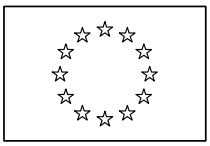
SFD FCD



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.03.2008
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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims.

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Grounds for and objectives of the proposal

The main purpose of the proposal is to bring the Directive on settlement finality in payment and securities settlement systems (SFD) and the Directive on financial collateral arrangements (FCD) into line with the latest market and regulatory developments. Firstly, this is done by extending the protection of the SFD to night-time settlement and to settlement between linked systems, since pursuant to Directive 2004/39/EC on markets in financial instruments[1] (hereinafter referred to as MiFID) and the European Code of conduct for clearing and settlement (hereinafter referred to as "the Code") systems are expected to become increasingly linked and interoperable. Secondly, this is done by broadening the scope of the protection provided by both directives to include new types of assets (i.e. credit claims eligible for the collateralisation of central bank credit operations) in order to facilitate their use throughout the Community. Lastly, this proposal seeks to introduce a number of simplifications and clarifications to facilitate the application of the FCD and SFD.

The recent, and still ongoing, financial turmoil provided an additional argument in favour of the proposal, since the solutions that it puts forward would make an important contribution to strengthening the tools for managing instability and turmoil in financial markets. For example, the establishment of a harmonised legal framework for the use of credit claims as collateral in cross-border transactions would help enhancing market liquidity, which has been severely hit in recent months. Furthermore, ensuring the proper functioning of settlement systems in rapidly evolving markets is indispensable for the stability of financial markets, even more so in times of market turmoil.

1.2. General context

In recent years new types of assets, such as bank loans or "credit claims", have become an important source for the continuously growing collateral operations on financial markets. In August 2004, the European Central Bank Governing Council decided to include credit claims as an eligible type of collateral for Eurosystem credit operations as of 1 January 2007. However, some Member States, i.e. France, Germany, Spain, Austria and the Netherlands already accepted credit claims, although operating under different legal regimes. In order to create a level playing field among central banks and to stimulate the cross-border use of collateral, the relevant legal framework[2] needs to be harmonised.

Another important development in financial markets is the increasing number of linkages between systems. This trend is expected to continue and possibly even to accelerate due to the introduction of the Code, adopted by providers of central

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1 OJ L …

2 Directive 2002/47/EC on Financial Collateral Arrangements, OJ L 168, 27.6.2002, p. 43, and Directive98/26/EC on Settlement Finality, OJ L 166, 11.6.1998, p. 45.

market infrastructure services on 7 November 2006.[3] The aim of the Code is to improve the efficiency of European clearing and settlement systems by making the user choices enshrined by Articles 34 and 46 of MiFID a genuine option rather than just a theoretical possibility. The general principles contained in Chapter IV of the Code and the detailed rules featured in the Access and Interoperability Guideline[4] presented by providers of infrastructure services in June 2007 enable user choice of service provider by making it easier for systems to set up links, i.e. gain access to and become interoperable with systems in foreign markets. To ensure that the objectives of the SFD are upheld in this new situation, the proposal adapts the SFD to this new market place which is characterised by an increased number of links.

1.3. Consistency with other policies and objectives of the Union

The two Directives on Settlement Finality and Financial Collateral Arrangements are the main Community instruments in the area of financial collateral, clearing and settlement. The proposed changes are consistent with provisions which can be found in the MiFID and, to some extent, with specific provisions on solvency ratios in the Capital Requirements Directives 2006/48/EC and 2006/49/EC[5]. Some provisions of Directive 2001/24/EC[6] on the winding-up of credit institutions and Regulation 1346/2000[7] on insolvency also have a bearing on collateral arrangements.

There is, however, no EU-wide framework for dealing with interests in securities held by an intermediary. Recognising that this may constitute a potential legal risk in cross-border transactions, the Commission created the Legal Certainty Group in January 2005 to advise on the appropriate legal framework. The final report of the Group is due by the end of 2008 and will be complementary to the Financial Collateral Arrangements Directive and Settlement Finality Directive and to the changes envisaged in this proposal. Simultaneously, at the international level, UNIDROIT – the International Institute for the Unification of Private Law – intends to convene a Diplomatic Conference in September 2008 with a view to arriving at a convention on substantive rules regarding intermediated securities. The provisions in the draft convention are in part modelled on the Financial Collateral Arrangements Directive and Settlement Finality Directive and should not give rise to any problems of incompatibility.

