

EUROPEAN PARLIAMENT

2004



2009

Session document

A6-0480/2008

5.12.2008

*****I**

REPORT

on the 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 (COM(2008)0213 – C6-0181/2008 – 2008/0082(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Piia-Noora Kauppi

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

CONTENTS

	Page
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION	5
EXPLANATORY STATEMENT.....	27
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS	30
PROCEDURE	34

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the 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 (COM(2008)0213 – C6-0181/2008 – 2008/0082(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2008)0213),
 - having regard to Article 251(2) and Article 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0181/2008),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs (A6-0480/2008),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

Amendment 1

Proposal for a directive – amending act

Article 1 – point -1 (new)

Directive 98/26/EC

Recital 8

Text proposed by the Commission

Amendment

(-1) Recital 8 is deleted.

Justification

The 1998 SFD explicitly allowed Member States to notify systems that were active in commodity derivatives. This explicit reference was necessary as commodity derivatives were not covered by the 1993 Investment Services Directive. Since then, MiFID has replaced the ISD and commodity derivatives are fully covered. Preamble 8 of the SFD has therefore lost its relevance and is therefore deleted.

Amendment 2

Proposal for a directive – amending act

Article 1 – point -1 a (new)

Directive 98/26/EC

Recital 14 a (new)

Text proposed by the Commission

Amendment

(-1a) The following recital is inserted:

“(14a) Whereas in case of interoperable systems, a lack of coordination in regard to the rules applicable at the moment of entry/irrevocability may expose participants in one system, or even the system operator itself, to the spill-over effects of a default in another system. In order to limit systemic risk, it is desirable to ensure that system operators of interoperable systems coordinate the rules on the moment of entry/irrevocability in the systems that they operate.”

Justification

Coordination of entry/irrevocability times is necessary in order to limit systemic risks and to avoid ex-post legal disputes.

Amendment 3

Proposal for a directive – amending act

Article 1 – point -1 b (new)

Directive 98/26/EC

Recital 14 b (new)

Text proposed by the Commission

Amendment

(-1b) The following recital is inserted:

“(14b) Whereas national supervisors should ensure, before approving the establishment of an interoperable system, that the operators of the systems establishing the interoperable system have agreed to the extent possible on common rules at the moment of entry into the

interoperable system. National supervisors should ensure in advance that the rules at the moment of entry into an interoperable system are coordinated, insofar as possible and necessary, in order to avoid legal uncertainty in the event of a defaulting participating system.”

Amendment 4

Proposal for a directive – amending act

Article 1 – point 2 – subpoint -a (new)

Directive 98/26/EC

Article 2 – point a – indent 3

Text proposed by the Commission

Amendment

(-a) In point (a), indent 3 is replaced by the following:

”– designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system. A system that is established by a legal act of the European Central Bank (ECB) and that is governed by the law of a Member State shall be designated (and notified to the Commission) by the ECB.”

Amendment 5

Proposal for a directive – amending act

Article 1 – point 2 – subpoint -a a (new)

Directive 98/26/EC

Article 2 – point a – paragraph 3 a (new)

Text proposed by the Commission

Amendment

(-aa) In point (a) the following paragraph is added:

"An arrangement entered into between interoperable systems shall not constitute a system."

Justification

Clarifies the meaning of a "system" and of an "interoperable system" for the purposes of the Directive.

Amendment 6

Proposal for a directive – amending act

Article 1 – point 2 – subpoint b

Directive 98/26/EC

Article 2 – point f – paragraph 1

Text proposed by the Commission

Amendment

(b) In point (f), ***the words***

(b) In point (f), ***the first paragraph is*** replaced by the following:

"'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."

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

Justification

The amendment clarifies that it is not the system but the system operator - which is a legal person - that is considered a participant.

Amendment 7

Proposal for a directive – amending act

Article 1 – point 2 – subpoint c

Directive 98/26/EC

Article 2 – point g

Text proposed by the Commission

Amendment

(g) 'indirect participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a

(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;

system **operator** 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, ***provided that the indirect participant is known to the system operator***;

Justification

The amendment clarifies that it is not the system but the system operator - which is a legal person - that is considered a participant. The latter part brings clarity to the position of the system operator who must have knowledge of whom they have responsibilities towards.

