

# European Commission Public consultation on the review of the Financial Collateral Directive (FCD) AMAFI's contribution

**Association française des marchés financiers (AMAFI)** is the trade organisation working at national, European and international levels to represent financial market participants in France. AMAFI members consist of investment firms and credit institutions (French, European and global firms), operating in and/or from France (corporate and investment banks (CIBs), brokers-dealers, exchanges, and private banks). **AMAFI is deeply involved in all regulatory matters that concern financial instruments** (MiFID II, AML/CFT, PRIIPs, etc.). AMAFI has more than 150 members operating in equities and fixed-income and interest rate products, as well as commodities, derivatives and structured products for both professional and retail clients.

AMAFI welcomes the opportunity to respond publicly to this [consultation](#) of the European Commission on the review of the Directive on financial collateral arrangements.

As an introductory comment, the Association underlines the great benefits that the FCD brought to the financial system. We are of the opinion that the legal regime as it currently operates is functioning very well and changes should be minimal. This also concerns the scope of the Financial Collateral Directive. Financial guarantees are a vigorous response to systemic risk. By extending Financial collateral to too many entities, i.e. by privileging too many persons in the unfortunate case of an insolvency proceeding, the effect could be that no-one is better protected than the others, thus reducing the protection against systemic risk.

## 1. SCOPE

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- **Question 1.1 – Should the personal scope of the FCD be amended to include the follow entities:**

**a) Payment institutions ?**

Yes

No

Don't know / no opinion / not relevant

The Association has no view on including payment institutions and e-money institutions.

**b) E-money institutions ?**

Yes

~~No~~  
Don't know / no opinion / not relevant

The Association has no view on including payment institutions and e-money institutions.

**c) Central securities depositories ?**

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

Concerning CSD's, AMAFI is of the opinion that the personal scope of the FCD could be extended to Central Securities Depositories as they are important players of the financial markets.

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

N/A

- *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:*

Yes, this rationale should be preserved and not extended. Financial collateral is a very vigorous means of limiting systemic risk that affects financial markets. The association considers that the undue extension of the protection offered by the financial collateral directive might produce the adverse effect of reducing the protection offered to financial institutions trading with each other or with professional clients (i.e. clients that are not physical persons or retail clients).

- *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

The Association is not aware of problems occurring as a result of this opt-out that Member States may implement.

As a general comment, the Association does not consider that opt-outs are source of legal uncertainty or otherwise problematic.

- **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:**

N/A

- **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**

The Association sees no reason to change the current possibility for Member States to include retail clients or SME's into the FCD. The fact that one of the parties to a financial collateral agreement must be a financial institution is the most important limitation in scope.

## **2. PROVISION OF CASH AND FINANCIAL INSTRUMENTS UNDER THE FCD**

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- **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~~

The financial collateral directive contains a minimum harmonised European regime for providing collateral between financial institutions. The fact that certain formal requirements vary among Member States is not an obstacle to taking cross border collateral and those differences are not a source of legal risk. We therefore are of the opinion that the formal specificities of the inclusion of dividends and interests should remain of the competence of Member States' domestic law.

Precisely the minimal formal requirements as provided for in the FCD are beneficial to the market.

- **Question 2.1.1. Please explain how this could be done:**

N/A

- **Question 2.2. Do you think that the concepts of "possession" and "control" in the FCD require further clarification and for which type of collateral?**

Yes

No

~~Don't know / no opinion / not relevant~~

The Association sees more risk than benefit in trying to harmonise civil law concepts such as "possession". In France, the concept of control as used in the FCD doesn't pose problems.

- *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.*

N/A

- *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~~

The Association understands the concept of good faith acquisition applied to cash and securities credited to securities accounts raises questions on a supra-European level, explaining namely that the Geneva Securities Convention contains an art. 18 on acquisition by an innocent person. However, within the European Union, it does not seem to the Association that the concept of "good faith acquirer" still raises questions. The Association sees more risk than benefit in trying to harmonise civil law concepts.

