



EBA CLEARING's response to the European Commission's [Public Consultation on the Directive on settlement finality in payment and securities settlement systems](#)

The European Commission has launched a Public Consultation regarding Directive 98/26/EC on settlement finality in payment and securities settlement systems (the Settlement Finality Directive or "SFD"). The review provides an opportunity for stakeholders to comment on the efficacy of the SFD in its current form. The European Commission is also considering a number of amendments to the SFD, in light of business, technological and regulatory developments since the last review of the SFD in 2008/2009.

As the operator of three payment systems designated under the SFD (EURO1, STEP2-T and RT1), EBA CLEARING has submitted a response for the European Commission's consideration, raising the following points:

- **on the role of the SFD**
 - The purpose of the SFD is to mitigate the risk to participants in a payment system, of an insolvency proceeding in respect of another participant in that payment system.
 - Absent the SFD, under the applicable insolvency rules, a participant's transfer orders in a system could be unwound in the event of an insolvency, to the benefit of the participant's (other) creditors.
 - Importantly, the SFD grants an exception to this. In other words, it is a legislative decision to favour the interests of "participants" in a "system" (as defined by the SFD), over the interests of these participants' creditors.
 - The rationale for this legislative decision is the risk that the default of one participant in a system could spread to other participants in the system, or indeed to other payment systems (a "domino effect"), if the payments are unwound post facto in insolvency proceedings.
 - The SFD therefore plays a crucial role in mitigating systemic risk. The SIPS Regulation recognises the crucial role of the SFD by encouraging systemically important payment systems to seek designation (Article 3(6)).

- **on amending the SFD**
 - EBA CLEARING considers that the SFD, in its current form, effectively achieves the objective of mitigating systemic risk. The SFD should only be revised to the extent necessary to continue to achieve this policy objective.
 - The SFD has provided a remarkably stable and robust legal framework for over 20 years (which have seen most other regulatory frameworks considerably changed) and EU-based systems rely on the central concepts of the SFD, as reflected in their system rules. It is important to avoid upsetting these concepts unnecessarily.
 - The addition of new types of participant and amendments adapting the SFD for alternative technologies should be assessed against the objective of avoiding systemic risk. Such amendments should only be considered following a robust risk assessment by the European



Commission, and the amendments should incorporate risk mitigation measures, as appropriate.

- In the event that the definition of “participant” is indeed broadened, payment system operators should retain the right to set reasonable risk-based requirements for the access by such new types of participants. Reference is made in this context to CPMI-IOSCO Principle for Financial Market Infrastructure KC 2 (*“An FMI’s participation requirements should be justified in terms of the safety and efficiency of the FMI and the markets it serves, be tailored to and commensurate with the FMI’s specific risks [...]”*).
 - Finally, it is essential that amendments to the SFD ensure that the principle of “same business, same risks, same requirements” is respected, to maintain a level playing field in the market.
- **on third-country systems**
 - EBA CLEARING welcomes the proposal to extend the protection of the SFD to EU entities that participate in third-country systems.
 - As the operator of three pan-European payment systems designated under the SFD, we value the stability and reliability the SFD brings to European payment systems and other financial market infrastructures.
 - Recognising the transnational operations of the participants in EU systems, we see a strong value in extending the protection of the SFD to EU-based participants in third-country systems, supporting the objective of the European Commission to make cross-border payments involving non-EU countries more accessible via EU providers.
 - We believe that extending the protection of the SFD to third-country systems will increase trust in payment systems and FMIs, and will contribute in the longer term towards the harmonisation of settlement finality provisions globally.
 - We have made a number of proposals to best achieve these benefits.
 - First, the protection of the SFD should only be extended to third country systems in countries that also protect SFD-designated systems. In other words, the protection should be reciprocal. This would incentivise third countries to protect SFD-designated systems, to the benefit of EU FMIs.
 - Second, the relevant EU authorities (be it at EU or Member State level) should defer to the competent authority of the third country in question. This would avoid the duplication or indeed multiplication of oversight requirements of EU/Member State competent authorities and third country competent authorities. If the principle of reciprocity is respected, this would ensure that EU-based systems are not unduly burdened by third-country regulations in order to obtain settlement finality protection in third countries.



- Third, the primary function of settlement finality regimes is to create legal certainty for payments made by participants in payment systems in the event of the insolvency of a participant. The extension of the EU SFD to third-country payment systems risks creating a conflict of law between the SFD and the law of the third country, thereby negating the legal certainty the SFD was intended to create. We believe that the most effective way to mitigate this risk is for the new EU framework to defer to the law that governs the payment system in question. If the principle of reciprocity is respected, this would ensure that the SFD always applies to payment systems governed by EU law, and that the SFD cannot be overridden by the courts of a third country in which the EU-based payment system has participants.
- **on enhancing the SFD**
 - Finally, EBA CLEARING has proposed a number of minor amendments to enhance the legal certainty provided by the SFD. These amendments include harmonising the Bank Recovery and Resolution Directive (Directive (EU) 2014/59/EU) with the SFD.
 - We have also proposed improvements to the notification process for insolvency proceedings. Specifically, we have proposed that all system operators of EU FMIs immediately receive a push message (i.e. an e-mail) from the SFD authority of the Member State in which the insolvency proceeding has been opened. Alternatively, EU authorities, such as ESMA or the European Banking Authority, could send or relay the message to SFD-designated FMIs.