

# Reply Form

**to the Consultation Paper on Technical Advice on  
CSDR Penalty Mechanism**

## Responding to this Consultation Paper

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

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

ESMA will consider all comments received by **29 February 2024**.

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

## Instructions

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

- Insert your responses to the questions in the Consultation Paper in this reply form.
- Please do not remove tags of the type < ESMA\_QUESTION\_CSDR\_0>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_CSDR \_nameofrespondent.

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

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

## **Publication of responses**

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

## **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

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

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

## 1 General information about respondent

Name of the company / organisation	Bundesverband deutscher Banken/Association of German Banks
Activity	Associations, professional bodies, industry representatives
Are you representing an association?	<input checked="" type="checkbox"/>
Country / Region	Germany

## 2 Questions

**Q1 Do you agree with ESMA's proposal? Which Option is preferable in your view? Please also state the reasons for your answer.**

<ESMA\_QUESTION\_CSDR\_1>

Generally, the actual occurrences of fails requiring the consideration of cash discount rates (i.e. fails due to "lack of cash" as well as receipts versus payments that are put "on hold") is very low; hence, we doubt there is actually a need for changing the current approaches as none of the options proposed by ESMA will likely have a measurable impact on the settlement efficiency rates. Instead, any options will incur development and/ or maintenance cost for CSDs, T2S and other stakeholders without benefits. Therefore, GBIC does not recommend making any changes.

In more detail:

Option 1 requiring currency conversions represents a totally new approach that would require multiple IT developments, i.e. cause much more efforts/ cost than Options 2, 3 and 4.

For Options 1, 2 and 3, we urgently request that the actual cash interest rates to be applied by CSDs for their daily penalty calculations would be already calculated by the Central Banks or ESMA and centrally published and maintained up to date by e.g. ESMA for all stakeholders. This ensures an efficient process for the same reference data being available to all stakeholder, avoids individual manual rate calculation needs and the subsequent risk of

potential errors (e.g. due to “day count conventions and other adjustments”) when calculating the applicable rates by every single stakeholder.

It should be noted that Options 1 to 3 miss to address similar issues that exist for “lack of cash” fails in non-EU currencies (e.g. USD or JPY; see ECSDA Penalties Framework for details about the current approaches applied). As stated by ESMA, the ECSDA Penalties Framework includes rules to define the cash discount rates – for all three options, these rules must be reviewed.

Option 1 is not supportable at all as a double currency conversion process (i.e. initial currency to be converted to EUR and back after penalty calculation) requires a completely new IT development (including in T2S) with too high cost for a very small business scenario and almost no benefit.

Despite technical development needs – if any changes would finally be demanded by ESMA - our preference is Option 4 without applying progressive rates. The rationale is that the rates definition and maintenance process would be much simpler and transparent, avoid the need to search, calculate or source, monitor and update the applicable rates for any currency on a frequent basis and be comparable with the existing approach applied for “lack of securities” fails.

We cannot judge the proportionality of the daily rates as proposed by ESMA in Option 4, however, they appear very high on an annualized basis (mainly due to the progressive approach that should be avoided also from a technical perspective) and we are concerned that the competitiveness of the EU capital markets could be negatively impacted by the application of overly high (even extreme) daily penalty rates.

<ESMA\_QUESTION\_CSDR\_1>

**Q2 Do you have other suggestions? If yes, please specify and provide arguments.**

<ESMA\_QUESTION\_CSDR\_2>

We see no need for changes, please see our response to Question 1

<ESMA\_QUESTION\_CSDR\_2>

**Q3 Do you agree with the approach followed for the Option you support to incorporate proportionality in the Technical Advice? If not, please provide an**

**indication of further proportionality considerations, detailed justifications and alternative wording as needed.**

<ESMA\_QUESTION\_CSDR\_3>

Please see our response to Question 1

<ESMA\_QUESTION\_CSDR\_3>

**Q4 What costs and benefits do you envisage related to the implementation of each Option? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_4>

Option		
	Qualitative description	Quantitative description/ Data
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

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<ESMA\_QUESTION\_CSDR\_4>

**Q5 As a CSD, do you face the issue of accumulation of reference data related to Late Matching Fail Penalties (LMFPs), that may degrade the functioning of the securities settlement system you operate? If yes, please provide details, including data where available, in particular regarding the number and value of late matching instructions, as well as for how many business days they go in the past from the moment they are entered into the securities settlement system, and the percentage they represent compared to the overall number and value of settlement fails on a monthly basis (please use as a reference the period June 2022 – June 2023).**

<ESMA\_QUESTION\_CSDR\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_5>

**Q6 What are the causes of late matching? How can you explain that there are so many late matching instructions? What measures could be envisaged in order to reduce the number of late matching instructions?**

<ESMA\_QUESTION\_CSDR\_6>

The main cause for late matching is that instructions are sent by the participants only after their intended settlement date (ISD).

As far as we can judge and derive from our clients' feedback, the main reasons for late matchings are related the trading level (transaction mismatches which are only rectified after the intended settlement day, e.g. due to price mismatches, discrepancies on the number of securities) as well as incorrect settlement instructions which require a late amendment to allow matching. In some cases settlement instructions for portfolio transfers are not sent in time or in the required format or contain different ISDs.

However, opposite to ESMA's statement, our data does not indicate that there are "so many" late matching instructions. For example, in 2023, 94% of the CBF transactions that settled after the intended settlement did not represent late matchings.

In our view, the tools (“hold and release”) are already available to participants to send settlement instructions to CSDs before the ISD even when no sufficient cash/ securities are available on ISD to avoid late matching. The extended use of this tool could reduce the occurrence of late matchings unless the reasons for late instructions are outside the control of the CSD participants (e.g. issues/ delays occur on trading level).