Furthermore, the provisions relating to credit claims do not seek to encroach on the rights of consumers, and in particular the rights under the recently agreed Consumer Credit Directive […]. The scope of this proposal is limited to credit claims that are eligible for the collateralisation of central bank credit operations, which in principle excludes credit claims by individual consumers. For instance, according to the eligibility criteria applied by the Eurosystem, debtors or guarantors either belong to the public sector or are non-financial or international/supranational institutions. Furthermore, the threshold for all domestic operations will be fixed at €500.000 from

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3 The Code of Conduct can be found on the European Commission's webpage: http://ec.europa.eu/internal_market/financial-markets/docs/code/code_en.pdf

4 The Guideline is published on the Commission's website: http://ec.europa.eu/internal_market/financial-markets/docs/code/guideline_en.pdf

5 OJ L …

6 OJ L …

7 OJ L …

2012, whereas the upper limit for consumer credit agreements is expected to be in the range €50.000-100.000. For these few instances where consumers' credit claims might be involved, which at present does not seem to be the case as far as the Eurosystem is concerned, a specific provision is added that gives precedence to the Consumer Credit Directive.

2. CONSULTATION OF INTERESTED PARTIES

2.1. Consultation of interested parties

Based on the responses to a questionnaire addressed to Member States, the Commission adopted its Evaluation Report on the application and transposition of the Settlement Finality Directive on 15 December 2005[8]. The report found that generally the SFD was working well, but it also highlighted ten issues concerning application and transposition that merited further analysis. Following reactions from the Member States and the European Central Bank, the Commission also invited industry, consumers and other stakeholders to submit further views. By 30 June 2006, seven further reactions had been received.

To prepare its Evaluation Report on the Financial Collateral Arrangements Directive of 20 December 2006[9] the Commission asked the Member States, the European Central Bank and the EEA States at the beginning of 2006 to reply to a questionnaire on the implementation and application of this Directive. A less extensive questionnaire was created for the private sector. In addition to the reactions from Member States and the ECB, the Commission received 27 replies directly from a broad spectrum of key financial market players and organisations. The FCD report likewise concluded that the Directive was working well and suggested extending its scope to include credit claims. Information on the two Directives, the consultations and the reports are published on the DG MARKT website[10].

Both reports were then thoroughly discussed with Member States and the ECB in the European Securities Committee (ESC) and with industry in the various stakeholders' groups (e.g. CESAME[11]). A working group with ECB and national central banks was also activated, to specifically consider legislative amendments in relation to credit claims.

3. IMPACT ASSESSMENT

The Commission has carried out an Impact Assessment[12] of the various options to facilitate the use of credit claims as collateral, to ensure the stability of settlement systems and to enhance legal certainty. It considers that the most logical and efficient way to achieve these goals is to change these Directives by way of another amending directive.

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8 COM(2005) 657
9 COM (2006)833
10 http://europa.eu.int/comm/internal_market/financial-markets
11 Clearing and Settlement Advisory and Monitoring Expert Group
12 See attached annex.

4. LEGAL ELEMENTS OF THE PROPOSAL

4.1. Legal basis

The legal basis of the proposal to amend Directive 1998/26/EC on Settlement Finality and Directive 2002/47/EC on Financial Collateral Arrangements is the same as for the two directives that are being amended, namely Article 95 of the Treaty.

4.2. Subsidiarity principle

According to this principle, there should only be legislative action at Community level when the aims envisaged cannot be sufficiently achieved by Member States alone. The Settlement Finality Directive has already demonstrated the importance of limiting the systemic risk inherent in such systems through common rules.

As regards the FCD, the proposed changes do not impinge on the Member States' decision whether or not to allow credit claims as collateral; this decision is left entirely to Member States. What the proposal does is to grant to credit claims used as collateral the same level of protection enjoyed by other types of financial collateral. Furthermore, by applying a harmonised set or rules to credit claims used as collateral it facilitates their use in cross-border transactions.

In view of the above the proposal complies with the subsidiarity principle.

4.3. Proportionality principle

The proposal complies with the proportionality principle, as it is strictly limited to the changes necessary to allow for the cross-border use of credit claims as collateral, interoperability of systems and some minor simplification measures.

