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ECSDA Response

Targeted consultation on the review of the Directive on settlement finality in payment and securities settlement systems

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

Introduction

Background to this consultation

The aims to reduce systemic risk arising from the insolvency Settlement Finality Directive (SFD) of participants in payment and securities settlement systems (systems). The SFD protects a duly designated, notified and published system (SFD system) and its participants – whether domestic or foreign – from the legal uncertainty and unpredictability inherent in the opening of insolvency proceedings against one of their number. It does so, by stipulating protections for the irrevocability and finality of transfer orders entered into an SFD system, thus, preventing them from being interfered with in such proceedings (settlement finality). It also provides for the enforceability of the netting of transfer orders, from the effects of the insolvency of a participant.

Moreover, the SFD ring-fences collateral security provided either in connection with participation in an SFD system or in the monetary operations of the Member States' central banks or the European Central Bank (ECB) from the effects of the insolvency of the collateral provider.

Settlement finality was not enacted lightly since it constitutes an exception to the equal treatment of creditors upon the opening of insolvency proceedings as well as to the principle of universality of insolvency proceedings. It was deemed justified by the overriding public interest in avoiding systemic contagion risks throughout the EU. This is why systemically important systems are covered by the SFD.

Since its adoption, the SFD was amended five times. In 2008/2009, the first review took place. The Commission's 2005 evaluation report concluded that the SFD worked well and had its intended effect. The amendments, therefore, aimed at keeping up with the latest market and regulatory developments, especially the increasing interoperability of SFD systems and the addition of credit claims to the types of financial collateral covered by the definition of collateral security. Afterwards there were another four amendments, the focus of which was to incorporate amendments made in other EU Regulations or Directives, which were introduced to deal with the aftermath of the financial crisis (i.e. the ESAs Directive, EMIR, CSDR and BRRD 2).

Report on the Directive

During the legislative process for the BRRD 2, the European Parliament (EP) sought to extend the protections of the SFD to any non-EU system (third-country system) where at least one (direct) participant had its head office in the EU. The EP's proposals were not adopted; Article 12a was added to the SFD requiring the Commission to report by 28.

June 2021 on how Member States apply the SFD to their domestic institutions which participate directly in systems governed by the law of a third-country and to collateral security provided in connection with their participation. If appropriate, the Commission shall provide a proposal for revision of the SFD. The Commission services intend to take the opportunity to consider a wide range of specific areas where targeted action may be necessary for the SFD to continue its functioning. Even though the Commission concluded during the last review, that the SFD worked well, the impact of new developments in a changing business, technological and regulatory environment should be considered.

Considering not only the issue raised in Article 12a but a wider range of areas is deemed appropriate, given the fact that the last review took place in 2008/2009. In parallel, issues regarding the closely linked Directive 2002/47/EC on. Two issues that are dealt with in the FCD consultation financial collateral arrangements (FCD) are considered are also important for the SFD: recognition of 'close-out netting provision' and 'financial collateral' ('cash' and 'financial instruments' the two most commonly used forms of 'collateral security' under the SFD). A first discussion with Member States on both, SFD and FCD related issues, took place in October 2020.

Responding to this consultation

The purpose of this consultation is to receive stakeholders' views and experiences regarding the functioning of the SFD in general and the protection of third-country systems in particular. The responses to this consultation will provide important guidance to the Commission services in preparing the final report and legal proposals where appropriate.

Responses to this consultation are expected to be most useful where issues raised in response to the questions are supported with **a detailed narrative and quantitative data (where appropriate)**, and accompanied by **specific suggestions for solutions** to address them in the Directive.

All interested stakeholders are invited to respond to the questions set out below; please note that some questions are only addressed to specific stakeholders.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-sfd-fcd- review@ec.europa.eu

1. Participation in systems governed by the law of a third-country

The covers systems governed by the law of Settlement Finality Directive (SFD, Directive 98/26/EC) a Member State but not those governed by the law of a third-country. Credit institutions and investment firms may, however, participate in an SFD system even when their head office is in a third-country (third-country participant). The protections of the SFD apply fully and without discrimination in the event of the insolvency of a third-country participant in an SFD system. However, since the SFD does not cover third-country systems regardless of whether such systems are established inside or outside the EU, transactions and collateral posted by EU participants in such systems and related netting are not protected under the SFD.

Recital 7 of the SFD recalls that it is up to Member States to apply the provisions of the SFD to their domestic institutions, which participate directly in third country systems, and to collateral security provided in connection with participation in such systems.

During the legislative process for the BRRD 2 the European Parliament (EP) sought to extend the protections of the SFD to any third-country system where at least one (direct) participant had its head office in the EU. The EP's proposals were not adopted. Article 12a was added to the SFD requiring the Commission to report by 28 June 2021 on how Member States apply the SFD to their domestic institutions which participate directly in systems governed by the law of a third-country and to collateral security provided in connection with their participation. If appropriate, the Commission shall provide a proposal for revision of the SFD.

ECSDA does not provide answers to the questions in this section.

2. Participants in systems governed by the law of a Member State

The SFD lists the participants that are eligible to participate directly in an SFD system and benefit from the protection offered by the SFD. (Direct) participants are, among others, credit institutions, investment firms, public authorities, CCPs, system operators and clearing members of an EMIR authorized CCP.

Furthermore, the SFD gives Member States the option to decide that, for the purposes of the SFD, an 'indirect participant' may be considered a 'participant', if that is justified on the grounds of systemic risk. Only 'indirect participants' that fall under the categories eligible for direct participation, may be considered as (direct) participants' under this derogation.

Largely, the SFD does not mandate the legal form of eligible participants. Both natural and legal persons that come under the definitions are eligible to participate, except for CCPs which must be legal persons. Investment firms must be legal persons under MiFID 2 although Member States are allowed to authorise natural persons as investment firms subject to conditions.

