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15 April 2026

# Presidency Discussion Paper
# Market Integration and Supervision Package
## Post-Trading – Proposal for a Regulation on Settlement Finality (SFR)

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## Introduction

On 4 December 2025, the European Commission published the proposal on the Market Integration and Supervision Package ('**MISP**'). The MISP was presented by the Commission at the Council Working Party ('**CWP**') kick-off meeting on 15 December 2025, together with references to the accompanying evaluation and Impact Assessment (IA). Given the extended scope of the MISP, a more detailed technical presentation addressing certain elements of the Proposal for a Regulation on Settlement Finality (**SFR**) took place on 16 January 2026. During the aforesaid presentation, Member States ('**MS**') had the opportunity to express their preliminary views and comments on the proposal. Following these exchanges, MS also had the opportunity to submit their written comments on the proposal to the Presidency ('**PCY**').

The purpose of this paper is to provide a structured basis for the technical discussions of the CWP meeting on 15 April 2026 which is dedicated to the first reading of the provisions of the MISP that are relevant to post-trading, notably the ones related to SFR.

The proposal seeks to modernise and harmonise the existing EU framework on settlement finality by replacing the current Directive with a directly applicable Regulation. Its objective is to enhance legal certainty for payment, clearing and securities settlement systems by ensuring that transfer orders and netting arrangements are legally enforceable and protected against insolvency challenges across the Union, while reducing divergences arising from national implementation. It also aims to clarify and update key definitions and concepts considering market developments, improve transparency and supervisory coordination, and align the framework with related EU legislation, with a view to further support financial stability and ultimately further integration of EU capital markets.

Today's CWP provides an opportunity to engage in constructive technical examination of the proposal and continue the exchange on the key issues raised. The PCY invites MS to provide comments during today's CWP, and to elaborate their positions in the subsequent written procedure.

## 1. Choice of legal instrument – Regulation vs Directive

Settlement finality has been regulated in a Directive, the Settlement Finality Directive (**SFD**).

According to the Commission, the SFD leaves some discretion to MS in terms of its transposition. As the European Commission points out this discretion has given rise to national specificities and differences, as well as different interpretations on many aspects of the SFD. One example, documented in the IA accompanying the MISP proposals (**Impact Assessment**), is that currently, indirect participants seem to benefit from automatic settlement protection in some EU MS but not in others. In addition, market participants have flagged different national interpretations as to the definitions of 'participant' and 'securities'. Regarding the latter, the Commission's report on the transposition of the SFD by MS[1] noted that

[1] Final report on the study to review the transposition by MS of the Settlement Finality Directive (98/26/EEC), section 3.2., https://finance.ec.europa.eu/system/files/2017-01/main-report-sfd-transposition_en.pdf

some MS have different interpretations as to whether the list of instruments included in the definition of 'securities' is maximum or minimum harmonisation[2]. This seems to impact the level of protection provided by the SFD in different MS. The same issues also arise regarding the definition of 'transfer order', 'book-entry' and 'e-money', among others. Moreover, respondents to the Commission's public consultation on the Savings and Investment Union (**SIU**) pointed out to different approaches by MS in accommodating new regulatory and technological developments.

MS have also taken different approaches to the designation process, which seems to result from the current SFD not providing rules on the procedural aspects to be followed (including timelines, information to be requested from a system operator and how the assessment of a system should be carried out), and the conditions to be assessed by MS when designating a system. For example, systems operated by CCPs are designated in different ways in different MS: in some MS they are designated as settlement systems, in others as payment systems and in other MS the CCPs are deemed to operate more than one designated system[3].

According to the Commission, the divergent approaches described above are likely to result in an unlevel playing field across the Union and hinder market integration.

As explained by the Commission during the January CWP meeting, the proposal to replace the SFD with a Regulation, the SFR, is based on the above justifications. The decision to move to a regulation has further implications for the legal text. Given that the SFR would be directly applicable, it needs to be sufficiently detailed and clear in its direct obligations for all parties involved (system operators, national authorities etc.). This is why the proposal would specify some matters that are not dealt with by the SFD and were dealt with in national laws, such as the procedure and conditions for designation, the settlement finality moments, etc.

**Preliminary Views of MS:**

Four MS supported replacing the Directive with a Regulation, viewing this as a means to enhance harmonisation, reduce divergent national implementation, and strengthen legal certainty. Three MS were open or broadly supportive in principle but attach important conditions, notably the preservation of national insolvency and netting frameworks, the avoidance of unnecessary administrative burden, appropriate grandfathering for existing systems, and clearer justification and safeguards in areas such as supervision and delegated powers.

Two MS expressed opposition to replacing the Directive, emphasising the close links to national insolvency and property law and warning against reduced legal certainty or unintended restrictions on broader national protections. Another two MS adopted a cautious stance, questioning whether the benefits of a directly applicable Regulation outweigh the risks of legal uncertainty, regulatory overlap, and increased

[2] Impact Assessment accompanying the proposals, p. 237: "*Based on the information provided, it would appear that at least some MS have included additional instruments in their national transpositions of the definition. In addition, since the definition contains a reference to a list of instruments provided in the annex of a Directive, the above issue may be compounded, at least in theory, by different transpositions by MS of that list under that Directive.*"

[3] Impact assessment, p. 238. In addition: "*Divergent national practices, specifically as regards i) concrete timelines regarding the designation process, ii) an explicit requirement for regular checks by MS whether their SFD-designated systems are still SFD-compliant, and iii) a clear requirement for operators of the SFD-designated systems to notify the national competent authority of any relevant changes in the rules of the system it operates, are also likely behind some of the past issues related to the list of SFD-designated systems that is publicly available on ESMA's website.*"

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complexity. Three MS maintained scrutiny reservations or are still assessing the proposal without having taken a definitive position.

**Questions to MS:**

**Q1: Do MS support replacing the SFD with a Regulation? If not, what other solution(s), if any, could be instead adopted to address the perceived fragmentation caused by divergent rules on settlement finality?**

**Q2: Do MS consider that the proposal covers all the aspects necessary for ensuring settlement finality? If not, which aspects are missing?**

**Q3: Do MS consider that the rules set out by the proposal include the appropriate level of detail? If not, which aspects would require less or further elaboration and why?**

## 2. Definitions

### i. Definition of 'system'

*Relevant Articles: Article 2(1), point (1) SFR*

Article 2, point (a), of the SFD defines a system as a formal arrangement:

- between three or more participants, excluding the system operator of that system, a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants;
- governed by the law of a MS chosen by the participants; the participants may, however, only choose the law of a MS in which at least one of them has its head office; and
- designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the European Securities and Markets Authority ('**ESMA**') by the MS whose law is applicable, after that MS is satisfied as to the adequacy of the rules of the system.

Furthermore, the SFD provides for two specific cases where – if warranted on grounds of systemic risks - MS may deviate from the conditions set out above:

- for securities settlement systems, MS may designate a formal arrangement whose business consists of the execution of securities transfer orders and which to a limited extent executes orders relating to other financial instruments as a securities settlement system (see Article 2, point (a), second subparagraph, of the SFD);
- for bilateral systems, MS may designate as a system a formal arrangement between two participants (see Article 2, point (a), third subparagraph, of the SFD).

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In the Commission's proposal, the conditions for designation and the definition of 'system' are split: the definition[4] would be set out in Article 2(1), point (1), of the SFR, while the conditions and requirements for designation, including the substance of the two abovementioned options for MS, would be moved to different Articles, such as Article 3 and Article 5 of the SFR.

Regarding the 'system' definition, compared to the SFD, the SFR:

- Removes the minimum three-participant requirement (no numerical threshold in the definition).
- Takes out designation and governing law elements from the definition.
- Explicitly excludes interoperability arrangements.
- Uses wording focused on settlement, clearing or execution of transfer orders.
- Expressly references payment, clearing and securities settlement systems, aligning terminology with current EU financial market infrastructure frameworks.

