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CSDR Refit (CSDR REVIEW)

Updated in September 2023

Central Securities Depositories (CSDs) are Financial Market Infrastructures (FMIs) alongside Trading Venues, Central Counterparties (CCPs), Trade Repositories and Payment Systems. Like CCPs they contribute to a large degree in maintaining the financial stability. CSDR, following MIFID2/MIFIR (covering Trading Venues) and EMIR (focused on CCPs), addresses the CSD's topic in Europe by giving the latter a regulatory framework in which they can exercise their function meanwhile requiring several measures to improve the settlement and to reinforce the investor protection.

CSDR has entered into force in 2014 with an implementation running until 2025. In accordance with Article 75 of CSDR, the European Commission (EC) was requested to review and prepare a general report on CSDR for submission to the European Parliament and the Council by September 2019. Due to the Covid pandemic the process started with a one year delay. After several surveys issued by ESMA in 2020 (on cross-border transactions, internalised settlements and a "blank page"), the EC has published its consultation paper on the 8th of December 2020, in July 2021 its summary of the responses received and finally its proposal on the 16th of March 2022.

The review of CSDR has been undertaken under the REFIT programme (in its 2021 programme the EC stated "the forthcoming proposal will therefore set out a number of targeted modifications of CSDR, aimed at simplifying the rules as well as making them more proportionate and less burdensome for stakeholders"). The Regulatory Fitness and Performance programme (known as REFIT) has been established by the EC in 2012 with the aim to make EU law simpler and to reduce the costs and burden of a regulation while still achieving intended benefits.

From the various areas covered by the EC in its 2020 consultation, 5 have been retained for the review of CSDR: the passport regime, the cooperation between supervisory authorities, the banking type ancillary services, the settlement discipline regime (SDR) and the oversight of third country CSDs.

Two points of interest: SDR are in the scope of the review although still not in place in 2020 and no changes are foreseen on the reporting of internalised settlements.

To be remained, CSDR is built on four main pillars:

- 1. INFRASTRUCTURE** by laying down a unified and harmonised framework for all European CSDs
 - Defining a CSD, its role and its responsibilities
 - Establishing a set of common requirements for CSDs operating securities settlement systems
 - Freeing the choice of an issuer CSD for issuers
 - Requiring CSDs to have a recovery plan

- 2. STRENGTHENING THE INVESTOR PROTECTION**
 - Dematerialization and immobilisation of securities, book-entry form for transferable securities
 - Segregation of investors' assets

3. IMPROVEMENT OF THE SETTLEMENT

- Reduction of the settlement cycle
- Reinforcement of the obligation to settle transactions in transferable securities, money-market instruments, units in collective investment undertakings or emission allowances on the date agreed between the parties (also called: ISD for Intended Settlement Date)
- Imposition of a settlement disciplines regime: set of several measures aiming to prevent and address settlement fails and thus have a transaction be fully settled on ISD

4. TRANSPARENCY

- Setting obligations of reporting to national competent authorities and ESMA
- Identification of the issuing entities via the use of LEI (Legal Entity Identifier)

1. Overview

a. Key aspects of the Regulation

- **Settlement Disciplines Regime (SDR)**

SETTLEMENT

The EC considers that original requirements are unclear and complicated:

CSDR introduced rules on settlement discipline to prevent and address failures in the settlement of securities transactions and therefore ensure the safety of settlement (...). Despite the absence of experience in applying the rules, the development and specification of the framework in the relevant RTS has allowed all interested parties to better understand the regime and the challenges its application could give rise to, especially at times of crisis, e.g. the COVID-19 crisis in spring 2020.

A large majority of respondents to the Commission targeted consultation (public authorities, CSDs, CCPs, banks, asset management companies, market makers, and their respective associations), considered that the settlement discipline framework should be reviewed. Member States took a similar position in the Member States' Experts Group meeting in July 2021. They almost unanimously expressed concerns about the current design of mandatory buy-ins and their influence, in particular on trading activity, liquidity or the competitiveness of EU capital markets. ESMA also supported a delay in the application of the buy-in regime noting that "ESMA is aware of market participants' serious difficulties regarding the implementation of the buy-in regime."

Two main issues have been identified: the lack of clarity and the complexity/burden of the settlement discipline requirements. These drivers lead to disproportionate compliance costs, in so far as the costs of complying with the framework potentially seem to outweigh the achievable benefits.