E-money institutions under the E-Money Directive (EMD 2) and payment institutions under the Payment Services Directive (PSD 2) are not currently eligible participants under the SFD. In its Retail Payment Strategy, the Commission announced that it would consider, in its SFD review, extending the scope of the SFD to include e-money and payment institutions, subject to appropriate supervision and risk mitigation. In the absence of a harmonised SFD solution at EU level, some Member States have introduced national solutions that allow e-money and payment institutions either direct or indirect participation in payment systems, provided they fulfil certain criteria. This situation has led to level playing field issues between Member States, fragmentation of the European retail payment market and legal uncertainty regarding the cross-border recognition of settlement finality on SFD payment systems with wider national participation. It might be worth considering to add them to the list of eligible participants when they fulfil certain criteria to ensure a level playing field and provide legal certainty in a cross-border context. In the public consultation on the EU's retail payments strategy, nearly 43% of respondents thought that direct participation in SFD qualifying systems should be allowed, whilst nearly 32% thought that indirect participation through banks was sufficient.[1]

Currently, the operator of a payment system that is not designated under the SFD is not an eligible type of SFD participant. Stakeholders raised the issue that this prevents these payment system operators from participating in TARGET2 (TARGET2 is the real-time gross settlement (RTGS) system owned and operated by the Eurosystem), where payment orders in euro are processed and settled in central bank money. They argue that (direct) participation of these payment system operators in TARGET2 (being SFD designated systems) would reduce the use of commercial bank money for

[1] See consultation for retail payments. A sizeable majority of respondents thought that direct participation should be allowed because non-banks are too dependent on banks. Some respondents thought that fees charged by banks were too high or that banks restricted access to bank accounts to non-banks. Others thought that indirect participation through banks was sufficient because non-banks offered indirect access at reasonable conditions or because the cost of direct participation would be too high.

settlement and the related credit and liquidity risk. Principle 9 of the principles for financial market infrastructures (PFMI) asks relevant (i.e. systemically important) financial market infrastructures to reduce credit and liquidity risks by conducting "its money settlements in central bank money where practical and available. If central bank money is not used, an FMI should minimise and strictly control the credit and liquidity risk arising from the use of commercial bank money." Adding them to the list of (direct) SFD participants would open up the possibility to allow their participation in TARGET2. While this could reduce credit and liquidity risk arising from settlement in commercial bank money, it has to be ensured at the same time that any risks arising for SFD systems are adequately mitigated.

Since the adoption of EMIR, CCPs have been added to the list of eligible (direct) SFD participants. However, CSDs as defined in Article 2(1)(1) of the CSDR are not explicitly included although their participation is implicitly covered in their function as 'settlement agents' and 'system operators'. Yet, Article 39(1) of the CSDR, requires Member States to designate and notify securities settlement systems operated by CSDs in accordance with the SFD. Adding them to the list of (direct) participants would further clarify that they benefit from the SFD protection also in those cases, where they do participate in a system but not in the function of 'settlement agent' or 'system operator'.

Question 2.1 Should the list of currently eligible SFD participants be either limited or extended or otherwise modified? Please explain your reasons for each type of participant where relevant.

- No need for modifications
- Should be extended
- Should be limited. Some participants should no longer be eligible
- Should be otherwise modified
- Don't know / no opinion / not relevant
-

Question 2.1.1 Please specify how it should be extended:

5000 character(s) maximum

Due to the core SSS function, CSDs are *de facto* listed as participants. The fact that CSDs are not listed as participants in SFD is a formality that can be addressed during the process of the SFD Review. ECSDA would appreciate the inclusion of the definition of CSDs, as defined under Article 2(1)(1) of CSDR, to the list of (direct) participants in order to clarify that CSDs benefit from the SFD protection also in those cases where they do participate in a system, but not in the function of 'settlement agent' or 'system operator'. Please also refer to the response to Question 2.7 below. From a CSD perspective, ECSDA does not view any further amendments in this regard are required.

Question 2.1.1 Please explain why it should be limited and list the participants that should no longer be eligible:

5000 character(s) maximum

N/A

Question 2.1.1 Please specify how it should be otherwise modified:

5000 character(s) maximum

N/A

Question 2.2 Should participation in an SFD system be limited to legal persons?

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

Question 2.2.1 Please explain your answer to question 2.2:
5000 character(s) maximum

Question 2.3 What is your opinion of the following (potential) participants? (options are exclusive)
You can select only one response for each type of institution.

	Payment institutions	**e-money institutions**
Should not be direct participants		
Should be direct participants (only)		
Should only be indirect participants who may be considered direct participants, if that is justified on the grounds of systemic risk		
Should be direct participants and indirect participants who may be considered direct participants, if that is justified on the grounds of systemic Risk		
Other		
Don't know / no opinion / not relevant	**X**	**X**

Please specify what you mean by other in your response to question 2.3:
5000 character(s) maximum

N/A

Question 2.4 Please state your opinion on the following:
a) If payment institutions and e-money institutions are added to the list of participants, they should be subject to a specific risk assessment.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please provide some comments/explanations on your opinion to proposal 2.4 a):
5000 character(s) maximum

In case payment institutions and e-money institutions are added to the list of participants, we would not see on which rationale a distinction should be made between existing participant types and these new ones.

b) Payment institutions and e-money institutions should only be made eligible SFD participants if 'warranted on grounds of systemic risk'.

- 1 - Disagree
- 2 - Rather not agree

- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please provide some comments/explanations on your opinion to proposal 2.4 b):
5000 character(s) maximum

In case payment institutions and e-money institutions are added to the list of participants, we would not see on which rationale a distinction should be made between existing participant types and these new ones.

c) If payment institutions and e-money institutions are added to the list of participants, no particular risk assessment is needed.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please provide some comments/explanations on your opinion to proposal 2.4 c):
5000 character(s) maximum

As a risk assessment is already foreseen under the current CSDR framework, there would be no need to specify or clarify the need for a specific risk assessment.

Question 2.5 Which risks should be considered in a specific risk assessment (mentioned in question 2.5.) for payment and e-money institutions?

How could such a risk assessment look like?

Please state your opinion on the following:

a) IT risks should be considered.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please provide some comments/explanations on your opinion to proposal 2.5 a):
5000 character(s) maximum

b) Operational risks (other than IT risks) should be considered.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral

- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please provide some comments/explanations on your opinion to proposal 2.5 b):
5000 character(s) maximum

N/A

c) Credit risk should be considered.
- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please provide some comments/explanations on your opinion to proposal 2.5 c):
5000 character(s) maximum

N/A

d) Liquidity risk should be considered.
- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please provide some comments/explanations on your opinion to proposal 2.5 d):
5000 character(s) maximum

N/A

e) Other, please specify:
5000 character(s) maximum

N/A

Question 2.6 In case a risk assessment is deemed useful: How often should risks be assessed?
- Annually (and ad hoc when necessary)
- Every two years (and ad hoc when necessary)
- As defined by a competent authority
- Don't know / no opinion / not relevant

Question 2.6.1 Please elaborate on your answer to question 2.6:
5000 character(s) maximum

Question 2.7 Do you agree with adding CSDs to the list of participants covered by the SFD?

