation of upcoming requirements. Recent developments in the market due to the COVID-19 crisis may also be considered in the overall assessment.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-csdr-review@ec.europa.eu.

More information on

- this consultation
- the consultation document
- Central securities depositories (CSDs)
- the protection of personal data regime for this consultation

About you

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* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- (•) English
- Estonian

- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Patrick

* Surname

Arora

* Email (this won't be published)

patrick.arora@dsgv.de

* In which of the following categories does your company/organisation fall?

- ○ Central Counterparties (CCPs)
- ○ Central Securities Depositories (CSDs)
- ◉ Other

* Organisation name

255 character(s) maximum

GBIC - German Banking Industry Committee

* Organisation size

- ○ Micro (1 to 9 employees)
- ○ Small (10 to 49 employees)
- ○ Medium (50 to 249 employees)
- ◉ Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

52646912360-95

* Country of origin

Please add your country of origin, or that of your organisation.

○ Afghanistan	○ Djibouti	○ Libya	○ Saint Martin
○ Åland Islands	○ Dominica	○ Liechtenstein	○ Saint Pierre and Miquelon
○ Albania	○ Dominican Republic	○ Lithuania	○ Saint Vincent and the Grenadines
○ Algeria	○ Ecuador	○ Luxembourg	○ Samoa

- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom

- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

* Field of activity or sector (if applicable):

- [ ] Accounting
- [ ] Auditing
- [x] Banking
- [ ] Credit rating agencies
- [ ] Insurance
- [ ] Pension provision
- [ ] Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)

- ☐ Market infrastructure operation (e.g. CCPs, CSDs, Stock exchanges)
- ☐ Social entrepreneurship
- ☐ Other
- ☐ Not applicable

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **Fo r the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* **Contribution publication privacy settings**

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- ○ **Anonymous**
  Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.
- ◉ **Public**
  Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☑ I agree with the personal data protection provisions

I. CSD Authorisation & review and evaluation processes

CSDs are subject to authorisation and supervision by the competent authorities of their home Member Sate which examine how CSDs operate on a daily basis, carry out regular reviews and take appropriate action when necessary.

Under Articles 16 and 54 of CSDR, CSDs should obtain an authorisation to provide core CSD services as well as non-banking and banking-type ancillary services. Article 69(4) however allows CSDs authorised under national law prior to the adoption of CSDR to continue operating under such national law until they have been authorised under the new CSDR rules.

As of August 2020, 22 out of 30 existing EU CSDs are authorised under Articles 16 and/or 54 CSDR. ESMA's register of EU CSDs shows that the time to complete the authorisation process varies significantly and that 7 existing EU CSDs have not yet been authorised under CSDR, while one CSD has been authorised under Article 16 of CSDR, but not yet under Article 54 of CSDR (i.e. for banking-type ancillary services). The size and complexity of CSDs and the different services they offer, as well as their initial level of compliance with primary and secondary legislation at the time of its adoption, may explain, at least partially, such differences. Furthermore, there is also anecdotal evidence from some stakeholders that the administrative burden of the authorisation process under CSDR, or as applied by some NCAs, can act as a barrier to new market entrants, thereby limiting competition. Similar feedback suggests that the authorisation process might lack proportionality in circumstances where not all requirements are relevant to the activity envisaged by the applicant.

Once a CSD has been authorised, CSDR requires national competent authorities (NCAs) to review CSD's compliance with rules emerging from the Regulation and to evaluate risks to which a CSD is or might be exposed, as well as risks it might create. This review and evaluation must be done at least on an annual basis. Its depth and frequency is to be established by NCAs taking into consideration the size, nature and systemic importance of the CSD under supervision. The detail of the information to be provided on an annual basis by CSDs to NCAs is set forth in Delegated Regulation (EU) 2017/392.

Looking forward, the lessons learnt from the way the authorisation procedures have run should also be useful for the CSDs' annual review and evaluation by their competent authorities. It has been argued that annual reviews should be integrated in NCAs' supervisory activities in such a way that they bring added value, suit their risk-based supervisory approach and ensure supervisory convergence at Union level.

Question 1. Given the length of time it has taken, and is still taking in some instances, to authorise CSDs under CSDR, do you consider that the application process would benefit from some refinement and/or clarification in the Regulation or the relevant delegated acts?

- Yes, some aspects of CSDR or the relevant delegated acts would merit clarification, although no legislative or regulatory amendment would be required.
- Yes, the CSDs authorisation process should be amended to be made more efficient.
- No, the length and complexity of the authorisation process reflects the complexity of CSDs' businesses.
- No, most of the CSDs in the Union have already been authorised under CSDR, there is no case for amending the authorisation process.
- Other

Question 1.1 Please explain your answer to question 1, providing where possible quantitative evidence and/or examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 2. Should an end date be introduced to the grandfathering clause of CSDR?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 3. Concerning the annual review process, should its frequency be amended?

- Yes
- No
- Don’t know / no opinion / not relevant

Please explain your answer to Question 3, providing where possible quantitative evidence and/or examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Articles 41 and 42 of Commission Delegated Regulation (EU) 2017/392 prescribe the information and the statistical data that CSDs should provide to NCAs on an annual basis.

Question 4.1 Do you consider this information and statistical data to be relevant for the review and evaluation process described in Article 22 of CSDR?

- Yes, all information and statistical data are relevant.
- No, not all information and statistical data should be required to be provided on an annual basis.
- Don’t know / no opinion / not relevant

Question 4.2 Do you consider these requirements to be proportionate?

- Yes, all information and statistical data must be provided on an annual basis.
- No, not all information and statistical data should be required to be provided on an annual basis.
- Don’t know / no opinion / not relevant

Question 5. Are there specific aspects of the review and evaluation process, other than its frequency and the content of the information and statistical data to be provided by CSDs, that should be examined in the CSDR review?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 6. Do you think that the cooperation among all authorities (NCAs and Relevant Authorities) involved in the authorisation, review and evaluation of CSDs could be enhanced (e.g. through colleges)?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 6.1 Please explain your answer to Question 6 providing, where possible, quantitative evidence and/or examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 7. How do you think ESMA’s role could be enhanced in order to ensure supervisory convergence in the supervision of CSDs (for example

with possible further empowerments for regulatory technical standards and /or guidelines, or an enhanced role in supervisory colleges, or direct supervisory responsibilities)?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

II. Cross-border provision of services in the EU

A core objective of CSDR is the creation of a single market for CSDs. CSDR provides important opportunities for cross-border activities by CSDs within the Union as it grants CSDs authorised in one Member State with a "passport" to provide their services in the EU without the need for further authorisation. This means also that CSD groups should be able to consolidate certain aspects of their operations in a much more efficient way. When a CSD provides its services in a Member State other than where it is established, the competent authority of the home Member State is responsible for the supervision of that CSD.

The procedure through which a CSD authorised in an EU Member State can provide notary and central maintenance services in relation to financial instruments constituted under the law of another EU Member State or to set up a branch in another Member State is set out in Article 23(3) to 23(7) of CSDR and is based on the cooperation of the CSD's home Member State competent authority with the host Member State competent authority. In that case, the home Member State competent authority bears the primary responsibility to determine the adequacy of the administrative structure and the financial situation of the CSD wishing to provide its services in the host Member State.