Amendment 8

Proposal for a directive – amending act

Article 1 – point 2 – subpoint c a (new)

Directive 98/26/EC

Article 2 – point g – paragraph 1 a (new)

Text proposed by the Commission

Amendment

(ca) In point (g), the following paragraph is added:

"Where an indirect participant is considered to be a participant on grounds of systemic risk, this does not limit the responsibility of the participant through which the indirect participant passes transfer orders on to the system."

Justification

Clarifies the definition of the respective responsibilities of a direct and an indirect participant.

Amendment 9

Proposal for a directive – amending act

Article 1 – point 2 – subpoint e

Directive 98/26/EC

Article 2 – point m

Text proposed by the Commission

(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;

Amendment

(m) 'collateral security' shall mean all realisable assets, including, ***without limitations, financial collateral referred to in Article 1(4)(a) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral***^{*}, 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;

^{*} ***OJ L 168, 27.6.2002, p. 43.***

Justification

The amendment ensures that all collateral accepted as such in Directive 2002/47/EC is treated similarly also for the purposes of this Directive thus bringing the two Directives in line with each other.

Amendment 10

Proposal for a directive – amending act

Article 1 – point 2 – subpoint e a (new)

Directive 98/26/EC

Article 2 – point m a (new)

Text proposed by the Commission

Amendment

(ea) The following point is added:

“(ma) ‘business day’ shall include day and night-time settlements and shall encompass all events happening during the business cycle of the system.”

Justification

Addition to the definitions in order for the Directive to cover night time settlements as intended by the European Commission draft.

Amendment 11

Proposal for a directive – amending act

Article 1 – point 2 – subpoint f

Directive 98/26/EC

Article 2 – point n

Text proposed by the Commission

(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*;

Amendment

(n) ‘interoperable *arrangements*’ shall mean *any arrangements entered into by two or more system operators* that entail the establishment of mutual solutions, *which involve cross-system execution of transfer orders*;

Justification

In the definition of ‘interoperable systems’, the term ‘system’ should be replaced by ‘arrangements’ (entered into by two or more systems) so as to avoid creating confusion between interoperability and a system as such and hence suggesting that the intention is to establish a new category of systems. The ECB proposed an amendment to the same effect in its opinion of 7 August 2008.

Amendment 12

Proposal for a directive – amending act

Article 1 – point 2 – subpoint f

Directive 98/26/EC

Article 2 – point o

Text proposed by the Commission

(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.

Amendment

(o) ‘system operator’ shall mean the entity *or entities legally responsible for* the operation of a system. A system operator may also act as a settlement agent, central counterparty or clearing house.

Amendment 13

Proposal for a directive – amending act

Article 1 – point 3 – subpoint a

Directive 98/26/EC

Article 3 – paragraph 1

Text proposed by the Commission

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.

Amendment

1. Transfer orders and netting shall be legally enforceable and **binding on third parties** even in the event of insolvency proceedings against a participant, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6(1). **This shall apply even in the event of insolvency proceedings against a participant (in the system concerned or in an interoperable system) or against a system operator of an interoperable system which is not a participant.**

Where 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, they shall be legally enforceable and binding on third parties only if the system operator can prove that **at the time such transfer orders become irrevocable**, it was not aware, nor should have been aware, of the opening of such proceedings.

Justification

The amendment clarifies the wording and brings it line with the changes in definitions of Article 2, points (f), (g) and (n).

Amendment 14

Proposal for a directive – amending act

Article 1 – point 3 – subpoint b

Directive 98/26/EC

Article 3 – paragraph 4

Text proposed by the Commission

4. In case of interoperable **systems**, each system determines its own rules **on** the moment of revocation in its system. One

Amendment

4. In *the* case of interoperable **arrangements**, each system determines **in** its own rules the moment of revocation in

system's rules on moment of revocation shall not be affected by any rules of the other systems with which it is interoperable.

its system, *so as to ensure, as far as possible, that the rules of all systems which are party to an interoperable arrangement are coordinated in this regard. Unless expressly provided otherwise by the rules of all the interoperable arrangements concerned,* one system's rules on the moment of revocation shall not be affected by any rules of the other systems with which it is interoperable.