In relation to designation and compared to the SFD, the proposal:

- Maintains the core concept of formal designation.
- Clarifies and modernises participant categories by aligning definitions with updated EU legislation.
- Strengthens systemic risk justification for derogations.
- Increases harmonisation and involves additional authorities in the procedure for designation (such as ESMA, EBA, ESCB).

**Preliminary Views of MS:**

MS generally favoured retaining key structural elements of the SFD definition, such as the multilateral character (more than three participants), and the governing-law rule in order to maintain legal certainty and avoid unintended expansion of the scope.

Several MS stressed that allowing bilateral or overly broad arrangements could create legal uncertainty and risk, including structures not intended to fall under the regulation.

Two MS suggested replacing the term "settlement" with "execution of orders" in order to better reflect operational reality and ensure coverage of both securities settlement systems and payment systems. Three MS sought clarification on the scope and limits of this provision, noting potential legal uncertainty and risks of overly broad designation.

Some MS expressed concerns regarding the fact that the SFR would no longer contain the requirement that a formal arrangement under the SFR needs to have at least three participants to be designated .

Another concern was raised related to the possibility that Article 3 of the SFR would enable designating authorities to designate systems offering to a limited extent the settlement, clearing or execution of

[4] "'system' means a formal arrangement, other than an interoperability arrangement, with common rules and standardised procedures, including a securities settlement system, a clearing system or a payment system, which provide for the settlement, clearing or execution of transfer orders between participants;"

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instructions related to instruments other than transfer order in financial instruments and other instruments, where authorised by the system, including in relation to collateral arrangements and clearing.

Two MS expressed doubts regarding the omission of the reference to the law governing the system in the proposed definition of 'system'.

**Questions to MS:**

**Q4: Do MS support the proposal to not include a minimum number of participants in the definition of 'system'? Alternatively, should MS return to the minimum number of three participants? If not, what should the minimum number be and why?**

**Q5: Do MS support the discretion that would be provided under Article 3(1), second subparagraph? If not, why?**

**Q6: Do MS see the need to specify how the law governing the system is determined? If so, how should this be done and why?**

### ii. Definitions of 'clearing', 'settlement', 'securities settlement system', 'payment system' and 'clearing system'

*Relevant Articles: Article 2(1), points (4) to (7) SFR*

Under the SFD, two types of systems can be designated: systems clearing or executing payment transfer orders (i.e. payment systems) and systems clearing or executing securities transfer orders (i.e. securities settlement systems). The Commission's proposal differentiates between three different types of systems, i.e. securities settlement systems, clearing systems and payment systems. As explained by the Commission during the January CWP meeting, this differentiation was deemed necessary to harmonise the designation of systems operated by CCPs across MS. As explained earlier, some CCPs are currently designated as securities settlement systems, some as payment systems, and some CCPs are deemed to operate more than one designated system. Also, the proposed differentiation would allow for targeted, system-specific requirements, such as potentially different specifications regarding the moment of entry of a transfer order into a designated system (Article 18), the moment of irrevocability of transfer orders (Article 20) and final settlement (Article 21).

The Commission's proposal aims to introduce explicit definitions of the terms 'clearing system' 'payment system' and 'securities settlement system' and would complement them with definitions of the terms 'clearing' and 'settlement'. According to the Commission, the aim of these definitions is to ensure a uniform understanding of the various concepts.

**Preliminary Views of MS:**

One MS suggested further clarifying the proposed definition of 'clearing' while four MS suggested clarifying the definition of 'settlement'.

As regards the definition of 'clearing', one MS pointed out that the definition should also refer to the clearing of funds occurring in payment systems instead of referring to the clearing of financial instruments only.

As regards the definition of 'settlement', three MS considered that the reference to the CSDR, when read together with the definition of 'payment system', would not cover the settlement of funds carried out in a payment system. One of those MS was also concerned that this narrow understanding of 'settlement' could affect the interpretation of other provisions and definitions in the proposal, such as 'business day', potentially excluding payment systems from their scope and from the related provisions relying on them. Two MS therefore suggested either removing the reference to the CSDR or explicitly extending the definition to also cover settlement in payment systems. In addition, two MS proposed replacing the term "settlement" with "execution of orders" to ensure comprehensive coverage of both securities and cash transfers.

One MS further noted that the reference to the CSDR in the definition of 'settlement' would include the payment leg within its scope, whereas payments are typically settled separately in a payment system. That MS therefore suggested limiting the definition of 'securities settlement system' to systems for the transfer of securities.

Two MS expressed concerns about potential inconsistencies and overlaps between the definitions of "payment system," "clearing system," and "securities settlement system," warning that certain systems could otherwise be classified simultaneously under more than one category, thereby creating legal uncertainty. One MS additionally highlighted that not all payment systems under PSD legislation are necessarily SFD-designated systems and cautioned that the interaction between these regimes should be clarified to avoid confusion as to the scope of the Regulation.

**Questions to MS:**

**Q7: Do MS agree with the proposed definitions of 'clearing' and 'settlement'? If not, how should those definitions be amended and why?**

**Q8: Do MS agree with the proposed differentiation between securities settlement systems, clearing systems and payment systems in the SFR? If not, what alternative solution could be adopted to address the issue related to the divergences in the designation of systems operated by CCPs?**

**Q9: Do MS agree with the proposed definitions of 'securities settlement system', 'clearing system' and 'payment system'? If not, how should those definitions be amended and why?**

### iii. Definition of 'clearing house'

*Relevant Articles: Article 2(1), point (14) SFR*

The definition of 'clearing house' in the Commission's proposal differs slightly from the corresponding definition in the SFD. While both refer to an entity responsible for calculating the net positions of institutions, the SFD refers to a "possible" central counterparty or settlement agent, whereas the SFR explicitly defines a clearing house as including a CCP or a settlement agent. The difference appears to be primarily drafting-related.

In response to questions on whether the concept of 'clearing house' is still needed and whether there are still entities responsible for the calculation of the net positions of institutions that are not CCPs or settlement agents, the Commission clarified in the January CWP that there are indeed entities other than CCPs and settlement agents that can carry out the activities of a clearing house.

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**Preliminary views of MS:**

One MS suggested that the definition should not refer to the calculation of net positions of institutions but rather to the calculation of net positions of participants (the latter being a broader category than the former). In that MS's view, such change would align the definition with the proposed definition of 'netting', which refers to the conversion of claims of participants.

**Questions to MS:**

**Q10: Do MS support to maintain the proposed definition of 'clearing house'? If not, how should the definition be amended?**

### iv. Definition of 'participant'

*Relevant Articles: Article 2(1), point (15) SFR*

The Commission proposal introduces two amendments to the list of eligible 'participants' compared to the SFD definition.

First, the proposal would add CSDs explicitly to the list of participants. As noted in the impact assessment accompanying the proposal, the current definition in the SFD explicitly refers to CCPs, following the adoption of the European Market Infrastructure Regulation (**EMIR**), while it does not contain a direct reference to CSDs. The proposal would therefore introduce an explicit reference to CSDs. According to the Commission, this clarification could also help avoid potential divergent interpretations of the notion of 'system operator', in particular as regards whether a system operator may participate in systems other than the one it operates.

Second, the proposal would introduce an additional category of 'entities' that could be admitted as participants in a system. As explained in Recital 10 of the proposal, "*the list of entities that can be considered as participants in a system should take into account the different participation models adopted by systems, while ensuring that the aim to protect the financial system from systemic risk is met. To that end, the entities to be admitted as participants should fulfil certain conditions to avoid creating unnecessary risks for the system in which they participate. Such conditions should, however, not impose additional requirements where the system operator already applies admission requirements to the system under Union law when admitting new entities as participants to its designated systems, as in the case of central counterparties (CCPs) and central security depositories (CSDs).[…]*" The last sentence of that Recital ("*It should be possible to include as participants in a system entities that perform validation or consensus functions that are essential for maintaining settlement integrity*") provides a more specific link to DLT-based system, as does the mandate that empowers the Commission to amend the definition of 'participant', by means of a delegated act, to add natural or legal persons to the list included in that definition, based on the experience of cases where such persons are allowed to participate in a DLT-based settlement system subject to the DLT Pilot Regime. The IA accompanying the proposal explains that this addition of entities to the list of participants creates a level playing field among systems regarding participants and the set-up would mimic and build on the current protections, for example those that exist for clearing members that participate in a CCP; for those, the CCP needs to ensure that they have sufficient resources and operational capacity to meet the obligations arising from participation in the system(s) operated by the CCP and that they meet all the other requirements set by the system.

