



**ECSDA's feedback to the
European Commission's
Consultation on the Proposal for a
Regulation on settlement finality
and repealing Directive 98/26/EC
and amending Directive
2002/47/EC on financial collateral
arrangements**

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Executive Summary

ECSDA recognises the importance of ensuring that the Settlement Finality framework remains both technologically advanced and neutral across traditional infrastructures, DLT, and other emerging technologies. It also supports targeted harmonisation where necessary to enhance consistency and strengthen legal certainty.

The settlement finality framework is a core pillar of the safety of settlement and payment systems in the EU and has proven its resilience in well-known crisis situations, as confirmed by the 2023 Commission Report, also recalled in the Explanatory Memorandum to the Proposal.

Any amendment should, therefore, be approached with caution. The application of the Settlement Finality Legislation provisions effectively modifies how standard insolvency law operates, which may affect the position of other creditors of the insolvent entity. Such a change of the standard insolvency process is justified for the purposes of financial stability for systems with systemic relevance.

This underscores the importance of carefully assessing whether changes to certain core definitions, such as the finality moments, are indeed necessary, as well as ensuring a consistent set of system designation criteria that preserve systemic relevance as the key principle justifying the exceptional insolvency regime.

ECSDA welcomes the reform's general objectives. However, SFD has already clearly defined all relevant aspects of settlement finality concerning CSD activities. Therefore, transforming the SFD into a more rigid instrument is not necessary to achieve further harmonisation in our area. And we need to remind that other barriers essential to be addressed remain untouched (*see AML-SeCo Post-trade barriers report*).

ECSDA would like to suggest the following enhancements to the proposal, ensuring its further alignment with the overall EU SIU objectives:

1. Proportionality and simplification should be essential elements guiding the policy-action concerning the entities already well-regulated for the purpose.

ECSDA considers that a **more targeted and proportionate solution** would be preferable to a complete redesign of the legal framework and the designation process, which in some cases may not provide additional certainty or simplification. With regard to the objective of more transparency around settlement finality in designated systems, the approach could consist of an enhanced disclosure and comparability of system rules.

We are also concerned by **some provisions creating overregulation**. Particularly, imposing duplicative requirements on supervised CSDs which already fall under existing regulatory frameworks. We, therefore, recommend adjustments to avoid duplications and conflicting rules and ensure the final regulation is proportionate and creates legal clarity for currently unregulated entities.

2. Systemic relevance should be further taken into account.

We believe the proposal should also clearly consider the systemic nature of the entities initially covered by the Directive and PFMIs. Protection granted to the entities may lead to a derogation of the regular insolvency procedures. In relation to process and criteria for designation, a broader or less stringent approach could extend the disapplication of insolvency rules beyond cases where it is strictly justified by systemic relevance. By doing so, it may distort the balance between systemic protection and creditor rights in general.

3. To preserve clarity and legal certainty in the operation of SSSs by branches, we ask the EC to reconsider the proposed conflict-of-laws rules for collateral security.

The proposed Art. 25 (2) may result in modifying the conflict of laws solution for collateral security. We are concerned that this may blur the legal certainty of collateral security in some cases.

4. We advise further technological neutrality to render the legislation future-proof.

We note that the proposal shifts away from technological neutrality by making references to specific technologies, which seems to contradict the original policy intent and is not future-proof.

Detailed comments

1. Definitions

We generally welcome the updated definitions, as they help remove the previous residual uncertainty regarding the personal and material scope of the Settlement Finality Directive (SFD). Nevertheless, we have some comments and observations on certain aspects that we believe could be further clarified or refined.

Definition of ‘Settlement’

The current SFD does not include a definition of settlement. The proposed Settlement Finality Regulation (SFR) definition refers to the CSDR definition, which applies solely to securities transactions and excludes payment transactions. We recommend deleting or adjusting this definition.

Definition of ‘Transfer order’

The proposed text assumes that every transfer order described in subparagraph (a) necessarily involves either the discharge or the assumption of a payment obligation. It should be noted that **book entry movements may also occur without an underlying obligation**. For this reason, we suggest reinstating the more general wording of the Directive to make sure all relevant entries in a system are captured, as follows:

*“‘transfer order’ means any of the following instructions, including instructions that require the use of a cryptographic key or other device or method to digitally sign: (a) an instruction by a participant to place at the disposal of a recipient or member an amount of funds **by means of a book entry or an instruction** which results in the assumption or discharge of a payment obligation as laid down in the rules of the system;”*

Definition of ‘Institution’ and ‘Participant’

Although this is not connected to changes brought by the proposal compared to the previous text of the Directive, we note a potential inconsistency —or at least an area for further clarification —in the definitions of ‘institution’ and ‘participant’.