Justification

In the definition of 'interoperable systems', the term 'system' should be replaced by 'arrangements' (entered into by two or more systems) so as to avoid creating confusion between interoperability and a system as such and hence suggesting that the intention is to establish a new category of systems. The ECB proposed an amendment to the same effect in its opinion of 7 August 2008.

Amendment 15

Proposal for a directive – amending act

Article 1 – point 3 a (new)

Directive 98/26/EC

Article 4

Text proposed by the Commission

Amendment

(3a) Article 4 is replaced by the following:

“Article 4

Member States may provide that the opening of insolvency proceedings against a participant or a system operator of an interoperable system shall not prevent funds or securities available on the settlement account of that participant from being used to fulfil that participant's obligations in the system on the *business day, as defined by the rules of the system*, of the opening of the insolvency proceedings. Furthermore, Member States may also provide that such a participant's credit facility

connected to the system be used against available, existing collateral security to fulfil that participant's obligations in the system *or in the interoperable system.*"

Amendment 16

Proposal for a directive – amending act

Article 1 – point 4

Directive 98/26/EC

Article 5 – subparagraph 2

Text proposed by the Commission

"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**."

Amendment

"In *the* case of interoperable **arrangements**, each system determines **in** its own rules the moment of **irrevocability, so as to ensure, as far as possible, that the rules of all systems which are party to an interoperable arrangement are coordinated in this regard. Unless expressly provided otherwise by the rules of all the systems that are party to the interoperable arrangement**, one system's rules on *the* moment of **irrevocability** shall not be affected by any rules of the other systems with which it is **operable**."

Justification

In the definition of 'interoperable systems', the term 'system' should be replaced by 'arrangements' (entered into by two or more systems) so as to avoid creating confusion between interoperability and a system as such and hence suggesting that the intention is to establish a new category of systems. The ECB proposed an amendment to the same effect in its opinion of 7 August 2008.

Amendment 17

Proposal for a directive – amending act

Article 1 – point 4 a (new)

Directive 98/26/EC

Article 7

(4a) Article 7 is replaced by the following:

"Article 7

Insolvency proceedings shall not have retroactive effects on the rights and obligations of a participant arising from, or in connection with, its participation in a system earlier than the moment of opening of such proceedings as defined in Article 6(1). This shall apply even as regards the rights and obligations of a participant in an interoperable system or of a system operator of an interoperable system which is not a participant."

Justification

The amendment updates the Article to cover interoperable systems.

Amendment 18

Proposal for a directive – amending act

Article 1 – point 5

Directive 98/26/EC

Article 9 – paragraph 1

Text proposed by the Commission

Amendment

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.

1. The rights of a system operator or of a participant to collateral security provided to **them** in connection with a system **or any interoperable 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:

(a) the participant (*in the system concerned or in an interoperable system*);

(b) the system operator of an interoperable system which is not a participant;

(c) a counterparty to central banks of the Member States or the European Central Bank, or

(d) any third party which provided the collateral security.

Such collateral security may be realised for the satisfaction of these rights.

Justification

The amendment renders the scope of the Article more accurate and updates it to account for the concept of interoperable systems.

Amendment 19

Proposal for a directive – amending act

Article 1 – point 5 a (new)

Directive 98/26/EC

Article 9 – paragraph 2

Text proposed by the Commission

Amendment

(5a) Article 9(2) is replaced by the following:

“2. Where securities (including rights in securities) are provided as collateral security to participants, *system operators* and/or central banks of the Member States or the [...] *European Central Bank* as described in paragraph 1, and their right (or that of any nominee, agent or third party acting on their behalf) with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.”

Amendment 20

Proposal for a directive – amending act

Article 1 – point 6

Directive 98/26/EC

Article 10

Text proposed by the Commission

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.