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The proposal aims to provide that such additional entities ('system members') may be admitted to a designated system only where certain conditions are met:

- they would need to have the capacity and ability to meet the obligations arising from their participation in the system and to mitigate the risks resulting from that participation in the system and would have to comply with the rules of the system (see Article 7(2), first subparagraph). Also, the system operator of a designated system would be required to ensure that they comply with the above conditions on an ongoing basis and to have timely access to the information relevant for such assessment (see Article 7(2), third subparagraph);
- the system operator of a designated system would need to establish admission criteria, differentiating per type of participant where relevant. Such admission criteria would need to be non-discriminatory, transparent and objective to ensure fair and open access to the designated system (see Article 7(2), second subparagraph);
- they would not qualify as indirect participants under the SFR and hence could not be considered participants under Article 7(1), third subparagraph.

  As regards the need to clarify that third-country authorities and international organisations could also be participants, according to the Commission, these entities might fall under the residual category of "entities" under the proposal, assuming they would not already qualify as a public authority or a publicly-guaranteed undertaking under the definition of 'institution'. However, neither the SFD nor the Commission's proposal provide further clarification on whether those categories cover third-country authorities and international organisations. According to information provided by the Commission, for credit institutions and investment firms having their head office in a third-country (which qualify as institutions under the SFD (see Article 2, point (b), fourth indent, thereof; they would continue to qualify as such under the Commission's proposal (see Article 2(1), point (10)(a)(v), thereof)), an interpretation of the SFD had been that those needed a branch in the EU to participate in order to ensure legal effects and recognition of EU settlement finality.

**Preliminary Views of MS:**

Ten MS expressed concerns or questioned the addition of 'entities' to the list in the definition of 'participant'. They considered the addition as very broad and potentially too far reaching, especially taking into account the effects of a participation in a designated system has regarding the disapplication of ordinary insolvency proceedings. Six MS requested further explanations regarding the rationale for including such a broad residual category. One MS expressed the view that the list of participants should explicitly include only legal entities, while another MS said that "entities" should be at least supervised or overseen to be allowed as participants. Another MS suggested to allow 'entities' as participants only in systems which are not operated on a top-tier level, thus allowing for innovation while ensuring financial stability. Yet another MS suggested to delete 'entities' from the list of participants as their proposed inclusion would cover too wide a range of entities (including corporate entities) and argued that the SFR should protect the largest systems and should not be used to avoid standard insolvency procedures where not necessary.

One MS highlighted that it was important to make sure that the "residual" category would not bring in unwanted and unforeseeable risks. One MS suggested to turn the relationship between 'system member' and 'entity' around and include system member in the list under (15) and define entity in (16) by referring to

(15). One MS suggested to clearly link "entities" to the conditions to be met under Article 7 of the proposal. Yet another MS pointed to sectorial legislation (specifically Article 31(1) of the Payment Services Regulation (**PSR**) which requires that *"payment system operators shall have in place objective non-discriminatory, transparent and proportionate rules on access to a payment system by authorised or registered payment service providers that are legal persons"* and suggested aligning the SFR with the PSR. That MS also indicated that Article 33(7) of the CSDR proposal allows, based on the provisions of the SFR, private individuals to participate in a securities settlement system. The same MS further noted that the conditions set out under Article 7 SFR relied too much on the system operator and that it might be worth considering introducing a requirement for the Commission to issue delegated regulations specifying additional requirements in this regard.

**Questions to MS:**

**Q11: Does your national transposition of the SFD extend the list of participants to entities that are not listed in the SFD? If so, which ones and why?**

**Q12: Do MS support the proposed addition of "entities" to the list of participants admitted to a designated system? If not, should an alternative solution be adopted to ensure that all entities, which are currently admitted as participants by EU systems or third-country systems to which SFD-like protections have been extended under national laws, would continue to be covered under the SFR?**

**Q13. Do MS consider that the proposal should clarify which third-country entities can be admitted as participants in designated systems? If yes, what should those clarifications be and why? If not, why?**

**Q14: Do MS support the possibility to allow natural persons to be admitted as participants to designated or registered systems? Are the proposed safeguards appropriately calibrated?**

**If yes, do MS support the proposal to empower the Commission to extend the definition of 'participant' to natural persons by means of a delegated act? If not, how else should it be done?**

**If not, why? and does this in particular mean that DLT-based systems authorised under the DLT Pilot Regime should not be allowed to benefit from the protections provided by the SFR if they admitted natural persons as participants?**

### v. Definitions of 'client' and 'indirect participant'

*Relevant Articles: Article 2(1), points (17), and (18) SFR*

The Commission's proposal aims to introduce a new definition of 'client' as meaning any undertaking with a contractual relationship with a participant, including an indirect participant, which enables that undertaking to settle, clear and execute its transfer orders through the designated system via such participant. This definition would be in conjunction to the proposed new provision on the responsibilities of a participant providing clients access to a designated system (see Article 7(3) of the proposal).

The proposal would also amend the current definition of 'indirect participant' by removing the qualification that the indirect participant has to be known to the system operator from the definition itself; the qualification would instead be incorporated in Article 7(1), third subparagraph, of the proposal, which provides that the indirect participant needs to be known to the system operator and the participants of the system.

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**Preliminary Views of MS:**

Some MS raised concerns regarding the breadth and rationale of the proposed definition of "client", particularly in light of the new definition of "indirect participant".

One MS enquired about the precise scope and delimitation of the definitions proposed for 'indirect participant' and 'client'. In the MS's view, the clarification was particularly important since it seemed that, in both cases, the responsibility remains within the participant in accordance with Article 7(1) and (3). The MS asked for further clarity on the distinction between the reference to "*via such participant*" in the definition of 'client' and the reference to "*the participant through which the indirect participant submits transfer orders to the designated system*" in Article 7(1). The MS also enquired whether a client could be considered an 'entity' under Article 2(1), point (15)(a)(vii), of the proposal. In addition, clarification was sought as to why the definition of indirect participant no longer referred to such participant being known to the system operator.

**Questions to MS:**

**Q15: Do MS support the proposal to introduce a definition of 'client'? If not, why? If yes, do MS consider that the definition could benefit from some clarifications? If yes, which ones and why?**

## 3. Designation of EU systems

### i. Designation procedure

*Relevant Articles: Articles 3, 4 SFR*

The SFD does not lay down the procedure that designating authorities must follow when designating systems. For example, the SFD is not prescriptive as to who should initiate the designation procedure, i.e. it does not specify whether the designation is to be initiated by the request of the interested operator of a system or *ex officio* (i.e. by the relevant authorities responsible for designation). Given the lack of rules in the SFD, MS have adopted different procedures.

The Commission's proposal aims to introduce a harmonised procedure for designating systems (see Article 4). As explained by the Commission during the January CWP meeting, the procedure would be based on the EMIR authorisation procedure, but with some specific adaptations to take into account the features of designation.

The designation procedure would include different steps for the designation of a system, from the application by a system operator until notification of the decision to grant or refuse the designation to the applicant and to the authorities listed in Article 4(2) of the proposal. The procedure would be run by the designating authority, while the aforementioned authorities would not be actively involved in the procedure, except for the requests for information that may be addressed to them by the designating authority according to Article 11.

