

The Swedish Securities Markets Association's response to the Targeted consultation on the review of the Directive on settlement finality in payment and securities settlement systems

The Swedish Securities Markets Association was founded on 15th December 1908. The Association represents 23 Swedish, Nordic and global banks and investment firms active on the Swedish securities markets. The Association's overall mission is to work for sustainable and competitive Swedish securities markets. The Association's working groups discuss a wide range of topics including equity, derivatives and bond markets, investor protection issues and sustainable finance. The Association also owns SwedSec Licensiering AB which is responsible for licensing e.g. financial advisors in the Swedish market since 2001.

1. Participation in systems governed by the law of a third-country.

Question 1.1 Should EU institutions that participate in third-country systems be protected by the SFD?

Yes

Question 1.2 Please bring the following options in an order, attributing 1 to the option that you consider most suited and 4 to the option that you consider least suited:

	1	2	3	4
Criteria for protection should be set at EU level. Also, decisions to extend the protection should be taken at EU level. This ensures a level playing field in the EU and predictability for market participants.	X			
Criteria for protection should be set at EU level. However, decisions to extend the protection should be taken at national level. This ensures greater harmonization within the EU but gives the possibility to consider national market characteristics and laws.		X		
Criteria for protection should be set by each Member State. Also, decisions to extend the protection should be taken by each Member State. They know best their national market and possible implications and interactions with national laws.				X
Other			X	

Question 1.3 In case the scope of the SFD was to be extended to EU institutions participating in third-country systems: How should this be done?

- The provisions of the SFD should apply directly to the third-country system in their entirety.
- The SFD should defer to the protections conferred by the applicable third- country law.
- Some SFD provisions should apply directly to the third-country system, whilst some provisions should defer to the protections conferred by the applicable third-country law.

- Don't know / no opinion / not relevant.

Question 1.4 Do you see the need to carry out an assessment whether the applicable third-country law provisions are comparable to the SFD's?

- An assessment to which extent the applicable third-country law provisions are comparable to the SFD's should be carried out.
- There is no need for an assessment.
- An assessment should be carried out only in certain cases (e.g. for certain systems or certain third-countries).
- An assessment to which extent its provisions are comparable to the SFD's should be carried out only for certain provisions.
- Don't know / no opinion / not relevant.

[Please note that we intended to choose option one, "An assessment to which extent the applicable third-country law provisions are comparable to the SFD's should be carried out", but in order to be allowed to respond to question 1.4.1 and provided input on the relevance of the different provisions in the list, the survey format requires the answer "An assessment to which extent its provisions are comparable to the SFD's should be carried out only for certain provisions".]

Question 1.4.1 Please evaluate for which of the following provisions such an assessment should be carried out:

1: not relevant, 2: rather non relevant, 3: neutral, 4: rather relevant, 5: fully relevant

eligibility to participate in the third-country system directly	5
eligibility to participate in the third-country system indirectly	
the moment of entry into the system, the moments of irrevocability and settlement finality within the system (notably whether such moments are left to the rules of the system or are mandated by the third country law governing the system)	5
the settlement finality provisions (notably the extent to which transfer orders and collateral security as well as their netting are protected from being interfered with)	5
the definition of a system	5
provisions regarding interoperability of systems	4
the application of the settlement finality provision without discrimination between domestic and foreign participants	4
the compatibility of any provisions on conflict of laws	5
Other	

Question 1.5 In case the SFD should provide criteria for the assessment for designation of a third- country system: What is your opinion regarding the following statements?

1: disagree, 2: rather not agree, 3: neutral, 4: rather agree, 5: fully agree

	1-5	Comment/explanation

(a) SFD protection should only be extended to third country systems if the third country extends protections towards SFD systems.	-	
(b) information about insolvency of a participant in the third country system should be provided in a timely manner by the third country system operator.	5	The SSMA considers it important that information about insolvency of a domestic participant is provided in a timely manner. We do not understand the questions under 1.5b) and 1.5c) to be mutually exclusive; ideally the information about a participant's insolvency should be provided both by the system operator and the third-country national authority.
(c) information about insolvency of a domestic participant should be provided in a timely manner by the third country national authorities.	5	The SSMA considers it important that information about insolvency of a domestic participant is provided in a timely manner. We do not understand the questions under 1.5b) and 1.5c) to be mutually exclusive; ideally the information about a participant's insolvency should be provided both by the system operator and the third-country national authority.
(d) systemic importance of the third country system should be prerequisite.	1	
(e) Adequacy of the rules of the system should be given.	5	
(f) Only systems that are as strict as the SFD regarding the provisions about (direct) participation should be eligible for designation.	4	The systems should fulfil a standard of quality that is comparable to the requirements in the SFD, to ensure the desirable degree of protection for the participants and to keep the systemic risks at an acceptable level. The SSMA does however not think that the requirements should have to be exactly the same as those in the SFD; it is the overall standard of quality that should determine the eligibility and a similar standard of quality could be achieved through other means than through the provisions in the SFD.
(g) Only systems that are as strict as the SFD regarding the provisions about indirect participation should be eligible for designation.	-	
(h) No discrimination between EU institutions and other institutions should be made by the third-country system.	-	
(i) All participants have to be known to the system operator	5	
(j) the country of establishment of the system operator should be considered.	4	To ensure the desirable degree of protection for the participants and to keep the systemic risks at an acceptable level