Amendment

1. Member States, or the ECB, where a system is established by an ECB legal act, shall specify the systems, the respective system operators, **and the participants in those systems,** 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.

Member States shall specify which party in the system bears the burden of proof in insolvency proceedings and shall provide for the limitation of systemic risk in the event of default of a system operator participating in an interoperable system.

In addition to the indication provided for in the second subparagraph, Member States may impose supervision or authorisation requirements on systems which fall under their jurisdiction.

Anyone with a legitimate interest may require an institution to inform him of the systems in which it participates and to provide information about the main rules governing the functioning of those systems.

2. A system designated prior to the coming into force of national provisions implementing Directive .../.../EC* shall continue to be designated for the purposes

of this Directive.

A transfer order which enters a system before the entry into force of provisions implementing Directive .../.../EC, but which is settled thereafter, shall be deemed to be a transfer order for the purposes of this Directive.*

** OJ: please insert number of the amending directive.*

Justification

The amendment adds to the transparency of the systems as well as includes necessary specifications to regulate transitional conditions in the entry into force of the Directive.

Amendment 21

Proposal for a directive – amending act

Article 1 – point 6

Directive 98/26/EC

Article 10 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Member States may impose supervision or authorisation requirements on systems that fall under their jurisdiction.

Amendment 22

Proposal for a directive – amending act

Article 1 – point 6

Directive 98/26/EC

Article 10 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. Anyone with a legitimate interest may require an institution to inform him or her of the systems in which it participates and to provide information about the main rules governing the functioning of those systems.

Amendment 23

Proposal for a directive – amending act

Article 2 – point -1 (new)

Directive 2002/47/EC

Recital 9

Text proposed by the Commission

Amendment

(-1) Recital 9 is replaced by the following:

“(9) In order to limit the administrative burdens for parties using financial collateral under the scope of this Directive, the only perfection requirement which national law may impose in respect of financial collateral should be that the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf while not excluding collateral techniques where the collateral provider is allowed to substitute collateral or to withdraw excess collateral. This Directive should not prohibit Member States from requiring that a credit claim be delivered by means of inclusion in a list of claims.”

Justification

The amendment clarifies that the inclusion in a list between the parties can have the function of delivery of a credit claim as well. As a result of the corpus of the directive, with respect to the delivery no heavier formality can be required.

Amendment 24

Proposal for a directive – amending act

Article 2 – point 1 – subpoint c

Directive 2002/47/EC

Article 1 – paragraph 4 – point a

Text proposed by the Commission

Amendment

(a) The financial collateral to be provided

(a) The financial collateral to be provided

must consist of cash, financial instruments or credit claims *eligible for collateralisation of central bank credit operations*.

must consist of cash, financial instruments or credit claims.

Justification

The amendment includes also inter-bank loans in eligible collateral.

Amendment 25

Proposal for a directive – amending act

Article 2 – point 1 – subpoint c a (new)

Directive 2002/47/EC

Article 1 – paragraph 4 – point b a (new)

Text proposed by the Commission

Amendment

(ca) In paragraph 4, the following point is added:

"(c) Member States may exclude from the scope of this Directive credit claims where the debtor is a consumer as defined in Article 3(a) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers* or a small enterprise as defined in Article 1 and Article 2(2) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises**, save where the collateral taker or the collateral provider of such credit claims is one of the institutions referred to in Article 1(2)(b) of this Directive.

**** OJ L 133, 22.5.2008, p. 66.***

***** OJ L 124, 20.5.2003, p. 36."***

Justification

It is desirable to close consumer credit as well as small enterprises' credit out of the scope of the directive because the amount of their credit claims is small.

Amendment 26

Proposal for a directive – amending act

Article 2 – point 1 – subpoint d

Directive 2002/47/EC

Article 1 – paragraph 5 – subparagraph 2 – last sentence

Text proposed by the Commission

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.

Amendment

For credit claims, the inclusion in a list of claims submitted in writing, or in a legally equivalent manner, to the collateral taker is sufficient to identify the credit claim and to evidence the provision of the claim provided as financial collateral ***between the parties***.