According to the proposal, the central database, to be created by ESMA, would act as a single point of entry for the submission of all documents relevant to the designation process and the exchange of all information

related to that process for all types of systems covered by the proposal. In addition, ESMA would ensure the centralised publication of updated information for all designated systems, as is currently the case.

**Preliminary Views of MS:**

As regards the initiation of the designation procedure, two MS considered that designation should also be possible ex officio, and not only upon the request of a system operator, or at least that the designating authority should be able to designate a system without an application by the system operator. One MS noted in this respect that, under its national law, designation is activated on the authority's own initiative (ex officio). That MS also argued that allowing system operators to initiate the designation process could lead to a large number of applications and therefore create an excessive administrative burden for authorities that may not be justified by systemic risk considerations. It therefore questioned the rationale for introducing a designation procedure based on a request from the system operator, particularly where operators are already subject to supervision under sectoral frameworks.

Two MS wondered whether it was appropriate for an "undertaking" to request designation, instead of an "entity" or a "legal entity" (this is linked to the definition of 'system operator' in Article 2(1), point (32) of the proposal).

As regards the rest of the designation procedure, there were concerns on the complexity of the proposed procedure and suggestions for simplifying or removing some of the steps of the procedure. In response to the above concerns, during the January CWP the Commission noted that the designation procedure mirrors the authorisation procedure in EMIR and adapts it to the specificities of designation.

On questions about whether the application for designation would need to be submitted to the designating authority, the Commission clarified that, based on the provisions in the proposed Article 26(3), first subparagraph,[5] and (5)[6], the application would need to be submitted to the central database created by ESMA and distributed to the relevant authorities.

On suggestions to explicitly recognise the involvement of the competent authority where it is different from the designating authority, it is the Presidency's understanding that this is already the case in the proposal, as the proposal's reference to the competent authority "where applicable", is to take into account situations where the system seeking designation would be established outside the EU, but would still be governed by the law of a MS; in such cases the competent authority would actually be a third-country competent authority.

There were concerns about assigning ESMA sole responsibility for publishing information on the designated systems, including payment systems, as it might not be evident to potential stakeholders that the information on payment systems would be made available centrally by ESMA rather than by EBA (or the ESCB). Concerns were also expressed about payment system operators having to submit their applications on a central database operated by ESMA. Also, there were arguments that it might be more appropriate to establish a shared responsibility between ESMA and EBA, considering their respective scopes of competence, as well as ensuring that the central database can be accessed and advertised through the

[5] "*System operators, including for designated and registered systems as well as the registered recipients shall upload to the central database, in electronic format, all information and documents, including applications, decisions, recommendations, requests, information, questions, answers and notifications, referred to in this Regulation unless stated otherwise.*"

[6] "*ESMA shall design the central database to automatically inform the registered recipients when changes have been made to its content, including the uploading, deletion or replacement of documents, submission of questions or requests for information.*"

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websites of both authorities. As explained by the Commission, at present, ESMA publishes information about all designated systems, including payment systems. The Commission's proposal therefore only confirms the status quo.

Concerns that the expression "*to a limited extent*" in Article 3(1), second subparagraph of the proposal is inherently subjective were expressed and MS asked that its scope would be clarified, preferably through the inclusion of an explanation in a Recital. The PCY notes that the language replicates the existing language in Article 2, point (a), second subparagraph, of the SFD.

On questions about whether the proposed designation procedure would ensure the possibility to operate throughout the EU, the Commission clarified that designation is not the same as authorisation. For any system to be designated, the pre-condition is that its operator would need to be authorised first,[7] in order to apply for designation. It is this authorisation, and not the designation, that would determine whether the system can provide services in MS different from the MS of authorisation (through passporting). As it is the case under the SFD, designation of a system in a MS would have EU-wide effects, and that system would not need (or even be able) to get designated in any other MS.

One MS expressed broader concerns about the proposed framework, arguing that the introduction of a designation procedure at the request of system operators could overlap with existing supervisory regimes, notably under EMIR and CSDR, and could create unnecessary administrative burdens without a clear systemic-risk justification. That MS therefore suggested deleting Article 3(1), or even the entire article.

Two MS suggested to further specify the role of central banks in the designation procedure of payment systems. One of these MS asked for central banks to be mentioned more explicitly in the designation process. The other MS pointed to the need to clarify the role of central banks for the designation of systems operated by central banks.

One MS argued that the proposal should provide the possibility for systems operated by central banks to be designated automatically under national law. Another MS questioned the need to designate payment systems operated by central banks.

**<u>Questions to MS:</u>**

**Q16: Do MS support the harmonisation of the designation procedure? If not, why? If yes, do MS consider that the procedure could benefit from improvements or simplifications? If yes, which ones and why?**

**Q17: Do MS support an additional ex officio designation or an automatic designation? If yes, what should be its scope?**

### ii. Conditions for designation

*Relevant Articles: Article 5 SFR*

Under the SFD, the designating authority must be satisfied of the adequacy of the rules of the system before designating it. However, the SFD does not lay down criteria or conditions for designation. It does, however, confer to MS the possibility to lay down in their law "*more stringent conditions of general application*" (see

[7] Please note that systems operated by central banks would be the exception to this, as infrastructures operated by central banks are usually exempted from authorisation requirements.

Article 2, point (a), third indent, of the SFD). This has led MS to adopt different conditions for designation, which resulted in fragmentation and an unlevel playing field.

The Commission's proposal aims to lay down a harmonised set of conditions that a system would need to meet in order to be able to be designated. Based on those conditions:

- The system must be governed by the law of the designating authority's MS, include at least one participant established in that MS, and operate using common rules and standardized procedures for settling, clearing, or executing transfer orders. These rules must clearly define moments of finality, participation requirements, and be consistent with the governing law.
- The system operator must be capable, reputable, financially resourced, and legally accountable for the system's operation, including links to other systems and relationships with third parties and authorities. The operator must also ensure compliance monitoring and implement adequate risk-mitigation measures.
- Where the operator is structured as a network of nodes, one entity must be legally responsible for the system. If the operator is a consortium, all entities are jointly and severally liable for the system's operation.

As explained by the Commission during the January CWP meeting, the conditions would be principle-based to cater for the fact that they would need to suit all (very different) types of systems.

Nevertheless, the proposal provides ESMA (for securities settlement systems and clearing systems) and EBA (for payment systems) the possibility – but not the obligation – to develop draft regulatory technical standards (RTS), in cooperation with the ESCB, to further specify those conditions.

There were concerns for overlapping of designation conditions with the conditions for authorisation provided in sectoral legislation, arguing that systems which are subject to sectoral regulation should be exempted from the conditions of designation that mirror those in sectoral legislation to avoid duplication and reduce administrative burden. Also, there were concerns on potentially contradictory assessments made by different authorities.

On questions raised on the need to give ESMA and EBA the power to further specify the conditions for designation, the Commission clarified that ESMA and EBA are empowered, but not mandated (the proposal uses "may" instead of "shall"), to produce RTS on this matter. As explained by the Commission during the January CWP meeting, the reason for this empowerment is twofold: it would allow to further clarify the different conditions (to facilitate their assessment and ensure greater harmonisation thereof) and it would allow to make them future-proof without the need to re-open the Level 1 text.

Some MS suggested to have as the main criterion for designation only systemic risk related.

***Preliminary Views of MS***

One MS questioned whether meeting only formal criteria should suffice for designation, suggesting that transaction volume/value may also be relevant. Some MS expressed concerns that the proposed conditions for designation were significantly more stringent than those for registration, and that this would represent an unjustified unequal treatment of EU systems compared to third-country systems

One MS considered that the possibility for ESMA and EBA to produce regulatory standards (using "may" instead of "shall") would be a source of legal uncertainty.

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Another MS requested clarification of the term "apparent conflict" in Article 5(1), point (f) asking what situations or circumstances would qualify as such.

One MS asked for clarifications to be given in order to ensure effective and predictable application of settlement finality protections to indirect participants and their clients.