For the German market/ CBF specifically: due to legal reasons, the market claims settlement instructions generation by CBF takes place systematically only when the underlying transaction actually settled – when settlement occurred after ISD, late matching penalties automatically apply to the market claims.

Therefore, to be applied for all CSDs/ markets, we strongly recommend to fully exclude market claims (and transformations) from the scope of penalties application as well as settlement fails reporting in future as:

- the current German market claims generation process cannot be changed due to legal reasons;
- in any case, market claims/ transformations settlement transactions do not represent trading activity;
- participants cannot directly influence the instructions generation;
- the application of penalties on market claims/ transformations leads to a kind of “double-penalization” of a single failing transaction.

Note that if a potential move to T+1 settlement resulted in a material increase in the level of settlement fails – i.e. increases the number of unsettled transactions over record date – the consequence of this may also be an increase in the number of market claims and subsequently late matching penalties.

<ESMA\_QUESTION\_CSDR\_6>

**Q7 Do you agree with ESMA’s proposal to establish a threshold beyond which more recent reference data shall be used for the calculation of the related cash penalties to prevent the degradation of the performance of the systems used by CSDs? Please also state the reasons for your answer.**

<ESMA\_QUESTION\_CSDR\_7>



We have no demand for a threshold but also no objections when a threshold would be applied instead of using “infinite” historical data to align with the T2S approach and simplify the calculation process.

<ESMA\_QUESTION\_CSDR\_7>

**Q8 Do you agree with the threshold of 92 business days or 40 business days in order to prevent the degradation of the performance of the systems used by CSDs? Please specify which threshold would be more relevant in your view:**

**a)92 business days;**

**b)40 business days;**

**c)other (please specify).**

**Please also state the reasons for your answer and provide data where available, in particular regarding the number and value of late matching instructions that go beyond 92 business days, 40 business days in the past or another threshold you think would be more relevant, and the percentage they represent compared to the overall number and value of settlement fails on a monthly basis (please use as a reference the period June 2022 – December 2023).**

<ESMA\_QUESTION\_CSDR\_8>

A threshold of 40 settlement days for late matching scenarios should be sufficient. Late matching refers to instances where the confirmation of trade details between counterparties is delayed, typically occurring after the standard settlement cycle. A 40-day limit provides a reasonable timeframe for parties to resolve matching issues without unduly prolonging the settlement process.

In specific cases where the instruction of transactions with a value date more than 40 days in the past is necessary, instructions should be based on current data, and the parties involved should explore alternative means for possible compensation.

<ESMA\_QUESTION\_CSDR\_8>

**Q9 Do you agree that the issuer CSD for each financial instrument shall be responsible for confirming the relevant reference data to be used for the related penalties calculation? Please also state the reasons for your answer.**

<ESMA\_QUESTION\_CSDR\_9>

GBIC wonders why this question is posed by ESMA at all as we see no need to change the current reference data sourcing approaches and responsibilities as there is always only one CSD or platform that is actually calculating the penalties.

Creating another dependency/ complexity on Issuer-CSDs to provide reference data across systems to other CSDs must be avoided. Also, it is unclear in such case how data from Issuer-CSDs outside the EU/ EEA could be covered at all for penalty purposes.

We repeat our strong recommendation for ESMA to centrally provide and publish all reference data needed to calculate penalties in a single database accessible to all stakeholders.

<ESMA\_QUESTION\_CSDR\_9>

**Q10 In your view, where settlement instructions have been matched after the intended settlement date, and that intended settlement date is beyond the agreed number of business days in the past, the use of more recent reference data (last available data) for the calculation of the related cash penalties should be optional or compulsory? Please also state the reasons for your answer.**

<ESMA\_QUESTION\_CSDR\_10>

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<ESMA\_QUESTION\_CSDR\_10>

**Q11 Do you have other suggestions? If yes, please specify, provide drafting suggestions and provide arguments including data where available.**

<ESMA\_QUESTION\_CSDR\_11>

We believe that the latest available reference price should be used to calculate any late matching penalties. I.e. the reference price as applicable on the actual late matching date should apply for any past fail day from ISD up to matching day minus 1 Business day.

Benefits:

- same price used for LMFPs used for all past fail days;
- less penalties calculation complexity;
- the latest available (market) price represents the current/ actual “cost” of a fail.

Cost:

- IT implementation and testing cost (medium).

<ESMA\_QUESTION\_CSDR\_11>

**Q12 Do you agree with the approach followed to incorporate proportionality in the Technical Advice? If not, please provide an indication of further proportionality considerations, detailed justifications and alternative wording as needed.**

<ESMA\_QUESTION\_CSDR\_12>

We agree to optionally allow to limit the age of reference date used to calculate penalties.

However, we believe proportionality would be best achieved by ESMA to centrally provide and publish all reference data needed to calculate penalties in a single database being accessible to all stakeholders.

<ESMA\_QUESTION\_CSDR\_12>

**Q13 What costs and benefits do you envisage related to the implementation of the approach proposed by ESMA? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_13>

Approach proposed by ESMA		
	Qualitative description	Quantitative description/ Data

<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

We do not see relevant benefits in ESMA's change proposal.

Instead, as stated in Q11, we believe it would be a much leaner approach when the latest available reference price would be used to calculate any penalties between the ISD and the actual matching date minus 1 BD.

