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Targeted consultation on the review of the Directive on financial collateral arrangements

Fields marked with * are mandatory.

Introduction

Background to this consultation

The Financial Collateral Directive (FCD) was adopted on 6 June 2002 and introduced a harmonised framework for the use of financial collateral to secure transactions: By doing so, it contributed to enhancing cross-border use of financial collateral. Prior to the FCD, only collateral security provided to a central bank or in connection with participation in a payment or securities settlement system covered by the SFD (SFD system) was protected by EU law in the event of the insolvency of the collateral giver. A more comprehensive approach covering also OTC transactions was deemed necessary because divergent national rules applicable to financial collateral were frequently impractical and often non-transparent. They resulted in uncertainty as to the effectiveness and enforceability of 'financial collateral arrangements', also as a means of protecting cross-border transactions. The FCD protects collateral takers notably by: ensuring that financial collateral arrangements can be mobilised and realisable without delay due to national formalities; providing for close-out netting provisions to be enforceable in accordance to their terms and ring-fencing the operation of financial collateral arrangements should one of the parties become insolvent. Where applicable, these protections may constitute exceptions to the principles of equal treatment of creditors upon the opening of insolvency proceedings and universality of insolvency proceedings. In such a way, they help to avoid systemic contagion risks throughout the EU. The FCD does not fully harmonise national laws applicable to financial collateral arrangements but partially harmonises certain provisions whilst dis-applying others. By doing so, the FCD aims to remove barriers to the timely cross-border creation and operation of such arrangements.

Article 12a of the Settlement Finality Directive (SFD) requires the Commission to report on the SFD by 28 June 2021. To this end, the Commission is reviewing the SFD. Since the FCD is closely related to the SFD, the Commission has decided to review the FCD in parallel. For the FCD to continue to serve its purpose, it is important to consider developments that could affect its functioning and to ensure coherence across legislative frameworks. Relevant issues can arise from market developments (economic, financial or technological) and/or regulatory changes. Two issues that are dealt with in this consultation are also important for the SFD: recognition of 'close-out netting provision' and 'financial collateral' ('cash' and 'financial instruments' the two most commonly used forms of 'collateral security' under the SFD). The Commission does not intend to deal with the (re-) use of financial collateral given under 'security financial collateral arrangement' by the collateral taker in this review because it was recently addressed in the Securities Financing Transactions Regulation (SFTR), which provided for improved transparency and monitoring. As reporting under the SFTR only started in July 2020, it is too early to draw any conclusions . A first discussion with Member States on both, SFD and FCD related issues, took place in October 2020.

Responding to this consultation

The purpose of this consultation is to receive stakeholders' views and experiences regarding the functioning of the FCD. The responses to this consultation will provide important guidance to the Commission services in preparing a legal proposal where appropriate.

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

More information on

- this consultation
- the consultation document
- financial collateral arrangements
- the related targeted consultation on the review of the Settlement Finality Directive (SFD)
- the protection of personal data regime for this consultation

About you

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* Language of my contribution

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English
- ○ Estonian
- ○ Finnish
- ○ French
- ○ German
- ○ Greek
- ○ Hungarian
- ○ Irish
- ○ Italian

- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Jörg

* Surname

Faulhaber

* Email (this won't be published)

joerg.faulhaber@dsgv.de

* Organisation name

255 character(s) maximum

GBIC - German Banking Industry Committee

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

52646912360-95

* Country of origin

Please add your country of origin, or that of your organisation.

- Afghanistan
- Åland Islands
- Albania
- Algeria
- American Samoa
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- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
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- Luxembourg
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- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
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- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
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- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
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- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
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- Montenegro
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- Morocco
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- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia

- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d’Ivoire
- Croatia
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
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- Norway
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- Palestine
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- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
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- Venezuela
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- Laos
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- Lebanon
- Lesotho
- Liberia
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

* Field of activity or sector (if applicable):

- [ ] Auditing
- [ ] Central Counterparties (CCPs)
- [ ] Central Securities Depositories (CSDs)
- [ ] Clearing house
- [ ] Credit institution
- [ ] Credit rating agencies
- [ ] E-money institution
- [ ] European supervisory authority
- [ ] Insurance
- [ ] Investment firm
- [ ] Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- [ ] Market infrastructure operation (except CCPs, CSDs, Stock exchanges)
- [ ] Member State Authority other than a National supervisory authority
- [ ] National supervisory authority
- [ ] Organisation representing European consumers' interests
- [ ] Organisation representing European retail investors' interests
- [ ] Payment institution
- [ ] Pension provision

- [ ] Publically guaranteed undertaking
- [ ] Settlement agent
- [ ] Stock exchanges
- [ ] System operator
- [ ] Technology company
- [x] Other
- [ ] Not applicable

* Please specify your activity field(s) or sector(s):

Banking

Is there anything else you would like to mention?

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

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1. Scope

The scope of the FCD determines who benefits from its protections. It 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.

To benefit from the FCD's protections, the collateral taker and the collateral provider must be covered by the FCD. The following are currently within the FCD's scope: public authorities; central banks; financial institutions; central counterparties; settlement agents and clearing houses. In addition, a person other than a natural person (including unincorporated firms and partnerships) can also be within the FCD's scope, provided that the other party to the financial collateral arrangement is one of the afore-mentioned entities (Article 1(3) FCD). Member States can opt-out of the latter provision. By applying this opt-out, Member States are able to exclude from the scope of the FCD financial collateral arrangements entered into by SMEs with their credit institutions for instance, that primarily belong to the retail rather than wholesale financial markets covered by the FCD.