**Questions to MS:**

**Q18: Do MS support the introduction of harmonised conditions for designation? If not, why? If yes, do MS consider that the conditions should not apply to certain types of systems? If yes, which ones and why?**

**Q19: Do MS consider that the proposed conditions are appropriate? If not, which criteria should be added, removed or adjusted and why?**

**Q20: Do MS support the proposal to give ESMA and the EBA the power to further specify the conditions for designation?**

### iii. Treatment of SFD-designated systems

*Relevant Articles: Article 28 SFR*

The Commission's proposal would provide a 5-year period during which designating authorities would have to re-designate the existing designated systems under the new regime.

*Preliminary Views of MS*

There was opposition to redesignating, under the new proposed regime, systems already designated under the SFD, instead they should be grandfathered. It was noted that introducing such a requirement would expose operators of previously designated systems to unnecessary costs and duplication related to the need to conduct the new designation procedure. Furthermore, it was argued that it could overnight deprive participants in these systems of finality protections if the operator of a previously designated system would fail to conduct the re-designation procedure within the specified 5-year period or would undergo the procedure but fail to be granted designation.

As explained by the Commission during the January CWP meeting, the choice of redesignation, instead of outright grandfathering, would ensure that all designated systems in the EU would be designated based on harmonised conditions and procedures, thus ensuring a level playing field.

**Questions to MS:**

**Q21: Do MS support the 5-year transitional period for redesignation of existing designated systems? If not, why and how should those systems be treated instead? Should existing systems continue to benefit from the protections conferred by SFR where they apply for designation before the end of the five-year transitional period but their application has not yet been determined by the end of that period?**

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# 4. Registration of third-country systems

## i. General considerations

*Relevant Articles: Article 12 SFR*

The protections granted by the SFD do not apply to transfer orders, netting and collateral security related to the participation of EU entities in third-country systems, i.e. systems governed by a third-country law. However, Recital 7 of SFD allows MS to extend SFD protections to third-country systems, as it provides that "*Member States may apply the provisions of this Directive to their domestic institutions which participate directly in third country systems and to collateral security provided in connection with participation in such systems".*

Given that the SFD does not provide any guidance on how the protections granted by the latter can be extended to cases involving third-country systems, MS have taken different approaches to this matter. As it is explained in the IA accompanying the Commission's proposals, some MS have not adopted national legislation in this regard, while others have done so. And those who have, have chosen different approaches, i.e. they apply different criteria and different procedures.

This is seen to have given rise to an unlevel playing field among EU participants in third-country systems with important implications in practice since third-country systems may request entities established in MS which have not extended SFD protections to those systems to provide additional collateral if they want to participate in those systems or may even not allow them access. [8]

To address these concerns about an unlevel playing field, the Commission proposes a harmonised procedure and harmonised conditions for registration of third-country systems, applicable in all MS.

## ii. Scope of protections granted to third-country systems

Article 1(2) of the proposal refers to the insolvency protections of Articles 17, 19, 22(1), 23, 24 and 25(1) afforded to transfer orders entered by institutions established in the EU into third country systems registered under the SFR[9]. The abovementioned Articles explicitly include an extension of their respective protections to the transfer orders of an EU participant in registered systems in the MS where the EU participant is established.

While Article 1(2) refers to the insolvency of qualifying institutions (credit institutions and investment firms, public authorities and publicly guaranteed undertakings, payment institutions and electronic money institutions), the specific protections afforded in Articles 17, 19, 22(1), 23, 14 and 25(1) refer to EU participants in registered systems, and would therefore also cover other EU financial entities, such as CCPs and CSDs, where they are members of third country registered systems.

[8] Third-country systems have an interest in legal certainty and settlement finality protection in the case of the insolvency of their EU participants.

[9] Article 1(2) SFR indicates that institutions which participate in registered third country systems "benefit from the extension of the insolvency protection provided for in Articles 17, 19, 22(1), 23, 24 and 25(1) to **transfer orders** entered into in such third-country systems". But Article 17, 19, 22(1), 23, 24 and 25(1) afford wider protection from insolvency proceedings than just for transfer orders. For example, Article 17(2) protects netting/close-out netting against insolvency unwind.

The SFR does not amend the BRRD and SRMR to ensure that MS provide third-country registered systems with the same protections against resolution stays, bail-in and partial transfers in resolution as EU designated systems and recognised CCPs. Article 30(2) of the SFR already ensures that the references in BRRD and SRMR to systems designated in accordance with SFD will be treated as references to systems designated under SFR. However the SFR does not amend the BRRD or SRMR to provide protection to third country registered systems equivalent to that provided to EU designated systems.

**Questions to MS:**

**Q22: Do MS support extending to third country registered systems the same insolvency protections as those afforded to EU designated systems? If yes, what clarifications or legislative amendments would be required to achieve this?**

**Q23: Do MS agree to limit the types of EU participants that may benefit from SFR insolvency protections in third country registered systems? If not, which other EU participants other than institutions as per the proposed definition in Article 2(1), point (10) should be considered for inclusion?**

**Q24: Do MS support the current proposal, which does not grant third country registered systems the same protections against resolution stays, bail-in and partial transfers in resolution as those afforded to EU designated systems? If not, what protections should be afforded to third country registered systems?**

### iii. Registration procedure

*Relevant Articles: Article 13 SFR*

The Commission's proposal aims to introduce a common procedure for the registration of third-country systems. This procedure seems to broadly mirror the one used for the designation of EU systems. In particular, the main steps would be almost the same, including that the procedure would be initiated through an application submitted by the operator of a third-country system seeking registration. The decision on registration would remain with national authorities appointed by each MS.

Despite the similarities, certain elements of the registration procedure would differ from the designation procedure. In particular, once a third-country system operator submits an application for registration to ESMA and the latter distributes it to all relevant MS (those which have participants established in their territory in that third-country system) separate registration procedures would be initiated in each of those MS where relevant. This reflects the fact that a registration decision adopted by a MS would only have impact over participants established within that MS territory.

In light of this, the Commission proposes to assign an enhanced role in the registration process to EBA (for payment systems), ESMA (for clearing systems and securities settlement systems), and the ESCB (for all three types of systems). In particular, these bodies would be empowered to take appropriate measures, including convening ad hoc meetings, with a view to promoting a convergent approach among the relevant registering authorities when deciding whether to grant or refuse the registration of a third-country system. Their role would be to facilitate, where possible, the development of a common view among those authorities as to whether the relevant system meets the conditions for registration. To support this

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coordination, EBA, ESMA and the ESCB would be duly informed (as is the case under the designation procedure) of registration applications and decisions, as well as of updates and changes to registrations.[10]

Under the proposed registration procedure, a third-country system wishing to be registered in several MS would be required to submit only a single application to ESMA. ESMA would then distribute the application, through a central database, to all relevant MS in which registration could take place.

*Preliminary Views of MS*

There were concerns about the complexity of the registration procedure similar to those in relation to the proposed designation procedure. Concerns were also raised regarding the need to move from the current regime arguing that if the objective was to ensure coordination at ESMA level, simpler approaches could be envisaged, like submitting applications directly to individual registering authorities. Also, the need for a registration procedure was questioned.

Furthermore, there were suggestions to explicitly include operational and cyber resilience within the conditions for third-country system registration, and that the proposed conditions for registration seem less stringent than the conditions for designation. With regard to the role of EBA, ESMA and the ESCB in the registration process, the Commission explained that they would have a role of convergence facilitator among the different registration authorities. They would therefore be given the power to take all appropriate measures to facilitate convergence among MS registration decisions of third-country systems. It should also be noted that they would not be able in any case to require MS to concur with the views or decisions of other MS on the registration of third-country systems.