<ESMA\_QUESTION\_CSDR\_13>

**Q14** If applicable (if you have suggested a different approach than the one proposed by ESMA), please specify the costs and benefits you envisage related to the implementation of the respective approach. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_14>

<b>Approach proposed by respondent (if applicable)</b>		
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
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As stated in Q11, we believe it would be a much leaner approach when the latest available reference price would be used to calculate any penalties between the ISD and the actual matching date minus 1 BD.

<ESMA\_QUESTION\_CSDR\_14>

**Q15 Based on your experience, what has been the impact of CSDR cash penalties on reducing settlement fails (by type of asset as foreseen in the Annex to Commission Delegated Regulation (EU) 2017/389 since the application of the regime in February 2022? Please provide data and arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_15>

A slight decrease in penalties has been observed since the introduction of CSDR. However, the fundamental disciplinary impact is, in our view, not noticeable due to the low penalty rates so far. The annual settlement efficiency data published by Clearstream shows a significant increase in the “by volume” and “by value” settlement efficiency rates for 2023 compared to 2022:

<https://www.clearstream.com/clearstream-en/newsroom/240131-3840498>

Definitely, CSDR penalties as well as complementary measures (like the working arrangements with relevant clients) significantly increased awareness of the importance of timely settlement (for at least some transactions as the SDR scope is currently too wide, see our comments to Questions 6 and 16) and have clearly contributed to a reduction of the settlement fails.

No relevant changes could be observed on specific asset type levels. Especially ETFs instruments (and subsequently those participants significantly active in the ETF business) continuously show comparably low settlement efficiency levels due to the currently complex processes. In this context, like for other primary market activities, we propose that the settlement of (any) Investment Funds subscriptions/ redemptions orders should be exempted from the CSDR settlement discipline regime (SDR) scope.

<ESMA\_QUESTION\_CSDR\_15>

**Q16 In your view, is the current CSDR penalty mechanism deterrent and proportionate? Does it effectively discourage settlement fails and incentivise their rapid resolution? Please provide data and arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_16>

We believe that the CSDR scope is currently too wide as it goes beyond the settlement of trading activity and covers as well participants' "internal" and other specific transaction such as:

- Share registration (especially relevant for DE Market/ CBF);
- Transfers between the same participant accounts (e.g. acc. 1234 delivers to 1234) or between main and sub-accounts (e.g. acc. 1234 000 delivers to 1234 001; e.g. due to TEFRA D bookings CBF) of the same participant;
- Portfolio transfers between the same and/ or different accounts/ participants;
- Market claims/ transformations (see as well our answer to Q6);
- Investment funds redemptions/ subscriptions orders settlement and other primary market transactions.

We therefore strongly recommend to adjust the scope of transactions subject to penalties and settlement fails reporting for ESMA to focus actions on data that is truly relevant regarding settlement and financial risk aspects and remove the activities listed above from consideration in future (for the sake of **completeness, it should be noted that none of these transactions should ever be made** subject to buy-ins).

In order to improve settlement efficiency, further measures could be considered, e.g. the introduction of a higher level of penalties. A greater acceptance of partial settlement could also lead to an improvement in settlement discipline and should therefore be more promoted. Nonetheless, the penalty regime should not become more complicated under any circumstances (e.g. by introducing a minimum penalty fee).

**As a measure of last resort, the acceptance of partial settlement could be mandated by CSDR. While fully settled transactions should remain a priority, partial settlements are an efficient alternative to reduce cash penalties and optimise the settlement of available inventory. Partial settlements are currently permitted under CSDR but are not yet widely used. To further enable the adoption of partial settlements, (1) the CSDR text should be amended to require market participants to accept partial settlements within certain parameters, or ii) both parties to the failed transaction should be penalized, the failing**

participants and the party that refuses to allow partial settlements (be it the delivery or receiving party). We note that, scenario ii) may complicate the calculation of penalties. A regulatory mandate to accept partial settlement of securities would avoid this.

<ESMA\_QUESTION\_CSDR\_16>

**Q17 What are the main reasons for settlement fails, going beyond the high level categories: “fail to deliver securities”, “fail to deliver cash” or “settlement instructions on hold”? Please provide examples and data, as well as arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_17>

During 2023, multiple main fail reasons were observed:

- Participants need to comply with asset protection rules, i.e. assets are only released for settlement once the relevant underlying client actually holds the needed security position; until then, settlement instructions are put “on hold” or only sent to the CSD once the securities are available (that may indeed be after the Intended Settlement Date).
- Some participants use, for risk mitigation purposes (custodian default), multiple custodians in parallel, hence, “position coverage realignments” between their chosen sub-custodians are the result and slow down the overall and sometimes exhaustive settlement chains.
- CBF and its participants are by far the most active users of cross CSD settlement in T2S. CBF participants reported issues due to complex instruction formats and deadlines which increase the risk to send correct instructions late for matching and/ or settlement. Some participants consider the unique German market design causes additional complexity as CBF is the only CSDR CSD that is running two different SSS’s in parallel, namely CBF (CASCADE/ T2S) and CBF-i (Creation). As a large number of foreign ISIN’s are eligible for trading on German Stock exchanges and eligible for settlement in both, CBF and CBF-i, although the underlying clients’ trading books might be flattened by the end of the trading day, different places of settlement may need to be handled so realignments between CBF and CBF-i are standard to cover lack of holdings in either account – such complexity does not exist within other European CSD.
- CBF processes the settlement of German Stock Exchanges trades of CBF participants’ underlying clients; this includes a huge portion of broker/ dealer/ market maker and retail clients’ activities, including trading in many foreign instruments and ETFs, that generate a significant settlement volume (and possibly fails due to DE market structural aspects (like “Makleraufgabengeschäft”).
- Intra-day in/ out trading activity of underlying clients that are brokers causes settlement

Instructions often turning in circles between those participants until the first in the chain initially receives the shares which are then passed through the different participants settling the instructions one after another, i.e. a single fail blocks multiple “linked” transactions from settlement.

