



European Securities and  
Markets Authority

# Final Report

**Draft RTS amending Article 19 of Commission Delegated Regulation  
(EU) 2018/1229**





## Table of Contents

1	Executive Summary .....	3
	Legislative references.....	4
2	Background.....	5
3	Feedback statement.....	6
3.1	Introduction .....	6
3.2	Simplification of the process for CCP-cleared transactions.....	6
3.3	Proposed amendment to Article 19 of the RTS on settlement discipline.....	9
3.4	Implementation timing .....	10
4	Annexes .....	13
4.1	Annex I - Commission mandate to develop technical standards.....	13
4.2	Annex II - Cost-benefit analysis.....	14
4.2.1	Baseline .....	14
4.2.2	Cost benefit analysis .....	14
4.3	Annex III - Advice of the Securities and Markets Stakeholder Group.....	15
4.4	Annex IV - Draft technical standards .....	16

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# 1 Executive Summary

## Reasons for publication

ESMA conducted a public consultation between 11 July and 9 September 2022, to seek stakeholders' views on a possible amendment to Commission Delegated Regulation (EU) 2018/1229 aiming at simplifying the process of collection and distribution of cash penalties for settlement fails relating to cleared transactions under Regulation (EU) No 909/2014 on Central Securities Depositories (the RTS on Settlement Discipline).

Having considered the responses received, ESMA finalised its amending regulatory technical standards (RTS) which is included in this final report as well as a feedback statement on the views expressed through this consultation.

## Contents

ESMA's draft amending RTS consists in removing the separate process established in Article 19 of the RTS on Settlement Discipline for the collection and distribution of the cash penalties in relation to settlement fails on cleared transactions to put the CSDs in charge of the entire process of collection and distribution of penalties according to Articles 16, 17 and 18 of the same regulation.

Section 2 provides general background to ESMA's proposal, while Sections 3 presents the feedback statement on the issues on which ESMA has sought input from the stakeholders, in particular on the drafting of the proposed amendment, and on the timing of its implementation.

The draft amending RTS are included as Annex IV.

## Next Steps

ESMA will submit the draft RTS to the European Commission for endorsement in the form of a Commission Delegated Regulation, i.e. a legally binding instrument applicable in all Member States of the European Union.

Following the endorsement of the draft RTS by the European Commission, the Commission Delegated Regulation will be subject to the non-objection of the European Parliament and of the Council.

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## Legislative references

CSDR	Central Securities Depositories Regulation – Regulation (EU) No 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) No 236/2012 (OJ L 257, 28.8.2014, p. 1–72)
ESMA Regulation	Regulation (EU) No 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, p. 84).
RTS on settlement discipline	Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 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)

## Acronyms used

CCP	Central Counterparty
CSD	Central Securities Depository
DvP	Delivery versus payment
EACH	European Association of CCP Clearing Houses
EC	European Commission
ESCB	European System of Central Banks
ESMA	European Securities and Markets Authority
NCA	National Competent Authority
RTS	Regulatory Technical Standards
SMSG	Securities and Markets Stakeholders Group

## 2 Background

1. The CSDR settlement discipline regime includes three main measures to address settlement fails: the reporting of settlement fails, the application of cash penalties and a mandatory buy-in regime.
2. The issue at stake here relates to the cash penalties regime which, after being postponed twice, has entered into force on 1 February 2022. More precisely, it concerns the process of collection and distribution of cash penalties in respect of cleared transactions.
3. Article 7(15)(a) of CSDR mandates ESMA to develop draft RTS to detail the processes for collection and redistribution of cash penalties and any other possible proceeds from such penalties. In this respect, Article 19 of the RTS on settlement discipline detailed a specific process for the collection and distribution of penalties for cleared transactions by CCPs, in parallel to the general process specified in Article 17 of the same regulation for the collection and distribution of penalties managed by CSDs.
4. The objective of this parallel CCP-run process was to specify the application of the penalty mechanism for cleared transactions when CCPs are involved, to ensure compliance with Article 7(11) of CSDR, which exempts CCPs from paying penalties in relation to settlement fails of transactions for which they interpose themselves between counterparties.
5. However, CCPs have expressed strong views that CSDs should replace CCPs in this specific mechanism, which appeared to be supported by “a considerable number of stakeholders”, as reported by the EC in its summary report on the targeted consultation on the review of CSDR<sup>1</sup>:

*“Process of collecting and redistributing cash penalties when a CCP is involved: Several stakeholders, in particular industry associations representing CSDs, CCPs and banks, suggested that the process of collection and redistribution of cash penalties is amended to ensure that one single party processes the collection and distribution of cash penalties. This would imply an amendment to Article 19 of the RTS on settlement discipline. These stakeholders submitted that a duplicative operational process as foreseen in the RTS could create important new risks, particularly cross-border. A single operational process would therefore be preferable according to them.”*

6. In view of the application of the RTS on settlement discipline, the European Association of CCP Clearing houses (EACH) explained to ESMA that CCPs and CSDs have established arrangements allowing them to comply with current Article 19 of the RTS on settlement discipline as of 1 February 2022. They stressed however that such arrangements create unnecessary operational risks and operating costs that a CSD-run cash penalties process would eliminate.

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<sup>1</sup> [Summary report](#) of the targeted consultation document on the review of regulation on improving securities settlement in the European Union and on central securities depositories 8 December 2020 – 2 February 2021 (p.42)

## 3 Feedback statement

### 3.1 Introduction

7. **Consultation responses.** ESMA's public consultation attracted a total of 261 responses, out of which 16 came from institutions, trade associations and corporates from the financial sector, covering CSDs, CCPs and their clients. All other responses were sent by individuals. There were two main sets of contributions:
- The contributions relating to the amendment of Article 19 of the RTS on settlement discipline, which were themselves drafted along two sets of arguments, as detailed below.
  - The contributions only focusing more broadly on the buy-in regime, which ESMA has not prioritised in the context of the suggested modification of Article 19 of the RTS on settlement discipline as they did not seem to concern the issue at stake (i.e. collection and distribution of cash penalties), furthermore, ESMA would like to remind that the application of buy-in has now been suspended until November 2025<sup>2</sup>.
8. ESMA has also requested the advice of the SMSG. The SMSG did not provide any comment.

### 3.2 Simplification of the process for CCP-cleared transactions

9. ESMA's proposal in the Consultation paper (CP) was to simplify the process of collection and distribution of cash penalties stemming from settlement fails of CCP-cleared transactions through the amendment of Article 19 of the RTS on Settlement discipline. ESMA, thus suggested to remove the special CCPs driven process by confirming that the general CSD-driven process established in Articles 16, 17 and 18 of the same RTS can also apply to these cash penalties, while ensuring compliance with Article 7(11) of CSDR according to which the cash penalty mechanism shall not apply to failing participants which are CCPs.

**Q1: Do market participants support removing the special process of collection and distribution of penalties by CCPs for cleared transactions? Please provide justifications, if possible supported by quantitative data.**

10. The majority of respondents agreed with ESMA's proposal to remove the special process of collection and distribution of cash penalties by CCPs for cleared transactions. This

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<sup>2</sup> Commission Delegated Regulation (EU) 2022/1930 of 6 July 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) 2018/1229 as regards the date of application of the provisions related to the buy-in regime (*OJ L 266*, 13.10.2022, p. 13–15)

process is seen by many of the respondents as an inefficient duplication of the general process for the collection and distribution of cash penalties for which the CSDs are responsible, multiplying operative costs. Among other arguments, respondents have highlighted that the establishment of one single process under the CSDs' responsibility will reduce unnecessary complexity, reduce risks and simplify the operating environment for market participants, result in a unique reporting and payment process per market/CSD, increase transparency and limit the number of intermediaries in the penalties collection chain. With regards to the costs related to the proposed change, several respondents have indicated that, despite the fact that sunk costs will not be recovered, the removal of the duplication of processes will eliminate the ongoing operative costs and minimise the operative risks.

