European Financial
Markets Lawyers Group

- THE CHAIRMAN -

12 September 2025

Mr. John Berrigan
Director-General of Financial Stability,
Financial Services and Capital Markets Union
European Commission
1049 Bruxelles
Belgium

Ms. Alexandra Jour-Schroeder
Deputy Director-General of Financial Stability,
Financial Services and Capital Markets Union
European Commission
1049 Bruxelles
Belgium

Mr. Martin Merlin
Director of Financial Markets
European Commission
1049 Bruxelles
Belgium

Ms. Jenny Robertson
Financial Markets Infrastructure
European Commission
1049 Bruxelles
Belgium

Ms. Tanya Panova
Securities Market
European Commission
1049 Bruxelles
Belgium

Dear Sir or Madam,

Re: Targeted Consultations on Integration of EU Capital Markets

On 15 April 2025, the Commission launched a targeted consultation on the integration of the EU capital markets, including by removing potential barriers under the Directive 98/26/EC on

settlement finality[1] (**SFD**) and the Directive 2002/47/EC on financial collateral arrangements[2] (**FCD**). We would like to take the opportunity to address some critical issues that should be considered when proposing amendments to the SFD and the FCD.

In doing so, we refer to the joint letter of the International Swaps and Derivatives Association, Inc. (**ISDA**) and the EFMLG to the Commission of 14 April 2008 (**Joint ISDA-EFMLG Letter 2008**)[3] and the letter of the EFMLG to the Commission of 6 May 2021 (**EFMLG Letter 2021**)[4]. Both letters clearly show that further harmonisation and modernisation of the two Directives is an important issue that the financial industry has been working on intensively for years and that little progress has been made so far.

The EFMLG Letter 2021 was a response to the two targeted consultations launched by the Commission on the review of the SFD and the FCD. Although the proposed amendments contained therein were mentioned in the Commission's report on the review of the SFD and FCD of 28 June 2023 (**SFD and FCD Review Report 2023**)[5], arguments put forward were not discussed in detail.[6] We therefore welcome the fact that the new targeted consultation paper gives us the opportunity to resubmit our previous proposals, which have lost none of their validity.

1. Financial Collateral Directive

a) Directive vs. Regulation

To ensure full application in all Member States and to create a uniform European cross-border framework, the FCD should become a regulation, which is directly applicable in all Member States (Article 289(1) TFEU).

We are aware that the European Union has no mandate to harmonise the substantive insolvency laws of its Member States. However, the provision of legal certainty through regulation in areas of substantial bankruptcy law (based on the concept of “implied competence”, as developed by the European Court of Justice) is not without precedent. One example is Regulation (EU)

---

1 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45–50).

2 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43–50).

3 The letter is available at: http://www.efmlg.org/Docs/Documents/2008-04-14%20ISDA%20letter%20to%20EC%20on%20Directive%202002_47_EC%20on%20Financial%20Collateral%20Arrangements%20_%20Proposal%20for%20a%20European%20Netting%20Directive.pdf.

4 The letter is available at: http://www.efmlg.org/Docs/Documents/2021-05-06%20EFMLG%20Letter%20to%20the%20European%20Commission%20re%20Settlement%20Finality%20Directive%20and%20Financial%20Collateral%20Directive.pdf.

5 European Commission, Report from the Commission to the European Parliament and the Council on the review of settlement finality in payment and securities settlement systems including its application to domestic institutions participating in third-country systems and of financial collateral arrangements under Directives 98/26/EC and 2002/47/EC dated 28 June 2023 (COM(2023) 345 final).

6 See Section 3.3. of the SFD and FCD Review Report 2023.

2019/834[7] (**EMIR Refit**), which introduced a new Article 39(11) of Regulation (EU) No 648/2012 (**EMIR**) on the recognition of the transfer and close-out of client positions in a clearing member's default.

