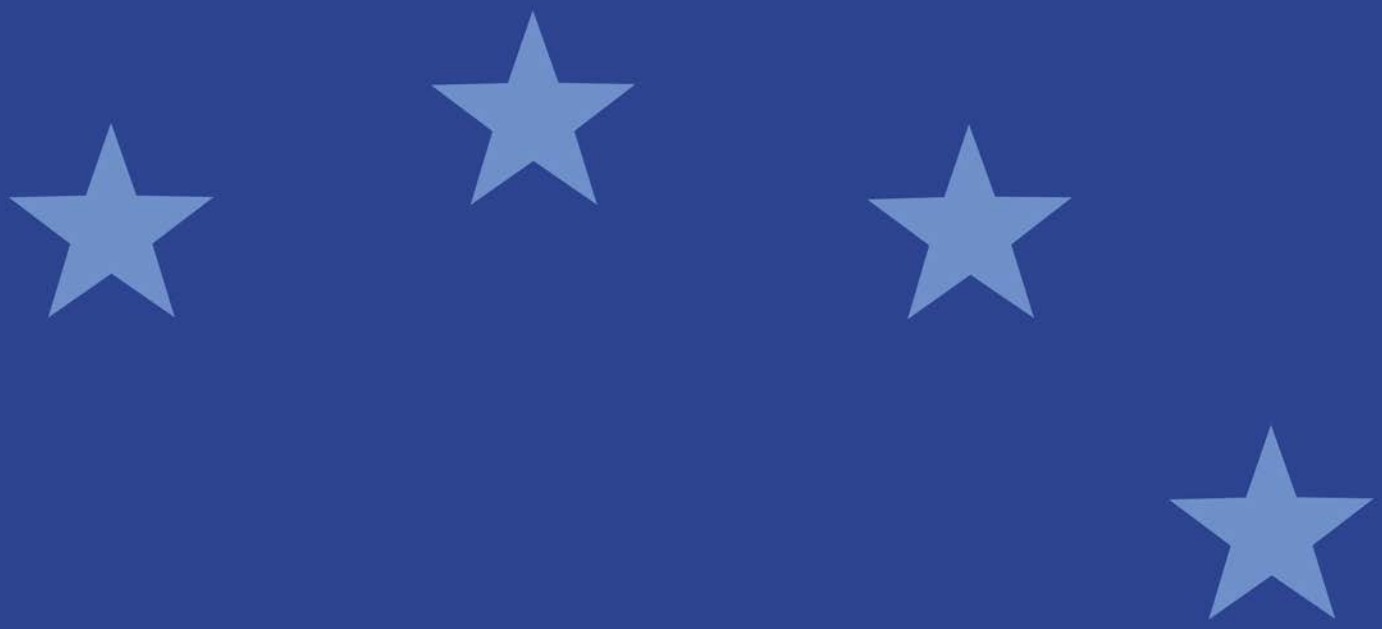
esma European Securities and Markets Authority

Reply form for the Technical Standards under the CSD Regulation



18 December 2014

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 - Technical Standards under the CSD Regulation, 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_TS_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_TS_CSDR_AIXX_REPLYFORM or ESMA_CE_TS_CSDR_AIXX_ANNEX1

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 Counterparty
Country/Region	Europe

Q1: Do you think the proposed timeframes for allocations and confirmations under Article 2 of the RTS on Settlement Discipline are adequate?

If not, what would be feasible timeframes in your opinion?

Please provide details and arguments in case you envisage any technical difficulties in complying with the proposed timeframes.

<ESMA_QUESTION_TS_CSDR_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_1>

Q2: Do you agree with the cases when matching would not be necessary, as specified under Article 3(2) of the draft RTS?

Should other cases be included? Please provide details and evidence for any proposed case.

<ESMA_QUESTION_TS_CSDR_2>
We believe that CCPs should have the ability to send "already matched" settlement instructions to CSDs; however they should not be mandated to do so, as required under Article 3(2) of the RTS. There are circumstances where indeed CCPs are prevented from sending "already matched" settlement instructions, as noted below:

i. The CCP and its clearing members have their accounts within the same CSD:

- If a clearing member wants to use the "Hold/release" functionality, primarily to avoid use of securities that are not owned by the party due to deliver when operating a omnibus account, technically speaking a CCP will need to send to the CSD an instruction in a "To be matched" status and flagged "Hold".
    - Based on an Power of Authority the CCP can generate the "To be matched" instruction on behalf of the member, following which they will be "Matched" in the CSD.
    - The member can update the instruction and set it to "Release" following which it will settle.

ii. The CCP and its clearing members have their accounts in a different CSD:

- If a clearing member uses another CSD than the one in which the CCP has its account then the CSD will require a CCP instructions to be sent in a "To be matched" status.
    - Based on an Power of Authority the CCP can generate the "To be matched" instruction on behalf of the member, following which they will be "Matched" in the CSD and will settle.

iii. Agents operating an omnibus account, where they hold all securities on behalf of all their clients, would require the ability to have matched instructions from a CCP to be created "on-Hold"; it would be for the agent to then "Release" them.

Therefore, we suggest the deletion of the last sentence in Article 3(2) of the draft RTS:

(2) A CSD shall match settlement instructions prior to settlement, based on the instructions sent by participants, except in the following circumstances:

(a) the settlement instructions received by the CSD are already matched by trading venues or other entities such as CCPs;

(b) FoP instructions which consist of transfers of financial instruments between different accounts opened in the name of the same participant.

~~CSDs shall require that CCPs send already matched settlement instructions into the securities settlement system operated by a CSD, unless letter b) of subparagraph 1 applies.~~

Article 3(2) of the RTS should also recognise the case of settlement between interoperating CCPs. We therefore believe ESMA should add the following paragraph in this article:

(2) (New): Settlement instructions between interoperating CCPs shall be sent matched by one of the CCPs, where this has been agreed between them, otherwise each CCP shall send an unmatched settlement instruction with the CSD performing the matching.

