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COMMISSION DELEGATED REGULATION (EU) .../...

of 25.5.2018

**supplementing Regulation (EU) No 909/2014 of the European Parliament and of the
Council with regard to regulatory technical standards on settlement discipline**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 909/2014 ('the Regulation')¹ harmonises the conduct of securities settlement in the Union and the rules governing central securities depositories (CSDs). One of the main objectives of the Regulation is to improve the safety and efficiency of securities settlement, in particular for cross-border transactions, by ensuring that buyers and sellers receive their securities and money on time and without risks. To achieve this objective, the Regulation harmonises the timing and framework for securities settlement in the Union. In particular, it provides for a set of measures to prevent and address failures in the settlement of securities transactions ('settlement fails'), commonly referred to as settlement discipline measures.

Against this background, the Regulation empowers the Commission to adopt, following submission of draft regulatory technical standards by the European Securities and Markets Authority ('ESMA'), and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 establishing ESMA², a delegated Regulation specifying further the settlement discipline measures set out in the Regulation.

In accordance with Article 10(1) of Regulation (EU) No 1095/2010, the Commission shall decide within three months of receipt of the draft regulatory standards whether to endorse the draft submitted. The Commission may also endorse those draft regulatory standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in that Article.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA carried out three public consultations:

- (a) one consultation on the initial Discussion Paper with the proposed options during March-April 2014;
- (b) one consultation on the first draft of the technical standards in a Consultation Paper during December 2014 – February 2015; and
- (c) a final consultation during July-August 2015 on the specific issue of who should be responsible for the execution of buy-ins (i.e. obligatory delivery of financial instruments following settlement fails).

ESMA's Securities and Markets Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1095/2010 was also consulted on the draft regulatory technical standards.

Additionally, ESMA involved the members of the European System of Central Banks (ESCB) in the development of these regulatory technical standards, where close cooperation was required under the Regulation.

¹ 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 Directive 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

² 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).

Together with the draft regulatory technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA submitted its impact assessment, including its analysis of the costs and benefits of the draft regulatory standards, and a detailed report on how the outcome of the public consultation has been taken into account. That analysis is available in Annex IV to the Final Report on the draft technical standards, which can be found at: <https://www.esma.europa.eu/press-news/esma-news/esma-issues-technical-standards-settlement-discipline-under-csdr>

Some Members of the European Parliament have also provided their feedback on the content of the draft regulatory technical standards submitted to the Commission.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt a Delegated act is provided for under Articles 6(5) and 7(15) of the Regulation. Under those provisions, the Commission is empowered to adopt draft regulatory standards that specify the following:

(a) measures to prevent settlement fails, which include the measures to be taken by investment firms to limit the number of settlement fails and the procedures and measures to be put in place by CSDs to facilitate and incentivise timely settlement of securities transactions (cf. Article 6(5) of the Regulation);

(b) measures to address settlement fails, which include 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 (cf. Article 7(15) of the Regulation).

Measures addressing settlement fails act as a deterrent and can thereby help to prevent settlement fails. Due to this substantive link between preventing and addressing settlement fails, this Delegated Regulation bundles both of the above empowerments of the Commission in one single act.

3.1. Chapters I and II, Articles 1 to 12

This Delegated Regulation harmonises the measures to be taken by investment firms and CSDs to prevent the occurrence of settlement fails.

The Delegated Regulation specifies the timing and the content of communications between investment firms and their clients concerning trades that should be settled in the securities settlement systems operated by CSDs. In particular, the Regulation requires clients to inform their investment firms about the financial instruments and cash allocated to a specific transaction and to confirm their acceptance of the terms of that transaction.

The Delegated Regulation requires CSDs to take several measures to limit the number of settlement fails. As a rule, CSDs should process settlement instructions from their users on an automated basis and provide their users with the functionality to support fully automated, continuous real-time matching of securities and cash settlement instructions. In addition, the Delegated Regulation harmonises the information that users of CSDs need to provide for the purpose of matching settlement instructions. Finally, the Delegated Regulation requires CSDs to put in place mechanisms that should allow their users to better manage their settlement instructions in the securities settlement systems operated by CSDs. Such mechanisms should enable CSD users to cancel, block, recycle or partially settle their settlement instructions and to have access to all relevant information about pending settlement instructions.

3.2. Chapter III, Section 1, Articles 13 to 15

The Delegated Regulation requires CSDs to put in place systems that enable them to monitor the number, value and length of settlement fails. CSDs should report to their supervisors monthly and annually the values and volumes of settlement fails. CSDs should also report on any measures planned or taken by them to improve settlement efficiency. Those reports should be made public annually by CSDs in an aggregated and anonymised form.

3.3. Chapter III, Section 2, Articles 16 to 20

Article 7(2) of the Regulation requires CSDs to charge cash penalties to users that cause settlement fails. The Delegated Regulation harmonises the rules for the management of cash penalties by CSDs. In particular, it provides that CSDs should charge cash penalties for each settlement instruction that fails to be settled, collect cash penalties at least monthly, receive the collected cash in a dedicated cash account and distribute that cash to users that faced settlement fails. The Delegated Regulation also specifies that CSDs using a common settlement platform shall jointly manage the collection and distribution of cash penalties.

3.4. Chapter III, Section 3, Articles 21 to 35

One of the measures to reduce settlement fails provided in Article 7(3) of the Regulation is the mandatory buy-in (i.e. an obligatory execution of the initial trade within a certain number of days from the date of the trade). For this purpose, the Delegated Regulation provides detailed rules concerning the details of the buy-in process and the various steps in the execution of the buy-in process.

The Delegated Regulation defines where a buy-in is considered not possible and where a buy-in process is considered ineffective. It also specifies the contractual arrangements and procedures between parties in the settlement chain to incorporate the requirements of the buy-in process.

Furthermore, the Delegated Regulation specifies the entities responsible for conducting buy-ins. For that purpose, it differentiates between transactions cleared by a central counterparty (CCP), transactions not cleared by a CCP but executed on a trading venue and transactions not cleared by a CCP and not executed on a trading venue. For each of these transactions, the Delegated Regulation specifies the details of the buy-in procedure, including the responsibilities of the different parties involved. Generally, where a buy-in is successful, the settlement instruction related to the settlement fail should be cancelled upon delivery of the financial instruments to the relevant counterparty. Where a buy-in is only partly successful, the partial delivery of financial instruments is complemented by a new settlement instruction for the remaining part of financial instruments. Where a buy-in fails and, as a result, the financial instruments cannot be delivered to the relevant counterparty, that counterparty should choose either to conduct another buy-in or to receive cash compensation for the losses incurred. If the buy-in fails within the deferral period cash compensation should be paid.

The Delegated Regulation specifies the calculation and payment of the cash compensation for failed buy-ins. It also ensures that counterparties that are affected by a settlement fail are not penalised by an increase in the price of the financial instruments from the time of the settlement fail until the delivery of the financial instruments following a buy-in. Thus, failing counterparties should pay the difference between the delivery price of the financial instruments and the price agreed at the time of the trade to the receiving counterparties.

3.5. Chapter III, Section 4, Articles 36 to 38

The Delegated Regulation specifies the timeframes for the launch of the buy-in process and the delivery of financial instruments following the buy-in process.

3.6. Chapter III, Sections 5 and 6, Articles 39 to 41

The Delegated Regulation specifies when CSDs may discontinue its services to users that consistently and systematically cause settlement fails. In particular, a CSD may discontinue its services to a user with a settlement efficiency rate 15% lower than the rate of the relevant securities settlements system.