A similar effect would be achieved by a Directive that does not allow any exemptions or opt-outs. The advantage of a Directive would be that minimum standards would be better integrated into the legal systems of the Member States, particularly in the areas of contract law and insolvency law. In any case, the minimum standards laid down in a Regulation or Directive should not prevent Member States from providing for more extensive protection.

b) Opt-out Provisions

During the negotiations of the FCD, special attention was paid to the FCD's scope of application and on whether the protection provided under the FCD, e.g. against bankruptcy clawbacks, may conflict with the principle of equal treatment of creditors in bankruptcy (*par conditio creditorum*).

In order to address the concerns of some Member States, three opt-out options have been introduced, authorising the Members States to reduce the personal scope of the FCD by excluding financial collateral arrangements entered into by non-financial corporates (Article 1(3) FCD), to exclude own shares and shares issued by affiliates from the scope of eligible collateral (Article 1(4)(b) FCD) or to decide to not recognise the realisation of financial collateral by appropriation (Article 4(3) FCD). Following the Commission's report on the evaluation of the FCD of 20 December 2006 (**FCD Evaluation Report 2006**)[8], during which it was determined that none of the Members States has used the opt-out of the collateral taker's right of appropriation, Article 4(3) FCD has been deleted by Article 2(7)(c) of Directive 2009/44/EC. However, the first two opt-out options are still applicable.

As far as the protection of non-financial corporates (Article 1(3) FCD) is concerned, as further described in the FCD Evaluation Report 2006, at the time only one Member State decided to apply a full opt-out. Five Member States applied a partial opt-out by e.g. excluding only small and medium-sized entities (**SME**) or limiting the protection to certain financial obligations. The proposed deletion of Article 1(3) FCD was mentioned in both the FCD Evaluation Report 2006 and the SFD and FCD Review Report 2023. However, the Commission was not prepared at that time to re-open the above-mentioned discussion on the European level.

---

[7] Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories PE/73/2019/REV/1 (OJ L 141, 28.5.2019, p. 42–63).

[8] European Commission, Report from the Commission to the European Parliament and the Council on the evaluation of the Financial Collateral Arrangements Directive (2002/47/EC), dated 20 December 2006 (COM(2006) 833 final).

The fragmentation of national law caused by Article 1(3) FCD was also discussed in the context of Directive (EU) 2019/1023 on preventive restructuring frameworks[9] (**PSFD**). Article 31(1) PSFD clarifies that the stay of individual enforcement actions in accordance with Article 6 PSFD should not impact on the safeguards provided under the national laws implementing the FCD. However, the discussion on the scope of protection provided under such national implementation led to a specific opt-in right in Article 7(6) PSFD for netting arrangements (i.e. the possibility to restrict a stay of individual enforcement action to the claim arising as a result of the netting), which because of the use of the opt-out pursuant to Article 1(3) FCD would not benefit from the protection under the FCD.

The removal of the two existing opt outs would enhance the European legislative financial framework, avoiding internal divergences among Member States and thus contributing to a simpler, safer and more robust European market either for local market participants or for third country firms willing to invest in the European Union. However, greater legal certainty would also benefit non-financial counterparties subject to the EMIR clearing obligation (so-called "NFC+") which are required by Article 2(3) of Commission Delegated Regulation (EU) 2016/2251[10] (***Uncleared Margin RTS***) to perform independent legal reviews of the enforceability of their collateral arrangements.

c) Close-out Netting Arrangements

In the Joint ISDA-EFMLG Letter 2008 we reiterated our view that it is essential for both the industry and its regulators to have a high degree of legal certainty regarding the enforceability of contractual close-out netting arrangements. Articles 206 and 296 of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms[11] (**CRR**) and Article 2(3) of the Commission Delegated Regulation (EU) 2016/2251 on regulatory technical standards for risk-mitigation techniques for OTC derivative contracts[12] (**Uncleared Margin RTS**) explicitly require that credit institutions, investment firms and non-financial corporates when using contractual netting arrangements must be satisfied that netting under their arrangements is legally valid and enforceable under the laws of each relevant jurisdiction.