11. With regards to the issue of 'imbalanced positions', described in paragraphs 13 to 16 of the consultation paper, one respondent has highlighted that the mutualisation of these costs by a CCP among all its clearing members should be avoided. Instead, this respondent would favour that the CCP establishes rules to assign these costs to identified clearing members.
12. Two associations representing mainly banks from the same jurisdiction and having provided the exact same answer to the consultation paper, have reminded that any change to the RTS on the settlement discipline with regards to cash penalties would intervene after several months of application of the current regime. Therefore, they ask that any proposed change to the RTS on settlement discipline by ESMA is balanced and well detailed in terms of contents and timelines and that it takes into consideration the needs of the different market operators involved along the settlement chain and their actual capability for complying with the change.
13. One respondent has provided the view that the changes in Article 19 of the RTS on settlement discipline should ultimately be reflected in Article 7(11) of CSDR.
14. Finally, there are two sets of individual responses which diverge from the main arguments put forward by the majority of respondents. Opinions expressed in both sets of responses are against the removal of the specific process for the collection and distribution of penalties in Article 19 of the RTS on settlement discipline. The first set of individual responses expresses concerns about the concentration of the process in CSDs and the fact that the CSD of a specific European country may become a monopoly and faces a conflict of interest. The second set of individual responses suggests that CCPs are in the best position to identify the parties that fail to deliver cash or securities through the use of Unique Trade Identifier (UTI).
15. **ESMA** welcomes the feedback received on the proposal to remove the special process for the collection and distribution of cash penalties by CCPs for cleared transactions. ESMA agrees with the majority of respondents with regards to the identified gains in terms of efficiency and operational risk reductions that the suggested modification to the RTS on settlement discipline would bring. Indeed, these responses confirm advantages that ESMA identified in its cost benefit analysis. ESMA remains confident that the proposed



modification will simplify the process and hence provide a relief for market participants through lowering operational risks and the costs of the collection and distribution process.

16. Concerning the feedback from the two associations representing mainly banks from a particular jurisdiction on the need to have balanced and well detailed content and timelines for proposed modification of Article 19 of the RTS on settlement discipline, ESMA also agrees. In particular, with regards to the timeline and their request to take into consideration the needs of different market operators involved along the settlement chain and their actual capability of complying with such change, ESMA acknowledges that it is important to allow enough time to prepare at all impacted levels of the chain (cf. ESMA's response below to feedback received to Question 3).
17. With regards to the issue of 'imbalanced positions', ESMA notes the feedback from the industry on their preference for rules identifying the clearing member responsible, rather than mutualising among all clearing members costs resulting from these positions. Further details are provided in the response to feedback received to Question 2 below.
18. On the need to ultimately reflect the proposed change in Article 7(11) of CSDR, ESMA would like to note that as already clarified by the European Commission through Q&A 6 (f) on settlement discipline published in ESMA's Q&As on CSDR<sup>3</sup>, the exemption provided in Article 7(11) of CSDR only concerns transactions for which CCPs interpose themselves. This exemption is not affected by the proposed amendment, which merely simplifies the application of the cash penalties requirements for transactions cleared by a CCP where the CCP is a participant.
19. Furthermore, with regards to the arguments put forward in the two sets of responses by individuals, ESMA does not consider that the proposed amendment adds any concentration risk for CSDs.
20. Finally, at this stage, the use of the UTI is limited to the reporting of certain financial transactions (derivatives and securities financing transactions). It should be noted however, that a CCP could not use them to trace a settlement fail down to its actual originator as CCPs only interact with their own clearing members (i.e the CCP will pass-on the cash penalties to its clearing members, which would in turn pass-on the cash penalties to their clients and do the disentanglement, in case of omnibus accounts where several clients positions are comingled). In addition, it should also be noted that Article 7(2) of CSDR requires the application of cash penalties by CSDs at the level of their participants, without referring to the identification of the initial failing counterparty. It is likely that participants may want to pass on the penalties to their clients down the chain, however this is up to the participants to establish such contractual arrangements with their clients.