		there should be an assessment of factors such as the regulatory environment and the level of supervision in the country of establishment, and whether these are equivalent to those within the EU.
(k) The country where the infrastructure is located, maintained and/or operated should be considered	3	There are requirements for equivalence assessments regarding many areas of a third country's financial regulation already today, e.g. in EMIR, CRR and CSDR. In our opinion, factors that are already covered by requirements in other legislative acts should not be repeated in the criteria for the assessment for designation of a third-country system. In addition, the complexity of identifying and determining all the relevant factors such as the location of relevant servers, personnel, accounting etc. should not be underestimated.
(l) The third-country law governing the system should fulfil the assessment criteria as indicated in my response under question 1.4	4	
(m) The volume and value of transactions either cleared, settled or otherwise executed through the third-country system in the three calendar years preceding this year should be considered.	2	
(n) Cooperative oversight arrangements with the third country concerned should be prerequisite	4	It would be appropriate to have some level of cooperation regarding the oversight arrangements. The framework for the cooperation should be negotiated in good faith and agreed upon in advance, by the concerned supervisory authorities.
(o) In the case of CCPs, the recognition of the CCP concerned under Article 25 of EMIR should be prerequisite	3	
(p) In the case of CSDs the recognition of the CSD concerned under Article 25 of CSDR should be prerequisite	3	
(q) The criteria should be the same for all third-country systems regardless by which third-country law they are governed	5	

Question 1.6 In case the scope of the SFD was to be extended to EU institutions participating in third-country systems: Should the scope be extended to EU institutions participating in third-country payment and security settlement systems?

- Only to payment systems.
- Only to security settlement systems.
- To both, payment and security settlement systems.

- Don't know / no opinion / not relevant.

Question 1.7 Should the scope of the SFD be extended to all EU-institutions participating in third-country systems without discrimination?

Yes

Question 1.7.1 Please explain your answer to question 1.7:

The scope should be extended to all EU-institutions participating in third-country systems, subject to the institutions' fulfilling the minimum standard of quality that should be required.

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Designation of a third-country system if the scope was to be extended.

Question 1.8 Should the assessment for designation of a third-country system be done on a case-by-case basis?

- Yes. This is most appropriate as criteria which are specific to a certain system should be considered (see my answers to question 1.5 above).
- No. It is sufficient to assess the third-country law in general regarding comparability.
- Don't know / no opinion / not relevant.

Question 1.9 Should a regular evaluation be required whether the requirements for a designation are still met?

No

Question 1.9.1 Please explain your answer to question 1.9:

A regular evaluation regarding whether the requirements for a designation would in our opinion not be necessary, but the administrators of non-EU systems that are designated under SFD should be required to keep their EU competent authority updated regarding any changes in law, regulation or to their system that would be relevant to their designated status.

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2. Participants in systems governed by the law of a Member State.

Question 2.1 Should the list of currently eligible SFD participants be either limited or extended or otherwise modified? Please explain your reasons for each type of participant where relevant.

- No need for modifications.
- Should be extended.
- Should be limited. Some participants should no longer be eligible.
- Should be otherwise modified.
- Don't know / no opinion / not relevant.

Question 2.1.1 Please specify how it should be extended:

CSDs should be explicitly included and not only implicitly covered, as described in the introduction to this section of the consultation paper.

Question 2.2 Should participation in an SFD system be limited to legal persons?

Yes

Question 2.2.1 Please explain your answer to question 2.2:

While we think that participation in an SFD system should be limited to legal persons, we would like to point out that a direct holder of securities is not the same thing as a system participant (but participants can hold securities directly as well). Where there is a possibility of being a direct holder of securities, this should not be limited to legal persons, but be open to natural persons as well.

