9 July 2024
ESMA74-1505669078-6673

Reply Form

Draft amending technical standards to Regulation (EU) 2017/392 and Regulation (EU) 2017/394 under CSDR

Responding to this Consultation Paper

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

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

ESMA will consider all comments received by **9 September 2024.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

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

- Insert your responses to the questions in the Consultation Paper in this reply form.
- Please do not remove tags of the type < ESMA_QUESTION_CR&E_0>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your responses, save the reply form according to the following convention: ESMA_CP1_ CR&E_nameofrespondent.

  For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA_CP1_ CR&E_ABCD.
- Upload the Word reply form containing your responses to ESMA's website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at *www.esma.europa.eu* under the heading *'Your input - Consultations'.*

Publication of responses

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

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Data protection'.

Who should read this paper?

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

1 General information about respondent

Name of the company / organisation	Clearstream Banking S.A.
Activity	CSD
Are you representing an association?	☐
Country / Region	Luxembourg

2 Questions

Q1 Do you agree with the proposed requirement for data on "relayed links"? If not, please elaborate.

<ESMA_QUESTION_CR&E_1>

Data on relayed links can be useful to complement the understanding of how cross-border settlement takes place in the EEA and to reflect on the stability of the number of links in the market as lastly assessed by ESMA in its report on cross-border services under CSDR.

However, it should be pointed out that it is not entirely clear how data on settlement instructions settled via relayed links can be useful to complement the dimensioning of a CSD's cross-border activity. In line with the definition reported in the consultation paper, relayed links are composed of two (or more) direct (standard or customised) links of the intermediary CSD with each of the other involved CSDs. Clarity is needed as to how data on number and value of settlement instructions settled via relayed links are to be reported in order to avoid double counting and misleading conclusions.

Please refer to our answer to Q3 regarding Annex II, table 3 "Statistical date", field 1a:

"The total number and value of settlement instructions settled via relayed links, consisting in contractual and technical arrangements established between one issuer CSD and one investor CSD to facilitate the transfer of securities through a chain of standard, customised or interoperable links established to facilitate the transfer of securities, specifying:

(i) whether the CSD is the investor or the issuer CSD;

(ii) the investor or issuer CSD at the other end of the chain"

In the past, ESMA has issued surveys to CSDs requesting to provide information about CSD-links for ESMA to be able to report on the provision of cross-border services by CSDs and handling of applications under Article 23 of CSDR (see last report from 31 January 2024 (ESMA74-2119945925-1568), covering 2020 to 2022 data). With the proposed upgrade of the "review & evaluation" reports, ESMA should ensure that no separate reporting/ surveys will be required anymore to save efforts and costs on CSDs' side.

Further, with regard to *(ii) "[…] at the other end of the chain"*, CSDs can only provide the information which we see in our systems (due to omnibus accounts).

In addition, given the structure of relayed links, it needs to be clarified who is the CSD requested to report the information, as not all CSDs in the chain of links established to facilitate the transfer of securities are necessarily aware of the existence of the relayed link.

We would also like to stress that the single point of contact should be the NCA, and reports and reporting data formats should be standardised.

Regarding the information to be reported, proportionality should be considered to avoid unnecessary burden:

1. As the amount of data to manage is quite substantial, it requires considerable automation efforts on CSDs' side.
2. Operational teams need to ensure that all data is available, as well as flag the data that needs to be reported and ultimately extract it. As for Compliance, they need to ensure that all data is captured across various jurisdictions.
3. Finally, we would like to highlight that adding such information would cause substantial IT development costs.

<ESMA_QUESTION_CR&E_1>

Q2 Do you agree with the proposed amendments to Delegated Regulation (EU) 2017/392? If not, please elaborate.

<ESMA_QUESTION_CR&E_2>

In general, we would like to point out that some of the provisions contained in the current ESMA draft technical standards seem to not align with the overall objective of the CSDR Refit to simplify and clarify the processes. As we will explain hereafter, some provisions will tend to increase the amount of information to be exchanged and the number of reports to be produced – thus introducing a higher amount and complexity of tasks instead.

With regard to the harmonisation of the report content, a list of information on changes to be notified as substantive changes under Art. 16(4) CSDR would be helpful.