Regarding doubts on centralising the application and publication of designated systems only in ESMA, in particular regarding payment systems, the Commission explained that the proposal is to submit the application to ESMA, also for payment systems (instead of submission to EBA), in order to ensure that all applications are submitted to a single point of entry. The same approach is proposed regarding the publication of the relevant information of registered systems, so that the information is published in a centralised way by ESMA. It is to be noted in this regard that ESMA has developed an automated system – the central database – under EMIR that can be used for this purpose. In any case, except for the submission of the application, EBA -and not ESMA-, will be involved in the registration third-country payment systems.

Regarding the legal effects of the registration, concerns were expressed and suggestions were made that the provisions clarify the intended legal effects of the registration. Based on explanations provided by the Commission, the registration decision of a MS would only have effects over the institutions which are established in its territory. This is why the harmonised registration procedure contained in the proposal seeks and facilitates the adoption of convergent registration decisions in each MS where the EU participants of the third-country system are established (to which the same rules and procedures of the third-country system would apply equally). The alternative had been registration by ESMA, EBA or the ESCB with effects in all MS.

One MS suggested replacing "members" with "participants" in the registration application to align with the terminology explained in Article 1(2).

[10] They would also be informed about, and involve in, the process of withdraw of registrations.

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**Questions to MS:**

**Q25: Do MS support including a registration regime of third-country systems? If not, why and what alternative solutions could be adopted to ensure a harmonised approach to this issue?**

**Q26: Do MS believe the designation and registration regimes should be closer aligned? If yes, what are the possible gaps and is it appropriate to address these?**

**Q27: Do MS support the registration procedure proposed? If not, why? If yes, do MS consider that the procedure could benefit from improvements or simplifications? If yes, which ones and why?**

**Q28: Do MS support the 5-year transitional period for the registration of third country systems to which a Member State has extended the SFD protection under Recital 7 of the SFD? If not, why and how should those systems be treated instead? Should existing systems continue to benefit from the protections conferred by SFR where they apply for registration before the end of the five-year transitional period but their application has not yet been determined by the end of that period?**

### iv. Conditions for registration

*Relevant Articles: Article 14 SFR*

The Commission's proposal contains a harmonised set of conditions that third-country systems would need to meet, cumulatively, in order to be registered. As explained above, this aims tofacilitate the registration of third-country systems in different MS as they would face a single set of conditions as opposed to the current situation.

Based on those conditions a third-country system may qualify if it operates under common rules and standardised procedures for processing transfer orders between participants, is authorised or supervised in its country of establishment and is governed by a legal framework that recognises settlement finality. The system must clearly define in its rules the moments of entry, irrevocability, and final settlement of transfer orders. In addition, the system operator must have an appropriate organisational and financial structure, and the system must comply in all material respects with internationally recognised principles for financial market infrastructures.

Most of the conditions for registration would be very similar (or even identical) to the conditions for designation. Similarly to what is proposed for the conditions for designation, EBA and ESMA, in cooperation with the ESCB, would be empowered to adopt technical standards to further specify the conditions.

*Preliminary Views of MS*

As mentioned in point 2(ii) above (section on conditions for designation), there were concerns about the differences between the conditions for registration and those for designation (see section on conditions for designation for further details and explanations on this issue).

Also, there were suggestions to explicitly include operational and cyber resilience as one of the conditions for registration.

**Questions to MS:**

**Q29: Do MS support the introduction of harmonised conditions for registration? If not, why?**

**Q30: Do MS consider that the proposed conditions are appropriate? If not, which criteria should be added, removed or adjusted and why?**

## 5. Settlement finality moments

### i. General considerations

*Relevant Articles: Articles 18, 20 and 21 SFR*

The moments of settlement finality determine whether the insolvency protections provided for in the SFD apply. Therefore, for reasons of legal certainty, those moments need to be clearly determined in the rules of each designated system and be publicly disclosed. In accordance with Article 3 of the SFD, a transfer order of a participant is valid if it enters the system ('moment of entry') after the opening of insolvency proceedings and is carried out on the same day of the opening of the insolvency proceedings, provided that by the moment that transfer order becomes irrevocable ('moment of irrevocability'), the system operator was not aware of the opening of the insolvency proceedings. Under normal insolvency proceedings, without the SFD protections, that transfer order would be normally void.

The Commission's proposal aims to build on the existing SFD and complement it with additional elements, specifically by i) introducing an additional moment, namely the moment of final settlement, ii) including some general principles for determining finality moments that could be further specified in technical standards, and iii) making the rules compatible with distributed ledger technology (DLT).

### ii. The moment of entry and the moment of irrevocability

*Relevant Articles: Articles 18 and 20 SFR*

Under Article 3(3) of the SFD, the **moment of entry** of a transfer order into a system is to be determined by the system in its rules, on the basis of national conditions, when they exist[11]. In addition, Article 3(4) of the SFD contains the principles for setting the moment of entry in case of interoperable systems.

Under Article 5 of the SFD, the **moment of irrevocability** is determined by the system in its rules and procedures.[12] Where MS have introduced additional conditions,[13] designated systems need to comply with those when determining the moment of irrevocability in their rules. In addition, Article 5 also contains the principles for setting the moment of irrevocability in case of interoperable systems.

In some MS transposition of the SFD, the moment of entry and the moment of irrevocability coincide.

The Commission's proposal would mirror the substance of the abovementioned articles (see Articles 18 and 20 of the proposal). In addition, it would:

[11] See Article 3 of the SFD

[12] See Article 5 of the SFD.

[13] Article 2, point (a), of the SFD.

(i) include general principles to be followed by all designated systems when they determine the moments of entry and irrevocability in their rules;[14]

(ii) ensure more harmonisation across the EU and facilitate interoperability and the set-up of links. In this respect, the SFR proposal removes the possibility of MS to lay down different national conditions to be followed by a system when determining in its rules the moment of entry and irrevocability.

(iii) empower ESMA (for clearing and securities settlement systems not operated by a CSD) and EBA (for payment systems) to further specify, in close cooperation with the ESCB, the general principles in regulatory technical standards, if needed.

*Preliminary Views of MS*

There were suggestions to maintain the settlement finality moments in a Directive as a Directive would allow MS to take into account the relevant links to national property laws when implementing the provisions. Also, there were considerations that the proposed regulatory technical standards should be deleted as this was an issue that was in the scope of national laws and national Parliaments' jurisdiction – not technical and thus not something that should be set out in Level 2. In addition, there were considerations that the definition of the three moments of finality in technical standards would constitute a complete departure from the fundamental concepts of the SFD and the definition of a system, where the rules of the system define those moments. Finally, there were questions on the justification of the motivation of this modification as well as questions about the necessity of the moment of entry, which seemed to go beyond the Principles for Financial Market Infrastructures (PFMI).

As regards the rules already in place in relation to finality moments, for CSDs, specifically in Article 48(8) of the CSDR, the Commission noted that the scope of the proposed empowerment for technical standards does not cover securities settlement systems operated by CSDs.

There were concerns about the effects and determination by the system of the moment of irrevocability. Based on those concerns, the provision in the first paragraph of Article 5 of the SFD[15] should be maintained in the SFR as that provision defines irrevocability and gives effect to such rule beyond the mere contractual value of the rules of the system. Also, reversals initiated by the operator of the system should be preserved.

Another concern related to the inclusion of the second sentence in Article 20(1), first subparagraph, of the proposal as irrevocability should be defined by the system operator at the point in time before the order entered the system as otherwise the system could not be protected.

On concerns about undue restriction of innovative and market-based solutions due to the empowerment on irrevocability, the Commission explained that the proposal would cater for this by laying down general principles which would apply to both traditional systems and new technologies and by providing the possibility of further tailoring the general principles to DLT-based systems through technical standards.

Two MS expressed concerns about the empowerments to ESMA regarding the settlement finality moments.

**Questions to MS:**

[14] For the moment of entry, the system must take into account the "*receipt and registration of the transfer order by the system*", while for the moment of irrevocability, they must take into account the "*moment where the transfer order that entered the system is confirmed by the system and where the processing of the order cannot be reversed*".

