ECSDA Answer

TARGETED CONSULTATION DOCUMENT

REVIEW OF REGULATION ON IMPROVING SECURITIES SETTLEMENT IN THE EUROPEAN UNION AND ON CENTRAL SECURITIES DEPOSITORIES

Disclaimer

This document is a working document of the Commission services for consultation and does not prejudge the final decision that the Commission may take.

The responses to this consultation paper will provide important guidance to the Commission when preparing, if considered appropriate, a formal Commission proposal.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
https://ec.europa.eu/info/business-economy-euro_en

European Central Securities Depositories Association, aisbl
Rue Royale 75, 1000 Brussels – ecsda.eu – info@ecsda.eu
RPM/VAT : BE0464619112 – Tribunal de l'entreprise francophone de Bruxelles
ING – BE30 3630 9647 3311 – Transparency Register : 92773882668-44

You are invited to reply **by 2 February 2021** at the latest to the **online questionnaire** available on the following webpage: https://ec.europa.eu/info/publications/finance-consultations-2020-csdr-review_en

Please note that in order to ensure a fair and transparent consultation process **only responses received through the online questionnaire will be taken into account and included in the report summarising the responses**.

This consultation follows the normal rules of the European Commission for public consultations. Responses will be published unless respondents indicate otherwise in the online questionnaire.

Responses authorised for publication will be published on the following webpage: https://ec.europa.eu/info/publications/finance-consultations-2020-csdr-review_en

INTRODUCTION

1. Background to this consultation

Central Securities Depositories (CSDs) are systemically important institutions for financial markets. They operate the infrastructure (so-called securities settlement systems (SSS)) that enables securities settlement. CSDs also play a crucial role in the primary market, by centralising the initial recording of newly issued securities. Furthermore, they ensure the maintenance of securities accounts that record how many securities have been issued by whom and each change in the holding of those securities. CSDs also play a crucial role for the financing of the economy. Apart from their role in the primary issuance process, securities collateral posted by companies, banks and other institutions to raise funds flows through securities settlement systems operated by CSDs. CSDs also play an essential role for the implementation of monetary policy by central banks as they settle securities in central bank monetary policy operations.

Regulation (EU) 909/2014 on central securities depositories[1] (CSDR) aims to increase the safety and improve settlement efficiency as well as provide a set of common requirements for CSDs across the EU. It does this by introducing:

- shorter settlement periods
- cash penalties and other deterrents for settlement fails
- strict organisational, conduct of business and prudential requirements for CSDs
- a passport system allowing authorised CSDs to provide their services across the EU
- increased prudential and supervisory requirements for CSDs and other institutions providing banking services that support securities settlement
- increased cooperation requirements for authorities across Member States with respect to CSDs providing their services in relation to financial instruments constituted under the law of a Member State other than that of their authorisation and to CSDs establishing a branch in another Member State.

Thus, CSDR plays a pivotal role in the post-trade harmonisation efforts in the EU, enhancing the legal and operational conditions in particular for cross-border settlement in the Union, while promoting cross-border competition within the single market. There have been diverging interpretations and application of the requirements related to cross-border activity. The Commission expects to be able to assess if there has been any evolution in the provision of CSDR core services on a cross-border basis and whether the objective of improving this activity is being reached.

2. Report on the Regulation

Article 75 of CSDR requires the Commission to review and prepare a general report on the Regulation and submit it to the European Parliament and the Council by 19

[1] Regulation (EU) 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) 236/2012, OJ L 257, 28.8.2014.

September 2019. However, a comprehensive review of CSDR is not possible at this point in time considering that some CSDR requirements did not apply until the entry into force of the relevant regulatory technical standards in March 2017 and that some EU CSDs were only recently authorised under CSDR.

Nevertheless, the forthcoming Commission report should consider a wide range of specific areas where targeted action may be necessary to ensure the fulfilment of the objectives of CSDR in a more proportionate, efficient and effective manner. Recent developments, in particular the pressure put on markets by the COVID-19 pandemic, have brought a lot of attention to the implementation of rules emerging from CSDR. For example, certain stakeholders argue that mandatory buy-ins would have been disproportionate as they would have heavily impacted market making and liquidity for certain asset classes (in particular the non-cleared bond market).

Furthermore, under Article 81(2c) of Regulation (EU) 2010/10 establishing a European Supervisory Authority (European Securities and Markets Authority),[2] the Commission is required, after consulting all relevant authorities and stakeholders, to conduct a comprehensive assessment of the potential supervision of third-country CSDs by ESMA exploring certain aspects, including recognition based on systemic importance, ongoing compliance, fines and periodic penalty payments.

The Commission 2021 Work Programme[3] and the 2020 Capital Markets Union action plan[4] already announce the Commission's intention to come forward with a legislative proposal to simplify CSDR and contribute to the development of a more integrated post-trading landscape in the EU. Enhanced competition among CSDs would lower the costs incurred by investors and companies in cross-border transactions and strengthen cross-border investment. The legislative proposal will also contribute to achieving an EU-rulebook in this area. Moreover, in its resolution on further development of the Capital Markets Union, the European Parliament has invited the Commission to review the settlement discipline regime under CSDR in view of the COVID-19 crisis and Brexit.[5]

In the preparation of its report on the CSDR review, the Commission objective is to consult as wide a group of stakeholders as possible. In September 2020, the Commission held a Member States' Expert Group meeting, with the participation also of the ECB and the European Securities and Markets Authority (ESMA), where the issues to be examined within the context of the CSDR review were discussed.

In addition, under Article 74 of CSDR, ESMA is required to submit a number of reports to the Commission on the implementation of the Regulation annually. A first set of reports on: (a) internalised settlement and (b) the cross-border provision of services by CSDs and the handling of applications to provide notary and central maintenance services on a cross-border basis, were submitted to the Commission on 5 November 2020. Given the lack of available and meaningful data until a sufficient number of CSDs was authorised, which was considered to have been reached in 2020, no reports were submitted to the Commission before that point in time. Input from the ESMA reports will

[2] Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Commission Work Programme 2021 - A Union of vitality in a world of fragility", COM (2020) 290 final.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Capital Markets Union for people and businesses-new action plan", COM (2020) 590 final.

[5] European Parliament resolution of 8 October 2020 on further development of the Capital Markets Union (CMU): improving access to capital market finance, in particular by SMEs, and further enabling retail investor participation (2020/2036(INI)), para. 21.

also feed into the forthcoming Commission report.

3. Responding to this consultation

The purpose of this document is to consult all stakeholders on their views and experiences in the implementation of CSDR to date. The responses to this consultation will provide important guidance to the Commission services in preparing their final report.

Responses to this consultation are expected to be of most use where issues raised in response to the questions are supported with **quantitative data or detailed narrative**, and accompanied by **specific suggestions for solutions** to address them. Such suggestions may relate to either the Regulation or to relevant delegated and implementing acts. Supplementary questions providing for free text responses may appear depending on the response to a multiple choice question.

All interested stakeholders are invited to respond to the questions set out below; please note that some questions indicate that feedback is sought only from specific types of stakeholders.

As mentioned above, it is acknowledged that certain core requirements and procedures provided for under CSDR are yet to be implemented. In particular, at this stage the settlement discipline regime is not yet in force. Nonetheless, the Commission services welcome the views of stakeholders as to any identified issues with respect to the implementation of upcoming requirements. Recent developments in the market due to the COVID-19 crisis may also be considered in the overall assessment.

CONSULTATION QUESTIONS

1. CSD AUTHORISATION & REVIEW AND EVALUATION PROCESSES

CSDs are subject to authorisation and supervision by the competent authorities of their home Member State which examine how CSDs operate on a daily basis, carry out regular reviews and take appropriate action when necessary.

Under Articles 16 and 54 of CSDR, CSDs should obtain an authorisation to provide core CSD services as well as non-banking and banking-type ancillary services. Article 69(4) however allows CSDs authorised under national law prior to the adoption of CSDR to continue operating under such national law until they have been authorised under the new CSDR rules.

As of August 2020, 22 out of 30 existing EU[6] CSDs[7] are authorised under Articles 16 and/or 54 CSDR. ESMA's register of EU CSDs shows that the time to complete the authorisation process varies significantly and that 7 existing EU CSDs[8] have not yet been authorised under CSDR, while one CSD has been authorised under Article 16 of CSDR, but not yet under Article 54 of CSDR (i.e. for banking-type ancillary services). The size and complexity of CSDs and the different services they offer, as well as their initial level of compliance with primary and secondary legislation at the time of its adoption, may explain, at least partially, such differences. Furthermore, there is also anecdotal evidence from some stakeholders that the administrative burden of the authorisation process under CSDR, or as applied by some NCAs, can act as a barrier to new market entrants, thereby limiting competition. Similar feedback suggests that the authorisation process might lack
proportionality in circumstances where not all requirements are relevant to the activity envisaged by the applicant.

Once a CSD has been authorised, CSDR requires national competent authorities (NCAs) to review CSD's compliance with rules emerging from the Regulation and to evaluate risks to which a CSD is or might be exposed, as well as risks it might create. This review and evaluation must be done at least on an annual basis. Its depth and frequency is to be established by NCAs taking into consideration the size, nature and systemic importance of the CSD under supervision. The detail of the information to be provided on an annual basis by CSDs to NCAs is set forth in Commission Delegated Regulation (EU) 2017/392.

Looking forward, the lessons learnt from the way the authorisation procedures have run should also be useful for the CSDs' annual review and evaluation by their competent authorities. It has been argued that annual reviews should be integrated in NCAs' supervisory activities in such a way that they bring added value, suit their risk-based supervisory approach and ensure supervisory convergence at Union level.

[6] This should be read as 'EEA' given that CSDR has been incorporated into the EEA Agreement as of 1 January 2020.
[7] Excluding CSDs managed by Central Banks (and other Member States' national bodies performing similar functions or other public bodies charged with or intervening in the management of public debt in the Union) which are exempted from the authorisation requirements under Article 1(4) of CSDR.
[8] CSDR applies in the EEA EFTA States since 1 January 2020 following the incorporation of CSDR into the EEA Agreement. (a CSD from an EEA EFTA State has not been authorised under CSDR either)

Question 1. Given the length of time it has taken, and is still taking in some instances, to authorise CSDs under CSDR, do you consider that the application process would benefit from some refinement and/or clarification in the Regulation or the relevant delegated acts?

- Yes, some aspects of CSDR or the relevant delegated acts would merit clarification, although no legislative or regulatory amendment would be required.
-Yes, the CSDs authorisation process should be amended to be made more efficient.
- No, the length and complexity of the authorisation process reflects the complexity of CSDs' businesses.
- No, most of the CSDs in the Union have already been authorised under CSDR, there is no case for amending the authorisation process.
-Other

Question 1.1 Please explain your answer to question 1, providing where possible quantitative evidence and/or examples. [Insert text box]

ECSDA Members believe that the authorisation process under CSDR may be improved through convergence across National Competent Authorities (NCAs) in what concerns the requirements of the authorisation process. This lack of legal certainty led to time-intensive changes in implementation of new requirements, causing delays. Diverging interpretations by NCAs of Level 1 and Level 2 rules also led to duplication of implementations costs by CSDs. ECSDA Members note that this convergence does not imply any need in amending level 1 or 2 text. Rather, ECSDA Members seek further clarification and further cross-border alignment of authorities. In addition, the uncertainty related to the implementation of the requirements outlined in the authorisation process may affect the requirements of the Review & Evaluation (R&E) process, as described in our responses to questions 3 and 3.1.

We believe that in some cases the process may also take a long time, due to the complexity of the CSDs' businesses, the high level of requirements of the CSD Regulation. Furthermore, in some markets additional local considerations need to be considered, e.g. discussions on the creation of a CCP that may also impact the CSD.

Question 2. Should an end date be introduced to the grandfathering clause of CSDR?

- Yes
- No
- Don't know / no opinion

Question 2.1. Please explain your answer to Question 2, providing where possible examples. [Insert text box]. If you answered "yes", please also indicate what the end date for the grandfathering clause should be.

An end-date cannot be contemplated without serious disruptions to the market.

It is also relevant to mention that CSDR was not included in the EEA Agreement before 1 January 2020. For CSDs from EEA-countries, the deadline for application was 30 June 2020. For those CSDs, time is needed for the authorisation process in line with what has been the case for EU CSDs.

Question 3. Concerning the annual review process, should its frequency be amended?

- Yes
- No
- Don't know / no opinion

Question 3.1 If you responded yes to question 3, what should be the frequency of such reviews?

