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

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 answer to question 1.1 a):

We support extending the personal scope of the FCD to include payment institutions and e-money institutions, to ensure these institutions are able to benefit from the protections and increased certainty afforded by the FCD in recognising the efficacy of netting mechanisms and giving effect to security arrangements. These protections support credit risk mitigation and efficient markets and so in general, we consider it advantageous to broaden the personal scope of the FCD.

b) E-money institutions?

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

Please explain your answer to question 1.1 b):

See the response to question 1.1 a) above.

c) Central securities depositories?

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

Please explain your answer to question 1.1 c):

Central securities depositories are a key part of EU financial market infrastructure and so it is logical to extend the personal scope of the FCD to include them (to the extent they are not already in scope) This would be consistent with the existing scope of 1(c) FCD, which includes central counterparties, settlement agents and clearing houses. It would also be in line with the Commission's statement to cover systemically important collateral providers and takers under Article 1(c) FCD.

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

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:

The definition of financial institution should be expanded to include the aforementioned types of entity. However, there is no need to change the above rule.

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 any problems to the cross-border provision of collateral in your opinion:

The discretion afforded to Member States in Article 1(3) to exclude collateral arrangements from scope of FCD protections where one party is an SME or other unregulated corporate entity creates additional costs and introduces uncertainty for market participants regarding the enforceability of collateral arrangements entered into with these counterparties.

The exclusion of collateral arrangements entered into with SMEs or unregulated corporate legal entities from FCD protections limits the ability of financial institutions to provide certain derivatives, margin financing, prime brokerage and related services to unregulated clients that may, but for their lack of regulatory authorisation, organically belong in the financial markets sphere.

We therefore support the proposal outlined in the ISDA response to limit the opt-out in scope, so that it provides a minimum safe-harbour extending to certain financial markets activities entered into by financial institutions with unregulated corporates.

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:

This is for the same reasons as set out in our response to question 1.3.

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:

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:

AFME believes the concepts of 'possession' and 'control' in the FCD require further clarification in order to provide additional protection to financial institutions entering into 'security financial collateral arrangements'.

In order to achieve the policy objective, AFME recommends expanding the range of permitted dealing with financial collateral beyond the existing provisions relating to substitution and withdrawal of excess collateral. The best way to provide additional protection for financial institutions is to permit incremental flexibility in order to avoid the loss of a 'security financial collateral arrangement' due to the lack of 'possession' and 'control'.

AFME supports the specific recommendations outlined in the ISDA response, with respect to clarifying that the rights of the collateral provider do not prevent the collateral taker from having "possession" or "control" of the collateral whether the collateral is held in the collateral taker's account, via a third-party custodian or via a tri-party collateral management service provider.

AFME also supports the specific recommendations outlined in the ISDA response which aim to provide additional protection to financial institutions by incrementally increasing the existing flexibility to deal with financial collateral during the term of the 'security financial collateral arrangement'. These specific recommendations include, without limitation, that:

1) the collateral may be held in an account in the name of either the collateral-provider or the collateral-taker;

2) the collateral-provider may withdraw income (e.g. interest, coupons or dividends) which accrues on the financial collateral from the account (provided that there is no default);

3) the collateral-provider may receive a copy of any notices relating to the financial collateral;

4) the collateral-provider may exercise voting rights relating to the financial collateral (provided that there is no default);

5) the collateral-provider may be responsible for determining the value of the financial collateral or the secured obligations;

6) the collateral-provider will generally be entitled to the return of financial collateral if the collateral taker goes insolvent (provided that the secured obligations have been fully and finally discharged); and

7) the provision of a standing instruction to a third party custodian or collateral manager to provide automated substitutions, return of excess collateral or transfers or reinvestment of income (e.g. interest, coupons or dividends).

Excess Financial Collateral

AFME believes that the phrase 'excess financial collateral' in Article 2(2) of the FCD is unclear and there is a risk it could be interpreted as meaning that the parties are required to hold collateral in excess of the value of the secured obligations. Financial markets participants should benefit from legal certainty that they have contractual flexibility to partially collateralise the secured obligations where this is the commercial intention of the parties.

We believe that the phrase 'excess financial collateral' should be amended based on the recommendations in the ISDA response to make it clear that an 'excess' arises where the value (or estimated value) of the collateral exceeds the amount of collateral required to be posted from time to time under the collateral agreement.

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

Question 2.3.1
Please explain how this might be done for 'cash' and 'financial instruments':

In an anonymous market involving fungible financial instruments which may be registered in the names of nominees acting for multiple end clients, acquirers can never know who previously owned the relevant assets and whether all previous acquisitions of the relevant securities were legally valid. Therefore, they need to be able to rely on the law ensuring their valid acquisition, even if one of the earlier acquisitions subsequently turns out to be invalid. For example, a court decision rendering an earlier acquisition void might create significant concern among market participants that have acquired these securities subsequently – thus creating uncertainty as to their title to assets that they thought were validly acquired.

Given the anonymity and the frequency of acquisitions in the market it is obvious that the entire market naturally relies on the principle of good faith acquisition. Therefore, the legal framework for good faith acquisition needs to be consistent throughout the EU.