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

Question 2.7.1 Please explain your answer to question 2.7:

5000 character(s) maximum

Please refer to the response given to question 2.1.1.

Question 2.8 What do you think of adding operators of EU payment systems that are not designated under the SFD to the list of participants covered by the SFD?

- All payment system operators of EU systems that are not designated under the SFD should be eligible participants under the SFD if risks for SFD systems are adequately mitigated.
- Participation should only be possible based on the grounds of systemic risk.
- Even though credit and liquidity risk related to settlement in commercial bank money are reduced, other risks stemming from their participation in SFD systems increase. Therefore, only if they qualify as another type of SFD participant (e.g. a credit institution) they are good to participate.
- Other
- Don't know / no opinion / not relevant

Question 2.8.1 Please elaborate how this risk mitigation could look like in your opinion:

5000 character(s) maximum

N/A

Question 2.8.1 Please elaborate on your answer to question 2.8:

5000 character(s) maximum

N/A

Question 2.8.1 Please elaborate on the risks that prevent their participation in SFD systems in your opinion:

5000 character(s) maximum

N/A

Question 2.8.1 Please explain your answer to question 2.8:

5000 character(s) maximum

N/A

Question 2.9 What do you think of limiting the number of eligible SFD participants by replacing or complementing the current list of eligible participants by an approach that is based on a risk assessment for participants?

- This is a good idea, as it ensures that only entities which are really systemically important benefit from the SFD protection (in case of a purely risk based approach: notwithstanding their legal form (whether they are a bank, investment firm, payment institution, e-money institution etc.))

- This is too difficult from an operational point of view and will therefore jeopardize the aim of a risk based approach (as risks cannot be appropriately monitored and considered when they actually occur)
- Other
- Don't know / no opinion / not relevant

Please specify what you mean by 'other' in your answer to question 2.9:
5000 character(s) maximum

N/A

Question 2.9.1 Please explain your answer and specify how such a risk assessment could look like, whether it should replace or complement the current list of eligible participants and how often it should take place:
5000 character(s) maximum

N/A

3. SFD and technological innovation

The SFD is meant to be technologically neutral. Tech neutrality is primarily achieved by referring key requirements (e.g. the moments of entry into the system and irrevocability) to the rules of the SFD system, rather than mandating them in the SFD, itself. This approach, has largely allowed SFD systems to develop as needed, without major legislative change, so far.

The Commission has received input from various stakeholders who argue that some of the SFD's requirements create obstacles to the use of distributed ledger technology (DLT) and crypto-assets[2]. Their main concerns 1 refer to the application of the SFD in a decentralised permission-less DLT and in a context where multilateral as opposed to mainly bilateral relationships prevail. The most important issues for permission-less DLT are that there is no centralised operator, unidentified participants can enrol without restriction and functions can be attributed simultaneously to several participants. As the existence of a system operator defining the rules of a system and clear legal responsibility are important for the functioning of the SFD, this poses considerable challenges whether the SFD provisions can actually apply and if so under which conditions.

As there is not enough experience yet of the benefits and risks associated with the use of DLT, the Commission has adopted a proposal for a pilot regime on DLT market infrastructures (the pilot; COM/2020/594 final) using a sandbox approach to allow experimentation by derogating from certain EU financial markets provisions.

The pilot enables CSDs to operate 'DLT securities settlement systems' outside the scope of the SFD, but does not preclude CSDs from operating 'DLT securities settlement systems' within the SFD as stakeholder feedback suggests that this may well be possible for permissioned DLT under certain circumstances, where the system operator could design the system and its rules to be SFD compliant, possibly subject to some specification or clarification of the SFD to enhance legal certainty. Furthermore, the pilot does not apply to DLT payment systems. Hence, it could be useful to specify and clarify, in the current review, certain definitions and concepts in the SFD (e.g. system, transfer order, book-entry, settlement account and agent, conflict of laws, links with other financial market infrastructures). This could ensure they are tech neutral when applied to permissioned DLT based payment systems as well as DLT securities settlement systems that are not covered by the pilot. Feedback received so far by the Commission in this respect provided very mixed results and has not allowed for the full specification of those obstacles and potential solutions or proposals.

Stakeholders indicate further, that not only Member States transpose the existing SFD requirements differently but also national competent authorities (NCAs) interpret them differently, which might lead to legal uncertainty. Clarifying certain concepts and definitions in the SFD could hence help avoiding diverging national interpretations and transpositions and resulting legal uncertainty.

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[2] On 19 December 2019, Commission services launched a . A part of the respondents consultation on markets in crypto-assets gave replies to one or more SFD related questions (e.g. around 40% of overall respondents had an opinion on the application of SFD definitions). The responses were mixed and conflicting. Some thought that the SFD as it currently stands or with minor changes is sufficiently tech neutral to accommodate DLTs and crypto-assets, whilst others thought further clarification or specification was needed. The reasons for further changes and how to make them were not always clearly stated. See also ESMA's 'Advice - Initial Coin Offerings and Crypto-Assets', January 2019; '30 recommendation on regulation, innovation and finance' by the 'Expert Group on Regulatory Obstacles to Financial Innovation' (ROFIEG), December 2019 and 'The potential impact of DLTs on securities post-trading harmonisation and on the wider EU financial market integration' by the 'Advisory Group on Market Infrastructures for Securities and Collateral' (AMI-Seco), September 2017.

Question 3.1 Do you consider the SFD to be technologically neutral?

- Yes, everything is sufficiently clear no matter the technology used.
- No, I do not know how to apply certain concepts or definitions of the SFD for specific technologies which creates legal uncertainty (please explain under question 3.5.).
- Don't know / no opinion / not relevant

Question 3.2 Do you agree that the concepts of the SFD do not work in a permissionless DLT environment?

- Yes, important concepts of the SFD do not work in a permissionless DLT environment, especially as legal responsibilities might be unclear. It is indeed problematic that there is no centralised operator, unidentified participants can enroll without restriction and functions can be attributed simultaneously to several participants.
- No, I do not see any problem to apply the concepts of the SFD in a permissionless DLT environment. (Please provide detailed information of how you think settlement finality under the SFD can be achieved despite the lack of a centralised operator, the fact that unidentified participants can enroll without restrictions and that functions can be attributed simultaneously to several participants.)
- Don't know / no opinion / not relevant

Question 3.2.1 Please provide detailed information on your answer to question 3.2:
5000 character(s) maximum

It is correct to say that, in general, a permissionless DLT technology is more troublesome to reconcile with the requirements laid out in SFD. However, rather than considering SFD as being non-technology neutral for the use of permissionless DLTs, we are of the opinion that not all technologies, in their basic and purest form, are as fit for purpose in a SFD context than others, i.e. permissioned DLT.