Furthermore, new financial entities have emerged in the EU capital markets acquis (e.g. payment institutions, e-money institutions or central securities depositories) which are currently not covered by the FCD and could be considered to be included in the scope.

Question 1.1 Should the personal scope of the FCD be amended to include the following entities:

a) Payment institutions?

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

Please explain your anwer to question 1.1 a):

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The legal protection the FCD provides for netting mechanisms (in the form of bilateral/contractual netting arrangements) as well as financial collateral arrangements are a cornerstone of the EU-framework for a common EU financial/capital market – and also an indispensable component of a capital markets union. Netting provisions play an essential role as an effective means to directly reduce and manage risk (effectively acting as a safety valve in case of a default). Likewise, financial collateral arrangements also serve to (further) reduce the risk exposure. In both cases, an ineffectiveness or even serious legal uncertainties result in immediate increases of the actual risk exposure (in case of netting provisions exponentially) and as directly related further effect also on capital requirements so that counterparties relying on netting and financial collateral arrangements for default risk management purposes are burdened both with additional capital charges as well as an increase of their actual risk exposure in case of a default of the counterparty. These effects can potentially be systemic and a lack of an appropriate protection of netting and financial collateral arrangements (jointly or separately) increase the stability and reduces risks and costs for all market participants. The personal scope of the FCD is currently too restrictive. In view of the importance of netting and financial collateral arrangements as risk reduction and management tools in financial markets it should be expanded to cover all relevant financial market participants. Institutions classified/regulated as payment institutions could be or become such relevant market participants, including systemically relevant market participants (subject to the understanding that such extension is combined with the ending of opt-out in order to avoid a fragmented personal scope of the FCD protections across the EU).

This also applies correspondingly to all of the subsequent categories of market participants (specifically, the following should be included into the scope: Re-insurers, investment firms (IFD), AIF, crypto asset service providers).

This extension and modernization of the personal scope – together with ending opt-outs is vital to establish a harmonised a clear minimum baseline for the protection of financial collateral and netting arrangements within the EU – which in turn is a prerequisite for a functioning and competitive European capital market.

b) E-money institutions?

- (●) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

Please explain your anwer to question 1.1 b):

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The scope should be extended to e-money institutions for the reasons already stated above under 1.1 a)

c) Central securities depositories?

- (●) Yes
- ( ) No

- ○ Don’t know / no opinion / not relevant

Please explain your anwer to question 1.1 c):

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The scope should be extended to CSD for the reasons already stated above under 1.1 a).

d) Any other entity(ies)? Please explain:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As already set out above in our response to question 1.1 a) above, the scope should cover all relevant financial market participants.

Question 1.2 Do you agree with maintaining the current rationale that only financial collateral arrangements should be protected where at least one of the parties is a public authority, central bank or financial institution?

- ○ Yes
- ◉ No
- ○ Don’t know / no opinion / not relevant

Question 1.2.1 Please explain why and how the rationale should be changed in your opinion:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The legal protection the FCD provides for netting mechanisms (in the form of bilateral/contractual netting arrangements) as well as financial collateral arrangements are a cornerstone of the EU-framework for a common EU financial/capital market – and also an indispensable component of a functioning capital markets union.

Netting provisions play an essential role as an effective tool to reduce and manage risk (effectively acting as a safety valve in case of a default). Likewise, financial collateral arrangements also serve to (further) reduce the risk exposure.

In both cases, a limited effectiveness or even serious legal uncertainties result in immediate increases of the actual risk exposure (in case of netting provisions exponentially). A further directly related effect of such increased risk exposure is an immediate increase of the regulatory capital requirements. Consequently, any deficiency of the effectiveness of the protection netting and/or collateral arrangements or any material uncertainty over the effectiveness means that counterparties relying on netting and financial collateral arrangements for default risk management purposes are burdened both with additional capital charges as well as an increase of their actual risk exposure to their counterparty. These effects can potentially be systemic and a lack of an appropriate protection of netting and financial collateral arrangements (jointly or separately) increase the stability and reduces risks and costs for all market participants.

The personal scope of the FCD is currently too restrictive and therefore should be expanded. In view of the importance of netting and financial collateral arrangements as risk reduction and management tools in financial markets it should be expanded to cover all relevant financial market participants. Specifically, the following should be included into the scope: Re-insurers, investment firms (IFD), AIF, crypto asset service providers.

This also means that the protection should therefore already exist where one of the parties is in scope of the FCD.

As to the need for such extension and modernization of the personal scope – together with ending opt-outs in order to establish a harmonised a clear minimum baseline for the protection of financial collateral and netting arrangements within the EU – see already above.

Question 1.3 Does the exclusion in Article 1(3) (allowing Member States to exclude retail/SME from the scope of the FCD) present any problems to the cross-border provision of collateral in your opinion?

- (●) Yes
- ( ) No
- ( ) Don’t know / no opinion / not relevant

Question 1.3.1 Please explain why the exclusion in Article 1(3) presents a problem to the cross-border provision of collateral in your opinion:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The possibility to exclude SME results in a fragmentation of the EU system for the protection of netting and financial collateral arrangements since the level of protection can differ significantly between member states. This materially impedes cross-border transactions by introducing unnecessary legal risks and uncertainties.