4.4. Simplification and clarification

The proposal brings some useful elements of simplification and clarification to the two directives. For example, the proposal seeks to facilitate the use of credit claims as collateral by suggesting a light regime for the evidencing of the provision of credit claims as collateral instead of a lengthy (and thus costly) procedure whereby proof of each individual credit claim would be required. The proposal also suggests to delete the unused opt-out provision in Article 4 (3) FCD and seeks to eliminate the outdated references in the two directives. As regards the SFD, clarifying its provisions will simplify its application. For example, the proposal clarifies the personal scope of the SFD by clearly including Electronic Money Institutions in Article 2.

4.5. Choice of instruments

The proposed instrument is a Directive because the purpose of the measure is to amend two existing Directives. Only this instrument can achieve the desired legal effect.

5. BUDGETARY IMPLICATION

The proposal has no implications for the Community budget and no additional human and administrative resources are required.

6. COMMENTS ON THE ARTICLES OF THE PROPOSAL

This proposal for an amending Directive relates first of all to the provision of credit claims. Secondly, apart from technical changes, it seeks to extend the benefits of the Settlement Finality Directive to systems that are increasingly operating on a cross-border basis.

6.1. Article 1: Changes to the Settlement Finality Directive ("SFD")

6.1.1. Article 1 SFD

Point (a) replaces "ecu" by "euro" and point (c) now includes a reference to the European Central Bank in order also to cover its respective operations as well.

6.1.2. Article 2 SFD

Point (b) contains several references to Community directives that have become out of date and replaced by other directives. The changes suggested for this paragraph are mainly editorial, but they also include two substantive changes.

First, it clarifies the position of Electronic Money Institutions. As highlighted in the Commission's evaluation, there have been divergent interpretations by Member States in the past on whether to consider Electronic Money Institutions as credit institutions. By replacing the reference to Directive 77/780/EEC in Article 2(b) with a reference to Article 4(1) of Directive 2006/48/EC – the consolidated recast that succeeded the 1977 Directive – it is now made clear that Electronic Money Institutions fall within the scope of the Directive.

The Code foresees a number of ways that systems can be linked to each other. Three of these are relevant for the SFD: standard access, customised access and interoperability. Systems that are linked by means of access, i.e. one system becoming a participant of the other, are not covered by the SFD, as a 'system' currently cannot be a participant. This lack of access is problematic as the need for such access is likely to become more common as a result not only of the Code but also MiFID. Point (f) is amended accordingly to allow a system also to become a participant.

Point (g) defines the notion of "indirect participant". The SFD allows Member States to extend the protection of the SFD to indirect participants, i.e. to consider an indirect participant as a participant, if they consider that this is justified from a systemic risk viewpoint. However, this possibility only applies to credit institutions that are members of payment systems. Others - such as central counterparties, settlement agents (including an agent of another system) or clearing houses - cannot be considered as participants. Furthermore, the possibility to consider an indirect participant as a participant does not apply to settlement systems. There is no obvious

reason for this discrimination and, consequently, the proposal extends the definition of indirect participants.

Point (h) is simply a technical update, replacing the reference to the ISD with a reference to MiFID.

Point (m) introduces an explicit reference to credit claims eligible for the collateralisation of Eurosystem credit operations within the definition of “collateral security” in order to avoid any possibility of uncertainty or differences of application in the Member States.

In order to adapt the SFD to the likely increase in the number of interoperability links resulting from MiFID and the Code of Conduct, or to a multilateral payment system such as TARGET2, paragraph (n) (new) introduces a definition of an interoperable system to cover situations where systems (be they payment systems, securities settlement systems, clearing houses or central counterparties) are linked by means of interoperability to facilitate cross-system clearing, settlement and delivery versus payment (DVP) arrangements.

Point (o) (new) introduces a definition of system operator in order to make it clear who is in charge of running the system and thus who bears the legal responsibility for its operation.

6.1.3. Article 3 SFD

Paragraph 1: An amendment is introduced to remove any uncertainty about the status of night-time settlement services. Since the SFD was adopted, more and more systems have introduced business days that start immediately after the closing of the business day on T-1. Such systems provide night-time settlement services, mainly designed to execute bulk and retail transactions. Currently, it is uncertain whether the SFD fully protects night-time settlement, as only transfer orders that are carried out on the same calendar day ('day of the opening of insolvency procedures’) are covered. A strict reading of the SFD might suggest that a transfer order which is entered into the system on T-1 is protected only if the batch processing is finalised before midnight, whereas such an order in a batch running after midnight is not. This would leave a substantial number of orders outside the scope of the Directive, and therefore it is suggested to replace 'day' by a reference to 'business day, as defined by the rules of the system'.

