

# Questions and Answers

**Implementation of the Regulation (EU) No 909/2014 on improving securities settlement in the EU and on central securities depositories**



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## 1. Background

1. Regulation (EU) No 909/2014 of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EC and Regulation (EU) No 236/2012 (“**CSDR**”) entered into force on 17 September 2014. Most of the obligations under the CSDR needed to be specified further via regulatory technical standards and they will take effect following the entry into force of the technical standards.
2. The CSDR framework is made up of the following EU legislation:
  - (a) CSDR;
  - (b) Commission Delegated Regulation (EU) 2017/389 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council as regards the parameters for the calculation of cash penalties for settlement fails and the operations of CSDs in host Member States (“**Delegated Act**”);
  - (c) Commission Delegated Regulation (EU) No 2017/390 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament of Council of 23 July 2014 with regard to regulatory technical standards on prudential requirements for central securities depositories and designated credit institutions offering banking-type ancillary services (“**RTS on CSD Prudential Requirements**”);
  - (d) Commission Delegated Regulation (EU) 2017/391 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards further specifying the content of the reporting on internalised settlements (“**RTS on Internalised Settlement**”);
  - (e) Commission Delegated Regulation (EU) 2017/392 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on authorisation, supervisory and operational requirements for central securities depositories (“**RTS on CSD Requirements**”);
  - (f) Commission Implementing Regulation (EU) 2017/393 of 11 November 2016 laying down implementing technical standards with regard to the templates and procedures for the reporting and transmission of information on internalised settlements in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council (“**ITS on Internalised Settlement**”);
  - (g) Commission Implementing Regulation (EU) 2017/394 of 11 November 2016 laying down implementing technical standards with regard to standard forms, templates and procedures for authorisation, review and evaluation of central securities depositories, for the cooperation between authorities of the home

Member State and the host Member State, for the consultation of authorities involved in the authorisation to provide banking-type ancillary services, for access involving central securities depositories, and with regard to the format of the records to be maintained by central securities depositories in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council (“**ITS on CSD Requirements**”); and

(h) Commission Delegated Regulation (EU) No 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (“**RTS on settlement discipline**”).

3. The European Commission has already released some Frequently Asked Questions to clarify the timing and the scope of CSDR<sup>1</sup>.
4. In view of ESMA’s statutory role to build a common supervisory culture by promoting convergent supervisory approaches and practices, ESMA has adopted this Q&As document which relates to the consistent application of CSDR. The first version of this document was published on 13 March 2017. This document is expected to be updated and expanded as and when appropriate.

## 2. Purpose

5. The purpose of this document is to promote common supervisory approaches and practices in the application of CSDR. It provides responses to questions posed by the general public, market participants and NCAs in relation to the practical application of CSDR.
6. This document is addressed to NCAs under the CSDR to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. It should also help, CSDs, their participants, investors and other market participants by providing clarity on the implementation of CSDR requirements.

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<sup>1</sup> [EU FAQs on Regulation \(EU\) No 909/2014](#)

### 3. Status

7. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 16(b) of the ESMA Regulation.
8. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties. In this particular case, considering the date of application of CSDR and the desirability of providing clarity to the market as soon as possible, ESMA has not engaged in such consultations.
9. ESMA will periodically review these questions and answers to identify if, in a certain area, there is a need to convert some of the material into ESMA Guidelines and Recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation would be followed.
10. **Disclaimer in relation to the answers provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation**<sup>2</sup>: these answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

### 4. Questions and answers process

11. This document is intended to be continually edited and updated as and when new questions are received. The date on which each section was last amended is included for ease of reference.
12. Questions on the practical application of any of the requirements of CSDR, including the requirements in CSDR technical standards, may be sent to ESMA using the procedure described on the [Q&As page of the website](#)<sup>3</sup>.

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<sup>2</sup> "The Authority shall forward questions that require the interpretation of Union law to the Commission. The Authority shall publish any answers provided by the Commission."

<sup>3</sup> <https://www.esma.europa.eu/questions-and-answers>

## Acronyms Used

CCP	Central counterparty
CSD	Central securities depository
CSDR	Regulation (EU) No 909/2014 of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EC and Regulation (EU) No. 236/2012
EC	European Commission
ECB	European Central Bank
ESMA	European Securities and Markets Authority
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
FCD	Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements
ITS	Implementing technical standards
ITS on CSD Requirements	Commission Implementing Regulation (EU) 2017/394 of 11 November 2016 laying down implementing technical standards with regard to standard forms, templates and procedures for authorisation, review and evaluation of central securities depositories, for the cooperation between authorities of the home Member State and the host Member State, for the consultation of authorities involved in the authorisation to provide banking-type ancillary services, for access involving central securities depositories, and with regard to the format of the records to be maintained by central securities depositories in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council
NCA	National competent authority
Q&A	Question and answer
RTS	Regulatory technical standards
RTS on CSD Requirements	Commission Delegated Regulation (EU) No 2017/390 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament of Council of 23 July 2014 with regard to regulatory technical standards on prudential requirements for central securities depositories and designated credit institutions offering banking-type ancillary services

RTS on Settlement Discipline

Commission Delegated Regulation (EU) No 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline

TC-CSD

third country (non-EU) CSD

### Table of questions

	Topic of the Question	Relevant Article	Last Updated
<b>General questions</b>	1 Ancillary service	Annex to CSDR	6 February 2018
	2 Additional national requirements		31 March 2017
	3 Relevant Authorities	Articles 12, 23 and 24 of CSDR	17 November 2017
	4 Book-entry form	Art 3 of CSDR	26 September 2018
<b>CSD Questions</b>	1 Authorisation and supervision	Art 17 of CSDR	23 March 2018
	2 Organisational requirements: general	Art 27 of CSDR	26 September 2018
	3 Organisational requirements: record keeping	Art 29 of CSDR	14 December 2017
	4 Conduct of business rules	Art 35 of CSDR	23 March 2018
	5 Protection of securities of participants and those of their clients	Art 38 of CSDR	17 November 2017
	6 Prudential requirements	Art 45 <i>et seq.</i> of CSDR	24 May 2018
	7 Provision of banking-type ancillary services	Art 54 <i>et seq.</i> of CSDR	2 October 2017
	8 Access	Art 49 of CSDR	2 June 2017
	9 Provision of services in other Member States	Art 23 of CSDR	31 March 2021
	10 Requirements for CSD links	Art 48 of CSDR	23 March 2018
	11 Review and evaluation	Art 22 of CSDR	12 May 2022
<b>Settlement Discipline Questions</b>	1 Matching settlement instructions	Art 7 of CSDR	3 December 2019
	2 Cash penalties: joint penalty mechanism	Art 7(2) of CSDR	26 September 2018
	3 Cash penalties: calculation	Art 7(2) of CSDR	18 October 2022
	4 Cash penalties: scope	Art 7(2) of CSDR	18 October 2022
	5 Cash penalties system: costs and process	Art 7(2) of CSDR	18 October 2022
	6 Settlement instructions sent by CCPs	Art 7(3) of CSDR	16 December 2021
	7 Buy-in	Art 7(3) of CSDR	8 July 2020
	8 Partial settlement functionality <b>[NEW]</b>	Art 6(3) of CSDR	13 March 2023
	9 Participants' settlement efficiency	Art 7(9) of CSDR	16 December 2021
	10 Bilateral cancellation facility	Art 7(2) of CSDR	3 August 2022
	11 Settlement fails	Art 7(1) of CSDR	15 November 2022
<b>Internalised Settlement Questions</b>	1 Internalised settlement: scope	Art 9 of CSDR	11 July 2019
	2 Internalised settlement: reporting parameters	Art 9 of CSDR	11 July 2019

## Part I: General Questions

Last update 26 September 2018

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### **General Questions 1 - Ancillary services**

- (a) *What does "providing regulatory reporting", the ancillary service mentioned in Section B point 4(b) of the Annex to CSDR, include?*
- (b) *Should a CSD intending to provide data reporting services listed in Section D of Annex I to MIFID II as ancillary services comply with the relevant requirements set out in MIFID II?*

### **General Answers 1**

- (a) This service can be identified in cases where a user of a CSD has a regulatory obligation to provide certain information to its NCA and the CSD takes care of such reporting with the NCA on behalf of its user.

For the sake of clarity, this service cannot be identified in cases where the regulatory obligation to report certain information in respect of its users is imposed directly on the CSD.

- (b) Yes, a CSD intending to provide data reporting services listed in Section D of Annex I to MIFID II should comply with the relevant requirements set out in MIFID II (including requiring an authorisation in accordance with Article 59(1) of MIFID II).

### **General Question 2 - Additional national requirements**

- (a) *Can Member States set additional requirements for CSDs to those set out in CSDR under national legislation?*

### **General Answer 2**

- (a) Article 1(1) and (2) of CSDR state that the Regulation lays down uniform requirements for settlement and rules on the organisation and conduct of CSDs, and that – unless otherwise specified in this Regulation – it applies to settlement in all financial instruments and activities of CSDs.

Such requirements that are allowed to be imposed by Member States are for instance mentioned in Article 38(5), second subparagraph, and explained in recital (42) of CSDR.

Against this background, the Member States should not set additional requirements in respect of the aspects harmonised by the CSDR unless otherwise provided by the CSDR itself. There might be however cases in which it is not clear whether a certain aspect has been harmonised. In those cases, a case-by-case analysis may be warranted.

### **General Question 3 – Relevant Authorities**

- (a) *In case of provision of services by a CSD in another Member State, Article 23(4) of CSDR requires to inform the "relevant authorities of the [host] Member State", and Article 24(4) thereof requires that, in case of substantial importance of the activities of a CSD in a host Member State,*



*the “relevant authorities of the home Member State and of the host Member State” shall be involved in the supervision of these activities.*

*Which authorities should be considered as relevant authorities of the home Member State and of the host Member State?*

### **General Answer 3**

(a) Relevant authorities of the home and of the host Member States are the authorities that have been identified as “relevant authorities” under Article 12(1) of CSDR, and which are located respectively in the home Member State and the host Member State.