Despite the fact that most of the applying CSDs have been able to obtain a “passport” to offer notary and central maintenance services in one or several other Member States, anecdotal information from stakeholders has indicated that this process has been significantly more burdensome than previously thought. This, in turn, could potentially lead to a reduction in the level of cross-border activity, limiting potential efficiency gains and, potentially, competition. This may be due to differing interpretations of CSDR’s requirements related to the provision of services in another Member State, but could also arise from the requirements themselves. Challenges mentioned include, but are not necessarily limited to, the role of the host NCA in granting the passport and supervision cooperation among NCAs, the determination of the law applicable to the issuance and the assessment of the measures the CSD intends to take to allow its users to comply with the national law under which the securities are constituted.

Note that question 8 is mainly intended for issuers.

Question 8. One of the main objectives of CSDR is to improve competition between CSDs so as to enable market participants a choice of provider and reduce reliance on any one infrastructure provider.

In your view, has competition in the provision of CSD services increased or improved in your country of establishment in recent years?

- Yes
- No
- Don't know / no opinion / not relevant

Question 8.1 Please explain your answer to Question 8, providing where possible quantitative evidence and/or concrete examples.

Please indicate where possible the impact of CSDR on:

a. **the number of CDs active in the market**

b. **the quality of the services provided**

c. **the cost of the services provided**

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Note that question 9 is mainly intended for CSDs and/or issuers.

Question 9. Are there aspects of CSDR that would merit clarification in order to improve the provision of notary/issuance, central maintenance and settlement services across the borders within the Union?

- Yes
- No
- Don't know / no opinion / not relevant

Question 9.1 Please explain your answer to Question 9, providing where possible quantitative evidence and/or concrete examples:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Note that questions 10, 11 and 12 are mainly intended for CSDs.

Question 10. Have you encountered any particular difficulty in the process of obtaining the CSDR "passport" in one or several Member States different to the one of your place of establishment?

- Yes
- No
- Don't know / no opinion / not relevant

Question 11. In how many Member States do you currently serve issuers by making use of your CSDR "passport"?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 12. Are there any obstacles in the provision of services to issuers in a Member State for which you have obtained the CSDR "passport" that actually prevent you from providing such services?

- Yes
- No
- Don't know / no opinion / not relevant

Question 12.1 Please explain your answer to Question 12, providing where possible quantitative evidence and/or concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 13. Do you think that the cooperation amongst NCAs would be improved if colleges were established for [or cooperative arrangements were always involved in] the Article 23 process?

- Yes
- No
- Don't know / no opinion / not relevant

Question 13.1 Please explain your answer to Question 13, providing where possible quantitative evidence and/or concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 14. How do you think ESMA's role could be enhanced in order to ensure supervisory convergence in the supervision of CSDs that provide their services on a cross-border basis within the EU?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

III. Internalised settlement

Article 9 of CSDR provides for internalised settlement reporting, whereby a settlement “internaliser” must report to the competent authority of its place of establishment, on a quarterly basis, the aggregated volume and value of all securities transactions that it settles outside a securities settlement system (SSS). The information which is required to be included in the quarterly internalised settlement reports is specified in Commission Delegated Regulation (EU) 2017/391, while the format of reports is outlined in Commission Implementing Regulation (EU) 2017/393.

The first internalised settlement reports were due to the competent authorities by 12 July 2019 and contained details of transactions settled internally from 1 April 2019 to 30 June 2019.

The objective of internalised settlement reporting is to enable NCAs to monitor and identify the risks (e.g. operational, legal) associated with internalised settlement. The identification of such risks or of any trends seems to have been limited to date. Nevertheless, the reported figures show very high volumes and values, high concentration, as well as high settlement fail rates. This proves the importance of monitoring the internalised settlement activity. Data quality issues (e.g. clarification of the exact scope of the requirement, development and implementation of IT tools and systems, correct implementation of reporting formats, etc.) and the relatively short timeframe since the start of this reporting regime (Q2 2019) may have limited any such analysis of risks and/or trends.

As part of its fitness check on supervisory reporting requirements, the Commission has committed to assessing whether the reporting objectives are set correctly (relevance), whether the requirements meet the objectives (effectiveness, EU added value), whether they are consistent across the different legislative acts (coherence), and whether the costs and burden of supervisory reporting are reasonable and proportionate (efficiency). Furthermore, the Commission is aware that changes to reporting requirements may imply costs and as such the overall benefits of any amendment to an established reporting requirement should exceed its costs.

Question 15. Article 2 of Delegated Regulation (EU) 2017/391 establishes the data which internalised settlement reports should contain.

Do you consider this data meets the objectives of relevance, effectiveness, EU added value, coherence and efficiency?

- (●) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

Question 15.1 Please explain your answer to Question 15, providing where possible quantitative evidence and/or concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe that the data currently reported is sufficiently granular to meet the objectives (relevance and effectiveness, EU added value). They required a significant technology being built and involved considerable costs creating the reporting systems which are now running smoothly, which is why we would rate the reporting reasonable and proportionate (efficiency) as long as it remains unchanged. We cannot assess the consistency across the different legislative acts (coherence).
The CSDR reporting obligation’s original objective was simply to get an overview of the internalised settlement activities on an aggregated basis. This relatively simple obligation of aggregated quarterly reports (“Settlement internalisers shall report […] on a quarterly basis the aggregated volume and value of all securities transactions that they settle outside securities settlement systems.”) became a complex and extensive reporting mechanism on level 2 and level 3 as very granular information now has to be provided. All information and data needed to identify potential risks have been listed in the RTS and ITS related to Art.

9 CSDR and were consulted several times.

The complexity and granularity of data to be reported also lead to the described issues (“e.g. clarification of the exact scope of the requirement, development and implementation of IT tools and systems, correct implementation of reporting formats, etc.”).

This may lead to the conclusion that the reports contain too many irrelevant data and that Article 2 of Commission Delegated Regulation (EU) 2017/391 is too excessive and therefore detrimental to the “relevance, effectiveness, EU added value, coherence and efficiency” of the objective pursued by Article 9 CSDR. However, the ESMA guidelines on internalised settlement reporting clarified all open questions regarding the implementation of the reporting requirements (e.g. scope, formats etc.), the reporting systems are in place and running smoothly. Reports have been submitted on time, technical questions were clarified during the testing period. Supervisory authorities should also be technically capable of sorting out and disregarding any excess information delivered pursuant to the ITS template.

We are therefore of the opinion that the existing reporting obligation and mechanism fulfils the objectives set out on level 1 and no change should be made, neither on level 1 nor on level 2.