Furthermore, a reference to the 'system operator' is inserted to clarify who is responsible for being aware of the opening of insolvency proceedings (settlement agent, central counterparty or clearing house).

Paragraph 4 (new): To make the SFD up to date with the interoperability links that may materialise as a result of the Code, this paragraph seeks to clarify the moment of entry in the case of interoperable systems. Unless there is full clarity as to which system's rules apply, interoperability may expose participants in one system or even the system itself to the spill-over effects of a default in another system with which it has established interoperability. A lack of clarity as to which system’s rules apply is a growing problem as systems are increasingly requesting interoperability with each other (fuelled by MiFID and the Code).

6.1.4. Article 5 SFD

As with the 'moment of entry', it is suggested that it should be made clear that, in case of interoperable systems, the rules on the moment of revocation of one system shall not be affected by rules of the other systems with which it is interoperable.

6.1.5. Article 9 SFD

Many systems operate on the basis of collateralisation mechanisms whereby participants provide collateral, often on an automated basis, to the system or where a collateral pool is established to safeguard settlement in case of failures. Under interoperability, such a provision of collateral is not expressly protected by the current wording of the SFD. Therefore, it is suggested that a reference to a system be added in paragraph 1.

Furthermore, the word "future" - which occurs twice in relation to the European Central Bank - is deleted.

6.1.6. Article 10 SFD

Subsequent to the changes proposed for Article 2(o) and 3(1) it is suggested that, when notifying systems to the Commission, Member States should also indicate the operator of the system. This obligation would apply to both existing and future systems.

6.2. Article 2: Changes to the Financial Collateral Arrangements Directive ("FCD")

6.2.1. Article 1 FCD "Subject matter and scope"

Paragraph 1 (2) contains several references to Community directives that have become out of date and been replaced by other directives. The changes suggested for this paragraph are merely technical updates.

Paragraph 1 (4) (a): The financial collateral to be provided consists of either cash or financial instruments. In the implementation of the FCD, three Member States - the Czech Republic, France and Sweden – have included specific kinds of receivables, such as credit or other claims, in the list of assets that may serve as collateral under the FCD. With the advent of this Directive, credit claims eligible for the collateralisation of central bank credit operations will be added as a third category for the entire Community.

Paragraph 5: A different *modus operandi* is described for evidencing the provision of credit claims as collateral. The means of evidence already in place concerning the provision of book entry securities or cash as collateral are inadequate when applied to credit claims. Given the rather divergent practices and the interest of the financial markets in having simple procedures that operate smoothly, the inclusion in a list of claims submitted to the collateral taker must suffice, without specifying in details the mobilisation of credit claims provided as collateral or the methods of identification. This list may be submitted in writing or in a legally equivalent manner, including by electronic means, since some national central banks use electronic lists.

Paragraph 6: Unlike cash or financial instruments, credit claims are not fungible. Thus, a collateral taker who exercises his right of use cannot return equivalent collateral to the collateral provider at the end of the transaction. Therefore, it would be appropriate to make it clear that the right of use as set out in Article 5 shall not apply to credit claims.

6.2.2. Article 2 FCD "Definitions"

Article 2(1) (b): In the definition of "title transfer financial collateral arrangement", the words "or full entitlement to" are added to distinguish between ownership of cash or financial instruments on the one hand and "entitlement" to credit claims on the other hand.

Article 2(1) (o): Definitions of credit claim

A new point 2(1) (o) is added to define the notion of "credit claims". This proposes a broad definition of credit claims, taking into account that credit claims may have different characteristics in the different EU jurisdictions and markets.

Article 2(2): This paragraph clarifies that, in the case of credit claims, it is not only the claim itself but also the possibility to collect the proceeds thereof until further notice that shall not prejudice the collateral being provided to the collateral taker.

6.2.3. Article 3 FCD "Formal requirements"

One of the impediments to the efficient use of credit claims is the requirement that the creation, validity or admissibility in evidence of their provision as financial collateral under a financial collateral arrangement be dependent on the performance of any formal act (such as the registration or the *ex ante* notification of the debtor of the credit claim provided as collateral). Several Member States (e.g. Finland, Greece, Ireland, Italy, Luxembourg, the Netherlands and Slovenia) require *ex ante* notification, and others (e.g. Austria, Belgium, Greece, Spain and Slovenia) have a registration system. Other Member States (e.g. France, Germany, Portugal and the United Kingdom) have neither.