### **General Questions 4 – Book-entry form**

*Article 3(2), second subparagraph, of CSDR provides that “transferable securities transferred following a financial collateral arrangement as defined in point (a) of Article 2(1) of the Financial Collateral Directive [FCD] shall be recorded in book-entry form in a CSD on or before the intended settlement date”.*

- (a) *Which transferable securities are in the scope of Article 3(2), second subparagraph, of CSDR?*
- (b) *Where transferable securities are transferred following a financial collateral arrangement in accordance with Article 3(2), second subparagraph, of CSDR, when is the intended settlement date?*

### **General Answers 4**

- (a) Article 3(2), second subparagraph, of CSDR concerns all transferable securities which are admitted to trading or traded on trading venues.
- (b) Article 2(1)(12) of CSDR defines the intended settlement date as “*the date that is entered into the securities settlement system as the settlement date and on which the parties to a securities transaction agree that settlement is to take place*”, with settlement being defined under Article 2(1)(7) of CSDR as “*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*”. In respect of financial collateral arrangements, the intended settlement date should therefore be on the date when the relevant securities are to be transferred to the collateral taker under the conditions laid down in the FCD, in particular Article 2(2) thereof, i.e. “*so as to be in the possession or under the control of the collateral taker*”, and not on the date when the relevant financial collateral arrangement is to be enforced.

# 1 Part II: Central Securities Depositories

Last update 12 May 2021

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## **CSD Questions 1 - Authorisation and supervision of CSDs**

- (a) *When do the relevant deadlines pertaining to the review of a CSD's application for authorisation under CSDR (including six months for a final decision) begin? Can the clock be stopped on application deadlines when an NCA is waiting for further information from the CSD?*
- (b) *Do the procedures referred to in Article 20(5) of CSDR include also the transfer of issuance accounts and records linked to the provision of the notary or central maintenance services referred to in points 1 and 2 of Section A of the Annex to CSDR?*
- (c) *Should the CSD links a CSD has established or intends to establish at the time of its application for authorisation under Article 16 of CSDR be assessed for the purpose of granting authorisation to that applicant CSD?*

## **CSD Answers 1**

- (a) Article 17(8) of CSDR provides that the NCA shall inform an applicant CSD of its decision to authorise it or not "*within six months from the submission of a complete application*".

The relevant deadlines pertaining to the review of a CSD's application for authorisation under CSDR (including six months for a final decision) do not begin until the CSD has submitted an application which the NCA deems complete, *i.e.* the 'clock' does not start until the application is considered to be complete. However, once the NCA has deemed an application complete, this constitutes confirmation that it has the information necessary to assess the CSD's compliance.

- (b) In order to ensure the continuity and integrity of securities issues in relation to which a CSD provides the notary or central maintenance services, as well as the possibility for transferable securities to be traded on trading venues and to be subject to financial collateral arrangements in accordance with Article 3(2) of CSDR, the procedures referred to in Article 20(5) of CSDR should also cover the transfer of any issuance accounts and records to another CSD, which is able to provide the notary or central maintenance services in relation to the respective securities.
- (c) Yes. Where a CSD has established or intends to establish CSD links at the time of its application for authorisation pursuant to Article 16 of CSDR, Article 36 of the RTS on CSD Requirements requires the applicant CSD to include an assessment of its compliance with Article 48 of CSDR and Chapter XII of the RTS on CSD Requirements for all the CSD links. Where a CSD has established or intends to establish interoperable links at the time of its application for authorisation under Article 16 of CSDR, except for interoperable links referred to in Article 19(5) of CSDR, the additional procedural steps envisaged under paragraphs (3) and (4) of Article 19 of CSDR should be taken into account while complying with the general procedure pursuant to Article 17 of CSDR.

### **CSD Questions 2 - Organisational requirements: general**

- (a) *Can a CSD have a combined audit and risk committee?*
- (b) *Should each of the risk, audit and remuneration committees be composed of entirely different members?*
- (c) *Which information is a CSD required to submit about changes in its management (board members and CEO)?*
- (d) *Article 27(2) of CSDR requires that “at least one third, but no less than two, of [the] members [of the management body] are independent”. What does “independent” mean in respect of members of the management body?*
- (e) *Are there any staff or category of staff that a CSD may not share with another entity of the same group of companies?*
- (f) *Is a direct contractual relationship between a CSD and a member of a user committee of a securities settlement system operated by that CSD mandatory?*
- (g) *Could a CSD share its risk monitoring committees (Article 48 of the RTS on CSD Requirements) with other entities of the same group?*
- (h) *Could risk monitoring committees of CSDs belonging to the same group have identical memberships?*
- (i) *Which services or activities of a CSD are in the scope of Article 30 of CSDR (Outsourcing)?*

### **CSD Answers 2**

- (a) No, the intention in Article 48 of the RTS on CSD Requirements is to have three separate committees for risk, audit, and remuneration.
- (b) No, there is no such requirement in CSDR. However, to ensure a separation between the committees, the chairs of each committee as well as the majority of their members should be different. In addition, conflicts of interest should be managed in respect of persons participating in more than one committee.
- (c) If there is a change in its management the CSD should provide information in the following cases:
  - Upon the occurrence of a substantive change: a CSD should report any “*substantive changes affecting the compliance with the conditions for authorisation*” to the NCA possibly in advance and in any case without undue delay upon occurrence of the change (Article 16(4) of CSDR) and within the review process (Article 40(1)(b) of the RTS on CSD Requirements).

A change in the membership of either the senior management or management body would impact the conditions of the authorisation. It would therefore qualify as a substantive change and be reported to the NCA. The CSD should transmit to the NCA all relevant information to be provided under Articles 9 to 15 of the RTS on CSD Requirements, in relation to the new member of the management.

Under Article 57 of the RTS on CSD Requirements, the business records need to reflect any substantive changes in the documents held by the CSD and need to include the organisational charts for the management body, senior management, relevant committees, operational units and all other units or divisions of the CSD.

- Upon request from CA: It should be noted that under Article 40(1)(c) of the RTS on CSD Requirements, a NCA may also request the provision of any additional information that is “*necessary for assessing the compliance of the CSD and its activities with the provisions of [CSDR and relating regulations]*”.

- (d) CSDR does not provide a definition of the term “independent member”. This being said, Article 27(3) of CSDR provides that “*the remuneration of the independent and other non-executive members of the management body shall not be linked to the business performance of the CSD.*” It may be inferred from this provision that “independent members” should be, at least, non-executive members of the management of the CSD.

In addition, the definition of the term “independent member” provided for in other Union legislation has to be taken into account. In this respect, Article 2(28) of EMIR requires that an “independent member” of the CCP board (which is equivalent to the CSD management body) is a member of the board who has no business, family or other relationship that raises a conflict of interests regarding the CCP concerned or its controlling shareholders, its management or its clearing members, and who has had no such relationship during the five years preceding his membership of the board.

ESMA considers the same requirements should apply to independent members of management bodies of CSDs.

- (e) No, however the sharing of staff is subject to certain conditions, as detailed below.

In line with other European legislation (cf. EMIR Q&A CCP Question no.13(b)), the term “staff” encompasses any person working for the CSD who is directly engaged in the services or activities which the CSD is authorised to provide or perform, and any natural person directly managing or supervising such persons.

The principle for the sharing of staff is set in Article 49(1) of the RTS on CSDR Requirements, which provides that “a CSD shall have adequate staff to meet its obligations” and that “a CSD shall not share staff with other group entities, unless it does so under the terms of a written outsourcing arrangement”.

This implies that outsourcing provisions set out in the CSDR (in particular Article 30 of CSDR) should also apply to the sharing of staff when the staff in question is part of other group entities.

In accordance with its powers under Articles 17 and 22 of CSDR, the competent authority should assess the appropriateness of sharing of staff considering the compliance with the Regulation, risks to the CSD (as well as risks created by the CSD for the smooth functioning of securities markets) and the level and suitability of resources available, having a special regard to Article 26(1) of CSDR.

Further, Article 50(3) of the RTS on CSD Requirements allows for the sharing of personnel exercising the functions of chief risk officer, chief compliance officer, chief technology officer or internal audit with other entities of the same group, provided that the governance arrangements ensure that related conflicts of interest at group level are appropriately managed.

Even though nothing is provided in respect of other functions, it is expected that for the sharing of personnel exercising any function in the CSD, the same requirements should apply.

- (f) No. Pursuant to Article 28(1) of CSDR and Article 16 of the RTS on CSD Requirements, members of a user committee should be elected among issuers and participants of the relevant securities settlement system operated by a CSD.

An agent of issuers or participants can be a member of a user committee in that capacity, under the following conditions:

- a. where there are clear rules for management of conflict of interests (in particular with respect to the agent's other clients), and
  - b. if at some point during its membership at the user committee, its mandate is terminated, or its principal terminates its contract with the CSD, such agent should no longer be a member of that user committee.
- (g) No, each CSD should have its own risk monitoring committees.
- (h) Yes, risk monitoring committees of CSDs belonging to the same group could be composed of the exact same members under certain conditions. The rules relating to the composition of such committees, to the sharing of staff and to the management of conflicts of interest should be strictly complied with. In particular, it should be ensured that each committee's composition and skills are sufficiently tailored for each CSD of the group.
- (i) Article 30 of CSDR should be complied with in respect of the outsourcing of all "services and activities" of a CSD. This should cover the outsourcing, including to other entities of the same group of companies, of:
- a. the core services listed in Section A of the Annex to CSDR,
  - b. the non-banking type ancillary services permitted under Section B of the same Annex,
  - c. the banking-type ancillary services permitted under Section C of the same Annex, and
  - d. any activities of a CSD that have an impact on the CSD's ability to discharge its obligations under CSDR (such as risk management function, the IT services needed for the operation of the securities settlement system, the archiving of documents, etc., but not services such as cleaning or catering provided by third parties to the CSD).