Evidence: The origin and intention of the reporting of internalised settlements should be reconsidered: The EC proposal of the CSDR did not contain a reporting obligation (cf. COM(2012) 73 final of 7 March 2012). The reporting obligation was initiated by the European Parliament (EP). The CSDR should set up a framework for the reporting of internalised settlement so it could be better understood and the CSDR could be tailored if necessary (cf. EP draft report of June 13, 2012). Recital 28 of the final CSDR reads: “In order to provide reliable data on the scale of securities settlement outside securities settlement systems and to ensure that the risks arising can be monitored and addressed, any institutions other than CSDs that settle securities transactions outside a securities settlement system should report their settlement activities to the competent authorities concerned. […]”

ESMA consulted twice in 2014 (ESMA/2014/299 and ESMA/2014/1563) on the requirements and data. Any open questions were consulted by ESMA in 2017 (ESMA70-151-457). BaFin offered workshop and testing before go live. We agree with ESMA’s recent report on internalised settlement (ESMA70-156-3729) “that data covering a longer period of time would be needed in order to have a clearer picture regarding internalised settlement trends.”

When assessing the reporting obligation and its objectives, it should be taken into account that the current methodology biases the volumes/values by double counting the instructions and the existence of failing settlement instructions. Failing instructions are furthermore counted in excess in relation to all other instructions which are aggregated and only counted once when settled. A single fail will contribute multiple times to the reporting of failed instructions while a settled instruction only does once. This misrepresents the true aggregate and rate of failed instructions, and should therefore not lead to wrong conclusions.

We are of the opinion that the reporting should not be changed. Although we welcome ESMA’s initial report, we would like to stress that further refinement (e.g. the client level behind the settlement internaliser) should not be introduced so shortly after the start of the reporting obligation, since client categories are already included in the reporting.

The Association of German Banks developed a detailed overview of issues for implementation (see attached Annex 1) which also served as an implementation market practice for all other associations of the GBIC.

Question 15.2 If you are an entity falling under the definition of "settlement internaliser", what have been the costs you have incurred to comply with the internalised settlement reporting regime?

Where possible, please compare those costs to the volumes of your average annual activity of internalised settlement:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Our members spent a considerable amount of costs and other resources for the implementation of a reporting mechanism. The costs for setting up and running the reporting system are demonstrated by the following four examples. Please note that many of our members were faced by a similar cost impact:

Set up and implementation:
Member 1: low to medium 6-digit EUR-amount
Member 2: 400 – 500 man-days
Member 3: € 5,000,000
Member 4: approx. 30.000 to 50.000 although only 3 to 4 retail portfolio transfers per year were to be expected.

Running costs,
Member 1: low 5-digit EUR-amount per year.
Member 2: cannot be defined as included in all reporting costs like a flat rate.
Member 3: 0.5 FTE
Member 4: Because of cost implications, member decided not to internalise any transactions any longer and instead forward all transfers to CSD even though unfavourable for clients (because external settlement costs need to be reimbursed by client). However, external CSD fees were lower than implementation and running costs for internalised settlement reporting.

Volumes can be determined in the reports. It is therefore unclear whether the question is aimed at revenues instead.

Question 16. Do you think that a threshold for a minimum level of settlement internalisation activity should be set for entities to be subject to the obligation to report internalised settlement?

- ○ Yes, based on the volume of internalised settlement
- ○ Yes, based on the value of internalised settlement
- ○ Yes, based on other criterion
- ◉ No
- ○ Don't know / no opinion / not relevant

Question 16.1 Please explain your answer to Question 16, providing where possible quantitative evidence and/or examples.

Please indicate:

- **whether you consider that the introduction of such a threshold could endanger the capacity of NCAs to exercise their supervisory powers efficiently**
- **The cost implications of complying or monitoring compliance with such a threshold**

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As already mentioned in Q 15.1 above, level 2 established very granular reporting requirements and the need to monitor all types of internalised settlement. All proposals for a proportionate reporting mechanism were thoroughly consulted by ESMA. The costs for setting up the reporting mechanism have already accrued.
We do not see the benefit of imposing thresholds which would have to be monitored. If a settlement internaliser exceeds the threshold, a process would have to be established to report or not report (when falling below the threshold again). This would require significant technical and operational support. Settlement internalisers should be permitted to continue reporting even if a threshold is introduced.

Furthermore, the monitoring of thresholds would indeed require to changing the current reporting system and implicate related costs. It would also lead to other practical questions. For cost implications see also Q15.2 above.

IV. CSDR and technological innovation

CSDs and providers of ancillary services increasingly explore new technologies in relation to 'traditional' assets in digital form and crypto-assets that qualify as financial instruments. Two aspects can be distinguished: on the one hand the use of new technologies to service traditional assets (in digital form) and on the other hand, services provided for crypto-assets.

While CSDR is meant to be technology-neutral, the Commission services have received feedback from various stakeholders (including following the public consultation on an EU framework for markets in crypto-assets that ended in March 2020) who argue that some of its rules create obstacles to the use of distributed ledger technology (DLT) and the tokenisation of securities. However, feedback received so far by the Commission in this respect has not allowed for the full specification of those obstacles and potential solutions or proposals to address them in the framework of CSDR in order to ensure the full potential of these technological innovations with regard to the settlement of securities.

Furthermore, some of the feedback received suggests that certain definitions contained in the CSDR would require specific clarification to contextualise them in an environment where DLT is used and securities are tokenised. Some of these definitions are for example "securities account", "dematerialised form" or "settlement".

On 24 September 2020, as part of the digital finance package, a Commission proposal for a Regulation on a pilot regime on market infrastructures based on distributed ledger technology has been published. Under this proposal, a CSD operating a DLT SSS would be able to benefit from certain exemptions from CSDR rules that may be difficult to apply in a DLT context (e.g. exemptions from the application of the notion of transfer of orders, securities account or cash settlement). This should help stakeholders test in practice potential solutions.

Question 17. Do you consider that certain changes to the rules are necessary to facilitate the use of new technologies, such as DLT, in the framework of CSDR, while increasing the safety and improving settlement efficiency?

- ○ Yes
- ○ No
- ◉ The pilot regime is sufficient at this stage
- ○ Don't know / no opinion / not relevant

Question 18. Would you see any particular issue (legal, operational, technical) with applying the following requirements of the CSDR in a DLT environment?

Please rate each proposal from 1 to 5.

	1 (not a concern)	2 (rather not a concern)	3 (neutral)	4 (rather a concern)	5 (strong concern)	Don't know / No opinion
Definition of 'central securities depository' and whether platforms can be authorised as a CSD operating a SSS which is designated under Directive 98/26/EC (Settlement Finality Directive (SFD))	○	○	○	○	◉	○
Definition of 'securities						

settlement system' and whether a blockchain /DLT platform can be qualified as a SSS under the SFD	○	○	○	○	◉	○
Whether and under which conditions records on a DLT platform can fulfil the functions of securities accounts and what can be qualified as credits and debits to such an account;	○	○	○	○	◉	○
Whether records on a DLT platform can be qualified as securities account in a CSD as required for securities traded on a venue within the meaning of of Directive 2014/65/EU (MiFID II)	○	○	○	○	◉	○
Definition of ‘book entry form’ and ‘dematerialised form'	◉	○	○	○	○	○
Definition of “settlement” which						

according to the CSDR means the completion of a securities transaction where it is concluded with the aim of discharging the obligations of the parties to that transaction through the transfer of cash or securities, or both; clarification of what could qualify as such a transfer of cash or securities on a DLT network/ clarification what constitutes an obligation and what would qualify as a discharge of the obligation in a DLT environment	○	○	◉	○	○	○
What could constitute delivery versus payment (DVP) in a DLT network, considering that the cash leg is not processed in the network/ what could constitute delivery versus						

delivery (DVD) or payment versus payment (PVP) in case one of the legs of the transaction is processed in another system (e.g. a traditional system or another DLT network)	○	○	○	○	◉	○
What entity could qualify as a settlement internaliser, that executes transfer orders other than through an SSS	○	○	○	◉	○	○

Question 18.1 Please explain your answers to question 18 (if needed), including how the relevant rules should be modified:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

There seems to be a misconception of what a DLT platform is: according to common understanding, a DLT platform would work as a decentralized, distributed ledger. It would therefore be operated by more than just one party which can have different functions (such as software provider, node and participant with different writing and reading rights). The technology behind DLT, or the application of DLT, could however also be used as a tool by one entity alone, for example by CSDs, involving separate locations or units within that entity serving as nodes.