The Delegated Regulation also specifies the settlement information that CSDs should provide to CCPs and trading venues.

3.7. Chapter IV, Article 42

Finally, the Delegated Regulation provides that it should enter into force 24 months following its publication in the Official Journal of the European Union to allow CSDs to adjust their IT systems and contractual arrangements for the purpose of applying the Delegated Regulation.

COMMISSION DELEGATED REGULATION (EU) .../...

of 25.5.2018

supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline

(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 236/2012³, and in particular Article 6(5) and Article 7(15) thereof,

Whereas:

- (1) The provisions in this Regulation are closely linked, since they deal with measures to prevent and address settlement fails and to encourage settlement discipline, by monitoring settlement fails, collecting and distributing cash penalties for settlement fails and by specifying the operational details of the buy-in process. To ensure coherence between those provisions, and to facilitate a comprehensive view of and a compact access to them by persons subject to the obligations, it is appropriate to include them in a single Regulation.
- (2) In view of the global nature of financial markets, due regard should be given to the Principles for Financial Market Infrastructures, which have been issued by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions ('CPSS-IOSCO Principles') in April 2012 and which serve as a global benchmark for regulatory requirements for central securities depositories ('CSDs'). The Recommendations for Securities Settlement Systems, issued by the Committee on Payment and Settlement Systems and the International Organisation of Securities Commissions, covering trade confirmation, settlement cycles, and securities lending, should also be taken into account.
- (3) In order to ensure the consistent application of Regulation (EU) No 909/2014 and to specify the technical terms necessary to apply this Regulation, a number of terms should be defined.
- (4) Investment firms should ensure that they have all the necessary settlement information in time to allow for an effective and efficient settlement of transactions. In particular, investment firms that do not have the necessary settlement information should communicate with their clients to obtain the information relevant for an efficient settlement, including the standardised data needed for the settlement process.
- (5) Straight-through processing ('STP') should be encouraged, since market-wide use of STP is essential both for maintaining high settlement rates as volumes increase and for

³ OJ L 257, 28.8.2014, p. 1.

ensuring timely settlement of cross-border trades. Moreover, both direct and indirect market participants should have the internal automation in place that is necessary to take full advantage of the available STP solutions. In this respect, investment firms should offer their professional clients the possibility of sending confirmations and allocation details electronically, in particular by using international open communication procedures and standards for messaging and reference data. Furthermore, CSDs should facilitate STP and, when processing settlement instructions, should use processes designed to work on an automated basis by default.

- (6) CSDs should offer matching possibilities throughout the day to promote early settlement on the intended settlement date.
- (7) CSDs should require that participants to their securities settlement systems use a list of mandatory matching fields for the matching of settlement instructions to facilitate settlement and to ensure consistency across securities settlement systems.
- (8) CSDs should have sound and efficient system functionalities, policies and procedures that enable them to facilitate and incentivise settlement on the intended settlement date.
- (9) CSDs should provide participants with real-time access to information on the status of their settlement instructions in the securities settlement systems they operate to encourage and incentivise timely settlement by those participants.
- (10) CSDs should offer real-time gross settlement to participants to their securities settlement systems, or at least several daily settlement possibilities throughout every business day in order to complete final settlement intraday.
- (11) The obligation on CSDs to have system functionalities should depend on the settlement efficiency of those CSDs. Certain system functionalities should therefore not be compulsory if the value and the rate of settlement fails in the securities settlement system operated by a CSD do not exceed certain predefined thresholds.
- (12) To facilitate the monitoring of settlement fails, CSDs should use a harmonised methodology to report settlement fails to the competent authorities and the relevant authorities. That methodology should cover a common list of items to be reported as well as the frequency of the reports to be delivered. Settlement instructions entered into the securities settlement system operated by CSDs should be monitored each day until they are settled or cancelled.
- (13) CSDs should set up working arrangements with the participants that have the highest rates of settlement fails, as well as, if feasible, with relevant central counterparties ('CCPs') and trading venues, in order to identify the main reasons for settlement fails.
- (14) CSDs should send monthly reports on settlement fails to their competent authorities and relevant authorities. Competent authorities should also be entitled to request additional information on settlement fails or more frequent reporting as necessary so that they can perform their tasks. Such additional information or reports should be shared by the requesting competent authorities with the relevant authorities without undue delay.
- (15) To promote transparency and facilitate the comparability of settlement fails across the Union, CSDs should use a single template for disclosing settlement fails data to the general public.
- (16) To ensure the consistent application of requirements on settlement discipline for CSDs, detailed provisions should be set out concerning the identification of all

transactions that remain unsettled after the intended settlement date, the implementation of the buy-in process where applicable, and the application of the penalty mechanisms established by a CSD, including the time of calculation and the collection and distribution of cash penalties.

- (17) Rules regarding the processes for the collection and distribution of cash penalties for settlement fails should be applied in coherence with the Commission Delegated Regulation (EU) 2017/389 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council as regards the parameters for calculation of cash penalties for settlement fails and operations of CSDs in host Member States.
- (18) To ensure that cash penalties for settlement fails are applied consistently, CSDs should charge, collect and distribute cash penalties on a regular basis and at least once a month. In addition, to ensure that their risk profile is not affected by the operation of the penalty mechanism, including where penalties are not paid as required by failing participants, CSDs should only be responsible for charging, collecting and distributing those cash penalties. Since a participant may also act as an agent for his clients, CSDs should provide participants with sufficient details regarding the penalty calculation to enable them to recover the cash penalty from their clients.
- (19) It is important that the cash penalty levied in the event of a settlement fail does not constitute a source of revenue for CSDs. The cash penalty should therefore be paid into a separate account of the CSD, which should be used exclusively for the collection and distribution of those penalties. The penalties collected should not be used to finance the implementation, maintenance or operation of the penalty mechanism.
- (20) In certain cases, a transaction may be part of a chain of transactions, in which case a settlement instruction may depend on another one and the settlement of one instruction may allow for the settlement of several instructions in that chain. The failure of one settlement instruction may thus have knock-on effects, resulting in the failure of subsequent settlement instructions.
- (21) To limit the number of cash transfers, CSDs should, therefore, net the amount due to participants against the amount to be paid by those participants and should ensure that the full amount of cash penalties is appropriately distributed within the settlement chain to those participants that suffered from the settlement fail. CSDs should provide participants sufficient information on the calculation of the amounts to be received to enable those participants, where appropriate, to transfer the amounts due to their clients.
- (22) The penalty mechanism should apply to all failed transactions, including cleared transactions. Where the failing participant is a CCP, however, the penalty should not be due by that CCP, but by the relevant clearing member that caused the settlement fail. For that purpose, CSDs should provide CCPs with all the necessary information on the settlement fail and the calculation of the penalty to enable CCPs to charge a penalty to the relevant clearing member and to distribute the collected amount to the clearing member that suffered from the subsequent settlement fail on the same financial instruments.
- (23) CSDs using a common settlement infrastructure should work closely together to ensure the appropriate implementation of the penalty mechanism.