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<sup>3</sup> [ESMA CSDR Q&As](#) (as published on 3 August 2022)

### 3.3 Proposed amendment to Article 19 of the RTS on settlement discipline

**Q2: Do market participants support amending Article 19 of the CDR on Settlement Discipline as suggested in Annex IV? Please provide justifications, if possible supported by quantitative data.**

21. **Drafting suggestions.** While four respondents fully supported the proposal made by ESMA, a few respondents suggested the following changes:

22. Deleting the reference to “transactions cleared by CCPs” in the title of the amended Article 19 and its first paragraph, and keeping the reference to “where the participant is a CCP” to avoid confusion and stay closer to the wording of Level 1;

- Removing the reference to the “other CSD participants” in paragraph (b) as the CCPs do not have information about CSD participants;
- Clarifying that cash penalties on cleared transactions can be subject to netting with cash penalties on non-cleared transactions to carry out a single payment;
- One response also highlighted that the final proposal should take into account the actual needs of the different market operators involved across the settlement chain and their actual ability to comply with such proposals.

23. Individual respondents were opposed to the proposal, considering that the calculation for collection and distribution of penalties must remain with CCPs, for the reasons mentioned above.

24. **ESMA** welcomes the support received to its proposed draft amendment.

25. As to the replacement of the reference to “transactions cleared by CCPs” by a return to the initial reference to “where the participant is a CCP”: ESMA has added a reference to the CCP being a participant of the CSD, to keep the link with L1 drafting.

26. Considering the reference to the “penalties (...) received or paid pursuant to point (a)” is sufficient, ESMA agrees to remove the reference to “the other CSD participants” in point (b).

27. As to the netting of the cash penalties on cleared transactions with the other cash penalties, ESMA confirms that this will be possible, and that in the proposed amendment, the reference in point (a)(ii) to Article 17 of the RTS on settlement discipline is sufficient to ensure that the cash penalties on settlement fails on cleared transactions will be treated by CSDs exactly like the other cash penalties, including for netting purposes.

28. On the **CCPs’ allocation process for imbalances**, no quantitative data has been provided by the respondents. The following suggestions were made:

- Clarifying that only CSDs may penalise a failing settlement, i.e. that CCPs cannot apply their own cash penalty regime (confirming that point (b) of the proposed amendment to Article 19 of the draft RTS on settlement discipline is the sole case where the CCP is involved in the administrative process of cash penalties collection and distribution);
  - Mutualisation or identification of the member responsible for the difference: one respondent representing banks which have no data and are neutral on this point consider that, in theory, the mutualisation may risk undermining the general principle that the parties impacted by settlement fails should have a neutral penalty outcome and could negatively impact smaller members with good settlement discipline. Therefore this allocation process should be specified in EU-wide harmonised mechanism;
  - Clarifying and harmonising the rules according to which the CCPs will assign costs to their clearing members;
  - Transparency: clearing members should be provided with the reasons for imbalanced positions and transactions should be referenced to ensure clearing members can further allocate cash penalties to the responsible client/trading party.
29. The reallocation of certain amounts of cash penalties by CCPs to their clearing members results from certain small imbalances in the cash penalties amounts applied by CSDs to CCPs, which are due to the interposing role of the CCP and which, pursuant to the exemption referred to in Article 7(11) of CSDR, need to be redirected to their clearing members. ESMA thus confirms that such reallocation is merely a way to ensure the implementation of the exemption provided for in Article 7(11) of CSDR and this is the only situation where the CCPs would be involved in the cash penalties process in respect of settlement fails on transactions they clear.
30. Although no quantitative data has been provided through this consultation by the respondents, ESMA understands from CCPs that the level of the imbalances to be recovered from clearing members does not exceed a few euros per month and per CCP and therefore that the impact of such imbalances on the clearing members should be very limited.
31. As to the method of reallocation: although ESMA cannot require CCPs to choose a specific method, the CCPs will have to describe the chosen method(s) in their rules, which should provide some clarity to clearing members.