However, it seems that information is requested twice pursuant to the amended **Art. 40 (2) DR 2017/392** (see examples below), i.e. as (a) change and as (b) substantive change:

1. Service changes

(a)

(i) changes in the provision of the CSD core and ancillary services, as per the Annex to Regulation (EU) No 909/2014, in its home Member State, and as applicable in other Member States and in third countries;

(b)

—changes to an existing activity or service other than in the context of Article 19(1) of Regulation (EU) 909/2014, where the description of services referred to in points (l) to (p) of Article 4(2) of this Regulation would need to be amended;

—termination of a CSD service;
—termination of a CSD link;

2. Governance changes

(a)

(ii) changes in the CSD's corporate governance and organisational structure including in the number of employees;

(b)

—change in the CSD's group structure, senior management, management body and shareholders pursuant to Article 27 of Regulation (EU) 909/2014;

3. Risk management changes

(a)

(iii) changes made to the risk management framework in respect of legal, business, operational and other direct or indirect risks referred to in Article 42 of Regulation (EU) 909/2014, demonstrating the CSD's ongoing evaluation of the changing landscape of risks it faces through a classification of the main risks;

(b)

—change in the CSD's risk management framework impacting the calculation of capital requirements under Article 47 of Regulation (EU) 909/2014;

We therefore propose not to request the information twice, i.e. under two similar items.

4. User committee

(iv) a summary of the user committee activities referred to in Article 28 of Regulation (EU) No 909/2014, including the number of meetings, advice and opinions delivered, indicating their topics and identifying those that have not been followed by the CSD's management body, if any;

We propose not to ask for this information under Art. 40 (2) (b) (iv) DR 2017/392 but to add this requirement to the existing Art. 41 (c) DR 2017/392 which already applies to the user committee.

Additionally, for **Art. 40, we suggest an adjustment to ESMA's proposal** to replace paragraph 2 as follows: *"For the purposes of the review and evaluation referred to in Article 22(1) of Regulation (EU) No 909/2014, a CSD shall provide to its competent authority, ~~in a clear, precise and accessible manner~~, the following: […]"*

- "accessible": We acknowledge the need for clear and understandable reporting. However, we would like ESMA to clarify if "accessible" refers to the means in which the information is provided or to the documentation? In ESMA's view, would the matter of accessibility already be addressed using a specific communication channel as agreed with the National Competent Authority when providing the requested reporting? In this context, if the concern regards the way in which the NCA has access to the information/documentation, we would propose to rather address this point separately, for example via ITS.
- "clear, precise": The difference between 'clear' and 'precise' in this context is not clear to us – can ESMA please clarify? Would this provision then extend to all CSDR-related communication with the NCA, also beyond the reporting within the review and evaluation processes (what about the rest of the reporting and communication due under CSDR)?

Art. 41 DR 2017/392 is extended by 16 new items to be reported by the CSD, which will considerably increase the workload for the CSDs and the regulators. We therefore wonder whether such specific reporting is necessary, given the existing powers and competence of NCAs and whether such specification would not compromise the objective of the CSDR Refit Level 1 text to have a less burdensome review and evaluation process.

In respect of the information list to be shared with the relevant authorities to support the reinforced consultation procedure introduced in Level 1, we recommend to further evaluate whether certain information, such as information on business risk, is significant for the relevant authorities, to preserve the smoothness and timeliness of the consultation process.

Moreover, we recommend full alignment with reporting deriving from other legislations such as DORA (Regulation (EU) 2022/2554), specifically mentioned in the

consultation. The information that CSDs will be requested to provide within the review and evaluation on how they manage their ICT-related risks under DORA shall not differ from the information required according to DORA.