By way of example, it is unclear why the definition of ‘institution’ includes only credit institutions and investment firms, while the definition of participant seems to encompass all third-country entities, including CCPs, CSDs and other regulated firms (corporates, investment funds, insurance companies).

We recommend aligning the definitions with a view that all non-EU entities currently participating in EU systems are adequately referred to.

2. Designation procedure

ECSDA supports the objective of creating a more consistent European designation framework addressing the issues identified in the Impact Assessment (i.e. lack of updated designation information and insufficient transparency and comparability of the systems' rules).

However, we question whether creating an entirely new process—intended to enhance harmonisation across Member States—is truly necessary to address these concerns, or whether it might instead lead to unintended consequences.

In this respect, we identify two concerns:

1. The conditions for designation are unrelated to the assessment of the systemic relevance of the entity seeking designation.
2. The conditions largely overlap with CSDR requirements, essentially creating a duplicative process and increasing administrative burden and costs, which is contradictory to the simplification and burden reduction objectives of the SIU.

More in detail, in some instances, the conditions seem to reflect conduct-of-business or other supervisory requirements that an entity would need to meet for authorisation purposes, rather than criteria intended to assess systemic relevance for the purpose of the Settlement Finality protections. This is particularly evident in the requirements set out in Article 5(1)(g) to (k).

ECSDA strongly recommend including systemic relevance criteria as a condition for designation.

To protect market stability, the settlement finality framework shall remain an exceptional regime which overrides general insolvency law principles only in clearly justified circumstances.

In the newly proposed approval process, only those requirements that are relevant to (1) assessing the systemic relevance and (2) evaluating the proper functioning of the protection mechanisms granted by the SFR should be included.

Beyond ensuring alignment with the objectives of the legislation, introducing a systemic relevance criterion would also help clarify the status of DLT (T)SS operators established under the EU DLT Pilot Regime when seeking an exemption from the SFD/R, as permitted under that regime. Indeed, an SSS operating within the DLT Pilot Regime is, by definition, experimental and should not be automatically considered a systemically relevant financial market infrastructure.

Designating CSDs again for settlement finality purposes is not in line with the simplification objective.

We see little value in re-designating CSDs, as they are already covered under CSDR (for capital, conduct of business and other relevant provisions) and SFD, carefully overseen, regularly reviewed and evaluated. **We consider it more aligned with the EU simplification objective to fully grandfather the entities holding a designation under Directive 98/26/EC at the date of entry into force of the new Regulation.**

Otherwise, the SFR risks duplicating regulation for system operators already subject to sector-specific frameworks such as EMIR or CSDR, which address all necessary prudential and conduct requirements, including the definition of finality moments. These additional re-designating requirements are contradictory to the simplification and burden reduction objectives of the SIU.

This proposed solution would not prejudice the compliance of CSDs with the rest of the requirements of the SFR, including the transparency of designation information and system rules, nor the comparability thereof. CSDs would retain the obligation to submit the relevant information to the central database.

Designating authority

The requirement in Article 5(1)(b) stipulates that at least one participant in the system must be established in the Member State of the designating authority. However, it could give rise to jurisdictional conflicts, especially when the law governing the system differs from the location of the system operator's registered office. We believe a more suitable approach would be to assign the designating authority to the competent authority of the Member State where the system operator is established.

Notification of designated systems

The update and publication process through the designating authority and ESMA, concerning certain system information under Articles 6(3) and (4) (together with the system operator's reporting obligations under Article 8(2)), may prove cumbersome—particularly regarding the list of participants in the system (Article 6(2)(f)), which can change frequently. A more practical approach would be to require the system operator to make its (direct) participant list publicly available.

Participants: scope extension and compliance monitoring

ECSDA welcomes the extension of the scope of the list of participants to allow for different participation models, while ensuring the protection of the financial system from systemic risk.