Justification

The amendment clarifies that the inclusion in the list between the parties is sufficient for the identification of the claim as collateral. Additional requirements would add to complexity without bringing added benefits and hamper effective harmonisation of the use of credit claims as collateral.

Amendment 27

Proposal for a directive – amending act

Article 2 – point 1 – subpoint d a (new)

Directive 2002/47/EC

Article 1 – paragraph 5 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

(da) In paragraph 5, the following subparagraph is added:

"Without prejudice to the second subparagraph, Member States may provide that the inclusion in a list of claims is also sufficient to identify the credit claim and to evidence the provision of the claim provided as financial collateral against the debtor and/or third parties."

Justification

The amendment clarifies that the inclusion in the list between the parties is sufficient for the identification of the claim as collateral. Additional requirements would add to complexity without bringing added benefits and hamper effective harmonisation of the use of credit claims as collateral.

Amendment 28

Proposal for a directive – amending act

Article 2 – point 2 – subpoint a – point i

Directive 2002/47/EC

Article 2 – paragraph 1 – point b

Text proposed by the Commission

(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;

Amendment

(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, **credit claims**, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations;

Justification

The addition clarifies that in the case of credit claims, full entitlement is sufficient as ownership as such cannot be transferred.

Amendment 29

Proposal for a directive – amending act

Article 2 – point 2 – subpoint a – subpoint i a (new)

Directive 2002/47/EC

Article 2 – paragraph 1 – point c

Text proposed by the Commission

Amendment

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

“(c) ‘security financial collateral arrangement’ means an arrangement under which a collateral provider provides financial collateral by way of

security in favour of, or to, a collateral taker, and where the full or qualified ownership of, or full entitlement to, the financial collateral remains with the collateral provider when the security right is established;”

Amendment 30

Proposal for a directive – amending act

Article 2 – point 3 – subpoint a

Directive 2002/47/EC

Article 3 – paragraph 1 – subparagraph 1a (new)

Text proposed by the Commission

Amendment

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

“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.”

(a) Paragraph 1 **is replaced by the following:**

“1. Without prejudice to Article 1(5), when credit claims are provided as financial collateral, Member States shall not require that **their** creation, **perfection**, validity, admissibility in evidence, **or enforceability** 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. **Member States may, however, maintain the performance of a formal act, such as registration or notification, for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor or third parties.”**

Justification

The exception to the rule in the first sentence of subparagraph 2 recognises that credit claims are different to other forms of financial collateral. There are circumstances where the enforceability of a credit claim against a debtor is subject to formal requirements (for example, for the protection of a debtor). The need for these provisions does not change because the credit claim is used as collateral. Though Member States should not be able to impose requirements on the provision of a credit claim as financial collateral (save as provided in the directive), their ability to require formalities in relation for the purposes of perfection, priority, or enforceability needs to be retained, and should not be removed after a transitional period.

Amendment 31

Proposal for a directive – amending act

Article 2 – point 3 – subpoint b

Directive 2002/47/EC

Article 3 – paragraphs 3 and 4

Text proposed by the Commission

(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

Amendment

(b) The following *paragraph is* added:

“3. ***Without prejudice to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* and national provisions concerning unfair contract terms***, 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.

* *OJ 95, 21.4.1993, p. 29.*”

Amendment 32

Proposal for a directive – amending act

Article 2 – point 3 a (new)

Directive 2002/47/EC

Article 4 – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(3a) In Article 4(1), the following point is added:

“(ba) credit claims, by sale or

appropriation and by setting off their value against or applying their value in discharge of the relevant financial obligations.”

Amendment 33

Proposal for a directive – amending act

Article 2 – point 3 b (new)

Directive 2002/47/EC

Article 4 – paragraph 2 – point b

Text proposed by the Commission

Amendment

(3b) In Article 4(2), point (b) is replaced by the following:

“(b) the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments and the credit claims.”

Amendment 34

Proposal for a directive – amending act

Article 2 – point 4 a (new)

Directive 2002/47/EC

Article 5 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

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

“5a. This Article shall not apply to credit claims.”

