



**EACH response to ESMA consultation
paper on Regulatory Technical Standards
on the CSD Regulation – The operation of
the Buy-in Process**

August 2015

Please note that due to the summer holidays this response is based on the input of a limited number of CCPs members of EACH.

Introduction

EACH appreciates the scope of the consultation on operations of buy-ins for trades neither cleared nor traded on a trading venue and would like to take the opportunity to raise specific issues in respect to the draft rules in the Annex 2 on buy-ins for cleared trades. We would like to reiterate some of the points made in the previous consultation response on CSDR. We hope that ESMA will take these into account in the final RTS.

Answers to questions:

Q1: Please provide evidence of how placing the responsibility for the buy-in on the trading party will ensure the buy-in requirements are effectively applied.

Please provide quantitative cost-benefit elements to sustain your arguments.

No EACH comments.

Q2: Please indicate whether the assumption that the trading party has all the information required to apply the buy in would be correct, in particular in cases where due to a lack of securities held by one of the intermediaries within the chain.

Recital (4):

The current wording states that clearing members should perform the buy-in. While trading venue members may or may not perform the buy-in for failed settlements, in accordance with the rules of the trading venues, in the case of cleared transactions and in line with the level 1 text of the CSD Regulation, the CCP is the party executing the buy-in, not the clearing members. We therefore suggest changing the current wording of **Recital 4 (page 16) as follows:**

*'For transactions executed on a trading venue, the trading venue members are the parties to the transaction and therefore the parties that should perform the buy-in. They have the relevant information to execute it. **For transactions cleared by a CCP, clearing members are the parties to the transaction and therefore the parties that should be subject to the buy-in performed by the CCP.'***

Q3: Should you believe that the collateralisation costs attached to this option are significant, please provide detailed quantitative data to estimate the exact costs and please explain why a participant would need to collateralise its settlement instructions under this option.

No EACH comments.

Q4: If you believe that option 1 (trading party executes the buy-in) can ensure the applicability of the buy-in provisions are effectively applied, please explain why and what are the disadvantages of the proposed option 2 (trading party executes the buy-in with participant as fall back) compared to option 1, or please evidence the higher costs that option 2 would incur. Please provide details of these costs.

No EACH comments.

Q5: Please provide detailed quantitative evidence of the costs associated with the participant being fully responsible for the buy in process and on the methodology used to estimate these costs.

No EACH comments.

Comments on Annex 2 – Section 3 Details of operation of the appropriate buy-in process

1. Article 12 – General

1.1. Article 12.1 – General – Initiation of the buy-in process

In order to ensure a consistent application of the provisions with regard to the initiation of the buy-in process, we would suggest the following adjustment to Article 12.1:

'The buy-in process shall be initiated at the end of the business day ~~following the elapse of on which~~ the extension period ~~elapses~~.'

1.2. Article 12.1 – General – Elements of the buy-in process

EACH would like to confirm that options 1-2-3 **only cover trades which are non-cleared/non-traded on trading venues.**

2. Article 13 - Notifications

2.1. Article 13.1

For clarification reasons we propose the following clarification to Article 13.1.b:

'without delay upon the appointment of the buy-in agent, a notification specifying the date of the appointment and the name of the buy-in agent, ***in case the buy-in is not executed via a buy-in auction***.'

2.2. Article 13.3

Article 13.3 requires CCP to send the notifications listed in paragraph 1 to both CSD and failing clearing members. EACH believes there is no need for CCPs to send notifications to the CSDs, as these have already all the information. Both CCPs and market participants have accounts at the relevant CSD, which will therefore know if and when a settlement instruction has settled or whether it will have to continue to apply the penalties.

3. Article 15

3.1. Article 15.2

We would like to suggest the following changes to Art 15.2 to ensure that rules around the execution of the buy-ins are firm but flexible enough in order to ensure the continuation of the different buy-in models used currently by CCPs, which work effectively:

15.2.a

~~'where the buy-in has been successful, the securities shall be delivered to the receiving clearing member~~ ***made available to fulfil outstanding deliveries***, and upon completion of the buy-in process, the CCP shall ensure that the settlement instruction is cancelled ***closed through settlement or cancellation***;

15.2.b We believe that the last sentence of Article 15 (2)(b) is not needed, as the CCP will always notify the failing clearing member when it is required to pay the cash compensation to the CCP.

~~'where the buy-in failed, the CCP shall notify without delay to the failing clearing member whether the CCP prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing clearing member shall pay to the CCP the cash compensation, which the CCP shall pass to the receiving clearing member;~~

In addition, for transactions cleared by a CCP neither there is a one to one relation between buy and sell transactions nor a dedicated assignment between deliveries to the CCP and receipts from the CCP. Price(s) used to calculate the cash compensation on the delivery instruction(s) to the CCP may differ from the price(s) of the delivery instruction(s) from CCP to the receiving party(ies). As a consequence the cash compensation received cannot simply be passed to the receiving party.

Therefore, would ESMA wish to maintain this last sentence, we would suggest at least rephrasing it as follows:

'In the absence of such notification, the failing clearing member shall pay to the CCP the cash compensation *as requested by the CCP, which the CCP shall pass to the receiving clearing member. The CCP shall transfer the appropriate cash compensation to the receiving party(ies) of the CCP.*'

15.2.c It would not seem logical for the failing participant to pay a cash compensation it has not been required to pay by the CCP - the CCP will always notify the failing clearing member when it is required to pay the cash compensation. Only then the failing clearing member will pay. Therefore, we believe that the following parts should be deleted:

'where the buy-in results in partial delivery of securities, the ~~receiving clearing member shall accept the bought-in securities~~ **shall be made available to partially settle the delivery as for a full buy-in.** For the non-delivered securities, ~~the receiving clearing member shall notify without delay to the CCP~~ **shall determine** whether it prefers to defer the buy-in process or to receive the cash compensation. ~~In the absence of such notification, the failing clearing member shall pay to the CCP the cash compensation, which the CCP shall pass to the receiving clearing member.'~~

3.2. Article 15.4

As for transactions cleared by a CCP neither there is a 1-1 relation between buy and sell transactions nor a dedicated assignment between deliveries to the CCP and receipts from the CCP. Price(s) used to calculate the cash compensation on the delivery instruction(s) to the CCP may differ from the price(s) of the delivery instruction(s) from CCP to the receiving party(ies). As a consequence the cash compensation received cannot simply be passed to the receiving party.

We therefore suggest the following rephrasing:

...'For transactions cleared by a CCP, the CCP shall transfer the **appropriate** received cash compensation to the receiving clearing member.

3.3. Article 16 - Partial Settlements

EACH believes that Article 16 should be improved to ensure consistency with recital 8 as follows:

When the relevant securities are available in the account of the delivering participant, partial settlement offered by CSDs in accordance with Article 3(9) shall be applied from the last business day of the extension period, irrespective of any contractual choice made by the participants. **Partial settlement should not apply to settlement instructions that have been put on hold by a participant, since this may indicate that the financial instruments in the account do not belong to the client for which the instruction has been entered into the system.**

3.4. Article 17 - Minimising the number of buy-in processes

We would like to confirm that the provisions of Article 17 **only apply to trades which are non-cleared/non-traded on trading venues.**