- (24) In order to support an integrated market for securities settlement, the buy-in process should be harmonised. Given the importance of incentivising timely actions to address settlement fails, it is important to keep all relevant involved parties informed during the buy-in process.
- (25) A settlement instruction may fail for all financial instruments included in that instruction, even if some financial instruments are available for delivery in the account of the failing participant. The purpose of a buy-in process is to improve settlement efficiency. In order to minimise the number of buy-ins, a buy-in process should be subject to the mandatory application of partial settlement to the relevant settlement instruction.
- (26) Mandatory partial settlement on the last business day of the extension period referred to in Article 7(3) of Regulation (EU) No 909/2014 strikes the right balance between the rights of the buyer to receive the financial instruments bought and the need to minimise the number of financial instruments subject to buy-in. Every bought-in financial instrument should therefore be delivered to the buyer, even if the number of bought-in financial instruments does not allow for the full settlement of the relevant settlement instruction.
- (27) Mandatory partial settlement should not apply to settlement instructions that have been put on hold by a participant, because the relevant financial instruments in the respective account may not belong to the client for which the settlement instruction has been entered into the securities settlement system.
- (28) To ensure compliance with the obligations set out in Regulation (EU) No 909/2014, all parties in the settlement chain should have contractual arrangements with their relevant counterparties which contain the buy-in process obligations and which are enforceable in all relevant jurisdictions.
- (29) In order to improve settlement efficiency, it should always first be verified whether a buy-in process is possible in respect of the relevant transactions and parties thereto.
- (30) All entities involved in the buy-in process need to be informed of the status of the buy-in process at key points in time. That information should be exchanged by way of a notification in order for the entities involved to be alerted on the status of the actions to settle the transaction and take further action as need be.
- (31) For transactions that are not cleared by a CCP, in order to set up an efficient buy-in process and to avoid that other parties in the settlement chain or participants become liable for obligations contracted by the trading venue members or trading parties, and in order not to increase the risk profile of CSDs or trading venues, the parties that originally concluded the relevant transaction should be responsible for the execution of the buy-in.
- (32) In respect of the settlement of a securities transaction, participants act for their own account or enter settlement instructions into the securities settlement system operated by a CSD upon request by their clients. Those clients may be a CCP and its clearing members, trading venue members or, where the transaction is not executed on a trading venue, trading parties. A buy-in should therefore be effected at the level where the contractual obligations to buy and sell securities have been created.
- (33) Given that the buy-in agent should act upon request of a party that does not bear the costs related to the buy-in agent's intervention, the buy-in agent should act according to best execution requirements and protect the interest of the failing clearing member, trading venue member or trading party.

- (34) To limit the number of buy-ins and to preserve the liquidity of the market for the relevant financial instruments, the failing clearing member, the failing trading venue member or the failing trading party, as applicable, should be allowed to deliver financial instruments to the CCP, the receiving trading venue members or the receiving trading parties through their participants up to the moment that they are informed that the buy-in agent has been appointed or that an auction has been launched. From that point in time, those parties should only be able to take part in the auction of the financial instruments or to deliver them to the buy-in agent, subject to his prior approval, so as to avoid that the receiving clearing member, the receiving trading venue member or the receiving trading party receives the financial instruments twice. Parties involved in the buy-in process could also limit the number of buy-ins by coordinating their actions amongst themselves, and informing the CSD thereof, where a transaction is part of a chain of transactions and may result in different settlement instructions.
- (35) Transactions not cleared by a CCP are generally uncollateralised and therefore each trading venue member or trading party bears the counterparty risk. Moving this risk to other entities such as their participants would force the latter to cover their exposure to counterparty risk with collateral. This could lead to increased costs of securities settlement in a disproportionate manner. The failing clearing member, the failing trading venue member or the failing trading party, as applicable, should therefore bear responsibility for the payment of the buy-in costs, the price difference and the cash compensation in the first place. Where the failing trading venue member or failing trading party do not comply with their obligation to pay those amounts, their participant, as the failing participant, should, however, cover the buy-in costs and the price difference but not the cash compensation.
- (36) Delivery obligations of bought-in financial instruments or the payment of cash compensation or of any price difference in the financial instruments subject to buy-in should ultimately be performed through the reception of the relevant financial instruments or cash by the CCP, the receiving trading venue members or the receiving trading parties through their participants.
- (37) Where the buy-in fails and in the absence of express communication on whether to extend the buy-in period within the prescribed timeframe, cash compensation should be paid so as to protect the interests of the parties and avoid any uncertainty resulting from the failed buy-in.
- (38) In order to avoid complexity and protect the CCP, the receiving trading venue member or the receiving trading party, the bought-in financial instruments should be delivered to the CCP, receiving trading venue member or receiving trading party through the relevant receiving participant rather than through the failing participant. For the same reasons, the initial settlement instruction that triggered the buy-in process should be put on hold and eventually cancelled.
- (39) In order to calculate and apply penalties for settlement fails appropriately after the end of the extension period, relevant settlement instructions should be cancelled and substituted with new settlement instructions on each business day on which financial instruments are received by CCPs, trading venue members or trading parties, through their participants, as a result of the execution of a buy-in. Cash penalties should apply to each new settlement instruction from the day they are entered into the securities settlement system.

- (40) To ensure a smooth functioning of the securities settlement systems operated by CSDs, and to ensure the certainty of the timeline for the buy-in process and for the payment of the cash penalties for settlement fails, failing settlement instructions should be cancelled upon delivery of the financial instruments or, if they are not delivered, upon the payment of the cash compensation, or at the latest on the second business day after the notification of the amount of cash compensation due.
- (41) Where the price of the financial instruments agreed at the time of the trade is lower than the price paid at the execution of the buy-in, the price difference should be paid by the failing clearing member, trading venue member or trading party, as applicable, to protect the interests of the receiving parties. Where the price of the financial instruments agreed at the time of the trade is higher than the price paid at the execution of that buy-in, the failing participant's obligation referred to in Article 7(6) of Regulation (EU) No 909/2014 should be deemed fulfilled given that receiving clearing members, trading venue members or trading parties are effectively paying for the bought-in financial instruments.
- (42) An efficient settlement process requires that the extension period, which takes place before the launch of the buy-in process, is adapted to the asset types and to the liquidity of the financial instruments. Where the market for shares is sufficiently liquid to be easily sourced, the extension period before the launch of the buy-in process should not be extended so that the relevant parties are incentivised to settle failed transactions in a timely manner. Shares that do not have a liquid market however should benefit from a longer extension period. Debt instruments should also benefit from a longer extension period, given their greater cross-border dimension and their importance for the smooth and orderly functioning of the financial markets.
- (43) The measures to address settlement fails related to buy-in and penalties may require significant IT system changes, market testing and adjustments to legal arrangements between the parties concerned, including CSDs and other market participants. Sufficient time should therefore be allowed for the application of those measures, to ensure that the parties concerned can meet the necessary requirements.
- (44) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the European Commission pursuant to the procedure in Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁴.
- (45) ESMA has conducted open public consultations on these draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010. In developing the draft regulatory technical standards, ESMA has also worked in close cooperation with the members of the European System of Central Banks,

⁴ 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).

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL

Article 1 **Definitions**

For the purposes of this Regulation, the following definitions apply:

- (a) ‘clearing member’ means an undertaking as defined in point (14) of Article 2 of Regulation (EU) 648/2012 of the European Parliament and of the Council⁵;
- (b) ‘exchange-traded fund (ETF)’ means a fund as defined in point (46) of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council⁶;
- (c) ‘execution of orders’ means ‘execution of orders on behalf of clients’ as defined in point (5) of Article 4(1) of Directive 2014/65/EU;
- (d) ‘retail client’ means a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU;
- (e) ‘settlement instruction’ means a transfer order as defined in point (i) of Article 2 of Directive 98/26/EC of the European Parliament and of the Council⁷;
- (f) ‘trading party’ means a party acting as principal in a securities transaction referred to in point (c) of the first sub-paragraph of Article 7(10) of Regulation (EU) No 909/2014;
- (g) ‘trading venue member’ means a member of, or a participant to, a trading venue.