Amendment 35

Proposal for a directive – amending act

Article 2 - point 4 b (new)

Directive 2002/47/EC

Article 9 a (new)

Text proposed by the Commission

Amendment

(4b) The following Article is inserted after

Article 9:

“Article 9a

*The provisions of this Directive shall be
without prejudice to Directive
2008/48/EC.”*

EXPLANATORY STATEMENT

Objectives of the Commission's proposal

The main purpose of the Commission's proposal is to bring the Directive on settlement finality in payment and securities settlement systems (SFD) and the Directive on financial collateral arrangements (FCD) in line with the latest market and regulatory developments.

First analyses of the implementation of the MiFID (directive 2004/39/EC) as well as the European Code of conduct for clearing and settlement show an increase of links and interoperability and therefore a need for extending the protection of the SFD to night-time settlement and to settlement between linked systems.

In order to recognise some practices already in use in many member states, the European Commission has broadened the scope of the protection provided by both directives to include new types of assets (i.e. credit claims) in order to facilitate their use throughout the Community.

Finally the European Commission used this recast in order to introduce a number of simplifications and clarifications to facilitate the application of the FCD and SFD.

The recent, and still ongoing, financial turmoil which requires strengthening the tools for managing instability and turmoil in financial markets, is also a strong argument in favour of this proposal.

Indeed, 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. Moreover, 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.

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 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 market infrastructure services on 7 November 2006.¹ 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 real option rather than just a possibility. The general principles contained in Chapter IV of the Code and the detailed rules featured in the Access and Interoperability Guideline 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.

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 rapporteur is of the opinion that the proposed changes are in line with the spirit and the provisions of the MiFID and with specific provisions on solvency ratios in the Capital Requirements Directives. Some provisions of Directive 2001/24/EC on the winding-up of credit institutions and Regulation 1346/2000 on insolvency also have a bearing on collateral arrangements.

Recognising that the lack of EU framework for dealing with interests in securities held by intermediaries may constitute a potential legal risk in cross-border transactions, the Legal Certainty Group was set up by the European Commission in January 2005 to advise on the appropriate legal framework. The final report of the Group is due by the end of 2008 and should complement the Financial Collateral Arrangements Directive and the Settlement Finality Directive and the changes envisaged in this proposal. Simultaneously, at the international level, UNIDROIT 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 are in line with the new provisions of the Consumer Credit Directive. The report supports the exclusion from the scope of the proposal of consumer loans, as defined in the Consumer Credit Directive, as well as the exclusion of loans given to small enterprises.

The rapporteur is also of the opinion that 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.

Main changes introduced by the report

The rapporteur is of the opinion that the Commission proposal for a recast of both directives is sound and coherent to the existing EU legislation.

The rapporteur would nevertheless propose few substantial, as well as a number of minor clarifications. As regards the Settlement Finality Directive, several amendments to the Commission proposal are introduced to clarify definitions of interoperable systems in order to improve legal certainty in the application of the Directive to such systems.

As regards the Financial Collateral Directive, the rapporteur proposes three substantial changes. First, consumer credit as well as credit for small enterprises is excluded from the scope of the Directive. A definition of a small enterprise is introduced in order not to exempt an unnecessarily large part of business loans from the scope of the Directive. Second, some Member States currently have requirements for a formal notification or registration of the use of credit claims as collateral. The current Council compromise does allow their maintenance. However, the experience from Member States where credit claims are already widely used as collateral does not suggest such requirements are necessary for any practical purpose. The rapporteur is of the opinion that formal notification requirement should be phased out and therefore introduces a sunset clause in five years from the entry into force of the Directive to the right for the member states to require notification or registration. Finally, the rapporteur would like this directive to have a scope as wide as possible and proposes to extend the scope of the directive to include inter-bank loans as eligible collateral, instead of just central bank loans as the original proposal suggested. These are already accepted in some Member States and their exclusion is unduly restrictive in the view of the benefits a larger collateral pool brings.

