



European Securities and
Markets Authority

Reply form for the Technical Advice under the CSDR





European Securities and
Markets Authority

Date: 18 December 2014



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - D Technical Advice under the CSDR, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type <ESMA_QUESTION_TA_CSDR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

Naming protocol:

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_TA_CSDR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were ESMA, the name of the reply form would be ESMA_TA_CSDR_ESMA_REPLYFORM or ESMA_CE_AIFMD_ESMA_ANNEX1

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **19 February 2015**.

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 end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that 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 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 'Disclaimer'.



General information about respondent

Are you representing an association?	No
Activity:	Central Securities Depository
Country/Region	Europe



Q1: What are your views on the proposed basis for the cash penalty calculation?

<ESMA_QUESTION_TA_CSDR_1>

The responses provided in this document convey the views and opinions of the Deutsche Börse Group, and more specifically of: Clearstream Banking Luxembourg S.A., Clearstream Banking Frankfurt AG, and LuxCSD S.A. jointly referred hereafter as “Clearstream”.

Reference price

On the reference price the penalty shall be calculated based on a “reference price” of the instrument involved. The technical Advice does not indicate how this reference price will be made available to the CSDs and impacted parties and by whom. It should be noted that especially in case of less liquid and OTC-traded instruments, prices are not necessarily publicly and/or easily available (as ESMA states in chapter 2.1.2, paragraph 42) making it difficult for the CSDs and impacted parties to make the penalty calculations.

We recommend ESMA to provide a central repository mechanism providing the required data to all CSDs and impacted parties to avoid application of deviating prices for a single instrument by the parties involved.

Partial deliveries: in case a suffering party declines to accept partial delivery, only the “missing part” of the financial instrument or cash shall be penalized. Since the identification of the “missing part” causes additional complexity, we suggest the following:

- Receiving party does not accept partial: exempt the whole transaction from penalties (leading to less technical complexity and at the same time increases the incentive for the receiving party to accept partials, thereby increasing settlement efficiency and reduce settlement risk throughout the settlement chain)
- Delivering party does not accept partial: penalize the full amount of the instruction (as proposed by ESMA)

<ESMA_QUESTION_TA_CSDR_1>

Q2: What are your views on the proposed approach regarding the categories of financial instruments and the penalty rates? In particular, do you consider that these penalty rates could dis-incentivise trading in small caps? Please provide evidence to support your views.

<ESMA_QUESTION_TA_CSDR_2>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_TA_CSDR_2>

Q3: What are your views on the proposed approach regarding the increase and reduction of the basic penalty amount?

<ESMA_QUESTION_TA_CSDR_3>

We agree with ESMA that no increases or decreases of the penalty rate should be foreseen at this stage but to allow CSDs, in limited circumstances and on an ad hoc basis, to decrease the penalty rate to zero, e.g. if a fail is caused by circumstances outside the control of the failing participant.

<ESMA_QUESTION_TA_CSDR_3>

Q4: What are your views on the proposed approach regarding the cash penalties in the context of chains of interdependent transactions?



<ESMA_QUESTION_TA_CSDR_4>

We agree that, for the sake of simplicity of the penalty mechanism, the parameters of penalty calculation should not be changed in cases of chains of interdependent transactions. ESMA should also clarify what treatment CSDs should apply to failed cross-border transactions involving at least one CSD located outside the EU.<ESMA_QUESTION_TA_CSDR_4>

Q5: Do you agree with the proposed frequency of one year for the assessment of the substantial importance of a CSD in another Member State?

<ESMA_QUESTION_TA_CSDR_5>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_TA_CSDR_5>

Q6: What are your views on the proposed indicators?

<ESMA_QUESTION_TA_CSDR_6>

With regard to the identification of substantial importance and the thresholds for other regulators to potentially join a “college” supervising a CSD, we do not understand neither the calculation method, nor what is the intention pursued by ESMA. As a CSD does not have the requested data available (i.e. denominator on European level), we are unable to assess whether the thresholds are reasonable.

ESMA has a role to play in this regard and will need to consolidate the data from the different markets in order to determine whether the proposed thresholds are in fact practicable to determine any “significant importance”. Without such indicators, we have to reserve our opinion whether such a system is at all viable to determine the role of other authorities in the supervision of CSDs.