/.../

Question 2.4 Please state your opinion on the following:

1: disagree, 2: rather not agree, 3: neutral, 4: rather agree, 5: fully agree

	1-5
a. If payment institutions and e-money institutions are added to the list of participants, they should be subject to a specific risk assessment	5
b. Payment institutions and e-money institutions should only be made eligible SFD participants if 'warranted on grounds of systemic risk'	-
c. If payment institutions and e-money institutions are added to the list of participants, no particular risk assessment is needed.	-

/.../

Question 2.9 What do you think of limiting the number of eligible SFD participants by replacing or complementing the current list of eligible participants by an approach that is based on a risk assessment for participants?

- This is a good idea, as it ensures that only entities which are really systemically important benefit from the SFD protection (in case of a purely risk based approach: notwithstanding their legal form (whether they are a bank, investment firm, payment institution, e-money institution etc.))
- *This is too difficult from an operational point of view and will therefore jeopardize the aim of a risk based approach (as risks cannot be appropriately monitored and considered when they actually occur).*
- Other.
- Don't know / no opinion / not relevant.

3. SFD and technological innovation

Question 3.1 Do you consider the SFD to be technologically neutral?

- Yes, everything is sufficiently clear no matter the technology used.
- *No, I do not know how to apply certain concepts or definitions of the SFD for specific technologies which creates legal uncertainty (please explain under question 3.5.).*
- Don't know / no opinion / not relevant.

Question 3.2 Do you agree that the concepts of the SFD do not work in a permissionless DLT environment?

- *Yes, important concepts of the SFD do not work in a permissionless DLT environment, especially as legal responsibilities might be unclear. It is indeed problematic that there is no centralised operator, unidentified participants can enroll without restriction and functions*

can be attributed simultaneously to several participants.

- No, I do not see any problem to apply the concepts of the SFD in a permissionless DLT environment. (Please provide detailed information of how you think settlement finality under the SFD can be achieved despite the lack of a centralised operator, the fact that unidentified participants can enroll without restrictions and that functions can be attributed simultaneously to several participants.)
- Don't know / no opinion / not relevant.

Question 3.3 Do you agree that the scope of the current review of the SFD should be limited to considering the tech neutrality of the SFD in the context of permissioned DLTs where the system operator could design the system and its rules so as to be SFD compliant?

No

Question 3.3.1 Please explain your answer to question 3.3:

The scope of the review of the SFD could in our opinion be broader than to only include aspects of tech neutrality in the context of permissioned DLTs, but we would like to emphasize the need for a thorough analysis before broadening the scope of the legislation. Any suggested amendments of the directive should be subject to public consultation.

Question 3.4 Do you think that first experience with the pilot regime for market infrastructures based on DLT (COM/2020/594 final) should be gained before considering possible issues in the SFD?

- Yes, this will show problems resulting from the use of DLT that have to be considered in the SFD.
- No, there are already issues which have to be addressed for the use in a DLT environment as they currently create legal uncertainty.
- Don't know / no opinion / not relevant.

Question 3.4.1 Please elaborate on your answer to question 3.4, if necessary:

We think that it is appropriate to make an assessment of any experience that can be gained from the pilot regime for market infrastructures based on DLT before amending the SFD. In addition, we would like to encourage the Commission to make further inquiries into whether and how DLT based systems are used today for settlement processes and/or the provision of different types of collateral. A report or an explanatory note with examples of how DLT based systems can be used would be helpful to better understand the benefits and potential risks of such systems.

Question 3.5 Should any of the definitions or concepts in the SFD be clarified or amended to apply explicitly in a permissioned DLT context?

The SSMA believes that the assessment of the pilot regime for market infrastructures based on DLT should be considered before an exhaustive list of definitions and concepts that need clarification can be composed. Many of the concepts used in the existing legislation are not well suited to the DLT technology so, most likely, all of the concepts and definitions listed in sections 3.5.1 – 3.5.7 (and possibly other concepts as well) will need to be clarified or amended. In our opinion, further analysis is however required before knowing how such clarifications and/or amendments should be done. The outcome of the pilot regime is likely to be useful data for such analysis and, if more data is needed, we would like to encourage the Commission to continue gathering the required information and analyse it thoroughly before proposing how to clarify and/or amend the relevant concepts. Moreover, in many cases it would not be sufficient to only update the legal acts to achieve the desired effects; the relevant system operator rules would also have to be updated.

Furthermore, we think there is a need to analyse potential effects on data protection and how data protection can be satisfactorily achieved in a DLT context.

3.5.1 Definition of a system

a) Should the definition of a system be clarified or amended to apply explicitly in a permitted DLT context?

Yes

/.../

3.5.2 Definition of transfer order

a) Should the definition of transfer order be clarified or amended to apply explicitly in a permitted DLT context?