Article 3(1)(new sentence) seeks to ensure that the mobilisation of credit claims cannot be invalidated on the grounds that it was not registered or that the debtor was not notified. This is not to say that registration or notification of the debtor should be prohibited as such; rather the intention is to eliminate the risk of invalidation on that ground. In some jurisdictions it might be considered beneficial to maintain registration and notification requirements for purposes other than the validity of a transaction (for instance opposability).

Article 3(3) deals with two additional issues that are intended to facilitate the use of credit claims as collateral. The first issue relates to the possible exercise of set-off by the debtor of the credit claim provided as collateral. This possibility might compromise the position of collateral takers in certain jurisdictions, since the collateral as such can disappear if the debtor exercises his set-off right vis-à-vis the creditors of the credit claim and vis-à-vis persons to which the creditors have assigned, pledged, or otherwise mobilised the credit claim as collateral. Therefore, it is stated that debtors, if they so wish, should be able to validly waive the right of set-

off vis-à-vis such persons by way of agreement (and this consent should prevail over any conflicting provisions of national law).

The second issue concerns banking secrecy. In certain jurisdictions the provision of data on the debtor and on the credit claim by the original creditor bank to the collateral taker might breach banking secrecy restrictions. As a result, either counterparties would be reluctant to submit credit claims as collateral or collateral takers would be unable to obtain sufficient information on the credit claim or the debtor. Here again, debtors should be able to validly waive their banking secrecy related rights vis-à-vis the creditor for the purposes of mobilising the credit claim by way of agreement.

The above provisions should not affect in any way the rights of individual consumers as reflected in the proposed Consumer Credit Directive. For consumer protection reasons the latter provides that, in the event of assignment to a third party of the creditor's rights, the consumer is entitled to plead against the assignee any defence which was available to him against the original creditor, including set-off. In addition, the consumer shall be informed of the assignment except where the creditor continues to service the credit vis-à-vis the consumer. The consumer is not entitled to waive the rights conferred on him by the proposed Directive. In order to maintain this level of consumer protection, including in cases where credit agreements are eligible collateral, the above provisions are without prejudice to the future Consumer Credit Directive.

6.2.4. Article 4 FCD "Enforcement of financial collateral arrangements"

Article 4(3) "appropriation": This provision allowed certain Member States to opt out of the right of appropriation for the collateral taker. Appropriation essentially means that the collateral taker may - under certain conditions - in an enforcement event keep the assets as its own property instead of selling them. However, no Member State has made use of this option. Consequently, all Member States now recognise appropriation for the collateral taker in the case of an enforcement event. Therefore, Article 4(3) has become obsolete, and has been deleted for the purposes of simplification.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission[13],

Having regard to the opinion of the European Central Bank[14],

Having regard to the opinion of the European Economic and Social Committee [15],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[16],

Whereas:

(1) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[17] established a regime under which the finality of transfer orders and netting, as well as the enforceability of collateral security, are ensured in respect of both domestic and foreign participants.

(2) The Evaluation Report from the Commission to the European Parliament and the Council on the Settlement Finality Directive 98/26/EC[18] concluded that Directive 98/26/EC in general is functioning well. It highlighted that some important changes may be underway in the area of payments and securities settlement systems and also concluded that there is some need to clarify and simplify Directive 98/26/EC.

(3) The main change, however, is the increasing number of linkages between systems, which at the time when Directive 98/26/EC was drafted, used to operate almost exclusively on a national and independent basis. This change is one of the results of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC

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13 OJ C […], […], p. […].
14 OJ C […], […], p. […].
15 OJ C […], […], p. […].
16 OJ C […], […], p. […].
17 OJ L 166, 11.6.1998, p. 45.
18 COM (2005) 657 final/2, 4.7.2006.

and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC[19], and the European Code of conduct for clearing and settlement[20]. In order to adapt to those developments, the concept of an interoperable system and the responsibility of system operators should be clarified.

(4) Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements[21] created a uniform Community legal framework for the (cross-border) use of financial collateral and thus abolished most of the formal requirements traditionally imposed on collateral arrangements.

