Global Cleared Markets

# FIA's Market Integration and Supervision Package Position Paper

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## ABOUT FIA

FIA is the leading trade organisation for the futures, options and cleared derivatives markets globally. FIA's membership includes clearing firms, exchanges, clearinghouses, principal traders, asset managers, execution firms, commodity brokers, end users and those legal, technology and other professionals who serve this community.

FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and promote high standards of professional conduct.

Our work includes engaging with global regulators, driving industry-led best practices, promoting efficiency and innovation, and protecting the integrity of derivatives markets.

# I. EXECUTIVE SUMMARY

The Futures Industry Association (FIA) welcomes the European Commission's ('Commission') market integration and supervision package (MISP), which forms a central pillar of the EU's Savings and Investments Union (SIU) agenda and aims to strengthen the integration, resilience and global competitiveness of EU capital markets.

FIA recognises the potential benefits of increased supervisory centralisation at EU level for some large exchanges operating multiple trading venues across several Member States (so called Pan European Market Operators (PEMOs)) that could enable operational synergies. In those cases, if appropriately calibrated, centralised supervision at EU level can help reduce fragmentation by applying a single supervisory approach. However, these benefits will only materialise if any new supervisory framework **avoids duplicative or overlapping supervisory layers and is implemented in a proportionate, cost-effective and carefully sequenced manner.** In this regard, FIA cautions against the creation of complex, multi-authority supervisory arrangements that risk undermining MISP's core objectives of simplification and enhanced EU competitiveness.

In the context of EMIR, FIA supports preserving the meaningful involvement of national competent authorities (NCAs) and central banks of issue in the oversight of significant EU CCPs. At the same time, FIA highlights that the proposed arrangements under Article 22d risk creating overlapping supervisory structures, which would be at odds with the removal of colleges under Article 22b. FIA therefore recommends supervisory models that would ensure a single point of interaction for EU CCPs, such as ESMA's CCP Supervisory Committee, while maintaining appropriate regulatory input from all relevant authorities.

FIA also expresses concerns regarding proposals that weaken supervisory convergence and legal certainty, notably the **removal of ESMA's explicit power to issue Q&As** and the introduction of enforcement tools that could directly or indirectly penalise market participants for supervisory shortcomings at national level, which are beyond their control. Provisions allowing for the **suspension of cross-border services or the revocation of authorisations** raise proportionality, legal certainty and competitiveness concerns and risk introducing overlapping or duplicative sanctions regimes. FIA recommends clear safeguards to protect compliant market participants and ensure respect for fundamental principles such as ne bis in idem.

With respect to ESMA's no-action powers, FIA strongly supports a more flexible and effective framework capable of addressing implementation challenges, sequencing issues between Level 1 and Level 2 measures, and significant market developments. The current proposals remain overly restrictive and do not resolve the structural limitations preventing timely relief or guidance where Level 1 obligations prove unworkable in practice. **FIA therefore advocates for expanded ESMA no-action powers, enhanced transparency and consideration of a narrowly defined mechanism allowing the temporary suspension of Level 1 requirements by the Commission in specific, carefully defined circumstances.**

FIA further recommends strengthening ESMA's mandate by explicitly introducing **competitiveness as a secondary objective** in the operative provisions of the ESMA Regulation. This would ensure that the impact of Level 2 rule-making on globally interconnected markets and EU firms' international competitiveness is systematically considered, without diluting ESMA's core objectives of financial stability, market integrity and investor protection.

The position paper also highlights the need for regulatory consistency and modernisation across the EU framework, particularly in relation to Distributed Ledger Technology (DLT). **FIA calls for EMIR to be aligned with MISP reforms concerning MiFID/R and CSDR to support CCPs in accepting tokenised collateral, including wholesale central bank digital currency, subject to existing risk management and eligibility standards.** Such alignment is essential to support innovation, maintain EU leadership and ensure the competitiveness of the EU clearing ecosystem.

Finally, while FIA broadly welcomes the conversion of the Settlement Finality Directive into a Regulation, several technical and legal inconsistencies remain, particularly concerning **third-country systems, definitions of participants, collateral, netting and transfer orders** that could undermine settlement finality and legal certainty if left unaddressed. FIA provides targeted drafting recommendations to ensure coherent application, proportionality and effective protection of clearing and settlement arrangements.

## II. INTRODUCTION

FIA welcomes MISP as a potentially transformative step towards strengthening the competitiveness, resilience and integration of EU capital markets. If appropriately calibrated, MISP can reduce supervisory fragmentation, enhance legal certainty and support the objectives of the SIU.

FIA highlights that proposed reforms to the supervisory framework will require **careful calibration** to ensure that increased centralisation does not give rise to overlapping mandates, additional supervisory layers or unintended compliance burdens that could undermine competitiveness.

This position paper sets out FIA members' views on key elements of MISP, with a particular focus on the proposed amendments to the **ESMA Regulation**, **EMIR** and the **Settlement Finality framework**. It highlights areas where the proposals can be strengthened to support supervisory convergence, proportionality and innovation, while safeguarding legal certainty.

FIA's recommendations are intended to support co-legislators in delivering a simpler, more coherent supervisory architecture that is **fit for globally interconnected markets**, while preserving the EU's high standards of financial stability, market integrity and investor protection. In this context, FIA also emphasises the importance of, meaningful stakeholder engagement and appropriate impact assessment as negotiations progress.

# III. ESMA REGULATION (1095/2010)

## 1. General comments

Supervisory divergence between EU member states does not promote the competitiveness of the EU and creates inconsistency, duplication and costs for firms. A regulatory framework that combines agility with legal certainty is essential to safeguarding the EU's competitive position. Clear allocation of rule making responsibilities, an effective supervisory authority and an explicit mandate for ESMA to consider competitiveness in their rule-drafting capacity will be critical to the success of the SIU.

FIA Financial Market Infrastructure (FMI) members highlight that a more centralised supervisory framework for some large exchanges operating multiple trading venues across several Member States (PEMOs) could deliver material benefits, including greater supervisory consistency, faster decision making and more efficient oversight at scale.

At the same time, FIA FMI members stress that those market operators are mostly active in equity markets. Derivatives markets, on the other hand, do not experience the same level of fragmentation. Instead, they already show a good balance between consolidation and competition across the different market players. The EU's internal market is a core strength for derivatives exchanges operating in the EU, as it allows a single EU exchange to operate under one license in a single Member State to service the whole of the EU and access global financial markets.

The EU banking sector has experienced central supervision for larger EU banks. While the rationale behind the SSM is sound, it has not yet led to a significant reduction in supervisory layers compared to a decentralised system. FIA wants to further emphasise that as ESMA's mandate expands, it is essential to draw the right lessons from the SSM experience and avoid replicating the same structural inefficiencies. Failure to do so risks increasing complexity and compliance burdens for both public authorities and market participants, while also giving rise to unintended market and supervisory consequences.

FIA FMI members note that the Commission proposal does not fully reflect those principles and suggests fine-tuning them to enhance the efficiency of the proposed framework in line with simplification goals:

> a) The proposal introduces overlapping supervisory mandates at the national and EU level, thereby splitting responsibilities among different supervisors and bodies – creating a supervisory environment that is unclear, inefficient and unduly costly.