- Once every two years
- Once every three years
- At the discretion of NCAs

Question 3.1. Please explain your answer to Question 3, providing where possible quantitative evidence and/or examples. [Insert text box]

The Review and Evaluation (R&E) is a yearly process by which NCAs need to review and evaluate any significant changes which have been made since the initial CSDR filing or the previous R&E. ECSDA Members noted that some CSDs are subject to a true review, limited to what is outlined in the CSDR, whereas other experience a review that is similar to a new (re)authorisation process.

This gives rise to different expectations amongst NCAs. As a result:
1. It creates important recurrent costs for both CSDs and NCAs,
2. It is also a duplication of work with the ongoing supervision, and
3. This increases fragmentation in the industry.

Hence, we would suggest to:

1. **Clarify the objective to ensure that a similar process applies to all CSDs:** The R&E process has not been designed to be a re-authorisation process.

2. **Review the frequency:** The R&E is a yearly exercise with a fixed reporting date. This creates duplication with the ongoing prudential supervision and, in our view, does not create sufficient added value. ECSDA Members note, in order to avail of this duplication process, two options can be envisaged :
   - an R&E which is embedded in the ongoing supervisory tasks and monitoring, similar to what exists in the banking world, could be an option to explore to the benefit for both CSDs and NCAs; or
   - a dedicated R&E process which is on a recurrent three-year basis.

3. **Reconsider the content:** See our responses to question 4.3. The content of the R&E process should be similar for all CSDs and should be streamlined so that it does not repeat the entire authorisation process; Articles 41 and 42 RTS provide the guidelines to streamline the R&E process, as described in our responses to questions 4.1, 4.2 and 4.3.

   ECSDA Members note that defining the R&E evaluation process should not be left at the discretion of NCAs. Otherwise, this will not foster supervisory convergence.

Articles 41 and 42 of Commission Delegated Regulation (EU) 2017/392 prescribe the information and the statistical data that CSDs should provide to NCAs on an annual basis.

Question 4.1 Do you consider this information and statistical data to be relevant for the review and evaluation process described in Article 22 of CSDR?

- Yes, all information and statistical data are relevant.
- No, not all information and statistical data should be required to be provided on an annual basis.
- Don't know / no opinion

Question 4.2 Do you consider these requirements to be proportionate?

- Yes, all information and statistical data must be provided on an annual basis.
- No, not all information and statistical data should be required to be provided on an annual basis.
- Don't know / no opinion

Question 4.3. Please explain your answers to Questions 4.1 and 4.2, providing where possible quantitative evidence and/or examples. If you answered "no" to any of them or to both, please also specify which information and/or statistical data are not relevant or could be provided on a less frequent basis. [Insert text box]

With regards to periodical reporting under Article 41 RTS, ECSDA Members would like to suggest reviewing the list of documents which needs to be included in the R&E. One example is the need for a CSD to provide information concerning identified infringements, Article 41 (q) RTS. This requirement could be amended. If not, this Article is at risk of contradicting fundamental principles and may create duplication of all risk and audit reports authorities received in this regard.

Concerning statistical data under Article 42 RTS, ECSDA Members believe that there is a need for statistical data to be finetuned, as some of the requested data needs to be sourced externally by CSDs. This data is only relevant for R&E, i.e. they are not requested during the authorisation. This may result in duplication and at times even inaccurate or obsolete information exchanges between the CSD and its NCAs. ECSDA Members note that the demands to provide information and statistical data have grown exponentially and have led to a significant increase in costs for CSDs. ECSDA Members note that in order to mitigate it, CSDs it would be greatly appreciated that the authorities reflect how the requests by NCAs and European authorities can be made more clear, consistent and providing for the time to respond. Furthermore, as CSDs are often confronted by parallel requests from many authorities, and it may be relevant to see how they can be streamlined.

Under Article 42.1 (c) RTS, the nominal value of securities denominated in units foresees reporting on 'total nominal value of securities recorded in securities accounts centrally and not centrally maintained in each securities settlement system operated by the CSD'. For securities denominated in units, there is not necessarily a known nominal price available in the market.

This is either not available at all or not publicly disclosed. In this category, we can find shares, warrants, funds or even certain debt denominated in units. Securities are traded in number of units and are recorded as such in the CSD systems. Therefore, reporting nominal value for this type of securities generates a fiction vs the standard use in the market. As possible alternatives, we consider providing a report with 'zero' value or number of units which are not fully aligned with the requirement.

In addition, we would recommend removing from the list of statistical data the mean, median, and

mode for the length of time taken to remedy the error, identified according to Article 65(2). This is suggested considering that the provision of the data requires a complex computation procedure.

Question 5. Are there specific aspects of the review and evaluation process, other than its frequency and the content of the information and statistical data to be provided by CSDs, that should be examined in the CSDR review? [Insert text box]

ECSDA Members note that the definition for 'substantial change' has not been interpreted in the same manner among NCAs under Article 16.4 CSDR, regarding notification of substantial changes. Not every change in a CSD should qualify as a 'substantial' change. It is worth noting that some divergence in the wording of different language versions on CSDR does not help the uniform application of this concept (e.g. English vs. Spanish version). This type of misalignment requires an exercise of interpretation, where the possibilities of diverging outcomes – and more burdensome consequences – arise. This lack of legal certainty is also stemming the efficiency of the processes for CSDs. Some ECSDA Members are forced to take the most prudent approach in interpreting 'substantial change', and forced to interpret this definition as 'any change'. This implies a significant administrative burden both for the CSDs and the competent authorities, which may ultimately hinder the supervisory activities and may lead to an unlevel playing field.

In addition, for T2S-in CSDs, there may be a need to streamline the reporting needs between NCBs and the Eurosystem with the ones between CSDs and NCBs. We could suggest, for example, to develop a common procedure on what information to be sent to the Eurosystem and at which point, in parallel to the ongoing supervisory process.

Question 6. Do you think that the cooperation among all authorities (NCAs and Relevant Authorities) involved in the authorisation, review and evaluation of CSDs could be enhanced (e.g. through colleges)?

- Yes
- No
- Don't know / no opinion

Question 6.1 Please explain your answer to Question 6 providing, where possible, quantitative evidence and/or examples. [Insert text box]

ECSDA wishes to express the need to foster supervisory convergence to ensure consistent and efficient (i.e. non-duplicative) supervision. Notably, ESMA and EBA have a role to play in furthering convergence. That being said, the national supervisors' understanding of the practical operations of the entities they supervise and the role that they play are essential.

We believe that an enhanced cooperation among the authorities could improve the authorisation, review and evaluation procedures of CSDs. In this context, ESMA, ECB and EBA could use the tools they have at their disposal to further supervisory convergence, for example, the peer review can be a way of increasing cooperation among supervisory authorities, as it supports the information sharing.

We believe that supervisory colleges may introduce additional complexity without fully addressing the need for convergence.

On the supervisory co-operation arrangements, we believe this to be more acute in the context of cross-border service provision. Please see our feedback provided to the other questions in this section.

Question 7: How do you think ESMA's role could be enhanced in order to ensure supervisory convergence in the supervision of CSDs (for example with possible further empowerments for regulatory technical standards and/or guidelines, or an enhanced role in supervisory colleges, or direct supervisory responsibilities)?

1. **We are in favour of increasing convergence through targeted amendments to level 2 and/or Q&A to be proposed by ESMA:**

- **CSDR ESMA RTS 2017/392, Article 70** describes the operational risk-management system and framework which a CSD needs to have in place. Paragraphs 3 and 6 describe the operational reliability objectives which a CSD needs to define, document and report on. ECSDA Members appreciate that the Eurosystem has provided its interpretation on (1) what constitutes the criteria to determine the operational reliability of a CSD and (2) how such needs to be presented to the Participants. We can observe, however, that the Eurosystem interpretation does not seem to be applied evenly and thus gives rise to an unequal level playing field between CSDs.

- **CSDR ESMA RTS 2017/392, Article 65 (Problems related to reconciliation):** There is an opportunity to clarify this article which was identified in the context of a T2S incident end of May 2020, in order to better reflect the policy intention in the provision. CSDR proposed a remediation action in case of creation or deletion of securities that would impact the markets and for which the reasons are not identified within 24 hours, i.e. suspension of settlement by the CSD. The policy intention is to support the markets in such a scenario and avoid further impact on the markets, the issuer and the holders of securities. However, the condition for the application of this remediation action should be strictly met (i.e. when the suspension will help solve the problems and mitigate risks related to creation or deletion of securities). The text would gain from reflecting that suspension of settlement is an ultimate measure (not the only one). This measure should be dedicated to situations where there is creation or deletion of securities with unknown cause, and where alternative solutions with less impact on the markets are not available or have not been identified. Materiality thresholds might also be considered to reflect that suspension of settlement is meant to be a last resort scenario.

- **Legal Entity Identification (LEI):** CSDs need to receive a valid LEI from the issuer before being able to process its issuance. It could be made clearer, however, that CSDs have no responsibility when it comes to the issuer renewing its LEI (i.e. same obligation as trading venues) and cannot lead to the removal of securities from the SSS (although the issuer will not be allowed to issue new securities without a valid LEI).

- **Settlement Discipline Regime (penalties):** Unless ESMA would be asked to provide a central single database allowing all stakeholders to derive all necessary information from one official source it would be helpful to have a formal statement from ESMA on the usage of the ESMA databases to determine which securities are in the scope of the penalty regime. The current assumption, on which basis all CSDs are proceeding, is that the scope relates to 'All ISINs included in FIRDS database (MIF scope) (minus) All ISINs included in SSR (Short Selling database)'. While this assumption has never been officially approved by ESMA (no Q&A), it follows ESMA guidance that we had during bilateral discussions (see also our proposal under Q34).

– **To add the possibility of cash collateral in the list of High-Quality Liquid Assets according to RTS 2017/390, Article 9 et seqq.**: Although cash is *de facto* accepted as collateral today, this type of asset is not specifically mentioned in the legal text. For legal certainty reasons and to avoid undue debate, this omission should be corrected.

2. We see benefit in clarifying the interaction between CSDR and other financial legislation / global standards which impacts directly or indirectly the CSD and its regulatory regime.

- **Regarding CPMI-IOSCO:** Apart from obtaining and maintaining its CSD licence, a CSD will typically be requested by authorities to demonstrate compliance with the CPMI-IOSCO principles.

  CSDR, however, already reflects and integrates those principles. In the report on the implementation of CPMI-IOSCO Principles (p.24), CSDR is mentioned as a way of implementing the Principles with regard to EU CSDs by the European Union. There should be clarity that there is no further need in additional compliance with CPMI-IOSCO Principles, as soon as the CSD has obtained a licence under CSDR. This will avoid CSDs having to duplicate the demonstration of compliance with PFMI with various authorities, while it should be sufficient to demonstrate compliance with CSDR (once).

- **For Markets in Financial Instruments Package (MiFID/R):** MiFID generally excludes CSDs from its scope, and CSDR does foresee which MIFID level 1 requirements do not apply to CSDs. We have identified some areas of overlap where compliance is required under MiFID for elements which are also governed by CSDR and for which there is any inconsistency between the requirements of MiFID versus CSDR. Areas linked to, for example, management of conflict of interest or recordkeeping, are meant to be governed by CSDR and hence requirements under MiFID should not be imposed on CSDs. A better mapping between the two texts should be performed to identify and address all overlaps.

- **Interaction between Annex B and C ancillary services:** (i.e. non-banking type ancillary services that do not entail credit or liquidity risks versus banking-type ancillary services that do entail such risks). Non-banking licensed CSDs may wish to provide services from Section B through the set-up of low-risk and very specific 'payment facilitation activities'. As long as such set-up would not result in the creation of credit or liquidity risks which give rise to the need of obtaining an additional authorisation, these should not be deemed to fall in the remits of Section C, merely because there is cash involved. Some of the services which non-banking CSDs wish to develop to service small issuers would fall in this scenario when these are strictly pursued as intended under CSDR, i.e. to support the processing of corporate actions, including tax, general meetings and information services.