- Settlement efficiency depends on the participants’ underlying clients (as many participants are acting as a broker/ clearing agent/ custodian for clients); in those set-ups, most fails are caused only by a few underlying clients.
- Further to the above, when the participants’ clients are market makers, securities sold by these clients are either being safekept by various custodians and CSDs or the positions taken have to be covered on different markets, the movement of securities or execution of trades can be delayed.
- Some participants demand (1) an increase of partial settlement windows for Clearstream internal and for Bridge settlements and (2) offer partial delivery for EU domestic markets, where possible or (3) require new or increased credit line facilities to avoid “lack of cash” fails or consider using securities lending services.
- For CBF, a significant number of failed DE registered shares (“CASCADE RS”) “high value” free of payment share registration orders occurred.
- While T2S cancels pending matched transactions after 60 days, this is not (yet) the case for CBL, CBF-i hence, fails continue to occur for multiple months when instructions are only unilaterally cancelled (and the counterparty has no incentive to cancel its instruction when it is receiving credit penalties) or the customer does not have the instruction in its records anymore (often the case for market claims or corporate actions related items for unknown reasons).
- Time zone differences may as well cause late settlement Clearstream participants: for example, participants that realign positions from the US market to Clearstream can only use the securities for same day settlement in EU markets if the US securities are delivered prior to the closing of the EU market.
- Due to Ukraine/ Russia sanctions measures, since April 2022 a significant increase in the number of CBL participants’ (underlying clients) accounts and transactions are blocked from settlement. Such transactions are not exempt from the settlement (fails) reporting. This generally negatively impacts the efficiency rates and no mitigation measures can be taken.

<ESMA\_QUESTION\_CSDR\_17>

**Q18 What tools should be used in order to improve settlement efficiency? Please provide examples and data, as well as arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_18>



Developments in recent months have shown that settlement efficiency has improved. The extent to which this is due to the penalties or other aspects (interest rate increases) will never be clearly proven. It can also be assumed that the future restriction of CSDR for penalties to trading transactions (not operations that are not considered as trading) will improve the settlement efficiency ratio. We therefore believe that no comprehensive reorganisation of the penalty regime is required or necessary. The system should remain as simple as possible. A moderate and linear increase in the penalty rates applicable to settlement fails should be sufficient to achieve further improvements in settlement efficiency.

Any change to the existing system would be very costly for everyone involved. It is not clear why a completely new method should be better than a linear modification of the existing calculation. All market participants would then be forced to extensively rebuild their systems. Against the background of a cost-benefit analysis, this is questionable. We also believe that a system that is too complex would make the European location unattractive in competition with other jurisdictions.

The extended use of “hold & release” as well as partial settlement/release functionalities and securities lending services by the participants could further enhance settlement efficiency.

However, processes that are performed prior that settlement instructions are sent to the CSD should also be assessed by the relevant stakeholders to complete the picture and address issues that already occur much earlier, e.g. on trading level.

Please see also our answer to Q16.

<ESMA\_QUESTION\_CSDR\_18>

**Q19 What are your views on the appropriate level(s) of settlement efficiency at CSD/SSS level, as well as by asset type? Please provide data and arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_19>

As stated in our answer to Q16, we strongly recommend adjusting the scope of transactions subject to penalties and settlement fails reporting for ESMA to focus actions on data that is truly relevant regarding settlement and financial risk aspects and remove e.g. the participants’ internal “housekeeping” activity from consideration in future.

Only then, an achievable and realistic level of efficiency may be jointly assessed by all stakeholders.

<ESMA\_QUESTION\_CSDR\_19>

**Q20 Do you think the penalty rates by asset type as foreseen in the Annex to Commission Delegated Regulation (EU) 2017/389 are proportionate? Please provide data and arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_20>

Yes, we believe that the current differentiation is appropriate. Here, too, any radical change to the system will result in high costs for all market participants and few recognizable benefits.

In general, we are concerned that the competitiveness of the EU capital markets could be negatively impacted by the application of overly high (or even extreme) daily penalty rates.

<ESMA\_QUESTION\_CSDR\_20>

**Q21 Regarding the proportionality of the penalty rates by asset type as foreseen in the Annex to Commission Delegated Regulation (EU) 2017/389, ESMA does not have data on the breakdown of cash penalties (by number and value) applied by CSDs by asset type. Therefore, ESMA would like to use this CP to ask for data from all EEA CSDs on this breakdown, including on the duration of settlement fails by asset type.**

<ESMA\_QUESTION\_CSDR\_21>

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<ESMA\_QUESTION\_CSDR\_21>

**Q22 In your view, would progressive penalty rates that increase with the length of the settlement fail be justified? Please provide examples and data, as well as arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_22>

Considering our answers to Questions 16 and 17, given the variety of (structural and operational) reasons for settlement fails, we believe that the root causes for fails are not yet fully understood and actioned upon. Hence, no changes should be made at this stage as we

have reasonable doubts that a (largely extremely significant) increase of the penalty rates would actually lead to more timely settlements overall. Instead, the root cause assessments of the stakeholders on “actionably avoidable” items should be continued and documented.

Also, such change would require significant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex for transactions failing for more than one day (and including late matching fails).

We note that the term “Day” used in the ESMA table “Option 1” (page 35) as well as in the “Option 2 - Example 2” on pages 56, 57 should be clarified and understood as “Business day”, not “Calendar day”.