<ESMA_QUESTION_TS_CSDR_2>

Q3: What are your views on the proposed approach under Article 3(11) of the draft RTS included in Chapter II of Annex I?

Do you think that the 0.5% settlement fails threshold (i.e. 99.5% settlement efficiency rate) is adequate? If not, what would be an adequate threshold? Please provide details and arguments.

Do you think that the 2,5 billion EUR/year in terms of the value of settlement fails for a securities settlement system operated by a CSD is adequate? If not, what would be an adequate threshold? Please provide details and arguments.

<ESMA_QUESTION_TS_CSDR_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_3>

Q4: What are your views on the proposed draft RTS included in Chapter II of Annex I?

<ESMA_QUESTION_TS_CSDR_4>
We have the following comments in respect to the RTS in Chapter II of Annex I.

Under Article 3(3)(c) of the draft RTS, ESMA proposes that "trade date" should be one of the standardised matching fields for all settlement instructions. Instructions which are the result of netting by a CCP (particularly, but not exclusively, in relation to repo transactions) may not be linked to a single trade as the instruction may be the result of the netting of multiple trades. For example, for CCPs using the Continuous Net Settlement (CNS) model, such as LCH.Clearnet SA, the Continental European entity of LCH.Clearnet Group Limited, the following three steps apply:

- **1st step: on ISD-1 the CCP performs netting of trades with the same ISD:**
  - The netting of all trades with the same ISD leads to a single Buy or Sell position.
    - In this process trades with potentially different trade dates, but with the same ISD are netted together.

- **2nd step: on ISD-1 CCPs also performs netting of unsettled instructions:**
  - The netting comprises trades resulting from step 1 and old unsettled instructions.
- **3rd step: aggregation process:**
  - Finally the CCP performs an aggregation process, whereby all long or short positions result in the creation of a single Delivery-versus-payment (DVP) instruction to be sent to the ICSD/CSD with a new ISD.

ESMA should recognise that "trade date" is not a piece of data which can be accurately provided at a settlement instruction level following the multilateral netting process by CCPs, particularly those using the CNS model, and should therefore allow this field to be completed with an 'NA' value to allow for cases where it is not applicable, for example following netting of cleared transactions. We would like to propose to amend the text of Article 3(3)(c) as follows:

(c): '*trade date'* ***(when applicable);***

Article 3(7), proposes that a CSD shall offer its participants the possibility to partially settle instructions. However, the multilateral netting process of the CCPs requires partial settlement and do not allow for discretion on the part of the participants. Therefore, we believe that CSDs should offer the auto-partialling functionality for cleared transactions to maximise settlement efficiency. ESMA should clarify that 'partialling' under Article 3(7) means 'unilateral partialling', i.e. the delivering participant can instigate the partial delivery without matching required by the receiving participant in each case. It is assumed that the 'opt out' option by the receiving participant is globally set on its account. We would like to understand the reason why the 'opt out' option has been provided as this appears to reduce settlement efficiency by stopping settlement taking place where both financial instrument due to be delivered and cash are available. In addition, Article 11(6) describes a case where the 'opt-out' option is not applied, that is on the last day of the extension period. It is therefore unclear the reason behind making this option available in the first place. We believe partial settlement should be required throughout the extension period, as a general rule. We suggest that the text in Article 3(7) is amended as follows to ensure that it does not undermine the partial settlement requirements of a CCP:

(7) ***Subject to any rules of a relevant CCP or trading venue mandating or restricting partial settlement of transactions, a*** CSD shall offer its participants the possibility to partially settle ***unilaterally*** their settlement instructions ***[deleted]***. ***A CSD shall also offer auto-partialling for transactions cleared by a CCP.***

Finally, we suggest that Article 3(9)(e), particularly points (i) to (vi), should not be required for failed settlements involving a CCP where the information would need to be sourced from the CCP. The usefulness of this information in this case is questionable and we believe that, where possible, the RTS should minimise the need for CSDs and CCPs to exchange bespoke information. We therefore propose the following amendment at the end of paragraph 9 of Article 3:

(9) (new): point (i) to (vi) of 9(e) shall not apply to failed settlements cleared by CCPs.

<ESMA_QUESTION_TS_CSDR_4>

Q5: What are your views on the proposed draft RTS on the monitoring of settlement fails as included in Section 1 of Chapter III of Annex I?

<ESMA_QUESTION_TS_CSDR_5>

In section 2.5 of the discussion part of the Consultation Paper, ESMA notes that regardless of whether a CCP uses a trade date netting model (TDN) or a CNS model, it should not lead to a different application of the RTS. However, we believe that Article in 4(2)(a) does not take into

account the case of CCPs which operate the CNS model. As explained in the answer to question 4, under the CNS model a settlement instruction that has failed to settle during the settlement window on a given day is cancelled at the end of that day and netted and aggregated as appropriate against new positions to be settled the following day, when a new settlement instruction is issued to the CSD. This process prevents a CSD to identify any information related to the original failed instruction, such as the lengh of a settlement fail. We therefore suggest the following amendment to Article 4(2)(a):

(2) A system monitoring settlement fails shall allow a CSD to identify:
(a) all the settlement fails***, except those involving a CCP,*** per intended settlement date, including the length of such settlement fails based on the number of business days in which a transaction fails to be settled after its intended settlement date**.**

<ESMA_QUESTION_TS_CSDR_5>

Q6: What are your views on the proposed draft RTS related to the penalty mechanism? Do you agree that when CSDs use a common settlement infrastructure, the procedures for cash penalties should be jointly managed?

<ESMA_QUESTION_TS_CSDR_6>
Under Article 9 of Chapter III of Annex I, ESMA proposes that when a CCP is involved in a failing settlement instruction, the penalty should not be collected from or paid by the CCP but the CSD should provide the calculation to the CCP, which in turn should collect and distribute the penalty from and to its clearing members.