SME can be significant financial market participants and, in any event, have a material interest in using netting in order to reduce and manage their counterparty risk in the same way as any other market participants. The holds particularly true for netting arrangements which are also widely used by SME relying on derivatives (FX etc.) in order to hedge risk from their trade transactions. It is difficult to see why they should be prohibited from benefiting from the risk reducing effects of netting arrangements.
However, under the current design of the FCD, the protection of netting arrangements is contingent on a parallel financial collateral arrangement. This significantly reduces the effectiveness of the protection of netting agreements since it excludes the protection for netting agreements with a wide range of counterparties where financial collateral arrangements are not necessary or too burdensome for the counterparty (e.g. because simpler forms of collateral arrangements are used).

Thus, SME and other market participants currently not in scope of the FCD would greatly benefit from a protection of netting arrangements independent from financial collateral arrangements.

Question 1.4 Should the FCD be exclusively applicable to the wholesale market (i.e. turning the national opt-out for retail/SME granted under Article 1 (3) into a binding FCD provision)?

- ○ Yes
- ◉ No
- ○ Don’t know / no opinion / not relevant

Question 1.4.1 Please provide an explanation/further information if you would like to:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

For the reasons stated already above in the response to 1.3.1, all financial market participants should benefit from the protections provided by the FCD - especially the protection of netting arrangements - because they have the same interest in having an effective tool to reduce and manage risk from derivatives and securities financing transactions. Many member states have recognized this and have not taken advantage of these opt-outs. Thus, we strongly believe that these opt-outs should not become binding since they significantly reduce the benefits of the FCD for all market participants.

In addition, opt outs significantly increase legal uncertainties and thus expose market participants to significant risks.

2. Provision of cash and financial instruments under the FCD

The FCD applies to financial collateral once it has been provided and if that provision can be evidenced in writing. Where the FCD says ‘provided’ and ‘provision’ what is meant is that the financial collateral must be delivered,

transferred, held, registered, or otherwise designated so as to be in the possession or under the control of the collateral taker or its representative. The question was raised whether the concepts of 'possession' and 'control' in the FCD are sufficiently clear or might need further clarification.

In case C-156/15 (Judgment of the Court (Fourth Chamber) of 10 November 2016. 'Private Equity Insurance Group' SIA v 'Swedbank' AS - "Swedbank decision") the Court of Justice of the European Union underlines that the FCD does not specify the circumstances in which the criterion requiring the collateral taker to be in 'possession' or 'control' of collateral is fulfilled in the case of intangible collateral, such as monies deposited in a bank account.

Furthermore, the FCD does not explicitly specify how the provision of financial collateral consisting of "claims relating to or rights in or in respect of" financial instruments (e.g. dividend or interest) which are provided as financial collateral separately from the underlying financial instruments in a security financial collateral arrangement should be evidenced.

Moreover, in the context of title transfer financial collateral arrangements, the lack of harmonised rules on good faith acquisition might undermine the legitimate expectations of a good faith acquirer.

Question 2.1 Do you see the need to specify the ways in which financial collateral such as dividend or interest ("claims relating to or rights in or in respect of") could be evidenced in writing when it is provided separately from its financial instrument?

- ○ No, there should be flexibility
- ◉ Yes, an explicit provision would be helpful
- ○ Don't know / no opinion / not relevant

Question 2.1.1 Please explain how this could be done:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The requirements of evidence in writing should be replaced and mordernised (future proofing especially with a view to digitisation) by allowing new and other market/commonly accepted forms of evidence of the arrangement.

Question 2.2 Do you think that the concepts of 'possession' and 'control' in the FCD require further clarification?

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

Question 2.2.1 Please explain why you think that the concepts of 'possession' and 'control' in the FCD require further clarification and for which type of collateral.

Please elaborate how this should be done in your opinion:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The concept of “control” could be clarified. However, as the question is connected to legal concepts of the member state laws it may need a thorough review in order to arrive at an understanding of control that is operational in and compatible with the legal concepts of all member state laws.

Most legal concepts distinguish between possession/ownership and a full proprietary interest (title). The concept of control is therefore as such not directly compatible with these legal concepts and could therefore be clarified taking into account current and evolving market practices regarding collateralisation.

Question 2.3 Do you believe that the notion of a good faith acquirer within the EU should be further clarified in the FCD?

- ○ Yes
- ◉ No
- ○ Don’t know / no opinion / not relevant

3. ‘Awareness’ of (pre-)insolvency proceedings

The FCD provides in Article 8(2) that Member States must ensure that “where a financial collateral arrangement or a relevant financial obligation has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of, winding-up proceedings or reorganisation measures, it shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor should have been aware, of the commencement of such proceedings or measures.”

The European Post Trade Forum (EPTF) pointed out that it was not clear as to what exactly was protected by Article 8 (2) of the FCD (EPTF’s 2017 report, sub-sub-section 1.2.1, 2nd bullet point, p. 76.), mainly in the context of OTC financial collateral arrangements. In practice, it would be difficult for a collateral taker to prove that he was not aware nor should have been aware of the aforementioned proceedings.

Question 3.1 Do you see the need to clarify how ‘awareness’ of (pre-) insolvency proceedings under Article 8(2) of the FCD is determined?

- ☐ I see the need to clarify how a collateral taker can ‘prove that he was not aware'
- ☑ I see the need to clarify how a collateral taker can ‘prove that he should not have been aware’

Please explain how in your opinion clarifying how a collateral taker can ‘prove that he should not have been aware' could be done:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We strongly believe that the burden of proving that the collateral taker should have been aware of the impending insolvency should be placed on the insolvency administrator which challenges the transfer of collateral and not vice versa:

The issue of suspect periods and the possibility to void transactions or their effects ex-post on the basis of the contention that the other party had knowledge of or should have been aware of the impending insolvency (constructive knowledge) is a key concern as this results in the very considerable risk that transactions which had been deemed to be protected are subsequently contested and may have to be unwound – which would have complex repercussions for all directly and also indirectly affected parties/systems.