For example, new Article 22d in EMIR envisages that relevant NCAs remain involved in the **authorisation and ongoing supervision** of significant EU CCPs. Depending on the applicable criteria, a significant EU CCP may therefore be subject to joint authorisation and supervision by several authorities, alongside ESMA. This would sit alongside the cooperation arrangements with the relevant central banks of issue under Article 22e. FIA fully acknowledges that NCAs and central banks of issue should continue to play a meaningful role in CCP oversight, and we support the inclusion of broad regulatory input into ESMA's supervisory decisions. That said, consistent with Article 22b, which abolishes colleges for significant CCPs, we caution against supervisory arrangements that could undermine the objectives of simplification and enhanced EU competitiveness. It is

important to avoid inadvertently duplicating existing processes or recreating the overlapping structures seen today. We therefore recommend building on models such as ESMA's CCP Supervisory Committee, which would provide EU CCPs with a single supervisory interface while ensuring the appropriate involvement of all relevant authorities.

Regarding trading venues, FIA highlights the multi-layered supervisory structure for the supervision of significant trading venues being introduced under the MISP proposals. This approach would divide supervision between national and EU level, thereby creating inefficiencies and duplication.

b) **The proposal automatically brings entities into scope of ESMA supervision if they are part of a group where one entity falls under direct ESMA supervision.** FIA is of the opinion that this is not proportionate and breaches the subsidiarity principle. The test should be if the specific EU entity fulfils the significance requirements. Otherwise, local markets would be brought under ESMA supervision with no material justification.

Importantly, the central supervisor must be appropriately resourced and have the right level of experience and skills, with an understanding of the operational realities of businesses that market participants run.

FIA members stress the need to adjust ESMA's agility, governance and interaction with market stakeholders, especially in case an uptake of further supervisory duties materialises.

However, any step towards central supervision should only be undertaken provided that the cost for the supervised entities does not significantly increase. If centralised supervision results in increased costs for the supervised entities, then those entities likely would pass a portion of the costs on to their clients and ultimately to end users.

When it comes to centralised supervision, we need to have transitional provisions and a staged approach. This would allow ESMA adequate time to staff up and build up the right competences. A staged approach starting with a transition to enhanced EU-level supervision for PEMOs, centralised supervision of significant CCPs, before evaluating a transition for other trading venues or significant CSDs may better accommodate an orderly transition from national to EU-level supervision.

If supervisory powers are transferred to ESMA in a short timeframe and ESMA does not have sufficiently skilled personnel, and necessary processes in place, the efficiency gains will not be realised. FIA members suggest avoiding a big bang approach and prefer a staged transition to central supervision by ESMA.

## 2. Article 16b/ Article 29 (Q&As)

The removal of the legal basis (Article 16b of the ESMA Regulation) for ESMA to issue Q&As without an explanation in MISP raises several concerns. It would deprive ESMA of a structured mechanism to issue Q&As that have proven to be a key tool for ESMA to provide clarifications on practical industry questions of application and interpretation of Level 2 requirements. Without a Q&A mechanism, or a similar tool, both market participants and NCAs risk losing a critical tool for supervisory convergence and direct engagement with ESMA, thereby undermining regulatory harmonisation and legal certainty, mostly on technical and operational matters.

This could also shift reliance towards slower and more formal instruments—such as Guidelines and RTS/ITS—which typically require months or years to develop and are unsuitable in certain instances to fast moving markets.

In addition, the absence of a clear Q&A framework may increase regulatory uncertainty. While legal certainty may instead derive from temporary Delegated Acts or the use of no action relief (where applicable), Q&As have served as an open and transparent forum for both NCAs and market participants to raise and clarify areas of uncertainty. **Their removal also creates ambiguity as to the continued status and applicability of existing Q&As.**

FIA members highlight that Article 29 does not explicitly recreate the powers previously contained in Article 16a vis-a-vis Q&As. New Article 29 of the ESMA Regulation includes former Article 16b, paragraph 5, which describes the possibility for the Commission to issue Q&As. However, it does not reflect the possibility for ESMA to issue Q&As. Accordingly, for the proposed plans of centralising supervision to realise the promised benefits, it is important to maintain the ability for ESMA to issue Q&As to ensure convergence.

Moreover, the proposed Q&A powers in Article 29 are limited, scattered within Articles 29(1) (harmonising supervisory practices) and 29(2) (convergence tools + the handbook). This makes the Q&A mandate less explicit and less prominent, and therefore less legally secure than under the current Article 16b. This would also risk creating an 'unlevel playing field' among the ESAs as the EBA and EIOPA can issue Q&As, unlike ESMA under the proposals.

## 3. Article 17aa - Failure in supervision on approval of financial products, services or entities

FIA welcomes the aim to prevent inconsistent national approvals that can create uneven competition, 'jurisdiction shopping' or contagion risks. For cross-border entities, this raises assurance that approvals across the EU meet consistent standards.

However, FIA members have concerns with changes proposed to Article 17aa where, in some scenarios, deficiencies in the supervision of an NCA could prevent **market participants from offering services and products in other Member States.** ESMA could force the NCA to revoke an authorisation decision, or the host authorities could suspend services or products.

Even if a market participant is only allowed to provide services and products in other Member States after the NCA has obtained an opinion from ESMA, this means a longer 'time to market' for the products and services it wants to offer.

There is also an overall risk that in a system where NCAs, to a larger extent, rely or depend on ESMA, they may become reluctant to take decisions on their own. This may have a negative impact on and hamper innovation and the competitiveness of EU capital markets.

Furthermore, if an NCA is found to have supervisory deficiencies, NCA actions or omissions are beyond the control of market participants, which should not negatively impact market participants. Deficiencies in

supervision do not automatically mean lack of compliance by market participants subject to NCA supervision, and there is no correlation between deficiencies in supervision and the quality of the products and services offered.

Against this background, FIA recommends protecting and safeguarding market participants, so that they are not unduly impacted by circumstances relating to the supervisor, which are outside their control. Supervisory convergence should prevent the emergence of an overly complex or fragmented allocation of supervisory accountability.

Possible ways of addressing this issue are via the tools offered in Articles 17, 29 and 30 of the ESMA Regulation, e.g. by issuing an opinion to the competent authority or by setting out appropriate follow-up measures in a peer review report, which ESMA could adopt in the form of guidelines and recommendations.

**Drafting recommendation:**

*"In exercising its powers under this Article, the Authority shall ensure that financial market participants are not unduly impacted by actions addressed to, or obligations imposed on, national competent authorities. In particular, no measure taken under this Article shall create direct or indirect obligations for financial market participants beyond those arising from applicable Union law, nor adversely affect them for supervisory shortcomings over which they have no control."*

## 4. Article 17aaa - Suspension of rights to provide services on a cross-border basis

FIA supports a fast, EU wide tool that protects market integrity and creates credible deterrence against bad actors that undercut compliant firms. However, FIA members express concern about possible impacts of the proposals included in Article 17aaa of the ESMA Regulation.

Suspension of cross-border services is a powerful tool that can be compared to a temporary withdrawal of authorisation and appears legally uncertain. We highlight the lack of proportionality in the proposed measures. ESMA is given powers that go beyond the current NCA powers to impose sanctions (but not suspend services). Suspension of cross-border services can cause significant damage to affected market participants and their clients.

Moreover, it is unclear what effect this would have on possible sanctions that may have already been imposed by the NCA. FIA discourages co-legislators from introducing a **double sanctions regime.** We therefore advocate for this provision to be removed or, at a minimum, for the article to clarify that market participants should not be subject to multiple administrative or supervisory sanctions for the same facts (see proposed drafting below).