- **Regarding Capital Requirements Directive Package (CRR) and (CRD):** In order to avoid undue discussion with NCAs and to the benefit also of consistency in EU legislation, we believe further clarity could be shed on the interaction between CRR/CRD and CSDR which is particularly important for CSD groups which include one or more entities with a banking license. If there is an entity in a group of CSDs having a banking license, CRD may at least indirectly affect the CSDs without a banking license. This is due to the application of CRD requirements at the consolidated level through the holding company. When applying banking requirements at the consolidated level, more consideration should be given to the potential impact of CSDs on the banking entity's risk profile. Requirements should not automatically be applied to the CSD entities, merely because they are important for the group. Nevertheless, should it be necessary to apply the banking requirements to the CSDs, more consideration should be given to their CSDR compliance. On topics covered both by CRD and CSDR (e.g. outsourcing requirements), it should be sufficient for the

parent company to ensure that CSDs in a group with an entity having a banking licence comply with CSDR without having regard to e.g. the EBA Guidelines on outsourcing for those CSDs. As a result, for non-banking CSDs in such a group, the CSDR requirements should supersede over the (indirect) ones in banking legislation (when the CSD and its services are of relevance).

- **With regard to Bank Recovery and Resolution Directive (BRRD):** In order to avoid undue discussion with NCAs and to the benefit also of consistency in EU legislation, we believe further clarity could be shed on the interaction between BRRD (requiring a recovery plan) and CSDR (requiring a wind-down plan) which is particularly important for CSD groups which include one or more entities with a banking license. We note that a similar approach exists for CCPs which are governed by EMIR: as an exception, BRRD contains a specific regime of resolution for CCPs having a credit institution authorisation. While CSDs without a banking license should be subject to CSDR requirements only, considering that CSDR includes a specific CSD regime on such matters.

  ECSDA Members would like to note that, even if ESMA were to be given an enhanced role, conversion of NCAs interpretation, supervision and application of the relevant law is to be desired.

2. CROSS-BORDER PROVISION OF SERVICES IN THE EU

A core objective of CSDR is the creation of a single market for CSDs. CSDR provides important opportunities for cross-border activities by CSDs within the Union as it grants CSDs authorised in one Member State with a "passport" to provide their services in the EU without the need for further authorisation. This means also that CSD groups should be able to consolidate certain aspects of their operations in a much more efficient way. When a CSD provides its services in a Member State other than where it is established, the competent authority of the home Member State is responsible for the supervision of that CSD.

The procedure through which a CSD authorised in an EU Member State can 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 is set out in Article 23(3) to 23(7) of CSDR and is based on the cooperation of the CSD's home Member State competent authority with the host Member State competent authority. In that case, the home Member State competent authority bears the primary responsibility to determine the adequacy of the administrative structure and the financial situation of the CSD wishing to provide its services in the host Member State.

Despite the fact that most of the applying CSDs have been able to obtain a “passport” to offer notary and central maintenance services in one or several other Member States, anecdotal information from stakeholders has indicated that this process has been significantly more burdensome than previously thought. This, in turn, could potentially lead to a reduction in the level of cross-border activity, limiting potential efficiency gains and, potentially, competition. This may be due to differing interpretations of CSDR’s requirements related to the provision of services in another Member State, but could also arise from the requirements themselves. Challenges mentioned include, but are not necessarily limited to, the role of the host NCA in granting the passport and supervision cooperation among NCAs, the determination of the law applicable to the issuance and the

assessment of the measures the CSD intends to take to allow its users to comply with the national law under which the securities are constituted.

Question 8. Question for issuers - One of the main objectives of CSDR is to improve competition between CSDs so as to enable market participants a choice of provider and reduce reliance on any one infrastructure provider. In your view, has competition in the provision of CSD services increased or improved in your country of establishment in recent years?

- Yes
- No
- Don't know / no opinion

Question 8.1: Please explain your answer to Question 8, providing where possible quantitative evidence and/or concrete examples. [Insert text box]. Please indicate where possible the impact of CSDR on: (a) the number of CSDs active in the market; (b) the quality of the services provided; (c) the cost of the services provided.

[N/A]

Question 9. Question for issuers/CSDs – are there aspects of CSDR that would merit clarification in order to improve the provision of notary/issuance, central maintenance and settlement services across the borders within the Union?

- Yes
- No
- Don't know / no opinion

Question 9.1: Please explain your answer to Question 9, providing where possible quantitative evidence and/or concrete examples.

CSDR provides a framework for the free provision of CSD services, as well as the free issuance of securities, in any EU / EEA Member State. Nevertheless, the rules in CSDR Article 23 – together with divergent application by National Competent Authorities (NCAs) of Article 23 and the closely related Article 49.1 list of relevant provisions – have reduced the possibility for CSDs to offer services as Issuer CSDs for instruments issued under the law of another Member State.

In this context, we would also like to highlight the considerations raised in the ESMA Report on Cross-Border Services (paragraph 47): Effective competition between CSDs *[ed. and improvement of provision of core CSD services across the borders within the EU]* is also dependent on the level of harmonisation of the legal environment. In this respect, the civil law requirements behind the technical processes remain fragmented.

Below, we outline more specifically the areas that would benefit from improvement, convergence and/or clarification to improve the provision of CSD services across the borders.

1) Decrease the burden that leads to the creation of a barrier to cross-border issuance.

We note that Article 23 has proven to be an impediment for issuers to issue in another Member State. Articles 23 and 49, need to be read jointly, as the additional burden resulting from these articles for both the existing and the new issuers led to restricting the intra-EU issuer mobility for new issuance.

Our recommendation is that the list of key relevant provisions in Article 49(3) is made more transparent and simpler, by specifying exactly the provisions that foreign CSDs must comply with under local law. ECSDA Members note that Articles 23 and 49 have reduced the possibility for CSDs

to offer services, as Issuer CSDs for instruments issued under the law of another Member State. Furthermore, the passport itself should have the intended purpose of providing the possibility for CSDs which wish to provide all core services, particularly issuance, in the host Member State.

2) ***Reduce the scope of passporting to shares only.***

The provisions in force should be improved further by limiting the scope of application of the passporting regime to shares. It would remove the barrier for the issuance of debt securities, which was not existing prior to the CSDR and would greatly simplify the whole process of determination of the relevant law for the purposes of Article 23. It should also be ensured that only one law and, therefore, only one Host Member State would be brought into the process. Please refer to our earlier exchanges on the matter. Else, we would be pleased to share our views on the matter again.

3) ***Provide additional clarifications ensuring convergence in handling of applications among NCAs.***

ECSDA members have observed some divergence in the handling of applications by NCAs. Furthering convergence and clear guidance across the EU would be beneficial.

In this context, we also find relevant the points raised in the above-mentioned ESMA Report on Cross-Border Services (paragraph 69):

- Clarifications to Article 23 of CSDR have been made so far in the form of Level 3 provisions which are not legally binding (existing ESMA CSDR Q&As and new Article 23-related issues should be 'upgraded' to Level 2 or Level 1 measures);
- Clarifications are required as to the identification of the law referred to in Article 23(2) of CSDR;
- Clarifications are needed in respect of the measures CSDs have to take to allow their users to comply with host Member State law requirements.

4) ***Clarify the meaning of cross-border provision of CSD services.***

Under Article 23(2) CSDR, the interpretation of cross-border provision of services is diverging from other pieces of EU legislation, such as MiFID, CRR, CRD. While in these Directives and Regulation the provision of cross-border services is defined by a strategic business choice of the relevant entities to perform and provide services in another jurisdiction, in CSDR this provision of cross-border services seems to be defined by CSDs having securities constituted under the law of another Member State. (In that sense, it is less for a CSD and rather for an issuer to make this decision).

Although a service may be considered as provided in another Member State under Article 23 (in this case, accepting securities from an issuer in another Member State under Article 49) it may be worth reconsidering what actually constitutes the provision of notary service/central maintenance in another Member State. And if, when a CSD provides the service without leaving its jurisdiction, this truly constitutes a provision of service in another Member State for a CSD when it provides the service without leaving its jurisdiction. The current legal uncertainty on what constitutes a cross-border service makes it difficult to determine the legal requirements against which the compliance must be ensured when a security is issued/primarily deposited in a CSD of another jurisdiction. In our view, the real cross-border service would be the one that requires the authorisation for its provision in another Member State. It is a legal fiction to consider the provision of notary and central maintenance services as cross-border service provisions, without the establishment of a branch. According to the industry evidence, the CSDR notary and central maintenance services cannot be provided but in combination with settlement services by CSD. Hence, we are speaking about the cases where that would be a combination of 1. Establishing a settlement system SSS under the laws of another jurisdiction and 2. Proving either notary service for foreign securities (under Article 49) or the central securities account maintenance service. As the provision of notary and central maintenance for securities issued in another Member State certainly does not alter the

definition of the settlement location in terms of jurisdictions, the passporting requirement should be deemed relevant when both 1. settlement and 2. either notary or central maintenance are provided in another jurisdiction (i.e. under the legal framework of this other jurisdiction).

Our recommendation is to reconsider CSDR provisions on passporting in light of the above.

5) ***Manage the need for information from NCAs separately.***

The right of the host Member State NCA to object, in Article 23(6), and the resulting need for information, has been designed for the issuer CSD passport. We believe that such right to object is not justified for issuer CSD passports, while the need for information of the host Member State should be covered separately from Article 23. The host country's appetite for reporting and information should not become the alleged reason for the non-objection process and should be addressed separately. Please find below a number of issues pointed out by ECSDA members as to be the most relevant and require further clarification.

- When applying Article 23 for the provision of notary and central maintenance services in another Member State, in general, NCAs would be keen to request more information and data than the ones required by European legislation and supervisors, and that creates an unjustified additional burden.

- From our experience, NCAs would be keen to request to be more engaged in the supervision of requesting CSD than what is expected under the CSDR provisions (Article 24) and that would create an additional burden.

6) ***Clarify the passporting for non-core CSD banking services.***

The CSDR does not require the passport for other than the cases explicitly specified in Article 23. Some NCAs, however, wish to request the passporting under CRR and CRD 4 for the CSD ancillary banking services in addition. This is not foreseen in the CSDR and would create an additional burden.

Question 10. Question for CSDs – have you encountered any particular difficulty in the process of obtaining the CSDR "passport" in one or several Member States different to the one of your place of establishment?

- Yes
- No
- Don't know / no opinion

Question 10.1: If you answered "yes" to Question 10, please explain your answer, providing where possible quantitative evidence and/or concrete examples.

The main difficulty encountered by CSDs is the length of time to obtain the green light for applications and the administrative burden.

CSDR has unintentionally introduced barriers in areas relating to cross-border service offering by CSDs, resulting in complex and costly analyses and delay in passport process for services that have been offered by a CSD for decades (typically on debt instruments). Level 2 legislation aggravated this and included the request for exchange of information and formal supervisory co-operation arrangements whenever the cross-border activity is deemed significant in the host Member State. While such activity has relevance in another Member State for supervisory purposes, it does not mean that the service is offered abroad or that the activity is being performed

abroad. From our point of view, a CSD that settles instructions in its own system and its own country cannot be seen as providing services abroad, except where it has established a branch. The information that is relevant for the supervisory work of competent authorities needs to be determined through the arrangements on the exchange of information rather than passports.

ECSDA Members have encountered the following difficulties during the process of obtaining the CSDR passport:

- Supplementary reporting requirements;
- Divergent requirements from different NCAs relating to Article 23 and Article 49;
- More information and data to support the application in comparison to what is requested by European legislation and Supervisors;
- Disproportionate direct involvement in the supervision on the requesting CSD;
- Additional demands of passporting under CRR and CRD 4 disregarding the principles of CSDR;
- Impossibility for CSDs to allow issuers to issue securities according to the law of an EU Member State other than the one where securities are centrally held, unless they have received authorisation from that Member State. The same is true for third-country CSDs recognised under Article 25 CSDR.

In addition to the above-mentioned issues coming from level 1 requirements, there are many obstacles in obtaining a passport to provide services in another Member State that may also result from the level 2 and level 3 legislation. Furthermore, the European authorities should be attentive to cases of adaptation of the national law in a restrictive way, leading to an unlevelled playing field, with requirements favouring domestic CSDs. These include different tax treatment of securities issued via national CSDs and foreign EEA CSDs, restrictions to the holding of the securities issued via a foreign CSD, additional reporting for non-domestic CSDs (not required under the CSDR) and the requirement to open a CSD branch as opposed to a passport regime.

Otherwise, these challenges do not prevent CSDs from applying and do not hinder the application process itself, as the way to apply is open. Challenges are mainly related to the responses to CSD applications, the burdens mentioned above, the timing of such responses which exclusively depends on each single NCA and the costs of legal due diligence on the Article 49(3) list of key relevant provisions of the relevant Member State.

Question 11. Question for CSDs – in how many Member States do you currently serve issuers by making use of your CSDR "passport"?

We invite the European Commission to consult the answers of individual CSDs.

Question 12. Question for CSDs – are there any obstacles in the provision of services to issuers in a Member State for which you have obtained the CSDR "passport" that actually prevent you from providing such services?