### **CSD Questions 3 - Organisational requirements: Record keeping**

- (a) *When will the CSD record keeping requirements under CSDR and the related technical standards start applying?*
- (b) *Can a CSD only validate the format of the data field for an LEI and not check that the LEI actually exists and that it belongs to the said entity?*

*Article 55(2)(a) of the RTS on CSD Requirements  
Annex IV, Field 1 of Table 2 on Position (Stock) Records of the ITS on CSD Requirements*

- (c) *Can a CSD refuse to complete field 16 of Table 2 (Types of securities account) on the basis that only the participant knows the usage?*

*Article 55(3)(b) of the RTS on CSD Requirement  
Annex IV, Field 16 of Table 2 on Position (Stock) Records of the ITS on CSD  
Requirements*

- (d) *What is the point in time where settlement instructions are considered as ‘failing settlement instructions’?*
- (e) *Should the record keeping requirements applying to the provision of ancillary services listed in the CSDR Annex also apply to the provision by a CSD of an ancillary service that is not precisely listed in the CSDR Annex?*
- (f) *Under rules implementing Articles 22 and 29 of CSDR, CSDs must record the LEIs of the issuers pertaining to the financial instruments in respect of which CSDs provide notary or central maintenance services. What action should be taken by CSDs in order to obtain the LEIs of issuers?*
- (g) *Which entities should be covered for the purpose of the records a CSD has to keep in relation to settlement banks as referred to in Article 54(2)(l) and Article 55(2)(g), (l) and (m) of the RTS on CSD Requirements?*

### **CSD Answers 3**

- (a) The CSD record keeping requirements under CSDR and the related technical standards will start applying from the date of authorisation of each CSD under CSDR, except for Article 54 (Transaction/Settlement Instruction (Flow) Records) of the RTS on CSD Requirements and Article 11(1) of the ITS on CSD Requirements, which apply as of date of entry into force of the RTS on Settlement discipline.
- (b) No. The notary function is a core service provided by a CSD. The CSD has a responsibility to verify that it has the correct credentials in place for issuers that wish to issue securities into its system. The CSD should verify that the LEI is for the correct entity, and that it is current (i.e. the status of the LEI shall be either “Issued”, “Pending Transfer” or “Pending archival”).
- If the CSD finds out that the LEI status of an issuer is not current, it should put in place enforceable rules according to which appropriate validation should be carried out upstream by an issuer’s agents, so that accurate up-to-date details are provided. This should apply in relation to all the information that issuers have to provide to CSDs under CSDR.
- (c) No. A participant need to know these details at all times, and a CSD should require in its rules that the participant disclose the account type to it and inform it of any updates.
- (d) Settlement instructions are considered as ‘failing settlement instructions’ from the moment when settlement at the Intended Settlement Date (ISD) is no longer possible, i.e. if they are still pending on the ISD after the settlement processing related to the respective settlement instructions submitted by the relevant cut-off time has been completed. The cut-off time is the deadline set by a system or an agent bank for the acceptance of transfer orders for a given settlement cycle, for the relevant settlement instructions, i.e. there could be different cut-off times for different settlement instructions.

- (e) The NCA should assess on a case by case basis whether an ancillary service provided by a CSD falls within one of the types of ancillary services listed in the CSDR Annex. If this is the case, the NCA should require the CSD to comply with the corresponding record keeping requirements specified in Annex II to the RTS on CSD Requirements. If this is not the case, *i.e.* the ancillary service does not fall within a type of ancillary services expressly listed in the CSDR Annex, the NCA should assess on whether the records kept by the CSD are adequate for the service provided.
- (f) CSDs should require in their rules that all issuers obtain and provide current LEI codes (cf. point (b) above).

For issuers of securities issues that will occur after the entry into force of the requirements for CSDs to record LEIs for issuers, CSDs should not accept new securities issues from issuers which cannot provide the CSD with an LEI that is current (cf. point (b) above).  
For issuers of securities issues that have occurred before the entry into force of the requirements for CSD to record LEIs, the CSDs should inform the issuers pertaining to the securities in respect of which the CSD provide notary service or central maintenance service of their obligation to obtain an LEI that is current (cf. point (b) above).

- (g) A CSD should keep records of the settlement banks which have a contractual relationship with the CSD or which are known to the CSD in relation to the provision of services by the CSD to participants or issuers.

#### **CSD Questions 4 - Conduct of business rules**

- (a) *Does Article 35 of CSDR allow CSDs to use internal or proprietary messaging standards in their communication procedures with the participants of the securities settlement system they operate and the market infrastructures they interface with?*
- (b) *Should a CSD assess the risks borne by the participants, issuers, linked CSDs or market infrastructures which are already using the CSD?*

#### **CSD Answers 4**

- (a) Article 35 of CSDR expressly requires that CSDs use “*international open communication procedures and standards with participants and market infrastructures in order to facilitate efficient recording, payment and settlement.*” “International open communication procedures and standards” are defined in Article 2(1)(34) of CSDR as “*internationally accepted standards for communication procedures, such as standardised messaging formats and data representation, which are available on a fair, open and non-discriminatory basis to any interested party*”.

Therefore, as a principle, the use by CSDs of other messaging standards (such as internal or domestic standards) in their communication procedures with the participants of the securities settlement systems they operate, and the market infrastructures they interface with, would not fulfil this requirement, even with a mapping from domestic standards to international open communication procedures and standards such as the SWIFT/ISO standards.

However, if a CSD can evidence:

- (i) cases where such internationally accepted standards are not “*available on a fair, open and non-discriminatory basis to any interested party*” or do not exist, its competent authority may

allow that CSD to use other messaging standards, until international standards become available; or

(ii) cases where the use of internationally accepted standards that are “*available on a fair, open and non-discriminatory basis to any interested party*” does not “*facilitate efficient recording, payment and settlement*” for a CSD, specific participants or market infrastructures, its competent authority may allow that CSD to use other messaging standards, as long as such lack of efficiency can be evidenced.

For the sake of clarity, interfaces designed for human-to-machine communication (e.g. graphical user interfaces or ‘GUIs’), are not covered by Article 35 of CSDR, which relates to machine-to-machine communication.

- (b) Yes, a CSD should inter alia monitor and manage the risks borne by all its participants, issuers, linked CSDs or market infrastructures, including those which are already using its services.

Indeed, Article 47(1) of RTS on CSD requirements provides that “a CSD should establish, as part of its governance arrangements, documented policies, procedures and systems that identify, measure, monitor, manage and enable reporting on the risks that the CSD may be exposed to and the risks that the CSD may pose to any other entities including its participants and their clients, as well as linked CSDs, CCPs, trading venues, payment systems, settlement banks, liquidity providers and investors”.

In respect of participants, the requirements for participation defined under Article 33(1) of CSDR are a tool to mitigate those risks and, once adopted by a CSD, the criteria for participation should apply indistinctively to all participants of the CSD, including existing participants. If the adoption of CSDR-compliant criteria for participation has triggered changes to the rules of the CSD, such changes should be notified by the CSD to its existing participants and the CSD should assess its participants’ compliance with such new requirements. The same applies to the rules for access applicable to issuers, other CSDs and other market infrastructures.

In addition, Article 41(m) of the RTS on CSD Requirements on the information to be provided by CSDs for each review period specifies that CSDs provide “information concerning the cases where the CSD denied access to its services to any existing or potential participant, any issuer, another CSD or another market infrastructure”. Denying access to an existing participant, issuer, CSD or market infrastructure also implies a periodic review of the compliance with the criteria for access.

#### **CSD Questions 5 - Protection of securities of participants and those of their clients**

- (a) *Once Article 38 of CSDR applies (i.e. after the CSD has been authorised), do participants have a phase-in period after authorisation of the CSD to offer all clients the level of protection envisaged in Article 38(5) or should they be ready to offer the envisaged accounts as of the date on which the CSD is authorised?*
- (b) *In accordance with Article 38(5) of CSDR, should all clients (existing and new) be offered the choice between omnibus client segregation and individual client segregation, and be informed of the costs and risks associated with each option, or just new clients?*
- (c) *Are there specific account segregation requirements in the context of links between an EU CSD and a TC-CSD?*
- (d) *Under Article 38(4) of CSDR, can a CSD maintain different types of securities accounts enabling participants to segregate the securities of any of the participants’ clients (‘individual client*



*segregation'), such as securities accounts with or without the identification of the participant's client at the CSD level?*

- (e) *When a CSD offers different types of individually segregated securities accounts (such as securities accounts with, and securities accounts without the identification of the participant's client at the CSD level), should the CSD participants offer in turn the same types of individually segregated securities accounts to their clients?*

## **CSD Answers 5**

- (a) Article 38(5) of CSDR applies to all participants of a CSD as of the authorisation of such CSD. Therefore, participants should be ready to “offer their clients at least the choice between omnibus client segregation and individual client segregation and inform them of the costs and risks associated with each option” at the time of the authorisation of the CSD that operates the securities settlement system in which they are participants. CSDs should be able to prove to their NCAs that they comply with Article 38 of CSDR, as this is one of the conditions to be granted authorisation under CSDR. This implies that CSDs need to coordinate with their participants (before they are granted authorisation under CSDR), in order to ensure that they take the necessary measures to be compliant with Article 38 of CSDR.
- (b) All clients (existing and new) should be offered the choice between omnibus client segregation and individual client segregation, and be informed of the costs and risks associated with each option.
- (c) The creation of links between EU CSDs and TC-CSDs is dealt with in Article 84 (*Conditions for the adequate protection of linked CSDs and of their participants*) and Article 85 (*Monitoring and management of additional risks resulting from the use of indirect links or intermediaries to operate CSD links*) of the RTS on CSD Requirements.

It follows that in the context of:

- standard links with a TC-CSD: no specific account segregation requirements apply, but the comparability of the level of the asset protection shall be positively assessed by the requesting CSD;
- indirect links with TC-CSDs: a specific account segregation requirement is prescribed by the RTS on CSD Requirements, but it can be waived provided that an adequate level of protection of the securities is nonetheless ensured. The relevant provisions are: points (a)(i), (a)(ii) and (h) and the last subparagraph of Article 85(1) of the RTS on CSD Requirements, according to which:

- (i) the relevant intermediary shall comply with segregation and disclosure requirements at least equivalent to those laid down in Article 38(5) and (6) of CSDR;
- (ii) an individually segregated account at the receiving CSD shall be used for the operations of the CSD link;
- (iii) where an individually segregated account at the receiving CSD is not available, the requesting CSD shall inform its competent authority about the reasons justifying the unavailability of individually segregated accounts and shall provide it with the details on the risks resulting from the unavailability of individually segregated accounts;

- (iv) the requesting CSD shall in any case ensure an adequate level of protection of its assets held with the TC-CSD.
- (d) Yes. Article 38(4) of CSDR does not impose a specific type of individual segregation arrangement, nor does it prevent a CSD to maintain several types of individually segregated securities accounts for its participants. Under CSDR, the CSD may or may not have access to information on the identity of its participants' clients.
- (e) No, Article 38(5), first paragraph, of CSDR only requires a CSD participant to offer its clients a choice between omnibus client segregation and individual client segregation, and does not impose to offer a specific type of individually segregated securities account. In addition, Article 38(4) of CSDR provides that a CSD shall keep accounts enabling a participant to segregate the securities of any of its clients "as required by the participant".