The burden of proving such awareness needs to lie with the insolvency administrator or any third party contesting the effectiveness of the collateral transfer and not on the collateral taker, not least because of the simple reason that it is very difficult to prove the non-existence of awareness/knowledge.

A clearer definition and precise understanding to this effect may greatly ensure legal certainty and allow for a more uniform regime across all members states.

4. Recognition 'close-out netting provisions' in the FCD and its impact on SFD systems

Close-out netting is an arrangement commonly used in financial markets, to set off and replace all agreed but not yet due liabilities and claims vis-à-vis a counterparty, by one single claim/liability. It ordinarily covers instances where a counterparty defaults or becomes insolvent. It is commonly used alongside a contract termination provision. Close-out netting is important for the efficiency of financial markets, as it reduces credit exposures from gross to net. By doing so, it enables financial institutions to reduce their settlement, counterparty credit and liquidity risks. It thereby reduces systemic risk.

The FCD acknowledges the importance for market participants to be able to rely on a legally protected close-out netting mechanism in the event of the (pre-) insolvency of their counterparty. This is done by providing that a "close-out netting provision can take effect in accordance with its terms", notwithstanding the onset of (pre-) insolvency proceedings vis-à-vis other counterparties and without regard to other matters that might otherwise affect the rights arising from a close-out netting provision. SFD systems rely on the FCD to protect their close-out netting provisions, notably in the context of their default management arrangements should a participant default, come under resolution or be subject to (pre-) insolvency proceedings. Therefore, any uncertainties regarding the enforceability of close-out netting under the FCD could also have a knock-on effect on SFD systems.

Nevertheless, the EPTF's 2017 report states that the FCD does not sufficiently protect close-out netting provisions in cross-border settings since parties still need to carry out due diligence in order to ascertain whether a close-out netting provision is enforceable in case of the insolvency of the other party. This is because the FCD is silent as to the application of avoidance actions in (pre-)insolvency proceedings to a close-out netting provision[1]. By contrast, avoidance action is expressly dis-applied to 'netting'[2] in the SFD (Article 3(2) SFD).

The Bank Recovery and Resolution Directive (BRRD - Directive 2014/59/EU), amended the FCD to include Article 1(6) of the FCD which was then amended by the Framework for the Recovery and Resolution of Central Counterparties (CCP RR - Regulation (EU) 2021/23). Article 1(6) of the FCD dis-applies the protections in Article 7 (Recognition of close-out netting provisions) of the FCD to any restriction on the enforcement of a close-out netting provision including any set-off that is imposed by virtue of a resolution action of a resolution authority. Under the BRRD and the CCP RR such restrictions are subject to the respect of specific safeguards. Article 1(6) of the FCD is intended to avert the immediate enforcement provision as provided for in the FCD so as to not precipitate the failure of a systemic institution

and jeopardise any effective resolution. Thus, it intends to reconcile the operation of close-out netting arrangements with the effectiveness of resolution of banks and CCPs to the benefit of financial stability. However, the EPTF raises the issue that the BRRD might create uncertainties[3] as to whether a close-out netting provision is enforceable in accordance with its terms under the FCD in the context of the resolution of a financial institution.

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[1] Article 8(4) FCD. See also Annex 3 of the EPTF's 2017 report, p. 230

[2] Article 2(k) SFD, which refers to multi-lateral netting used in the operation of an SFD system as opposed to close-out netting used for the realisation of collateral security in an SFD system. According to Annex 3 of the EPTF's 2017 report, p. 230, most Member States have used the SFD to protect 'netting' between direct SFD participants and their clients)

[3] EPTF's 2017 report, sub-section 1.1, 2nd bullet, p. 74 as well as Annex 3 of the EPTF's 2017 report, which cites Articles 49, 68, 76 and 77 BRRD, p. 230.

Question 4.1 Have you encountered problems with the recognition /application of close-out netting provisions?

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

Question 4.1.1. What were these problems related to?

- ( ) use within one Member State
- ( ) cross-border use
- (●) both

Question 4.1.2. What did these problems concern?

- ( ) OTC transactions
- ( ) transactions carried out on an SFD system
- (●) both

Question 4.1.3 Please describe the problems and the outcome:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The limited scope and the opt-out options and the diverging manner of implementation of the FCD by the member states have resulted in a highly fragmented protection framework for netting agreements within the EU which causes considerable legal uncertainties and risks for market participants.

Because of the fragmentation market participants effectively have to review each member state FCD (and SFD) regime and adjust their transactions and risk management procedures accordingly. The current status is incompatible with the concept of a capital markets union, prevents/impedes intra-EU cross border provision of capital (financial services cannot be provided on the same terms and conditions) and also severely reduces the international competitiveness and attractiveness of the EU financial market. Specifically with regard to netting arrangements, the differences in implementation across member states (especially regarding the personal scope but also the product scope) and the fact that protection is contingent on the combination of a netting and a financial collateral agreements poses significant challenges and results in considerable legal risks for counterparties relying on netting arrangements as an (otherwise highly effective and standard) risk mitigation instrument.

Members state courts have in some cases interpreted the FCD protection of netting agreements extremely narrowly or failed to take into account the FCD when interpreting member state insolvency and/or netting laws, thereby exposing the counterparties relying on the FCD protection to substantial risks.