- Yes
- No
- Don't know / no opinion

Question 12.1: Please explain your answer to Question 12, providing where possible quantitative evidence and/or concrete examples.

The passporting process has not prevented CSDs from offering issuer-CSD services in the country

of establishment of the CSD for securities constituted under the laws of another Member State. It has, however, slowed down their ambitions. The remaining uncertainty will continue to generate administrative and legal costs and complexity.

With regard to the suggestions to limit the scope of passporting to equities: we believe that the initial intention of the policy-makers was to provide a new right/freedom to the issuers and to set up the scope of the passporting requirement to cover equities only (as issuers already benefitted from such freedom for debt instruments). Although later, the scope has been extended without a thorough impact assessment. It resulted in an artificial barrier for issuance of other instruments (such as bonds) that already benefitted from the freedom of issuance prior to the CSDR**. The artificial barrier for other instruments than shares should be removed and we, therefore, support that the scope of the passporting requirements be limited to equities.**

Please also refer to our answer to question 10.1.

Question 13. Do you think that the cooperation amongst NCAs would be improved if colleges were established for [or cooperative arrangements were always involved in] the Article 23 process?

- Yes
- No
- Don't know / No opinion

Question 13.1: Please explain your answer to Question 13, providing where possible quantitative evidence and/or concrete examples.

We believe that there is a need to strengthen supervisory convergence. We are uncertain, however, on how that could be best achieved. In any case, ESMA and EBA have a role to play in furthering such convergence. See also our feedback provided to question 7.

We believe that issues related to article 23 could be solved with more transparency on the process and standardisation of information required by each competent authority.

The clarifications we suggest regarding Article 23 (and 24, i.e. disentangling the passporting process from the process to exchange information between NCAs) would contribute to a more straight-forward cooperation amongst NCAs. The need for information from NCAs should not be a condition to the passporting, nor should the information exchange between NCAs represent such an important administrative burden. It results from the good intention of CSDR to legislate through the same provisions the set-up of a branch, the freedom of service and the issuer CSD services. The provisions, however, include the need for the host NCA to approve the passport in all cases, thereby also creating a need for information exchange between NCAs in all cases. This results in excessive administrate burden, whereas a passport process in the EU in the context of other EU legislation usually does not involve the possibility for the host Member State to block it upfront.

Question 14: How do you think ESMA's role could be enhanced in order to ensure supervisory convergence in the supervision of CSDs that provide their services on a cross-border basis within the EU?

More convergence is needed to ensure consistent and efficient (i.e. non-duplicative) supervision or requirements. Notably, ESMA (and EBA, where relevant) have a role to play in furthering convergence. See also our answer to question 1.7 which contains suggestions to increase convergence (i) through targeted amendments, (ii) by clarifying the interaction between CSDR and other financial legislation/global standards and (iii) by streamlining the supervision process and enhancing Its overall transparency.

In addition, and specifically in the context of Article 23 CSDR, we believe that ESMA can enhance convergence amongst NCAs by:

- Clarifying the policy objectives behind the issuer CSD passporting requirements and, hence, what constitutes a cross-border service. This would also remove some of the current legal uncertainty which makes it difficult to obtain a correct legal analysis. The issuance does not take place in the Member State where the CSD passports, hence there is confusion on what applies (key provisions) and what needs to be included in such legal analysis.
- Applying passporting only to services actually offered by a CSD in another Member State than the one where it is incorporated/authorised, i.e. through a branch in another Member State.
- Disentangling the need for information exchange between NCAs from the passporting process, i.e. manage the need for information from NCAs separately.

It is important that Member States do not create overly cumbersome requirements, which would jeopardise their competitive edge and attractiveness, which would lead investors to favour common law jurisdictions with less cumbersome laws and regulations.

Please refer to the answer given to question 7 & 9.1.

3. INTERNALISED SETTLEMENT

Article 9 of CSDR provides for internalised settlement reporting, whereby a settlement "internaliser" must report to the competent authority of its place of establishment, on a quarterly basis, the aggregated volume and value of all securities transactions that it settles outside a securities settlement system (SSS). The information which is required to be included in the quarterly internalised settlement reports is specified in Commission Delegated Regulation EU 2017/391,[9] while the format of reports is outlined in Commission Implementing Regulation EU 2017/393.[10]

The first internalised settlement reports were due to the competent authorities by 12 July 2019 and contained details of transactions settled internally from 1 April 2019 to 30 June 2019.

The objective of internalised settlement reporting is to enable NCAs to monitor and identify the risks (e.g. operational, legal) associated with internalised settlement. The identification of such risks or of any trends seems to have been limited to date. Nevertheless, the reported figures show very high volumes and values, high concentration, as well as high settlement fail rates. This proves the importance of monitoring the internalised settlement activity. Data quality issues (e.g. clarification of the exact scope of the requirement, development and implementation of IT tools and systems, correct implementation of reporting formats, etc.) and the relatively short timeframe since the start of this reporting regime (Q2 2019) may have limited any such analysis of risks and/or trends.

As part of its fitness check on supervisory reporting requirements, the Commission has committed to assessing whether the reporting objectives are set correctly (relevance), whether the requirements meet the objectives (effectiveness, EU added value), whether they are consistent across the different legislative acts (coherence), and whether the costs and burden of supervisory reporting are reasonable and proportionate (efficiency). Furthermore, the Commission is aware that changes to reporting requirements may imply costs and as such the overall benefits of any amendment to an established reporting requirement should exceed its costs.

[9] Commission Delegated Regulation (EU) 2017/391 of 11 November 2016 further specifying the content of the reporting on internalised settlements, OJ L 65, 10.3.2017, p. 44–47.
[10] Commission Implementing Regulation (EU) 2017/393 of 11 November 2016 laying down implementing technical standards with regard to the templates and procedures for the reporting and transmission of information on internalised settlements in accordance with Regulation (EU) 909/2014 of the European Parliament and of the Council, OJ L 65, 10.3.2017, p. 116–144.

Question 15. Article 2 of Commission Delegated Regulation (EU) 2017/391 establishes the data which internalised settlement reports should contain. Do you consider this data meets the objectives of relevance, effectiveness, EU added value, coherence and efficiency?

- Yes
- No
- Don't know / no opinion

Question 15.1: Please explain your answer to Question 15, providing where possible quantitative evidence and/or concrete examples.

We note the large volumes of settlement internalisation reported in the ESMA report on CSDR Internalised Settlement dated 5 November 2020. We support the findings of the ESMA report and believe that they deserve deeper consideration of authorities.

We also support continued monitoring of the settlement internalisation volumes. We believe that the authorities should be particularly attentive to the essential protections that are solely provided to the market participants thanks to the complete compliance of CSD operators with the entirety of CSDR, including all of its parts such as the settlement discipline (SDR) requirements. Further settlement internalisation does not result in the same level of legal certainty and protection. We believe that the risks of settlement internalisation should be continuously monitored, and measures should be taken by the authorities (e.g. a reflection on whether the SDR measures should apply to internalised settlement may be relevant).

By keeping large volumes of settlement internalised, the changes in beneficial ownership are not communicated to the CSDs. Not only does this create reconciliation problems down the chain it also creates problems from a tax law perspective due to the lack of legal certainty of the owner/beneficial owner.

Question 15.2: If you are an entity falling under the definition of "settlement internaliser", what have been the costs you have incurred to comply with the internalised settlement reporting regime? Where possible, please compare those costs to the volumes of your average annual activity of internalised settlement.

N/A

Question 16. Do you think that a threshold for a minimum level of settlement internalisation activity should be set for entities to be subject to the obligation to report internalised settlement?

- Yes, based on the volume of internalised settlement
- Yes, based on the value of internalised settlement
- Yes, based on other criterion
- No
- Don't know / no opinion

Question 16.1: Please explain your answer to Question 16, providing where possible quantitative evidence and/or examples. Please indicate:

- whether you consider that the introduction of such a threshold could endanger the capacity of NCAs to exercise their supervisory powers efficiently;
- the cost implications of complying or monitoring compliance with such a threshold

N/A

If you answered "yes" to Question 16, please also consider whether such a threshold should be set at national level or at Union level.

N/A

4. CSDR AND TECHNOLOGICAL INNOVATION

CSDs and providers of ancillary services increasingly explore new technologies in relation to 'traditional' assets in digital form and crypto-assets that qualify as financial instruments. Two aspects can be distinguished: on the one hand the use of new technologies to service traditional assets (in digital form) and on the other hand, services provided for crypto-assets.

While CSDR is meant to be technology-neutral, the Commission services have received feedback from various stakeholders (including following the public consultation on an EU framework for markets in crypto-assets that ended in March 2020) who argue that some of its rules create obstacles to the use of distributed ledger technology (DLT[11]) and the tokenisation of securities. However, feedback received so far by the Commission in this respect has not allowed for the full specification of those obstacles and potential solutions or proposals to address them in the framework of CSDR in order to ensure the full potential of these technological innovations with regard to the settlement of securities.

Furthermore, some of the feedback received suggests that certain definitions contained in the CSDR would require specific clarification to contextualise them in an environment where DLT is used and securities are tokenised. Some of these definitions are for example "securities account", "dematerialised form" or "settlement".

On 24 September 2020, as part of the Digital Finance Package, a Commission Proposal for a Regulation on a pilot regime on market infrastructures based on distributed ledger technology has been published.[12] Under this proposal, a CSD operating a DLT SSS would be able to benefit from certain exemptions from CSDR rules that may be difficult to apply in a DLT context (e.g. exemptions from the application of the notion of transfer of orders, securities account or cash settlement). This should help stakeholders test in practice potential solutions.

[11] According to point (1) of Article 3(1) of the Commission proposal for a Regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (COM/2020/593 final) 'distributed ledger technology' or 'DLT' means a type of technology that support the distributed recording of encrypted data.
[12] Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology, COM/2020/594 final.

Question 17. Do you consider that certain changes to the rules are necessary to facilitate the use of new technologies, such as DLT, in the framework of CSDR, while increasing the safety and improving settlement efficiency?

- Yes
- No
- The pilot regime is sufficient at this stage
- Don't know / no opinion

Question 18. Would you see any particular issue (legal, operational, technical) with applying the following requirements of the CSDR in a DLT environment? Please rate each proposal from 1 to 5.

	1 (Not a concern)	2 (Rather not a concern)	3 (Neutral)	4 (Rather a concern)	5 (Strong concern)	No opinion
1. Definition of 'central securities depository' and whether platforms can be authorised as a CSD operating a SSS which is designated under Directive 98/26/EC (Settlement Finality Directive (SFD))	**X**					
2. Definition of 'securities settlement system' and whether a blockchain/DLT platform can be qualified as a SSS under the SFD	**X**					
3. Whether and under which conditions records on a DLT platform can fulfil the functions of securities accounts and what can be qualified as credits and debits to such an account;	**X**					
4. Whether records on a DLT platform can be qualified as securities account in a CSD as required for securities traded on a venue within the meaning of Directive 2014/65/EU (MiFID II)	**X**					
5. Definition of 'book entry form' and 'dematerialised form'	**X**					
6.Definition of "settlement" which according to the CSDR means the completion of a securities transaction where it is concluded with the aim of discharging the obligations of the parties to that transaction through the transfer of cash or securities, or both; clarification of what could qualify as such a transfer of cash or securities on a DLT network/ clarification what constitutes an obligation and what would qualify as a discharge of the obligation in a DLT environment.	**X**					

7. What could constitute delivery versus payment (DVP) in a DLT network, considering that the cash leg is not processed in the network/ what could constitute delivery versus delivery (DVD) or payment versus payment (PVP) in case one of the legs of the transaction is processed in another system (e.g. a traditional system or another DLT network)	**X**					
8. What entity could qualify as a settlement internaliser, that executes transfer orders other than through an SSS	**X**					

Question 18.1 Please explain your answers to question 18 (if needed), including how the relevant rules should be modified.

In ECSDA view, CSDR level 1 is a technology-neutral legislation for CSDs to service crypto-assets considered as MiFID financial instruments. Because we do not believe that there is any particular issue in the level 1 text when using a permissioned DLT platform with a centralised validation model, all requirements listed in question 18 have, therefore, been qualified as 'not a concern'.