Further, we would like to suggest the following **specific amendments to ESMA's proposal**:

Art. 41, paragraph (t):

"*information on changes that occurred during the review period to the CSD's management of legal risk as referred to in Article 43 of Regulation (EU) No 909/2014 and Article 31 of this Regulation*"

- The management of legal risks on a day-to-day basis is covered by various assessments required by the internal product committees (MCP) or risk committees. The provision of such information may be redundant with the information obtained under other articles, as well as the minutes of the various committees.
- Furthermore, a daily provision of a report on the annual activities of a legal department managing the legal risks, increases the workload significantly and is not a realistic expectation for a company's daily BAU activities.
- We therefore opt for a **removal of this paragraph**, as there are no precise indications regarding the documentation expected from a practical standpoint, and because it would lead to a disproportional workload on supervisory as well as entity level. Also, the difference to paragraph (u) is unclear.

Art. 41, paragraphs (da) and (ea):

"(da) information on the review(s) and internal audits of the CSD's ICT risk management framework that occurred during the review period, as referred to in Articles 6(5) and (6) of Regulation (EU) 2022/2554;

(ea) information on the outcome of the testing of the CSD's ICT systems that occurred during the review period, in accordance with Articles 75 of this Regulation and Chapter IV of Regulation (EU) 2022/2554;"

- This information is already part of a dedicated reporting under DORA. We therefore opt for a **removal of this paragraph**.

Art. 42, paragraph (a):

"a list of the participants of each securities settlement system operated by the CSD, specifying all of the following:

(i) their country of incorporation or, when acting through a branch, the country where the branch is located;
(ii) their LEI code,
(iii) their registered name and
(iv) their type, according to the following classification:
— a credit institution as defined in Article 4(1) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC including the institutions listed in Article 2 of that Directive,
— an investment firm as defined in Article 4(1)(1) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), excluding the institutions set out in Article 2(1) thereof,
— public authorities and publicly guaranteed undertakings,
— a central counterparty or clearing house,
— a CSD,
*— ~~for~~ a third country **regulated** entity **with an indication of its local regulatory status**, ~~a function similar to one of those listed previously~~, or*
— other;"

- Why are these provisions limited to such a classification that is not aligned with the Settlement Finality Directive (SFD)? What about the funds managers, insurance companies or equivalent of institutions within the meaning of SFD and their qualification as participants?
- The information to be provided **should be more accurate and should refer to the actual regulatory status of the third country entity** rather than trying to match with a very limited list without being sure that from a local law perspective there is an equivalence or similarity with the listed status. If not, everything will from a practical standpoint be reported as "other".

Art. 42, sub-paragraph (I)-(iv):

"*in case a CSD link qualifies both as an interoperable link as well as another type of link, for the purpose of (ii), such link should be exclusively considered as an interoperable link*"

- It is unclear what is covered here: a link with two features that could be an interoperable link and an indirect link? Is it intended to cover the T2S link? When referring to the list under (ii), this seems misleading, noting that the direct link is not even defined as such under CSDR.
- Is there a reason why the references to requesting and receiving CSDs have been removed? These references were helpful in giving the persons that elaborate the report a practical idea in which sense to consider the CSD link, i.e. when the CSD has another CSD as participant (in its capacity as receiving CSD) and when the CSD has transactions as participant locally with another CSD (in its capacity as requesting CSD).
- We would **propose to delete this sub-paragraph, as it is unclear**. The previous wording was clearer and more precise. The current suggestion is confusing and difficult to understand also from a practical standpoint.
  We would **prefer to keep the previous wording** as it should be sufficient to give an idea of the cross-border activities considering the other changes and new requirements.

Art. 42, paragraph (Ia):

"(Ia) the total number and value of settlement instructions settled via relayed links, consisting in contractual and technical arrangements established between one issuer CSD and one investor CSD to facilitate the transfer of securities through a chain of standard, customized or interoperable links established to facilitate the transfer of securities, specifying:

(i) whether the CSD is the investor or the issuer CSD;

(ii) the investor or issuer CSD at the other end of the chain.

For the purposes of this paragraph, "relayed links" are contractual and technical arrangements enabling an issuer CSD and an investor CSD to hold and transfer securities through a securities account with another CSD, acting as an intermediary CSD."