CHAPTER II

MEASURES TO PREVENT SETTLEMENT FAILS

Article 2 **Measures concerning professional clients**

1. Investment firms shall require their professional clients to send them written allocations of securities or of cash to the transactions referred to in Article 5(1) of Regulation (EU) No 909/2014, identifying the accounts to be credited or debited. Those written allocations shall specify the following:
 - (a) one of the following types of transaction:
 - (i) purchase or sale of securities;

⁵ 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)

⁶ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

⁷ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p.45).

- (ii) collateral management operations;
- (iii) securities lending/borrowing operations;
- (iv) repurchase transactions;
- (v) other transactions, which can be identified by more granular ISO codes;
- (b) the International Securities Identification Number (ISIN) of the financial instrument or where the ISIN is not available, some other identifier of the financial instrument;
- (c) the delivery or the receipt of financial instruments or cash;
- (d) the nominal value for debt instruments, and the quantity for other financial instruments;
- (e) the trade date;
- (f) the trade price of the financial instrument;
- (g) the currency in which the transaction is expressed;
- (h) the intended settlement date of the transaction;
- (i) the total amount of cash that is to be delivered or received;
- (j) the identifier of the entity where the securities are held;
- (k) the identifier of the entity where the cash is held;
- (l) the names and numbers of the securities or cash accounts to be credited or debited.

Written allocations shall include all other information required by the investment firm for facilitating the settlement of the transaction.

Investment firms that have received confirmation of the execution of a transaction order placed by a professional client shall ensure through contractual arrangements that the professional client confirms its acceptance of the terms of the transaction in writing, within the timeframes set out in paragraph 2. That written confirmation may also be included in the written allocation.

Investment firms shall provide their professional clients with the option of sending the written allocation and the written confirmation electronically, through the international open communication procedures and standards for messaging and reference data referred to in Article 35 of Regulation (EU) No 909/2014.

2. Professional clients shall ensure that written allocations and written confirmations referred to in paragraph 1 are received by the investment firm by one of the following deadlines:
 - (a) by close of business on the business day on which the transaction has taken place where the investment firm and the relevant professional client are within the same time zone;
 - (b) by 12.00 CET on the business day following that on which the transaction has taken place where one of the following occurs:
 - (i) there is a difference of more than two hours between the time zone of the investment firm and the time zone of the relevant professional client;

- (ii) the orders have been executed after 16.00 CET of the business day within the time zone of the investment firm.

Investment firms shall confirm receipt of the written allocation and of the written confirmation within two hours of that receipt. Where the written allocation and the written confirmation is received by an investment firm within less than one hour before its close of business, that investment firm shall confirm receipt of the written allocation and of the written confirmation within one hour after the start of business on the next business day.

- 3. Where investment firms receive the necessary settlement information referred to in paragraph 1 in advance of the timeframes referred to in paragraph 2, they may agree in writing with their professional clients that the relevant written allocations and written confirmations are not to be sent.
- 4. Paragraphs 1, 2 and 3 shall not apply to professional clients holding, at the same investment firm, the securities and cash relevant for the settlement.

Article 3

Measures concerning retail clients

Investment firms shall require their retail clients to send them all the relevant settlement information for transactions referred to in Article 5(1) of Regulation (EU) No 909/2014 by 12.00 CET on the business day after that on which the transaction has taken place within the time zone of the investment firm, unless that client holds the relevant financial instruments and cash at the same investment firm.

Article 4

Settlement facilitation and processing

- 1. CSDs shall process all the settlement instructions on an automated basis.
- 2. CSDs that have intervened manually in the automated settlement process in the manner referred to in either point (a) or point (b) of paragraph 3 shall notify the competent authority of the reason for that intervention within 30 days of its occurrence, unless the same reason has already been notified for previous interventions.
- 3. A manual intervention in the automated settlement process shall occur in the following circumstances:
 - (a) where the feed of a received settlement instruction into the securities settlement system has been delayed or modified or where that settlement instruction itself has been modified outside of the automated procedures.
 - (b) where in the processing of received settlement instructions in the settlement engine, an intervention takes place outside of the automated procedures, including the management of IT incidents.
- 4. Competent authorities may inform CSDs at any time that a particular reason does not justify manual interventions in the automated settlement process. CSDs shall not intervene manually in the automated settlement process thereafter on the basis of that reason.

Article 5

Matching and population of settlement instructions

1. CSDs shall provide to participants a functionality that supports fully automated, continuous real-time matching of settlement instructions throughout each business day.
2. CSDs shall require participants to match their settlement instructions through the functionality referred to in paragraph 1 prior to their settlement, except in the following circumstances:
 - (a) where the CSD has accepted that the settlement instructions have already been matched by trading venues, CCPs or other entities;
 - (b) where the CSD itself has matched the settlement instructions;
 - (c) in the case of free of payment ('FoP') settlement instructions, referred to in point (g)(i) of Article 13(1), which consist of orders for transfers of financial instruments between different accounts opened in the name of the same participant or managed by the same account operator.

Account operators referred to in point (c) shall include entities that have a contractual relationship with a CSD and that operate securities accounts maintained by that CSD by means of recording book entries into those securities accounts.

3. CSDs shall require participants to use the following matching fields in their settlement instructions for the matching of settlement instructions:
 - (a) the type of settlement instruction, as referred to in point (g) of Article 13(1);
 - (b) the intended settlement date of the settlement instruction;
 - (c) the trade date;
 - (d) the currency, except in the case of FoP settlement instructions;
 - (e) the settlement amount, except in the case of FoP settlement instructions;
 - (f) the nominal value for debt instruments, or the quantity for other financial instruments;
 - (g) the delivery or receipt of the financial instruments or cash;
 - (h) the ISIN of the financial instrument;
 - (i) the identifier of the participant that delivers the financial instruments or cash;
 - (j) the identifier of the participant that receives the financial instruments or cash;
 - (k) the identifier of the CSD of the participant's counterparty, in the case of CSDs that use a common settlement infrastructure, including in the circumstances referred to in Article 30(5) of Regulation (EU) No 909/2014;
 - (l) other matching fields required by the CSD for facilitating the settlement of transactions.
4. In addition to the fields referred to in paragraph 3, CSDs shall require their participants to use a field indicating the transaction type in their settlement instructions based on the following taxonomy:
 - (a) purchase or sale of securities;
 - (b) collateral management operations;

- (c) securities lending/borrowing operations;
- (d) repurchase transactions;
- (e) other transactions (which can be identified by more granular ISO codes as provided by the CSD).

Article 6

Tolerance levels

For the purpose of matching, CSDs shall set tolerance levels for settlement amounts.

The tolerance level shall represent the maximum difference between the settlement amounts in two corresponding settlement instructions that would still allow matching.

For settlement instructions in EUR, the tolerance level per settlement instruction shall be EUR 2 for settlement amounts of up to EUR 100 000 and EUR 25 for settlement amounts of more than EUR 100 000. For settlement instructions in other currencies, the tolerance level per settlement instruction shall be of equivalent amounts based on the official exchange rate of the ECB, where available.

Article 7

Cancellation facility

CSDs shall set up a bilateral cancellation facility that enables participants to bilaterally cancel matched settlement instructions that form part of the same transaction.

Article 8

Hold and release mechanism

CSDs shall set up a hold and release mechanism that consists of both of the following:

- (a) a hold mechanism that allows pending settlement instructions to be blocked by the instructing participant for the purpose of settlement;
- (b) a release mechanism that allows pending settlement instructions that have been blocked by the instructing participant to be released for the purpose of settlement.