Infrastructures such as CSDs would certainly not benefit from the creation via the back door of colleges of supervisors. The creation of colleges had been clearly avoided during the trilogue discussions leading to the compromise text of the CSD-R text, by requiring a role in the supervision of a CSD only in the case of the establishment of a “branch” in another Member State (the freedom for CSDs to provide services in other Member State (or CSD passport) and the cooperation between authorities, are clearly stated under Article 23 and 24 of the level-1 text). This subtle distinction has disappeared from the subsequent text of the CSD-R officially published. We believe this omission is contrary to the spirit of the level-1 text as originally agreed on 18 Dec 2013.

To avoid such a distressing situation, ESMA should favour in its proposal higher thresholds in order to keep the danger of creating largely attended “college” small. Pending clarity with regards to these topics, we propose ESMA to consider the thresholds applicable to the whole of the points raised in the TA proposal to be raised to 25%.

Another concern relates to the time in which such thresholds shall be calculated. For the forthcoming authorisation of the existing CSDs, such process should be undertaken before the authorisation process is to start as, otherwise, other supervisory requirements might need to be included or catered for during the authorisation process or during the implementation of significant decisions for the prospective CSDs seeking authorisation.

In addition to the above, we have several critical concerns, with regards to the CSD services and definitions used to determine such substantial importance.

We object to the introduction via the level-2 rules of a differentiation of the CSD services, not envisaged nor expected under the level-1 text.

The level-2 text introduces: a) new CSD definitions (such as the term of investor CSD or issuer CSD and respective definitions), b) new specific roles for the CSDs (by using terms such as “centrally maintained securities” in contrast to “maintained securities”), and new services (such as the “settlement service from an issuer perspective” versus the “settlement service from a participant’s perspective”). These newly introduced distinctions should be removed, as contrary to the level-1 text and the overall aim of the legislator.

Reference of the use of these new definitions, terminology and newly introduced distinctions between the CSD services are listed hereafter, for its removal from the future in the RTS and TA:

Definition	TS document Annex III Art 1 on page 203 TS document Annex IV on page 242
Reference	TS document on para. 312 (page 89) TS document on para. 319 (page 90) TS document Annex III Art 10 on page 215 TS document Annex IV end of Art 6 (page 252) TS document Annex VII Table 2 (page 313) TA document on para. 81 (page 21) TA document on para. 84 (page 22) TA document on para. 85 (page 22)
Reference to the distinction between "central maintenance services" vs "maintenance services"	TS document Art 42.1 (c) and (d) (page 180) ITS document Annex VI Table 3 line 2, 3 and 4 (page 291) ITS document Annex VI Table 3 line 10 (page 298) TA document on para. 81 (page 21) TA box on page 21+22 TA document on para. 84 (page 22) TA document on para. 85 (page 22)
Reference to the distinction between "settlement service – issuer’s perspective" vs "settlement service – participant’s perspective"	TA box on page 27+28

The definition of “participants” versus “holder of securities accounts” is unclear; it seems to be related to the direct holding model; therefore it is unclear what to use as a basis.

<ESMA_QUESTION_TA_CSDR_6>

Q7: What are your views on the proposed thresholds?

<ESMA_QUESTION_TA_CSDR_7>

The proposed technical advice formulation establishes denominators for the thresholds’ calculations which are not in the sphere of information accessible to CSDs, elements such as:

- nominal value of securities non-centrally maintained by all CSDs established in the European Union...
- nominal value of the FOP settlement instructions settled by all CSDs established in the European Union...
- nominal value of settlement instructions settled by all CSDs established in the European Union from participants...
- etc....



Elements as the listed above are not available to CSDs and therefore making calculations on the proposed thresholds not assessable to CSDs.

<ESMA_QUESTION_TA_CSDR_7>

Q8: Do you believe that the proposed indicators and thresholds are relevant in the case of government bonds? If not, please provide details and arguments.

<ESMA_QUESTION_TA_CSDR_8>

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<ESMA_QUESTION_TA_CSDR_8>