We assert that where CCPs are involved in failing transactions they do not need to be involved in the collection or distribution of the associated penalties, rather this can and should be done by the CSDs using the same process as when CCPs are not involved. As such it is recommended that Article 9 (1) to (5) as currently drafted is removed. This position is explained as follows.

The CSD Regulation asserts that failing participants are due to pay penalties to receiving participants, including CCPs, but the Regulation also maintains that the penalty mechanism shall not apply to failing participants that are CCPs. As such, at face value, CCPs have a revenue stream from the penalties as they are entitled to collect the penalties and have no obligation to pay them. We understand that this is not the intention of the legislation. This is clear from the immunisation principle described whereby participants in the middle of a chain of fails would receive and pay the same amount. However, this principle would be broken for the failed participant in a chain where a CCP was their failing participant. In order for the immunisation principle to work where a CCP is in the chain, the CCP would, at least in effect, be subject to the same penalty as all other participants. Given that CCPs must be, by definition, always flat with regard to sales and purchases, the immunisation principle should ensure that a CCP never has a net penalty to either pay or receive, confirming that the penalty mechanism does not apply to CCPs, in line with the CSD Regulation.

The relevant accounts of the participants, including CCPs, are held at the CSDs. Where the CSD has the ability to calculate the relevant penalties, as assumed by Article 9(2) as currently drafted, it also has the ability to collect and distribute the penalties as it would when a CCP is not involved. Requiring CCPs to be involved in this process, which can be undertaken by the CSDs, adds unnecessary complexity and administrative costs for CCPs, their clearing members, CSDs and their participants, making the process less efficient for no benefit.

This view that CCPs should not need to play any part in the penalty mechanism is supported by the fact that there is no authority under article 7(2) of the CSD Regulation to require a CCP to administer the penalty mechanism itself. This article only refers to CSDs having procedures in place to "facilitate the penalty process". It does not impose any requirements on CCPs to actively administer the process.

Circumstances can arise where settlement instructions are deleted on or after ISD. This is the case for CCPs operating the CNS model. In this case, the CSD will be able to calculate penalties on the basis of the cancellation instructions received from the CCP.

We suggest that Article 9 comprise the following clauses to address the issues raised above:

(1) CCPs shall have no involvement in the penalty mechanism.

(2) CCPs shall not pay nor receive penalties.

<ESMA_QUESTION_TS_CSDR_6>

Q7: What are your views on the proposed draft RTS related to the buy-in process?

In particular, what are your views on applying partial settlement at the end of the extension period? Do you consider that the partialling of the settlement instruction would impact the rights and obligations of the participants?

What do you think about the proposed approach for limiting multiple buy-in and the timing for the participant to provide the information to the CSD?

<ESMA_QUESTION_TS_CSDR_7>
We have indentified the following issues with the buy-in process as proposed under Article 11 of Chapter III of Annex I.

Both in the discussion section of the consultation paper and in recital 32, ESMA recognises that CCPs operate different models, such as TDN and CNS; ESMA also recognises that buy-ins are executed via an auction process or by appointing a buy-in agent. It follows that the Regulation should not prevent or compromise the use of any model or process used by a CCP. In this context, the effective execution of the buy-in process should not preclude the failing participant to complete delivery of the missing financial instruments during the execution period. To achieve this, the following amendments to Article 11(2) of the draft RTS are suggested:

> (2) The buy-in shall be executed in a manner to avoid unnecessary costs for the failing participant and shall not imply any unnecessary risk taking by the CSD, CCP or trading venue. ***Pursuant to the contractual rules of the buy-in process established under paragraph 1, the failing participant may deliver all or part of the financial instruments required under the failed settlement instruction during the buy-in process.***

Article 11(4) requires CCPs to send a notice to both the failing and receiving participant. In the case of settlement instructions which are generated as a result of the netting of several transactions within a CCP, there is no necessary link between the failing and receiving parties across the CCP. Therefore, it is not meaningful to send a notice to a receiving participant. It is possible that the only outstanding receiving participant transaction has not even reached ISD. We propose the following amendment to address this point:

(4) The CSD, CCP, or trading venue, as applicable in accordance with Article 7(10) of Regulation (EU) No 909/2014, shall send a notice to ***[deleted]*** the failing participants ***[deleted]***, ***and where applicable to the receiving participants****:*

Article 11(6) states that "The partialling functionality offered by the CSD...shall be applied on the last day of the extension period when the financial instruments are available in the account of the delivering participant ..."; it is therefore not clear how the financial instruments can still be available to deliver in the failing participant's account as described in Article 11(5). It follows that the CCP must be able to buy-in the full amount due to be delivered, as it currently happens, without requiring any information from the CSD on the reserved financial instrument. To address this issue we propose that Article 11(5) is deleted:

~~(5) Except when the settlement instruction is on hold in which case the buy-in shall be perfomed for the full instruction, the buy-in shall only relate to the financial instruments that are not available in the failing participant's account with the CSD. The CSD shall reserve the relevant financial instruments available in the failing participant's account for the settlement of that instruction.~~

We note that paragraph 7 of Article 11 includes a drafting error and the reference to article 9 should be a reference to Article 12, which sets out the timeframes to deliver the financial instrument subject to the buy-in.

The CSD Regulation states that the CCP is not subject to buy-ins and executes the buy-in for cleared transactions; therefore, it is important that the RTS recognise that the CCP must be in control of all the steps of the buy-in process, including the choice to defer the buy-in or perform the cash compensation, when it is involved both as the receiving and the delivering participant. In order to address the above issue we suggest the following amendment to paragraph 8 of Article 11:

(8) Where the buy-in fails, the receiving participant shall choose to defer the buy-in or to receive the cash compensation by the end of the business day following the receipt of the notice ***[deleted] under paragraph 4***. In the absence of response within that timeframe, the cash compensation shall be paid.