We explain below and in question 3.3 why we believe that, in the current level of development of the technology, permissionless DLT models require more reflections on their usability within a system designated under SFD.

Transactions on a DLT ledger must be recorded based on a centralized validation model (i.e. a model in which transactions are validated by a 'master node' operated by a central authority (being a regulated entity), because proof-of-work or other consensus models create a problem of 'probabilistic finality', i.e. no 100% guaranteed finality, where already processed transactions may be revoked as a consequence of replacing transactions retroactively[3]. In addition, the liability framework is not clear in a permissionless DLT environment.

On the other hand, we believe the concepts laid down in SFD can be more readily applied using DLT with a permissioned DLT platform. A centralized validation model could be implemented in a private[4], permissioned[5] DLT system for which the protocols and architecture can be designed with

[3] European Central Bank (Advisory Group on Market Infrastructures for Securities and Collateral), "The potential impact of DLTs on securities post-trading harmonisation and on the wider EU financial market integration", September 2017, p. 53

[4] In a "private" DLT implementation, sight of the record is restricted by system design to a limited subset of users (UK Jurisdiction Taskforce of the LawTech Delivery Panel, "Public Consultation: The status of crypto-assets, distributed ledger technology and smart contracts under English private law", May 2019, p. 112).

[5] In a « permissioned » DLT implementation, prior authorisation (by all other participants or a central authority holding the « master node ») is required in order to participate in the network.

the principle of settlement finality in mind[6]. Moreover, the use of a DLT system with centralized validation model could ensure the ability to reverse transactions in response to a mistake or an order from a court or regulatory authority (without having to depend on the consent of the majority of the nodes like in a consensus method of a public blockchain, like the Bitcoin blockchain)[7]. It seems likely that regulators will require there to be a regulated institution overseeing the operation of the blockchain-based settlement system with an authority to execute such reverse transactions by creating a fork. Another possibility in a private, permissioned blockchain would be that regulators have themselves a node on the blockchain with the power to propose forks to compel participants to take additional steps to verify regulator-initiated forks.

Moreover, in order to mitigate market risk and safeguard investors' rights, the system operator may ensure that the AML/CFT requirements are sufficiently met. In our view, it should be considered deeper how the use of a permissionless DLT could be done in such a way that it does not substantially increase the risks associated with money laundering and terrorist financing.

That being said current regulatory framework has been shaped in order to preserve market integrity, financial stability and investor protection. Although ECSDA is of the opinion that SFD is technology neutral and does not provide for barriers to new technology, ECSDA notes that the implementation of permissionless DLT requires further deep consideration on the points raised above, for example liability. In this regard we believe that European Commission and other relevant authorities should investigate further how relationships between network participants are governed possibly starting from the existing concepts such as agency and outsourcing.

Question 3.3 Do you agree that the scope of the current review of the SFD should be limited to considering the tech neutrality of the SFD in the context of permissioned DLTs where the system operator could design the system and its rules so as to be SFD compliant?

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

Question 3.3.1 Please explain your answer to question 3.3:

5000 character(s) maximum

Although we believe that permissionless DLT networks cannot comply with the SFD requirements and should therefore not be allowed under SFD (see further below), we are of the opinion that SFD should remain technology neutral and future-proof and therefore not restrict the use of any particular type of technologies.

We note that today there is no definition of what a Securities Settlement System is and the features it must meet in order to be designated as such. While we do not believe this clarification should be made in SFD, which needs to remain neutral in regards to all types of systems, this could be done either in a dedicated legislative text or through an existing one such as CSDR.

[6] In addition: "Restricted DLT networks have a number of advantages compared to unrestricted systems when it comes to governance issues, scalability or the risk of illicit activities, which makes them more suitable for securities markets. They provide a more fine-grained access control to records and thus enhance privacy while keeping track, in the local node of any participant, of any counterparty they transacted with" (European Central Bank (Advisory Group on Market Infrastructures for Securities and Collateral), "Potential use cases for innovative technologies in securities post-trading", January 2019, p. 16).

[7] In addition: "Restricted DLT networks have a number of advantages compared to unrestricted systems when it comes to governance issues, scalability or the risk of illicit activities, which makes them more suitable for securities markets. They provide a more fine-grained access control to records and thus enhance privacy while keeping track, in the local node of any participant, of any counterparty they transacted with" (European Central Bank (Advisory Group on Market Infrastructures for Securities and Collateral), "Potential use cases for innovative technologies in securities post-trading", January 2019, p. 16).

The list the features that the SS must comply with in order to be recognised as such could include:

(a) the ability to reach "real" settlement finality;

(b) the ability for a duly regulated and supervised entity to oversee the operation of the securities settlement system and to correct mistakes.

(c) ability for a duly regulated and supervised entity to perform customer due diligence in respect of the participants of the DLT securities settlement system in order to prevent/mitigate the risk of money laundering, terrorist financing and breach of sanctions;

(d) clarity about the moments of entry into the system and irrevocability of transfer orders;

(e) legal certainty relating to the applicable law;

(f) compatibility with the PFMIs. Among other things, the PFMIs require

1. governance arrangements that 'provide clear and direct lines of responsibility and accountability';
2. risk-management frameworks that are reviewed periodically and which enable it to 'identify, measure, monitor, and manage the range of risks that arise in or are borne by the FMI'; and
3. a clear legal basis.

As mentioned above, in the current stage of development of the technology, we believe that permissionless DLT networks are not able to comply with the aforementioned fundamental principles:

(a) risk of probabilistic finality: already processed transactions may be revoked by certain participants of the network as a consequence of replacing transactions retroactively ("forking");

(b) lack of access management and of oversight/control in emergency scenarios or fraud cases;

(c) unclarity about the moments of entry and irrevocability of transfer orders due to the distributed nature of the validation process: since all participants to a permissionless DLT network share one and the same ledger/register, transfer orders may not necessarily be deemed entered into the system at the same time from the perspective of all of these participants (because of latency issues, lack of consensus, etc).