Hence, if a CSD offers its participants to maintain several types of individually segregated securities accounts, a CSD participant may decide, in accordance with any applicable national legal and regulatory requirements, to offer to its own clients only one or several of the types of individually segregated securities accounts offered by the CSD.

#### **CSD Questions 6 - Prudential requirements - Operational risks**

- (a) *Is the definition of a "critical service provider" referred to in Article 68 of the RTS on CSD Requirements restricted to a party that has a contract to provide services to the CSD?*
- (b) *Article 69 of the RTS on CSD Requirements refers to measures to be put in place to mitigate operational risks in the context of arrangements between a CSD and other market infrastructures. Does the reference to "market infrastructures" include trading venues?*
- (c) *Do overnight deposits with a central bank, an authorised credit institution or a CSD authorised to provide banking-type ancillary services fulfil the requirements specified in Article 82(1) of the RTS on CSD Requirements?*
- (d) *Do central banks providing cash settlement in central bank money for CSDs qualify as critical service providers referred to in Article 68 of the RTS on CSD Requirements?*
- (e) *Does TARGET2-Securities (T2S) qualify as a critical service provider within the meaning of Article 68 of the RTS on CSD Requirements?*
- (f) *In Article 82(2) of the RTS on CSD Requirements, does "access to financial instruments on the same business day when the decision to liquidate the financial instruments is taken" mean that these financial instruments should be liquidated on the same business day?*

#### **CSD Answers 6**

- (a) No. A contract for the provision of services is not necessary to identify a critical service provider – however, once a service provider has been identified as critical by the CSD, in accordance with Article 68, the CSD needs to put in place adequate contractual and organisational arrangements with the respective provider "before any relationship with such providers becomes operational".

- (b) Yes. According to Article 53 of CSDR, market infrastructures include trading venues. Therefore, the same concept should apply to the RTS.
- (c) A CSD can use overnight deposits and other time deposits with a central bank, an authorised credit institution or a CSD authorised to provide banking-type ancillary services, provided that the CSD can have immediate and unconditional access to its respective cash assets.
- (d) No. Given the nature of the central bank provision of cash settlement services, payment systems operated by central banks should be considered as market infrastructures. Accordingly, the provisions referring to market infrastructures, i.e. Articles 35 and 45(6) of CSDR and Articles 69, 75(6)(d), 76(2)(c)(iv) and 79(c)(iv) of the RTS on CSD Requirements, should cover in their scope also payment systems operated by central banks.
- (e) No. Article 30(5) of CSDR exempts CSDs from the requirements laid down in paragraphs 1 to 4 of Article 30 of CSDR, when they outsource some of their services or activities to a public entity and where that outsourcing is governed by a dedicated legal, regulatory and operational framework which has been jointly agreed and formalised by the public entity and the relevant CSD and agreed by the competent authorities on the basis of the requirements established in the CSDR. This exemption precludes the application of Article 68 of the RTS on CSD Requirements in the case of T2S, for which the organisational and operational safety, efficiency and resilience of T2S should be ensured through the dedicated legal, regulatory and operational framework and agreed governance arrangements.
- (f) No. According to Article 82(2) of the RTS on CSD Requirements, a CSD should be able to dispose of the financial instruments on the day when the decision to liquidate (i.e. to convert into cash) is made, i.e. to be in a position, from a legal and operational standpoint, to order a liquidation of the financial instruments. It does not necessarily entail that a CSD should liquidate these financial instruments on the same business day.

**CSD Questions 7 - Provision of banking-type ancillary services**

- (a) *Which are the participants' competent authorities responsible for the supervision of the participants of the CSD that are established in the three Member States with the largest settlement values in the CSD's securities settlement system pursuant to Article 55(4)(e) of CSDR?*
- (b) *How should the values referred to in Article 54(5) of CSDR be calculated?*
- (c) *Article 55(4)(e) of CSDR requires the competent authority of a CSD to calculate the settlement values of each participant of that CSD over a one-year period and to aggregate them by Member State in order to identify the top three Member States. How should those settlement values be determined?*

## CSD Answers 7

- (a) In order to determine which authorities should be involved under Article 55(4)(e) of CSDR, a CSD's NCA should first identify the three relevant Member States for this purpose and then identify the competent authorities of the participant in each of these Member States.

To identify the three relevant Member States, a CSD's NCA should (i) calculate the aggregate settlement values in each of the CSD's securities settlement system of each and every participant over a one-year period, (ii) aggregate such values by Member State and (iii) determine which are the top three Member States.

The authorities referred to in Article 55(4)(e) of CSDR will be the competent authorities of the participants located in these top three Member States. Where more than one competent authority is established for the relevant participant, they can all be entitled to receive the relevant information and issue reason opinions.

- (b) For the purposes of Article 54(5) of CSDR, the total value of cash settlement through accounts opened with credit institutions, and the total value of all securities transactions against cash settled in the books of the CSD over a one-year period should be determined by taking into account the settlement instructions that are eligible to be included in the calculations of the indicators for the determination of the most relevant currencies pursuant to Article 12(1)(b) of CSDR, having regard to the ESMA Guidelines on the process for calculation of the indicators to determine the most relevant currencies in which settlement takes place.

In addition to the principles specified in the ESMA Guidelines mentioned above, cash distributions (e.g. cash dividend, interest payment) should be included for the purposes of Article 54(5) of CSDR, given that the objective of Article 54(5) is to manage risks that are related to a CSD designating a credit institution for the provision of banking-type ancillary services.

If a CSD seeks to designate a credit institution to provide any banking-type ancillary services from within a separate legal entity, for the authorisation of the CSD under CSDR, the values to be used should be those covering one year up to the month prior to the submission of the authorisation request. For the following years after the authorisation of the CSD, the values to be used should be those covering each calendar year.

- (c) For the purposes of Article 55(4)(e) of CSDR, the settlement values of a participant in the securities settlement system of a CSD should be determined by considering all and only the settlement instructions of that participant that are eligible to be included in the calculations of the indicators for the determination of the most relevant currencies pursuant to Article 12(1)(b) of CSDR, having regard to the ESMA Guidelines on the process for calculation of the indicators to determine the most relevant currencies in which settlement takes place.

For the authorisation of a CSD under CSDR, the values to be used should be those covering one year up to the month prior to the submission of the authorisation request. For the following years after the authorisation of a CSD, the values to be used should be those covering each calendar year.

### **CSD Question 8 - Access to CSDs**

*Article 49(2) of CSDR provides that a CSD shall provide a response to an access request from an issuer within three months. If the CSD asks the requesting issuer for additional information, does it automatically entail an extension of the three-month period?*

### **CSD Answer 8**

No, CSDR does not provide CSDs with any possibility to extend this three-month period. If the request submitted by an issuer does not satisfy the access conditions set out by it, the CSD can, based on a comprehensive risk assessment, refuse to grant access to such issuer. In that case, as specified in Article 49(4) of CSDR, the issuer shall have the right to complain to the competent authority of the CSD.

### **CSD Questions 9 - Provision of services in other Member States**

- (a) *Article 23(3) of CSDR relates to the provision of notary and central maintenance services in another Member State. Its paragraph (e) specifically provides that “where relevant, [a CSD shall communicate to the NCA of the home Member State] an assessment of the measures the CSD intends to take to allow its users to comply with the national law referred to in Article 49(1)” i.e. the corporate law of the Member State under which the securities are constituted.*
- i. *Does Article 23 of CSDR apply to all types of securities (such as shares, bonds, etc.)?*
  - ii. *What type of assessment should the CSD provide to the home Member State NCA?*
- (b) *Under Article 23(3)(b) of CSDR, should the “programme of operations” include information on core services and on the ancillary services a CSD intends to provide in the other Member State?*
- (c) *Under Article 23(3)(e) of CSDR, a CSD is required to provide, where relevant, an “assessment of the measures [it] intends to take to allow its users to comply with the national law referred to in Article 49(1)”. Should the CSD provide one assessment per security issue?*
- (d) *Where an applicant CSD is already providing core services referred to in Article 23(2) of CSDR in another Member State, how do the authorisation procedure set out under Article 17 of CSDR and the passporting procedure set out in Article 23 of CSDR interplay?*
- (e) *For the purposes of Article 23(3) of CSDR, which changes to the provision of cross-border services should be considered as changing the range of the services provided within the territory of a host Member State?*
- (f) *Article 23(3)(e) CSDR provides that “where relevant, an assessment of the measures the CSD intends to take to allow its users to comply with the national law referred to in Article 49(1)”. When should it be considered relevant to provide such assessment?*
- (g) *For the purposes of Article 23(6) of CSDR, what happens if the NCA of a host Member State disapproves of the assessment referred to in Article 23(3)(e) of CSDR?*

*(h) Article 23(2) of CSDR specifies that the procedure for providing services in another Member State shall apply to authorised CSDs that intend to provide certain services in relation to “financial instruments constituted under the law of another Member State referred to in Article 49(1)”.*

*For the purpose of Article 23(2) of CSDR, which law should be considered as “the law under which securities are constituted” as referred to in Article 49(1) of CSDR and which Member State(s) should be considered as the host Member State(s) for the purpose of Article 23(3) to (7) of CSDR?*

## **CSD Answers 9**

**(a) Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

- i. Yes, Article 23 of CSDR applies to all types of securities as defined under Article 2(8) of CSDR, that means financial instruments as defined in point (15) of Article 4(1) of Directive 2014/65/EU, whether admitted to trading on regulated markets or MTFs, traded on trading venues, or not.
- ii. National laws referred to in Article 49(1) of CSDR govern the relationship between issuers and holders of such securities or any third party, such as ownership rights, voting rights, dividends and corporate action, which for the sake of clarity, is not the national law of the home NCA that will receive this communication.

Therefore, to assess that these measures allow its users to comply with the applicable securities law, the CSD should not only communicate the measures it intends to take and the procedure it intends to follow, but should also provide actual evidence that the proposed measures ensure compliance. To that end, independent legal opinions may be requested in order to certify that the rules and procedures set out by the CSD allow their users to comply with each applicable national law.