<ESMA\_QUESTION\_CSDR\_22>

**Q23 What are your views regarding the introduction of convexity in penalty rates as per the ESMA proposed Option 2 (settlement fails caused by a lack of liquid financial instruments)? Please justify your answer by providing quantitative examples and data if possible.**

<ESMA\_QUESTION\_CSDR\_23>

We advocate for straightforward penalty rates. Our position is grounded in the belief that introducing unnecessary complexities to the rule framework does not yield significant benefits. A streamlined and easily understandable penalty system is essential for effective communication, comprehension, and adherence by market participants. Uncomplicated rules facilitate transparency and help avoid potential misinterpretations or disputes, ensuring that the penalty mechanism serves its intended purpose without unnecessary intricacies.

Focusing solely on liquidity when calculating penalties would represent a significant change compared to the current approach. The cost/ benefit ratio is too low to justify any change that will require relevant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex for transactions failing for more than one day (and including late matching fails).

<ESMA\_QUESTION\_CSDR\_23>

**Q24 Would it be appropriate to apply the convexity criterion to settlement fails due to a lack of illiquid financial instruments as well? Please justify your answer by providing quantitative examples and data if possible.**

<ESMA\_QUESTION\_CSDR\_24>

Please refer to our answer under Q 23.

<ESMA\_QUESTION\_CSDR\_24>

**Q25 What are your views regarding the level of progressive penalty rates:**

**a) as proposed under Option 1?**

**b) as proposed under Option 2?**

<ESMA\_QUESTION\_CSDR\_25>

We generally oppose increasing penalty rates through significant structural changes of the penalty mechanism (like introducing progressive rates). Implementing changes to penalty rate categories may necessitate adjustments to various technical aspects, such as interfaces and reporting presentations throughout the entire settlement process chain. We would like to question whether the efforts and costs involved in these technical adaptations would be justified in terms of the overall benefits gained. Therefore, our inclination is to prioritize a comprehensive evaluation of generally higher penalty rates before considering additional adjustments that may introduce complexities and raise questions about their cost-effectiveness.

Please see also our response to Question 22.

For the sake of clarity we note that already today ETFs (category “ETFS”) are penalized in the same way as the categories “SECU”, “UCIT”, “EMAL” and “other” instruments (per fail day, 0.50/ 0.25 bp’s apply) and we see no obvious reason why a new category for ETFs should be added.

<ESMA\_QUESTION\_CSDR\_25>

**Q26 If you disagree with ESMA’s proposal regarding the penalty rates, please specify which rates you believe would be more appropriate (i.e. deterrent and proportionate, with the potential to effectively discourage settlement fails, incentivise their rapid resolution and improve settlement efficiency). Please provide examples and data, as well as arguments to justify your answer. If**

**relevant, please provide an indication of further proportionality considerations, detailed justifications and alternative proposals as needed.**

<ESMA\_QUESTION\_CSDR\_26>

We strongly favour to keep the current system with a slight/moderate general increase of the penalty rates. The current set-up is in place for only two years and has already shown positive effects.

Implementing changes to penalty rate categories may necessitate adjustments to various technical aspects, such as interfaces and reporting throughout the entire settlement process chain. We would like to question whether the efforts and costs involved in these technical adaptations would be justified in terms of the overall benefits gained.

Therefore, our inclination is to prioritize a comprehensive evaluation of generally higher penalty rates without progressive or other new elements before considering additional adjustments that may introduce complexities and raise questions about their cost-effectiveness.

<ESMA\_QUESTION\_CSDR\_26>

**Q27 What are your views regarding the categorisation of types of fails:**

**a) as proposed under Option 1?**

**b) as proposed under Option 2?**

**Do you believe that less/further granularity is needed in terms of the types of fails (asset classes) subject to cash penalties? Please justify your answer by providing quantitative examples and data if possible.**

<ESMA\_QUESTION\_CSDR\_27>

The two suggested options would represent a significant change compared to the current penalties calculation approach. The cost/benefit ratio is too low to justify any change that will require relevant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex for transactions failing for more than one day (and including late matching fails).

Please also refer to our answer to Q 26.

<ESMA\_QUESTION\_CSDR\_27>

**Q28** What costs and benefits do you envisage related to the implementation of progressive penalty rates by asset type (according to ESMA's proposed Options 1 and 2)? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_28>

<b>Progressive penalty rates (by asset type) - ESMA's proposal Option 1</b>	<b>Please see ESMA's proposed Option 1 in Section 5.3 of this CP.</b>	
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs: - One-off - On-going</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Progressive penalty rates (by asset type) - ESMA's proposal Option 2</b>	<b>Please see ESMA's proposed Option 2 in Section 5.3 of this CP.</b>	
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs: - One-off - On-going</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
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We oppose the introduction of progressive penalty rates. The implementation of changes to the penalty mechanism is unnecessarily complex. The two suggested options would represent a significant change compared to the current penalties calculation approach. The cost/ benefit ratio is too low to justify any change that will require relevant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex for transactions failing for more than one day (and including late matching fails).

Please also refer to our answer under Q 26 and 27.

<ESMA\_QUESTION\_CSDR\_28>

**Q29** **Alternatively, do you think that progressive cash penalties rates should take into account a different breakdown than the one included in ESMA’s proposal above for any or all of the following categories:**

- (a) asset type;**
- (b) liquidity of the financial instrument;**
- (c) type of transaction;**
- (d) duration of the settlement fail.**

**If you have answered yes to the question above, what costs and benefits do you envisage related to the implementation of progressive penalty rates according to your proposal? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_29>

We oppose the introduction of progressive penalty rates. The implementation of any changes to the penalty mechanism is unnecessarily complex. The consideration of any new criteria would represent a significant change compared to the current approach. The cost/ benefit ratio is too low to justify any change that will require relevant IT developments (including testing) for

any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex for transactions failing for more than one day (and including late matching fails).