Article 9

Recycling

CSDs shall recycle settlement instructions that have resulted in a settlement fail until they have been settled or bilaterally cancelled.

Article 10

Partial settlement

CSDs shall allow for the partial settlement of settlement instructions.

Article 11

Additional facilities and information

1. CSDs shall offer participants the possibility to be informed about a pending settlement instruction of their counterparties, either within one hour after the first unsuccessful attempt to match that instruction, or immediately after such an

unsuccessful attempt where that attempt has been made within the five-hour period before the cut-off of the intended settlement date or after the intended settlement date.

2. CSDs shall provide participants with access to real-time information on the status of their settlement instructions in the securities settlement system, including information on:
 - (a) pending settlement instructions that can still be settled on the intended settlement date;
 - (b) failed settlement instructions that can no longer be settled on the intended settlement date;
 - (c) fully-settled settlement instructions;
 - (d) partially-settled settlement instructions, including both the settled and unsettled parts of either financial instruments or cash;
 - (e) cancelled settlement instructions, including information about whether those instructions have been cancelled by the system or by the participant.
3. The real-time information referred to in paragraph 2 shall include the following:
 - (a) whether the settlement instruction has been matched;
 - (b) whether the settlement instruction can still be partially settled;
 - (c) whether the settlement instruction is on hold;
 - (d) the reasons why instructions are pending or failing.
4. CSDs shall offer participants either real-time gross settlement throughout each business day or a minimum of three settlement batches per business day. The three settlement batches shall be spread across the business day in accordance with market needs, based on a request by the user committee of the CSD.

Article 12

Derogation from certain measures to prevent settlement fails

1. Articles 8 and 10 shall not apply where the securities settlement system operated by a CSD meets the following conditions:
 - (a) the value of settlement fails does not exceed EUR 2.5 billion per year;
 - (b) the rate of settlement fails, based either on the number of settlement instructions or on the value of settlement instructions, is lower than 0.5 % per year.

The rate of settlement fails based on the number of settlement instructions shall be calculated by dividing the number of settlement fails by the number of settlement instructions entered into the securities settlement system during the relevant period.

The rate of settlement fails based on the value of settlement instructions shall be calculated by dividing the value in EUR of settlement fails by the value of settlement instructions entered into the securities settlement system during the relevant period.

2. By 20 January of each year, CSDs shall assess whether the conditions referred to in paragraph 1 are met and shall notify the competent authority of the results of that assessment in accordance with Annex II.

Where the assessment confirms that at least one of the conditions referred to in paragraph 1 no longer applies, CSDs shall apply Article 8 and Article 10 within one year from the date of the notification referred to in the first subparagraph.

CHAPTER III

MEASURES TO ADDRESS SETTLEMENT FAILS

SECTION I

Monitoring settlement fails

Article 13

Details of the system monitoring settlement fails

1. CSDs shall establish a system that enables them to monitor the number and value of settlement fails for every intended settlement date, including the length of each settlement fail expressed in business days. That system shall, for each settlement fail, collect the following information:
 - (a) the reason for the settlement fail, based on the information available to the CSD;
 - (b) any settlement restrictions such as the reservation, blocking or earmarking of financial instruments or cash that make those financial instruments or cash unavailable for settlement;
 - (c) the type of financial instrument, within the following categories, affected by the settlement fail:
 - (i) transferable securities as defined in point (a) of Article 4(1)(44) of Directive 2014/65/EU;
 - (ii) sovereign debt as defined in Article 4(1)(61) of Directive 2014/65/EU;
 - (iii) transferable securities as defined in point (b) of Article 4(1)(44) of Directive 2014/65/EU, other than sovereign debt referred to in point (ii);
 - (iv) transferable securities as defined in point (c) of Article 4(1)(44) of Directive 2014/65/EU;
 - (v) exchange-traded funds (ETFs);
 - (vi) units in collective investment undertakings, other than ETFs;
 - (vii) money-market instruments, other than sovereign debt referred to in point (ii);
 - (viii) emission allowances;
 - (ix) other financial instruments.
 - (d) the type of transaction, within the following categories, affected by the settlement fail:
 - (i) purchase or sale of financial instruments;

- (ii) collateral management operations;
 - (iii) securities lending/borrowing operations;
 - (iv) repurchase transactions;
 - (v) other transactions, which can be identified by more granular ISO codes as provided by the CSD.
- (e) the place of trading and of clearing of the affected financial instruments, where applicable;
 - (f) the type of settlement instruction, within the following categories, affected by the settlement fail:
 - (i) an intra-CSD settlement instruction, where the failing and the receiving parties are both participants in the same securities settlement system; or
 - (ii) a cross-CSD settlement instruction, where the failing and the receiving parties are participants in two different securities settlement systems or one of the participants is a CSD;
 - (g) the type of settlement instruction, within the following categories, affected by the settlement fail:
 - (i) FoP settlement instructions that consist of deliver free of payment ('DFP') and receive free of payment ('RFP') settlement instructions;
 - (ii) delivery versus payment ('DVP') and receive versus payment ('RVP') settlement instructions.
 - (iii) delivery with payment ('DWP') and receive with payment ('RWP') settlement instructions; or
 - (iv) payment free of delivery ('PFOD') settlement instructions that consist of debiting payment free of delivery ('DPFOD') and crediting payment free of delivery ('CPFOD') settlement instructions.
 - (h) the type of securities accounts connected to the settlement fail, including:
 - (i) a participant's own account;
 - (ii) a participant's client individual account;
 - (iii) a participant's client's omnibus account.
 - (i) the currency in which the settlement instructions are denominated.
2. CSDs shall establish working arrangements with the participants referred to in fields 17 and 18 of Table 1 in Annex I which have the most significant impact on their securities settlement systems and, where applicable, with relevant CCPs and trading venues to analyse the main reasons for the settlement fails.

Article 14

Reporting settlement fails

1. CSDs shall communicate the information referred to in Annex I to the competent authority and the relevant authorities on a monthly basis and by close of business on the fifth business day of the following month.

That information shall include the relevant values in EUR. Any value conversion into EUR shall be carried out using the official exchange rate of the ECB of the last day of the reporting period where that official exchange rate of the ECB is available.

CSDs shall report more frequently and provide additional information on settlement fails if so requested by the competent authority.

2. By 20 January of each year, CSDs shall report to the competent authority and the relevant authorities the information referred to in Annex II, including the measures planned or taken by CSDs and their participants to improve the settlement efficiency of the security settlement systems it operates.

CSDs shall regularly monitor the application of the measures referred to in the first subparagraph and shall provide the competent authority and the relevant authorities, upon request, with any relevant findings resulting from such monitoring.

3. The information referred to in paragraphs 1 and 2 shall be provided in a machine-readable format.
4. The value of settlement instructions referred to in Annexes I to III shall be calculated as follows:
 - (a) in the case of settlement instructions against payment, the settlement amount of the cash leg;
 - (b) in the case of FoP settlement instructions, the market value of the financial instruments referred to in Article 32(3) or, where not available, the nominal value of the financial instruments.

Article 15

Public disclosure on settlement fails

CSDs shall publish the information set out in Annex III for the securities settlement system it operates on their website for free, including the relevant values in EUR.

Any value conversion into EUR shall be carried out using the official exchange rate of the ECB of the last day of the reporting period where that official exchange rate of the ECB is available.

The information referred to in the first subparagraph shall be published annually and in a language customary in the sphere of international finance and shall be machine-readable.

SECTION 2

Cash penalties

Article 16

Calculation and application of cash penalties

1. The cash penalties referred to in Article 7(2) of Regulation (EU) No 909/2014 shall be calculated and applied by CSDs for each settlement instruction that fails to settle.