8 A (New) ***Where the CCP is the delivering participant paragraph 8 shall not apply. Where the buy-in fails, the CCP shall choose to defer the buy-in or to pay the cash compensation.***

We would like to clarify that the clearing members to be notified under parapgraph 9 of Article 11 are the clearing members involved in the buy-in action and not all clearing members of the CCP. In addition, Recital 26 suggests that the buy-in process should be capable of being accelerated and cash compensation paid where the financial instrument is not available. However, this is not reflected in Article 11 of the draft RTS and we believe it should be clear that a buy-in may not be deemed possible at any point of the execution period. We suggest the following amendments to address these points:

(9) Where the buy-in is not possible, the following steps shall be taken, ***at any time prior to or upon the end of the last day of the execution period***:

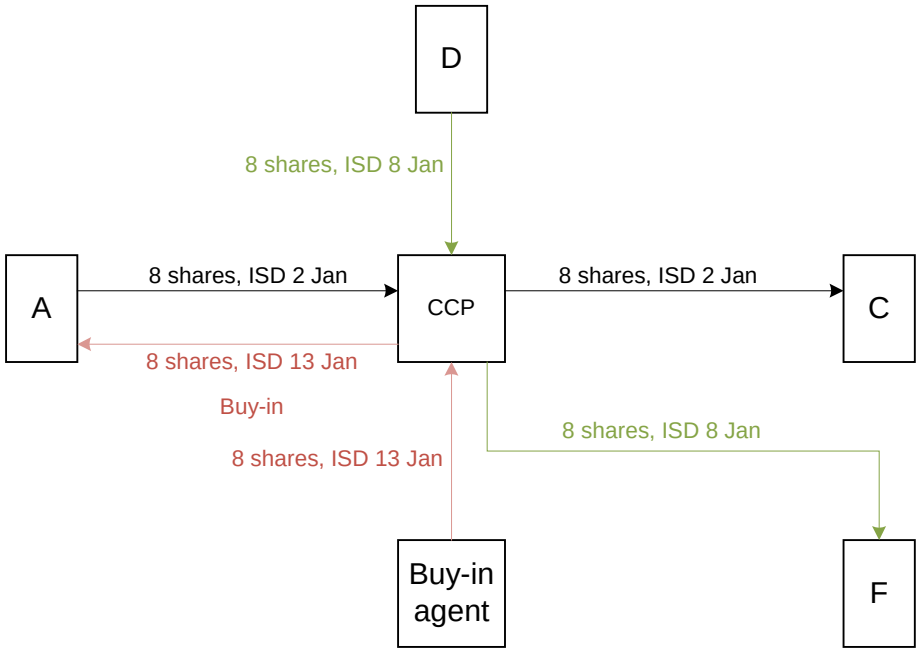
(a) the buy-in agent shall inform the receiving participant and the CSD, the trading venue or the CCP as relevant. In case of buy-in auction, the CCP shall inform the clearing members ***which participated in the buy-in action***;

LCH.Clearnet Limited (Ltd), the UK entity of the LCH.Clearnet Group Limited, uses an approach to buying-in for cleared equities via the appointment of a buy-in agent which has proved very effective and includes features to maximise early delivery to receiving participants. We would request that the RTS do not preclude the continuation of this approach. The approach, with examples, is described below.

The key features of this approach are:

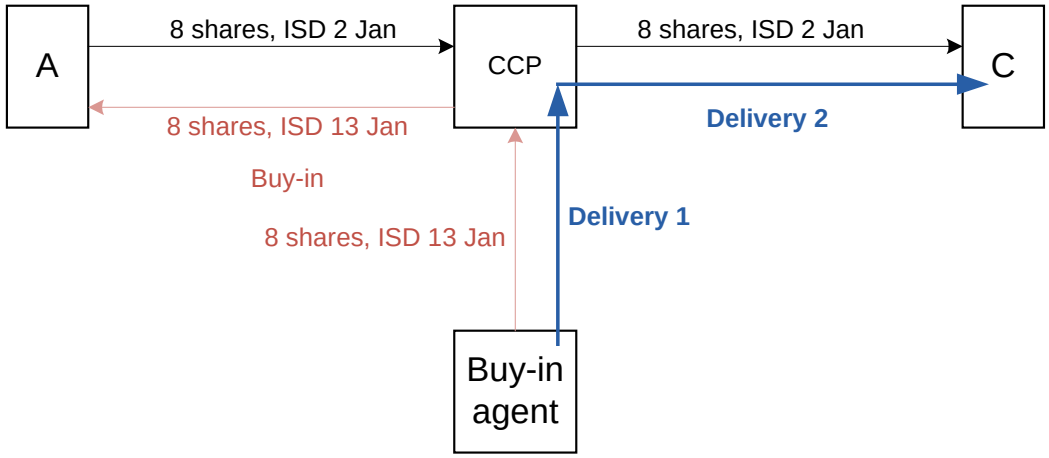
- Buy-in is triggered by a qualifying fail to Ltd.
- Buy-in is not triggered by any fail from Ltd.
- The buy-in is made in the market through a buying-in agent.
- The original failing settlement instructions are left in the CSD.
    - Generally CSDs will 'recycle' failed settlements to remain for settlement on sub-sequent days.
- The buy-in is instructed to settle against the failing party.
    - The principle is that the buy-in is delivered to the failing party for them to fulfil their original obligation.
- There is no link between the buy-in against a failing seller to Ltd and any buyer from Ltd.
    - The oldest failed-to buyer will get the first stock delivered to Ltd rather than being tied to any seller being bought in.

Subsets of the diagram below are used to consider various cases.