**Drafting recommendation:**

*"When exercising its powers under this Article, the Authority shall ensure full respect for the principle of ne bis in idem. In particular, no financial market participant shall be subject to multiple administrative or supervisory sanctions or measures for the same facts and the same conduct by both the Authority and national competent authorities. The Authority and the relevant competent authorities shall cooperate closely to avoid duplication of proceedings and to ensure that firms are not adversely affected by overlapping or parallel enforcement action."*

## 5. Article 60 – Appeal Procedure

To accompany any potential transfer of direct supervisory powers to ESMA, it is important to ensure that legal protection standards are fully preserved. The appeal procedure set out in Article 60 of the ESMA Regulation deviates from the fundamental standards of legal protection in key aspects, which weakens the position of the affected parties. A deficit of the appeal procedure is the lack of a mandatorily provided suspensive effect of the appeal. As a result, a challenged supervisory act can generally be enforced despite the legal remedy being filed. This undermines a fundamental principle of effective legal protection. Article 60 of the ESMA Regulation should therefore be amended so that an appeal generally has a suspensive effect.

Furthermore, the determination of the procedural rules is not defined directly in the ESMA Regulation - as the central legal basis. Instead, they are delegated to the responsible Board of Appeal. FIA has concerns that such an external definition of the rules of procedure carries significant disadvantages for transparency and legal certainty.

## 6. Article 9a – No-action letters

**ESMA should have expanded no-action powers beyond the scope currently envisaged in the ESMA Regulation** to more effectively mitigate unintended regulatory frictions and prevent potential adverse impacts arising from the application of specific requirements. Such powers should explicitly enable ESMA to address level-playing-field concerns and issues related to third-country treatment, thereby supporting the smooth functioning and international competitiveness of EU capital markets.

Market participants, NCAs and the ESAs have repeatedly faced challenges due to tight implementation timelines and effective dates. The lack of flexibility has caused significant market and supervisory disruptions.

This mechanism to give direction to NCAs to temporarily de-prioritise supervision and enforcement in a specific area or prescribe steps that would constitute compliance with regulatory requirements is necessary to address gaps arising from the sequencing challenges stemming from the Lamfalussy process, the absence or delay of Level 2 measures, and periods of acute market stress, including geopolitical shocks.

The no-action letter is a tool intended for use in specific, defined cases. However, as currently drafted in

MISP, FIA members believe the proposed ESMA no-action letter powers have a limiting effect.

a. The criteria in paragraph 1 of Article 9a of the ESMA Regulation state that ESMA may only raise an issue and share an Opinion with the Commission on recommended actions in "**urgent and unforeseen circumstances**".

FIA proposes to remove these two criteria in paragraph 1 to enable ESMA to act when faced with acute implementation challenges, which may not always amount to 'urgent and unforeseen circumstances'. Moreover, FIA recommends rephrasing the two additional conditions proposed under MISP in Article 9a into one condition that provides the necessary flexibility for ESMA to react to significant implementation or market challenges.

Article 9a(1) drafting suggestion:

*The Authority shall take the measures referred to in paragraph 2 of this Article when it considers that the application of one of the legislative acts referred to in Article 1(2), or of any delegated or implementing acts based on those legislative acts, is liable to raise significant issues, for one of the following reasons.*

*...*

*point d is added:*

*"the Authority considers that the application of such act would impose disproportionate implementation burden on market participants, and/or would create a competitive disadvantage vis a vis third-country firms"*

b. ESMA shall, among other things, issue an "opinion on any action it considers appropriate, in the form of a new legislative proposal or a proposal for a new delegated or implementing act".

FIA questions why an opinion should always result in a new legislative proposal, delegated act, etc. It may happen that ESMA needs to issue a 'no-action letter' stating that no supervisory measures should be prioritised in a certain area due to specific circumstances. It is important not to limit ESMA's mandate and ability to issue relief in acute circumstances.

c. New grounds for no-action powers

FIA would welcome the introduction of additional grounds for the exercise of no action powers as a pragmatic enhancement to Article 9a. In particular, extending these powers to cover the expiry of transitional measures and significant market developments that give rise to disproportionate regulatory burdens would provide regulators with a necessary degree of flexibility. This would help ensure regulatory continuity, mitigate cliff edge effects and allow for timely responses to evolving market conditions, while preserving the overall objectives of the legislation and safeguarding legal certainty.

However, several points warrant further consideration:

First, while paragraph 4 of Article 9a provides for action without delay, the urgency inherent in these circumstances should be given greater weight. In this context, enhanced transparency would be essential to ensure that financial market participants are kept appropriately informed and provided with a sufficient degree of legal certainty, in a timely manner, as to **whether action is anticipated pending the adoption of a formal relief.**

Second, the triggering conditions should expressly include information received from financial market participants and not be limited solely to input from national competent authorities.

Third, greater clarity would be achieved by providing illustrative examples of what constitutes "significant market developments."

d. Limitations of Article 9a

Notwithstanding these improvements, Article 9a does not address the fundamental constraint that ESMA lacks the legal authority to suspend Level 1 or Level 2 obligations. This limitation, not specific to ESMA and rooted in the Meroni doctrine, continues to prevent ESMA from delivering timely and effective no action relief in circumstances where Level 1 and Level 2 requirements prove unworkable in practice.

Inefficiencies in the EU regulatory framework are often driven by implementation misalignment resulting in **double implementation,** particularly where binding Level 1 obligations take effect before the supporting technical standards are in place. In such cases, firms are forced to operationalise broad legislative requirements in the absence of detailed specifications, only to revisit and adjust those implementations once RTS or ITS are adopted.

This persistent weakness in the Lamfalussy architecture (identified by the Commission nearly two decades ago) continues to generate compliance uncertainty, inconsistent supervisory outcomes across Member States and avoidable operational costs, all of which hinder market integration and the effective functioning of EU capital markets.

Mitigating these effects requires an additional policy instrument. **Granting the Commission a narrowly defined power to temporarily pause, in specific and well defined circumstances, the application of legislative requirements (Level 1)** would allow the management of sequencing issues and exceptional market conditions without altering the underlying legal framework. Such an approach would respect the institutional role of the co legislators while enabling timely, proportionate intervention where rigid application of the rules proves impractical.

By smoothing transitions during complex implementation phases and reducing the risk of abrupt compliance cliff edges, it would contribute to market stability.

Appropriate conditional safeguards may include clear activation criteria, defined time limits, transparent justifications and public disclosure of all decisions. Experience from existing EU financial legislation (EMIR and MiFIR), as well as comparable tools in other jurisdictions, demonstrates that such mechanisms can support orderly market functioning while fully preserving core regulatory objectives.

FIA welcomes the new proposals under Articles 10 and 15 of the ESMA Regulation that empower the Commission to suspend the application of RTS/ITS on its own initiative via a Delegated Act or an Implementing Act. This amendment addresses the application of Level 2 rules, but it **does not address the underlying obligations stemming from the Level 1 legislative text.**

More broadly, FIA recommends legislators translate the Council Conclusions of 12 December 2025[1] into practice by aligning the application of Level 1 and Level 2 measures and providing firms with realistic implementation timelines during trilogue negotiations. Improved sequencing would reduce fragmentation, lower unnecessary compliance costs and strengthen the predictability and credibility of the EU rulebook.