[15] "*A transfer order may not be revoked by a participant in a system, nor by a third party, from the moment defined by the rules of that system*".

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**Q31: Do MS support the introduction of harmonised general principles and in a regulation that all designated systems need to take into account to determine the moment of entry and the moment of irrevocability? If not, why? Do MS see any material overlaps with existing sectoral legislation?**

**Q32: Do MS support the proposed empowerment that would allow those general principles to be further specified, if needed, in Level 2, including for DLT-based systems?**

**Q33: Do MS have a view as to granting a degree of flexibility to the system operator to determine irrevocability? If yes, in which cases?**

### iii. The moment of final settlement

*Relevant Articles: Article 21 SFR*

The Commission's proposal aims to introduce a new settlement finality moment - the moment of final settlement. The moment of final settlement is explicitly covered in the PFMI[16], in particular in Principle 8 on settlement finality[17], and in Key Consideration 8.1. The later provides that *"[a]n FMI's rules and procedures should clearly define the point at which settlement is final"*.

Article 21(1) of the proposal would incorporate this concept in EU law by taking into account the definition of 'final settlement' provided in the Explanatory notes of Principle 8 of the PFMI[18].

Final settlement is a legally defined moment which depends on the national applicable law regarding transfer of property or other rights. The proposal (Article 21(1)) reflects this when it provides that:

*"Settlement shall be final when the discharge of the obligations of the parties to a transaction is completed in an unconditional and irrevocable manner as determined by the common rules and standardised procedures of each designated system, in accordance with the applicable law for transfer of ownership and other rights"*.

Similarly to the moment of entry and the moment of irrevocability, each system would need to determine the moment of final settlement. That determination would need to be in accordance with the applicable national law on transfer of property or other rights.

The proposed empowerments to ESMA and EBA follow the same logic as the proposed empowerments for the other two moments of finality explained in the previous section.

In relation to DLT-based systems, the empowerments already provide some clarifications as to the moment of final settlement in case of probabilistic or layered finality models,[19] that ESMA and EBA may need to further specify in the future to take into account technological developments. In this respect, it is to be

[16] Principles for Financial Market Infrastructures

[17] "An FMI should provide clear and certain final settlement, at a minimum by the end of the value date. Where necessary or preferable, an FMI should provide final settlement intraday or in real time".

[18] "Final settlement is defined as the irrevocable and unconditional transfer of an asset or financial instrument, or the discharge of an obligation by the FMI or its participants in accordance with the terms of the underlying contract"

[19] Probabilistic or layered finality models may not meet absolute legal certainty but may still be able to achieve legal certainty depending on the structure and rules of the system.

noted that respondents in the targeted consultation pointed out the necessity of a general understanding on how different DLT-based systems can achieve finality.[20.]

*Preliminary Views of MS*

It was supported that the moment of final settlement would be better dealt with in a Directive. Also, there was no understanding of the purpose of the proposed amendments as no problems were perceived with the current SFD, which does not specify the moment of final settlement. In response, the Commission explained that the identified problems relate to the different national conditions adopted in the transposition of SFD and the resulting market fragmentation.

There were doubts as to the relationship between the concept of final settlement and the irrevocability of the transfer order. More specifically, the purpose of the proposal was unclear because the protection that would be granted by the SFR, like the SFD, was linked only to the moment of entry of the transfer order. Also, the reference to the "*applicable law for the transfer of ownership and other rights*" was unclear and not appropriate .

As regards questions on the proposed extension of the concept of final settlement to DLT-based systems, the Commission explained that the proposed empowerments to clarify the general principles for setting moments of finality includes clarifications to determine the three settlement finality moments for DLT-based systems. Since those systems face the challenge of probabilistic settlement, it is important that this does not prevent final settlement.

On questions about the reference to "*deterministic and legally enforceable*", the Commission clarified that the purpose of the specific language was to adapt the general principle applicable to traditional systems, i.e. the discharge of the obligations of the parties to a transaction in an unconditional and irrevocable manner, to DLT-based systems due to their specific features.

The inclusion of the moment of final settlement in the SFR was questioned. Some MS suggested to cover it in sectoral legislation (like CSDR), while others considered that it was a matter of civil law and should therefore not be part of the proposal. In response, the Commission explained that not all sectoral regulation covers finality moments. In addition, the proposal would ensure a certain consistency, via the setting of general principles, applicable to all types of systems.

Some MS considered that the moment of final settlement should not be determined by ESMA, but rather by the system. Other MS considered that the determination of the settlement moments was a matter for civil law and could not be defined in technical standards. As explained by the Commission, the proposal would leave the determination of the settlement finality moments to the systems on the basis of general principles, which may be further developed by ESMA or EBA, if needed.

A number of MS expressed reservations about empowering ESMA to adopt regulatory technical standards (RTS) on settlement finality. They argued that key elements such as the moments of entry, irrevocability, and final settlement are typically determined by system rules and national law and therefore may not be suitable for harmonisation through RTS. Also, there were concerns about potential overlaps with other EU frameworks (such as EMIR, CSDR, DLTR and SIPSR), risks of constraining innovation, and duplication of supervisory requirements.

[20] See the impact assessment accompanying the proposal, p. 232.

Finally, one MS considered that the notion of "absolute legal certainty" referred to in the provision was not sufficiently clear and would require further clarification.

**Questions to MS:**

**Q34: Do MS support the introduction of the concept of moment of final settlement? If not, why? If yes, should any clarifications be included regarding that moment? If yes, which ones?**

**Q35: Do MS support the introduction of harmonised general principles and in a regulation that all designated systems need to take into account to determine the moment of final settlement? If not, why?**

**Q36: Do MS support the proposed empowerment that would allow those general principles to be further specified, if needed, in Level 2, including for DLT-based systems? If not, why?**

## 6. Conflict-of-law rule

*Relevant Articles: Article 25 SFR*

Article 9(2) of the SFD[21] contains a conflict-of-law rule to determine the rights of collateral security holders[22] over collateral posted in connection with a system where that collateral security is legally recorded on a register, account or centralised deposit system located in a MS. It determines that the applicable law is the law of the MS where the securities account is maintained or located. Recitals 20 and 21 of the SFD provide some further clarification in this respect.

However, as explicitly noted in the Commission Communication on the applicable law to the proprietary effects of transactions in securities[23], there are different ways to determine which is the MS where the securities account is maintained or located. MS have therefore transposed Article 9(2) of the SFD in different manners and, as a consequence, divergent national rules may apply to determine the rights of the holders of collateral security across the EU.

In addition, for DLT-based systems, it may not be possible to identify the location of the asset or the location of the register or account (the MS where the relevant entries are made or maintained is not a meaningful concept in the DLT world as the register or account could be stored on every node in a DLT network).

[21] *"Where securities including rights in securities are provided as collateral security to participants, system operators or to central banks of the Member States or the European Central Bank as described in paragraph 1, and their right or that of any nominee, agent or third party acting on their behalf with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State".*

[22] As well as the rights of any nominee, agent or third party acting on their behalf.

[23] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on the applicable law to the proprietary effects of transactions in securities, COM(2018) 89 final, 12.03.2018. In particular: *"Under national implementation there are different ways to determine where a securities account is 'located' or 'maintained'. Without prejudice to potential future decisions of the Court of Justice of the European Union, these different ways of interpretation all appear to be valid under the Directives. The conflict of laws provisions in the three Directives do not provide clear definitions of how to determine where the securities account is located or maintained".*

Consequently, in some of those systems is not possible to identify the location of the account, register or centralised deposit system in order to apply the conflict-of-law rule in the SFD[24].