Note: as discussed during the CSDR consultations some years ago, the transaction type is not a matching criteria for settlement transactions, hence, the information could deviate between the securities delivery and receipt leg of a transaction making the application of penalties based on this criteria “random” at best.

Please also refer to our answer under Q 26 and 27..

<b>Progressive penalty rates – respondent's proposal (if applicable)</b>		
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_29>

**Q30** Another potential approach to progressive penalty rates could be based not only on the length of the settlement fail but also on the value of the settlement fail. Settlement fails based on instructions with a lower value could be charged a higher penalty rate than those with a higher value, thus potentially creating an incentive for participants in settling smaller value instructions at their intended settlement date (ISD). Alternatively, settlement fails based on instructions with a higher value could be charged a higher penalty rate than those with a lower value. In your view, would such an approach be justified? Please provide arguments and examples in support of your answer, including data where available. What costs and benefits do you envisage related to the implementation of this approach? Please use the table below. Where relevant,



**additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_30>

Please see our feedback to Questions 27 to 29.

The consideration of any new criteria would represent a significant change compared to the current approach. The cost/ benefit ratio is too low to justify any change that will require relevant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex for transactions failing for more than one day (and including late matching fails).

<b>Progressive penalty rates – based on the length and value of the settlement fail</b>	<b>Settlement fails based on lower value settlement instructions could be charged a higher penalty rate than those based on higher value settlement instructions</b>		<b>Settlement fails based on higher value settlement instructions could be charged a higher penalty rate than those based on lower value settlement instructions</b>	
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
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TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_30>

**Q31 Besides the criteria already listed, i.e. type of asset, liquidity of the financial instruments, duration and value of the settlement fail, what additional criteria should be considered when setting proportionate and effective cash penalty rates? Please provide examples and justify your answer.**

<ESMA\_QUESTION\_CSDR\_31>

No additional criteria should be considered as any new criteria would represent a significant change compared to the current approach. The cost/ benefit ratio is too low to justify any change that will require relevant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex for transactions failing for more than one day (and including late matching fails).

<ESMA\_QUESTION\_CSDR\_31>

**Q32 Would you be in favour of the use of the market value of the financial instruments on the first day of the settlement fail as a basis for the calculation of penalties for the entire duration of the fail? ESMA would like to ask for the stakeholders' views on the costs and benefits of such a measure. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_32>

In general, the simplicity and clarity of the penalty mechanisms are crucial factors for their effectiveness.

Choosing simpler mechanisms aligns with the goal of promoting transparency, accountability, and ease of comprehension for all stakeholders involved in the settlement process. It helps to

maintain a fair and accessible penalty framework that supports efficient settlement practices across the financial markets landscape.

More specifically: For late matching penalties, as stated in our response to Question 11, we believe that the latest available reference price should be used to calculate any late matching penalties. Despite IT development impacts this would simplify the way penalties are being calculated for past fail dates between ISD and actual matching date.

<b>Use the market value of the financial instruments on the first day of the settlement fail as a basis for the calculation of penalties for the entire duration of the fail</b>		
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_32>

**Q33** How should free of payment (FoP) instructions be valued for the purpose of the application of cash penalties? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_CSDR\_33>

We see no need for changes, the current process should continue to apply.

<ESMA\_QUESTION\_CSDR\_33>

**Q34 Do you think there is a risk that higher penalty rates may lead to participants using less DvP and more FoP settlement instructions? Please justify your answer and provide examples and data where available.**

<ESMA\_QUESTION\_CSDR\_34>

We are of the view that the replacement of DVPs by FOPs at a significant scale seems very unlikely.

<ESMA\_QUESTION\_CSDR\_34>

**Q35 ESMA is considering the feasibility of identifying another asset class subject to lower penalty rates: “bonds for which there is not a liquid market in accordance with the methodology specified in Article 13(1), point (b) of Commission Delegated Regulation (EU) 2017/583 (RTS 2)”. The information on the assessment of bonds’ liquidity is published by ESMA on a quarterly basis and further updated on FITRS. However, ESMA is also aware that this may add to the operational burden for CSDs that would need to check the liquidity of bonds before applying cash penalties. As such, ESMA would like to ask for the stakeholders’ views on the costs and benefits of such a measure. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_35>

Applying lower penalty rates for illiquid bonds		
	Qualitative description	Quantitative description/ Data
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs: - One-off</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<b>- On-going</b>		
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

Additional asset classes are not necessary. They overly complicate the penalty system and do not provide any discernible benefits. Even though the calculation of penalties is primarily the responsibility of the CSDs, the system should be easily understandable for market participants.

The inclusion of more asset classes could introduce unnecessary complexity into the penalty framework without clear advantages. It is essential to prioritize simplicity and transparency in the penalty calculation process to ensure that market participants can easily grasp the rules and implications. This not only facilitates a clearer understanding of the penalty mechanism but also empowers parties to scrutinize and contest any penalties that may have been inaccurately calculated.

Promoting a transparent and comprehensible penalty system not only aligns with the principles of fairness and accountability but also contributes to a smoother interaction between market participants and the regulatory framework. Clarity in penalty calculations supports a more efficient and responsive settlement environment by allowing for effective communication and resolution in cases where concerns or discrepancies arise.