Case 1

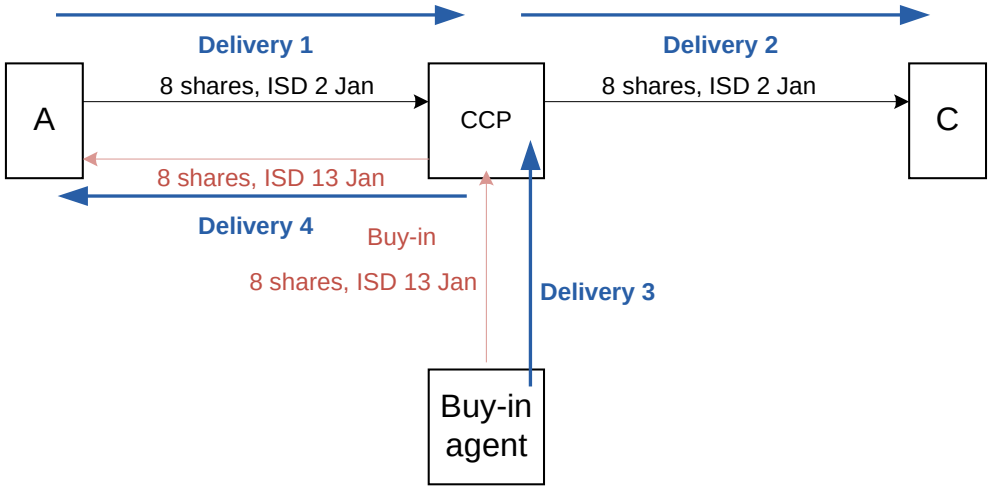
Standard ongoing failure by 'A'.



- 'A' sells 8 shares to 'C' with an ISD of 2nd Jan 2015.
- This continues to fail on 8th Jan 2015, triggering a successful buy-in on the 9th Jan 2015 with an ISD of the 13th Jan 2015.
- The buy-in agent delivers the shares to Ltd on 13th Jan which is delivered to 'C', oldest ISD.
- There is an outstanding settlement pair between Ltd and 'A'. The CSDs should settle these through technical netting in their settlement algorithms – many do.

Case 2

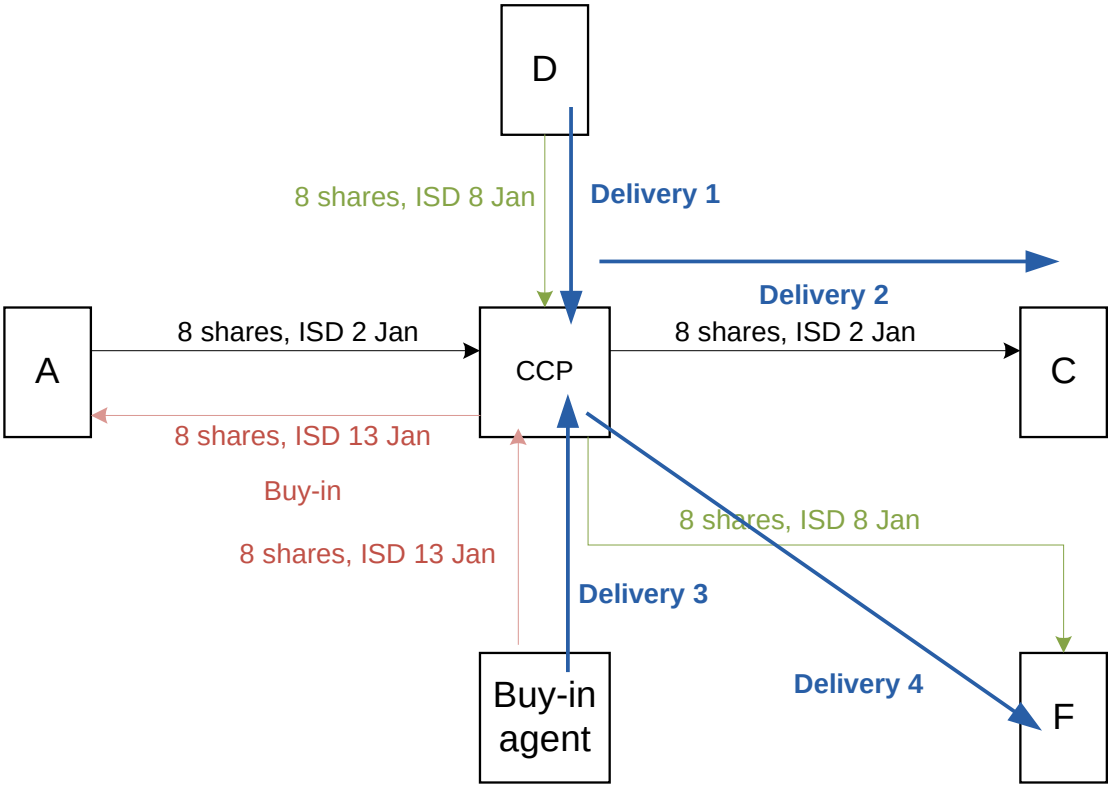
The buy-in against 'A' does not preclude 'A' from delivering before the buy-in completes, which allows 'C' to get their stock earlier than otherwise.



- 'A' sells 8 shares to 'C' with an ISD of 2nd Jan.
- This continues to fail on 8th Jan 2015, triggering a successful buy-in on the 9th Jan 2015 with an ISD of the 13th Jan 2015.
- 'A' fulfils the original delivery on the 12th Jan which is delivered to 'C'.
- The buy-in agent delivers to Ltd on 13th Jan which is delivered to 'A'.