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 was not aware' could be done:

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

Really, it is a question of actual knowledge. It should be assumed that that there is no knowledge unless the circumstances are such that it can be proven or any reasonable person would be aware. If the burden is on the collateral taker, it should be a light one, which can be reversed through relevant evidence.

Otherwise, the level of due diligence will be significant and upset the balance that allows collateral to be accepted simply and efficiently

The EPTF Report provides further analysis on this issue.

“Article 8(2) FCD should provide additional clarification as to the insolvency protection of collateral provided after the opening of insolvency proceedings, where the collateral-taker is not aware of such opening. It should be specified that it is necessary that the collateral-taker was not aware of the opening of the insolvency proceedings at the moment the collateral arrangement came into existence (rather than the moment that the collateral was delivered). It is understood that a financial collateral provided after the opening of insolvency proceedings must be protected, at a minimum where the insolvency proceedings were opened between the date of the conclusion of the collateral agreement (transaction) and the intended date of delivery of the collateral (settlement).”

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-àvis other counterparties and without regard to other matters that might otherwise affect the rights arising from a closeout 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 provision1 . 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 uncertainties3 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.

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:

Question 4.1.4
Please describe a solution that you consider appropriate:

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:

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:

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:

AFME agrees with the conclusions of the EPTF report.

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:

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. W UD (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:

AFME members are supportive of the proposal outlined in the ISDA response for the Commission to conduct a detailed comparison analysis of national-level netting legislation.

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 aforementioned 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 5.1.1
If so, please elaborate which type of collateral and why:

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

Formatted: Highlight

Please explain why and how updating the definition of cash should be done:

The definition of cash for FCD purposes should be updated as follows: "*money in any currency, credited to an account, or a similar claim for repayment of money and includes money market deposits and sums due or payable to, or received between the parties in connection with the operation of a financial collateral arrangement or a close-out netting provision*".

Furthermore, it should be clarified that FCD protections apply to security arrangements that consist of both financial and non-financial collateral.

This would benefit the cross-border provision of financial collateral in the EU and reduce legal uncertainty.

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

Assets that may be treated as financial collateral should be harmonised across all Member States.

Please explain why and how updating the definition of credit claims should be done:

Financial instruments

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

- Yes, they are a commonly 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 5.4.1
Please elaborate on how this might be done in a manner that is compatible with national laws regarding securities, companies, contracts, property and book-entry:

In order for the potential efficiency benefits of DLT to be realised in relation to security financial collateral arrangements, it is important that the digital assets that are the subject of these arrangements be made amenable to concepts of "possession" and "control" as envisioned in the FCD.

Specifically, it should be clear that digital assets are capable of being possessed or controlled through the exclusive control of the private keys associated with those assets. Similarly, it should be clear that it is possible to control, and in some cases possess, digital assets through their effective immobilisation (subject to the occurrence of certain trigger events) in a smart contract satisfying "possession or … control" requirements. We note that smart contracts may be especially suited to satisfying these requirements since they can be coded to ensure they are automatically transferred to the collateral taker or collateral provider in accordance with the terms of the collateral arrangement. We agree with others that this type of arrangement should be capable of amounting to control.

We also agree with others that assets constituting collateral may be coded in a way that allows them to be transferred in accordance with the sole instructions of the collateral taker. Such arrangement should be capable of amounting to either possession or control.

Alternatively, a smart contract may not govern the digital asset constituting collateral, but may be utilised as a means to immobilise it.

We agree with others that it should be possible to clarify at an EU level that these types of arrangements should be capable of meeting the possession and control requirements under the FCD without undermining national laws. However, other questions inevitably will need to be addressed in national law: for example, questions arise as to whether "ownership" of types of digital assets convey rights in rem, how this ownership may be evidenced and whether they are amenable to national law conceptions of possession or control.

In any case, we believe these clarifications should, where possible, be provided at an EU-level to promote harmonisation, notwithstanding potential national law differences with respect to the ownership rights or nature of digital assets.

Question 5.5.1
Should the notions 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:

Question 5.5.2
Should the notions 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:

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

Question 5.6.1
Please elaborate on how this might be done in a manner that is compatible with national laws regarding securities, companies, contracts, property and book-entry:

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

Question 5.7.1
What is the context of this problem?

- national context
- cross-border context
- both of the above

Question 5.7.2
Do you see the need to remove a debtor's set-off rights? Please consider the set-off risks against the risks to households and SMEs in the event of the insolvency of a credit institution?

- No, it is for the collateral taker to decide what kind of collateral they accept and ensure appropriate risk mitigation where applicable
- Yes, it removes operational burden and enhances legal certainty for the collateral taker which rectifies the weakening of debtor's set-off rights

Question 5.7.2.1
Why do you see the need to remove a debtor's set-off rights?

Question 5.7.2.2
Under which conditions should such a removal take place?

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

Please explain why you think the provisions of the Insolvency Regulation (Regulation (EU) 2015/848) 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:

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:

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:

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

Please explain why you think the provisions of the Framework for the recovery and resolution of central counterparties (Regulation (EU) 2021/23) 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:

Question 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:

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:

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

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