(d) uncertainty about the applicable law because of the lack of a central operator/administrator where the assets could be considered to situate;

(e) incompatibility with the PFMIs. For example, in a permissionless DLT securities settlement system, who would be held accountable and liable in the event of a system failure? While individual participants may be held accountable for their own failures, some entity needs to be made responsible for managing risks at a systemic level, including ensuring that the system is, and remains, robust and a number of risk management roles are simply not capable of being decentralized. This is particularly important at a time of crisis: experience reveals that centralized operators play a core function in ensuring the robustness and continued operation of key financial market infrastructure—being systems of central importance to the proper functioning of our economies—during times of market stress. If the validation is completely decentralized (like in permissionless DLT networks), it is unclear what the underpinning liability framework could be. It is very unrealistic to assume that all participants to a permissionless DLT network would be able and willing to take the liability that is covered today by CSDs (as operator of securities settlement systems). Likewise, it is difficult to see how a regulator could exercise effective oversight of a decentralized group that may be located in multiple jurisdictions outside its regulatory ambit or indeed how such a decentralised group could meet the high prudential requirements we would expect regulators to apply.

That being said, this may not preclude interactions with decentralised (public or federated) permissioned or permission-less networks by these authorised players. With the aim to retain technology neutrality, the SFD review could be an opportunity to balance the fundamental incumbents' roles and that of any new business models. In the context of CSDs, this means to provide efficient and reliable trade and post-trade transactions services, while at the same time, assuring investor protection, markets integrity and financial stability. It is important that system operators could benefit from sufficient flexibility in order to both develop and keep up with the innovation process. Ultimately, in pursuit of this aforementioned balance, it is important to remind that the regulatory framework must define in a technology-neutral way the requirements that must be complied with by the regulated market infrastructure. If a specific technology cannot comply with those requirements, it should not be the legislation that is considered as non-technology neutral but rather the technology that must be considered as not fit for purpose.

Question 3.4 Do you think that first experience with the pilot regime for market infrastructures based on DLT (COM/2020/594 final) should be gained before considering possible issues in the SFD?

- Yes, this will show problems resulting from the use of DLT that have to be considered in the SFD.
- No, there are already issues which have to be addressed for the use in a DLT environment as they currently create legal uncertainty.
- Don't know / no opinion / not relevant

Question 3.4.1 Please elaborate on your answer to question 3.4, if necessary:

5000 character(s) maximum

The European legislator/regulator needs to determine which features a system should have in order to reduce systemic risk and minimise the disruption caused by insolvency proceedings against a participant in a securities settlement system. Such features would be crucial to determine which specific type of DLT is suitable as the underlying technology of a securities settlement system. In addition, some of the concepts used in the SFD would benefit from clarification in a DLT context (e.g. securities account and transfer order).

Furthermore, ECSDA notes that the issue relating to the conflict of law rules included in SFD . This conflict of law concern is an issue that will not be tackled during the Pilot Regime and therefore, in order to identify one criterion, one need not wait for the lessons learned from the Pilot Regime on DLT. Currently, these rules are based on the criteria of 'location of system' which derives from the traditional concept of intermediated securities and on the location of the relevant securities account/PRIMA approach (discussed below). Application of these rules in a distributed environment would grant legal certainty and enforceability of rights. DLT record keeping and validation methods should be assessed against acquisition and disposition rules applicable in the relevant jurisdiction in which the DLT chooses to locate itself.

Those clarifications, which are aiming to ensure a continued technology neutrality of SFD, must be done independently from the pilot regime. In this way, entities willing to use DLT under the existing regulatory framework will not be unduly constrained by not having the full legal certainty to do so.

Question 3.5 Should any of the definitions or concepts in the SFD be clarified or amended to apply explicitly in a permissioned DLT context?

3.5.1 Definition of a system

a) Should the definition of a system be clarified or amended to apply explicitly in a permissioned DLT context?

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

b) How should this ideally be done?

5000 character(s) maximum

N/A

c) Is an amendment to the SFD required?

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

d) Please explain you answer to 3.5.1 c):

5000 character(s) maximum

N/A

e) Could this be dealt with by the system operator in the rules of the system?

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

f) Please explain you answer to 3.5.1 e):

5000 character(s) maximum

N/A

3.5.2 Definition of transfer order

a) Should the definition of transfer order be clarified or amended to apply explicitly in a permissioned DLT context?

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

b) How should this ideally be done?

5000 character(s) maximum

Current provisions of SFD already cater for some activity in the domain of digital- assets, however, attention shall be given in a future review to aspects such as their explicit inclusion in the definition of 'transfer orders'. However, the definition of 'transfer order' would need to cover all relevant digital-assets including crypto-currencies to cater for finality of relevant instructions. Ideally, it should be clarified that an entry on a DLT ledger can constitute a "book entry on a register" (as referred to in the definition of "transfer order" in Article 2 (i) of the SFD). It could however be argued that an amendment of the SFD is not absolutely necessary as the definition of transfer order leaves the means of transfer open: "by means of a book-entry on a register, 'or otherwise'. Guidance by the relevant European regulator should be sufficient.

In terms of executing a transfer order in the context of permissioned DLT, the operator must ensure its functionality and achieves its purpose. Furthermore, the liability of the operator must also be clearly defined. There is a need for accountability and legal certainty of securities transfers. This is also essential for the management of settlement instructions in the case of insolvency of a participant. It should be clear to users and regulators who is accountable for eventual issues related to the functioning of the processes and compliance with legislation.

c) Is an amendment to the SFD required?

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

d) Please explain you answer to 3.5.2 c):

5000 character(s) maximum

Please refer to the response given to question 3.5.2. (b). ECSDA is of the opinion that although clarification is needed in this context, a level 1 amendment to the text may not be strictly necessary.

e) Could this be dealt with by the system operator in the rules of the system?

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

f) Please explain you answer to 3.5.2 e):

5000 character(s) maximum

The SFD does not define the moment of entry of transfer orders in a system (Article 3(1) and the moment and content of irrevocability (Article 5) of transfer orders but leaves that to the rules of the system.

The moment of entry of transfer orders in a system (Article 3(1) SFD) and the moment and content of irrevocability (Article 5 SFD) of transfer order is not explicitly defined under SFD. The intention of the drafters was to leave these rules to the discretion of the system operator itself. Furthermore, the inclusion of 'otherwise' in the definition of transfer order leaves room for the system rules of the operator to clarify how a transfer of title is affected (e.g. through entries on a DLT ledger).