## 7. Articles 10 and 15 – proposed new/expanded Commission Level 2 powers

MISP proposes to re-calibrate the Level 2 framework, increasing the Commission's role relative to ESMA and NCAs. It expressly expands the Commission's powers in relation to Level 2 measures in three ways:

> **(i)** amends the Commission's power to adopt RTS/ITS without an ESMA draft –*amended Article 10(2) and (3) and Article 15(2) and (3);*
>
> **(ii)** broadens the Commission's power to amend ESMA drafts "in substance" – *new Article 10(5) and Article 15(5); and*
>
> **(iii)** establishes new Commission power to disapply Level 2 – *new Article 10(6) and Article 15(6).*

As mentioned above, FIA welcomes the proposed amendments that give the Commission the authority to suspend RTS/ITS to address an immediate threat to investor protection, to the orderly functioning and integrity of financial markets, the stability of the whole or part of the financial system in the Union, or fair competition between firms based in the Union and those based in third countries. We note that the suspension of RTS/ITS would be temporary and limited to a maximum period of 12 months (renewable once). We would also like to reiterate our concern that this tool is only available to the EC with respect to Level 2 rules, so the question of compliance with Level 1 requirements, where Level 2 has been temporarily disapplied, remains unresolved.

FIA outlines several recommendations to improve the current proposed amendments:

> a. **Extend this provision to enable ESMA to recommend initiating such a procedure with the Commission.** The current proposal is limited to allowing the Commission to act on its own initiative only (and may consult ESMA). As ESMA is in constant communication with the market on regulatory and supervisory matters, enshrining in the ESMA Regulation this explicit option for ESMA, in addition to the Commission, would improve clarity and transparency.
>
> b. Amend the proposed requirement (by deleting **'immediate'**) to provide more flexibility for the Commission and ESMA to consider situations that may require action.

**1.** https://data.consilium.europa.eu/doc/document/ST-16463-2025-INIT/en/pdf#:~:text=e)%20Coordination%2C%20timing%20and%20sequencing,take%20effect%20twice%20a%20year.

c. **Shorten Parliament and Council objection period (currently 1 month proposed) in cases meeting the threshold as per Article 10(6).** If the Commission temporarily suspends the application of a Level 2 act based on the urgency of the circumstances, this should be reflected in the period the co-legislators are given to object. Moreover, we note that if the Council or the Parliament objects, the Commission must repeal the RTS, even if it has entered into force. Such a procedure would cause confusion and legal uncertainty among market participants, who would not be able to fully rely on and apply the adopted RTS until the objection period is over.

d. Extend the Commission's suspension powers to Level 1 obligations to effectively address the sequencing issue of application of Level 1 rules even where Level 2 rules do not yet exist or do not apply.

## 8. Article 1 – Establishment and Scope

### FIA Proposal: ESMA's competitiveness mandate as a secondary objective

**Article 1 is amended as follows:**

3) the following point (h) is added:

'(h) supporting market integration in the Union and innovation in the financial sector.'

A secondary objective of ensuring the competitiveness of European markets should be added to the operative part of the ESMA Regulation, alongside the proposed mandates on market integration and innovation in the financial sector. The notion of competitiveness should be considered during the Level 2 rule-drafting process and Level 3 guidance. This does not entail considering competitiveness from an economic policy standpoint, which would remain part of legislators' domain of activity. It also does not cover areas such as authorization, supervision and enforcement. The focus of this new competitiveness mandate should be on the impact technical rules can have on both the EU markets and on firms doing business in the EU vis-a-vis non-EU firms in global markets.

**Proposed drafting - Article 1(5):**

*(h) to contribute, without prejudice to the objectives set out in points (a) to (c), to the competitiveness of Union financial markets and market participants. For the purpose of paragraph 5(h), 'competitiveness' shall mean the ability of Union capital markets and markets participants to operate efficiently and at scale, including at global level, within a coherent, proportionate and predictable regulatory and supervisory framework.*

While **Recital (5) of the proposed reform to the ESMA Regulation** acknowledges competitiveness as part of the broader policy rationale, this reference remains interpretative in nature and does not provide

sufficient operational guidance. For competitiveness to meaningfully inform ESMA's development of Level 2 regulatory and implementing technical standards. Article 1(5) of the Regulation must explicitly reflect it.

The introduction of a new Article 1(5)(h) addressing market integration and innovation is a welcome development. However, as currently framed, it does not ensure that ESMA systematically takes competitiveness into account in respect of well established and globally interconnected markets. In particular, it does not address situations in which EU firms operate in direct competition with non EU peers or rely on access to global liquidity pools. Without an explicit reference, there is a risk that competitiveness considerations will not be adequately factored into regulatory decisions affecting these markets.

This proposal would not undermine ESMA's core objectives of financial stability, investor protection, and market integrity. It would introduce a proportionality and efficiency perspective consistent with the objectives of the reform.

**This proposal does not advocate for assigning ESMA a macroeconomic or growth oriented mandate.** The intention is not to position ESMA as an institution responsible for steering economic growth, competitiveness outcomes, or broader macroeconomic policy, which remain the prerogative of the EU co-legislators and the Commission. Rather, the proposal recognises that ESMA's new competitiveness secondary objective should remain firmly anchored in its rule-drafting process of regulatory and implementing technical standards (Level 2), as well as Level 3 guidance.

The proposed competitiveness mandate is therefore limited to ensuring that ESMA's regulatory actions are proportionate, risk based and cognisant of their impact on the efficiency and global attractiveness of EU capital markets.

The ESMA Regulation should also provide for an accountability framework under which ESMA would set out and assess how it has considered the competitiveness objective when drafting Level 2 and Level 3 measures in an annual report that they would make publicly available.

## IV. EUROPEAN MARKET INFRASTRUCTURE REGULATION - EMIR (648/2012)

As outlined in FIA's whitepaper, Accelerating the velocity of collateral - the potential for tokenisation in cleared derivatives markets, tokenisation could radically transform how derivative markets function.

The daily collection of margin is central to ensuring the safety and soundness of the global cleared derivatives markets. Margin serves as a first line of defense against market losses and customer defaults by serving as a reserve liquidity resource if payments are not made. Participants in the global cleared derivatives markets move cash and securities worth billions of dollars every business day to backstop their trading activity and prevent potential defaults.

Tokenisation holds the potential to radically transform this process. Cash and securities can be represented as digital tokens on a blockchain and transactions involving those assets can be conducted and recorded on a blockchain. This technological advance can benefit the industry by reducing operational friction in the movement of collateral to meet margin requirements. Settlement times have the potential to

drop from days to minutes, unlocking liquidity and the reducing risk and cost associated with traditional settlement processes.

**Considering the clear use cases of DLT in derivative markets, we strongly believe that EMIR should not be overlooked in the DLT-related reform already contained in the MISP.**

While CSDR, for example, is proposed to be updated to allow settlement of cash payments in e-money tokens, no comparable amendment has been made in EMIR for the clearing ecosystem to ensure consistency.