### **3.4 Implementation timing**

32. In its CP, ESMA proposed to defer the application date of the suggested amendment by six months, to allow for the proper implementation and end-to-end testing of the required technical changes for all concerned stakeholders.

**Q3: Do market participants support delaying the application of the envisaged amendment by six months after the publication of the amending RTS in the Official Journal of the EU? If not, what would be appropriate implementation timeline in your view? Please provide explanations.**

33. Only two respondents from the banking sector argued that where CSDs and CCPs would be ready to start earlier than the others, they should not be prevented to do so. However, most respondents, including CSDs and CCPs, argued to the contrary that such a change in the cash penalties process would require all impacted market participants to be ready before moving to the new process, in view of the interdependencies existing between the various market infrastructures and to avoid hybrid or temporary solutions. It was reported by one association that this would be particularly relevant in the Nordic markets where several CCPs are active in the same CSD.
34. **Deferred date of application.** Various periods allowing the application of the proposed amendment to Article 19 of the draft RTS have been suggested, ranging from immediate application (given that the amendment is already available and market infrastructures can start preparations) to a deferral by twelve months (to properly carry out IT implementation and testing).
35. **ESMA** considers that, taking into account the difficulties met by the industry in the first months of application of the cash penalties regime in the beginning of 2022, a 'big bang approach' with sufficient time enabling concerned parties to implement the changes would be safer. This means allowing for enough time to prepare for market participants at all levels of the settlement chain, covering implementation of necessary technical changes and the conduct of end-to-end testing. ESMA's initial proposal has therefore been amended to introduce a twelve-month delay of application.
36. **Application date.** Two respondents agreed with ESMA proposal to start applying the change at the beginning of a month.
37. One trade association suggested that the change should be implemented as of the first business day of a month for any settlement fails in the scope of the cash penalties regime that occurred on that day and after.
38. ESMA agrees with this suggestion to specify the starting date with a reference to the dates of the settlement fails and have reflected it in the draft amending RTS.
39. **Technical issues.** Questions related to the practical implementation process have been raised:
- Testing environment: will the tests of the new processes be performed within a test environment or within a production environment during a dry-run period with a concurrent suspension of the application of the penalties?
  - Reporting: will the CCPs continue producing and sending reports of cash penalties collection/distribution (through MT537 messages) or will the CSDs do it?

- SWIFT message: will the changes to Article 19 impact the content of the specific fields within the MT537 message?
40. As to the testing environment, **ESMA** is not in favour of any suspension of the application of the cash penalties. It will be up to the individual CSDs in cooperation with the respective CCPs to ensure an adequate transition without impacting the application of penalties.
41. As to the reporting on the collection and distribution of cash penalties, ESMA understands that, when not in charge of the actual collection and distribution anymore, the CCPs will stop sending those reports and CSDs will take over.
42. Last, ESMA also notes the feedback on the need to modify certain fields of the MT537 message but understands from preliminary discussions with the industry that no change to the MT537 message should be necessary. This will be discussed further at industry level at a later stage.

## 4 Annexes

### 4.1 Annex I - Commission mandate to develop technical standards

Article 7(15) of Regulation (EU) No 909/2014

#### **Measures to address settlement fails**

15. ESMA shall, in close cooperation with the members of the ESCB, develop draft regulatory technical standards to specify:

- (a) the details of the system monitoring settlement fails and the reports on settlement fails referred to in paragraph 1;
- (b) the processes for collection and redistribution of cash penalties and any other possible proceeds from such penalties in accordance with paragraph 2;
- (c) the details of operation of the appropriate buy-in process referred to in paragraphs 3 to 8, including appropriate timeframes to deliver the financial instrument following the buy-in process referred to in paragraph 3. Such timeframes shall be calibrated taking into account the asset type and liquidity of the financial instruments;
- (d) the circumstances under which the extension period could be prolonged according to asset type and liquidity of the financial instruments, in accordance with the conditions referred to in point (a) of paragraph 4 taking into account the criteria for assessing liquidity under point (17) of Article 2(1) of Regulation (EU) No 600/2014;
- (e) type of operations and their specific timeframes referred to in point (b) of paragraph 4 that renders buy-in ineffective;
- (f) a methodology for the calculation of the cash compensation referred to in paragraph 7;
- (g) the conditions under which a participant is deemed consistently and systematically to fail to deliver the financial instruments as referred to in paragraph 9; and
- (h) the necessary settlement information referred to in the second subparagraph of paragraph 10.