However, we note that requirements for participation fall under the conduct of business rules and are already addressed by CSDR. Its Article 33 requires CSDs to ensure fair, open, and risk-based access through transparent, objective, and non-discriminatory criteria as part of these rules and overlaps with the requirements outlined in Art. 7(2).

The definition of 'participant' in the Settlement Finality framework is primarily intended to enable the application of insolvency protections, which is the purpose of the framework, and is not meant to establish conduct of business rules.

The obligation for system operators to monitor compliance by their members with participation requirements would result in double regulation for already regulated operators, who are subject to

equivalent and more specific obligations under the relevant entity-based frameworks, such as Article 33 CSDR (or Article 37 EMIR).

We recommend eliminating overlaps, maintaining CSDR as the relevant framework for participation requirements.

3. Insolvency protections

Articles 17 to 21 SFR

ECSDA supports the objective of enhancing harmonisation and clarity of the framework where it is meaningful and necessary.

However, to preserve technological neutrality and allow for the evolution of the entities in line with the constantly evolving technologies, we believe it is crucial that systems maintain autonomy in defining the moment of entry within their own rules.

We question whether the proposed approach—identifying certain principles to guide the determination of finality moments through common rules and standardised procedures—would genuinely provide additional certainty and harmonisation. On the contrary, there is a risk that these **principles may not be compatible with the technical features of all systems, leading to legal uncertainties.**

For instance, in defining the **moment of entry** (Article 18), some CSDs typically rely on technical **validation rather than “registration”**. Applying the principle as currently proposed in Article 18 could therefore be technically inaccurate.

Similarly, the proposal in Article 20(1), which requires that the determination of the **moment of irrevocability** considers when the transfer order is “confirmed” by the system and when processing can no longer be reversed, does not align with the processing rules of some CSDs and could trigger unnecessary IT changes.

In addition, we note **that the concept of reversal** is generally associated with final settlement, rather than irrevocability. Consequently, the inclusion of this language risks creating ambiguity between well-established concepts.

We would like to emphasise that a harmonised definition of **final settlement** at the EU level is not necessary, as demonstrated by the long-term effective application of the SFD without such a definition and has not prevented coordination in interoperability scenarios (e.g. T2S).

If transfer orders are protected from the effects of insolvency through the definition of the moment of entry and irrevocability in the system’s rules, then defining when they are executed becomes unnecessary and adds complexity.

Under the Settlement Finality Directive, once transfer orders are entered into a designated system, they are irrevocable and enforceable in accordance with system rules, even in the event of insolvency, thereby protecting them from unwinding or revocation arising from insolvency proceedings.

Also, in seeking to define final settlement, Article 21(1) refers to its determination by the common rules and standardised procedures of each designated system, in accordance with the applicable law for transfer of ownership and other rights. It is in this respect, it is worth reminding that the rules of the system relate to the operational settlement of the transfer orders (instructions) and, from a legal perspective, do not determine the underlying obligations of counterparties to a transaction (which may not even be participants). Rules of the system interact differently with local securities laws in different countries, also depending on the asset transferred in the system.

As a result, it is difficult to see the value of the new provision in terms of ensuring EU alignment. We believe that the new rule adds complexity without additional protection. It blurs the legally important distinction between the instructions in the system and the underlying economic activity which leads to those instructions.

We propose removing the definition of final settlement and limiting Article 21 to DLT-specific requirements.

As we fully support the autonomy of systems in the determination of finality moments, we also believe that **there should be no Level 2 mandate for ESMA to further elaborate on the moment of entry, irrevocability and final settlement for SSSs operated by CSDs.**

Given the variety of current and potential future technical solutions, we question the feasibility of the mandate assigned to ESMA and EBA to define settlement finality moments for DLT-operated systems.

Detailing principles in this context poses challenges due to the diversity of validation protocols, which complicates the identification of common rules. We believe that a general principle, as set out in Article 21(1), should be sufficient (see paragraph on DLT-related amendments for further details).

Conflicts of laws

Article 24: Law governing the rights and obligations of participants

This conflict-of-laws rule is one of the most critical and practically relevant elements of the current SFD for system operators (Article 8 SFD). We see value in directly transferring this rule into the regulation.

We recommend updating the provision to reflect the new terminology of the regulation proposal, making it clearer by explicitly referring to both designated and registered systems.