We are therefore concerned by the questions 1 to 3 in the table: a DLT platform could work in a way that the entry of a new owner of DLT securities is comparable to the settlement of transactions in the conventional securities world. But such a platform would not per se be a securities settlement system (SSS), especially where the DLT securities are not listed. Although we agree that a DLT platform could potentially fulfil the definition of an SSS under certain circumstances, it would not automatically be a CSD. Likewise, internalised settlement of DLT securities would not take place, because no settlement chain exists in a (pure) DLT platform. In a DLT platform rather all participants have direct access to/knowledge of the ultimate beneficial owner without any intermediaries in between.

A CSD, in contrast, is a legal entity which operates an SSS. Furthermore, registering the new owner of a DLT security and deleting the former owner at the same time would only take place in one ledger. Therefore,

the entry in the distributed ledger cannot be compared to the debit and credit of two (or more) accounts within a custody chain.

We therefore welcome the EC's proposal of a pilot regime under which all questions in the table will be adequately addressed and experience will be gained for future amendments needed as regards existing regulation.

Question 18.2 Do you consider that any other changes need to be made, either in CSDR or the delegated acts to ensure that CSDR is technologically neutral and could enable and/or facilitate the use of DLT?

- (●) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

Question 18.3 If yes, please indicate the provisions and make the relevant suggestions:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that any changes in the CSDR are necessary now but will be according to the outcome of the pilot regime. Art. 3(2) CSDR stipulates that where a transaction in transferable securities takes place on a trading venue, the relevant securities shall be recorded in book-entry form in a CSD on or before the intended settlement date, unless they have already been so recorded.

In order to set up pilot operations for transactions in DLT securities which are traded on DLT MTFs or other DLT "trading venues", there needs to be an exemption from Art. 3(2) CSDR: DLT securities do not have to be recorded in a CSD but in a DLT MTF or DLT SSS permitted under the pilot regime. This exemption is to be granted by the NCA according to the regulation introducing the pilot regime. We do not believe that the CSDR needs to be changed under the current review but it could be changed as a result of the pilot regime assessment.

Furthermore, clarification is needed that DLT trading/execution venues permitted under the pilot regime are not regarded as trading venues in the sense of Art. 3(2) CSDR. Otherwise, issuers who wish to issue DLT securities which are to be traded on DLT trading/execution venues under the pilot regime would remain obliged to record the DLT securities in a CSD although the DLT trading/execution venue itself is exempt from this requirement. This clarification should also be made in the regulation introducing the pilot regime.

Question 19. Do you consider that the book-entry requirements under CSDR are compatible with crypto-assets that qualify as financial instruments?

- (●) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

Question 19.1 Please explain your answer to question 19:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As set out in Q 18.1 above, the notion of a CSD book-entry can be compared with the recording of ownership in a decentralized ledger. However, the exact requirements need to be looked at more closely, depending on whether the process is the same (entry of an owner) or different (one entry in one ledger or two entries, e.g. debit and credit, on two or more accounts in a custody chain).

Question 20. Would you see any particular issue (legal, operational, technical) with applying the current rules in a DLT environment?

Please rate each proposal from 1 to 5.

	1 (not a concern)	2 (rather not a concern)	3 (neutral)	4 (rather a concern)	5 (strong concern)	Don't know / No opinion
Rules on settlement periods for the settlement of certain types of financial instruments in a SSS	○	◉	○	○	○	○
Rules on measures to prevent settlement fails	○	○	○	◉	○	○
Organisational requirements for CSDs	○	○	◉	○	○	○
Rules on outsourcing of services or activities to a third party	○	○	◉	○	○	○
Rules on communication procedures with market participants	○	○	○	◉	○	○

and other market infrastructures						
Rules on the protection of securities of participants and those of their clients	○	◉	○	○	○	○
Rules regarding the integrity of the issue and appropriate reconciliation measures	○	○	○	○	◉	○
Rules on cash settlement	○	○	○	○	◉	○
Rules on requirements for participation	○	◉	○	○	○	○
Rules on requirements for CSD links	○	◉	○	○	○	○
Rules on access between CSDs and access between a CSD and another market infrastructure	○	◉	○	○	○	○
Rules on legal risks, in particular as regards enforceability	○	○	○	◉	○	○

Question 20.1 Please explain your answers to question 20, in particular what specific problems the use of DLT raises:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 20.2 If you consider that there are legal, operational or technical issues with applying other rules regarding CSD services in a DLT environment (including other provisions of CSDR, national rules regarding CSDs implementing the EU acquis, supervisory practices, interpretation,), please indicate them and explain your reasoning:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The proposal for a Pilot Regime Regulation is a good approach to reveal and analyse such issues and also to develop technical, operational as well as regulatory and legal solutions.

V. Authorisation to provide banking-type ancillary services

According to Article 54 of CSDR, the provision of banking-type ancillary services by CSDs is allowed either by themselves or through one or more limited license credit institutions, provided that some requirements are complied with in terms of risk mitigation, additional capital surcharge and cooperation of supervisors in authorising and supervising the provision of these banking services to CSD users. It seems that limited license credit institutions do not exist yet. Article 54(5) foresees an exception to conditions applying to credit institutions that offer to settle the cash payments for part of the CSD's securities settlement system, if the total value of such cash settlement through accounts opened with those credit institutions, calculated over a one-year period, is less than one per cent of the total value of all securities transactions against cash settled in the books of the CSD and does not exceed a maximum of EUR 2,5 billion per year. CSDs have voiced in the past difficulties regarding cash settlement in foreign currencies. Questions in this section aim at identifying these and other potential concerns as well as possible ways forward.

Note that questions 21 to 26 included are mainly intended for CSDs.

Question 21. Do you provide banking services ancillary to settlement to your participants?

- Yes
- No
- Don't know / no opinion / not relevant

Question 22. Do you think that the conditions set in Article 54(3) for the provision of banking-type ancillary services by CSDs are proportionate and help cover the additional risks that these activities imply?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 23. In your view, are there banking-type ancillary services that cannot be provided by CSDs under the current regime for this type of services?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 24. Concerning settlement in foreign currencies, have you faced any particular difficulty?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 24.1 Please explain your answer to question 24 providing concrete examples and quantitative evidence:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 25. What are the main reasons CSDs do not seek to be authorised to provide banking-type ancillary services?