Case 3

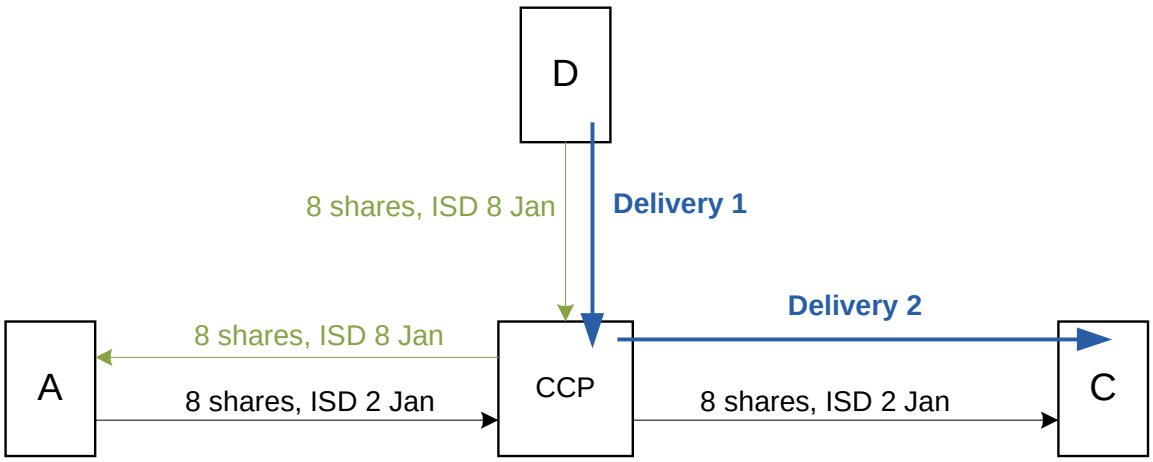
A subsequent separate trade/settlement delivers to ‘C’ before ‘A’ or the buy-in.



- ‘A’ sells 8 shares to ‘C’ with an ISD of 2nd Jan 2015.
- ‘D’ sells 8 shares to ‘F’ with an ISD of 8th Jan 2015.
- ‘D’ delivers the 8 shares on the 8th Jan 2015 which are delivered to ‘C’, oldest ISD.
- ‘A’ continues to fail on 8th Jan 2015, triggering a successful buy-in on the 9th Jan 2015 with an ISD of the 13th Jan 2015.
- The buy-in agent delivers to Ltd on 13th Jan 2015 which is delivered to ‘F’, oldest ISD.
- There is an outstanding settlement pair between Ltd and ‘A’. The CSDs should settle these through technical netting in their settlement algorithms – many do.

Case 4.

Buy to cover by 'A' stopping a buy-in. In this case 'F' in the previous example is 'A'.



- 'A' sells 8 shares to 'C' with an ISD of 2nd Jan 2015.
- 'D' sells 8 shares to 'A' with an ISD of 8th Jan 2015.
- 'D' delivers the 8 shares on the 8th Jan 2015 which are delivered to 'C'.
- 'A' continues to fail on 8th Jan 2015, but as Ltd is due to deliver shares to 'A' before the earliest buy-in delivery date 'A' has effectively arranged his own buy-in, or 'buy-to-cover'. Ltd does not do a separate buy-in.
- There is an outstanding technical net between Ltd and 'A'

<ESMA_QUESTION_TS_CSDR_7>

Q8: What are your views on the proposed draft RTS related to the buy-in timeframe and extension period?

<ESMA_QUESTION_TS_CSDR_8>
Both the extension periods and the timeframes to deliver the financial instruments take into account the liquidity of the specific financial instrument. We believe that it is essential for policy makers to provide a clear definition of liquidity, currently proposed under the level 2 measures of MiFID II. Clarity is essential to ensure that there is a consistent understanding of such definition across market participants, CCPs, trading venues and CSDs. Otherwise, there could be inconsistency across a chain of transactions, for example where a specific instrument may be bought in on a liquid basis at the beginning of a chain and on an illiquid basis at the end of the same chain.

We would like to comment particularly on paragraph 1 of Article 12. As it is currently drafted would prevent the use of the buy-in agent model, whereby a buy-in can be considered successfully executed only after the confirmation sent by the buy-in agent to the CCP. There is therefore, no guaranteed delivery within a specified period. The RTS should not prevent the buy-in agent from buying the securities in the market and deliver them subject to the standard settlement period. In order to ensure that the use of the buy-in agent model can continue, we propose the following amendment to paragraph 1 of Article 12:

1. Shares or bonds, including those shares cleared by a CCP or those shares or bonds that are SME growth market instruments, shall be available for settlement ~~***and delivered***~~ to the receiving participant within:

(a) 4 business days after the end of the extension period where the bonds or shares are considered to have a liquid market, in accordance with point (a) of Article 2(1)(17) or point (b) of Article 2(1)(17), respectively, of Regulation (EU) No 600/2014;

(b) 7 business days after the end of the extension period where the bonds or shares are not considered to have a liquid market, in accordance with point (a) of Article 2(1)(17) or point (b) of Article 2(1)(17), respectively, of Regulation (EU) No 600/2014.
<ESMA_QUESTION_TS_CSDR_8>

Q9: What are your views on the proposed draft RTS related to the type of operations and their timeframe that render buy-in ineffective?

<ESMA_QUESTION_TS_CSDR_9>
The CSD Regulation (Article 7(4)(b)) exempts the opening leg of short-term repo transactions. CCPs, such as LCH.Clearnet, include both opening and closing legs of cleared repo transactions in their netting process. The exemption for the opening leg of a short term repo has a significant impact on the netting process, as it implies that CCPs will need to perform separate netting runs (one for exempted legs and one for non-exempted legs). The result is reduced netting efficiency, therefore increased settlement instructions, which in turn may lead to increased failed instructions. In our view, this undermines the core principle of the CSD Regulation and the ESMA level 2 measures to improve settlement in the EU. As proposed, the netting process in CCPs would be required to differentiate between transaction subject to buy-in and those not subject to buy-in during the netting process as there is a risk, due to the level 1 text exemption, that the CCP could be required to execute the buy-ins against a failed delivery where the corresponding receiving party is not subject to an offsetting buy-in. The separation of non-fungible instructions would reduce netting efficiency, require the CCP to prioritise off-setting instructions where buy-ins may be applicable (thereby withdrawing them from the netting cycle altogether) and is likely to result in extended failure period for some transactions.