If no level 2 and/or level 3 clarification are foreseen: it is envisaged that the CSD – as operator/governor/gatekeeper of the DLT platform – would continue to frame and regulate the rules of the platform and any transfer order requirements (including any account opening, operation and termination requirements), and would be responsible for the maintenance and security of such accounts (i.e., the DLT Addresses), and potentially also be entitled to be paid a certain fee for this.

3.5.3 Concept of book-entry

a) Should the concept of book-entry be clarified or amended to apply explicitly in a permissioned DLT context?

- Yes

- No
- Don't know / no opinion / not relevant

b) How should this ideally be done?

5000 character(s) maximum

The current definition and function of book-entry accounts are sufficient to cater for the provision of cash or securities collateral provided through DLT. Book-entry accounts are technically also digital in nature and not physical accounts, so it is difficult to imagine why DLT Addresses would not constitute accounts in the same way.

As SFD aims to be technology-neutral these amendments will have to be made either through level 2 and/or level 3 amendments, or through national rules in alignment with the EU legislation.

It may be beneficial that the European Commission confirm that provision of cash or securities collateral recorded on a distributed ledger fall within the meaning of securities cash or collateral issued in dematerialised from that fulfil book-entry requirements.

Furthermore, as the concept of book entry is not only used in the SFD but also in other legal texts such as CSDR. Therefore, it is important to obtain guidance from the relevant European regulator on what it means in a DLT context.

c) Is an amendment to the SFD required?

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

d) Please explain you answer to 3.5.3 c):

5000 character(s) maximum

N/A

e) Could this be dealt with by the system operator in the rules of the system?

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

f) Please explain you answer to 3.5.3 e):

5000 character(s) maximum

N/A

3.5.4 Definition of settlement account

a) Should the definition of settlement account be clarified or amended to apply explicitly in a permissioned DLT context?

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

b) How should this ideally be done?
5000 character(s) maximum

The definition of 'settlement account' would benefit from clarification, more specifically on whether data recorded to DLT ledger can be reconciled with the concept of "account" and if so, under what conditions (e.g. the DLT used needs to record account balances and not only transactions outputs).

Regarding the use of a DLT platform, it is reasonable to consider participants holding 'digital addresses' as constituting 'accounts' within the meaning of the SFD. It would be beneficial, in tandem with the response to question 5.5.2.1, that further clarification is given in this regard.

That being said, a distinction will need to be made between an account-based DLT and a transaction-based DLT. As SFD aims to be technology-neutral these amendments will have to be made either through level 2 and/or level 3 amendments, or through national rules in alignment with the EU legislation.

One must bear in mind that the definition should be amended that will not prejudice the use of future technology, while at the same time not compromising the initial concept of transfer order.

c) Is an amendment to the SFD required?

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

d) Please explain you answer to 3.5.4 c):
5000 character(s) maximum

No level 1 change would be required, regulatory guidance at EU level could be sufficient.

e) Could this be dealt with by the system operator in the rules of the system?

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

f) Please explain you answer to 3.5.4 e):
5000 character(s) maximum

Only the European legislator or the European regulator applying and interpreting the European legal texts (such as the SFD) have authority to clarify the intended meaning of a notion used in such legal texts.

3.5.5 Definition of settlement agent

a) Should the definition of settlement agent be clarified or amended to apply explicitly in a permissioned DLT context?

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

b) How should this ideally be done?
5000 character(s) maximum

If securities settlement occurs on DLT, some of the functions which a CSD (settlement agent) traditionally performs (e.g. admission of participants and granting credit), might be performed by other participants to the network (i.e. in a distributed manner). However, the function of validating and settling securities transactions should remain with a CSD in order to comply with its regulatory framework and reduce systemic risk (cf. our answer to question 3.3.1 above). Therefore, the concept of 'settlement agent' could be replaced by 'system operator', being the entity performing, at a minimum, the following function: validating the final settlement of securities transactions.

c) Is an amendment to the SFD required?

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

d) Please explain you answer to 3.5.5 c):
5000 character(s) maximum

Please refer to our response given to question 3.5.5b.

e) Could this be dealt with by the system operator in the rules of the system?

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

f) Please explain you answer to 3.5.5 e):
5000 character(s) maximum

The concept of settlement agent should be revisited. The rules of the system cannot change legislation.

3.5.6 Links with other financial market infrastructures and trading venues (traditional or DLT based)

a) Should the links with other financial market infrastructures and trading venues (traditional or DLT based) be clarified or amended to apply explicitly in a permissioned DLT context?

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

b) How should this ideally be done?
5000 character(s) maximum

N/A

c) Is an amendment to the SFD required?

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

d) Please explain you answer to 3.5.6 c):
5000 character(s) maximum

N/A

e) Could this be dealt with by the system operator in the rules of the system?

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

f) Please explain you answer to 3.5.6 e):
5000 character(s) maximum

N/A

3.5.7 Concept of conflict of laws

a) Should the concept of conflict of laws be clarified or amended to apply explicitly in a permissioned DLT context?

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

b) How should this ideally be done?
5000 character(s) maximum

In the context of CSDs, the interplay between existing provisions outlined in the CSDR and SFD are currently clearly outlined under Article 39 CSDR. To take an example, Article 39 CSDR makes explicit reference to Articles 3 and 5 of SFD concerning transfer orders. In the context according to which criteria the location of the register or account should be determined and thus which (i) Member state would be considered the Member state which the register or account (ii) where the relevant entries are made or maintain, we would appreciate such clarity. The location of an asset constituted on a DLT and the possible span of a DLT over several jurisdictions, could prevent us from using current conflict of laws solutions. Hence, we would appreciate further clarity, that may need to be agreed at the international level.

In this context, the Place of the Relevant Intermediary Approach (PRIMA) (as set out in Article 9 (2) of the SFD) does not translate well when applied to securities issued, held and transferred on a DLT system (and having no existence independent of the DLT system). The location of an asset constituted on a DLT ledger – which by definition is distributed and can span several jurisdictions – is not clear. Locating the register of such securities on a DLT ledger is not meaningful, as a DLT ledger is stored and reproduced at every node in the blockchain. Therefore, it is advisable that specific conflict of laws rules for this particular situation are adopted.

ECSDA proposes that in case of a permissioned DLT system with a centralized validation model, we believe the PROPA approach (place of the Relevant Operating Authority) would be most suitable: the applicable law governing the proprietary aspects of securities transactions on DLT is the law of the place where the relevant operating entity is situated.

c) Is an amendment to the SFD required?