In this connection it should also be noted that the default protection mechanisms of central counterparties (CCPs) depend on the netting mechanisms provided under the relevant rules and regulations (applicable between CCP and its clearing members) as well as the netting mechanism in the contractual arrangements between their clearing members and the clients of the clearing members.

Question 4.1.4 Please describe a solution that you consider appropriate:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Greater legal certainty and a more harmonised common EU-framework for netting arrangements is an indispensable building block a CMU and can be greatly improved by

- extending the personal scope of the FCD to include all relevant market participants (which partly already be achieved by updating the references to parties covered by the IFD/IFR, CSDR, AIF), as well as re-insurers, investment firms (IFD), AIF, crypto asset service providers.
- ending opt-out, and
- providing for protection of netting arrangements that are not contingent on the netting provisions included in or concluded together with a financial collateral arrangement (requiring a change of the definition Art. 2 (1) (n)).

In this connection it could be considered to address the protection of netting agreements in an independent /stand lone netting regulation.

Question 4.2 In case you have collected legal opinions regarding the enforceability of close-out netting: Are they upheld or to be changed in light of the framework for the recovery and resolution of central counterparties (Regulation (EU) 2021/23)?

- (●) Yes

- No
- No legal opinions collected / don’t know / no opinion / not relevant

Question 4.2.1 please specify why and how the legal opinions you have collected were changed:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The German Banking Industry Committee operates a netting and collateral opinion program for the German master agreements for financial derivatives as well as securities transactions (including a client clearing documentation). Legal opinions are commissioned on regular basis for a wide range of members state and third-country jurisdictions (currently covering 14 EU members states and a total of 25 jurisdictions). The introduction of resolution regimes for CCPs has been reflected in the opinions in two ways and largely in the same way as the introduction of resolution regimes (and suspension, transfer and bail-in powers) for banks under the BRRD and comparable resolution regimes under third country jurisdictions. We therefore refer to our response to 4.3.1.

Question 4.3 In case you have collected legal opinions regarding the enforceability of close-out netting: Were they upheld or changed in light of the revision of the BRRD (Directive 2014/59/EU)?

- (•) Yes
- No
- No legal opinions collected / don’t know / no opinion / not relevant

Question 4.3.1 please specify why and how the legal opinions you have collected were changed:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As already stated above in our response to Question 4.2.1, the netting and collateral opinion program of the German Banking Industry Committee for the German master agreements for derivatives, securities lending and repo tarnsactions (including a client clearing agreement) covers a wide range of member states and third-country jurisdictions.

The opinions are obtained in view of Art. 296 et seq. CRR and have the purpose of allowing institutions to conclude whether the CRR requirements for regulatory netting are met, thus enabling them to apply regulatory netting. It, however, remains the institutions own decision to conclude whether and to what extent it will apply regulatory netting on this basis.
The opinions also serve as a valuable instrument to identify and assess potential legal risk with regard to the netting agreements in a jurisdiction even if the institution does not actually apply regulatory netting for the purposes of the CRR. Here they serve as a tool to assess the legal risks.
Since the implementation of bank resolution regimes in the EU and comparable regimes of third country jurisdictions (triggered by and based on the FSB recommendations) the legal opinions obtained regularly address the effects these regimes and specifically the suspension, transfer and bail-in powers afforded to resolution authorities can have on the netting provisions in these master agreements in two specific ways:
For one the opinions now contain a detailed description of these powers and the effects and specifically analyse the legal protections the resolution regimes provide for netting agreements. The key elements are the limitation of stays/moratoria to no more than two days/48h, the requirement to transfer netting portfolios as a whole (no cherry picking) and the requirement that any bail-in only occurs following a close-out under the terms of the applicable netting agreement and in relation to the close-out amount).
They also point out existing gaps and uncertainties over the interpretation of the legal protections. One example is the treatment of netting agreements for securities finance transactions which, in contrast to netting agreements for derivatives transactions are not always expressly covered or not covered as clearly as one would expect by the members state laws implementing the EU resolution regime (which itself is in some instances not always as clear as one would hope on the precise scope of the protections it extends to netting agreements).
Two, where the legal protections under the EU resolution regimes rely on references to the FCD and SFD, they address the uncertainties and differences in the implementation of these instruments in the relevant jurisdiction and set out the legal uncertainties or potential gaps in the protection resulting from these uncertainties and differences.
However, it would be a misconception to expect that the opinions set out a binary assessment that netting is or is not effective because of the existence of resolution powers affecting netting arrangements. They also do not include an assessment that the requirements of the CRR under Art. 296 et seq. are met or not met because of such powers (as this an assessment to be made by the institution independently on the basis of the opinion).
The opinions, however, give a very valuable insight into the risks the institutions are exposed to in case of a resolution action against a counterparty.
Because of the protections in the EU resolution regime for netting agreements (consisting of the abovementioned key elements) institutions have generally been able to come to the conclusion that the resolution regimes as such do not prevent regulatory netting. However, uncertainties exist and the risks emanating from these uncertainties have to be assessed and weighed by institutions with regard to each jurisdiction.
It yet remains to be seen whether the above will also apply to the resolution regimes for corporates which may not provide for the same level of protection for netting arrangements in every EU member state jurisdiction.

Question 4.4.1 Do you see legal uncertainties related to close-out netting provisions due to the FCD's silence regarding the application of national avoidance actions to such provisions?