- The reference to relayed links seems fine, if it does not create any duplicate with the Eurosystem self-assessment. It shall be aligned with the same terminology used by the Eurosystem to avoid divergent interpretations with the risk to create additional requirements.
- **The definition of the RTS is not clear**. Why is this paragraph referring to standard or customised links or even interoperable links (the current number of such links does not require such a strong focus). The concept used by the Eurosystem is actually very simple and clear, there are three SSS linked by direct links.
- We see no need to complicate the requirements further with the reference to the chain of standard, customised or interoperable links. If the CSDR did not include the concept of direct link, which is the most known, at least the RTS should not overcomplicate known concepts with additional information that create confusion.

In short, from our point of view, the **essential steps** in order to streamline the overall reporting process are: i) avoiding duplication of information, ii) standardising reporting content and terminology, iii) notifying on substantive changes vis-à-vis previous reports.

Lastly, in order to include the additional information in the reporting workflows, IT developments and adaptations will be necessary, requiring on average a change management period of one year from the coming into force of the new RTS.

<ESMA_QUESTION_CR&E_2>

Q3 Do you agree with the proposed amendments to Implementing Regulation (EU) 2017/394? If not, please elaborate.

<ESMA_QUESTION_CR&E_3>

Comments to Annexes and report templates:

Annex II, table 2 “Periodic information”, field ha:

Related to *"7. To bring further light on the way in which CSDs deal with free-of-payment (FOP) settlement instructions and mitigate related risks, CSDs should, as part of the review and evaluation process, provide information on the **measures or tools they use to mitigate the risks inherent to FOP settlement instructions**, as well **as statistical data as on the type of operation from which such FOP settlement instructions result.**",* field ha) requires CSDs to provide *"information on the **measures or tools the CSD used during the review period to condition the delivery of securities to the payment of the cash leg operated outside its system for free-of-payment (FOP) settlement instructions,** if any":*

- Can ESMA please clarify why in ESMA's view FOPs would represent (more) risk and where you see the CSDs' capacity/ role to mitigate this risk? Whether DVP or FOP is used is solely decided by the CSD participants and thus CSDs cannot judge whether using FOP is "reasonable" or not. **Hence, we disagree on this point with ESMA's view.**

Annex II, table 3 "Statistical date", field a:

*"List of participants of each securities settlement system operated by the CSD, specifying: - their country of incorporation and, when acting through a branch, the country where the branch is located - their LEI code - their **registered name** - their **type, according to the following classification**" (INVF, CDRI…):"*

- the term "registered name" is used in various fields – could ESMA **please clarify** how "registered" is to be defined (as per CSD's records/ ref. data, etc.)?
- "type" represents a new classification that would need to be collected from all participants and built into CSD reference data systems (AM, KUSTA; SAP), which means a considerable effort for operational teams regarding data gathering and IT system development. As the benefits of this additional data are questionable, **we disagree with ESMA's proposal due to lack of proportionality**.

Annex II, table 3 "Statistical date", field ha:

*"for **free of payment (FOP) settlement instructions**, the type of transaction from which they result, using the following list: —corporate action, —portfolio transfer, —collateral management operation, —transaction in commercial bank money and foreign currencies, —other":*

- the information for "Type of operations" can only be derived if made available to the CSD, e.g. using "transaction type" (that is not a matching criteria for settlement), which means that the **data will not be available in all cases**.
- Please note that the item "*transaction in commercial bank money and foreign currencies*" **cannot be derived by CSDs at all.**

Annex II, table 3 "Statistical date", field Ia:

"The total number and value of settlement instructions settled via relayed links, consisting in contractual and technical arrangements established between one issuer CSD and one investor CSD to facilitate the transfer of securities through a chain of standard, customised or interoperable links established to facilitate the transfer of securities, specifying:

(i) whether the CSD is the investor or the issuer CSD;

(ii) the investor or issuer CSD at the other end of the chain"

- With regard to *(ii) "[…] at the other end of the chain"*, **CSDs can only provide the information which we see in our systems** (due to omnibus accounts).

In general, ESMA should ensure being very precise in terminology used across the various CSDR reports (e.g. "country" of incorporation" vs. "jurisdiction of incorporation") to avoid different interpretations and ensure reliable conclusions.

Lastly, we would like to highlight that IT developments and adaptations will be necessary, requiring on average a change management period of one year from the coming into force of the new Regulation.

<ESMA_QUESTION_CR&E_3>