However, level 2 and/or level 3 clarifications would still be required to ensure legal certainty to CSDs when performing their core activities using DLT. By making those clarifications, EU authorities will contribute to the development of a secondary market for DLT transferable securities. Please find below a list of clarifications that would need to be considered:

1. Definition of CSD: The definition is technology-neutral. DLT provides for a number of governance models and can be applied in the context of a CSD. However, a CSD is by definition a legal entity. This allows the designation of liability for the operation of the DLT platform and compliance with the applicable rules (e.g. capital requirements). A platform does not as such qualify as a CSD because it is not (necessarily) a legal person. The private permissioned version of DLT with a centralised validation model allows for combining the benefits of DLT like Peer-to-Peer transactions, same version of truth, resilience and availability with the benefits of centralized governance like clear accountability, legal certainty, performance, privacy, integrity and security.

2.Definition of SSS: Definition is technology-neutral, no difficulty to apply in a DLT context.

3. Credits and debits: Confirmation needed that the data recorded on the DLT addresses of the transferor and transferee can be considered as 'credits' and 'debits' within the meaning of CSDR.

Proposal: Clarification in Recital 11 of the CSDR that for the purpose of the regulation the performance of recording of securities, crediting and debiting on accounts can be provided through any technical features including data recorded to a blockchain that can be considered as 'credits' and 'debits' within the meaning of CSDR. Alternatively, formal guidance (such as the ESMA Q&As) would be useful.

4. Records as securities account in a CSD:

A. In the context of a DLT platform, participants hold digital 'addresses' (DLT Addresses) on the

platform to which the Tokens are recorded. Whether DLT Addresses are capable of constituting "accounts" within the meaning of the CSDR would benefit from clarification. We believe a distinction will need to be made between account-based DLT and transaction-based DLT (the so-called UTXO model).
B. The DLT Addresses may be located on a distributed ledger and not in the CSD's centralised internal systems. Notwithstanding, under this structure, a CSD would be the operator/governor/gatekeeper of the DLT platform. Whether the DLT Addresses on the platform are capable of being construed as accounts "*provided and maintained by the CSD*" would benefit from clarification.

Proposal: Accounts opened with a CSD in the context of existing systems in which securities are recorded in book-entry form are technically also digital in nature and not physical accounts. It would be difficult to see why DLT Addresses would not constitute 'accounts' in the same way. Further, it is envisaged that the CSD – as operator/governor/gatekeeper of the DLT platform – would frame and regulate the rules of the platform and any account-holding requirements (including any account opening, operation and termination requirements), and would be responsible for the maintenance and security of such accounts (i.e., the DLT Addresses), and potentially also be entitled to be paid a certain fee for this. There is, therefore, a good argument that DLT Addresses on the platform are capable of being construed as accounts *"provided and maintained by the CSD"*. It would however be helpful if this view could be confirmed by the regulator.

5a. Definition of 'book-entry form': confirmation needed that the data recorded to a DLT ledger would be capable of constituting a 'book-entry' within the meaning of the CSDR.

Proposal: Clarification of Recital 11 that for the purpose of this regulation the performance of recording of securities, crediting and debiting on accounts can be provided through any technical features including blockchain. Alternatively, formal guidance (such as the ESMA Q&As) would be useful.

5b. Definition of 'dematerialised form': Tokens that exist purely in digital form on the DLT platform should be no different from the 'dematerialised securities' that are issued straight to screen in the existing systems. Tokens on a DLT platform are capable of being structured differently, but the DLT platform ought to have the same elements/features as those existing for dematerialised securities, with the sole difference residing on having issuance on a distributed system rather than on a centralised one.

6. Definition of 'settlement': When a transaction is 'validated' on a DLT platform, data is recorded to the transferor's and the transferee's DLT Addresses; that results in the 'transfer' of the token. Would this meet the requirement to have a 'delivery' of the securities (in this case, the tokens)? We believe that the term 'settlement' could be easily adapted to DLT context.

Proposal: Provided the underlying terms and conditions of the tokens and the contractual arrangement between the members on the DLT platform set out clearly that their obligations to each other would be discharged by this method of transfer, the token transfer mechanism should be capable of resulting in 'settlement' within the meaning of CSDR (subject to any national law requirements in relation to how title can be transferred on an electronic platform or register maintained by a third-party operator). It would be helpful if this view could be confirmed by the regulator/policymaker.

7. DvP considerations: DvP on a DLT network could be achieved on a single DLT network by making the cash transfers directly on the DLT ledger. These could be done through CBDCs or with asset-referenced tokens or e-money tokens (which we assume would be considered as commercial bank

money). Alternatively, cash can be processed outside the DLT network ('off-ledger') through mechanisms of interfaced settlement between the DLT network and the cash payment system. New technologies would allow interfaced settlements to occur in a 'simultaneous and irrevocable' manner if both the DLT network and the cash payment network are governed by regulated market infrastructures or central banks.

If settlement is not done in Central Bank Digital Currencies (CBDC), it is unclear how the current CSDR requirements for the provision of banking-type of ancillary services and settlement in commercial bank money would apply to asset-referenced tokens or e-money tokens which are used as settlement asset. Indeed, the settlement asset should carry as little credit or liquidity risk as possible. As it will be crucial for the development of DLT that a tokenised form of cash (CBDCs or asset-referenced tokens/e-money tokens) can be used for the DvP settlement of securities, the review of CSDR should clarify the requirements linked to DvP settlement in central bank money and commercial bank money related to cash tokens.

8. Settlement internalisers: Under the Pilot Regime proposal, DLT MTFs can obtain an exemption from Article 3 (2) of the CSDR. Consequently, they can perform CSD services (such as securities settlement) without being licensed as a CSD. Since only a duly licensed CSD can operate a SSS as designated in accordance with the SFD, the settlement system of such DLT MTF does not qualify as a SSS under the SFD. The DLT MTF, unless it is fully compliant with the CSDR, is, therefore, a settlement internaliser. We believe that the authorities should clearly state it, to prevent legal unclarity.

Question 18.2 Do you consider that any other changes need to be made, either in CSDR or the delegated acts to ensure that CSDR is technologically neutral and could enable and/or facilitate the use of DLT?

- Yes
- No
- Don't know / no opinion

Question 18.3 If yes, please indicate the provisions and make the relevant suggestions.

Question 19. Do you consider that the book-entry requirements under CSDR are compatible with crypto-assets that qualify as financial instruments?

- Yes
- No
- Don't know / no opinion

Question 19.1. Please explain your answer to question 19. [Insert text box]

Book-entry accounts are technically also digital in nature and not physical accounts, so it is difficult to imagine why DLT Addresses would not constitute accounts in the same way (assuming we talk about account-based DLT as opposed to the Unspent Transaction Output (UTXO) model.

This view is confirmed by ESMA in its Advice on ICO and crypto-assets published in January 2019. CSDR does not prescribe any particular method for the initial book-entry form recording, meaning that any technology, including DLT, could virtually be used, provided that the book-entry form is

with an authorised CSD.

Question 20. Would you see any particular issue (legal, operational, technical) with applying the current rules in a DLT environment? Please rate each proposal from 1 to 5, 1 standing for "not a concern" and 5 for "strong concern".

	1 (not a concer	2 (rather no	3 (neutral)	4 (rather a concern)	5 (strong concern	No opinion
Rules on settlement periods for the settlement of certain types of financial instruments in a SSS,	X					
Rules on measures to prevent settlement fails.	X					
Organisational requirements for CSDs	X					
Rules on outsourcing of services or activities to a third party.	X					
Rules on communication Procedures with market participants and other market	X					
Rules on the protection of securitiesof participants and those of their clients.	X					
Rules regarding the integrity of the issue and appropriate reconciliation measures	X					
Rules on cash settlement	X					
Rules on requirements for participation	X					
Rules on requirements for CSD links	X					
Rules on access between CSDs and access between a CSD and another market infrastructure	X					
Rules on legal risks, in particular as regards enforceability	X					

Question 20.1. Please explain your answers to question 20, in particular what specific problems the use of DLT raises.

In ECSDA view, CSDR level 1 is technology-neutral for CSDs to service crypto-assets considered as MiFID financial instruments. Because we do not believe there is any particular issue in the level 1 text when using a permissioned DLT platform with a centralized validation model, all requirements listed in question 20 have, therefore, been qualified as 'not a concern'.

However, level 2 and/or level 3 clarifications would still be required to ensure legal certainty to CSDs when performing their core activities using DLT. By making those clarifications, EU authorities will contribute to the development of a secondary market for DLT transferable securities. Please find below a list of clarifications that would need to be considered:

Rules on settlement periods: T+2 settlement period comes mostly from market practice (for liquidity/clearing purposes) rather than from technological limitations linked to CSDs. CSDs could operate on a T+0 with their existing technology in a similar way as DLT. We do not see why settlement periods should differ based on the technology used as this method would go against the technology-neutrality principle.

Rules on outsourcing of services or activities to a third party, Article 30 CSDR: Clarification needed regarding the circumstances in which entities involved in the validation function are to be covered by outsourcing requirements under Article 30 CSDR.

In our view, a CSD should not of be considered to be outsourcing its obligations in respect of the platform it operates, as long as a CSD is the only node able to validate a transaction on the DLT platform, the mere real-time sharing of data with the participants, and the validation of changes to that data (for example, recording any transfer of tokens on the platform) resulting in the local copies of the data structure on each participant's node being updated automatically in real-time (the so-called 'distributed record' model. This, assuming the validation and recording of transactions on the platform remains exclusively the power of the CSD. This view should be confirmed by the regulator.

As opposed to the 'distributed record' model, the 'distributed validation' model consists of the participants in the network (or a subset of them) running validator nodes that share the function of validating transfers and maintaining the ledger, in accordance with the system protocol, with controls built-in at the level of the central operator (CSD). Clarification is needed as to how the CSDR outsourcing requirements would apply to this model, and if this constitutes outsourcing of a core service.

A key drawback of the outsourcing approach is that it would not reflect practical realities. Distribution is not the same as a typical outsourcing arrangement. Outsourcing suggests the service provider is structurally subordinated to the operator, while distribution involves the operator and the other participants mutually performing a function for and to each other. The concepts and obligations under the existing regulatory framework may not naturally sit well.

Outsourcing is not allowed to prevent the exercise of supervisory and oversight functions, including on-site access to acquire any relevant information needed to fulfil those functions. It is difficult to see how this should be applied in practice. Furthermore, under the outsourcing regime, the CSD would maintain full regulatory responsibility. This emphasises that an appropriate liability framework is required to allocate liability between the system operator and the validator nodes, so as not to expose the system operator to excessive liability risk.

Rules on communication procedures with market participants and other market infrastructures
Definition of 'international open communication procedures and standards' under Article 35: it may be beneficial to have the clarification that, for example, the DLT-based real-time data-sharing with nodes would satisfy this requirement in the CSDR).

Proposal: Clarification of recital 41 that DLT-based communication methods to share information on a real-time basis would satisfy this requirement. DLT is still developing and may be seen as not being standardised in that sense. Alternatively to a recital, the regulator could produce formal guidance (such as the ESMA Q&As) in this regard.

Rules on the protection of securities of participants and of their clients: See answer to question 20.2.

Rules regarding the integrity of the issue and appropriate reconciliation measures: Reconciliation measures under Article 37 (1): Confirmation that reconciliation can be satisfied through real-time data sharing on DLT would be beneficial.
Reconciliation implies an obligation of means and results. To the extent real-time data sharing achieves this specific outcome, this requirement should be capable of being satisfied without further steps to be taken. It would be helpful if this view could be confirmed by the regulator.

Rules on cash settlement: See answer to question 18.1.
If settlement is not done in central bank money, it is unclear how the current CSDR requirements for the provision of banking-type of ancillary services and settlement in commercial bank money would apply to asset-referenced tokens or e-money tokens used as settlement asset. The settlement asset should carry as little credit or liquidity risk as possible. As it will be crucial for the development of DLT that a tokenized form of cash (CBDCs or asset-referenced tokens/e-money tokens) can be used for the DvP settlement of securities, the review of CSDR should aim to clarify the requirements linked to DvP settlement in CBDC and commercial bank money related to cash tokens.

Rules on legal risks of enforceability: Requirements are clear and should also be complied with in a DLT context.

Question 20.2 If you consider that there are legal, operational or technical issues with applying other rules regarding CSD services in a DLT environment (including other provisions of CSDR, national rules regarding CSDs implementing the EU acquis, supervisory practices, interpretation), please indicate them and explain your reasoning:

In ECSDA view, CSDR is a technology-neutral legislation, and some CSDs already experiment or use the technology in their activities. Some of the concepts described below pertain to Securities Law and, therefore, are governed by domestic rules. We do not see that the CSDR de facto prevents the use of the DLT technology. Nonetheless, we see a benefit in providing clarity and level-playing field by making clarifications either in recitals of CSDR and/or in level 2 standards.