Please explain in particular if this is so due to obstacles created by the regulatory framework:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 26. Have you made use of the option to designate a credit institution to provide banking type ancillary services to CSDs?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 27. In your view, are the thresholds foreseen in Article 54(5) set at an adequate level?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 28. Do you think that the conditions set out in Article 54(4) for the provision of banking-type ancillary services by a designated credit institution are proportionate and help cover the additional risks that these activities imply?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 29. Why do you think there are so few, if any, credit institutions with limited license to provide banking-type ancillary services to CSDs?

Please explain in particular if this is so due to obstacles created by the regulatory framework:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 30. Are there requirements within Title IV of CSDR which should be specifically reviewed in order to improve the efficiency of the provision of banking-type ancillary services to and/or by CSDs while ensuring financial stability?

- (●) Yes
- ( ) No
- ( ) Don't know / no opinion / not relevant

Question 30.1 Please explain your answer to question 30, providing where possible quantitative evidence and/or concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not have any particular requirements of Title IV of CSDR in mind. However we would like to highlight that the need to ensure the prudential requirements that apply to CSDs wishing to provide banking-type ancillary services should not result in a significant negative impact on CSD-participants or even the services offered to the market as such where the overall theoretical risk resulting from such services is fully covered by collateral. Although we believe that the CSDs' critical role as central market infrastructures for core functions should remain adequately protected from any additional risks that are normally associated with the provision of banking services, no formalistic or too narrow approach should be taken. We believe that a risk /benefit analysis should also consider market implications and should not be focused on the CSD alone.
For example: Where a credit line granted by a CSD is fully collateralized, we do not see the need to limit the credit line facilities to the detriment of CSD-participants and their clients. Tried and tested processes for collateralising commercial bank money transactions (credit line facilities vs. pre-funding) should not be altered merely because the collateral taker and the credit line facility giver has outsourced the operation of the accounts which hold the collateral for the credit line facility. This set up has historical reasons but has proven to be a robust and stable risk mitigation mechanism and has accomplished effective securities transactions and settlement efficiency. We believe that the massive changes for CSD-participants (cancellation of credit line facilities or movement of securities into other accounts/CSDs) do not serve the purpose of safe and beneficial CSD requirements. Furthermore, the pre-funding obligations put on CSD-participants will lead to a drawback of a whole market and to the disadvantage of investors.

VI. Scope

CSDR lays down a series of requirements for the settlement of financial instruments in the Union and harmonised rules on the organisation and conduct of CSDs. While the scope of rules applicable to CSDs seems clear, the requirements applying to the settlement of financial instruments has given rise to numerous questions. A certain number of these questions has been addressed by ESMA, especially in relation to the scope of requirements on internalised settlement, relevant currencies or the substantial importance of a CSD.

Article 2(1)(8) of CSDR defines financial instruments in accordance with the definition of financial instruments in Directive 2014/65/EU on markets in financial instruments (MiFID II) (i.e. transferable securities, money-market instruments, units in collective investment undertakings, various types of derivatives and emission allowances). Some CSDR provisions explicitly restrict the scope of their applicability to a subset of the above definition, e.g. Articles 3 on book entry-form (only transferable securities) and Article 5 on the intended settlement date. Other provisions are not explicit or refer generally to financial instruments or securities (e.g. Article 23 on the provision of services in another Member State).

In the case, for instance, of the settlement discipline, stakeholders have indicated that the different provisions of CSDR setting out the scope of the requirements such as settlement fails reporting, cash penalties or buy-ins are not always clear. This lack of legal certainty could potentially lead to reducing the efficiency in securities settlement. Furthermore, feedback from some stakeholders suggests that in some circumstances the drafting of CSDR in relation to the scope of the settlement discipline is clear, however, its application could bring unintended consequences.

Question 31. Do you consider that certain requirements in CSDR would benefit from targeted measures in order to provide further legal certainty on their scope of application?

- (●) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

Question 31.1 If you answered "yes" to Question 31, please specify which provisions could benefit from such clarification and provide concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The following clarifications/targeted measures would be welcomed to provide further legal certainty:

1. Settlement Discipline, scope of buy-ins

a. Transactions for buy-ins: clarification that the trading party of a secondary market transaction is the addressee of the requirements; however no buy-in obligations for portfolio transfers and primary market transactions.

For any type of buy-in (contractual at the discretion of the parties or mandatory), clarification is needed that certain transaction are out of its scope: settlements which are not based on a trade (in the secondary market), such as portfolio transfers, collateral management recordings and primary market transactions should be out of scope of Art. 7(3) CSDR. Buy-ins for such transactions do not make sense, neither economically nor with respect to the consequences. For example, a portfolio transfer without change of beneficial ownership should not result in a buy-in against oneself. For more details on the objective of the buy-in and types of transactions which should be out of scope, please see our Q+A request submitted to ESMA (Annexes 3 and 3a).

b. Third country CSDs: clarification that the buy-in provisions do not apply where both delivering and receiving settlement instruction are matched in the SSS of a non-EU-CSD.

Transactions between trading parties settling in the SSS of a non-EU CSD are not in scope of the CSDR and

therefore also not in scope of the CSDR settlement discipline (Article 7 CSDR). It should be clarified that the involment of an EU-CSD or EU-bank along the custody chain does not trigger a buy-in obligation.
c. As regards the addressee of the buy-in provisions, several market participants could come into consideration: “Trading party” could be a broker, a commission agent, a fund asset manager, an investment fund company or, theoretically, also a retail investor. It should be clarified that in particular retail investors are out of scope.
d. Corporate Actions: clarification that corporate actions are not a result of a contractual agreement between two trading parties but the result of a corporate event and are therefore not in scope of the buy-in requirements, especially market claims not being in scope. Furthermore, the impact of and on the CAJWG standards of corporate actions is unclear.

2. Settlement Discipline, Penalties
a. Clarification on the addressee of penalties, especially no involvement of retail clients, tax implications and legal uncertainty at national level.
The classification of How to classify the penalty, e.g. like an administrative fine or a contractual penalty should be included. The CSDR caters for rules in case of the insolvency of a CSD-participant. Rules on the insolvency of a trading party exist on level 2, however, only with regard to buy-ins and not with regard to penalties. The rules should require that Penalties are must be stopped in case of insolvency of failing trading party.
b. Penalties involving CCPs: CSD handling should be possible. Calculation and offsetting/charging of CCP penalties should be done by one “source” only, ideally by the CSD. Clarification at level 1 that penalties at CCP level can also be charged by CSD.