(5) The European Central Bank's Governing Council has decided to introduce credit claims as an eligible type of collateral for Eurosystem credit operations as of 1 January 2007, and in order to maximise the economic impact thereof, the European Central Bank recommended an extension of the legal coverage of Directive 2002/47/EC. The Evaluation Report from the Commission to the European Parliament and the Council on the Financial Collateral Arrangements Directive 2002/47/EC[22] addressed this issue and subscribed to the opinion of the European Central Bank. The use of credit claims will increase the pool of available collateral and the harmonisation of the legal provisions in Directive 2002/47/EC would further contribute to a level playing field among credit institutions in all Member States. If the use of credit claims as collateral were to be facilitated further, consumers/debtors would also benefit as the use of credit claims as collateral could ultimately lead to more intense competition and better availability of credits.

(6) In order to facilitate the use of credit claims, it is important to abolish or prohibit any administrative rules, such as notification and registration obligations, that would make the assignments of credit claims impracticable. Similarly, in order not to compromise the position of collateral takers, debtors should be able to validly waive their set-off rights vis-à-vis creditors. The same rationale should also apply to the need to introduce the possibility for the debtor to waive bank secrecy rules, as otherwise the collateral taker may have insufficient information to properly assess the value of the underlying credit claims. [These provisions are without prejudice to the Consumer Credit Directive [……].

(7) Member States have made no use of the option under Article 4(3) of Directive 2002/47/EC to opt out of the right of appropriation of the collateral taker. That provision should therefore be deleted.

(8) Directives 98/26/EC and 2002/47/EC should therefore be amended accordingly.

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19 OJ L 149, 30.10.2004, p. 1. Directive as last amended by Directive 2007/44/EC (OJ L 247, 21.9.2007, p. 1).

20 "http://ec.europa.eu/internal_market/financial-markets/docs/code/code_en.pdf"

21 OJ L 168, 27.6.2002, p. 43.

22 COM (2006) 833 final, 20.12.2006.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 98/26/EC

Directive 98/26/EC is amended as follows:

(1) Article 1 is amended as follows:

(a) In point (a), the word "ecu" is replaced by the word "euro".

(b) In point (c), the second indent is replaced by the following:

"- operations of the central banks of the Member States or the European Central Bank in their function as central banks."

(2) Article 2 is amended as follows:

(a) In point (b), the first and second indents are replaced by the following:

"- a credit institution as defined in Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council[23] including the institutions listed in Article 2 of that Directive,

- an investment firm as defined in point (1) of Article 4(1) of Directive 2004/39/EC[24], excluding the institutions set out in Article 2(1) thereof, or"

(b) In point (f), the words

" 'participant` shall mean an institution, a central counterparty, a settlement agent or a clearing house."

are replaced by the following:

" 'participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system."

(c) Point (g) is replaced by the following:

"(g) 'indirect participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system with a contractual relationship with an institution participating in a system executing transfer orders which enables the indirect participant to pass transfer orders through the system;"

(d) Point (h) is replaced by the following:

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[23] O J L 177, 30.6.2006, p. 1.

[24] OJ L 145, 30.4.2004, p. 1.

"(h) 'securities' shall mean all instruments referred to in Section C of Annex 1 to Directive 2004/39/EC;"

(e) Point (m) is replaced by the following:

"(m) 'collateral security' shall mean all realisable assets, including credit claims eligible for the collateralisation of central bank credit operations, provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the European Central Bank;"

(f) The following points (n) and (o) are added:

"(n) 'interoperable system' shall mean a system that enters into an agreement with one or more systems that entail the establishment of mutual solutions and not simply connecting to existing standard service offerings;

(o) 'system operator' shall mean the entity in charge of the day to day operation of a system. A system operator may also act as a settlement agent, central counterparty or clearing house."

(3) Article 3 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. Transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant or an interoperable system, shall be binding on third parties, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6(1).

Where, exceptionally, transfer orders are entered into a system after the moment of opening of insolvency proceedings and are carried out within the business day, as defined by the rules of the system, during which the opening of such proceedings occur, they shall be legally enforceable and binding on third parties only if, after the time of settlement, the system operator can prove that it was not aware, nor should have been aware, of the opening of such proceedings."

(b) The following paragraph 4 is added:

"4. In case of interoperable systems, each system determines its own rules on the moment of entry in its system. One system's rules on moment of entry shall not be affected by any rules of the other systems with which it is interoperable."

(4) In Article 5, the following subparagraph is added:

"In case of interoperable systems, each system determines its own rules on the moment of revocation in its system. One system's rules on moment of revocation shall not be affected by any rules of the other systems with which it is interoperable."