The calculation referred to in the first subparagraph shall include settlement instructions that have been put on hold by a participant.

Where matching is required pursuant to Article 5(2), cash penalties shall only be applied to matched settlement instructions.

2. Cash penalties shall be calculated and applied at the end of each business day where the settlement instruction fails to settle.
3. Where a settlement instruction has been entered into the securities settlement system or has been matched after the intended settlement date, cash penalties shall be calculated and applied as from the intended settlement date.

Where new settlement instructions are entered into the securities settlement system for any non-delivered financial instruments in accordance with Article 27(10), Article 29(11) or Article 31(11), cash penalties shall apply to the new settlement instructions from the day those instructions are entered into the securities settlement system.

Where settlement instructions have been matched after the intended settlement date, cash penalties for the period between the intended settlement date and the business day prior to the day on which matching has taken place shall be paid by the last participant who has entered or modified the relevant settlement instruction in the securities settlement system.

4. CSDs shall provide each relevant participant with the details of the calculation of the penalties for each failed settlement instruction on a daily basis, including details on the account to which each failed settlement instruction refers.

Article 17

Collection and distribution of cash penalties

1. CSDs shall charge and collect on at least a monthly basis the net amount of cash penalties to be paid by each failing participant.

Cash penalties shall be deposited into a dedicated cash account.

2. CSDs shall distribute on at least a monthly basis the net amount of cash penalties referred to in paragraph 1 to receiving participants affected by settlement fails.

Article 18

Costs of the penalty mechanism

1. CSDs shall not use cash penalties to cover costs related to the penalty mechanism.
2. CSDs shall disclose, in detail, the amount of the costs referred to in paragraph 1 to participants.
3. CSDs shall charge participants separately for the costs of the penalty mechanism. Those costs shall not be charged on the basis of gross penalties applied to each participant.

Article 19

Penalty mechanism where the participant is a CCP

Where the failing or the receiving participant is a CCP, CSDs shall ensure the following:

- (a) that CCPs are provided with the calculation of the cash penalties for the failed settlement instructions submitted by those CCPs;
- (b) that CCPs collect the cash penalties referred to in point (a) from the clearing members that caused the settlement fails;

- (c) that CCPs distributes the cash penalties referred to in point (b) to the clearing members that are affected by the settlement fails.
- (d) that CCPs report to the CSD on the penalties that they have collected and distributed, on a monthly basis.

Article 20

CSDs that use a common settlement infrastructure

CSDs that use a common settlement infrastructure, including where some of their services or activities have been outsourced as referred to in Article 30(5) of Regulation (EU) No 909/2014, shall jointly establish the penalty mechanism referred to in Article 7(2) of Regulation (EU) No 909/2014 and jointly manage the modalities for the calculation, application, collection and distribution of cash penalties in accordance with this Regulation.

SECTION 3

Details of the buy-in process

SUB-SECTION 1

General

Article 21

Buy-in not possible

A buy-in shall only be considered not possible where:

- (a) the relevant financial instruments no longer exist;
- (b) for transactions not cleared by a CCP, the failing trading venue member or the failing trading party is subject to insolvency proceedings.

For the purposes of point (b), insolvency proceeding shall mean any collective measure provided for in the law of a Member State, or a third country, either to wind up the trading venue member or trading party or to reorganise it, where such measure involves the suspension or imposition of limitations on transfers or payments.

Article 22

Ineffective buy-in process

1. For the purposes of point (b) of Article 7(4) of Regulation (EU) No 909/2014, the following operations shall be considered to be composed of several transactions:
 - (a) operations where one party sells financial instruments for cash ('first transaction'), with a commitment of the other party to sell equivalent financial instruments to the first party for a price that is determined or determinable ('second transaction');
 - (b) operations where one party transfers financial instruments to another party ('first transaction'), with a commitment of that other party to return equivalent financial instruments to the first party ('second transaction').

2. Where paragraph 1 applies, the buy-in process shall be considered ineffective where the intended settlement date of the second transaction is set within 30 business days after the intended settlement date of the first transaction.

Article 23

Application of partial settlement

1. Where on the last business day of the extension period referred to in Article 7(3) of Regulation (EU) No 909/2014, some of the relevant financial instruments are available for delivery to the receiving participant, the receiving and failing clearing members, trading venue members or trading parties, as applicable, shall partially settle the initial settlement instruction unless the conditions set out in Article 12(1) of this Regulation are fulfilled.
2. The first subparagraph shall not apply where the relevant settlement instruction is put on hold in accordance with Article 8.

Article 24

Buy-in agent

A buy-in agent shall not have any conflict of interest in the execution of a buy-in and shall execute the buy-in on the terms most favourable to the failing clearing member, trading venue member or trading party, as applicable, in accordance with Article 27 of Directive 2014/65/EU.

Article 25

Contractual arrangements and procedures

1. Parties in the settlement chain shall establish contractual arrangements with their relevant counterparties that incorporate the buy-in process requirements specified in paragraph 2 and the procedures specified in paragraph 3.
2. The contractual arrangements referred to in paragraph 1 shall fully incorporate the applicable requirements set out in Article 7 of Regulation (EU) No 909/2014 and Articles 26 to 38 of this Regulation. Each party in the settlement chain shall ensure that the contractual arrangements established with its relevant counterparties are enforceable in all relevant jurisdictions.
3. CCPs, clearing members, trading venue members or trading parties shall establish the necessary procedures to execute the buy-in, pay the cash compensation, the price difference and the buy-in costs within the required timeframes. The contractual arrangements and the procedures referred to in this Article shall include the necessary provisions to ensure that the relevant parties in the settlement chain receive the information required to exercise their rights and obligations in accordance with the timeframes specified in Articles 26 to 35 of this Regulation.
4. The participants shall establish the necessary contractual arrangements with their clients to ensure that the buy-in requirements set out in this Regulation are enforceable in all the jurisdictions to which parties in the settlement chain belong.
5. The bought-in financial instruments may only be considered as delivered for the purposes of Article 27, Article 29 and Article 31 where those instruments have been received in the securities settlement system operated by the CSD by the receiving

participants acting on behalf of the CCP, the receiving clearing members, trading venue members or trading parties.

6. The cash compensation referred to in Article 33 and the price difference referred to in Article 35(1) may only be considered as paid where the cash payment has been received by the receiving participants acting on behalf of the CCP, the receiving clearing members, trading venue members or trading parties.

SUB-SECTION 2

Buy-in process for transactions cleared by a CCP

Article 26

Initial verification

1. On the business day following the expiry of the extension period, CCPs shall verify whether a buy-in is possible in accordance with Article 21(a) in relation to any of the transactions it has cleared.
2. Where a buy-in is not possible pursuant to Article 21(a), the CCP shall notify the failing clearing member of the cash compensation amount calculated in accordance with Article 32. The cash compensation shall be paid in accordance with Article 33(1).
3. Where a buy-in is possible, Article 27 shall apply.

Article 27

Buy-in procedure and notifications

1. Where a buy-in is possible, CCPs shall launch an auction or appoint a buy-in agent on the business day following the expiry of the extension period and notify the failing and receiving clearing members thereof.
2. Upon receipt of the notification referred to in paragraph 1, the failing clearing member shall ensure that any relevant settlement instruction relating to the settlement fail is put on hold.
3. Upon receipt of the notification referred to in paragraph 1, the failing clearing member may only deliver the financial instruments as follows:
 - (a) to the buy-in agent where the buy-in agent gives prior consent;
 - (b) to the CCP where the auction has been awarded to that failing clearing member.