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

d) Please explain you answer to 3.5.7 c):

5000 character(s) maximum

Please refer to our response given to question 3.5.7b.

e) Could this be dealt with by the system operator in the rules of the system?

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

f) Please explain you answer to 3.5.7 e):

5000 character(s) maximum

A contractual document such as the system rules cannot deviate from a legal provision containing a mandatory conflict of laws rule.

3.5.8 Other

a) Is there any other definition or concept that should be clarified or amended to apply explicitly in a permissioned DLT context?

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

b) Please specify what other definition or concept should be clarified or amended to apply explicitly in a permissioned DLT context?

5000 character(s) maximum

ECSDA would like to take the opportunity to note that Article 4 SFD, specifically 'funds available on the settlement account' does consider the difference between positions in a DLT ledger versus positions in a settlement account, i.e. positions in a DLT ledger are not necessarily reflected on a settlement account.

c) How should this ideally be done?

5000 character(s) maximum

The amendment must be able to balance on the one hand, ensuring that the SFD retains its technological neutrality and is in a position to cater for DLT as well as future technological developments as a whole, on the other hand, not compromising the initial concept enshrined in Article 4 SFD.

d) Is an amendment to the SFD required?

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

e) Please explain you answer to 3.5.8 d):
5000 character(s) maximum

Please refer to our response given to question 3.5.8 d.

f) Could this be dealt with by the system operator in the rules of the system?

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

g) Please explain you answer to 3.5.8 f):
5000 character(s) maximum

N/A

Question 3.6 Are there any other amendments to the SFD that should be considered to deal with opportunities and/or risks that are specific to a permissioned DLT based SFD system?

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

Question 3.6.1 Please explain the risks and how they might be mitigated in the SFD:
5000 character(s) maximum

N/A

4. Protections granted under the SFD vis-à-vis collateral security

The definition of 'collateral security' under the SFD covers 'all realisable assets', including financial collateral covered by the FCD. Such financial collateral includes cash, financial instruments and credit claims and is discussed in the targeted consultation on the FCD.

Article 9(1) of the SFD insulates collateral security given in connection with participation in an SFD system or in connection with monetary operations involving the national central banks of the Member States (NCBs) or the ECB from the effects of the insolvency of the collateral giver where the latter is a:

- participant in a system or in an interoperable system
- system operator of an interoperable system that is not a participant
- counterparty to the NCBs or ECB
- third party that provided the collateral security

However, Article 9(1) of the SFD does not protect collateral security provided by the client of a participant in an SFD system (e.g. a counterparty clearing its derivatives) from the effects of the opening of insolvency proceedings against the participant (e.g. a clearing member) or the system operator (e.g. a CCP) beyond any protection afforded by sectoral legislation (e.g. EMIR or CSDR).

Question 4.1 Should the protection in Article 9(1) of the SFD be extended to clients of participants in an SFD securities settlement system in the event of the insolvency of that participant?

- Yes
- Yes, but only for certain SFD securities settlement systems
- Yes, but only to certain clients of participants
- No
- Don't know / no opinion / not relevant

Question 4.1.1 Please explain your answer to question 4.1:
5000 character(s) maximum

N/A

Question 4.2 In case the protection in Article 9(1) of the SFD was extended to clients of participants in an SFD securities settlement system: How useful do you consider the following conditions?

a) The client should be known to the system operator.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain why you provided that response to question 4.2 a):
5000 character(s) maximum

N/A

b) The client should have to fulfill criteria that are predefined by the system operator, e.g. regarding the client's credit/risk assessment.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain why you provided that response to question 4.2 b):
5000 character(s) maximum

N/A

c) The client should have its own segregated account.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain why you provided that response to question 4.2 c):
5000 character(s) maximum

N/A

d) The client should provide collateral security to secure transactions exceeding the threshold under EMIR (whereupon they are obliged to centrally clear their transactions).

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain why you provided that response to question 4.2 d):
5000 character(s) maximum

N/A

e) Other, please specify and explain why:
5000 character(s) maximum

Question 4.3.1 As a client of a participant in an SFD system that is also an EMIR authorised CCP, please indicate the aggregated value of *your clearing* entered into *transactions* the system in 2020.

Note that the that the answers given to this question will be treated confidentially and will not be published.
5000 character(s) maximum
N/A

Question 4.3.2 As a client of a participant in an SFD system that is also an EMIR authorised CCP, please indicate the aggregated value of *related* entered into *collateral security* the system in 2020.

Note that the that the answers given to this question will be treated confidentially and will not be published.
5000 character(s) maximum

N/A

Question 4.3.1 As an EMIR authorised CCP: Of how many clients of clearing members are you aware?

Note that the that the answers given to this question will be treated confidentially and will not be published.
5000 character(s) maximum

[ ] clients

N/A

Question 4.3.2 Please explain your answer to question 4.3.1:

Note that the that the answers given to this question will be treated confidentially and will not be published.
5000 character(s) maximum

N/A

5. Settlement finality under the SFD

The SFD bestows settlement finality on SFD systems. To determine what is covered and how it is covered, the SFD refers to two specific moments that must be defined in the rules of the system: entry into the system and irrevocability.

In this regard, stakeholders indicated what they consider shortcomings in the SFD. They state that the legal duty for an SFD system to specify the moments of entry into the system and irrevocability as well as where settlement is both enforceable and irrevocable, is not clearly stipulated in the SFD (see also, 15 May 2017). EPTF Report Furthermore, in their opinion, the settlement finality

provisions of the SFD do not accommodate the specificities of clearing systems both under business-as-usual and market stress conditions (e.g. where commodities derivative contracts reached maturity or when a CCP's default management procedures kicked-in). Additionally, they raised the point that there was no provision in the SFD for ensuring that the moment of settlement finality is identical in relation to both the cash and securities legs of a transaction settled based on 'delivery-versus-payment'. Especially in the event of the insolvency of a participant in an SFD system, different finality timestamps in interoperable systems could cause problems. A transaction could be final, protected and executable in one system, while being neither final nor executable in another system (e.g. relevant in case of a CCP and a CSD of which one settles the cash leg and the other settles the securities leg of the transaction).

Question 5.1 Do you agree with the concerns raised regarding the settlement finality and notification about insolvency proceedings under the SFD?

a) The legal duty for an SFD system to specify the moments of entry into the system and irrevocability as well as where settlement is both enforceable and irrevocable should be clearly stipulated in the SFD.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain your answer to question 5.1 a):

5000 character(s) maximum

As is currently the outlined, the legal duty for an SFD system to specify the moments of entry into the system and irrevocability as well as where settlement is both enforceable and irrevocable is not currently stated in the SFD. In this context, ECSDA believes that the SFD had outlined enough clarity.