3. Settlement Discipline, general:
a. Penalties and Buy-Ins: can be understood as consecutive measures but no forced “unity” of the two mechanisms (see also 1a above).
b. Instruments where main place of trading is outside the EU: Art. 7(13) CSDR only refers to shares which may be copied from the short selling regulation. For a harmonised, practical and legally reliable determination of those instruments which are in scope of the settlement discipline regime, a central and easily accessible database is needed (“golden source”). Civil-law implications, e.g. in Germany, if usage of other existing databases is not approved by CSDR. Otherwise, endless civil-law disputes over the “correct” database will evolve.
Without such a clarification, also operational problems will be caused. A mandate for ESMA should be introduced at level 1 to providebuild a golden source/database listing all required reference data for SD application, e.g. in scope financial instruments, liquidity indicators for shares and reference prices.
c. Uncertainty exists regarding the impact and consequences on the law of performances and damages between the parties of a trade. Furthermore, the consequences for further contractual arrangements also seem unclear (e.g. the rights and obligations of commission agents under the German Commercial Code between the trading party and its customer).

4. Internalised Settlement: ESMA guidelines provide for clarification regarding the scope of reporting (usage of PSET and alternatives). Therefore, no clarification for interpretation is needed. Should amendment to clarify scope be made, the ESMA interpretation should be used.

Question 31.2 If you answered "yes" to Question 31, please specify what clarifications/targeted measures could provide further legal certainty:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Article 7 (3) CSDR should explicitly state that settlements which are not based on a trade in the secondary market are out of scope. Details of the objective of buy-ins and the concrete addressee (trading party) of the requirements would be beneficial. Amendments for clarification should be made to the Recitals, e.g. No. 15, and to Article 7(3) and (4) CSDR. For further details, examples and justification please refer to Annexes 2 and 2a.

Level 1 and level 2 provisions differ in their wording or concrete wording is missing. Under level 1 the addressee is a CSD-participant although it does not necessarily have a (contractual) relation to the trade. Under level 2 the party to the trade is the norm addressee of the buy-in provisions. These requirements should be aligned.
Regarding penalties, however, the norm addressee under level 2 seems to be the CSD-participant with the option to pass on the penalties to its client.
At level 1one, the addressees of both penalties and buy-ins seem are CSD-participants and they seem to apply to all types of transactions. However, the buy-in provisions are targeted at the trading parties of a market transaction. They seek to sanction the party which does not comply with its contractual obligations. Therefore, the requirements do not aim at the settlement unlike the penalty provisions. Consequently, penalties are a prerequisite for buy-ins but they do not necessarily translate into a buy-in.

It is therefore also unclear in which relation penalties and buy-ins stand. As set out in Annex 3, not all transactions that are subject to penalties should also be subject to buy-ins. This should be clarified in Article 7 CSDR.

It is further unclear whether the CSDR settlement discipline regime substitutes or changes national civil law claims and existing obligations or puts additional obligations on the trading parties (besides termination rights), e.g. in Germany. The legal nature of penalties and buy-ins is also unclear under national law with uncertain tax related questions. Clarification in Art. 7(2) CSDR would be beneficial.

Article 7(13) CSDR could be broadened to other types of financial instruments.

Furthermore, in order to precisely determine in-scope instruments, ESMA should be mandated to establish and operate a single central database listing the in-scope instruments (and other reference data needed under the CSDR, e.g. market prices) in a new Article 7 (x) CSDR. This would remove legal uncertainty and operational complexity.

Question 32. Do you consider that the scope of certain requirements, even where it is clear, could lead to unintended consequences on the efficiency of market operations?

- (●) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

Question 32.1 If you answered "yes" to Question 32, please specify which provisions are concerned.

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Art. 7 and RTS 2018/1229

- Penalties and level 2 provisions: It is clear that the CSD would charge its CSD-participant with penalties and that the CSD-participant can get reimbursed by its client. It is however unclear down to what level and on which legal basis the penalties can be passed on.
- Buy-ins and transaction reporting obligation under Art. 26 MiFIR, especially when buy-in is not or only partially successful.
- Insolvency of a trading party: Art. 7(12) CSDR only apply in the case of an insolvency of a CSD-participant. An insolvency of a failing trading party is however only addressed by level 2 for buy-ins but not for penalties although the addressees of the buy-in regime are the trading parties.

Problems to determine the market price for the calculation of the penalty and the cash compensation for an unsuccessful buy-in.

Question 32.2 If you answered "yes" to Question 32, please specify what targeted measures could be implemented to avoid those unintended consequences while achieving the general objective of improving the efficiency of securities settlement in the Union:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

- Clarification is needed that retail clients are not the trading party to be sanctioned by penalties and buy-ins. The trading party would be the credit institution executing the order for the retail client. Likewise, penalties and buy-ins received by a credit institution would remain on this level and not be passed on. It should also be clarified of what legal nature penalties and cash compensations are in order to determine any national legal or tax consequences.
- It should be clarified for reporting purposes (transaction reporting under Article 26 MiFIR) how the reporting of the original trade should be treated in case the buy-in is not or only partly successful.
- The insolvency of a failing trading party would lead to an ineffective buy-in with the consequence of a cash compensation to be paid. Penalties would be calculated and charged until the cash compensation is paid which will not be the case due to the insolvency of the failing trading party. Therefore, the CSDR provision should forsee that the penalties should not be calculated and charged from the day the insolvency of the failing trading party was notified or the settlement instructions were to be cancelled.
- Mandate for ESMA to establish and operate a central database or list of financial instruments (“golden source”) and other relevant reference data, including market prices relevant for the calculation of penalties and the cash compensation in a new paragraph of Article 7 CSDR. This would make available a harmonised, transparent access to relevant reference data and prices and would limit the costs for data vendors. Easily accessible and operationally available.

VII. Settlement Discipline

CSDR includes a set of measures to prevent and address failures in the settlement of securities transactions (‘settlement fails’), commonly referred to as ‘settlement discipline’ measures. Application of the relevant rules in CSDR is dependent on the date of entry into force of Commission Delegated Regulation (EU) 2018/1229 on settlement discipline, which specifies the following:

a. measures to prevent settlement fails, including measures to be taken by financial institutions to limit the number of settlement fails as well as procedures and measures to be put in place by CSDs to facilitate and incentivise timely settlement of securities transactions;

b. measures to address settlement fails, including the requirements for monitoring and reporting of settlement fails by CSDs; the management by CSDs of cash penalties paid by their users causing settlement fails; the details of an appropriate buy-in process following settlement fails; the specific rules and exemptions concerning the buy-in process and the conditions under which a CSD may discontinue its services to users that cause settlement fails.

Commission Delegated Regulation (EU) 2018/1229 was supposed to enter into force on 13 September 2020. However, in May 2020 the Commission adopted a Commission Delegated Regulation amending it, thereby postponing its date of entry into force from 13 September 2020 to 1 February 2021. This short delay was considered necessary to take into account the additional time needed for the establishment of some essential features for the functioning of the new framework (e.g. the necessary ISO messages, the joint penalty mechanism of CSDs that use a common settlement infrastructure and the need for proper testing of the new functionalities).

During the COVID-19 crisis, many stakeholders asked for a further postponement of the entry into force of Commission Delegated Regulation 2018/1229. Those stakeholders argued that the COVID-19 pandemic impacted the overall implementation of regulatory projects and IT deliveries by CSDs and their participants and that, as a result of that, they will not be able to comply with the requirements of the RTS on settlement discipline by 1 February 2021. On 23 October 2020, the Commission endorsed ESMA's proposal to postpone further the entry into force of the RTS on settlement discipline to 1 February 2022.