We also repeat our strong recommendation for ESMA to centrally provide and publish all reference data needed to calculate penalties in a single database accessible to all stakeholders.

<ESMA\_QUESTION\_CSDR\_35>

**Q36 Do you have other suggestions for further flexibility with regards to penalties for settlement fails imposed on illiquid financial instruments? Please justify your answer and provide examples and data where available.**

<ESMA\_QUESTION\_CSDR\_36>

The existing framework provides ample room for both parties to collaboratively adjust instructions, allowing for a more adaptive and responsive approach to settlement processes. It is within their discretion to cancel or modify instructions based on mutual agreement and, if needed, incorporate new parameters to facilitate smooth settlement. Encouraging a proactive

utilization of this existing flexibility can contribute to a more dynamic and efficient settlement environment.

This flexibility can be particularly advantageous in situations where unexpected developments or changes in circumstances warrant adjustments to settlement instructions. By promoting increased utilization of this mechanism, market participants can enhance their ability to navigate evolving conditions, fostering a settlement process that is not only effective but also responsive to the dynamic nature of financial markets.

<ESMA\_QUESTION\_CSDR\_36>

**Q37 How likely is it that underlying parties that end up with “net long” cash payments may not have incentives to manage their fails or bilaterally cancel failing instructions as they may “earn” cash from penalties? How could this risk be addressed? Please justify your answer and provide examples and data where available.**

<ESMA\_QUESTION\_CSDR\_37>

There could be cases where transactions are only unilaterally cancelled and remain subject to continuous penalties; the reason why bilateral cancellation is not applied by the counterparty is unknown but apparently participants do not always succeed to make their counterparty confirm the cancellation request.

T2S cancels even matched failing settlement transactions after 60 days so the issue is limited to 2 months from a T2S “efficiency” perspective. Applying the same approach by all (I)CSDs could mitigate the issue.

<ESMA\_QUESTION\_CSDR\_37>

**Q38 How could the parameters for the calculation of cash penalties take into account the effect that low or negative interest rates could have on the incentives of counterparties and on settlement fails? Please provide examples and data, as well as arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_38>

Please refer to our answer to Question 1.

<ESMA\_QUESTION\_CSDR\_38>

**Q39 To ensure a proportionate approach, do you think the penalty mechanism should be applied only at the level of those CSDs with higher settlement fail rates? Please provide examples and data, as well as arguments to justify your answer. If your answer is yes, please specify where the threshold should be set and if it should take into account the settlement efficiency at:**

- a) CSD/SSS level (please specify the settlement efficiency target);**
- b) at asset type level (please specify the settlement efficiency target); or**
- c) other (please specify, including the settlement efficiency target).**

<ESMA\_QUESTION\_CSDR\_39>

No, the penalty mechanism must not be applied only at the level of those CSDs with higher settlement fail rates as this would heavily damage (intra- and outside EU/ EEA) competition and level-playing field and target the wrong entities as CSDs are not the ones who could significantly steer the settlement efficiency of their participants.

<ESMA\_QUESTION\_CSDR\_39>

**Q40 Please specify what costs and benefits you envisage regarding the application of the penalty mechanism only at the level of the CSDs with higher settlement fail rates. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_40>

<b>Application of the penalty mechanism only at the level of CSDs with lower settlement fail rates</b>		
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

In addition to our response to Question 39, especially for T2S CSDs, such approach would be extremely counterproductive: for T2S and its participants, the running and development cost of the penalty mechanism would be attributed to a much smaller customer base, hence, heavily increase the cost distributed to few CSDs and clients what will make the use of such CSDs or even T2S unreasonable. For T2S, significant impact/ cost can be expected.

<ESMA\_QUESTION\_CSDR\_40>

**Q41 Do you think penalty rates should vary according to the transaction type? If yes, please specify the transaction types and include proposals regarding the related penalty rates. Please justify your answer and provide examples and data where available. Please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_41>

TYPE YOUR TEXT HERE

<b>Applying penalty rates by transaction types</b>		
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE



<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

As discussed during the CSDR consultations some years ago, the transaction type is not a matching criteria for settlement transactions, hence, the information could deviate between the securities delivery and receipt leg of a transaction making the application of penalties based on this criteria “random” at best.

The cost/ benefit ratio is too low to justify any change that will require relevant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex.

<ESMA\_QUESTION\_CSDR\_41>

**Q42 Do you think that penalty rates should depend on stock borrowing fees? If yes, do you believe that the data provided by data vendors is of sufficient good quality that it can be relied upon? Please provide the average borrowing fees for the 8 categories of asset class depicted in Option 1. (i.e. liquid shares, illiquid shares, SME shares, ETFs, sovereign bonds, SME bonds, other corporate bonds, other financial instruments).**

<ESMA\_QUESTION\_CSDR\_42>

No.

<ESMA\_QUESTION\_CSDR\_42>

**Q43 Do you have other suggestions to simplify the cash penalty mechanism, while ensuring it is deterrent and proportionate, and effectively discourages settlement fails, incentivises their rapid resolution and improves settlement efficiency? Please justify your answer and provide examples and data where available. Please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_43>

We have nothing to add beyond what we mentioned already in multiple previous questions.

<b>Respondent's proposal</b> (if applicable)		
	<b>Qualitative description</b>	<b>Quantitative description/ Data</b>
<b>Benefits</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Compliance costs:</b> - One-off - On-going	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Costs to other stakeholders</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>Indirect costs</b>	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_43>

**Q44** Based on your experience, are settlement fails lower in other markets (i.e USA, UK)? If so, which are in your opinion the main reasons for that? Please also specify the scope and methodology used for measuring settlement efficiency in the respective third-country jurisdictions.