Yes

/.../

3.5.3 Concept of book-entry

a) Should the concept of book-entry be clarified or amended to apply explicitly in a permitted DLT context?

Yes

/.../

3.5.4 Definition of settlement account

a) Should the definition of settlement account be clarified or amended to apply explicitly in a permitted DLT context?

Yes

/.../

3.5.5 Definition of settlement agent

a) Should the definition of settlement agent be clarified or amended to apply explicitly in a permitted DLT context?

Yes

/.../

3.5.6 Links with other financial market infrastructures and trading venues (traditional or DLT based)

a) Should the links with other financial market infrastructures and trading venues (traditional or DLT based) be clarified or amended to apply explicitly in a permitted DLT context?

Yes

/.../

3.5.7 Concept of conflict of laws

a) Should the concept of conflict of laws be clarified or amended to apply explicitly in a permitted DLT context?

Yes

/.../

4. Protections granted under the SFD vis-à-vis collateral security.

Question 4.1 Should the protection in Article 9(1) of the SFD be extended to clients of participants in an SFD securities settlement system in the event of the insolvency of that participant?

- Yes.
 - Yes, but only for certain SFD securities settlement systems.
 - Yes, but only to certain clients of participants.
 - No.
 - Don't know / no opinion / not relevant.

Question 4.1.1 Please explain your answer to question 4.1:

While we are in favour of making sure that all relevant parties in the settlement and custody chain are protected in the event of an insolvency of a participant, we acknowledge that both the system setups and the regulatory landscape are complex, which makes it hard to get a comprehensive overview. We would like to encourage the Commission to analyse these issues further in order to get a better understanding of the interaction between the SFD and other legislation such as the BRRD, applicable property and insolvency laws, how the legislation works in a DLT environment, etc. The fundamental objectives of the SFD – to ensure secure settlement systems with low levels of risks for the participants – should be considered when amendments are proposed, and any amendments should be preceded by a thorough analysis of the potential consequences.

Question 4.2 In case the protection in Article 9(1) of the SFD was extended to clients of participants in an SFD securities settlement system: How useful do you consider the following conditions?

1: Disagree, 2: Rather not agree, 3: Neutral, 4: Rather agree, 5: Fully agree

	1-5
(a) the client should be known to the system operator	1
(b) The client should have to fulfil criteria that are predefined by the system operator e.g., regarding the client's credit / risk assessment	1
(c) The client should have its own segregated account	1
(d) The client should provide collateral security to secure transactions exceeding the threshold under EMIR (whereupon they are obliged to centrally clear their transactions)	1

/.../

5. Settlement finality under the SFD

Question 5.1 Do you agree with the concerns raised regarding the settlement finality and notification about insolvency proceedings under the SFD?

Yes, we agree with the concerns regarding system interoperability described in the introduction to this section of the consultation paper.

1: Disagree, 2: Rather not agree, 3: Neutral, 4: Rather agree, 5: Fully agree

	1-5	Comment/explanation
(a) the legal duty for an SFD system to specify the moments of entry into the system and irrevocability as well as where settlement is both enforceable and irrevocable should	5	

be clearly stipulated in the SFD		
(b) the settlement finality provisions of the SFD should accommodate the specificities of clearing systems both under business-as-usual and market stress conditions more clearly.	1	The applicable rules should in our opinion be the same both in a stressed and a business-as-usual scenario, hence the SFD provisions should be formulated in a way that is suitable for both normal and stressed market conditions. The specificities with regards to credit institutions and CCPs in resolution or insolvency are and should be regulated in the BRRD and the framework for the recovery and resolution of central counterparties, respectively.
(c) a provision in the SFD for ensuring that the moment of settlement finality is identical in relation to both the cash and securities legs of a transaction settled on the basis of "delivery-versus-payment" is needed	4	Ideally, the moment of settlement finality should be identical in both the cash and the securities legs of a transaction. The complexity in achieving this when more than one system is involved should, however, be considered when drafting such provisions.
(d) The SFD needs to be amended to ensure that different times of finality do not cause problems in interoperable systems	4	
(e) The SFD should clearly stipulate that a system operator should also be immediately notified about the opening of insolvency proceedings (in addition to an authority chosen by the Member State, the ESRB, ESMA and other Member States).	5	

Question 5.2 Would your answer change if the SFD would be extended to cover third-country systems?

No

6. The SFD and other Regulations/Directives

/.../

7. Other issues

/.../

Question 7.2 Is there anything else you would like to mention?

It would be beneficial if the rules regarding conflict of laws in the SFD and FCD were further clarified in order to avoid legal uncertainty, and we would like to encourage the Commission to continue the work in this area.