(5) Article 9(1) is replaced by the following:

"1. The rights of a system or of a participant to collateral security provided to it in connection with a system, and the rights of central banks of the Member States or the European Central Bank to collateral security provided to them, shall not be affected by insolvency proceedings against the participant or counterparty to central banks of the Member States or the European Central Bank which provided the collateral security. Such collateral security may be realised for the satisfaction of these rights."

(6) Article 10 is replaced by the following:

"Article 10

Member States shall specify the systems**,** and the respective system operators, which are to be included in the scope of this Directive and shall notify them to the Commission and inform the Commission of the authorities they have chosen in accordance with Article 6(2).

The system operator shall indicate to the Member State whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them."

Article 2

Amendments to Directive 2002/47/EC

Directive 2002/47/EC is amended as follows:

(1) Article 1 is amended as follows:

(a) Point (b) of paragraph 2 is replaced by the following:

"(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as referred to in Annex VI, Part 1, Section 4 of Directive 2006/48/EC of the European Parliament and of the Council[25], the International Monetary Fund and the European Investment Bank;"

(b) In point (c) of paragraph 2, points (i) to (iv) are replaced by the following:

"(i) a credit institution as defined in point (1) of Article 4 of Directive 2006/48/EC including the institutions listed in Article 2 of that Directive;

(ii) an investment firm as defined in point (1) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council[26];

(iii) a financial institution as defined in point (5) of Article 4 of Directive 2006/48/EC;

[25] OJ L 177, 30.6.2006, p. 1.
[26] OJ L 145, 30.4.2004, p. 1.

(iv) an insurance undertaking as defined in point (a) of Article 1of Council Directive 92/49/EEC[27] and a assurance undertaking as defined in point (a) of Article 1of Directive 2002/83/EC of the European Parliament and of the Council[28];

(c) Point (a) of paragraph 4 is replaced by the following:

"(a) The financial collateral to be provided must consist of cash, financial instruments or credit claims eligible for the collateralisation of central bank credit operations;"

(d) In paragraph 5, after the second subparagraph, the following sentence is added:

"For credit claims, the inclusion in a list of claims submitted in writing, or in a legally equivalent manner, including by electronic means, to the collateral taker is sufficient to prove the mobilisation and the identification of the claim provided as collateral."

(e) The following paragraph 6 is added:

"6. Article 5 shall not apply to credit claims."

(2) Article 2 is amended as follows:

(a) Paragraph 1 is amended as follows:

(i) Point (b) is replaced by the following:

"(b) 'title transfer financial collateral arrangement' means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of, or full entitlement to, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations;"

(ii) The following point (o) is added:

"(o) 'credit claims' means pecuniary claims arising out of an agreement whereby a credit institution, as defined in point (1) of Article 4 of Directive 2006/48/EC including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan."

(b) In paragraph 2, the second sentence is replaced by the following:

“Any right of substitution or to withdraw excess financial collateral in favour of the collateral provider or, in the case of credit claims, to collect the proceeds thereof until further notice, shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in this Directive."

(3) Article 3 is amended as follows:

(a) In paragraph 1,the following subparagraph is added:

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[27] OJ L 228, 11.8.1992, p. 1.
[28] OJ L 345, 19.12.2002, p. 1.

"When credit claims are provided as financial collateral, Member States shall not require that the creation, validity or admissibility in evidence of their provision as financial collateral under a financial collateral arrangement be dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claim provided as collateral.

(b) The following paragraph[s] 3 [and 4] is[are] added:

"3. Member States shall ensure that debtors of the credit claims may validly waive, in writing or in a legally equivalent manner:

(i) their rights of set-off vis-à-vis the creditors of the credit claim and vis-à-vis persons to which the creditor assigned, pledged or otherwise mobilised the credit claim as collateral; and

(ii) their rights arising from banking secrecy rules that would otherwise prevent or restrict the ability of the creditor of the credit claim to provide information on the credit claim or the debtor for the purposes of using the credit claim as collateral."

[4. Paragraphs 1, 2 and 3 shall be without prejudice to the Consumer Credit Directive …/xxx/EC

(4) Article 4(3) is deleted.

Article 3

Transposition

1. Member States shall adopt and publish, by 1 October 2009 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from 1 October 2010.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Entry into Force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Brussels, […]

For the European Parliament
The President
[…]

For the Council
The President
[…]