First, the requirements of the settlement discipline regime are often unclear, creating legal uncertainty, thus increasing compliance costs. This lack of clarity is also shown by the number of Q&As received by ESMA and the Commission. Since 2017, ESMA has frequently updated its CSDR Q&As, with currently seven Q&A's related to settlement discipline. More than 25 Q&As on settlement discipline are also currently being assessed. The need to clarify questions related to the settlement discipline regime puts an additional burden on market participants, but also the relevant authorities. This uncertainty means that companies have to obtain additional legal opinions on how the rules should be applied, to enable them to adapt existing trading and reporting procedures. Should those rules subsequently be interpreted differently, additional costs will be incurred to re-adapt (...)

Second, the requirements of the settlement discipline regime are often complicated and increase compliance costs. In addition to one-off costs incurred to adapt IT systems,¹⁷⁰ the two examples below on contractual repapering (i.e. update of existing contracts) and the use of buy-in agents show how the actual application of the requirements could increase costs for market participants.¹

Thus the CSDR Refit includes several amendments to the SDR as regards penalties and buy-ins.

PENALTIES

The essential change brought to the penalties is the review of the scope. In CSDR penalties applied on quite all the settlement fails (ie irrespective of the type of transactions) as soon as the financial instrument is in the scope of the SDR.

¹ Extract from the impact assessment (pages 34-36)

With CSDR Refit, the EC introduces two possible exemptions:

- where the settlement fail is caused by factors not attributable to the participants to the transaction
- where a transaction does not involve two trading parties

It should be noted that there is no definition so far of what “trading parties” means. The one existing in the delegated act concerning the SDR is not appropriate.

One point of attention relates to the second condition; it should be carefully designed since it may impede the immunization process described by ESMA where only the real defaulter should be penalized.

Buy-Ins

The current MBI is changed in several ways:

- The MBI implementation could become applicable if one of these three conditions are met: (i) the application of the penalties alone does not allow a satisfactory improvement of the settlement on the correct date, (ii) the settlement rate is lower than what can be observed in other regions, (iii) the suspension rate may impact/impact the Union’s financial stability.

Important:

- . it doesn’t mean that the MBI will apply as soon as one of the conditions is reached but it allows the EC to consider if the MBI constitutes a proportionate mean to address the level of settlement fails in the EU
- . if yes, the EC may decide within the scope of transactions eligible to the MBI, which ones should be under the MBI requirement (it could be a type of transactions, a type of financial instruments, ...)
- . the EC recognizes the need for the industry to benefit from a period of time to be prepared after the decision has been taken by the EC
- The EC also reviews the scope of application of the mandatory buy-in: this would no longer apply in cases where the failing settlement is not due to the participants or when there is no trading parties.
- Another important point, the text introduces the so-called “pass-on” mechanism to avoid triggering unnecessary buy-ins.
- Finally, the MBI could be suspended in case of a major impact on the functioning of the markets.

- **Passporting**

INFRASTRUCTURE

An authorised CSD may provide services covered by this authorisation within the territory of the Union provided it has communicated to the competent authority of the home Member State the list of Member State in which it intends to operate, the services it wants to provide, the currencies it intends to process as well as the organisational structure in case of branch.

Actually the passporting process has proved burdensome and unclear:

A core objective of CSDR was to dismantle the barriers to cross-border settlement in order for authorised CSDs to enjoy the freedom to provide services within the EU. To ensure an appropriate level of safety in the provision of services by CSDs in another Member State, CSDs are currently subject to a specific procedure in Article 23 of CSDR. Under this article, when CSDs wish to provide notary and central maintenance services in relation to financial instruments “constituted under the law of another EU Member State” or to set up a branch in another Member State a specific procedure needs to be followed, involving the approval by the host national authority. In particular, they should communicate to the competent authority of their home Member State information including, 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).

These requirement of the CSDR passporting process aimed to ensure that the relevant pieces of national legislation would be taken into account and would still be complied with. However, such requirements allow the host competent authority to verify this only once, when assessing the passporting request, and not on a continuous basis. Furthermore, the possibility to refuse the passport does not seem to have been used by host competent authorities. (...)

Further to these first passporting procedures, the majority of stakeholders and Members States now generally agree that the passporting procedure is burdensome (one CSD even noted that it stopped providing services with respect to foreign securities in order to avoid it) and some of its requirements are unclear and could result in divergent interpretations by national authorities, thus reducing CSDs’ cross-border activity and leading to disproportionate compliance costs. (...).²

² Extract from the impact assessment (pages 30-31)

b. Other aspects

- **CSD's supervision**

The EC has pointed out insufficient coordination and cooperation between authorities:

CSDR requires the cooperation of authorities that have an interest in the operations of CSDs that operate domestically and cross-border. Nonetheless, the supervisory arrangements remain fragmented and can lead to differences in the allocation and nature of supervisory powers depending on the EU CSD concerned. This in turn creates barriers to the cross-border provision of CSD services, perpetuates the remaining inefficiencies in the EU settlement market and has negative impacts on the stability of EU financial markets³.