Question 33. Do you consider that a revision of the settlement discipline regime of CSDR is necessary?

- (●) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

Question 33.1 If you answered yes to Question 33, please indicate which elements of the settlement discipline regime should be reviewed:

you can select more than one option

- [x] Rules relating to the buy-in
- [x] Rules on penalties
- [ ] Rules on the reporting of settlement fails
- [ ] Other

Question 34. The Commission has received input from various stakeholders concerning the settlement discipline framework.

Please indicate whether you agree (rating from 1 to 5) with the statements below:

	1	2	3	4	5	Don't know /

	(disagree)	(rather disagree)	(neutral)	(rather agree)	(fully agree)	No opinion
Buy-ins should be mandatory	○	◉	○	○	○	○
Buy-ins should be voluntary	○	○	○	○	◉	○
Rules on buy-ins should be differentiated, taking into account different markets, instruments and transaction types	○	○	○	○	◉	○
A pass on mechanism should be introduced	○	○	◉	○	○	○
The rules on the use of buy-in agents should be amended	○	○	○	○	○	◉
The scope of the buy-in regime and the exemptions applicable should be clarified	○	○	○	○	◉	○
The asymmetry in the reimbursement for changes in market prices should be eliminated	○	○	◉	○	○	○

The CSDR penalties framework can have procyclical effects	○	○	○	○	○	◉
The penalty rates should be revised	○	○	○	◉	○	○
The penalty regime should not apply to certain types of transactions (e.g. market claims in cash)	○	○	○	○	◉	○

Question 34.1 Please explain your answers to question 34, providing where possible quantitative evidence and concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While we are supportive of a settlement discipline regime, where cash penalties are imposed we have a differentiated position on mandatory buy-ins:
We are supportive of the provisions regarding mandatory buy-ins of CCP cleared transactions. For cleared transactions, the CCP needs either a bought-in security or a cash compensation in order to fulfill its role and to minimise systemic risk. While in a bilateral trade the trading party is interested in acquiring the actual security and not in the cash compensation, the CCP as a party to the trade is not interested in holding securities but in closing an open position in the security. Furthermore, the CCP is a trading party and a CSD-participant at the same time who also operates the CSD-accounts of its clearing members by power of attorney. The mandatory buy-in regime has been in place and proven effective for a considerable time.

On the contrary, the situation is rather different for non-CCP cleared transactions. Many legal and operational questions – as listed below - remain for the implementation of a mandatory buy- in regime, including the introduction of an EU-wide market practice for the execution of buy-ins.
Therefore, GBIC strongly recommends postponing the implementation of a regulatory buy-in regime at the current stage. Before a regulatory buy-in-regime is introduced, a thorough revision of the buy-in rules has to be undertaken in order for the market to be in the position to implement such a regime.

The CSDR rules on mandatory buy-ins seem to turn civil law claims into an obligation. It is furthermore unclear what the nature of the settlement regime is (supervisory law or civil law, e.g. in Germany).
The CSDR settlement discipline rules require the use of certain complex reference data, e. g. for the determination of in-scope instruments or of market value/prices.
Such reference data is not (centrally) available today for the new processes. GBIC would welcome such data to be centrally placed at the disposal of the market participants (golden source). In the absence of such golden source, assumptions have to be made, e.g. the usage of already established lists like the FIRDS list and the third country list although these might not be fit for purpose (incomplete) and give rise to legal

uncertainty (civil law claims).

Due to the automated generating of settlement instructions by the systems of trading venues, a cancellation or adaption of these settlement instructions is technically impossible (e.g. cancellation and new or partial settlement).
Unsuccessful buy-in processes cause problems in legal and technical respect concerning the consequences for clients of the trading party (= end investors such as retail clients). This includes the deletion of a recording of securities delivery as well as the reimbursement of associated costs and penalties although divergent contractual obligations may exist. Furthermore, problems with transaction reporting pursuant to Art. 26 MiFIR can be triggered.
Limited availability of buy-in agent services and different price models as regards the trading activity of different market participants (Example: members with very few trades and/or no client business will pay fees although no fails occur); this might even exclude (smaller) market participants from trading in financial instruments, thus, leading to a risk concentration We would not expect this to be the intention behind implementing a settlement discipline regime.
Race for non-penalisation when late matching of settlement instructions occurs.
Putting a receive instruction on hold after the initiation of a buy-in (to ensure that seller does not deliver securities during the buy-in process) would result in penalties for buyer although cash is not lacking.
The impact of corporate actions on settlement discipline and vice versa (impact of CSDR on CAJWG standards on corporate actions) may be different among EU member states, possibly leading to different results.
In contrast to OTC-trades, when executing trades on trading venues, the trading parties are paired up randomly (they are selected by the trading venue rather by the trading parties themselves). However, the information flows and the risk taking between the parties seems to be brought in line with OTC trading parties.
No harmonized usage of ISO transaction codes by trading parties.
When calculating and charging penalties, the different approach and process of CCP and non-CCP transactions leads to higher cost and unnecessary complexity in the entire market.
The CSDR rules on settlement discipline can cause multiple buy-ins along a chain of consecutive trades. A pass-on mechanism is permissible to avoid multiple buy-in processes. However, the complexity of pass-ons as well as the significant financial disadvantages in the risk assessment for the ultimate seller make a pass-on mechanism suitable in very few cases only.

Question 35. Would the application of the settlement discipline regime during the market turmoil provoked by COVID-19 in March and April 2020 have had a significant impact on the market?

- ○ Yes
- ○ No
- ◉ Don’t know / no opinion / not relevant

Question 35.1 Please explain your answer to Question 35, describing all the potential impacts (e.g. liquidity, financial stability, etc.) and providing quantitative evidence and/ or examples where possible:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 36. Which suggestions do you have for the improvement of the settlement discipline framework in CSDR?

Where possible, for each suggestion indicate which costs and benefits you and other market participants would incur:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We are supportive of a settlement discipline regime, where cash penalties are imposed. However, the exact civil law nature of these penalties should be clarified to avoid legal uncertainty and therefore consequential issues arising in particular with respect to tax law, e.g. in Germany.

We are furthermore supportive of the provisions regarding mandatory buy-ins of CCP cleared transactions. For cleared transactions, the CCP needs either a bought-in security or a cash compensation in order to fulfill its role and to minimise systemic risk. While in a bilateral trade the trading party is interested in acquiring the actual security and not in the cash compensation, the CCP as a party to the trade is not interested in holding securities but in closing an open position. Furthermore, the CCP is a trading party and a CSD-participant at the same time who also operates the CSD-accounts of its clearing members by power of attorney. The mandatory buy-in regime has been in place and proven effective for a considerable time. However, it is only the CCP initiating buy-ins, not the clearing members.