5.11.2008

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on Economic and Monetary Affairs

on the 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

(COM(2008)0213 – C6-0181/2008 – 2008/0082(COD))

Rapporteur: Aloyzas Sakalas

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive – amending act

Article 1 – point -1 (new)

Directive 2002/47/EC

Recital 9 a (new)

Text proposed by the Commission

Amendment

(-1) The following recital 9 a shall be inserted:

“(9a) In order to limit the administrative burdens for parties using financial collateral coming within the scope of this Directive, the only perfection requirement which national law may impose in respect of financial collateral should be that the financial collateral is delivered, transferred, held, registered or otherwise

designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf while not excluding collateral techniques where the collateral provider is allowed to substitute collateral or to withdraw excess collateral. This Directive does not preclude Member States from requiring that a credit claim be delivered by means of its inclusion in a list of claims."

Justification

The amendment clarifies that inclusion in a list between the parties can have the function of delivery of a credit claim as well. As a result of the corpus of the Directive, with respect to the delivery no heavier formality can be required.

Amendment 2

Proposal for a directive – amending act

Article 1 – point 2 – point -a (new)

Directive 98/26/EC

Article 2 – point a – indent 3

Text proposed by the Commission

Amendment

(-a) In point (a), indent 3 shall be replaced by the following:

"– designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system. A system that is established by an ECB legal act and governed by the law of a Member State shall be designated (and notified to the Commission) by the ECB."

Amendment 3

Proposal for a directive – amending act

Article 1 – point 6

Directive 98/26/EC

Article 10

Text proposed by the Commission

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).

Amendment

Member States, ***or the ECB, where a system is established by an ECB legal act,*** 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).

PROCEDURE

Title	Securities settlement systems and financial collateral arrangements
References	COM(2008)0213 – C6-0181/2008 – 2008/0082(COD)
Committee responsible	ECON
Opinion by Date announced in plenary	JURI 8.5.2008
Drafts(wo)man Date appointed	Aloyzas Sakalas 25.6.2008
Discussed in committee	13.10.2008
Date adopted	4.11.2008
Result of final vote	+: 25 -: 0 0: 0
Members present for the final vote	Carlo Casini, Titus Corlăţean, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Neena Gill, Othmar Karas, Klaus-Heiner Lehne, Katalin Lévai, Antonio López-Istúriz White, Antonio Masip Hidalgo, Hans-Peter Mayer, Manuel Medina Ortega, Aloyzas Sakalas, Francesco Enrico Speroni, Diana Wallis, Jaroslav Zvěřina, Tadeusz Zwiefka
Substitute(s) present for the final vote	Sharon Bowles, Eva Lichtenberger, Rareş-Lucian Niculescu, Georgios Papastamkos, Gabriele Stauner, József Szájer, Jacques Toubon, Renate Weber

PROCEDURE

Title	Securities settlement systems and financial collateral arrangements
References	COM(2008)0213 – C6-0181/2008 – 2008/0082(COD)
Date submitted to Parliament	23.4.2008
Committee responsible Date announced in plenary	ECON 8.5.2008
Committee(s) asked for opinion(s) Date announced in plenary	JURI 8.5.2008
Rapporteur(s) Date appointed	Piia-Noora Kauppi 20.5.2008
Discussed in committee	9.9.2008 5.11.2008
Date adopted	2.12.2008
Result of final vote	+: 28 -: 0 0: 1
Members present for the final vote	Mariela Velichkova Baeva, Paolo Bartolozzi, Zsolt László Becsey, Sebastian Valentin Bodu, Sharon Bowles, Udo Bullmann, David Casa, Christian Ehler, Jonathan Evans, José Manuel García-Margallo y Marfil, Jean-Paul Gauzès, Robert Goebbels, Donata Gottardi, Louis Grech, Gunnar Hökmark, Othmar Karas, Wolf Klinz, Andrea Losco, Astrid Lulling, Gay Mitchell, Sirpa Pietikäinen, John Purvis, Peter Skinner, Margarita Starkevičiūtė, Ivo Strejček, Cornelis Visser, Sahra Wagenknecht
Substitute(s) present for the final vote	Harald Ettl, Alain Lipietz