INFRASTRUCTURE

CSDR Refit, following the example of EMIR for CCPs, establishes colleges of supervisors.

- **Banking licence / purpose bank**

CSDR defines separation between CSD and Banking activities. A CSD shall not itself provide any banking-type ancillary services unless it has obtained an additional authorisation (granted as “credit institution”) to provide such services. The banking license can be used only for a limited scope of activities linked with settlement business. It can also designate a credit institution to provide these services. The credit institution shall strictly segregate these activities in a specific legal entity being a “limited purpose bank” that will have to send the same kinds of report to the competent authority and submit appropriate recovery plan.

INFRASTRUCTURE

The conditions set in CSDR has been considered too restrictive:

An important element of the functioning of CSDR is the banking services that CSDs can offer to clients in addition to the core CSD services and other non-banking settlement services. As noted, the provision of banking services is a prerequisite to settle in foreign currencies, if no access to the relevant central bank is practical or available.

Nonetheless, the requirements for the provision of banking-type services related to settlement are restrictive, leading to both a reduction of CSDs' cross-border activity and to disproportionate compliance costs (...).

First, under CSDR, apart from being authorised themselves to provide banking services, CSDs may also use a designated credit institution for such services. Nonetheless, the conditions set out in CSDR for such institutions are very strict to mitigate risks to financial stability (...).

Second, the threshold under which a commercial bank may provide banking services (i.e. the total value of cash settlement is less than 1% of the total value of all securities transactions against cash settled in the books of the CSD and does not exceed a maximum of EUR 2.5 billion per year) is considered by the majority of stakeholders, including CSDs and their association as well as a public authority, as too low for the majority of EU CSDs to be able to compete in the settlement in foreign currencies.⁴

CSDR Refit intends to facilitate CSDs' access to banking type ancillary services by allowing CSDs with a banking license to offer such services to other CSDs and also by reviewing the threshold below which CSDs may use a commercial bank.

- **Third country (TC) CSDs**

An authorised CSD may maintain or establish link with third-country CSD. Third-country CSDs may also provide CSD services within the Union. This availability is subject to effective authorisation, supervision and oversight, ensuring full compliance with the prudential requirements applicable in that third country. Cooperation arrangements between ESMA and the responsible authorities in the third country should be established.

INFRASTRUCTURE

The current regime should be improved:

Under CSDR, third-country CSDs providing services in the EU provide insufficient insight into their activities in relation to financial instruments constituted under the law of a Member State, in particular when they provide services under the grandfathering clause (...). This leads to potential risks for the whole settlement ecosystem, and in particular on EU authorities, EU CSDs and issuers: EU authorities are not aware of the activities of third-country CSDs in the EEA, certain third-country CSDs follow different rules than those EU CSDs are

³ Extract from the impact assessment (pages 31-33)

⁴ Extract from the impact assessment (pages 33-34)

subject to, and provide services in relation to the same financial instruments and the lack of information on third-country CSDs' activities may create a risk for investors⁵

CSDR Refit introduces an end date to the grandfathering clause and a notification requirement for third country CSDs. This will allow the EC to prioritise its assessment of equivalence between EU and third country frameworks. This equivalence is a prerequisite to any recognition of a TC CSD by ESMA.

c. Progress update and way forward:

The draft proposal issued by the EC has been studied both by the European Parliament (EP) and by the Council. The two bodies adopted their own version of the regulation (December 2022 for the Council and March 2023 for the EP).

Foreseen to start on the 28th of March 2023 the trilogue process whereby the 3 versions (from the EC, from the EP and from the Council) will be confronted in order to reach out a compromise text has started on the 18th of April 2023.

An important point has been the publication by the ECB of its opinion on CSDR Refit and particularly its preference for a pure removal of the mandatory buy-in.