Ensuring that CCPs can accept tokenised collateral and settle transactions using digital versions of cash would directly support the political objectives of the MISP to make EU capital markets more integrated, efficient and competitive. The capability, enabled by DLT, to execute collateral transfers near real-time would allow CCPs to manage liquidity even more efficiently, ensuring that collateral is available precisely and only where and when it is needed. As a result, clearing members of CCPs as well as their clients could manage the delivery and withdrawal of their collateral at the CCP more efficiently. In this context, the Eurosystem has taken an important step by accepting DLT-based assets that fulfil the existing eligibility criteria, as collateral starting in March 2026.

Considering recent EU and international developments, it is imperative that the EU takes prompt action to maintain its leadership and avoid lagging in innovation – a lapse that could significantly diminish the appeal and competitiveness of the EU clearing ecosystem in the long term. The worldwide adoption of DLT-based collateral has arrived at a critical juncture. In the US, the CFTC has issued guidance and no-action letters that allow an increased use of tokenised assets and stablecoins. The Bank of England is considering similar measures in the UK. To ensure that the EU clearing ecosystem keeps pace with international competitors, regulatory amendments to the collateral rules applicable to CCPs are necessary in order to support CCPs in accepting DLT-based collateral. This would build upon the meaningful regulatory progress in this area, with the amendments to the Settlement Finality Regulations (SFR) providing legal finality for DLT based systems, changes to CSDR that enable DLT based settlement and DLT compatible services by CSDs, as well as MiFID amendments which classify tokenised securities as financial instruments. Such EMIR reform would ensure intra-EU legal consistency, and it would also leverage ongoing regulatory and technological advancements, including the MiCA regulation and the development of the digital euro.

In particular, **CCPs should be able to treat wholesale Central Bank Digital Currency (wCBDC), including the digital Euro currently being developed by the ECB, the same way they treat non-digital central bank money (cash).** When accepting a MiFID II financial instrument such as a money-market instrument or a transferable security, or cash as collateral, which is issued based on DLT, the risks of that financial instrument should be assessed based on the existing framework. With the adoption of the MiCA Regulation in 2023, the EU has already set the standards for new types of instruments, which a CCP should be able to accept as collateral if respective conditions are fulfilled. While some of these use-cases could be clarified by ESMA via an update of the RTS 153/2013, it would be preferable that amendments are made in EMIR to support legal clarity and certainty. Particularly, **the amendments applied to CSDR under the MISP, which allow CSDs to use DLT-instruments for the cash leg of a transaction, should also be introduced to EMIR.**

Changes to regulation can play a role in facilitating the uptake of tokenised collateral. There may also be other relevant considerations that are not regulatory, such as technology risks. As with all asset classes, it is important that both firms and supervisors understand the risks and challenges.

From a risk perspective, there are a few areas that will benefit from regulatory focus:

- **Technology risk,** including smart contract risk, which is largely operational in nature.
- **Liquidity risk of tokenised assets under stress**, including confidence that tokenisation mechanics function as intended in stressed conditions and, where non-traditional assets are used, that appropriate haircuts are applied.
- **Custody risk**, in case settlement systems are used that are not operated by CSDs or financial institutions, which extends beyond key management to include node security, operational resilience, and effective recovery procedures.

It is worth considering whether acceptance of tokenised collateral should be framed around the purpose and risk profile of the obligation being met (i.e., initial margin, variation margin, default fund, excess margin, etc.), rather than for all use cases. Different obligations impose different requirements in terms of immediacy of liquidity, stress performance and it may therefore be appropriate for the permissibility, conditions and safeguards around tokenised collateral to vary accordingly.

Any changes to EMIR that introduce non traditional operating models should place a strong emphasis on providing clearing members and the wider clearing ecosystem with sufficient, timely information to allow them to form views and processes in reaction to these technological developments.

**Recommendations:**

FIA recommends ensuring that changes proposed in MISP to other regulations are consistently reflected in EMIR. As with CSDR, EMIR should also be modernised in respect to the use of DLT.

1. In CSDR, the MISP is adding the following definition for *'central bank money' :*

*"a liability of a central bank that is in the form of deposits held at the central bank, including in tokenised form, and that can be used for settlement purposes."*

We believe this definition should also be added to EMIR Article 2 for consistency and that there is clarity that the future wholesale digital Euro issued by the ECB may be accepted by EU CCPs.

2. MiFID II already has a technologically agnostic definition of financial instruments. Legal certainty would be improved by including the following definition in EMIR Article 2:

*"'financial instrument' means a financial instrument as defined in Article 4(1), point (15), of Directive 2014/65/EU."*

3. Changes proposed within MISP enable CSDs to use e-money tokens for settlement. Consistency with EMIR could be created by the following amendment, referring to MiCA, **(bold)** to Article 50 Paragraph 1:

*"A CCP shall, where practical and available, use central bank money to settle its transactions. Where central bank money is not used, steps shall be taken to strictly limit cash settlement risks.* ***For the purposes of the second sentence of paragraph 1, e-money tokens within the meaning of Regulation (EU) 2023/1114 may be used by the CCP to settle its transactions."***

Beyond this, the existing EMIR framework would continue to apply, in particular the rules on settlement, margin, and collateral. Crucially, there is no change to the counterparties with which the CCP interacts (settlement would still take place via a CSD or an authorised financial institution), nor to the nature of the instruments involved (a tokenised bond remains a bond and must continue to meet all applicable collateral eligibility criteria, including credit quality and secondary market liquidity). The only new element is the extension of settlement to e-money tokens.

FIA highlights this follows the **first positive step** that the ECB took when it announced that the Eurosystem will accept marketable assets issued in CSD using DLT-based serviced as eligible collateral for Eurosystem credit operations in March this year. While this is step in the right direction, FIA also welcomes the critical additional work launched by the ECB to explore how and under what criteria assets issued using DLT and **not represented in eligible securities settlement systems** could become eligible and be mobilised as Eurosystem collateral in the future knowing this is a key condition to embrace the full potential of DLT[2]:

*Like other marketable assets [issued in CSDs using DLT] , they must comply with Eurosystem collateral eligibility criteria and collateral management requirements. These criteria include availability for settlement in eligible securities settlement systems, which must be compliant with the CSD Regulation and reachable via TARGET2-Securities (T2S).* ***These assets will be mobilised as collateral in line with the Eurosystem's existing collateral management practices, like any other marketable asset.***

# V. SETTLEMENT FINALITY REGULATION (SFR)

## 1. General comments:

We welcome the Commission's proposal to convert SFD into a regulation as this should reduce national divergence and forum-shopping risks around insolvency and settlement finality. However, we have some specific concerns that we have set out below for consideration. As an overarching comment, we believe that SFR should not provide less protection than what the national regimes provide for today.

**2.** ECB paves way for acceptance of DLT-based assets as eligible Eurosystem collateral

## 2. Specific comments:

### a. Scope of insolvency carve-outs for third-country systems

It is important that the same insolvency protections apply to EU and third-country systems. To that end, we note that the draft SFR inconsistently applies insolvency protections to third-country ('registered') systems. For example, Articles 17, 19, 23, 24 and 25 explicitly apply to third-country systems. However, Articles 18(1) (moment of entry) and 21(1) (final settlement) do not, despite being fundamental to settlement finality. Article 20 (irrevocability) also omits third-country systems, albeit as a compliance obligation rather than a pure insolvency carve-out.