1. Segregation under Article 38 of CSDR: The segregation requirement requires the CSD to keep records and accounts in order that it may be able to identify at any time assets that belong to a particular client, distinct from another client's assets or from the CSD's own assets. To the extent segregated records are maintained on the DLT platform to enable such identification, this requirement should be capable of being satisfied. It would however be helpful if this view could be confirmed by the regulator/policy-maker.

Clarification as to the steps a CSD would be required to take in order to satisfy segregation requirements would be beneficial. Specifically, how that requirement can be satisfied in the context of

DLT Addresses would be welcome.

Proposal: The segregation requirement leads the CSD to keep records and accounts in order to identify, at any time, the assets that belong to a particular client, distinct from another client's assets or from the CSD's own assets. To the extent segregated records are maintained on the DLT platform to enable such identification, this requirement should be capable of being satisfied. It would, however, be helpful if this view could be confirmed by the regulator/policymaker.

2. Omnibus account under Article 38 of CSDR: DLT platform allows tokens of different clients to be recorded to a single DLT Address, but each Token is also identifiable on the platform (i.e. the CSD's records) as belonging to a particular client, therefore we believe that the definition of omnibus account is also applicable in DLT context.

Clarification as to the characteristics of an 'omnibus account' in relation to DLT Addresses would be welcome.

Proposal: Some guidance can be included in the recitals or a formal guidance on the key characteristics and requirements for an omnibus account'. For instance, if the DLT platform allows tokens of different clients to be recorded to a single DLT Address, but each Token is also identifiable on the platform (i.e., the CSD's records) as belonging to a particular client, would this constitute an omnibus account within the meaning of this provision?

3. Operational reliability and resilience under Article 45 (2) of CSDR: To be clarified whether the operator of the settlement functionality of a DLT platform would have to ensure that the smart contract overlaid onto the blockchain is bug-free and sufficiently precise to achieve the purposes of that smart contract. The operator's liability for such role must be clarified as well. The DLT operator (be it a DLT SSS or a DLT MTF) should also be compliant with other relevant legislation on resilience, such as DORA.

Additionally, the same clarifications as to the application of concepts, such as book-entry form, accounts and transfer order and others, will have to be made in national rules in alignment with the EU legislation.

5. AUTHORISATION TO PROVIDE BANKING-TYPE ANCILLARY SERVICES

According to Article 54 of CSDR, the provision of banking-type ancillary services by CSDs is allowed either by themselves or through one or more limited license credit institutions, provided that some requirements are complied with in terms of risk mitigation, additional capital surcharge and cooperation of supervisors in authorising and supervising the provision of these banking services to CSD users. It seems that limited license credit institutions do not exist yet. Article 54(5) foresees an exception to conditions applying to credit institutions that offer to settle the cash payments for part of the CSD's securities settlement system, if the total value of such cash settlement through accounts opened with those credit institutions, calculated over a one-year period, is less than one per cent 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. CSDs have voiced in the past difficulties regarding cash settlement in foreign currencies. Questions in this section aim at identifying these and other potential concerns as well as possible ways forward.

Questions for CSDs

Question 21: Do you provide banking services ancillary to settlement to your participants?

- Yes
- No

[N/A]

Question 21.1 If you answered "yes" to Question 21, did you provide these services prior to the entry into force of CSDR?

- Yes
- No

[N/A]

Question 21.2 If you answered "yes" to Question 21, have you been authorised to provide those services under Articles 54 and 55 of CSDR?

- Yes
- In the process of the authorisation
- No

[N/A]

Question 21.2: If you answered "yes" to Question 21, have you been authorised to provide those services under Articles 54 and 55 of CSDR?

- Yes
- In the process of the authorisation
- No

[N/A]

Question 21.3: If you were providing banking services ancillary to settlement prior to the entry into force of CSDR and you are not providing them anymore, or you limited their provision below the threshold as defined in Article 54(5), please explain the reasoning behind your decision.

[N/A]

Question 22: Do you think that the conditions set in Article 54(3) for the provision of banking-type ancillary services by CSDs are proportionate and help cover the additional risks that these activities imply?

- Yes
- No

Question 22.1: If you answered "no" to Question 22, please elaborate further and provide quantitative evidence and/or examples.

[N/A]

Question 23: In your view, are there banking-type ancillary services that cannot be provided by CSDs under the current regime for this type of services?

Please see our answers to questions 24.1 and 24.2, as well as 28.

Question 24: Concerning settlement in foreign currencies, have you faced any particular difficulty?

- Yes
- No

Question 24.1 Please explain your answer to question 24 providing concrete examples and quantitative evidence.

Certain ECSDA Members encounter situations where issuers request to issue a new instrument in a foreign currency. In these cases, some CSDs without a banking licence and not having a possibility to access all relevant central banks face difficulties in addressing their demands. One of the reasons may be that the threshold and the percentage in Article 54(5) are too tight / unintentionally too restrictive.

ECSDA provides some examples illustrating the issues encountered below (please note that this list is not exhaustive).

- Sovereign bonds servicing: some CSDs are facing difficulties to issue domestic government bonds in foreign currencies.

Investment fund servicing: the difficulty to access currencies (and central bank money accounts in certain currencies) deter investment funds from choosing to be registered with a given CSD.

The EU legislator had foreseen in the CSDR text a compromise that would allow CSDs to settle a transaction in foreign currencies, e.g. through so-called Designated Credit Institutions. The concern

was that cluster risks would otherwise appear. The concern of the legislator is proving to materialise over the years.

No Designated Credit Institutions have seen the light of day and the lack of foreign currencies suppliers to CSDs is deeply profiling itself. The Authorities might want to consider assessing solutions to facilitate the access to foreign currencies for CSDs.

Question 24.2: If you answered yes to question 24 and based on the quantitative evidence you might have provided to support your answer, how could the settlement of transactions in a foreign currency be facilitated? Please provide concrete examples.

CSDR suggests enabling the DVP for settlement of securities transactions. This requires settlement of the cash leg to be seamless and efficient within the CSD setup. If a CSD does not have a banking licence but needs to service transactions in other currencies, this could cause an obstacle in its evolution and innovation capacity. This is also the case when a CSD requires some agility and flexibility in order to better provide its core and ancillary (non-banking type) services.

CSDs also note that the alternative routes set out in Articles 54(4) – appointing a designated credit institution – and 54(5) – exceptions where the activity runs below the thresholds established therein – have proven to be unfeasible.

ECSDA proposes the following to facilitate settlement of transactions in a foreign currency, particularly for CSDs without a banking licence (as not all CSDs face issues with cross-currency settlement):

Facilitate access to non-domestic central bank money, within the European Economic Area and third countries, in line with Articles 40(2) and 59(4)(h) of CSDR, considering the specific regulatory requirements surrounding FMI operations. As such, we suggest that the legislator enshrine the CPMI-IOSCO principle 9 on Money settlements, which is dedicated to provide a safe and liquid settlement service.

Reassess the threshold and the percentage used in Article 54(5). A proper analysis of CSDR Article 54(5) should be performed to assess the threshold based on hard evidence gathered per market. The threshold then needs to be adjusted according to the reality of each CSD market profile and used currencies, for a one-size-fits-all solution is not adaptable to medium and large markets.

Allow CSDs with a limited banking licence to be Designated Credit Institutions, providing banking-type ancillary services to other CSDs. Article 54 (4)(c) does not allow authorised CSDs to provide ancillary banking services to other CSDs, which cannot turn to CSDs holding a banking licence for solutions.

Question 25: What are the main reasons CSDs do not seek to be authorised to provide banking-type ancillary services? Please explain in particular if this is so due to obstacles created by the regulatory framework.

The reasons vary from one market to another. CSDs may be discouraged by the ecosystem of their Member States, or the high costs involved.

For CSDs without a banking licence but part of an overarching group, the main reason is the lack of economies of scale due to fragmentation and associated high costs.

Question 26: Have you made use of the option to designate a credit institution to provide banking type ancillary services to CSDs?

- Yes
- No

Question 26.1: If you answered "no" to Question 26, please explain why.

No CSD in Europe has been able to make use of this option. The CSDs that have provided these services without a special limited-purpose licence have done so under the threshold, as no credit institution that addresses the requirements exists. In our view, the requirements may be deterrent to that set-up. The CSDs and the markets would benefit from a reflection on the methodology and the process to better determine the threshold and the percentage set in Article 54 (5) for these to be meaningful and practical. Please also see our answers to the questions above, e.g. Q 24.2.

Questions for all stakeholders:

Question 27: In your view, are the thresholds foreseen in Article 54(5) set at an adequate level?

- Yes
- No
- Don't know / no opinion

Question 27.1: Please explain your answer to question 27, providing where possible concrete examples. If you answered "no", please provide where possible quantitative evidence (including any suggestion on different threshold levels).

ECSDA recommends comprehensively reassessing the threshold and the percentage used in Article 54(5), based on hard evidence gathered per market. The threshold contained therein requires an adjustment according to the reality of each CSD market profile and used currencies. A one-size-fits-all solution is not adaptable to the different market sizes. We would be pleased discussing with the authorities the possible solutions.

Some Question 28: Do you think that the conditions set out in Article 54(4) for the provision of banking-type ancillary services by a designated credit institution are proportionate and help cover the additional risks that these activities imply?

- Yes
- No
- Don't know / no opinion

Question 28.1: Please explain your answer to question 28, providing where possible concrete examples. If you answered "no", please provide where possible quantitative evidence.

The requirements around the very particular limited-purpose bank that can be a designated credit institution are stringent. As such, there is no institution offering such cash settlement services to CSDs. There is seemingly no business case for when these services are to be carried out from a limited-purpose bank and only provided in support of CSD(s)' service.

We believe that, although the requirements could theoretically be adequate, the absence of an

offering from credit institutions is evidence to the contrary, giving the impression that the requirements are unintentionally too strict (which is the result of applying the same requirements as CSDs with banking licence for level playing field and systemic risk reasons). We see that a CSD should also be able to use another CSD with a limited-purpose banking licence.

Question 29: Why do you think there are so few, if any, credit institutions with limited license to provide banking-type ancillary services to CSDs? Please explain in particular if this is so due to obstacles created by the regulatory framework.

Please see our answers to questions 26.1 and 28.1.

Question 30: Are there requirements within Title IV of CSDR which should be specifically reviewed in order to improve the efficiency of the provision of banking-type ancillary services to and/or by CSDs while ensuring financial stability?

- Yes
- No
- Don't know / no opinion

Question 30.1 Please explain your answer to question 30, providing where possible quantitative evidence and/or concrete examples:

6. SCOPE

CSDR lays down a series of requirements for the settlement of financial instruments in the Union and harmonised rules on the organisation and conduct of CSDs. While the scope of rules applicable to CSDs seems clear, the requirements applying to the settlement of financial instruments has given rise to numerous questions. A certain number of these questions has been addressed by ESMA, especially in relation to the scope of requirements on internalised settlement, relevant currencies or the substantial importance of a CSD.

Article 2(1)(8) of CSDR defines financial instruments in accordance with the definition of financial instruments in Directive 2014/65/EU on markets in financial instruments (MiFID II) (i.e. transferable securities, money-market instruments, units in collective investment undertakings, various types of derivatives and emission allowances). Some CSDR provisions explicitly restrict the scope of their applicability to a subset of the above definition, e.g. Articles 3 on book entry-form (only transferable securities) and Article 5 on the intended settlement date. Other provisions are not explicit or refer generally to financial instruments or securities (e.g. Article 23 on the provision of services in another Member State).

In the case, for instance, of the settlement discipline, stakeholders have indicated that the different provisions of CSDR setting out the scope of the requirements such as settlement fails reporting, cash penalties or buy-ins are not always clear. This lack of legal certainty could potentially lead to reducing the efficiency in securities settlement. Furthermore, feedback from some stakeholders suggests that in some circumstances the drafting of CSDR in relation to the scope of the settlement discipline is clear, however, its application could bring unintended consequences.

Question 31. Do you consider that certain requirements in CSDR would benefit from targeted measures in order to provide further legal certainty on their scope of application?

- Yes
- No
- Don't know / no opinion

Question 31.1 If you answered "yes" to Question 31, please specify what clarifications/targeted measures could provide further legal certainty.

ECSDA believes that there is incoherence concerning the scope of different CSDR articles.