• ECB's opinion

At the request of the European Council, the European Central Bank (ECB) published its opinion on the draft revision of CSDR (CSDR Refit) on 28 July 2022:

- The ECB welcomes the progress contained in the proposal, for example on the “passporting” procedure, cooperation between countries, cross-border settlements and the settlement discipline regime (SDR).
- With regard to the latter, the ECB considers that the penalties should be applied taking into account the context and the parties involved, suggesting that only those fails with a negative financial impact on the non-defaulting party should be penalized. The two exemptions proposed by the European Commission (EC) are thus favourably received by the Central Bank, which nevertheless stresses the need to clarify what a transaction does not involve two “trading parties” is. It will ultimately be up to the CSDs and T2S to be able to distinguish the fails to be penalized from those outside the scope.
- Another flagship measure for the SDR is the mandatory buy-in (MBI) which is also addressed in the ECB communication. While welcoming the proposals made by the EC and in particular a conditional implementation of the MBI, the ECB goes one step further and proposes that this measure be discarded. Otherwise, the ECB warns about the impact of the MBI on financial stability and suggests three changes: the buy-in procedure would be established between the parties through their contractual relations (rather than imposed by the regulation) and its activation would be at the hand of the buyer (the buy-in should be optional); as for SFTs, they would all be exempt from MBI (the exemption is only partial today).
- Finally, the Central Bank indicated that it intends to be involved in future discussions on CSDR and the drafting of texts and that it was at the disposal of the EC. The list of agreed CSDs is available on the ESMA's website (see below).

• European Parliament

Although the Rapporteur was in favour of a pure removal of the MBI, the final (and adopted) EP's version keeps the MBI but in the same vein as the Council, introduces amendments to the EC's proposal that should render the MBI even more theoretical (but still possible):

- Only conditions 1 and 3 remain and they are now cumulative; SFTs are completely out of the scope
- The assessment of the settlement efficiency should be based on instructions remaining failing at the end of the extension period (this was a strong request from the industry)
- The review of the penalty rates shall be a first step in the process of improving the quality of the settlement in the EU
- ESMA and NCAs shall follow the CSDs' settlement efficiency and investigate in case of CSDs having “a settlement efficiency significantly lower over a period of 6 months than the average settlement efficiency in the EU”

⁵ Extract from the impact assessment (pages 29-30)

- **Council**

Unlike the ECB, the Presidency doesn't intend to remove the MBI but to keep it as a measure of last resort in the aim of having a level of settlement efficiency that could at least be comparable with other countries.

Thus, while maintaining it, it renders the implementation of the MBI less likely (change in the conditions triggering the entry into application of the MBI, consultation of the ESRB, the ESCB and ESMA, reassessment of the penalties mechanism, ...), adds additional situations for the suspension of the buy-in (when it is no more necessary, appropriate or proportionate), ...

The Council's version of CSDR Refit has been voted on the 20th of December 2022.

While being similar to the EP's position as regards SDR, there are some differences

- The extension period is equal to 6 business days (instead of 4 or 7)
- The MBI included in the Short Selling Regulation (thus dedicated to CCPs) is maintained even if the CSDR MBI were to apply, thus leaving CCPs with two different buy-in processes depending on the type of financial instrument (share versus others).

 **NEW!**

- **Agreed version**

The EU Council announced on the 27th of June that a provisional agreement had been reached between the Parliament and the Council on CSDR Refit. While the agreement still needs to be formally ratified, its broad outlines are already known.

In particular those relating to the mandatory buy-in:

- Two conditions must be jointly met (the system of penalties is not sufficiently effective and if the level of fails can impact the financial stability of the Union) in order to allow the EC to start any reflection on the benefit of an MBI
- In particular the possible impact of MBI on the market, the number/volume/age of fails or the fact that alternative solution exist will be element of the analysis to be conducted
- Some specific exemption are already in the level 1 (SFTs)
- While the final version keeps the ones proposed by the EC (settlement fails whose underlying cause is not attributable to the participants to the transactions and transactions that are not considered as trading); which will have to be explained in the delegated act (level 2)
- The extension period is 5 days but can be increased to 7 days; the 15 days for SME has been kept

It should be noted that the Council's proposal to have two different articles (one for penalties and one for MBI) has been retained; this may help have different definitions of trading depending on the discipline

Finally the T+1 topic should also be part of CSDR review via a report ESMA will have to submit.

2. Reference text(s)

- [EC CSDR review consultation paper](#)
- [EC report following the consultation on CSDR review](#)
- [ESMA's letter to the EC as regards the CSDR review \(May 2021\)](#)
- [ESMA report on banking-type ancillary services under CSDR](#)
- [ESMA report on use of FinTech by CSDs](#)
- [EC's proposal for CSDR Refit](#)
- [EC's impact assessment](#)
- [EC's summary of the impact assessment](#)
- [ECB opinion](#)
- [EP draft report](#)
- [EP communication after vote](#)

- [Council adopted version](#)
- [EP adopted version \(March 2023\)](#)
- [Communique on CSDR Refit](#)

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