On the contrary, the situation is rather different for non-CCP cleared transactions. Many legal and operational questions remain for the implementation of a mandatory buy- in regime, including the introduction of an EU-wide market practice for the execution of buy-ins. Therefore, we believe that it would be beneficial to start with the penalty regime for non-CCP cleared transactions as currently envisaged (from February 2022) but to further delay the mandatory buy-in regime. This delay should be used to clarify all remaining operational questions and to evaluate the effects of the penalty regime (to be assessed by ESMA). The assessment (report) should indicate whether the introduction of a mandatory regime for non-CCP cleared transactions would effectively enhance the settlement efficiency accompanied by account a cost benefit analysis. During the delay, the contractual buy-in would be available to the trading parties as an option. Regarding the costs and benefits, we would like to refer to the assessment of other industry associations like ICMA.

Furthermore, level 1 and level 2 would have to be aligned. Level 1 is under the misconception that trades are deemed to take place at settlement level. However, CSD-participants as custodians are usually not trading parties, whereas not all trading parties are CSD-participants. Therefore, many problems exist with regard to the settlement discipline regime. Level 2 seeks to fix this issue both in relation to penalties and buy-ins.

Level 1 should therefore be amended: the addressee of a (contractual at the discretion of the parties or mandatory) buy-in should be the trading party, not the CSD-participant. Hence, Article 7(3) should only be applicable for the CCP with respect to CCP-cleared transactions. Article 7(10) b and c CSDR should be

deleted. The different functions and levels of trading on the one hand and settlement on the other should be taken into account. This should be reflected in Recitals 14 to 20.

Furthermore, CSD-participants should be entitled but not obliged at level 1 to pass on penalties to their clients along the custody chain down to the trading party. It should be clarified, that a retail client is not a trading party. Intermediaries should be entitled to introduce thresholds or other measures (e.g. catalogue of criteria) when passing on penalties. This could be introduced in Recitals 14 to 20 accordingly.

It should also be taken into account that financial instruments are products that can be
- Issued and placed in the primary market
- Traded in the secondary market and
- Settled in a CSD.

This should find explicit mention in the Recitals.

In order to clarify the instruments in scope of the settlement discipline and to achieve a harmonised and low-cost application of relevant reference data, like ISINs, market prices, liquidity indicators, or currency exchange rates, ESMA should be mandated to establish, operate and publish such data in a dedicated central database (golden source). Otherwise significant uncertainty in both operational and legal perspective will remain.

VIII. Framework for third-country CSDs

Article 25(1) of CSDR provides that third-county CSDs may provide their services in the EU, including through setting up branches on the territory of the EU.

Article 25(2) requires a third-country CSD to apply for recognition to ESMA in two specific cases:

a. where it intends to provide certain core CSD services (issuance and central maintenance services related to financial instruments governed by the law of a Member State); or

b. where it intends to provide its services in the EU through a branch set up in a Member State.

Services other than those described (including settlement services) do not require recognition by ESMA under Article 25 CSDR.

ESMA may recognise a third-country CSD that wishes to provide issuance and central maintenance services only where the conditions referred to in Article 25(4) of CSDR are met. One of those conditions is that the Commission has adopted an implementing act determining that the regulatory framework applicable to CSDs of that third country is equivalent in accordance with CSDR.

One CSD has applied to date for recognition to ESMA, i.e. the UK CSD in the context of Brexit. At least two other CSDs have contacted ESMA and have expressed their intention to apply for recognition as third-country CSDs. However, according to the current provisions of Article 25 of CSDR, the recognition process is only triggered once there is an equivalence decision issued by the European Commission in respect of a particular third country. In the meantime, according to Article 69(4) of CSDR, third-country CSDs can continue providing services in the EU under the national regimes.

Question 37. Do you use the services of third-country CSDs for the issuance of securities constituted under the law of the EU Member State where you are established?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 38. Do you consider that an end-date to the grandfathering provision of Article 69(4) of CSDR should be introduced?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 39. Do you think that a notification requirement should be introduced for third-country CSDs operating under the grandfathering clause, requiring them to inform the competent authorities of the Member States where they offer their services and ESMA?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 39.1 Please explain your answer to question 39, providing where possible examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 40. Do you consider that there is (or may exist in the future) an unlevel playing field between EU CSDs, that are subject to the EU regulatory and supervisory framework of CSDR, and third-country CSDs that provide / may provide in the future their services in the EU?

- Yes
- No
- Don’t know / no opinion / not relevant

Question 40.1 Please explain your answer to question 40, elaborating on specific areas and providing concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 41. Which aspects of the third-country CSDs regime under CSDR do you consider require revision / further clarification?

Please rate each proposal from 1 to 5:

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	Don't know / No opinion
Introduction of a requirement for third-country CDS to be recognised in order to provide settlement services in the EU for financial instruments constituted under the law of a Member State	○	○	○	○	○	○
Clarification of term "financial instruments constituted under the law of a Member	○	○	○	○	○	○

State" in Article 25(2) of CSDR						
Recognition of third-country CSDs based on their systemic importance for the Union or for one or more of its Member States	○	○	○	○	○	○
Enhancement of ESMA's supervisory tools over recognised third-country CSDs	○	○	○	○	○	○

Question 41.1 Please explain your answers to question 41, providing where possible concrete examples:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 42. If you consider that there are other aspects of the third-country CSDs regime under CSDR that require revision/further clarification, please indicate them below providing examples, if needed:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

IX. Other areas to be potentially considered in the CSDR Review

Question 43. What other topics not covered by the questions above do you consider should be addressed in the CSDR review (e.g. are there other substantive barriers to competition in relation to CSD services which are not referred to in the above sections? Is there a need for further measures to limit the impact on taxpayers of the failure of CSDs)?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We would like to emphasize that while we would appreciate any amendments of the CSDR according to our suggestions in our response, any such changes should be clearly addressed and communicated as soon as possible - especially with regards to the settlement discipline regime. It should be borne in mind that appropriate time for the implementation of any changes would be needed. Uncertainty about the scope and the requirements that need to be complied with when the settlement discipline regime becomes effective in February 2022 should be avoided as far as possible. We would also like to express our hope for a robust and sustainable framework to guarantee smooth operation once the systems are in place.

Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) below. **Please make sure you do not include any personal data in the file you upload if you want to remain anonymous**.

The maximum file size is 1 MB.

You can upload several files.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

fd2e56af-5939-440c-b1e7-fbb4e276a1a6/2021-02-02_Annex_1_GBIC_comments_on_CSDR_review_internalisierted_settlement.pdf

446c4a18-33fc-40d1-8c98-5f6590ee23a4/2021-02-02_Annex_2a_GBIC_comments_on_CSDR_scope_buy-ins.pdf

b04d46a7-d5cc-4ddc-8704-6ce957397acb/2021-02-02_Annex_2_GBIC_comments_on_CSDR_scope_buy-ins.pdf

Useful links

More on this consultation (https://ec.europa.eu/info/publications/finance-consultations-2020-csdr-review_en)

Consultation document (https://ec.europa.eu/info/files/2020-csdr-review-consultation-document_en)

More on central securities depositories (CSDs) (https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/central-securities-depositories-csds_en)

Specific privacy statement (https://ec.europa.eu/info/files/2020-csdr-review-specific-privacy-statement_en)

More on the Transparency register (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

Contact

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