Article 25: Collateral Security

We appreciate that the new rule confirms *lex rei sitae* as a general principle to determine the applicable law for collateral rights, currently set forth by Art. 9 of the SFR.

However, the proposed Art. 25(2) **would consider an account held with a legal entity (CSD) to be located in the Member State of the entity's registered office**, even if the account is maintained at a branch.

Similarly to credit institutions, the relevant **account-maintaining** establishment may be the branch of a CSD where the account is opened and maintained, notwithstanding the absence of separate legal personality. This scenario is not new and may be envisaged by CSDs in the future, especially in the context of market integration.

Also, in some markets, in a scenario where a CSD incorporated in Member State A operates a settlement system in Member State B, the securities accounts (or registers) used for collateral recording are considered to belong to system B as part of the settlement system's infrastructure, and therefore located in the Member State where the settlement system is operated, not "held" by the CSD as a legal entity.

Therefore, the proposed approach creates **legal uncertainty for financial instruments held at branches—including in the case of existing set-ups with one legal entity operating multiple settlement systems in different jurisdictions**, as they would be treated as if located at the head office.

It would act as a barrier to more flexible set-ups that could bring efficiency and facilitate consolidation within the post-trade infrastructure sector. It departs from the *lex rei sitae* principle—which continues to apply to other ownership aspects of the same instruments—and introduces inconsistencies with other EU legislation, including the Winding-up Directive and Solvency II.

ECSDA therefore strongly recommends deleting the proposed paragraph and retaining the established rule.

4. DLT-related amendments

ECSDA supports the following targeted amendments related to the provision of services via the DLT technology, with some improvement recommendations.

Designation of one legally accountable undertaking

The Obligation for a DLT-based SSS with decentralised validation to designate one undertaking as legally accountable and liable is welcomed as a necessary step to support legal certainty. However, the provision should be further detailed – already in level one, despite the ESMA mandate - in order to understand which entities could qualify for that role.

Approach to the definition of finality moments

We support the obligation for a DLT-based SSS to have a consensus mechanism that produces **deterministic and legally enforceable finality**.

We note that the requirement should apply to all finality moments, as implied by the formulation of Article 21(1). Consequently, placing this requirement solely under final settlement may not be appropriate.

However, as mentioned within the comments on article 21, we would invite further consideration of the feasibility of the mandate given to ESMA and the EBA under paragraph 2 for the specification of the finality rules.

While in theory standardisation is both necessary and desirable, at this stage, the significant diversity of protocols and consensus mechanisms across DLT networks, as well as the intrinsic distributed nature of the database with multiple nodes in multiple locations and the associated latency issues, would likely prevent any standardisation exercise from resulting in a meaningful standard.

The complexity of the exercise is further compounded by existing fragmentation in the DLT environment, with multiple ledgers exhibiting diverse characteristics already present in the market.

In order to prevent additional barriers and unnecessary constraints in the design of future market architecture, while allowing for competition between DLT infrastructures and preserving technological neutrality, the definition of finality moments should remain a market-driven process based on concrete experience.

To this end, we propose that the Commission convene an industry working group to address the harmonisation of the definition of finality moments.

Conflicts of laws

We acknowledge and understand the need to address the long-standing issue of the law applicable to proprietary aspects in cases where it is not possible to determine the location of a register, account or centralised deposit system that is connected to distributed ledger technology.

The conflict of law criteria envisaged by Art. 25(3) in such cases refers to the law governing the system, as contractually agreed between the participants and the system. While not disagreeing with this choice, we note that it departs from the established criteria whereby proprietary rights are governed by the law where the assets are located.

We suggest considering the so-called “PROPA” approach, i.e., applying the law of the jurisdiction where the relevant operator is established as the **lex situs**. The criteria should be linked to Art. 5, identifying the relevant operator as the designated legally accountable entity.

This approach is more closely aligned with the traditional concept of asset location, providing a more consistent legal framework for the enforceability of rights regardless of the technology used. It would also help mitigate the risk of regulatory arbitrage that could arise from reliance on a contractually chosen law.

As a final remark, to support innovation, although we understand that Art. 25 sets rules of conflict of laws for collateral security, we take this opportunity to raise the importance of maintaining a flexible and non-intrusive approach in respect of the law of the issuance and the law of the securities.

We thank the European Commission for the possibility to contribute to the policy-making process through this consultation response.



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