- *Question 2.3.1 Please explain how this might be done for "cash" and "financial instruments"*

N/A

### **3. « AWARENESS » OF (PRE-) INSOLVENCY PROCEEDINGS**

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- *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'

N/A The Association deems that this is a question of burden of proof.

**Please explain how in your opinion clarifying how 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.**

The Association fully agrees with the findings of the [EPTF](#), namely that it is difficult for a collateral taker to prove that he was not aware nor should have been aware of the aforementioned proceedings. The burden of proof should lie on the party claiming that the collateral taker was aware. Art. 8(2) of the FCD should not be revised.

### **4. RECOGNITION « CLOSE-OUT NETTING PROVISIONS » IN THE FCD AND ITS IMPACT ON SFD SYSTEMS**

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- *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

The Association and its members have not encountered problems with close out netting provisions. Quite to the contrary: the 2008 financial crises evidenced that close out netting, specifically applied by CCP's functioned well.

- *Question 4.1.1. What were these problems related to?*

N/A

- *Question 4.1.2. What did these problems concern?*

N/A

- *Question 4.1.3. Please describe the problems and the outcome*

N/A

- *Question 4.1.4. Please describe a solution that you consider appropriate.*

N/A

- *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.*

N/A

- *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?*

N/A

- **Question 4.4.1.1. Please explain the legal uncertainties you have identified and how these might be solved:**

N/A

- **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?**

N/A

- **Question 4.4.2.1. Please explain the legal uncertainties you have identified and how these might be solved:**

N/A

- **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., WUD (Directive 2001/24/EC), BRRD (Directive 2014/59/EU), CCP RR (Regulation (EU) 2021/23) and the importance of the close-out netting for risk management and the calculation of own funds requirements for credit institutions and investment firms under CRR**

N/A

## 5. FINANCIAL COLLATERAL

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### 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

The Association sees no need to extend the scope of the FCD.

- **Question 5.1.1. If so, please elaborate which type of collateral and why:**

N/A

- **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

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

N/A

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

N/A

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

N/A

## 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~~

Yes, we agree that emission allowances should be included in the scope of the FCD, not necessarily to the definition of financial instruments.

- **Question 5.4. For crypto assets qualifying as financial instruments, would you see a need to specify the ownership, provision, possession and control requirements of the FCD further 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:**

The Association is of the opinion that civil law questions related to ownership, provision, possession, control should not be harmonised at European level. Concerning the inclusion of crypto-assets, this should be addressed under a general regime governing them, not now in this modification of the FCD.

- **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:**

The notion of account should be retained. The Association is not favourable to trying to precisely define the notion of “account”. This notion is used in the FCD and in SFTR as it stands and this does not raise further comments. We refer to the minimalistic definition of “account” in the Geneva securities convention, that shows that a more precise definition is not required for the legal provisions to produce effects.

We reiterate our comment on civil law topics expressed in the answer to question 5.4.1.

- **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:**

The notion of “book-entry” should be retained. We reiterate our comment on civil law topics expressed in the answer to question 5.4.1.

- **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:**

N/A

## 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?**

The Association does not think that a debtor's set-off rights should be removed. The fact that the creditor transfers the claim under a financial collateral agreement should remain transparent for the debtor. The claim is provided as financial guarantee with all exceptions, including the debtor's set-off rights. It is for the collateral taker to decide what kind of collateral they accept and ensure appropriate risk mitigation where applicable.

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

N/A

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

N/A

## 6. THE FCD AND OTHER REGULATIONS/DIRECTIVES

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- **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?**

- **Question 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 are not sufficiently clear (Regulation (EU) 2015/848) in terms of their interaction with the FCD or the other way round. Please also explain how this matter might be solved.**

- **Question 6.1.2 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.**

- **Question 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.**

- **Question 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:**

N/A

## 7. OTHER ISSUES

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- **Question 7.1. To what extent have inconsistencies in the transposition of the FCD caused cross-border issues, which would merit further harmonisation?**

N/A

**Please provide examples of such instances:**

N/A

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

N/A

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

N/A

## 8. ADDITIONAL INFORMATION

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Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) below. Please make sure you do not include any personal data in the file you upload if you want to remain anonymous.