Furthermore, neither the buy-in procedure in the level 1 text nor the draft RTS specifically address settlement with regards to triparty settlement systems (such as those supported by Euroclear Bank, Clearstream International or Euroclear UK & Ireland's Delivery by Value (DBV) and Term DBV products). In the response to the ESMA discussion paper issued in March 2014, LCH.Clearnet had asked ESMA to confirm that settlements relating to repurchase transactions in triparty environments would be excluded from the scope of the settlement discipline regime in the CSD Regulation. The settlement of triparty products is substantially different from standard DVP transactions, and is based on an ongoing obligation (from the start to end date of a trade) to support mark-to-market transactions initiated by the triparty provider, and the automatic return of collateral at the end date of a trade. We believe that the buy-in process for triparty products should be deemed to be ineffective because the buy-in of collateral would not be sufficient to support the efficient settlement of triparty transactions on an ongoing basis (especially in relation to mark-to-market transactions, which take place on an a daily basis). We therefore suggest that ESMA adds the following amendment in a recital or as an additional paragraph to Article 14 of the RTS:

The buy-in process for triparty products should be deemed to be ineffective because the buy-in of collateral would not be sufficient to support the ongoing obligation of the triparty provider to mark-to-market transactions during the life of a trade and the automatic return of collateral at the end date of that trade.
<ESMA_QUESTION_TS_CSDR_9>

Q10: What are your views on the proposed draft RTS related to the calculation of the cash compensation?

<ESMA_QUESTION_TS_CSDR_10>
We support ESMA's approach explained in paragraph 103 of the discussion section of the Consultation which allows for the cash compensation to be based on a pre-agreed price or pre-agreed method to determine such price. However, this is not fully reflected in Article 15 of the draft RTS, which does not refer to the pre-agreed method to calculate the cash compensation. Indeed, in the case of cleared transactions, a single failed settlement instruction may be the net of many trades from many trade sources; due to multilateral netting by a CCP, it is also likely that the net consideration of the selling party does not match that of the buying party – i.e. the equivalent 'trade price' is different on each side of the fail. CCPs should therefore be able to determine the price compensation according to a method set out in their rulebook. To address this point we propose the following amendment in Article 15 of the RTS:

> The cash compensation shall be determined as follows:
>
> (a) Where the participants pre-agreed the price ***or a method to calculate such price*** to ***settle*** the cash compensation, the difference between the pre-agreed price and the price set for the failed transaction shall determine the cash compensation;
>
> (b) Where the participants have not pre-agreed a price ***or a method to calculate such price***, the cash compensation shall be determined by the difference between the price determined by the buy-in agent by reference to the closing price of the relevant trading venue on the day before the payment of the cash compensation and the price set for the failed transaction.

<ESMA_QUESTION_TS_CSDR_10>

Q11: What are your views on the proposed draft RTS related to the conditions for a participant to consistently and systematically fail?

<ESMA_QUESTION_TS_CSDR_11>
ESMA should clarify that CSDs are responsible for determining the calculation under Article 16 of the RTS to indentify systematically failing participants on the basis of the reports on settlement fails under Article 5 of the RTS. This ensures that the calculation captures the overall settlement fail rate of a participant across all its transactions. In addition, our understanding is that CSDs would calculate the percentage in paragraph 1 based on the gross value and volume of the settlement fails. Using net value and volumes would unnecessarily capture a too large amount of participants, defeating the purpose of the calculation. We would welcome clarification that our understanding is correct.

Article 7(9) of the CSD Regulation requires CSDs, CCPs and trading venues to have procedures in place that enable them to suspend participants which consistently and systematically fail. The divergence reference for identifying participants who systematically fail should be set on the basis of its relevant peer group for a specific category of financial instrument settled on the relevant securities settlement system. For example, the settlement rate for an entity which specialises in trading low liquidity instruments should not be judged against a settlement rate for entities which do significant volumes of trading in a limited number of very highly liquid instruments. This would distort the meaning of the divergence rate because it does not take into account the relative liquidity of the instruments which might lead to a divergence in settlement performance. Furthermore, the procedures for suspension should only relate to the type of financial instruments which the participant is systematically failing to settle and not other types of financial instruments. Therefore, if a CSD were to suspend a participant it should be clear what types of financial instruments it is suspended from transacting in. This should be notified to

CCPs and trading venues which, on the basis of specific instructions by their competent authorities, would determine the actions to be taken in respect of the participant identified as systematically failing.

It is important that ESMA and relevant competent authorities recognise that any suspension by a CSD should not automatically trigger any action by a CCP. The CCP should be in close dialogue with its competent authority before determining the steps to be taken against one or more systemic failing participants in order to minimise the impact of a potential suspension on the market activity. It is essential that the RTS also recognise that any decision, taken following consultation with the relevant competent authorities, to suspend the clearing activity of a systemic failing participant under Article 16 of the RTS:

i. should only be applied to future trades not yet registered by the CCP
ii. should not be applied to existing trades or future trades that have been already registered with the CCP at the point of the suspension.

Failure to do so would adversely impact the operations of the CCP and the relevant clearing member/s. The suspension should also be for a fixed period at the discretion of the CCP in accordance with its rulebook. We suggest the following amendments to Article 16 of the draft RTS to address the above points:

(1) A participant shall be deemed to consistently and systematically fail to deliver ***a type of*** financial ***instrument*** when its settlement efficiency rate is 10% lower than the settlement efficiency rate determined by the ***CSD for that type of financial instrument*** over a number of days that exceeds 10% of the number of days when the participant is active in the ***CSD***, over a 12 ***month*** period. ***For the purposes of determining the settlement efficiency rate of a type of financial instrument, the CSD shall take into account whether such financial instrument is considered to have a liquid market in accordance with point (a) of Article 2(1)(17) or point (b) of Article 2(1)(17), respectively, of Regulation (EU) No 600/2014.***

(2) In calculating the percentage referred to in paragraph 1, ***the CSD shall consider*** both the value and the volume of settlement fails ***in relation to gross settlement instructions***. Where either the percentage in volume or in value terms is lower than the one indicated in paragraph 1, the participant shall be deemed to consistently and systematically fail to deliver the financial instruments.