ESMA shall submit those draft regulatory technical standards to the Commission by 18 June 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

## 4.2 Annex II - Cost-benefit analysis

Pursuant to the third subparagraph of Article 10(1) of the ESMA Regulation, ESMA shall conduct open public consultations on draft RTS and analyse the potential related costs and benefits, unless such consultations and analyses are highly disproportionate in relation to the scope and impact of the draft RTS concerned or in relation to the particular urgency of the matter.

ESMA has conducted a high-level analysis of the potential costs and benefits of the proposed amendment, which is finalised based on the responses to the consultation.

### 4.2.1 Baseline

The purpose of the draft amending RTS included in Annex IV hereto is to simplify the process of collection and distribution of cash penalties for settlement fails of cleared transactions, by making the CSDs responsible for the collection and distribution of cash penalties for all transactions (both cleared and uncleared).

### 4.2.2 Cost benefit analysis

On the basis of the analysis below, ESMA concludes that the benefits of amending Article 19 of the RTS on Settlement Discipline outweigh the costs:

Policy objective	Establishing a single harmonised penalties collection and distribution process for settlement fails on all types of transactions, both uncleared and cleared.
Technical proposal	Amending Article 19 of the RTS on Settlement Discipline to remove the special collection and distribution process of penalties currently run by CCPs for cleared transactions by making the CSDs responsible for the collection and distribution of penalties in relation to both cleared and uncleared transactions.
Benefits	The expected impact of the proposed change will represent a relief for market participants through lowering operational risks and the costs of the collection and distribution process by simplifying the process.
Costs	Costs of adapting the market participants' systems, mostly CSDs and CCPs, to the new process.  No additional costs are envisaged.

### **4.3 Annex III - Advice of the Securities and Markets Stakeholder Group**

In accordance with Article 10(1) and Article 37(1) of the ESMA Regulation, ESMA has requested the advice of the Securities and Markets Stakeholder Group (SMSG). The SMSG has not provided any comment.



## 4.4 Annex IV - Draft technical standards

**COMMISSION DELEGATED REGULATION (EU) .../..**  
**amending the regulatory technical standards laid down in Delegated**  
**Regulation (EU) 2018/1229 as regards the collection and distribution of**  
**cash penalties for cleared transactions**

of [    ]

**(text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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) No 236/2012<sup>4</sup>, and in particular Article 7(15) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2018/1229<sup>5</sup> specifies measures to prevent and address settlement fails, and to encourage settlement discipline. Those measures include monitoring settlement fails and collecting and distributing cash penalties for settlement fails. Delegated Regulation (EU) 2018/1229 also specifies the operational details of the cash penalties regime.
- (2) Delegated Regulation (EU) 2018/1229 was amended by Commission Delegated Regulation (EU) 2020/1212<sup>6</sup> to defer the date of entry into force until 1 February 2021.

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<sup>4</sup> OJ L 257, 28.8.2014, p. 1

<sup>5</sup> Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 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).

<sup>6</sup> Commission Delegated Regulation (EU) 2020/1212 of 8 May 2020 amending Delegated Regulation (EU) 2018/1229 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (OJ L 275, 24.8.2020, p. 3).

That deferred date of entry into force was again deferred to 1 February 2022 by Commission Delegated Regulation (EU) 2021/70<sup>7</sup>.