- (b) Yes, the programme of operations required under Article 23(3)(b) of CSDR should cover both the core and ancillary services the CSD intends to provide in the other Member State.
- (c) No. The NCA should require the CSD to provide an assessment of the measures it intends to take to allow its users to comply with the national law referred to in Article 49(1) at least for each type of financial instruments in respect of which it intends to provide the services referred to in points 1 or 2 of Section A of the Annex to CSDR.
- (d) Without prejudice to NCAs from the home and host Member States agreeing to start the procedure set out in Article 23 of CSDR in advance and to run both procedures in parallel, the procedure set out in paragraphs (3) to (7) of Article 23 of CSDR applies to ‘authorised CSDs’, and thus only as of the day when a CSD is authorised under Article 17 of CSDR. Therefore, where an applicant CSD already provides (and intends to continue providing) core services as referred to in Article 23(2) of CSDR, the communication of the information required under Article 4(3) of the RTS on CSD Requirements by the CSD to its NCA in its application for authorisation under Article 17 of CSDR or in any subsequent update thereof shall not *per se* trigger any of the deadlines set in Article 23 of CSDR.

As from the granting of its authorisation under Article 17 of CSDR and until the completion of the procedure set out in Article 23 of CSDR, including the period during which a disapproval from the NCA of the host Member State of an assessment referred to in Article 23(3)(e) of CSDR would be challenged in accordance with point (g) below, the CSD:

- can continue to provide the core services referred to in Article 23(2) of CSDR that it provided in other Member States before the granting of its authorisation under Article 17 of CSDR and for which it has communicated to its NCA the information required according to Article 23(3) of CSDR immediately upon its authorisation;
- must stop providing the services that it used to provide before being authorised by the home NCA but for which it has not communicated to the home NCA the information required according to Article 23(3) of CSDR immediately upon its authorisation; and
- must not start providing within the territory of a host Member State any core service referred to in Article 23(2) of CSDR that it did not provide before the granting of its authorisation under Article 17 of CSDR.

Please refer to point (e) below on the changing of the range of services, to determine whether a service should be deemed as already provided or not.

- (e) The following changes should be considered as changing the range of services provided within the territory of a host Member State:
- Provision of another core service (referred to in point 1 or 2 of Section A of the Annex to CSDR)
  - Provision of service(s) in relation to another type of financial instrument

For this purpose, the following types of financial instruments (as referred to in Article 42(1)(d)(i) of the RTS on CSD Requirements) should be taken into account:

- a) transferable securities referred to in point (a) of Article 4(1)(44) of Directive 2014/65/EU,
  - b) sovereign debt referred to in Article 4(1)(61) of Directive 2014/65/EU,
  - c) transferable securities referred to in point (b) of Article 4(1)(44) of Directive 2014/65/EU, other than sovereign debt referred to in Article 4(1)(61) of Directive 2014/65/EU,
  - d) transferable securities referred to in point (c) of Article 4(1)(44) of Directive 2014/65/EU,
  - e) exchange-traded funds as defined in point (46) of Article 4(1) of Directive 2014/65/UE (ETF),
  - f) units in collective investment undertakings, other than ETFs,
  - g) money-market instruments, other than sovereign debt referred to in Article 4(1)(61) of Directive 2014/65/EU,
  - h) emission allowances,
  - i) other financial instruments (to be specified by the CSD).
- (f) "Where relevant" should be understood as meaning that the CSD must provide an assessment whenever there are requirements under the national law that it has determined as being relevant for the users of each cross-border service it provides or intends to provide.
- (g) Where the NCA of the host Member State refuses to approve such assessment it shall, within three months from the date of transmission of the communication referred to in Article 23(4) of

CSDR, provide the CSD's NCA with the full written reasons for its disapproval, including the specific national requirements which are not complied with and may suggest appropriate measures to be taken by the CSD to allow its users to comply with the national law referred to in Article 49(1) of CSDR.

In such case, the CSD should submit an updated assessment referred to in Article 23(3)(e) of CSDR to its NCA, which should transmit it to the NCA of the host Member State which will review it under the procedure set out in Article 23(6) of CSDR.

Where the NCA of the host Member State disapproves of the updated assessment, that NCA shall within three months from the date of transmission of the updated assessment provide the CSD's NCA with a fully reasoned written decision confirming its disapproval. including the specific national requirements which are not complied with and may suggest appropriate measures to be taken by the CSD to allow its users to comply with the national law referred to in Article 49(1) of CSDR.

This second reasoned decision should clearly state the way in which an appeal against such decision can be lodged. Only when such matters are settled definitively should the procedure set out under Article 23 of CSDR be considered as being completed.

**(h) Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

Article 49(1) of CSDR establishes the issuer's right to arrange for its securities admitted to trading on regulated markets or MTFs or traded on trading venues to be recorded in any CSD established in any Member State, subject to compliance by that CSD with the conditions referred to in Article 23.

Article 49(1) also provides that, without prejudice to the issuer's right referred to in the first subparagraph, the corporate or similar law of the Member State under which the securities are constituted shall continue to apply. The latter should be interpreted in the light of Recital 56 of CSDR and therefore be understood as the law governing the relationship between the issuer and holder and their respective rights and duties attached to the securities such as voting rights, dividends and corporate actions.

If the national law of an issuer, including substantive law and conflict of laws rules, allows a law different from the law of the issuer to govern some securities (e.g. bonds) or certain aspects of their issuance, it is possible for 'the national law under which securities are constituted' to be or to include that different law.

For instance, if the national law of the issuer determines that any issue of shares should be governed by the national law of the issuer, indeed the national law of the issuer would be the 'law under which the securities are constituted' in the meaning of Article 49(1) of CSDR. This would seem to be the case for most shares. It is, however, possible that in case of debt securities, the national law of the issuer allows that the law governing the issue can be chosen contractually.

For the purpose of Article 23(2) of CSDR, by default, the 'law under which the securities are constituted' in the meaning of Article 49(1) of CSDR should be the 'standard' law of the issuance for each type of financial instruments per host Member State (i.e. for shares, the national law of the issuer, and for bonds, the law that has been contractually chosen to govern the issuance).



However, without prejudice to the above-mentioned default approach, if, for a certain type of financial instruments, the issuer determines that the national law of the issuer should be complied with through measures to be taken by the CSD, two cases may exist:

(1) Upon information from the issuer, the CSD determines that it should take measures to allow its users to comply not only with the 'standard' law of the issuance, but also with the national law of the issuer. In this case, in order to provide notary or central maintenance services in relation to such type of financial instruments, the CSD should perform the assessment as per Article 23(3)(e) of CSDR and apply the process under Article 23(3) of CSDR for the respective type of financial instruments covering the laws of both host Member States, with the involvement of the competent authorities in both host Member States;

(2) Upon information from the issuer, the CSD determines that it should take measures to allow compliance only with the national law of the issuer. In this case, in order to provide notary or central maintenance services in relation to such type of financial instruments, the CSD should perform the assessment as per Article 23(3)(e) of CSDR and apply the process under Article 23(3) of CSDR for the respective type of financial instruments covering only the national law of the issuer and involving the competent authority in the issuer's jurisdiction. A CSD should only perform the assessment as per Article 23(3)(e) of CSDR once per type of financial instruments and per host Member State.

*The following example may illustrate this approach:*

A CSD from Member State A would like to provide notary or central maintenance services in respect of bonds whose terms and conditions are governed by the law of host Member State B (law contractually chosen to govern the issuance).

For the purpose of Article 23(2) of CSDR, the CSD should perform the assessment as per Article 23(3)(e) of CSDR of the measures the CSD intends to take to allow its users to comply with the law of host Member State B. Consequently, the competent authority of host member State B would be involved in the procedure under Article 23(2) of CSDR.

If an issuer from Member State C issues bonds whose terms and conditions are governed by the law of Member State B (law contractually chosen to govern the issuance) and informs the CSD that it has determined that:

(1) in addition to the national law of Member State B as law of the issuance, the national law of Member State C (issuer's law) would also require the CSD to take measures to allow its users to comply with it, then the CSD would need to perform the assessment as per Article 23(3)(e) of CSDR in respect of both the national law of host Member State B and the national law of host Member State C and involve competent authorities of both host Member State B and host Member State C. If the CSD has already been subject to the procedure for providing services in respect of bonds in host Member State B, then it would only need to be subject to the procedure for providing services in respect of bonds in host Member State C; or that

(2) only the national law of Member State C (issuer's law) would be relevant for the measures the CSD would need to take to allow its users to comply with the national law referred to in Article 49(1) of CSDR, then the CSD would be subject to the procedure for providing services with respect to that type of financial instruments in host Member State C. The CSD would thus need to perform the assessment as per Article 23(3)(e) of CSDR of the measures the CSD intends to take to allow its users to comply with the national law of host Member State C referred to in Article 49(1) of CSDR relevant for bonds and only the competent authority of host member State C would need to be involved in the procedure under Article 23(2) of CSDR.

### **CSD Questions 10 - Requirements for CSD links**

- (a) *Article 84(1)(d) of the RTS on CSD Requirements provides that the requesting CSD shall make available to its participants the legal and operational terms and conditions in relation to the link arrangement. Where the receiving CSD is not the issuer CSD and, thus, has itself a CSD link with the issuer CSD (or with another investor CSD), should the requesting CSD provide its participants with legal and operational terms and conditions applying to these other link arrangements?*
- (b) *Article 84(1)(e) of the RTS on CSD Requirements provides that the requesting CSD shall assess the local legislation applicable to the receiving TC-CSD. Where the receiving TC-CSD is not the issuer CSD and, thus, has itself a CSD link with the issuer CSD (or with another investor CSD), should the requesting CSD perform an assessment of the local legislation applying to these other CSDs?*
- (c) *How should CSDs and their NCAs assess the risks related to a link with an EU CSD which has not been authorised under the CSDR yet?*
- (d) *Are links between CSDs participating in T2S interoperable links as defined in the CSDR?*

### **CSD Answers 10**

- (a) The requesting CSD does not need to provide its participants with information concerning any further CSD links up to the issuer CSD. Article 84(1)(d) of the RTS on CSD Requirements relates to the link with the receiving CSD only and to the legal and operational terms and conditions of this specific link arrangement.
- (b) Article 84(1)(e) of the RTS on CSD Requirements requires the requesting CSD to perform an assessment of the local legislation applicable to the receiving TC-CSD which should include asset protection considerations, as per Article 84(1), last sub-paragraph. If necessary, this assessment should thus consider any information about the receiving TC-CSD's further CSD links (as the case may be, up to the issuer CSD) that may have an impact in terms of entitlement of the requesting CSD to the securities or of insolvency proceedings effects (e.g. in case the applicable law would make a *renvoi* to the law of the issuer CSD as the law applicable to proprietary aspects, or to the nature of the rights of the receiving CSD on the securities).
- (c) When assessing the risks related to a link with a CSD established in the EU that has not been authorised yet, CSDs should comply, and their NCAs should verify their compliance, with the requirements set out in Article 48 of CSDR and the related technical standards.
- (d) Yes, as Article 2(33) of CSDR defines an interoperable link as a “*CSD link whereby CSDs agree to establish mutual technical solutions for settlement in the securities settlement systems they operate*”, which is the case of CSDs participating in T2S, as they use a common settlement infrastructure.

