German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

on the Savings and Investments Union: EU rules on settlement finality

Lobby Register No R001459
EU Transparency Register No 52646912360-95

[redacted]

Berlin, 2 April 2026

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks.

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Content

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I. SFR

A. General Remarks

We support the EU-Commission's objective to harmonize the existing framework of the Settlement Finality Directive by means of a directly applicable regulation and to specifically adapt it to new technologies (Article 30 SFR-E).
However, we are concerned that the Financial Collateral Directive (FCD) is not addressed at the same time in a similar manner: The SFD and FCD are essential elements of the EU capital markets legal framework for financial transactions and are deeply interlinked. The proposed limited FCD-adjustments are insufficient and fail address the fragmentation of the EU legal framework in the key area of financial collateral and netting agreements.
In detail, we would like to address the following key points:

B. Specific comments

1. Art. 1 (2) SFR - Object and scope

The registration requirement for 3rd country systems currently requiring registrations in all relevant member states should be replaced by a single EU registration process: Access to 3rd country systems is vital for the international competitiveness of EU institutions. Requiring individual member state registrations would result in a patchwork of differing protections under the SFR for 3rd country systems. This causes legal uncertainties for EU participants and their transactions via such systems with 3rd country and EU participants. See also comments on Art. 12.

2. Art. 2 (1) and (2) SFR - Definitions

We support the newly introduced and modernised existing definitions, in particular the following:

System – Art. 2 (1) (1)

We agree with the definition of system. However, to avoid uncertainties whether it covers CCP clearing, it needs to be clarified that it applies to clearing of transactions by a system. Under the current wording, as "clearing" is mentioned directly after "settlement", the definition can be misunderstood to mean clearing of transfer orders.

Transfer order – Art. 2 (1) (20) and Art 2 (2)(a):

We agree with the definition in point (20) and we particularly welcome the empowerment to adjust the definition of "transfer order" (Article 2(2)(a) SFR-E) by way of delegated acts ensuring that new asset-types (digital assets/commodities) can be covered by the protections provided by the SFR. However, this possibility to extend the protections should be strictly limited to assets used in a regulated environment (e.g., MiCAR, DLT Pilot Regime).

Funds – Art. 2 (1) (21):

We support the expansion of the definition of funds to include assets covered by the MiCAR (e-money, EMT and stablecoins). However, this expansion needs to be mirrored in the FCD to ensure legal consistency (see below).

Book Entry - Article 2(1) (22):

We expressly welcome the fact that the definition of "book-entry" is now to include electronic records using DLT. This is a crucial step toward achieving technological neutrality. To avoid undermining the efficiency benefits of DLT, however, clarification is needed that a "book-entry" on a DLT does not require additional mirroring in a central register. In other words, the constitutive nature of the record on the DLT needs to be ensured.

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3. Art. 5 (1) (l) SFR - Conditions for designation of DLT-systems

The provision currently demands a single/central legally accountable entity in case of a DLT-system: In practice, this means that DLT systems must always establish a single liable company as the main addressee. This approach is not suitable for fully decentralized models. While a legal anchor for insolvency protection is necessary, the RTS should allow for flexible governance structures.

4. Art. 7 SFR - Participants in designated system

We fundamentally disagree with the proposal leaving the decision to include indirect participants to member states and treating this as an exception and not the norm: Indirect system access is vital for significant sections of EU financial market, especially for CCP-clearing of derivatives and indirect participants require the same protections as direct participant. Leaving the determination of the level of protections to member states maintains the current status quo with legal fragmentation and uncertainties.

5. Art. 12 SFR - Registration of third-country systems

In the interest of EU participants, the proposed member state-level registration needs to be replaced by a single EU-wide registration – see already above. In addition, the requirement that the "member" needs to be an institution should be deleted as such restriction is not necessary and also conflicts with the definition of participant in Art. 2 (1) (15).

6. Art. 14 SFR - Conditions for registration

The procedures and techniques used by systems to determine the entry of orders, irrevocability and finality may differ in detail: The focus of the registration process should therefore be on the material/functional equivalence and not on formal compliance with Art. 18, 20 and 21 and any further specifications in delegated acts.

7. Art. 18 SFR - Moment of entry of a transfer order

We agree with maintaining the SFD-approach concerning the moment of entry of transfer orders – this being the moment designated by the system.
This provision – together with Art. 19 (subject to the clarification mentioned below), 20 and 21 – is essential to make sure that the irrevocability of transfer order is recognized across all members states. This ensures legal certainty and equal treatment of all participants regardless of where they access the system from and also prevents that insolvency laws applicable to participants (including indirect participants) override the system's determination of these moments to the detriment of all other participants.