Prior to receipt of the notification referred to in paragraph 1, the failing clearing member may still deliver the financial instruments directly to the CCP.

4. The CCP shall notify the results of the buy-in to the failing and receiving clearing members and to the relevant CSD at the latest on the last business day of the period determined in accordance with Article 37.
5. Where the buy-in is successful in part or in full, the notification referred to in paragraph 4 shall include the quantity and price of the bought-in financial instruments.

6. Where the buy-in fails in part or in full, the notification referred to in paragraph 4 shall include the cash compensation amount calculated in accordance with Article 32 unless that notification specifies that the execution of the buy-in is deferred.
7. Where the execution of the buy-in is deferred, the CCP shall notify the results of that deferred buy-in to the failing and receiving clearing members and to the relevant CSD at the latest on the last business day of the deferral period referred to in Article 38.
8. Where the buy-in referred to in paragraph 7 is successful in part or in full, the notification referred to in that paragraph shall include the quantity and price of the bought-in financial instruments.
9. Where the buy-in referred to in paragraph 7 fails in part or in full, the notification referred to in that paragraph shall include the cash compensation amount calculated in accordance with Article 32.
10. The CCP shall accept and pay for the bought-in financial instruments referred to in paragraphs 5 and 8 and ensure that the following is carried out at the end of each business day on which the CCP receives those financial instruments:
 - (a) the bought-in financial instruments are delivered to the receiving clearing members;
 - (b) the settlement instructions relating to the settlement fail are cancelled;
 - (c) new settlement instructions are entered into the securities settlement system for any non-delivered financial instruments and the CSD receives the information necessary to identify such new settlement instructions accordingly.
11. The CCP shall ensure that the settlement instructions relating to the settlement fail are cancelled upon payment of the cash compensation referred to in paragraphs 6 and 9 or, at the latest, on the second business day after the notification referred to therein.

SUB-SECTION 3

Buy-in process for transactions not cleared by a CCP and executed on a trading venue

Article 28

Initial verification

1. For transactions not cleared by CCPs and executed on a trading venue, receiving participants, through their clients, shall inform receiving trading venue members of any settlement fails without undue delay.
2. The trading venue shall disclose to the receiving trading venue member the identity of the failing trading venue members upon request. On the business day following the expiry of the extension period, the receiving trading venue member shall verify whether a buy-in is possible in accordance with Article 21.
3. Where a buy-in is not possible pursuant to Article 21, the receiving trading venue member shall notify the failing trading venue member of the results of the verification and the cash compensation amount calculated in accordance with Article 32. The cash compensation shall be paid in accordance with Article 33(2).
4. Where a buy-in is possible, Article 29 shall apply.

Article 29

Buy-in procedure and notifications

1. Where a buy-in is possible, the receiving trading venue member shall appoint a buy-in agent on the business day following the expiry of the extension period and notify the failing trading venue member thereof.
2. Upon receipt of the notification referred to in paragraph 1, the failing trading venue member shall ensure that any relevant settlement instruction relating to the settlement fail is put on hold.
3. Upon receipt of the notification referred to in paragraph 1, the failing trading venue member may only deliver the financial instruments to the buy-in agent where the buy-in agent gives prior consent.
Prior to receipt of the notification referred to in paragraph 1, the failing trading venue member may still deliver the financial instruments directly to the receiving trading venue member.
4. The receiving trading venue member shall notify the results of the buy-in to the failing trading venue member and to the relevant CSD at the latest on the last business day of the period determined in accordance with Article 37.
5. Where the buy-in is successful in part or in full, the notification referred to in paragraph 4 shall include the quantity and price of the bought-in financial instruments.
6. Where the buy-in fails in part or in full, the notification referred to in paragraph 4 shall include the cash compensation amount calculated in accordance with Article 32 unless that notification specifies that the execution of the buy-in is deferred.
7. Where the execution of the buy-in is deferred, the receiving trading venue member shall notify the results of that deferred buy-in to the failing trading venue member and to the relevant CSD at the latest on the last business day of the deferral period referred to in Article 38.
8. Where the buy-in referred to in paragraph 7 is successful in part or in full, the notification referred to in that paragraph shall include the quantity and price of the bought-in financial instruments.
9. Where the buy-in referred to in paragraph 7 fails in part or in full, the notification referred to in that paragraph shall include the cash compensation amount calculated in accordance with Article 32.
10. The receiving trading venue member shall accept and pay for the bought-in financial instruments referred to in paragraphs 5 and 8.
11. The receiving and the failing trading venue members shall ensure that the following is carried out at the end of each business day on which the receiving trading venue member receives the instruments referred to in paragraphs 5 and 8:
 - (a) the settlement instructions relating to the settlement fail are cancelled;
 - (b) the new settlement instructions are entered into the securities settlement system for any non-delivered financial instruments and the CSD receives the information necessary to identify such new settlement instructions accordingly.
12. The failing trading venue member shall pay the cash compensation referred to in paragraphs 6 and 9 in accordance with Article 33(2).

13. The failing and receiving trading venue members shall ensure that the relevant settlement instructions relating to the settlement fail are cancelled upon payment of the cash compensation referred to in paragraphs 6 and 9 or at the latest on the second business day after the notification of the amount of cash compensation.

SUB-SECTION 4

Buy-in process for transactions not cleared by a CCP and not executed on a trading venue

Article 30

Initial verification

1. For transactions not cleared by a CCP and not executed on a trading venue, receiving participants, through their clients, shall inform receiving trading parties of any settlement fails without undue delay.
2. On the business day following the expiry of the extension period, receiving trading parties shall verify whether a buy-in is possible in accordance with Article 21.
3. Where buy-in is not possible pursuant to Article 21, receiving trading parties shall notify the failing trading party of the results of the verification and the cash compensation amount calculated in accordance with Article 32. The cash compensation shall be paid in accordance with Article 33(2).
4. Where the buy-in is possible, Article 31 shall apply.

Article 31

Buy-in procedure and notifications

1. Where the buy-in is possible, the receiving trading party shall appoint a buy-in agent on the business day following the expiry of the extension period and notify the failing trading party thereof.
2. Upon receipt of the notification referred to in paragraph 1, the failing trading party shall ensure that any relevant settlement instruction relating to the settlement fail is put on hold,
3. Upon receipt of the notification referred to in paragraph 1, the failing trading party may only deliver the financial instruments to the buy-in agent where the buy-in agent gives its prior consent.

Prior to the receipt of the notification referred to in paragraph 1, the failing trading party may still deliver the financial instruments directly to the receiving trading party.
4. The receiving trading party shall notify the results of the buy-in to the failing trading party at the latest on the last business day of the applicable period determined in accordance with Article 37. The receiving trading party shall ensure that the relevant CSD receives the information notified without undue delay.
5. Where the buy-in is successful in part or in full, the notification referred to in paragraph 4 shall include the quantity and price of the bought-in financial instruments.