Furthermore, Article 19(5) of CSDR clearly contemplates the specific case of T2S when referring to “*interoperable links of CSDs that outsource some of their services related to those interoperable links to a public entity*” (thus establishing an exemption for such interoperable

links from the authorisation process generally applicable to other interoperable links, and subjecting them to a mere notification procedure).

However, this qualification as interoperable link covers only the T2S-related aspects of the relationship between the respective CSDs, i.e. the settlement of securities through T2S. Two CSDs participating in T2S can have in parallel other types of CSD links between themselves, in relation to different securities not settled through T2S, to the extent allowed by the dedicated legal, regulatory and operational framework referred to in Article 30(5) of CSDR. These other CSD links should not be qualified as interoperable links only because of the participation of the two CSDs in T2S.

### **CSD Question 11 - Review and evaluation**

*(a) With regards to Art. 42 (Statistical data) of the Commission Delegated Regulation (EU) 2017/392, should the CSD provide under 1c, 1d, 1e, 1g and 1h nominal value for securities expressed in units?*

### **CSD Answer 11**

(a) Paragraphs 1c, 1d, 1e and 1f of Article 42 of Delegated Regulation (EU) 2017/392 require CSDs to provide their NCAs with market and nominal value of securities recorded in securities accounts centrally and not centrally maintained in each securities settlement system operated by the CSD, and with market and nominal value of securities initially recorded in each securities settlement system operated by the CSD. Furthermore, paragraphs 1g and 1h of the same Article require CSDs to provide to their NCAs with the total number and the values of the settlement instructions against payment and the total number and the values of the free of payment (FOP) settlement instructions settled in each securities settlement system operated by the CSD. In the case of FOP settlement instructions, the value shall be the market value of the financial instruments or, where not available, the nominal value of the financial instruments.

For securities denominated in units and recorded as such in securities settlement systems, where the nominal value is not available, the nominal value should be set at zero.

## 2 Part III: Settlement Discipline

Last update 13 March 2023

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### **Settlement Discipline Questions 1 – Matching settlement instructions**

- (a) *How often should the exchange rate used to determine the tolerance level for settlement instructions in other currencies than EUR (referred to in Article 6 of the RTS on Settlement Discipline) be updated?*
- (b) *Are “delivery without matching” instructions (“dump” instructions) allowed under the RTS on Settlement Discipline? In the case of such instructions, there would be no matching at the level of the securities settlement system operated by the CSD, i.e. the delivery of the financial instruments would be settled by the CSD by generating a receipt instruction for settlement and booking into the receiving participant’s securities account, as mentioned in the delivering participant’s instruction, without any prior matching taking place.*
- (c) *Is “passive matching” allowed under the RTS on Settlement Discipline? In such a case, participants can give a standing instruction on single account level whether or not they should send a “Receive Free of Payment” instruction whenever another participant submits a “Deliver Free of Payment” instruction against the given account of participant who is supposed to receive the financial instruments. The “passive matching” creates the corresponding required matching instruction for the receiving participant, which is based on the instruction of the delivering participant.*

### **Settlement Discipline Answers 1**

- (a) ESMA considers that the exchange rate should be updated annually. To ensure consistency across CSDs, CSDs should use the same exchange rates. Therefore, CSDs should use the official exchange rates of the ECB, where available, valid on 1 January of the respective calendar year.
- (b) Only dump instructions involving transfers of financial instruments between different accounts opened in the name of the same participant or managed by the same account operator would still be allowed once the RTS on Settlement Discipline enters into force. Such instructions would be captured under point c) of Art 5(2) of the RTS on Settlement Discipline.
- (c) The “passive matching” as described above is in line with the RTS on Settlement Discipline, given that matching takes place at the level of the securities settlement system operated by the CSD prior to settlement.

### **Settlement Discipline Questions 2 – Cash penalties: joint penalty mechanism**

- (a) *When CSDs use a common settlement infrastructure, which part of the penalty mechanism should be jointly managed? Can such CSDs use multiple service providers to operate the penalty mechanism?*
- (b) *Is the use of a common framework or rulebook sufficient in order to satisfy the requirement for a joint establishment and joint management of the cash penalty mechanism under Article 20 of the RTS on Settlement Discipline?*

## Settlement Discipline Answers 2

- (a) According to Article 20 of the RTS on Settlement Discipline, when CSDs use a common settlement infrastructure, the entire penalty mechanism should be jointly managed. It is thus expected that the calculation, application, collection and redistribution of cash penalties is jointly managed.

If multiple service providers are used, it is up to the CSDs using a common settlement infrastructure to prove how they can ensure the joint management of the penalty mechanism, in particular with regard to the coordination and exchange of information between the different service providers.

- (b) No. Such a framework may be helpful in terms of ensuring an increased degree of harmonisation across all CSDs in the EU, however, in order to ensure compliance with Article 20 of the RTS on settlement discipline, in the case of CSDs that use a common settlement infrastructure, the penalty mechanism should be jointly established, managed and operated by the respective CSDs. This should include at least:
- i. the joint governance and legal enforceability of common rules and procedures related to the application of the penalty mechanism;
  - ii. the use of common reference data and prices;
  - iii. the use of a single calculation engine, which does not require reconciliation operations amongst the involved CSDs related to the application of the penalty mechanism.

## Settlement Discipline Questions 3 – Cash penalties: calculation

- (a) *Is bilateral netting followed by aggregation of the amounts resulting in one credit and one debit amount per CSD participant in line with Article 17 of the RTS on settlement discipline?*
- (b) *Which rate should be applied (the securities rate or the cash rate) for the calculation of cash penalties in accordance with Article 7(2) of CSDR and Articles 2 and 3 of the Commission Delegated Regulation (EU) 2017/389?*
- (c) *Should cash penalties be applied to settlement fails in the case of receive free of payment ('RFP') settlement instructions, receive with payment ('RWP') settlement instructions, or crediting payment free of delivery ('CPFOD') settlement instructions (as referred to in Article 13(1)(g) of the RTS on Settlement Discipline), which are put on hold?*
- (d) *When should penalty rates for financial instruments traded on SME growth markets apply, as set out in the Annex to the Commission Delegated Regulation (EU) 2017/389?*
- (e) *Should the net amounts of cash penalties referred to in Article 17 of the RTS on settlement discipline be calculated and communicated only in Euros to the CSD participants?*
- (f) *Article 3(2) of Commission Delegated Regulation 2017/389 provides that "The reference price referred to in paragraph 1 shall be used to calculate the level of cash penalties for all settlement fails, irrespective of whether the settlement fail is due to a lack of securities or cash." What should be the basis for calculating cash penalties in cases where the settlement instruction does not include any securities or when its security component is not related to its cash component (e.g. when two separate and opposite transactions between two participants result in a settlement instruction that consists in a delivery with payment or a payment free of delivery)?*

- (g) *Is it admissible for Member States or CSDs to apply cash penalties rates that would differ from the penalty rates set in Commission Delegated Regulation (EU) 2017/389?*
- (h) *Should cash penalties be applied from the intended settlement date (ISD) to new settlement instructions that are entered into a securities settlement system to replace failed instructions if penalties have already been applied to such settlement instructions between the ISD and the date on which the new instructions are entered into the securities settlement system?*

### **Settlement Discipline Answers 3**

- (a) Yes.
- (b) The cash rate should be applied if the reason for the settlement fail is applicable to the leg of the transaction which delivers the cash, while the securities rate should be applied in case the reason for the fail is applicable to the leg of the transaction which delivers the securities.
- (c) Yes. Regarding receive free of payment ('RFP') settlement instructions, receive with payment ('RWP') settlement instructions, or crediting payment free of delivery ('CPFOD') settlement instructions (as referred to in Article 13(1)(g) of the RTS on Settlement Discipline), which are put on hold, cash penalties should be applied in order to penalise the non-timely settlement and foster settlement discipline, even if the participant who put the instruction on hold did not suffer from the non-delivery of securities or cash.
- (d) The penalty rates for SME growth market instruments should only apply if the particular trade has actually taken place on an SME growth market. In order for these penalty rates to apply, the same information identifying the relevant SME growth market should be included in the field related to the place of trading in both corresponding settlement instructions.
- (e) No. The net amounts of cash penalties referred to in Article 17 of the RTS on Settlement Discipline should be calculated per settlement currency and should not be converted into Euros.
- (f) **Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

In a situation where the settlement instrument does not imply the delivery of financial instruments, (e.g. an instruction for a payment free of delivery) or where a settlement instruction implies that one participant shall both deliver the financial instruments and pay a cash component (e.g. an instruction for delivery with payment) and the delivery of the financial instruments occurs but the payment of the cash leg fails, the basis for calculating the cash penalties shall be the cash component of the settlement instruction. This ensures, in line with Recital 12 of Commission Delegated Regulation (EU) 2017/389, a deterrent effect of cash penalties and incentivised timely settlement by failing participants.

- (g) **Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

The question refers to the possibility to set different penalty rates from those prescribed in Commission Delegated Regulation (EU) 2017/389 for the calculation of cash penalties for settlement fails.

Commission Delegated Regulation (EU) 2017/389 is a delegated act. The Commission is empowered<sup>4</sup> to adopt delegated acts in accordance with Article 67 CSDR to specify parameters for the calculation of a deterrent and proportionate level of cash penalties. The objective of the delegated act is to supplement the EU legislative act.

The overall objective<sup>5</sup> of the CSDR is to increase the safety and efficiency of settlement in the Union by preventing any diverging national rules, to reduce the regulatory complexity for market operators and CSDs and to eliminate competitive distortions. Specifically, the objective<sup>6</sup> of the CSDR with respect to the settlement discipline regime is to “...provide for uniform rules concerning penalties and certain aspects of the buy-in transaction for all transferable securities..., in order to avoid adversely impacting on the liquidity and efficiency of securities markets...”.

The Delegated Act clearly states<sup>7</sup> that the level of cash penalties for settlement fails of transactions in a given financial instrument shall be calculated **by applying the relevant penalty rate** set out in the Annex of the Act to the reference price of the transaction. The Annex lists quantitative parameters (in basis points) to be applied to various types of fails, with the exception of settlement fails due to a lack of cash, where an official interest rate for overnight credit charged by the central bank is to be applied.