- (3) Pursuant to Article 7(11) of Regulation (EU) 909/2014, the cash penalties regime should not apply to failing participants which are central counterparties (CCPs), as defined in Regulation (EU) No 642/2012 of the European Parliament and Council<sup>8</sup>. A CCP should, therefore, be subject to the cash penalties regime only in relation to transactions entered into by a CCP where it does not interpose itself between counterparties.
- (4) With a view to ensure that, in respect of settlement fails relating to cleared transactions, where CCPs interpose themselves between counterparties, cash penalties are not applied to CCPs, Article 19 of Delegated Regulation (EU) 2018/1229 provides for a specific collection and distribution process for cash penalties to be carried out by CCPs, which can directly collect and distribute penalties from and to their own clearing members.
- (5) However, both CCPs and CSDs, as well as their members and participants, have indicated that the implementation of this process by CCPs adds risks, technical complexities and costs to the process of collection and distribution of cash penalties for settlement fails of cleared transactions.
- (6) CCPs and CSDs further indicated that penalties for settlement fails of cleared transactions could be fully calculated, applied, collected and redistributed by CSDs, from and to all the participants identified in the latter settlement instructions, in accordance with Articles 16, 17 and 18 of Delegated Regulation (EU) 2018/1229, as any other penalties for settlement fails of uncleared transactions.
- (7) To facilitate the calculation and distribution of the cash penalties related to settlement fails of cleared transactions, while at the same time reducing the risks and the cost related to such process, it is desirable that this process on the collection and distribution of cash penalties is conducted by CSDs.
- (8) Where CCPs interpose themselves between counterparties which are failing and receiving CSD participants, the net amount of penalties that CSDs would have to collect from or distribute to CCPs should amount to zero. However, in certain cases such as a late delivery of securities to a CCP on the intended settlement date which does not allow for the settlement of the delivery instructions from the CCP, or in cases of differences in the penalties calculated by different CSDs, imbalanced positions in respect of cleared transactions may remain in the books of the CCPs and the net amount of penalties to be collected from, or distributed to, CCPs can be different from zero. In such cases, the

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<sup>7</sup> Commission Delegated Regulation (EU) 2021/70 of 23 October 2020 amending Delegated Regulation (EU) 2018/1229 concerning the regulatory technical standards on settlement discipline, as regards its entry into force (OJ L 27, 27.1.2021, p. 1).

<sup>8</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1–59).

CCPs may allocate the penalties' amount, credit or debit, to their clearing members and should establish relevant mechanism in their rules to that effect.

- (9) Article 19 of Delegated Regulation (EU) 2018/1229 should therefore be amended accordingly.
- (10) To enable CCPs and CSDs' to implement the necessary technological adaptations to their systems in view of ensuring compliance with this amended process of distribution and collection of cash penalties, it is appropriate to defer the application of this amendment by twelve months.
- (11) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (12) In developing the draft regulatory technical standards, ESMA has conducted a public consultation, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council. ESMA has also cooperated with the members of the European System of Central Banks.

HAS ADOPTED THIS REGULATION:

*Article 1*  
**Amendment to Delegated Regulation (EU) 2018/1229**

Delegated Regulation (EU) 2018/1229 is amended as follows:

Article 19 is replaced by the following:

“Article 19

Penalty mechanism for transactions cleared by CCPs where the participant is a CCP

With respect to settlement fails of transactions cleared by CCPs where the failing or the receiving participant is a CCP:

(a) CSDs shall:

- (i) calculate and apply the cash penalties in accordance with Article 16;
- (ii) collect from and distribute to their participants the net amount of cash penalties in accordance with Article 17; and

(iii) manage costs relating to the application of the cash penalties mechanism to such transactions in accordance with Article 18.

(b) CCPs may allocate to their clearing members the net amount of penalties, credit or debit, received or paid pursuant to point (a). In such cases, CCPs shall establish relevant mechanism in their rules.”

#### *Article 2*

#### **Entry into force and application**

1. This Regulation shall enter into force on the on the twentieth day following that of its publication in the Official Journal of the European Union.

2. It shall apply in respect of all settlement fails subject to the cash penalties referred to in Article 7(2) of Regulation (EU) No 909/2014 and occurring on the first business day or later of the twelfth month following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,