<ESMA\_QUESTION\_CSDR\_44>

The European market's fragmentation, characterized by the presence of multiple CSDs, introduces a level of complexity that can potentially lead to delays in the settlement process. In contrast, the United States benefits from a more centralized structure with the Federal Reserve (FED) and the Depository Trust and Clearing Corporation (DTCC) serving as the primary CSDs. This centralized setup contributes to a more streamlined and efficient settlement process, reducing the likelihood of delays. Therefore, the European market is not comparable with other markets, e.g. the US market.

<ESMA\_QUESTION\_CSDR\_44>

**Q45 Do CSD participants pass on the penalties to their clients? Please provide information about the current market practices as well as data, examples and reasons, if any, which may impede the passing on of penalties to clients.**

<ESMA\_QUESTION\_CSDR\_45>

Most of our members pass on penalties to their customers to the extent the customers are considered to be legally impacted (i.e. excluding retail clients).

<ESMA\_QUESTION\_CSDR\_45>

**Q46 Do you consider that introducing a minimum penalty across all types of fails would improve settlement efficiency? Is yes, what would be the amount of this minimum penalty and how should it apply? Please provide examples and data, as well as arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_46>

Considering our answers to Questions 16 and 17, given the variety of (structural and operational) reasons for settlement fails, we believe that the root causes for fails are not yet fully understood and actioned upon. Hence, we have reasonable doubts that the increase of penalty rates would lead to more timely settlements overall. Also, such change would require significant IT developments (including testing) for any EU/ EEA CSDs, T2S and participants and would make the application of penalty rates much more complex (including for late matching fails).

<ESMA\_QUESTION\_CSDR\_46>

**Q47 What would be the time needed for CSDs and market participants to implement changes to the penalty mechanism (depending on the extent of the changes)? Please provide arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_47>

The process of penalty calculation is within the purview of the Central Securities Depositories (CSDs) or Target2-Securities (T2S). Consequently, the primary responsibility for addressing this question lies with these entities.

It is imperative to afford market participants an adequate lead time for timely communication to clients. This allows for effective planning and communication strategies, ensuring that market participants can convey relevant information to their clients in a timely manner. Providing an sufficient lead time facilitates a smoother and more transparent communication process between market participants and their clients in response to penalty-related matters.

E.g. from the date of issuance of the final ESMA RTS, depending on the significance of the changes required, for internal developments of our members and including testing with participants/clients and T2S, at least 12 to 18 months will be required.

More development time may be needed by the 4CBs for changes in T2S.

<ESMA\_QUESTION\_CSDR\_47>

**Q48 Since the application of the RTS on Settlement Discipline, how many participants have been detected as failing consistently and systematically within the meaning of Article 7(9) of CSDR? How many of them, if any, have been suspended pursuant to same Article?**

<ESMA\_QUESTION\_CSDR\_48>

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<ESMA\_QUESTION\_CSDR\_48>

**Q49 In your view, would special penalties (either additional penalties or more severe penalty rates) applied to participants with high settlement fail rates be justified? Should such participants be identified using the same thresholds as in Article 39 of the RTS on Settlement Discipline, but within a shorter timeframe (e.g. 2 months instead of 12 months)? If not, what criteria/methodology should be used for defining participants with high settlement fail rates? Please provide examples and data, as well as arguments to justify your answer.**

<ESMA\_QUESTION\_CSDR\_49>

We cannot support an approach that is requiring to treat our participants differently and publicly brandmark them as “offenders” as the actual settlement efficiency is dependent on many factors (like structural/ legal aspects, business models, underlying client bases, financial instruments served, location/ region/ time-zone) that cannot always, easily or at all be

influenced by the CSD and/ or its participants as illustrated in our feedback to e.g. Questions 6, 16 and 17.

Hence, an “automatic” increase of penalties for certain participants must be absolutely avoided.

It is also unclear who would benefit from such fees and how they should be processed/ paid when ESMA states “These special penalties would be in addition to the general cash penalty mechanism provided for in CSDR. In principle, they would not be credited to the participant’s counterparties and should not represent an additional source of income for the CSD.”.

Leaving aside any IT development cost (including for T2S) we believe the existing “suspension” process (see as well Question 48) perfectly serves the purpose to incentivise relevant participants to take mitigating actions, whenever possible.

<ESMA\_QUESTION\_CSDR\_49>

**Q50 How have CSDs implemented working arrangements with participants in accordance with article 13(2) of the RTS on Settlement Discipline? How many participants have been targeted?**

<ESMA\_QUESTION\_CSDR\_50>

Monthly working arrangements have been implemented in 2022; in 2023, a total of 27 CBF and 20 CBF-I different clients with a relevant impact on the CSD settlement efficiency were subject to the process to collect feedback on fail reasons and measures applied.

The applicable process is described in the Clearstream Client Handbooks chapter “CSDR Settlement Discipline Regime” section “Monitoring Settlement Fails (settlement efficiency)” in detail.

<ESMA\_QUESTION\_CSDR\_50>

**Q51 Should the topic of settlement efficiency be discussed at the CSDs’ User Committees to better identify any market circumstances and particular context of participant(s) explaining an increase or decrease of the fail rates? Please justify your answer.**

<ESMA\_QUESTION\_CSDR\_51>

In the context of the Clearstream User Committee (CUC), there is an ongoing and regular discourse on this particular topic. It is recommended that a similar approach be adopted by all other Central Securities Depositories (CSDs) to sustain heightened awareness across various markets.

<ESMA\_QUESTION\_CSDR\_51>