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

Question 4.4.1.1 Please explain the legal uncertainties you have identified and how these might be solved:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The issue of suspect periods and the possibility to void transactions ex-post on the basis of the contention that the other party had knowledge of or should have been aware of the impending insolvency (constructive knowledge) or because of collusion is a key concern: The possibility that transactions which had been deemed to be protected are subsequently contested and may have to be voided – can have serious repercussions for all directly and also indirectly affected parties/systems.
A clearer, harmonized definition and precise understanding under what circumstances transactions and collateral transfers can be voided may greatly ensure legal certainty.

A further aspect are member state asset protection laws which also introduce considerable legal uncertainties are not always aligned with the FCD.

In this context it should be taken into account that the introduction of the EMIR-margin requirements (requirement to exchange variation margin and post initial margin) have significantly increased the importance of harmonised, effective and clear protections of collateral arrangements in order to reduce systemic risks.

Question 4.4.2 Do you see legal uncertainties related to close-out netting provisions by virtue of the introduction of Article 1(6) of the FCD?

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

Question 4.4.2.1 Please explain the legal uncertainties you have identified and how these might be solved:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As to the uncertainties resulting from the EU resolution regime, we refer to our response to Question 4.3.1. In this connection it is important to note that legal uncertainties in connection with resolution primarily result from the limited scope of the FCD as well as from uncertainties in the resolution regimes in question (specifically the rules on the protection of netting agreements it provides (most importantly, the limitation of stays/moratoria to no more than two days/48h, the requirement to transfer netting portfolios as a whole (no cherry picking) and to bail-in only following a close-out).

Material uncertainties could be largely avoided by ensuring that these protections are consistent with those provided under the BRRD and the FSB recommendations and as regards references to the SFD and FCD, by expanding the scope of the FCD and SFD in the manner described in our response to Question 4.1.4 above as well as 4.5.1 below (independent protection of netting agreements and extension of personal and material scope).
Having said this it should be noted that the FCD should not be the primary place to address and clarify the necessary protection of netting and collateral arrangements in case of resolution measures, especially regarding third country resolution regimes: If resolution measures were to be addressed in some form in the FCD beyond the reference in Art. 1 (6) this would need to be contingent on clear protective provisions for netting agreements in the resolution regime (most importantly, the limitation of stays/moratoria to no more than two days/48h, the requirement to transfer netting portfolios as a whole (no cherry picking) and to bail-in only following a close-out).

Question 4.5 Do you consider that there is a need for further harmonisation of the treatment of contractual netting in general and close-out netting in particular?

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

Question 4.5.1 Please explain your reasons as well as possible solutions taking into account possible interactions with other national or EU law (e.g. WUD (Directive 2001/24/EC), BRRD (Directive 2014/59/EU), CCP RR (Regulation (EU) 2021/23)) and the importance of close-out netting for risk management and the calculation of own funds requirements for credit institutions and investment firms under the CRR:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As already mentioned in our response to 4.3.1, the differences in implementation across member states (especially regarding the personal scope) and the fact that protection of netting arrangements is contingent on the combination of a netting and a financial collateral agreements poses significant challenges and results in considerable legal risks for counterparties relying on netting arrangements as a risk mitigation instrument.
Members state courts have in some cases interpreted the FCD protection of netting agreements extremely narrowly or failed to take into account the FCD when interpreting member state netting laws, thereby exposing the counterparties relying on the FCD protection to substantial risks.

The following would significantly improve legal certainty across the EU and prevent fragmentations and unintended obstacles for cross-border financial transactions within the EU:
• An extension of the personal scope all relevant market participants (which partly already be achieved by updating the references to parties covered by the IFD/IFR, CSDR, AIF), and by including re-insurers
• the elimination of opt-outs reducing the scope, and
• providing for protection of netting arrangements that are not contingent on the netting provisions included in or concluded together with a financial collateral arrangement (requiring a change of the definition Art. 2 (1) (n)) or, alternatively, the introduction of an independent netting regulation.

In this connection it should also be considered to address the interaction between the FCD and the protection it provides for netting agreements with the Second Chance Directive (Directive (EU) 2019/1023) and specifically the moratorium provisions:
Stays or moratoria in relation to netting agreements are – by their nature - difficult to reconcile with the core function of netting agreements (which is to work as a firewall in case of a default or impending insolvency) and thus always have to designed narrowly and provide adequate safeguards for netting arrangements in order to ensure that the stays do not transfer risks to the counterparty. In particular, any stay/moratorium extending to close-out netting mechanisms must be limited to very short periods of time (48 hours/BRRD) in order to reduce the considerable risks the counterparty will be exposed to in the event of a stay (since a stay effectively exposes the counterparty to all risks emanating from the volatility of the positions under the netting agreement which has been stayed and thus their default exposure without this counterparty having any form of remedy to mitigate this increased exposure).

The Second Chance Directive (Directive (EU) 2019/1023) introduced a moratorium but failed to provide for adequate safeguard for netting agreements (leaving this to the member states). This should be remedied in order to ensure a minimum harmonized level of protection for netting agreements by way of exemptions for netting and collateral agreements and/or clear limitation on the stays (as in the BRRD).

See also our response below to question 6.1.2.

5. Financial collateral

To keep up with market and regulatory developments affecting financial collateral that is currently used or may be used in future by market participants the current list of eligible financial collateral under the FCD ought to be put under review either to broaden or update it.

Possible updates of the definition of financial collateral under the FCD also have an impact on SFD collateral security, which covers all realisable assets including FCD financial collateral. Currently, financial collateral under the FCD consists of cash, financial instruments and credit claims.