Today, each CSD determines the method in which settlement finality is defined in its own system. As a result, varying technical set-ups and models have been implemented by varying CSDs. This has not created any problems and concerns to the CSDs, nor to their participants.

The method in which settlement finality is currently defined within the SFD should remain as such and be left to the discretion of the CSDs and the systems.

It is important to remind that CSDs are already subject to an obligation in CSDR article 39(2) and (3) to specify and disclose SF1, SF2 and SF3.

If there is a wish from a policy perspective to impose similar obligations on system operators which are not CSDs authorised under CSDR, this should rather be done via the dedicated legal framework regulating their activity.

b) The settlement finality provisions of the SFD should accommodate the specificities of clearing systems both under business-as-usual and market stress conditions more clearly.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain your answer to question 5.1 b):
5000 character(s) maximum

N/A

c) A provision in the SFD for ensuring that the moment of settlement finality is identical in relation to both the cash and securities legs of a transaction settled on the basis of 'delivery-versus-payment' is needed.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain your answer to question 5.1 c):
5000 character(s) maximum

It is not the vocation of the SFD to define the nature of the services offered in a designated system. The objective of SFD is to ensure, in a transversal manner for all designated systems, that the rules of and settlement in a system (and any related netting, if relevant) can be upheld notwithstanding a participant insolvency. In order to achieve this, the system needs to have clear rules to which insolvency law can refer, but SFD should not regulate how those services are designed. This is a contractual matter organised by the system operator taking into account the circumstances and the nature of the settlement.

Furthermore, CSDs are already subject to an obligation in CSDR to settle on a DvP basis when transactions are against cash (see CSDR article 39(7)) and CSDR contains a clear definition of DvP settlement which links the delivery of securities to the cash and vice versa.

d) The SFD needs to be amended to ensure that different times of finality do not cause problems in interoperable systems.

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain your answer to question 5.1 d):
5000 character(s) maximum

SFD already sufficiently addresses this issue. Article 3(4) of the SFD provides that in the case of interoperable systems, each system determines in its own rules the moment of entry into its system, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Article 5, second paragraph also provides that in the case of interoperable systems, each system determines in its own rules the moment of irrevocability, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard.

e) The SFD should clearly stipulate, that a system operator should also be immediately notified about the opening of insolvency proceedings (in addition to an authority chosen by the Member State, the ESRB, ESMA and other Member States).

- 1 - Disagree
- 2 - Rather not agree
- 3 - Neutral
- 4 - Rather agree
- 5 - Fully agree
- Don't know / no opinion / not relevant

Please explain your answer to question 5.1 e):

5000 character(s) maximum

ECSDA understands that timely information is a key factor in mitigating risks to financial stability. That being said, information shortcomings on the opening of insolvency proceedings have yet to be seen. In the context of CSDs having a systemic role in mitigating financial stability, timely information of the system operator would of course be beneficial.

f) Other, please specify and explain your answer:

5000 character(s) maximum

N/A

Question 5.2 Would your answer change if the SFD would be extended to cover third-country systems?

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

Question 5.2.1 Please explain why and how your answer would change if the SFD would be extended to cover third-country systems:

5000 character(s) maximum

N/A

6. The SFD and other Regulations/Directives

The proper functioning of the SFD also requires clarity regarding its interaction with other relevant legislation, especially insolvency legislation. When the SFD was adopted, (pre-) insolvency and insolvency-like proceedings (e.g. regulatory moratoria) were governed by national law. Since then, the EU has adopted the BRRD, the Insolvency Regulation as well as the Second Chance Directive and the Framework for the recovery and resolution of central counterparties.

The Commission's services are interested in possible other legislation where provisions may not be sufficiently clear in their interaction with the SFD or vice versa.

Question 6.1 Is there any (insolvency or other) legislation where provisions are not sufficiently clear in terms of their interaction with the SFD or the other way round?

6.1.1 Insolvency Regulation (Regulation (EU) 2015/848)

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

Please explain why you think the provisions of the Insolvency Regulation are not sufficiently clear (Regulation (EU) 2015/848) in terms of their interaction with the SFD or the other way round.

Please also explain how this matter might be solved:

5000 character(s) maximum

N/A

6.1.2 Second Chance Directive (Directive (EU) 2019/1023)

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

Please explain why you think the provisions of the Second Chance Directive (Directive (EU) 2019/1023) are not sufficiently clear in terms of their interaction with the SFD or the other way round.

Please also explain how this matter might be solved:

5000 character(s) maximum

N/A

6.1.3 BRRD (Directive (EU) 2014/59/EU)

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

Please explain why you think the provisions of the BRRD2 (Directive (EU) are not sufficiently clear in terms of their interaction 2019/879) with the SFD or the other way round.

Please also explain how this matter might be solved:

5000 character(s) maximum

N/A

6.1.4 Framework for the recovery and resolution of central counterparties (Regulation (EU) 2021/23)

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

Please explain why you think the provisions of the Framework for the recovery and resolution of central counterparties (Regulation (EU) 2021/23) are not sufficiently clear in terms of their interaction with the SFD or the other way round.

Please also explain how this matter might be solved:
5000 character(s) maximum

N/A

6.1.5 PSD2 (Directive (EU) 2015/2366)

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

Please explain why you think the provisions of the PSD2 (Directive (EU) 2015/2366) are not sufficiently clear in terms of their interaction with the SFD or the other way round.

Please also explain how this matter might be solved:
5000 character(s) maximum

N/A

6.1.6 If there is any (insolvency or other) other legislation where provisions are not sufficiently clear in terms of their interaction with the SFD or the other way round, please specify which ones, explain why, and explain how this matter might be solved:
5000 character(s) maximum

N/A

7. Other issues

The Commission's services are interested in possible other matters that stakeholders may have encountered in the context of the SFD that might be important for the review.

Question 7.1 To what extent have inconsistencies in the transposition of the SFD caused cross-border issues, which would merit further harmonisation?

Please provide examples of such instances:

5000 character(s) maximum

N/A

Question 7.2 Is there anything else you would like to mention?

5000 character(s) maximum

N/A

Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) below. **Please make sure you do not include any personal data in the file you upload if you want to remain anonymous.**

N/A