In order to address the legal uncertainty stemming from the SFD and the challenges posed by new technologies, the Commission proposes to clarify the conflict-of-law rule contained in Article 9(2) of the SFD. In particular, the Commission's proposal aims to:

(i) clarify that the location of a register, account or centralised deposit held at a legal entity is the MS where that entity has its registered office (Article 25(2), second subparagraph);

(ii) include a fall-back provision to determine the MS law to be applied, when it is not possible to determine the location of the account, register or centralised deposit system as per point (i), mainly for DLT-based systems. In that case, the law applicable to determine the rights of the holders of collateral security would be the law governing the system in connection with which the collateral was provided (Article 25(3));

(iii) clarify that the conflict-of-law rule above only covers the substantial provisions of the applicable legal regime and excludes any redirection to the law of another country (Article 25(4)).

*Preliminary views of MS*

In the January CWP, clarifications were asked on the reasons for the changes proposed to the conflict-of-law rule in the proposal. Also, the clarity of the proposal regarding DLT-based systems and the technological neutrality of the proposal were questioned. In response, the Commission explained that the purpose of the proposal is to further clarify the conflict-of-law rule in the SFD and to offer a fall-back solution if it cannot be applied, in particular for DLT-based systems. Also, the proposed conflict of law rule is meant to be technology neutral and to apply to any designated system, irrespective of the technology used by the system, also in case of decentralised ledger technology.

Some MS asked clarifications on the reasons for referring to the MS of the registered office and one of MS asked for examples where the latter could not be identified. Also, it was not clear whether the proposal referred to the location of the account or the location of the entity holding the account. Some MS considered that the proposal is not clear as to how to determine the location of DLT-based systems. Another MS asked whether the proposal laid down a presumption that could be rebutted, in which case the proposal would not be acceptable to them. As explained by the Commission, the proposal intends to provide legal certainty as to the applicable law and therefore relates to an objective factor which is the registered office of the entity holding the account. That factor – the registered office of the entity holding the account – is therefore proposed to apply in all cases as it is an objective criterion that should be easily identified in a similar way by any stakeholder. Since this criterion may not be identifiable for DLT-based systems, a fall-back option – the law of the system- is proposed.

One MS asked for the provisions of the article to be transferred back to the Directive.

One MS pointed out that the drafting of Article 25 could be interpreted as covering collateral posted to central banks generally, even when not linked to settlement systems.

**Questions to MS:**

[24] See the impact assessment accompanying the proposal, p. 235.

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**Q37: Do MS support clarifying the conflict-of-law rule that is currently included in the SFD? If not, why? If yes, are the clarifications provided in the proposal adequate? If not, how should they be adjusted and why?**

**Q38: Do MS support the proposed introduction of a fall-back conflict-of-law rule? If not, why? If yes, do MS consider that the proposed fall-back conflict-of-law rule would address the specificities of DLT-based systems? If not, how should it be modified?**

## 7. Amendments to the Financial Collateral Directive

*Relevant Articles: Article 31 SFR*

As stated in the explanatory memorandum of the legislative proposal, both the SFD and related provisions in Directive 2002/47/EC (the Financial Collateral Directive or FCD) lack full technological neutrality, as their provisions were drafted with traditional, account-based systems in mind. The Commission maintains that this creates legal uncertainty for the use of DLT and tokenised forms of cash or securities as collateral under financial collateral arrangements.

To ensure consistency with the changes proposed under the SFR and thus avoid unintended divergences in the scope between the SFR and the FCD that could result in legal uncertainty and conflicting application, in particular in relation to instruments issued on DLT, the Commission proposes two groups of targeted amendments to the FCD. First, it proposes clarifying certain provisions of the FCD, in particular to include in its scope cash, financial instruments and credit claims if they are issued or recorded on DLT. And second, it proposes a new definition, i.e. that of 'account', in order to align the FCD with the SFR, and expands certain definitions to include electronic records, including those based on DLT.

*Preliminary Views of MS*

In the January CWP, MS raised concerns on the need to align the definition of 'collateral security' in the SFD and 'financial collateral' in the FCD. In response, the Commission pointed out that the definition of collateral under the proposal[25] would be aligned with the definition of collateral security under the SFD.[26] However, it would differ insofar as it would explicitly include collateral issued or recorded using DLT.

The proposed amendments to Article 1(4) of the FCD would make the latter read as follows:

*"The financial collateral to be provided shall consist of cash, financial instruments or credit claims.*

[25] *"'collateral' means all realisable assets, including, without limitation, those financial instruments and funds, including those issued or recorded using distributed ledger technology, including in tokenised form, and financial collateral referred to in Article 1(4), point (a), of Directive 2002/47/EC, provided under a pledge, a title transfer arrangement, a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with or related to a system, or provided to central banks of the Member States or to the European Central Bank".*

[26] *"'collateral security' shall mean all realisable assets, including, without limitations, financial collateral referred to in Article 1(4)(a) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the European Central Bank".*

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*For the purpose of this Directive, references to cash, financial instruments and credit claims shall include where they are issued or recorded using DLT.*

*MS may extend the scope of financial instruments to be covered by this Directive to include the instruments referred to as 'financial instrument' in Article 4(1), point (15), of Directive 2014/65/EU where these are negotiable on the capital market."*

The optionality that has been added in the third subparagraph would meet the abovementioned request made by the industry, albeit only partially.[27] This is because a complete alignment of the definitions of 'collateral security' under the SFR and 'collateral' under the FCD could be considered to be quite far reaching. Indeed, while the SFR allows for all realisable assets to be covered and thus provides for a very broad definition, the FCD aims at covering only collateral which can be realised easily and within a short period of time.

Some MS had strong concerns about the proposed amendments to the FCD, pointing to the fact that collateral covered by the FCD must be easily realisable in insolvency proceedings. Otherwise, the trust in the protections given by the FCD (and the reasons for exceptions to general insolvency rules) would be seriously undermined. The MS were of the view that the desire to promote the use of DLT should not undermine financial stability and trust in collateral covered by the FCD. As explained by the Commission, it would seem difficult to argue that DLT-based versions of types of collateral that are already eligible under the FCD (cash, financial instrumetns and credit claims) are by definition difficult to realise in insolvency proceedings merely because they are DLT-based. Recent developments, such as the ECB paving the way for the acceptance of DLT-based assets as eligible Eurosystem collateral, [28] would rather seem to refute that argument.

One MS noted that the Commission had only proposed minor amendments to the FCD and wanted to understand why the Commission did not also review the conflict-of-law provisions in the FCD. The same MS questioned whether natural persons could be included as collateral takers or providers.

Four MS were of the view that the proposed 18 months for the transposition of the amendments to the FCD were insufficient and asked to be given at least 24 months.

**Questions to MS:**

**Q39: Do MS support the proposed amendments to the FCD to make the latter compatible with DLT? If not, why? If yes, do MS see scope for improvement to any of the amendments? If yes, which ones and why?**

[27] The proposed definition of 'collateral' in Article 2(1), point (27), of the SFR states that collateral "means all realisable assets, including, without limitation, those financial instruments and funds, including those issued or recorded using distributed ledger technology, including in tokenised form, and financial collateral referred to in Article 1(4), point (a), of Directive 2002/47/EC, provided under a pledge, a title transfer arrangement, a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with or related to a system, or provided to central banks of the Member States or to the European Central Bank."

[28] https://www.ecb.europa.eu/press/pr/date/2026/html/ecb.pr260127_1~a946167ce1.en.html: "Eurosystem to accept marketable assets issued in central securities depositories (CSDs) using distributed ledger technology (DLT) as eligible collateral for Eurosystem credit operations as of 30 March 2026. Further work is exploring ways to expand eligibility to assets issued and settled entirely on DLT networks." [accessed on 15 February 2026]

**Q40: Do MS support the proposed amendment giving MS the possibility to allow financial instruments covered under MiFID II where negotiable on the capital market to be included in the scope of the FCD? If not, why? If yes, should the scope be expanded even further and if so, to which collateral?**

**Q41: Do MS see the need for any additional amendments to the FCD? If so which ones?**

**Q42: Do MS support the proposed deadline for transposition of the amendments? If not, what would be the appropriate deadline and why?**

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