In the light of the development of crypto-assets the question arises if the financial collateral definition in the FCD ought to be extended to encompass such so-called stable-coins once they are regulated in the EU (the Commission published a proposal for a Regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937). These questions concern especially e-money tokens (which aim to maintain a stable value by referencing one single currency) or asset-referenced tokens (which do so by referencing several fiat currencies, one or several commodities / other 'crypto-assets').

Furthermore, although FCD financial instruments encompass transferable securities, money-market instruments and units in collective investment undertakings that are listed in MiFID 2, the FCD definition differs from the MiFID 2 definition: FCD financial instruments do not include derivatives listed in MiFID 2, except for certain options in respect of shares or bonds; nor do they include emission allowances. The exclusion of emission allowances was due to the fact that they were not in existence when the FCD was first adopted and were only recently listed as financial instruments under MiFID 2.

The FCD intends to be technologically neutral. Therefore, one could assume that financial instruments issued by means of distributed ledger technology (DLT) that fall within the definition of financial instruments of the FCD are within the scope of the FCD and could also be eligible as financial collateral under the FCD. However, questions could arise regarding the FCD requirement that financial collateral must "be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf". To be covered by the FCD, possession or control of the collateral by the collateral taker would have to also be ensured in a DLT environment. According to the public consultation on markets in crypto-assets, possession and control can be challenging in the context of DLT as, in many

models, what might constitute legal ownership in a DLT may be unclear. This is primarily a matter for national securities, corporate, contract and/or property law. Moreover, regarding enforcement, respondents indicated that in some cases the enforcement of rights relies on the actions of others (e.g. where private keys from different parties are needed to transfer an instrument and/or validation of transfer requires consensus from different nodes). The afore-mentioned issues raise the question of whether crypto-assets qualifying as FCD financial instruments should be included within the scope of eligible financial collateral under the FCD (and if so under which conditions) and whether clarifications in the FCD would be needed. Furthermore, there might possibly be the need for clarification whether records on a DLT could qualify as book-entries on a 'relevant account' in relation to 'book-entry securities collateral' under the FCD.

Regarding credit claims it has been suggested by some stakeholders to amend the FCD to exclude a debtor's set-off rights for credit claims that are provided as collateral to central banks. This exclusion should also cover in their opinion any third party to whom the credit claim is subsequently assigned. Set-off rights give the debtor of a credit claim the right to reduce the outstanding amount of its debt by the amount of counterclaims it has against the lender. They are, therefore, important for the debtor in case of an insolvency of the lender. On the one hand, set-off rights pose a risk in taking credit claims as collateral, in particular for central banks. This risk varies across jurisdictions and across banks. It is also volatile as it depends on the daily value of the debtors' counterclaims. Hence, this makes the valuation of a credit claim taken as collateral more difficult. Moreover, the cost of low operational efficiency of such collateral may not be negligible. As a result, many central banks do not accept credit claims as collateral unless set-off rights are excluded. On the other hand, this might raise legal issues in the context of consumer and debtor protection. Prohibiting set-off would shift the risk of insolvency of the bank, which assigns the credit claim as collateral to a central bank, from that central bank to the original consumer (e.g. account holder) / debtor (e.g. mortgagee). Thus, potentially worsening the debtor's position in the event of the failure of its bank. This could potentially have an impact on the real economy, in particular on households and SMEs.

General questions

Question 5.1 Do you think other collateral than cash, financial instruments and credit claims should be made eligible under the FCD?

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

Question 5.2 Do you see the need to update the definitions of currently eligible collateral?

- ☐ I see the need to update the definition of **cash**
- ☑ I see the need to update the definition of **financial instruments**
- ☐ I see the need to update the definition of **credit claims**

Please explain why and how updating the definition of ***financial instruments*** should be done:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The scope of claims qualifying as financial instruments covered by the FCD should be clarified and expanded. It should, in particular, include claims under derivative transactions or a master agreement for derivative transactions, including a potential close-out netting claim.

It should also be considered to include other instruments which have since become well established such as

- guarantees
- emission rights,
- commodities and

new digital instruments (crypto-currencies/e-money, where appropriate and specifically where legally treated as or in the same manner as securities).

Financial instruments

Question 5.3 Should emission allowances be added to the definition of financial instruments in the FCD?

- Yes, they are a commnly used financial collateral and should therefore be eligible as collateral under the FCD
- No, emission allowances do not provide a sufficiently stable value to be used as financial collateral under the FCD
- Don’t know / no opinion / not relevant

Question 5.4 For crypto-assets qualifying as financial instrument, would you see a need to specify the ownership, provision, possession and control requirements of the FCD further for a DLT context in order to provide legal certainty as to the question whether they are covered within the FCD?

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

Question 5.5.1 Should the notion of *‘account’* be retained, replaced or further clarified/specified for the purposes of evidencing the provision of cash or securities collateral provided through DLT?

- Retained
- Replaced
- Further clarified/specified
- Don’t know / no opinion / not relevant

Question 5.5.1.1 Please explain why you think so and how this matter might be solved:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

There should not be a specific need for any DLT-spezific concepts/definitions.

See also our response to Question 5.5.2.1.

Question 5.5.2 Should the notion of '*book-entry*' be retained, replaced or further clarified/specified for the purposes of evidencing the provision of cash or securities collateral provided through DLT?