---

[9] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) PE/93/2018/REV/1 (OJ L 172, 26.6.2019, p. 18–55).

[10] Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty C/2016/6329 (OJ L 340, 15.12.2016, p. 9–46).

[11] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1–337).

[12] Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty C/2016/6329 (OJ L 340, 15.12.2016, p. 9–46).

The above-mentioned provisions highlight the Union's concern for legal certainty in view of its implications for the stability of the financial system. As can be seen from the Uncleared Margin RTS, which applies to all counterparties that intend to enter into uncleared OTC derivatives, following the global financial crisis of 2008-2009, ensuring legal certainty is no longer just about the prudentially supervised credit institutions and investment firms, but about all market participants who trade financial instruments and which use contractual netting arrangements in order to mitigate their counterparty default risk. The broad use of contractual netting arrangements by non-financial corporates has also been highlighted by the International Institute for the Unification of Private Law (**UNIDROIT**) when publishing its 2013 Principles on the Operation of Close-out Netting Provisions[13].

The EFMLG believes that it is feasible to provide the required legal certainty either by enacting a new regulation on close-out netting (**Netting Regulation**) or by further developing the FCD. The main content of a Netting Regulation has been outlined in an annex to the Joint ISDA-EFMLG Letter 2008. The annex could, however, also be used as guidance for a revision of the FCD which would include, amongst other modifications (see also below), changes to the subject matter and scope (Article 1(1) FCD) and the terms "close-out netting provision" (Article 2(1)(n) FCD) and "enforcement event" (Article 2(1)(l) FCD).

Due to the great increase in the clearing volumes of derivatives in Central Counterparties (**CCP**) since EMIR and its principal to principal clearing model have come into effect, another field for adding legal certainty would be the clarification, at FCD level, that client clearing agreements (e.g. those developed by ISDA to cater for principal-to-principal client clearing) benefit from Close-out Netting Provisions and that a single netting set can include various sub-netting sets (e.g. a single ISDA including annexes for client clearing trades and pure OTC trades).

The adoption of a separate instrument on close-out netting (preferably in the form of a regulation) or the amendment of the FCD to extend its scope to netting agreements has been discussed in both the FCD Evaluation Report 2006 and the SFD and FCD Review Report 2023. However, at the time, the Commission was not prepared to continue the above-mentioned discussion.

Given the importance of close-out netting not only for the financial industry, we welcome very much that the current targeted consultation raised again the question of the need for harmonization of close-out netting. The answer to this question is clearly yes.

d) Personal Scope

The broadening of the personal scope of application has been discussed in both the FCD Evaluation Report 2006 and the SFD and FCD Review Report 2023. At the time, a majority of ten Member States had widened the scope to cover also entities not mentioned in Article 1(2) FCD, which may be viewed as a strong indication of a possible need for adjustment.

It is not justified to exempt private individuals from the scope of application. It cannot be the purpose of the FCD to protect retail clients from entering into certain transactions (**SFT**) through

[13] The principles are available at: https://www.unidroit.org/english/principles/netting/netting-principles2013-e.pdf.

depriving them of the safeguards and benefits (e.g. less associated costs in the provision of financial guaranties) provided under the FCD.

The list of eligible collateral taker and the collateral provider set out in Article 1(2) FCD should be amended to also cover:

- Re-insurance companies;
- Investment firms regulated under the Directive (EU) 2019/2034 on the prudential supervision of investment firms[14] (**IFD**);
- Central securities depository (**CSD**) regulated under the Regulation (EU) No 909/2014 on central securities depositories[15] (**CSDR**);
- Alternative investment funds (**AIFs**). There are good arguments to extend the personal scope to AIFs and their management companies, which are subject to a similar supervisory regime as undertaking for collective investment in transferable securities (**UCITS**), which were already regulated entities in 2002 at the time the FCD came into force, and which are covered by Article 1(2)(c)(v) FCD. However, the scope of the FCD has to be considered carefully, since the removal of national safeguards to the enforcement of financial collateral arrangements could contribute to moral hazard. At the same time, to achieve the FCD's objective of avoiding systemic risk, the scope of the FCD should cover systemically important collateral takers and providers. Thus, regarding AIFs it should be assessed whether their legal and supervisory regime should merit the same legal treatment for the purpose of this Directive as credit institutions, UCITs and other financial institutions.
- Crypto asset service providers within the meaning of Art. 3(15) of Regulation (EU) 2023/1114[16] (**MiCAR**).

For this reason, we suggest the Commission to take the necessary steps for the coordination between both pieces of legislation, for the final inclusion of these providers within the personal scope of the Directive.

It should also be clarified that the collateral provider or the non-defaulting party (in case of a Netting Regulation or FCD which protects all close-out netting arrangements) may also be established or domiciled outside the Union.

Further, the references to outdated directives and regulations used in Article 1(2) FCD should be updated.

e) Financial Collateral

[14] Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU PE/79/2019/REV/1 (OJ L 314, 5.12.2019, p. 64–114).

[15] Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1–72).

[16] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 PE/54/2022/REV/1 (OJ L 150, 9.6.2023, p. 40–205).

The scope of financial collateral should be broadened. The following assets should be added to Article 1(4) FCD:

- "Close-out-amounts" determined in accordance with a "close-out netting provision"; the inclusion would support netting under cross product netting arrangements (including "master masters" and "bridges").
- Claims under "guarantees" or similar credit protection; the inclusion would support netting arrangements that include exposure of multiple counterparties (e.g. entities of the same group, which have provided each other guarantees).
- EU and non-EU emission rights as well as voluntary carbon credits (**VCC**).
- Crypto assets within the meaning of Article 3(5) MiCAR.
- The term "financial instruments" (Article 2(1)(e) FCD) should have the meaning assigned to it in Article 4(1) point (15) MiFID II and Section C of Annex I so that it would also cover derivatives, emission allowances and crypto assets.
- The term "credit claims" (Article 2(1)(o) FCD) should include loans granted by "financial institutions whether located in the Union or not".

The legal concepts underlying the terms “possession” and “control” (as used in Article 2(2) FCD) should be clarified. The same applies to the term “book entry securities collateral” and the concept of a “register” or “account”.

f) Reorganisation Measures

The term "reorganisation measures" (Article 2(1)(o) FCD) could be clarified by adding references to Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms[17] (**BRRD**), the Regulation (EU) No 806/2014[18] (**SRMR**) and the PSFD.

g) Conflict of Laws

The need for a revision of the conflict of laws rule set out in Article 9 FCD has already been discussed in the FCD Evaluation Report 2006. Like Article 4(1) of the 2006 Hague Securities Convention[19], Article 9 FCD is based on the so-called "place of the relevant intermediary approach" (**PRIMA**). It provides that any question with respect to book-entry securities collateral shall be governed by the law of the country in which the relevant account is maintained.

---

[17] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190–348).

[18] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1–90).

[19] Hague Conference on Private International Law (HCCH), Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary of 5 July 2006, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=72.

Considering the inconsistent national implementation by the Member States, the Commission concluded that Article 9 FCD (as well as Article 9 SFD and Article 24 of the Directive 2001/24/EC on the reorganisation and winding up of credit institutions[20] (**Winding-up Directive**)) should be amended to improve the legal certainty within the Union by specifying the criteria for determining the relevant location where the account is "maintained"[21]. The Commission's proposal to introduce a clear and unique rule for determining the location of the relevant account has also been supported by the European Central Bank (**ECB**)[22]. As confirmed by the Commissions Communication of 12 March 2018[23] (**2018 Communication**) and the Commission Staff Working Document of 28 March 2018[24] (**2018 Evaluation**), the current fragmentation in the national conflict of laws regimes is still an issue[25]. However, the Commission decided not to take any action, but to continue its monitoring of the developments in this area and to assess how national interpretations and market practices evolve.