8. Art. 19 SFR – Use of funds and financial instruments

We agree with the proposed Art. 19 (taking the place of Art. 4 of the SFD). This provision addresses the need to insulate collateral provided into the system from the effects of an insolvency of participants or system operators of an interoperable system. In this connection, we also agree with the proposed broad understanding of collateral and the manner in which it may be provided (as further clarified by Recital 18). However, to ensure the necessary full protection against interferences with collateral, it also needs to be expressly clarified that insolvency proceedings of member states can also not prevent, postpone or otherwise impede the realisation or other use of such collateral within and by the system.

9. Art. 20 - The moment of irrevocability of transfer orders

We agree with the proposed Art. 20 as this provision (together with Art. 18, 19 and 21) is essential to ensure that the irrevocability of transfer order is recognized across all members states. See also our comments on Art. 18.

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10. Art. 21 (1) SFR - Final settlement

We support the introduction of the provision clarifying that the moment the finality of settlements is the one determined by the system's rules.
This rule supports and complements Art. 18, 19, and 20 and thus further ensures that insolvency laws applicable to participants (including indirect participants) do not override the system's determination to the detriment of all other participants.

A further step would be to have the SFR define a uniform point in time for all systems, regardless of national legal systems. Transposing the SFD into a regulation could be seen as an opportunity to take a first step towards real standardisation, as there would no longer be a need to review the legal system of each member state to determine the moment of finality applicable to a system in such member state.
The qualification in respect DLT-systems requiring "deterministic" finality moments should, however be reviewed as the term is insufficiently clear and could be interpreted restrictively and thus may not cover existing or future models providing equivalent certainty.

11. Art. 21 (3) (a) to (c) SFR - Possibility for specifications through delegated acts

Since Articles 21(3) and (4) provide that ESMA and EBA are to define, by means of delegated acts, how entry, irrevocability, and final settlement (including for probabilistic or layered models) can be legally framed, a significant part of the legal certainty for DLT-based infrastructures thus depends on future level 2 details.
While we generally support a flexible approach that can adapt to technological innovation, it is crucial that the mandate for the delegated act is sufficiently broad. Therefore, the delegated act must be drafted to ensure true technological neutrality. Specifically, they should focus on the outcome (certainty of settlement) rather than prescribing a specific technical process, to avoid inadvertently excluding established DLT governance models.

12. Art. 22 SFR - The moment of the opening of insolvency proceedings

We also generally support maintaining the SFD- understanding of the moment of insolvency. We, however, see the need to replace or at least clarify the term "handed down" as this an unclear concept: The relevant moment should be the point in time where the decision on the opening of insolvency proceedings takes legal effect and becomes public under and in the manner prescribed by the applicable relevant insolvency law.

13. Art. 24 SFR - Law governing the rights and obligations of participants

The definition of participants currently only covers EU participants and should be expanded to include 3rd country participants in order to avoid legal uncertainties for all participants.

14. Art. 25 SFR – Collateral Security

The provision on the applicable law under in Art. 25 (2) second sub-paragraph currently only addresses the registered office of a register, account or deposit but not branches: In case of branches, the law applicable to such branch would the more appropriate governing law. This should be clarified.

15. Recovery and resolutions regimes for 3rd country system

There are currently no provisions addressing the protections for 3rd country systems in view of BRRD/SRM measures. Adequate protections are in the interest of all participants (including indirect participants) since resolution measures would affect their transactions via and any assets held for them by such system.

II. FCD: Need for fundamental reforms and inconsistencies with SFR-definitions/concepts

A. Need for fundamental modernisation of FCD

As already stated above the proposed limited FCD-adjustments are insufficient in view of the importance of the FCD as a central element of EU legal framework for capital market transactions and the fact that the FCD in its current form fails to ensure a truly uniform EU framework for contractual financial collateral agreements and netting agreements. Market participants are still forced to review the effectiveness financial collateral and/or netting agreements in respect of each member state separately and continue to be exposed to considerable legal uncertainties. Key issues are that the FCD does not protect netting agreements independently (only in combination with financial collateral arrangements) and the significant differences and uncertainties regarding the varying personal and material scope of the FCD protections in member states.

B. Alignment with SFR

The modernisation of SFR-definitions needs to be reflected in the FCD definitions and concepts as far as possible to ensure consistency, particularly regarding the SFR-definitions of "funds" and the FCD-definition of "cash financial and instruments" (FCD). While the definition of "funds" in the SFR-E includes e-money and e-money tokens (EMT) or stablecoins within the meaning of MiCAR, the FCD continues to refer to "cash". Hence, other than in the SFR-E not all, but only some stablecoins may be covered by the FCD. This leads to legal uncertainty and unequal treatment in collateralization outside of systems.

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