Authorities are called upon not to pursue the objective of legal certainty via exhaustively prescriptive legislative guidance. In our experience, discussions linked to such approach draw on resources of both authorities and industry without adding the value. Preferably, any exemption list / Level 3 guidance should maintain a certain degree of flexibility to allow each CSD to ensure that it operates against its own legal / risk assessment of the requirements, considering its set-up, service offering and local jurisdiction. We would favour a pragmatic approach based on the demand for legal certainty only for targeted articles.

Please see our input on the list of specific articles on which further certainty is necessary in our answer to the next question 31.2.

Question 31.2 If you answered "yes" to Question 31, please specify which provisions could benefit from such clarification and provide concrete examples.

ECSDA Members would benefit from clarifications of the following points:

- **Articles 3 and 5,** including the recently added question raised in the context of the Digital Finance package. Particularly, more clarity is sought for situations where CSDs can service crypto-assets under CSDR.

- **Article 7,** settlement discipline, from the following perspectives:
  - **For the scope of instruments,** CSDs intend to use ESMA databases to identify the scope of securities for the application of the settlement discipline. We also lack clarity on the possibility of CSDs to use these databases as a formal and single source of information. We would appreciate the possibility for European authorities to set a mandate for ESMA to provide the necessary reference data for settlement discipline purposes in one single ESMA CSDR SDR database, This should clearly indicate, on a daily basis, such data as the ISINs in scope, the liquidity indicators for shares instruments or reference prices to be applied. Please also see our answer to question 34.1.

  - **For the scope of transactions**, we would also appreciate clarity in line with our requests for Q&As submitted to ESMA and exchanges on these matters. We believe the policy intention of Article 5 is, including but not limited to, among others, the increased settlement efficiency of secondary market activity. Article 7 specifies further that one of the measures to achieve such efficiency is by penalising those parties — in a financial settlement transaction — who fail to deliver cash or securities on the Intended Settlement Date. By consequence, the Article, in our view aims to capture secondary market settlement transactions that fail to settle on the intended settlement date, other than for reasons external to either party. This is, however, not clearly mentioned in the text, raising questions. It may be helpful indeed to acknowledge more explicitly that transactions that fail to settle due to 'external reasons' should not be deemed in the scope of settlement fails reporting and/or penalties processing, for example. Please also see our answer to question 34.1.

- **Article 23.**

Question 32. Do you consider that the scope of certain requirements, even where it is clear, could lead to unintended consequences on the efficiency of market operations?

- Yes
- No
- Don't know / no opinion

Question 32.2 If you answered "yes" to Question 32, please specify which provisions are concerned.

[N/A]

Question 32.1 If you answered "yes" to Question 32, please specify what targeted measures could be implemented to avoid those unintended consequences while achieving the general objective of improving the efficiency of securities settlement in the Union?

[N/A]

7. SETTLEMENT DISCIPLINE

CSDR includes a set of measures to prevent and address failures in the settlement of securities transactions ('settlement fails'), commonly referred to as 'settlement discipline' measures. Application of the relevant rules in CSDR is dependent on the date of entry into force of Commission Delegated Regulation (EU) 2018/1229 on settlement discipline[13], which specifies the following:

(a) measures to *prevent settlement fails*, including measures to be taken by financial institutions to limit the number of settlement fails as well as procedures and measures to be put in place by CSDs to facilitate and incentivise timely settlement of securities transactions;

(b) measures to *address settlement fails*, including the requirements for monitoring and reporting of settlement fails by CSDs; the management by CSDs of cash penalties paid by their users causing settlement fails; the details of an appropriate buy-in process following settlement fails; the specific rules and exemptions concerning the buy-in process and the conditions under which a CSD may discontinue its services to users that cause settlement fails.

Commission Delegated Regulation (EU) 2018/1229 was supposed to enter into force on 13 September 2020. However, in May 2020 the Commission adopted a Commission Delegated Regulation amending it, thereby postponing its date of entry into force from 13 September 2020 to 1 February 2021. This short delay was considered necessary to take into account the additional time needed for the establishment of some essential features for the functioning of the new framework (e.g. the necessary ISO messages, the joint penalty mechanism of CSDs that use a common settlement infrastructure and the need for proper testing of the new functionalities).

During the COVID-19 crisis, many stakeholders asked for a further postponement of the entry into force of Commission Delegated Regulation 2018/1229. Those stakeholders argued that the COVID-19 pandemic impacted the overall implementation of regulatory projects and IT deliveries by CSDs and their participants and that, as a result of that, they will not be able to comply with the requirements of the RTS on settlement discipline by 1 February 2021. On 23 October 2020, the Commission endorsed ESMA's proposal to postpone further the entry into force of the RTS on settlement discipline to 1 February 2022.

[13] Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (OJ L 230, 13.9.2018, p. 1).

Question 33: Do you consider that a revision of the settlement discipline regime of CSDR is necessary?

-Yes
-No
-Don't know / no opinion

Question 33.1: If you answered yes to Question 33, please indicate which elements of the settlement discipline regime should be reviewed: (you may choose more than one options)

- Rules relating to the buy-in
- Rules on penalties
- Rules on the reporting of settlement fails
- Other

Question 33.2: If you answered "Other" to Question 33.1, please specify to which elements you are referring.

Timing:

We are concerned by the timing difference between the entry into force of the regulatory requirements in February 2022 and the consequent modifications of the requirements. Such modifications could change the underlying obligations and render obsolete the developments and arrangements within a short notice, thereby resulting in significant useless spending of resources. We believe that this would not be in line with the 'better regulation' practices of the European Union.

CSDs are advanced in their IT developments for Settlement Discipline Regime and would not like to see changes in the text which could lead to undoing some of these developments. We, therefore, ask to keep changes as limited as possible, and only in those areas where the regime would benefit from (minor) corrections.

We call the EC to ensure a coherent timeline avoiding the decommissioning or modification of the developments that would be necessary to comply with CSDR and SDR RTS in the areas mentioned above.

Concerning the provisions related to the Settlement Penalties in CSDR and the Standards on Settlement Discipline, we believe that the areas outlined below require a particular attention:

Buy-ins:

We are aware of significant market concerns related to the implementation of the mandatory buy-in regime, and believe that the EC should be attentive to the views of the industry, as evidenced with statistical data. Considering the role that CSDs play we focus below mostly on settlement penalties and reporting. We note, however, that EU CSDs may face an unlevel playing field versus non-EU CSDs in countries without such a buy-in regime.

Rules on penalties:

- Scope of penalties (transactions and instruments),
- Settlement fails penalties for cleared transactions (CSDR SDR RTS Article 19).

Rules on reporting of penalties of settlement fails:

We are awaiting the issuance of the ESMA guidelines on the Settlement fails penalties reporting. Based on the guidelines, we will be able to better assess the answer to this question. We believe that the

CSDR review consultation should allow for further input on this matter at a later stage.

The Settlement efficiency rates may need to consider the specific situation of some instruments in certain markets, e.g. such as of ETFs. Secondary market settlement of these type of securities are often connected to an additional process involving the new issuance in the primary market for creating the required availability of instruments to be delivered (i.e. subscription of new quotes). Such process often determines a delay that prevents timely delivery of newly issued ETF securities. Effects of this peculiarity is also acknowledged by ESMA (please see the report on Trends, Risk and Vulnerabilities dated September 2020, page 24, https://www.esma.europa.eu/sites/default/files/library/esma_50-165-1287_report_on_trends_risks_and_vulnerabilities_no.2_2020.pdf) and seen in the T2S statistics (discussed in the '4th CSG Workshop on Market Settlement Efficiency (MSE)', held last 8 October 2020) that shows ETF's settlement efficiency is the lowest in comparison to that of all other financial instruments one. The application of cash penalties will not improve settlement efficiency for these instruments and cannot solve this structural issue. We kindly ask the authorities to investigate the problem with the relevant stakeholders, including CSDs, to discuss possible solutions.

Question 34: The Commission has received input from various stakeholders concerning the settlement discipline framework. Please indicate whether you agree (rating from 1 to 5) with the statement below:

	1 (disagree)	2 (rather disagree)	3(neutral)	4 (rather agree)	5 (fully agree)	No opinion
Buy-ins should be mandatory						X
Buy-ins should be voluntary						X
Rules on buy-ins should be differentiated, taking into account different markets, instruments and transaction types						X
A pass on mechanism should be introduced[14]						X
The rules on the use of buy-in agents should be amended						X
The scope of the buy-in regime and the exemptions applicable should be clarified						X
The asymmetry in the reimbursement for changes in market prices should be eliminated						X

[14] E.g. a mechanism providing that where a settlement fail is the cause of multiple settlement fails through a transaction chain, it should be possible for a single buy-in to be initiated with the intention to settle the entire chain of fails and to avoid multiple buy-ins being processed at the same time, and that where a receiving trading party in a transaction chain initiates the buy-in process, all other receiving trading parties in that transaction chain are relieved of any obligation to initiate a buy-in process.

The CSDR penalties framework can have procyclical effects						X
The penalty rates should be revised						X
The penalty regime should not apply to certain types of transactions (e.g. market claims in cash)					X	

Question 34.1 Please explain your answers to question 34, providing where possible quantitative evidence and concrete examples.

On Buy-ins:
Please see our answer under question 33.2.
We note, however, that EU CSDs may face unlevel playing field versus non-EU CSDs in countries without such buy-in regime.

On 34.1 9) Penalty regime application to certain types of transactions:
We agree that the penalties regime should not apply to certain types of transactions:

1. We kindly ask the policymakers to formally approve the exemptions as discussed with ESMA, such as for Corporate Actions on Stock, and T2S Technical realignments and other transactions out of participants' control (for example, auto-generated by the CSD transactions: collateral management-related transactions and realignments).
2. ECSDA also requests to have the treatment of 'participant settlement suspension' events (due to e.g. Sanctions, Anti-money laundering proceedings, Court order enforcing, Risk management procedures or similar) clarified in context of the penalties (non)application, as e.g. referred to in its Penalties Framework chapter 12.2.2.1. (The ECSDA Framework can be found at https://ecsda.eu/wp-content/uploads/2020/12/2020_12_18_ECSDA_CSDR_Penalties_Framework_updated.pdf)

We suggest and highly need a formal clarification of views to be issued by the European Commission. ECSDA would be pleased to provide its views during an exchange dedicated to this topic.

Settlement penalty rates and the regime overall:

We recommend the EC and ESMA to review the criteria to calculate penalties. Indeed, the actual sourcing of prices needed for the calculation of penalties brings about uncertainty, operational complexities, unnecessary costs and fragmentations. In the actual scenario, CSDs are required first to run three different processes to identify the source of reference prices. Each of them is creating technical and operational issues (e.g. download and extract daily data from ESMA FIRDS database which has not been created for this purpose, so that some technical and operational problems occur). Then, CSDs should source (from information providers) data and prices, which brings about variable costs that may vary from CSD to CSD. These costs cannot be fully recovered from Participants. Therefore, we ask the EC and ESMA to reconsider the possibility to establish one single source and methodology for the calculation of penalties. In this regard, we are keen to work with ESMA to identify the best solution.

Question 35. Would the application of the settlement discipline regime during the market turmoil provoked by COVID-19 in March and April 2020 have had a significant impact on the market?

-Yes
- No
- Don't know/ no opinion

Question 35.1 Please explain your answer to Question 35, describing all the potential impacts (e.g. Liquidity, financial stability, etc.) And providing quantitative evidence and/ or examples where possible. Market participants are better placed to provide an answer to this question.

Please see our answer with regard to buy-in aspects, under question 33.2.

Question 36. Which suggestions do you have for the improvement of the settlement discipline framework in CSDR? Where possible, for each suggestion indicate which costs and benefits you and other market participants would incur.

Regarding the provisions related to the Settlement Penalties in the CSDR and the Standards on Settlement Discipline, we are concerned by the timing difference between the entry into force of the regulatory requirements in February 2022 and the consequent modifications of the requirements. Those modifications could change the underlying obligations and render obsolete the developments and arrangements within a short notice, resulting in significant useless spending of resources. We call the EC to ensure a proportionate timeline to comply with the CSDR and SDR RTS in the following areas:

- **Rules on penalties** (clarification on scope instruments/transactions (see our answer to question 31.1) and removal of Article 19 CSDR Settlement Discipline RTS):

With regard to the treatment of penalties for cleared transactions under the Settlement Discipline Regime:

We support the request of CCPs to remove Settlement Discipline RTS Article 19, to allow a single operational process at the level of the CSD and the CCP and its members. While we understand the policy intention to protect a CSD system against the risks of a CCP system, we believe that such contagion risk does not exist in practice. While a duplicative operational process could create more important new risks, particularly on a cross-border basis. A single operational process would be preferable. We encourage an amendment of the text, ahead of the implementation date, to avoid re-work and duplication of efforts without value-added.