Furthermore, the Delegated Act, in the spirit of the provisions of CSDR, notes<sup>8</sup> that appropriate penalty rates should be based on a single table of values that should be easy to automate and apply to ensure their effective application by CSDs.

In view of this, the parameters to be used for the calculation of cash penalties and the underlying logic for their application (coherency across securities markets, efficiency of settlement, prevention of anti-competitive effects) do not provide any flexibility in their application or how they are set. Departing from the penalty rates set in Delegated Regulation (EU) 2017/389 would not be compatible with the choice of the EU legislator to empower the Commission to lay down uniform penalty rules that are both deterrent and proportionate.

**(h) Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

No. Article 16(3) first subparagraph of the RTS on settlement discipline (Commission Delegated Regulation (EU) 2018/1229) states that where a settlement instruction has been entered into the securities settlement system or has been matched after the intended settlement date (ISD), cash penalties shall be calculated and applied as from the ISD. However, this article should not lead to the application of duplicative penalties for the same settlement instructions on the period between the ISD and the date of the introduction of the new settlement instruction into the securities settlement system. Nevertheless, irrespective of the technical means used in the cases referred to above, it should be ensured that there is no gap in the application of cash penalties.

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<sup>4</sup> Regulation (EU) 909/2014, Art. 7(14).

<sup>5</sup> Regulation (EU) 909/2014, Recital 5.

<sup>6</sup> Regulation (EU) 909/2014, Recital 15.

<sup>7</sup> Commission Delegated Regulation (EU) 2017/389, Article 2.

<sup>8</sup> Commission Delegated Regulation (EU) 2017/389, Recital 5.

#### **Settlement Discipline Questions 4 – Cash penalties: scope**

- (a) *Are there exceptional situations where the cash penalty mechanism provided for under Article 7(2) of CSDR should not be applied?*
- (b) *How should Article 7(12) of CSDR apply in respect of cash penalties due to, and owed by, a participant against which insolvency proceedings are opened?*
- (c) *What reference data should CSDs use when identifying the financial instruments subject to cash penalties under Article 7 of CSDR?*
- (d) *Should cash penalties apply in the case of settlement fails relating to transactions which were intended to be settled before the date of application of cash penalties requirements and which failed and are still failing on and after the date of application of cash penalties requirements?*

#### **Settlement Discipline Answers 4**

- (a) Yes. In addition to situations where insolvency proceedings are opened against the failing participant in accordance with Article 7(12) of CSDR, cash penalties should not be applied in the following situations where settlement cannot be performed for reasons that are independent from the involved participants:
  - i. ISIN suspension from settlement due to a reconciliation issue under Article 65 (2) and (6) of the RTS on CSD Requirements;
  - ii. ISIN suspension from trading, such as for example under Article 32(1), Article 52(1), Article 69(2) of MiFID II or Article 40(1) of MiFIR;
  - iii. settlement instructions involving cash settlement outside the securities settlement system operated by the CSD if, on the respective day, the relevant payment system is closed for settlement;
  - iv. technical impossibilities at the CSD level that prevent settlement, such as: a failure of the infrastructure components, a cyber-attack, network problems.

CSDs should report the concrete cases falling in the above-mentioned categories to their competent authorities, and the competent authorities should have the possibility to ask the CSDs to apply cash penalties in the future in similar cases, if they consider the non-application of penalties unjustified.
- (b) As of the date of the opening of insolvency proceedings against a participant, Article 7(12) of CSDR applies and, therefore, Article 7(2) shall cease to apply to the settlement fails caused by the insolvent participant and consequently:
  - i. Cash penalties should no longer be calculated in respect of settlement fails caused by the insolvent participant;
  - ii. Cash penalties calculated in respect of settlement instructions involving the insolvent participant until that date should be managed separately i.e. not be included in the aggregated net amounts referred to in Article 17 of the RTS on Settlement Discipline; and
  - iii. Cash penalties should not apply to settlement instructions relating to the liquidation of positions of an insolvent participant.



- (c) In order to have a consistent approach across CSDs, CSDs should identify the financial instruments subject to cash penalties on business day D+1, based on data available from ESMA registers and databases (as well as based on other sources of information, if the necessary information is not covered by the ESMA registers and databases) on business day D (i.e. the date of publication in the ESMA registers and databases or other sources of information).

Without prejudice to the due diligence to be performed by CSDs, the following registers and databases published by ESMA could be used by CSDs for the application of cash penalties under Article 7 of CSDR:

- 1) To identify the financial instruments referred to in Article 5(1) of CSDR which are admitted to trading or traded on a trading venue, and the asset type to which they belong, as well as the trading venues on which they are admitted to trading or traded, for the purpose of determining the market values referred to in Article 7 of the Commission Delegated Regulation (EU) 2017/389: [Financial Instruments Reference Database \(FIRDS\)](#).
- 2) To identify the most relevant market in terms of liquidity referred to in Article 4(1)(a) of MiFIR, for the purpose of determining the market values referred to in Article 7(a) of the Commission Delegated Regulation (EU) 2017/389: [Financial Instruments Transparency System \(FITRS\)](#).
- 3) To identify the shares referred to in Article 7(13) of CSDR, having their principal trading venue in a third country, which are exempted from the application of cash penalties under Article 7 of CSDR: [List of exempted shares \(having their principal trading venue located in a third country\)](#).
- 4) To verify if the place of trading indicated in a settlement instruction is an SME growth market, for the purpose of applying the penalty rates referred to in points 3 and 6 of the Annex to the Commission Delegated Regulation (EU) 2017/389: [List of Trading Venues/ Systematic Internalisers/ Data Reporting Service Providers](#).

- (d) **Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

According to Article 76(5) CSDR, each of the settlement discipline measures referred to in Article 7(1) to (13) shall apply from the date of application specified for each settlement discipline measure in Commission Delegated Regulation (EU) 2018/1229.

According to Article 7(2) CSDR, a CSD must establish a penalty mechanism which will serve as an effective deterrent for participants that cause fails.

Furthermore, according to Article 16(2) of Commission Delegated Regulation (EU) 2018/1229, cash penalties shall be calculated and applied at the end of each business day where the settlement instruction fails to settle. The objective of the cash penalties is to sanction the non-delivery of the security on each business day after the intended settlement date, in other words the continuous settlement failure. Where a transaction failed to settle before the date of application of the settlement discipline measure referred to in Article 7(2) of CSDR and continues to be in settlement failure after that date, cash penalties are to be paid for each business day in which the transaction continues to fail to be settled after that date.

### **Settlement Discipline Questions 5 – Cash penalties: costs and process**

- (a) *Can the costs of the penalty system be charged to participants on the basis of their settlement fails?*
- (b) *Is it possible for CSDs to use additional incentives to limit the occurrence of payment delays leading to partial collection and distribution of cash penalties?*

## Settlement Discipline Answers 5

- (a) According to Article 18 of the RTS on Settlement Discipline, the costs of the penalty mechanism that are charged to participants by a CSD should not be allocated on the basis of the number or value of penalties applied to participants, as it could result in a concentration of the cost allocation to a limited number of participants and be seen as a shadow penalty. Other related services, such as additional reports that may be requested by participants, can be charged separately to the respective participants.
- (b) **Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

Insofar as those incentives do not impede the effective application of requirements set out in CSDR and Commission Delegated Regulation (EU) 2018/1229, CSDs can put in place such measures to limit the occurrence of payment delays leading to partial collection and distribution of cash penalties.

## Settlement Discipline Questions 6 – Settlement instructions sent by CCPs

- (a) *Where a netted settlement instruction sent by a CCP to a CSD stems from the netting of transactions having different trade dates, how should the settlement instruction field indicating the trade date be populated?*
- (b) *Where a netted settlement instruction sent by a CCP to a CSD stems from the netting of different types of transactions (belonging to more than one of the categories listed in points (a) to (d) of Article 5(4) of the RTS on Settlement Discipline), how should the settlement instruction field indicating the transaction type be populated?*
- (c) *Under CSDR, is there a requirement for settlement instructions to include a field indicating the place of trading of the respective securities transaction?*
- (d) *How should a CCP sending a settlement instruction stemming from the netting of transactions executed in various trading places populate a field with the 'place of trading'?*
- (e) *Article 13(1) of the RTS on Settlement Discipline provides that "CSDs shall establish a system that enables them to monitor the number and value of settlement fails" and that such "system shall, for each settlement fail, collect information" relating to, inter alia, "(e) the place of trading and of clearing of the affected financial instruments, where applicable". What is the responsibility of CSDs in relation to this requirement, specifically as regards the "place of trading"?*
- (f) *Are all settlement fails involving CCPs captured by the exemption provided for in Article 7(11) of CSDR?*

## Settlement Discipline Answers 6

- (a) Subject to the CCP being able to retrieve the original trade date for each constituent transaction, the relevant field could be populated with a date chosen by the CCP, such as the 'ISD', 'ISD - 1', the date in which the instructions are sent to the CSD, or the date of the first trade.
- (b) Subject to the CCP being able to retrieve the original transaction type for each constituent transaction, the relevant field should identify the transaction type as "other transactions" as per point (e) of Article 5(4) of the RTS on Settlement Discipline and the ISO transaction type code "NETT" or equivalent code could be used to populate such a field, as provided by the CSD.
- (c) No, there is no such obligation in CSDR nor in the RTS on Settlement Discipline. A CSD could however provide such a field for it to be populated, in particular to identify transactions traded on SME growth markets for the purpose of benefitting from the penalty rate for financial instruments traded on SME growth markets (as set out in the Annex to the Commission Delegated Regulation (EU) 2017/389) and of the extension period mentioned in the second paragraph of Article 7(3) of CSDR.
- (d) Subject to the CCP being able to retrieve the original place of trading for each constituent transaction, a CCP's netted settlement instruction 'place of trading' field could be populated with the 'place of trading' chosen by the CCP. Please note that, in order to benefit from the penalty rate applicable to financial instruments traded on SME growth markets (as set out in the Annex to the Commission Delegated Regulation (EU) 2017/389), transactions traded on SME growth markets should not be netted with transactions traded in other trading places (see also Settlement Discipline Question 3(d)).
- (e) CSDs' responsibility in relation to Article 13(1)(e) of the RTS on Settlement Discipline, specifically as regards the "place of trading", is to collect information to the extent that such information is included in the settlement instruction (i.e. for those settlement instructions which do not contain the relevant information, specifically the "place of trading", such information cannot be collected by CSDs).
- (f) **Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**  
No. The definition of a CCP in Article 2(1)(16) of CSDR refers to the definition in Article 2(1) of EMIR, i.e. "a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer".  
Therefore, only the settlement fails relating to transactions for which a CCP interposes itself between the counterparties (i.e. transactions cleared by the concerned CCP) should be captured by the exemption under Article 7(11) of CSDR, whereas settlement fails relating to transactions entered into by a CCP for which it does not interpose itself between the counterparties (e.g. its own treasury activity, collateral transactions or transactions entered into to liquidate a defaulting clearing member's positions) should not be covered by Article 7(11) of CSDR.