The EFMLG is concerned about the lack of activity in this important area. Legal certainty as to the law applicable to indirectly held book-entry securities and crypto assets is of critical importance for the stability of the financial systems, which otherwise may face considerable systemic risks.

2. Settlement Finality Directive

a) Directive vs. Regulation

In order to ensure full application in all Member States, the SFD should be transformed into a regulation, which is directly applicable in all Member States.

b) Inclusion Mechanism

The inclusion mechanism set out in in Articles 2(a) and Article 10(1) sent. 1 SFD should be reconsidered. The SFD should apply automatically to all systems established in the Union, without being specified as such by the relevant Member State.

---

[20] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15–23).

[21] See page 11 of the FCD Evaluation Report 2006.

[22] ECB, Opinion (CON/2005/7) of 17 March 2005, note 6.

[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 of 12 March 2018, COM(2018) 89 final.

[24] Commission Staff Working Document, Impact Assessment, accompanying the documents (i) Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of the assignment of claims (COM(2018) 96 final) and (ii) 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).

[25] See page 125 of the 2018 Evaluation and the summary of responses to Question 20 on page 105 of the 2018 Evaluation.

This should apply at least to those systems operated by a CSD or a CCP authorised in accordance with Article 16 CSDR or Article 14 EMIR. The designation of the system in accordance with Article 2(a) SFD should not be a precondition for operating the system (see Article 39(1) CSDR and Article 17(4) EMIR).

c) Third-country Systems

The safeguards provided under the SFD should apply to:

(i) all participants established in the Union and all financial collateral provided by such participants, irrespective of whether the system is governed by the laws of a Member State or a third country; and

(ii) all participants, whether located in the Union or not, that participate in a system established in the Union, and all financial collateral provided by such participants.

This should apply at least to those third-country systems that have been recognised by the Union in accordance with a procedure that ensures equivalence in legal certainty provided by the laws governing the third country. The recognition procedure for third-country systems, if any, could be aligned to the procedure set out in Article 25 et seq. EMIR.

d) Participants

The list of eligible participants defined in Article 2(f) SFD and by the term "institution" in Article 2(b) SFD should be amended to also cover:

- Investment firms regulated under the IFD;
- CSDs regulated under the CSDR;

Further, the references to outdated directives and regulations used in Article 2(b) SFD should be updated. The reference to the "Community" should be replaced with a reference to the "Union".

e) Securities vs. Financial Instruments

The term "securities" introduced by Article 2(h) SFD should be replaced with "financial instrument", wherever it appears in the text of the SFD.

Article 2(a) second indent SFD should be deleted.

f) Insolvency Proceedings

The definition of "insolvency proceeding" in Article 2(j) SFD should be aligned to the terms "winding-up proceedings" and "reorganisation measures" used in Article 2(1)(j) and (k) FCD.

g) Conflict of Laws

The conflict of laws rule set out in Article 9 SFD (and Article 24 Winding-up Directive) should be aligned to Article 9 FCD. As discussed above, we support the Commission's proposal to introduce

a clear and unique rule for determining the location of the relevant register, account or centralised deposit system (including for the location of crypto assets).

The Commission should also consider, whether the wording "legally recorded" used in Article 9(2) SFD is clear enough to be implemented and construed consistently by all Member States. In order to support all legal concepts applied to the proprietary aspects of rights in indirectly held book-entry securities, we would support a mere functional approach and delete the word "legally".

The Commission should also introduce a provision (as in Article 9(1) sent. 2 FCD) which exludes *renvoi*. ("*The reference to the law of the Member State is a reference to its domestic law, disregarding any rule under which, in deciding the relevant question, reference should be made to the law of another country*").

Yours sincerely,

Otto Heinz

Chairman