This inconsistency is noteworthy because Article 14(d) *requires* third-country systems to define moments of entry, irrevocability, and final settlement by cross reference to Articles 18, 20 and 21. A possible consequence of the current drafting is therefore to impose compliance burdens on third country CCPs to comply with the SFR framework, without providing any related benefits in terms of finality. Article 1(2) also implies a limited treatment of third-country systems and system operators, which is inconsistent with the operative provisions of Articles 17, 19, 23, 24 and 25, all of which are stated to protect third-country systems.

We note that system operators are among those persons who would most need to rely upon the insolvency carve-outs in the current Settlement Finality Directive (SFD) / proposed SFR in order for this to be effective and to promote financial stability. We are concerned that the omission of appropriate references to third-country systems in articles 1(2), 18, 20 and 21 could incentivise insolvency practitioners appointed over EU participants to ignore or challenge transfer orders processed through third-country systems, take actions seeking clawback from innocent participants or sue system operators in respect of completed or supposedly irrevocable settlements or challenge the use of margin, default fund or other collateral by system operators.

Note that article 48(4) of EMIR (Regulation 648/2012) requires CCPs to verify the enforceability of their default rules. Article 5 of Regulation 153/2013 then requires CCPs to take various compliance steps in this regard including to identify and analyse potential conflicts of law issues and analyse the soundness of their rules and contractual arrangements. These provisions apply to third-country recognised CCPs pursuant to article 25 of EMIR, either on a direct applicability (tier 2) or comparability (tier 1) basis. Similarly, article 43 of CSDR (Regulation 909/2014) requires that a CSD shall design its rules, procedures and contracts so that they are enforceable in all relevant jurisdictions, including in the case of the default of a participant; and a CSD conducting business in different jurisdictions shall take all reasonable steps to identify and mitigate the risks arising from potential conflicts of law across jurisdictions.

- On an insolvency, the law of the place of establishment of the insolvent entity governs the hierarchy of creditors and post-insolvency validity of transactions, not the system's applicable law.
- For this reason, CCPs and CSDs must obtain legal opinions on the enforceability of their rules, including on an insolvency, under the jurisdiction of each clearing member or direct participant. Third-country CCPs and CSDs seek such legal opinions in respect of EU clearing members and need 'clean' opinions in order to provide access.

- It is, therefore, crucial that EU laws support third-country systems such as CCPs and CSDs having finality to their transfer orders, as a matter of the insolvency laws of member states.

Article 1(2) particularly concerns FIA because as an initial scoping provision, it implies that the Regulation only applies to protect EU participants (so, by implication, not third-country system operators) from insolvency law challenges. This seems to be either in error or an understatement of other provisions of the draft regulation. For example, Article 1(2) is inconsistent with the operative provisions of articles 17, 19, 23, 24 and 25 of the draft SFR, which apply expressly to third-country system operators and would appear to protect them from insolvency law challenges.

The provisions that will newly and expressly apply to third-country systems as a matter of EU law are important and welcomed as one of the most important changes in the proposed SFR. These are as follows: Article 17 – enforceability of transfer orders and close out netting; Article 19 – allowing the system operator to apply the margin and default fund; Article 22 – moment of opening of insolvency proceedings; Article 23 – no retroactive events; Article 24 – law governing rights of participants; Article 25(1) – enforceability of collateral security. It is odd, and indeed inexplicable, that Articles 18(1) (moment of entry of transfer order) and 21(1) (finality of transfer orders) are omitted and not so applied to third-country systems.

We understand the Commission may have some concerns about the territorial scope of the draft SFR, and it may be concerned that some third-country insolvency laws, financial regulations or system rules do not have the same level of specificity as regards the effects of the moments of entry or irrevocability of transfer orders as under the SFD/SFR. However, this would be misplaced as a justification for not going further:

- As above, article 14(d) would require third-country system rules to address such matters (although we share comments on that article below).

- Such a concern could not be relevant to article 21, which already refers to the relevant applicable law, so is sufficiently qualified to cater for third-country systems and the jurisdictions in which they operate.

As a practical matter and for example, all UK systems used to operate under SFD and the UK adopted the SFD as law after Brexit. Such systems continue to operate under the same substantive law as in the current SFD and so all these systems have rules on the point of entry and irrevocability of transfer orders. Even third-country systems based in jurisdictions without a common history of similar legislation, e.g. the US, include SFD-compatible rules. ICE Clear Credit offers an example of a U.S. system with existing EU participants with SFD-compatible and SFD-specific rules on transfer orders and their entry into, irrevocability and settlement.

**Recommendations:**

FIA recommends amending Articles 1(2), 18(1), 20(1) and 21(1) to explicitly extend these protections to registered third-country systems and their EU established participants.

We suggest the following drafting amendments:

*Article 1(2). This Regulation also lays down requirements for the registration of third-country systems*

*in one or several Member States in order to enable ~~institutions~~ their participants established in those Member States~~, which participate in those third-country systems~~, and those third-country systems when dealing with those participants to benefit from the ~~extension of the~~ insolvency protection provided for in Articles 17, 18(1), 19, 21(1), 22(1), 23, 24 and 25(1) ~~to transfer orders entered into in such third-country systems~~.*

*In the case of an insolvency of a person participating in ~~member of~~ such a system, the insolvency protection provided for in Articles 17, 18(1), 19, 21(1), 22(1), 23, 24 and 25(1) shall apply to transfer orders entered by that member and these shall be protected where both the following conditions are met:*

*(a) the system is ~~member participates in~~ a registered system as defined in Article 2(1), point (9);*

*(b) the person is a participant ~~member is an institution~~ as defined in Article 2(1), point (15)(b) ~~(10)(a) (i) to (iv) and (b)~~, established in the Member State which has registered that system under Article 12.*

*Article 18(1). The moment of entry of a transfer order into a designated system shall be determined by the common rules and standardised procedures of that system. If the common rules and standardised procedures of a registered system make provision for the moment of entry of a transfer order, the moment of entry of a transfer order into that registered system shall be determined by the those rules and procedures for the participants in that registered system established in Member States where the third-country system is registered in accordance with the law governing that registered system.*

*Article 20(1). Each ~~designated~~ system shall determine the specific moment where, in its system, a participant or a third party cannot revoke a transfer order. Such determination shall take account of the moment when a transfer order that entered into the system was confirmed by the system and where the processing of the order could not be reversed.*

*Article 21(1). Settlement shall be final when the transfer of funds, financial instruments or other instruments is irrevocable and unconditional or the discharge of ~~the~~ obligations by the system or a participant in accordance with the terms of a transaction ~~of the parties to a transaction~~ is completed in an unconditional and irrevocable manner as determined by the common rules and standardised procedures of each a designated system or a registered system in relation to participants established in Member States where the third-country system is registered whose common rules and standardised procedures make provision for the finality of transfer orders~~, in accordance with the applicable law for transfer of ownership and other rights.~~ A designated system that is based on DLT shall implement mechanisms guaranteeing deterministic and legally enforceable finality moments.*

### b. Definition of 'participant'

The definition of 'participant' is problematic in two different ways.

First, with respect to EU (designated) systems, the 'other entity' category is open-ended and vague, potentially allowing any entity to become a participant without being directly authorised by a financial

services regulatory body. This is inconsistent with SFD policy, which has historically limited participation largely to authorised or approved entities and is potentially at odds with the detailed provisions on indirect participants in Article 7. That being said, *'a client of a clearing member or of a CCP authorised pursuant to Article 17 of Regulation (EU) No 648/2012'* should be added to the list of eligible entities in Article 2(1)(15)(a) SFR, which is a defined term under Article 2(15) EMIR. This would ensure better protection of trilateral clearing models under which a CCP enters into a direct contractual relationship with the clearing member and its client.