Furthermore, the European authorities may need to reflect on the need to provide the specific mandate to ESMA (and resources) to support the use of the databases. The high reliance of CSDs on the functioning of ESMA databases needs to be considered by the EC. We would appreciate the possibility for the European authorities to set a mandate for ESMA to provide the necessary reference data for settlement discipline purposes in one single ESMA CSDR SDR database, clearly indicating, on a daily basis, the necessary data, such as the ISINs in scope, the liquidity indicators for shares instruments or reference prices to be applied. Please also see our answer to question 31.2.

- Rules on the reporting of settlement fails. We lack guidance from ESMA particularly with regard to the scope of penalties instruments and transactions, and the possibility to use ESMA Databases for guidance.

Please see also our answer with regard to buy-in aspects, under question 33.2.

8. FRAMEWORK FOR THIRD-COUNTRY CSDS

Article 25(1) of CSDR provides that third-county CSDs may provide their services in the EU, including through setting up branches on the territory of the EU.

Article 25(2) requires a third-country CSD to apply for recognition to ESMA in two specific cases:

(a) where it intends to provide certain core CSD services (issuance and central maintenance services related to financial instruments governed by the law of a Member State); or

(b) where it intends to provide its services in the EU through a branch set up in a Member State.

Services other than those described (including settlement services) do not require recognition by ESMA under Article 25 CSDR.

ESMA may recognise a third-country CSD that wishes to provide issuance and central maintenance services only where the conditions referred to in Article 25(4) of CSDR are met. One of those conditions is that the Commission has adopted an implementing act determining that the regulatory framework applicable to CSDs of that third country is equivalent in accordance with CSDR.

One CSD has applied to date for recognition to ESMA, i.e. the UK CSD in the context of Brexit. At least two other CSDs have contacted ESMA and have expressed their intention to apply for recognition as third-country CSDs. However, according to the current provisions of Article 25 of CSDR, the recognition process is only triggered once there is an equivalence decision issued by the European Commission in respect of a particular third country. In the meantime, according to Article 69(4) of CSDR, third-country CSDs can continue providing services in the EU under the national regimes.

Question 37. Do you use the services of third-country CSDs for the issuance of securities constituted under the law of the EU Member State where you are established?

- Yes
- No
- Don’t know / no opinion

37.1 If you answered "Yes" to question 37, please indicate which services of a third- country CSD you use.

Question 38. Do you consider that an end-date to the grandfathering provision of Article 69(4) of CSDR should be introduced?

- Yes
- No
- Don’t know / no opinion

Question 38.1. Please explain your answer to question 38. If “yes”, please indicate what that end-date should be explaining your reasoning.

We call here for the proportionality principle.

In our understanding, grandfathering is only applicable to CSDs already active in the EU market and who have indicated vis à vis the EU authorities that they wish to continue offering their services in the EU. In cases, where the third-country CSD and its home authorities do not take the necessary steps to ensure equivalence, third-country CSDs should not be allowed to continue providing CSD services in the EU without being bound by equivalent rules. Otherwise, such situation raises level playing field concerns for EU CSDs. The EU authorities should have the possibility to end grandfathering for the third-country CSD in certain circumstances and a careful assessment to weigh the benefits and the drawbacks of this decision would need to be conducted.

On the other hand, once a third-country CSD has expressed its intention to ESMA to apply for recognition after the equivalence decision has been made by the Commission, the third-country CSDs are at the mercy of the European authorities and do not have any direct influence on the proceedings. This is contrary to two important tenets of the European financial market: maintaining financial market infrastructure as no-risk or low-risk institutions and investor protection.

Question 39. Do you think that a notification requirement should be introduced for third-country CSDs operating under the grandfathering clause, requiring them to inform the competent authorities of the Member States where they offer their services and ESMA?

-Yes
-No
-Don’t know / no opinion

Question 39.1 Please explain your answer to question 39, providing where possible examples.

If non-EU CSDs were already active in a Member State before the entry into force of CSDR, they are providing activities under the respective national laws which were in force before the entry into force of CSDR. With CSDR, these CSDs should ensure that they continue to comply with the relevant laws and notify local authorities.

At the same time, we understand that without such notification, the European Commission and ESMA may not be aware that a third-country CSD provides CSD services in the EU.

More transparency on the advancement of the decision-making should be given to both, the third-country CSD and the relevant EEA CSDs.

Alternatively, EU issuers may be requested to inform the European Commission or ESMA of the fact that they use a third country CSD for the establishment of their securities in book-entry form. This requires a change to Article 25, possibly in line with amendments made to Article 23.

Question 40. Do you consider that there is (or may exist in the future) an unlevel playing field between EU CSDs, that are subject to the EU regulatory and supervisory framework of CSDR, and third-country CSDs that provide / may provide in the future their services in the EU?

-Yes
-No
-Don’t know / no opinion

Question 40.1 Please explain your answer to question 40, elaborating on specific areas and providing concrete examples.

In its analysis of third-country legislation as part of the equivalence proceedings, the European Commission places a strong emphasis on ensuring that the two regulatory regimes provide for a level playing field. Where significant differences are apparent, no equivalence decision should/ will be forthcoming. The equivalence proceedings themselves, therefore, should guarantee that there is a level playing field between EU and third-country CSDs.

At the same time, we believe that reciprocity is a major element to be considered in the equivalence decision by the European authorities. While the EU has established an approach of competing CSDs within the EU, that may not be the case in certain third countries where local CSDs are the only providers of core services to issuers and the entry of foreign CSDs (by law or practice) is not allowed. That is an important factor for the equivalence decision of the European Commission. Failure of considering such elements could cause an unlevelled playing field for EU CSDs.

Question 41. Which aspects of the third-country CSDs regime under CSDR do you consider require revision / further clarification? Please rate each proposal from 1 to 5

	1 (irrelevant)	2 (rather not relevant)	3 (neutral)	4 (rather relevant)	5 (fully relevant)	No opinion
Introduction of a requirement for third-country CSDs to be recognised in order to provide settlement services in the EU for financial instruments constituted under the law of a Member State				X		
Clarification of term "financial instruments constituted under the law of a Member State" in Article 25(2) of CSDR				X		
Recognition of third-country CSDs based on their systemic importance for the Union or for one or more of its Member States		X				
Enhancement of ESMA's supervisory tools over recognised third-country CSDs				X		

Question 41.1: Please explain your answers to question 41, providing where possible concrete examples.

- **Settlement services equivalence:** Article 25(2) CSDR already foresees the requirement for third-country CSDs to be recognised to provide settlement services in the EU for financial instruments constituted under the law of a Member State. That requirement is identical to the one imposed on EU CSDs in Article 23(2) CSDR.

Any changes to Article 23(2) CSDR should be equally reflected in Article 25(2) CSDR to ensure a level playing field. Article 25 may need to be amended in line with amendments to Article 23.

We would also invite the EC to look at the article from a forward-looking perspective, particularly in the context of DLT.

- **Financial instruments:** Under the current use of the term 'financial instruments constituted under the law of a Member State', EU competent authorities and ESMA have no transparency on EU-established issuers using the core services of a third-country CSD. An EU issuer using a third-country CSD will likely use the local law of that third country. The EC should ensure that the third-country CSD operates in transparency towards EU supervisors. This requires a broader reflection, also in line with possible amendments to Article 23.
- **ESMA's role:** ESMA already has several tools to supervise third-country CSDs in the EU, namely the authorisation process in Article 25. That being said, as transparency should be treated as a priority and ensured at all times. ESMA may also need to notify NCAs of the relevant Member States.

Question 42. If you consider that there are other aspects of the third-country CSDs regime under CSDR that require revision / further clarification, please indicate them below providing examples, if needed.

The process with which the equivalence proceedings are initiated could benefit from further clarification in the law.

9. OTHER AREAS TO BE POTENTIALLY CONSIDERED IN THE CSDR REVIEW

Question 43. What other topics not covered by the questions above do you consider should be addressed in the CSDR review (e.g. are there other substantive barriers to competition in relation to CSD services which are not referred to in the above sections? Is there a need for further measures to limit the impact on taxpayers of the failure of CSDs)?

CSDs have been permanent supporters of harmonisation and improvement. Although not directly relevant to CSDR, we believe that further harmonisation in tax-related matters, insolvency laws, and securities laws would be key steps towards the Genuine Single Market.

We welcome the proposal of a DLT pilot regime, that aims to foster innovation within the set-up of a resilient market infrastructure. We also appreciate the proposal for a Digital Operational Resilience Act (DORA), that strives to create a single legislative framework for management of ICT-risk within the financial sector.

The recent ESMA reports - on securities markets and settlement internalisation - raise the question about how CSDs are attracting (or not) settlement volumes from MTFs. Given some of the findings in the reports, we see value in the Commission pursuing an analysis of the whole value chain and how the different infrastructures fit in this landscape: is there a trend (+ or -) in the activity of market infrastructures? A comprehensive assessment would be required if the Commission considers a broad-ranging review of CSDR in the coming years.

Policy developments in the context of the Digital Finance Package are happening independently of the review of the CSDR. We will share our comments to the individual proposals accordingly. Nevertheless, we wish to share some reflections on elements which impact the complementarity between the current and the future legislative framework.

1. **Within CSDR, clarifications from ESMA are needed to support CSDs participation in a new and innovative financial landscape.**
   CSDR level 1 is technology-neutral in the way that it can be applied to crypto-assets considered as MiFID financial instruments using a permissioned DLT platform with a centralized validation model. Nevertheless, clarifications are needed. These would need to be enacted in parallel and independently from progress in the proposal of the DLT Pilot Regime. See also our responses to section 4.

2. **Careful consideration is needed between the current and the future legislative framework to ensure there is seamless co-existence.**
   We have noted that convergence is needed mainly for those areas where different regulatory regimes intersect with CSDR. Also, in the draft proposals, we note some misalignment as follows:

a. DORA: While the scope of application is large, we note that the requirements do not apply to system operators as defined in point (p) of Article 2 of Settlement Finality Directive. As CSDs are explicitly in scope of DORA, it is unclear how they can at the same time be exempted as operators of a Securities Settlement System.
b. DLT Pilot Regime: The current proposal envisages the collapsing of trading and post-trading functions into a single DLT infrastructure. A DLT MTF will be able to integrate the notary function. Given the large number of MTFs operating in Europe, it is unclear what will be the impact of the DLT Pilot Regime on the overall architecture of capital markets. While further integration of capital markets is pursued in the context of the CMU Action Plan, we see a risk materialising that the set-up of new infrastructure types will lead to increased or renewed fragmentation, as well as, leading to an unequal level of competition.

3. **A note of increasing dependency and outsourcing to public entities, thus considered as critical ICT third-party provider to the CSDs.** CSDs are outsourcing their settlement function to T2S. Once the Settlement Discipline Regime is implemented, CSDs will also be reliant on ESMA as a source of data to feed the penalties engine. We understand that DORA does not intend to alter the derogations in CSDR (i.e. outsourcing to public entities or the need for approval when a CSD outsources a core function). There may be a need to reflect on how CSDR can integrate such increasing dependency while also catering for sufficient flexibility to integrate some of the progressive insights in the context of T2S (for example the need for a CSD to suspend (or not) settlement in crisis scenarios).

   It is important to ensure that CSDs can continue participating in a changing financial landscape and are able to maintain an appropriate level of digital operational resilience.

4. **Further regulatory convergence can be achieved:**

a. ECSDA will respond directly to the AIFMD consultation, however, ECSDA Members will note here that the issue of the delegation to custody to an investor CSD, coupled with the harmonised liability regime in the context of the CSDR does not provide legal certainty from the perspective of CSDs. While relevant safeguards are provided through the CSD's legislative framework, CSD's have a liability framework as part of normal business conduct to cater for negligence, misconduct and fraud. Such liability framework will depend on the CSDs local jurisdiction and set-up. In the context of CSDR, we have not identified a need to have an identical liability regime amongst European CSDs.

b. Certain ECSDA Members are part of a group in which there is a banking-licenced entity. The ability of such CSDs to organise themselves as a group with both 'group' and 'shared' functions (as expressly foreseen in article 49 of CSDR ESMA RTS 2017/392) should be facilitated. Such an organisation should not lead to additional supervisory requirements at the level of each CSD, nor to the duplication of functions. We suggest that the supervision of group functions at the EU level is improved with further coordination between authorities and the recognition of supervisory responsibilities of other EU authorities.