(3) ***The CSD shall inform the relevant CCPs and trading venues where a participant which consistently and systemically fails to deliver a type of financial instrument is suspended from the CSD, detailing for which financial instruments the participant is suspended from its settlement systems.***

<ESMA_QUESTION_TS_CSDR_11>

Q12: What are your views on the proposed draft RTS related to the settlement information for CCPs and trading venues?

<ESMA_QUESTION_TS_CSDR_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_12>

Q13: What are your views on the proposed draft RTS related to anti-avoidance rules for cash penalties and buy-in?

<ESMA_QUESTION_TS_CSDR_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_13>

Q14: Do you agree that 18 months would be an appropriate timeframe for the implementation of the settlement discipline regime under CSDR? If not, what would be an appropriate timeframe in your opinion? Please provide concrete data and evidence justifying a phase-in for the settlement discipline measures and supporting your proposals.

<ESMA_QUESTION_TS_CSDR_14>
We fully support ESMA's proposal to defer the application of the RTS on settlement discipline sometime after they are published. As ESMA notes, the publication of the RTS is expected by the end of this year, so under the current proposed phase-in of 18 months the application would be required in early 2017. We believe this timeline is the minimum time necessary for all relevant stakeholders to fully understand and implement the detailed new requirements on settlement discipline. Market infrastructures and market participants will need to undertake systems changes and adapt their rulebooks in order to comply with the new requirements. The phased in implementation is essential to allow them to do so appropriately, because regulatory change needs to be coordinated internally to minimise any disruption and risks to core services and sufficiently budgeted for through a firm's internal governance structure.

Furthermore, due to the ongoing implementation of the T2S project, CSDs are likely to face significant resources constraints if required to concurrently implement the settlement discipline rules. This could have a negative impact on the functioning of the equity and fixed income markets, given that the implementation of the settlement discipline's rules require coordination between the CSDs and their participants, including CCPs and trading venues.

We would also like to note that until the complete migration to the T2S project some fails are likely to occur because of settlement infrastructure's issues, not intentionally (e.g. based on a decision by a participant not to make a delivery). Therefore, the phased in implementation is essential to prevent market disruption.
<ESMA_QUESTION_TS_CSDR_14>

Q15: What are your views on the proposed draft RTS on CSD authorisation (Chapter II of Annex II) and draft ITS on CSD authorisation (Chapter I of Annex VI)?

<ESMA_QUESTION_TS_CSDR_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_15>

Q16: What are your views on the proposed draft RTS on CSD review and evaluation (Chapter III of Annex II) and draft ITS (Chapter II of Annex VI)?

<ESMA_QUESTION_TS_CSDR_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_16>

Q17: What are your views on the proposed draft ITS on cooperation arrangements as included in Chapter III of Annex VI?

<ESMA_QUESTION_TS_CSDR_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_17>

Q18: What are your views on the proposed draft RTS on CSD recognition (Chapter IV of Annex II)?

<ESMA_QUESTION_TS_CSDR_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_18>

Q19: What are your views on the proposed approach regarding the determination of the most relevant currencies?

<ESMA_QUESTION_TS_CSDR_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_19>

Q20: What are your views on the proposed draft RTS on banking type of ancillary services (Chapter VI of Annex II) and draft ITS on banking type of ancillary services (Chapter IV of Annex VI)?

<ESMA_QUESTION_TS_CSDR_20>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_20>

Q21: What are your views on the proposed draft RTS on CSD participations (Chapter II of Annex III)?

<ESMA_QUESTION_TS_CSDR_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_21>

Q22: What are your views on the proposed draft RTS on CSD risk monitoring tools (Chapter III of Annex III)?

<ESMA_QUESTION_TS_CSDR_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_22>

Q23: What are your views on the proposed draft RTS on CSD record keeping (Chapter IV of Annex III) and draft ITS on CSD record keeping (Annex VII)?

<ESMA_QUESTION_TS_CSDR_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_23>

Q24: What are your views on the types of records to be retained by CSDs in relation to ancillary services as included in the Annex to the draft RTS on CSD Requirements (Annex III)? Please provide examples regarding the formats of the records to be retained by CSDs in relation to ancillary services.

<ESMA_QUESTION_TS_CSDR_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_25>

Q25: What are your views on the proposed draft RTS on reconciliation measures included in Chapter V of Annex III?

<ESMA_QUESTION_TS_CSDR_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_25>

Q26: Do you believe that the proposed reconciliation measures where other entities are involved in the reconciliation process for a certain securities issue within the meaning of Article 37(2) of CSDR are adequate? Please explain if you think that any of the proposed measures would not be applicable in the case of a specific entity. Please provide examples of any additional measures that would be relevant in the case of specific entities.

<ESMA_QUESTION_TS_CSDR_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_26>

Q27: What are your views on the proposed reconciliation measures for corporate actions under Article 15 of the draft RTS included in Chapter V of Annex III?

<ESMA_QUESTION_TS_CSDR_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_27>

Q28: What are your views on the proposed draft RTS on CSD operational risks included in Chapter VI of Annex III?

<ESMA_QUESTION_TS_CSDR_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_28>

Q29: What are your views on the proposed draft RTS on CSD investment policy (Chapter VII of Annex III)?

<ESMA_QUESTION_TS_CSDR_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_29>

Q30: What are your views on the proposed draft RTS on access (Chapters I-III of Annex IV) and draft ITS on access (Annex VIII)?

<ESMA_QUESTION_TS_CSDR_30>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_30>

Q31: What are your views on the proposed draft RTS on CSD links as included in Chapter IV of Annex IV?

<ESMA_QUESTION_TS_CSDR_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_31>

Q32: What are your views on the proposed draft RTS on internalised settlement (Annex V) and draft ITS on internalised settlement (Annex IX)?

<ESMA_QUESTION_TS_CSDR_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_TS_CSDR_32>