Second, regarding third-country (registered) systems, the draft definition focuses narrowly on 'members', which somewhat depends upon how a registered system defines its participant levels. Critical actors, such as system operators, settlement banks, delivery facilities, interoperating market infrastructure and indirect participants risk being excluded from scope. This departs from the SFD position, including under most member states' implementation of Recital 7, under which system operators and other classes of participants (such as banks in the payment systems of CCPs and CSDs) are also protected.

Article 7(1) of the draft SFR addresses indirect participants (at least for EU designated systems; its application to third-country systems is ambiguous), but the definition of 'participant' does not address either case, creating ambiguity—especially for third-country systems.

We would propose aligning the third-country definition of "participant" with the EU definition, covering system operators, authorised entities, approved "other" entities, and approved indirect participants.

Further, it would be helpful if Article 1(2) was simplified by moving participant related qualifications into the definition itself, ensuring consistency throughout the Regulation.

**c. Other matters related to third-country systems**

Article 14 sets out broad conditions for the registration of third-country systems including that the system's governing law "upholds the principles of settlement finality". We would appreciate more clarity on how these conditions will be assessed, given the consequences of not meeting them. Some of these conditions may be difficult to meet under the third-country insolvency laws of system operators, some of which do not address participant insolvency in the same way as the EU's finality-based approach, while some do. However, clearly some system operators would meet these requirements where their laws are closely aligned to the SFD/SFR. As a result, we advise greater flexibility.

Principle 8 of the Principles for Financial Market Infrastructure (PFMI) provides that an FMI: "should provide clear and certain final settlement, at a minimum by the end of the value date. Where necessary or preferable, an FMI should provide final settlement intraday or in real time."

In addition, under key considerations, Principle 8 states that: "An FMI's rules and procedures should clearly define the point at which settlement is final" ; and "An FMI should clearly define the point after which unsettled payments, transfer instructions, or other obligations may not be revoked by a participant."

Point (f) of Article 12 SFR already makes it a condition of registration that a third-country system complies in all material respects with the PFMI, including Principle 8.

Separately, the SFD interacts with many other pieces of EU law. It would be helpful to clarify that the

exclusions and protections currently applying to EU-designated systems under the Bank Recovery and Resolution Directive, Single Resolution Mechanism Regulation, EU Insolvency Regulation and Credit Institutions Winding-Up Directive will also extend to third-country systems registered under the SFR. This would avoid legal uncertainty and ensure consistent and coherent treatment.

### d. Definition of 'collateral'

We greatly welcome the express reference to the margin and default funds of CCPs within the SFR, being a protected class of margin especially under Article 19(1). Issues as to the scope of collateral definitions are problematic in practice, as the Financial Markets Law Committee (FMLC) detailed in a paper[3] on this topic in relation to the SFD.

There is, however, still an internal inconsistency and mismatch between the general definitions and the scoping provisions on collateral in Articles 1(3), 2(1)(27), 25. They fail to mention margin or a default fund, nor does it mention Article 19(1), which explicitly includes CCP margin and default fund contributions.

This could create uncertainty as to the scope of provisions of collateral other than those in Article 19(1). CCP margin and default funds secure exposures arising from open cleared contracts, not just "transfer orders". Moreover, a default fund is not collateral in the traditional bilateral sense, as it covers mutualised losses, increasing legal ambiguity. The FMLC noted both of these points and we urge the co-legislators to plug this gap in the SFR.

Without explicit inclusion in the relevant definition within the SFR, it is unclear whether all CCP margin and default fund assets benefit from all the relevant settlement finality and insolvency protections and related recitals (as we believe is intended) or just those in Article 19 (which would not make substantive sense).

**Recommendations:**

FIA proposes amending the definitions so as to expressly include CCP margin and default funds in the scope provision (Article 1(3)) and in the definition of "collateral" (Article 2(1)(27)), to align these provisions with Article 19 and remove residual uncertainty.

This would be done as follows:

*Definition: 2(1)(27) 'collateral' and 'collateral security' ~~means~~ mean all realisable assets, including, without limitation, those financial instruments and funds, including those issued or recorded using distributed ledger technology, including in tokenised form, and financial collateral referred to in Article 1(4), point (a), of Directive 2002/47/EC, provided under a pledge, a title transfer arrangement, a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with or related to a system, or provided to central banks of the Member*

**3.** See https://fmlc.org/wp-content/uploads/2024/11/FMLC-Paper-Treatment-of-Collateral-under-SFRs.pdf. The FMLC paper discussed a legal uncertainty issue with collateral under the SFD and related UK regulations. It is drafted as regards the UK SFRs but all the same issues arose for "collateral" and collateral security charges under the EU SFD. See also FMLC letter dated 7 May 2021. FMLC-Response-to-SFD-Review.pdf

*States or to the European Central Bank and including any default fund held by a CCP authorised under Article 14 of Regulation (EU) No 648/2012 in accordance with Article 42 of that Regulation and margins as referred to in Article 41 of that Regulation and any comparable default fund held by or margins provided to a third-country CCP;*

A similar change should be made in Article 1(3). The references to default fund and margin in Article 19 would then no longer be needed.

As a more technical note, the defined term has been changed from "collateral security" to "collateral". The term collateral security is, however, still used (See in particular Article 25).

**e. Definition of 'netting'**

The definition of "netting" in point (24) is narrow and – strictly speaking – does not include a set-off (where several unidirectional claims can remain, which together constitute the net sum). Regarding the term "close-out netting provisions", Article 17(2) SFR makes reference to Article 2(1), point (n), of Directive 2002/47/EC, which involves a broader understanding of the term "netting" (determination of a net sum "through the operation of netting or set-off or otherwise"). It is important that a broad scope of protection under Article 7 is ensured.

**f. Recognition of Clearing Systems as 'system'**

The explicit recognition of a "clearing system" as a "system" (Article 2 (1), point (1) SFR) and the intention to broaden the SFR regarding the scope of cleared instruments is highly welcome. However, the specific articles of the SFR still focus too much on security settlement systems and payment systems. We urge a holistic approach that accommodates a wide range of established clearing systems is warranted.

**g. Definition of 'transfer order'**

The definition of "transfer order" under Point (i) of Article 2 SFD contained two distinct alternatives:

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*"any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank, a central counterparty or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system."*

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This definition has been changed in Article 2(1), point (20) (b) SFR. By deleting ",or any instruction", the new definition merges both alternatives into one, further tailoring the definition towards payment systems. The wording of the SFD could accommodate an even wider range of instructions, if they result in a payment obligation. That change should be reversed to avoid ambiguity in relation to the clearing of exchange traded products (see the further recommendations below). Furthermore, we suggest an explicit recognition that CCPs clear transactions and that the payment and delivery obligations result directly from these transactions.

### h. Definition of 'client' and 'indirect participant'

*First*, the definition of "indirect participant" in Article 2(1), point (17) SFR should be broadened to cover entities listed in Article 2(1), point (15)(a)(vii) and not only points (i) to (v). Article 2(1), point (15) (a) (vii) extends the scope of eligible participants to "any other entity". If a non-institution can be a participant, it should be eligible as an indirect participant. It should also apply to third-country systems, who likely will need to interact with indirect participants and should not face insolvency law challenges when they do so.

