

Visa Europe Limited (“VEL”) Supplementary Response to the European Commission’s Consultation on the Directive on Settlement Finality in Payment and Securities Settlement Systems (Directive 98/26/EC)

About the EU Settlement Finality Directive

Across the European Union, laws determining when a transfer order is considered irrevocable (i.e. it must be settled and cannot be revoked) in event of participant insolvency are determined nationally. As such there can be fragmentation in approach between Member States, which may disrupt the smooth functioning of payment settlement systems operating across the EU internal market and in turn have a detrimental effect on overall financial stability.

Helpfully the EU SFD goes some way to coordinate the agreed point of irrevocability across the EU internal market for designated settlement systems. To facilitate this, the SFD provides Member States with common definitions of “system”, “participant” and “insolvency proceedings” which help provide a common understanding of approach across the EU.

EU settlement systems who have been designated under SFD by their relevant national competent authority, and notified to the European Commission, can rely on their national designation being recognised by other Member States and enjoy certain protections to reduce instability and legal uncertainty when operating across the EU internal market. This helps lower the overall risk resulting from participant insolvency across the EU internal market, and not just that one Member State in turn encouraging greater cross-border transfer order activity.

In our view, extending the benefits of stability and legal certainty to as many participants and systems operating in the EU internal market, including non-EU settlement systems, would be a welcome inclusion under the SFD review.

Financial stability has been enhanced through the introduction of SFD designation for EU settlement systems

In practical terms, a settlement systems’ designation under SFD by an EU Member State provides a degree of certainty when operating domestically and cross-border in the EU internal market.

When an EU settlement system has been designated by Member State authorities and notified to the European Commission, market operators can rely on the legal quality of the providers of services and the legal framework in which they will operate. Foreign courts and authorities must respect the protection granted under the SFD to those systems which helps provide financial stability.

Designation ensures that as soon as a payment transfer order or a securities settlement order has been entered into the system, it is protected against third party claims, even in the event of a bankruptcy of one or more participants in the system.

This protective effect occurs if a transfer order has been entered into a system before opening of insolvency proceedings, or, on the same day after the opening of such proceedings, provided the concerned parties can prove that they were not aware or should not have been aware of those proceedings.

Further to this protection, no law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the opening of insolvency proceedings shall lead to the unwinding of a netting of transfer orders. The crucial moment of entry of a transfer order is determined by the rules of each system.

Furthermore, the SFD requires the disapplication of all retroactive effects of insolvency proceedings on transfer orders or netting.

Financial stability can be further enhanced by recognizing non-EU settlement systems operating in the EU internal market

The current regime for non-EU payment settlement systems operating across the EU internal market is less robust. EU Member States may recognise the designation of non-EU payment systems, but this only applies nationally rather than across the EU. This therefore leaves much of the financial stability risks associated with fragmentation unaddressed across the EU internal market.

In our view, the review of the EU Settlement Finality Directive offers an opportunity to strengthen the approach taken to non-EU settlement systems across the EU internal market. We would welcome measures to widen and facilitate EU Member States' recognition of non-EU designated settlement systems against common minimum standards, including payment systems, and to facilitate their recognition within the EU internal market as a whole.

To achieve this we suggest two policy actions, listed in order of preference:

1. Introduce provisions to allow the European Commission to assess and declare non-EU settlement finality designation 'equivalent' to EU SFD settlement finality designation
2. Promote Member States' assessment and recognition of non-EU settlement systems against SFD standards

Action 1: Introduce provisions to allow the European Commission to assess and declare non-EU settlement finality designation 'equivalent' to EU SFD settlement finality designation

Any revised SFD should include provisions to allow the European Commission to consider non-EU settlement finality designation procedures as equivalent to those set out in the EU SFD.

The Commission's assessment should be outcome-based, be based on objective criteria, and applied broadly, to encourage the eligibility of all settlement systems under SFD, to provide settlement and legal certainty which in turn underpins the smooth functioning of securities and payments markets. To avoid undue delay in extending SFD protection to non-EU systems, we would encourage equivalence assessments to be conducted with the relevant expertise, set out against a clear process and timeline.

We propose a series of common minimum standards which can serve as a benchmark for EU and non-EU settlement finality regimes. These common standards should (a) relate to the recognition of settlement systems which have received settlement finality designation in third countries, and (b) reflect and embed principles and/or requirements in other EU legislation international standards, such that (i) settlement systems have appropriate and robust risk assessments in place for direct settlement; (ii) settlement systems must have the ability to determine the point of irrevocability beyond which settlement may not be countermanded; and (iii) that participants are allowed access settlement systems where they have been assessed by the system as having met the relevant risk assessment criteria.

If a non-EU process for granting settlement finality protection to settlement systems is considered equivalent to the EU SFD designation procedure, any non-EU settlement system which the non-EU process considers worthy of protection should also be notified and published on the European Commission's list of SFD systems. This should grant the same SFD protection and certainty to non-EU

settlement systems operating across the EU if designated under an “equivalent” regime to the EU SFD, as to those designated EU settlement systems.

Action 2: Promote Member States’ assessment and recognition of non-EU settlement systems against SFD standards

The revised Settlement Finality Directive should set common minimum standards to be implemented at national level, respecting the Treaty principles of competence and conferral (as set out in Action 1).

Member States should be encouraged or mandated to have in place a process to assess and recognise non-EU settlement systems, like national settlement systems, against these common minimum standards when operating in their markets.

This common minimum standards approach would allow for a degree of harmonisation whilst still granting national supervisors and settlement systems important flexibility to determine how exactly these standards are to be implemented and enacted in practice. This flexibility is important to suit the different needs, risks and sizes of different settlement systems operating in Europe.

To encourage the number of Member States recognising non-EU settlement systems against the SFD common minimum standards, the European Commission should act as a central hub to record and publish those non-EU systems which have been recognised by a Member State. This would allow a clear repository of non-EU settlement systems who have been assessed against the SFD common minimum standards, so other Member State authorities can apply simplified or less onerous assessments to that same non-EU settlement system if they want to.

About Visa Europe (System Operator)

Visa Europe Limited (“VEL”) is the operator of the Visa payment system. The Visa payment system (“Visa”) facilitates global commerce through the transfer of value and information among a global network of stakeholders, Merchants, financial institutions, businesses, strategic partners, and government entities. Visa enables Authorization, Clearing, and Settlement of payment transactions and provides its Members with a wide range of products, platforms, and value-added services.

In June 2020, Visa Europe Limited successfully applied for the designation of “Visa Europe” under the UK’s Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (“SFR”). The SFR entered law as part of the UK’s transposition of the EU Directive on settlement finality in payment and securities settlement systems 1998 (“EU Settlement Finality”), noting that the UK was an EU Member State until 31 January 2020. Designation is awarded and enforced by the Bank of England (BoE), the lead supervisor of the Visa payment system.