6. Where the buy-in fails in part or in full, the notification referred to in paragraph 4 shall include the cash compensation amount calculated in accordance with Article 32, unless that notification specifies that the execution of the buy-in is deferred.
7. Where the execution of the buy-in is deferred, the receiving trading party shall notify the results of that deferred buy-in to the failing trading party at the latest on the last business day of the deferral period referred to in Article 38. The receiving trading party shall ensure that the relevant CSD receives the information notified without undue delay.
8. Where the buy-in referred to in paragraph 7 is successful in part or in full, the notification referred to in that paragraph shall include the quantity and price of the bought-in financial instruments.
9. Where the buy-in referred to in paragraph 7 fails in part or in full, the notification referred to in that paragraph shall include the cash compensation amount calculated in accordance with Article 32.
10. The receiving trading party shall accept and pay for the bought-in financial instruments referred to in paragraphs 5 and 8.
11. The receiving and the failing trading parties shall ensure that the following is carried out at the end of each business day on which the receiving trading party receives the instruments referred to in paragraphs 5 and 8:
 - (a) the settlement instructions relating to the settlement fail are cancelled;
 - (b) the new settlement instructions are entered into the securities settlement system for any non-delivered financial instruments and the CSD receives the information necessary to identify such new settlement instructions accordingly.
12. The failing trading party shall pay the cash compensation referred to in paragraphs 6 and 9 in accordance with Article 33(3).
13. The failing and receiving trading parties shall ensure that the relevant settlement instructions relating to the settlement fail are cancelled upon payment of the cash compensation referred to in paragraphs 6 and 9 or at the latest on the second business day after the notification of the amount of that cash compensation.

SUB-SECTION 5

Calculation and payment of the cash compensation, of the buy-in costs and related price difference

Article 32

Calculation of the cash compensation

1. The cash compensation to be paid pursuant to Article 7(7) of Regulation (EU) No 909/2014 shall be calculated in either of the following ways:
 - (a) for settlement instructions against payment, the difference between the market value of the relevant financial instruments on the business day before the payment of the cash compensation and the settlement amount included in the failed settlement instruction where that settlement amount is lower than that market value;

- (b) for settlement instructions free of payment, the difference between the market value of the relevant financial instruments on the business day before the payment of the cash compensation and the market value of those financial instruments on the day of their trade, where the market value of those financial instruments on the day of their trade is lower than on the business day before the payment of the cash compensation.
2. Where not already included in the market value of the financial instrument, the cash compensation to be paid pursuant to Article 7(7) of Regulation (EU) No 909/2014 shall include a component reflecting exchange rates variation, as well as corporate entitlements and accrued interest.
3. The market value referred to in paragraph 1 shall be determined as follows:
 - (a) for financial instruments referred to in Article 3(1) of Regulation (EU) No 600/2014 of the European Parliament and of the Council⁸ admitted to trading on a trading venue within the Union, the value determined on the basis of the closing price of the most relevant market in terms of liquidity referred to in Article 4(6)(b) of that Regulation;
 - (b) for financial instruments admitted to trading on a trading venue within the Union other than those referred to in point (a), the value determined on the basis of the closing price of the trading venue within the Union with the highest turnover;
 - (c) for financial instruments other than those referred to in points (a), and (b), the value determined on the basis of a price calculated using a pre-determined methodology approved by the competent authority of the CSD that refers to criteria related to market data, including market prices available across trading venues or investment firms.
4. The market value referred to in paragraph 1 and the component reflecting exchange rates variation, corporate entitlements and accrued interest, referred to in paragraph 2, shall be disclosed to clearing members, trading venue members and trading parties in a detailed breakdown.

Article 33

Payment of the cash compensation

1. For transactions cleared by a CCP, the CCP shall collect the cash compensation from the failing clearing members and pay the cash compensation to the receiving clearing members.
2. Where transactions have not been cleared by a CCP but executed on a trading venue, the failing trading venue members shall pay the cash compensation to the receiving trading venue members.
3. Where transactions have not been cleared by a CCP and have not been executed on a trading venue, the failing trading parties shall pay the cash compensation to the receiving trading parties.

⁸ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173 12.6.2014, p. 84).

Article 34

Payment of the costs of the buy-in

The amounts referred to in Article 7(8) of Regulation (EU) No 909/2014 shall be paid by the failing clearing members, failing trading venue members or failing trading parties, as applicable.

Article 35

Payment of the price difference

1. Where the price of financial instruments referred to in Article 5(1) of Regulation (EU) No 909/2014 agreed at the time of the trade is lower than the price effectively paid for those financial instruments pursuant to Articles 27(10), 29(10), and 31(10), the failing clearing members, failing trading venue members or failing trading parties shall pay the price difference to the CCP, receiving trading venue members or receiving trading parties, as applicable.

Where transactions are cleared by a CCP, the price difference referred to in the first subparagraph shall be collected from failing clearing members by the CCP and paid to the receiving clearing members.

2. Where the price of the shares agreed at the time of the trade is higher than the price effectively paid for those shares pursuant to Article 27(10), Article 29(10) and Article 31(10), the corresponding difference referred to in Article 7(6) of Regulation (EU) No 909/2014 shall be deemed paid.

SECTION 4

Timeframes for buy-in process

Article 36

Extension periods

In accordance with point (a) of Article 7(4) of Regulation (EU) No 909/2014, the extension period for the financial instruments referred to in Article 5(1) of Regulation (EU) No 909/2014 shall be increased from four to seven business days for all financial instruments other than shares that have a liquid market as referred to in point (b) of Article 2(1)(17) of Regulation (EU) No 600/2014.

Article 37

Timeframes for the delivery of financial instruments

Following the buy-in process, the financial instruments referred to in the first subparagraph of Article 5(1) of Regulation (EU) No 909/2014 shall be delivered to the receiving participants which are acting on behalf of the CCP, the receiving clearing members, the trading venue members or the trading parties, within the following timeframes:

- (a) four business days after the extension period referred to in Article 36 for shares that have a liquid market;
- (b) seven business days after the extension period referred to in Article 36 for financial instruments other than shares that have a liquid market;

- (c) seven business days after the extension period referred to in the second subparagraph of Article 7(3) of Regulation (EU) No 909/2014 for financial instruments traded on SME growth markets;
- (d) where shares referred to in point (a) are traded on SME growth markets, point (c) shall apply.

Article 38

Duration of deferral of the execution of a buy-in

Where the CCP, the receiving trading venue member or the receiving trading party defers the execution of the buy-in, the duration of the deferral period referred to in Article 7(7) of Regulation (EU) No 909/2014 shall be determined in accordance with the timeframes referred to in Article 37.

SECTION 5

Systematic delivery failure

Article 39

Consistent and systematic failure to deliver securities

1. A participant shall be considered as consistently and systematically failing to deliver in a security settlement system, as referred to in Article 7(9) of Regulation (EU) No 909/2014, where its rate of settlement efficiency, determined by reference to the number or to the value of settlement instructions, is at least 15% lower than the rate of settlement efficiency of that securities settlement system, during at least a relevant number of days over the 12 previous months.

The relevant number of days shall be determined for each participant as 10% of the number of days of activity of that participant in the security settlement system over the 12 previous months.

2. When calculating a participant's rate of settlement efficiency, exclusive reference shall be made to settlement fails caused by that participant.

SECTION 6

Settlement information

Article 40

Settlement information for CCPs and trading venues

The settlement information referred to in the second subparagraph of Article 7(10) of Regulation (EU) No 909/2014 shall include the identification of the relevant transactions, of the participants and of the relevant settlement instructions. That information shall be based on the information in the securities settlement system the CSD operates.

Article 41

Settlement information in the absence of direct transaction feed from the trading venue

For transactions executed on a trading venue which are not cleared by a CCP, and in the absence of a direct transaction feed from the trading venue to the CSD, participants shall identify the trading venue and the transactions in their settlement instructions. In the absence of such information, CSDs shall consider the transactions as not having been executed on a trading venue.

CHAPTER IV

FINAL PROVISIONS

Article 42

This Regulation shall enter into force 24 months following the day 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, 25.5.2018

For the Commission
The President
Jean-Claude JUNCKER