*Second*, we welcome the explicit inclusion of the term 'client' in Article 2(1)(18) of the SFR.

*Third*, it should be clarified that indirect participants and clients may enter transfer orders directly into the system. It is not required that the participant serves as a conduit, i.e. passes on the transfer orders (the latter is strongly suggested in the German version of Article 7 (3)). The decisive factor is that these transfer orders lead to an obligation of the participant, according to the system rules (see definition of transfer order).

A different perspective could have unintended consequences of removing the clearing of exchange-traded transactions from the protection of the SFR, under some models. Exchange transactions are concluded by matching orders according to the rules of the market. In an open offer clearing model, a contract with the CCP is formed directly upon matching of orders at the market. The rulebook of the CCP, and thus the rulebook of the system operated by the CCP, directly refers to this matching of orders. The exchange orders constitute transfer orders within the meaning of the system rules, and they become irrevocable upon matching. In other clearing models, most notably the novation clearing model, a contract may arise as a result of trading and would subsequently be novated or registered at a CCP. In such a situation, the rulebook of a CCP, and thus the rulebook of the system operator, may provide that there is a transfer order as regards the novation of the exchange contract into a cleared contract, at which point the transfer order becomes irrevocable upon matching.

The participant in the system is typically the clearing member within the meaning of EMIR. The trading participant on the exchange who enters the order into the system can also be the clearing member itself but is usually a client of the clearing member known to the CCP, i.e. an indirect participant. In a principal-to-principal clearing model, the matching of orders creates a chain of transactions: one between the clearing member and the CCP, and a mirrored transaction between the clearing member and its customer. The trading participant's order therefore results in an obligation in the relationship between the clearing member and the CCP, and thus between direct and indirect participants in the system. With increasing regulatory fragmentation, chains of participants are increasingly commonplace, especially among affiliates and especially for purposes of non-EU infrastructure connecting with EU users.

There are other models for open offer not involving such transfer orders, but chains of transactions will always be established. In any case, it would be beneficial, especially to EU users that are indirect participants seeking to reassure their clients as to insolvency-related risks, for them to be included within the scope of the SFRs.

**Recommendations:**

Article 2(1)(17): *'indirect participant' means any of the entities listed in point (15)(a)(i) to (v) and (vii) that has a contractual relationship with a participant in a designated system executing transfer orders*

*which enables the entity to enter transfer orders into the designated system or become bound by transfer orders or pass transfer orders through the designated system;*

Article 2(1)(18): *'client' means any undertaking with a contractual relationship with a participant, including an indirect participant, which enables that undertaking to enter transfer orders into the system or become bound by transfer orders or pass transfer orders through the designated system or otherwise settle, clear and execute its transfer orders through the designated system via such participant;*

Article 7(3): *A participant that enables its clients to access a designated system by transmitting instructions for transfer orders through that system, or allowing the client to enter transfer orders into the system or become bound by transfer orders or, shall inform the system operator of that system thereof. That participant shall have the necessary additional financial resources and operational capacity to perform that activity and shall provide the system operator with the information necessary to identify, monitor and manage relevant concentrations of risk relating to the provision of services to clients.*

### i. Admission of indirect participants

The SFR should allow for the recognition of indirect participants as eligible system participants, and Member States should not determine their admission.

**Recommendations** for Article 7(1) last sub-paragraph:

~~A Member State may, in exceptional circumstances and for the purposes of this Regulation,~~ A system operator may admit an indirect participant as participant where the indirect participant is known to the system operator and the participants of the system, and where that is warranted on the grounds of systemic risk. That possibility shall, however, not limit the responsibility of the participant ~~through which the indirect participant passes transfer orders to the designated system~~ with whom the indirect participant has a contractual relationship which enables the indirect participant to pass transfer orders through the designated system.

### j. Articles 18, 20 and 21

The determination of the point in time for the irrevocability of transfer orders should be left entirely to the rules of the system to avoid any potential conflict with, or ambiguity in relation to, established market practice. The additional criteria of entry, registration and confirmation by the system (Article 18 (1) and 20 (1), respectively) may seem appropriate for many areas of application, but not for all. This applies, in particular, to Open Offer Clearing Models where numerous different structures exist and where irrevocability may be linked to the point in time that the orders are matched on the market. For that reason, we suggest reconsidering the granting of regulatory powers to ESMA and EBA in Article 21(3) and (4).

### k. Non-financial instruments and non-securities

**Article 3:** With regard to non-financial instruments, it is crucial to ensure alignment with EMIR. EMIR 3.0 has clarified that the authorisation of a CCP can extend to the clearing of non-financial instruments (see Articles 14(3), 15(1) and 17(4) of EMIR). EMIR does not provide for a restriction that a CCP may only offer the clearing of non-financial instruments "to a limited extent." This restriction in Article 3 should be deleted. Furthermore, it should be ensured that the SFR, regarding the scope of inclusion of non-financial instruments, automatically follows the scope of the CCP's authorisation under EMIR. When a CCP clears non-financial instruments, protection under the SFR would appear to be always "warranted on grounds of systemic risk" which is the decisive element under Article 3(1) second subparagraph already. That is of particular relevance for CCPs clearing non-securities transactions, such as commodity derivatives settled by the delivery of foodstuffs, electricity, oil or energy.

Although certain protections may arise for open derivatives under SFD, there is also currently a major lacuna as regards deliveries under SFD. The SFD only covers deliveries of securities upon expiry, e.g. cleared equity derivatives, as well as cash legs for all contracts and cash legs for cash-settled products. The SFD/SFR does not protect the finality of deliveries of commodities via CCPs under commodity derivatives. However, there is no reason why a participant or indirect participant taking delivery of wheat, electricity, gas, sugar, voluntary carbon allowances, coffee, etc. via a CCP should not be equally immune to insolvency law challenges as those taking delivery of products in the current scope (which are basically limited to the payment of cash, shares, emission allowances and bond deliveries). The definition of transfer order should be expanded to cover all deliveries via CCPs that are in-scope of their EMIR authorisation.

**Article 19:** Reference to non-financial instruments should also be included in Article 19 to align with the intended wider scope of the SFR and EMIR 3.0.

**Definition of 'settlement' (Article 2(1), point (3)):** The term "settlement" is defined in Article 2(1), point (3) SFR by reference Regulation (EU) No. 909/2014 and, thus, limited to the settlement of securities transactions. The SFR does not use the term settlement in that limited sense, in line with its intended wider scope (see the defined terms "transfer order" and "settlement account" in Article 2(1), points (20) and (25)).

### l. Monitoring of participants' compliance

FIA suggests deleting the requirement on system operators to monitor compliance by system members with participation requirements (Article 7 SFR). It would lead to a double regulation of regulated system operators, which are already subject to corresponding, more specific requirements (e.g. under Article 37 EMIR).

### m. Transitional Provisions

The current text envisages that EU and third-country systems currently designated or registered will re-apply under the SFR. This may be unnecessarily burdensome for both systems and authorities. An alternative would be to introduce a grandfathering provision for such systems to bring them automatically into the SFR. This would be more straightforward, proportionate and aligned with the EU's simplification agenda.

If the requirement to re-apply is retained, the transitional period should be no less than five years (as set out in Article 28 of the draft SFR), in order to avoid uncertainty for systems and participants.


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