- (•) Retained
- ( ) Replaced
- ( ) Further clarified/specified
- ( ) Don't know / no opinion / not relevant

Question 5.5.2.1 Please explain why you think so and how this matter might be solved:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The concept of "book-entry" and "booking to an account" is, of course, well established with regard to securities and cash but cannot easily be transferred / applied to financial instruments in the form of contractual agreements such as derivative contracts (which are in any event mostly covered by a master agreement resulting in one single agreement) as well as financial collateral arrangements. Any attempt to clarify these concepts or any reliance upon them thus should be carefully considered and would need to take into account the fundamental differences between transactions involving securities (and comparable materialised or non-materialised rights being the object of a transactions the one hand and contractual agreements producing claims/rights such as derivatives. This is directly related to the need to differentiate between clearing of derivatives and securities settlement in the SFD (in particular regarding the treatment of participants, see above).

Question 5.6 Are there any other issues you would like to address regarding FCD financial collateral in a DLT environment?

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

Credit claims

Question 5.7 In your opinion, do existing provisions on set-off create a problem for the provision of credit claims as collateral?

- ( ) Yes
- (•) No

- ○ Don’t know / no opinion / not relevant

6. The FCD and other Regulations/Directives

The proper functioning of the FCD also requires clarity regarding its interaction with other relevant legislation.

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

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

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

- ○ Yes
- ◉ No
- ○ Don’t know / no opinion / not relevant

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

- ◉ Yes
- ○ No
- ○ Don’t know / no opinion / not relevant

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

Please also explain how this matter might be solved:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Second Chance Directive (Directive (EU) 2019/1023) introduced a moratorium but failed to provide for adequate safeguard for netting agreements, leaving this to the member states. This should be remedied in order to ensure at least a minimum harmonized level of protection for netting and collateral agreements by way of exemptions for netting and collateral agreements and/or clear limitation on the stays (as in the BRRD) across the EU.
See also our response above to question 4.5.1.

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

- ◉ Yes
- ○ No
- ○ Don’t know / no opinion / not relevant

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

Please also explain how this matter might be solved:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The uncertainties primarily result from the limited personal scope and deficiencies of the FCD protection for netting agreement which means that protections under the BRRD relying on FCD references produce uncertainties over the exact scope of the FCD protections. For further details, we refer to our response to questions 4.3.1 /4.4.2.1 above.

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

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

6.1.5 If there is any other legislation where provisions are not sufficiently clear in terms of their interaction with the FCD or the other way round, please specify which ones, explain why, and explain how this matter might be solved:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Presently there are two key concerns:

The first is the (already interaction) interaction with Second Chance Directive (Directive (EU) 2019/1023) and more precisely the insufficient protection of netting agreements. We refer to our response to question 6.1.2.

The second results from Art. 16(10) of Directive 2014/65/EU (MiFID II) which prohibits title transfer financial collateral arrangements with retail clients. This restrictions force market participants to replace effective and established collateral arrangements based on title transfer such as the collateral arrangements for the exchange of variation margin in connection with derivative transactions by considerably more complex and burdensome arrangements such as pledge arrangements which actually impede the required prompt re-adjustment of collateral between the parties. The restrictions should therefore be repealed, at least in respect of derivative transactions.

7. Other issues

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

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

Please provide examples of such instances:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The FCD does not provide an equal level of protection for transactions involving third-country counterparties where these are collateral/security takers.
Uncertainty over the level of protection exposes them to considerable risks and indirectly also their counterparties: The risks they are exposed to are not only an impediment to the inflow of capital into the EU but also fall back on EU counterparties (as counterparties or members/participants in systems etc.).
An equal level of protection for third-country counterparties is thus in the direct interest of the EU market participants.
Third-country counterparties should therefore be expressly included in the scope of protection.

Question 7.2 How could we further enhance cross-border flows of financial collateral across the EU?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 7.3 Is there anything else you would like to mention?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

- It should be considered to revise the conflict-rule in Art. 9 in order to take into account the potential involvement of branches / head offices and/or intermediaries holding accounts.
- It should be considered to improve the protection of the provision of collateral from clearing client through intermediaries in the clearing chain up to the clearing member and from there to the CCP and vice versa (which may also be achieved via the SFD).
- As to the need to modernize/future proofing of formal requirements, see our response to Question 2.11
- As to the need for an independent protection of netting agreements (independent from collateral

arrangements) within the FCD or as a separate instrument, see for example our response to question 1.3.1 / 4.5.1.

- As to the need to include claims under derivative transactions or a master agreement for derivative transactions, in particular potential close-out netting claims, see our response to question 5.2.
- As to the need to extend the personal and material scope and to end opt-outs in order to establish a harmonized and clear minimum baseline for the protection of financial collateral and netting a functioning in the interest of functioning and competitive European capital market, see our responses above.
- As to the impact of the restrictions on the provision of collateral by way of full title transfer Art. 16(10) of Directive 2014/65/EU (MiFID II) see our response to question 6.1.5 above.

Additional information

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

The maximum file size is 1 MB.
You can upload several files.
Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

Useful links

More on this consultation (https://ec.europa.eu/info/publications/finance-consultations-2021-financial-collateral-review_en)

Consultation document (https://ec.europa.eu/info/files/2021-financial-collateral-review-consultation-document_en)

Related targeted consultation on the review of the Settlement Finality Directive (https://ec.europa.eu/info/publications/finance-consultations-2021-settlement-finality-review_en)

More on financial collateral arrangements (https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/financial-collateral-arrangements_en)

Specific privacy statement (https://ec.europa.eu/info/files/2021-financial-collateral-review-specific-privacy-statement_en)

More on the Transparency register (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

Contact

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