## Settlement Discipline Questions 7 – Buy-in timeframes

- (a) *Article 36 of the RTS on Settlement Discipline provides that "the extension period... shall be increased from four to seven business days for all financial instruments other than shares that*

*have a liquid market.” As the liquidity classification of a share could potentially change between the trade date and the intended settlement date and over the lifecycle of an unsettled transaction, on which date should participants determine whether a share is deemed to have a liquid market or not?*

- (b) *According to Articles 26, 27(1), 28, 29(1), 30 and 31(1) of the RTS on Settlement Discipline, a buy-in process should be initiated “on the business day following the expiry of the extension period”. By when, on the business day following the extension period, should the buy-in process be started by the party in charge of it?*

### **Settlement Discipline Answers 7**

- (a) The length of the extension period should be determined based on the liquidity classification of the share as of the intended settlement date of the transaction.
- (b) Article 2(1)(14) of CSDR refers to the definition of “business day” that is provided in point (n) of Article 2 of SFD: it “shall cover both day and night-time settlement and shall encompass all events happening during the business cycle of a system”. For the purposes of conducting a buy-in process, the relevant system is the securities settlement system where the settlement fail occurred. Therefore, should the buy-in process be considered effective according to Article 22 of the RTS on Settlement Discipline, the party in charge of the buy-in should initiate the process (i.e. check if a buy-in is possible and, if it is the case, launch an auction or appoint a buy-in agent, as the case may be) at any time during the business day (as defined in the rules of the securities settlement system where the settlement fail occurred) following the expiry of the extension period, and not necessarily at the start of that business day.

### **Settlement Discipline Questions 8 – Partial settlement functionality [NEW]**

- (a) *When should CSDs start offering a partial settlement functionality as per Article 10 of the RTS on Settlement Discipline?*
- (b) *How should field 19 of table 1 of Annex II to the RTS on Settlement discipline be filled in if a CSD has no intention to use the derogation provided for in Article 12 of the RTS on Settlement Discipline?*
- (c) *Should a CSD set up its partial settlement functionality as a proper functionality or could it be an outcome-based feature? [NEW]*

### **Settlement Discipline Answers 8 – Partial settlement functionality [NEW]**

- (a) Article 10 of the RTS on Settlement Discipline requires CSDs to allow for the partial settlement of settlement instructions. Article 12 of the same RTS provides for a derogation to that requirement, if both the value and the rate of settlement fails in a securities settlement system operated by a CSD are below certain thresholds.

CSDs that want to benefit from the derogation in Article 12 of the RTS on Settlement Discipline should perform the required calculations by 20 January of the year following that of the entry into force of the RTS on Settlement Discipline. If the calculation shows that a CSD reaches one of the above-mentioned thresholds, that CSD should start offering a partial settlement

functionality within one year following the notification of the results of the calculation to the competent authority.

- (b) If a CSD does not intend to use the derogation provided for in Article 12 of the RTS on Settlement Discipline, the CSD should specify “NO” in field 19 of table 1 of Annex II to the same RTS. In such a case, the CSD would not need to provide any justification.
- (c) **Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5): [NEW]**

Article 10 of Commission Delegated Regulation (EU) 2018/1229 (regulatory technical standards on settlement discipline) requires that a CSD allow for the partial settlement of settlement instructions. Furthermore, Article 23 of the RTS on settlement discipline states that where on the last business day of the extension period some of the relevant financial instruments are available for delivery to the receiving participant, the receiving and failing clearing members, trading venue members or trading parties, as applicable, shall partially settle the initial settlement instruction, unless the instruction is put on hold. However, neither the CSDR Regulation nor the RTS on settlement discipline provide a detailed explanation or set instructions as to how to proceed with a partial settlement, implying a certain degree of flexibility in how CSDs are to achieve this outcome.

Therefore, CSDs are free to determine how the partial settlement functionality and its related features are implemented in practice. CSDs should nevertheless actively undertake all necessary steps to make partial settlement available, rather than solely rely on the participants' initiative.

### **Settlement Discipline Question 9 – Participants' settlement efficiency**

*(a) Which settlement fails should be taken into account when calculating a participant's rate of settlement efficiency in accordance with Article 39(2) of the RTS on settlement discipline?*

### **Settlement Discipline Answer 9**

(a) The settlement fails to be used for this calculation should cover, for each participant, all the participant's accounts opened/operated by the respective participant in a CSD securities settlement system: the participant's own accounts and the participant's client accounts. In addition, for all these accounts of a participant, the calculation should not take into account settlement fails where the settlement fail cannot be attributed to the participant (e.g. when the settlement fail is caused by the participant's counterparty).

### **Settlement Discipline Questions 10 – Bilateral cancellation facility**

- (a) *According to Article 7 of the RTS on settlement discipline, CSDs shall set up a bilateral cancellation facility that enables participants to bilaterally cancel matched settlement instructions that form part of the same transaction. Can this cancellation facility be contractually waived by the participants, e.g. for settlement instructions already matched by a trading venue (and subject to multilateral settlement) or transactions centrally cleared by a CCP?*
- (b) *Is it possible for matched settlement instructions to be cancelled automatically by the CSD if on settlement date for any reason settlement is not possible (i.e. securities, cash is not available) or does this require bilateral cancellation from the participants submitting the instructions?*

### **Settlement Discipline Answers 10**

- (a) **Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

Yes. While Article 7 of the RTS establishes an obligation for the CSDs to set up a bilateral cancellation facility, the use of the facility remains a possibility for the participants. Consequently, in respect of non-CCP-cleared securities transactions, the possibility for trading venue members to make use of the bilateral cancellation right referred to in Article 7(2) CSDR can be contractually arranged in the rules of the relevant trading venue. In respect of CCP-cleared securities transactions, the rules of the CCP can govern the possibility and the manner in which the bilateral cancellation right may be used.

- (b) **Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation (please see the related Disclaimer on page 5):**

No. Article 7 of the Commission Delegated Regulation (EU) 2018/1229 provides that CSDs shall set up a bilateral cancellation facility that enables participants to cancel matched settlement instructions that form part of the same transaction. This entails that the right of cancellation itself is the prerogative of participants and not of the CSDs.

However, participants should be able to contractually agree to delegate this right to the CSD, under specific and pre-defined conditions.

### **Settlement Discipline Question 11 – Settlement fails**

- (a) *By when should CSDs publish the information set out in Annex III of the RTS on settlement discipline, as referred to in Article 15 of the same RTS?*

#### **Answer 11**

- (a) In order to ensure a level playing field, CSDs should publish the information set out in Annex III of the RTS on settlement discipline on their website for free, on an annual basis, by the end of February of each year. The first publications should take place by the end of February 2023.

### 3 Part IV: Internalised Settlement

Last update 11 July 2019

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#### **Internalised Settlement Questions 1 – Scope**

- (a) *Should a settlement internaliser include unmatched internalised settlement instructions in the reports under Article 9 of CSDR?*
- (b) *What working days should a settlement internaliser take into account for the purpose of the reports under Article 9 of CSDR?*
- (c) *What financial instruments should be covered by the reporting obligation under Article 9 of CSDR?*
- (d) *Should an investment firm report client orders where the corresponding settlement instructions are forwarded in their entirety to a custodian? What if the custodian is established outside the EEA?*
- (e) *Should an investment firm that does not hold any client assets and that performs trade netting in order to reduce the amount of settlement instructions be considered as a settlement internaliser in the meaning of the CSDR, and therefore be required to comply with the reporting obligations pursuant to Article 9 of CSDR?*

#### **Internalised Settlement Answers 1**

- (a) No. In the case of internalised settlement instructions that require matching, a settlement internaliser should only include matched internalised settlement instructions in the reports under Article 9 of CSDR.
- (b) For the purpose of the reports under Article 9 of CSDR, a settlement internaliser should take into account the working days in the country where it is established and, if applicable, any additional days where the settlement internaliser is open for business.
- (c) The scope of Article 9 of CSDR covers all financial instruments eligible for settlement in a securities settlement system operated by an EU CSD and/or designated under the law of a Member State under the Settlement Finality Directive, including financial instruments which may have been initially recorded or centrally maintained with an entity that may not necessarily be a CSD, such as a registrar or a transfer agent.
- (d) An investment firm does not need to report client orders where the investment firm does not execute the corresponding settlement instructions itself, which are forwarded in their entirety to a custodian. Even if the custodian is established outside the EEA and, as such, would not be required to report under Article 9 of CSDR, there remains no obligation for the investment firm to report as the investment firm does not execute the transfer orders itself, and, therefore, it does not fall under the definition of settlement internaliser as specified in point 11 of Article 2(1) of CSDR.
- (e) No, given that, for an investment firm that does not provide safekeeping and administration of financial instruments for the account of clients, including custodianship, trade netting as such does not qualify as execution of transfer orders, and, therefore, in such a case, the investment firm does not fall under the definition of settlement internaliser as specified in point 11 of Article 2(1) of CSDR.

### **Internalised Settlement Questions 2 – Reporting parameters**

- (a) *How should a settlement internaliser treat internalised settlement instructions received after the end of the quarter, for settlement in a previous quarter, for the purpose of the reports under Article 9 of CSDR?*

### **Internalised Settlement Answers 2**

- (a) A settlement internaliser should include such internalised settlement instructions in the report for the quarter during which the instructions are submitted, i.e. data covering the number of working days from the previous quarter(s) during which the respective instructions have failed to settle should be included in the report for the quarter during which the instructions are submitted. Previously submitted reports should not be updated in such cases.

For example, an instruction which has an Intended Settlement Date for the previous quarter (Q2) but is instructed late in Q3 (and fails for 2 business days in each quarter) would be reported as follows:

<b>Quarter</b>	<b>Failing Business Days</b>	<b>Reported Failing Business Days</b>
Q2	2	0
Q3	2	4