

Banks and financial markets: settlement finality in payment and securities settlement systems; financial collateral arrangements as regards linked systems and credit claims

2008/0082(COD) - 23/04/2008 - Legislative proposal

PURPOSE: to bring provisions relating to (i) settlement finality in payment and securities settlement systems (SFD) and (ii) financial collateral arrangements (FCD), into line with the latest market and regulatory developments.

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: 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 for Governing Council, agreed to include credit claims as an eligible type of collateral for Eurosystems credit operations as of 1 January 2007. However, France, Germany, Spain, Austria and the Netherlands already accepted credit claims, albeit that they operated under differently legal regimes. In order to create a level playing field among central banks and in order to stimulate the cross-border use of collateral, the relevant legal framework needs to be harmonised.

Further, an increasing number of linkages between systems is a trend that is set to continue and possibly even to accelerate due to the introduction of the Code as adopted by providers of central market infrastructure services. The purpose of the Code is to improve the efficiency of European clearing and settlement systems by making user choice a genuine option rather than just a theoretical possibility. To ensure that the objective of the SFD are upheld the proposal seeks to adapt the SFD to the new, increasingly interlinked, market place.

CONTENT: based on the above the main purpose of this proposal is to bring SFD and FCD provisions in line with the latest market and regulatory developments. In summary, the main provisions of the proposal are as follows:

Changes to the Settlement Finality Directive:

- The position of the Electronic Money Institutions is clarified.
- Systems that are linked by means of access (i.e. one system becoming a participant of the other) will in future become a participant as defined by the Directive.
- The definition of “indirect participant” is extended to include central counterparties, settlement agents (including an agents of another system) and clearing houses. It is no longer limited to credit institutions that are members of payment systems only.
- An explicit reference is made to credit claims eligible for the collateralisation of the Eurosystem credit operations within the definition of “collateral security”.
- A new definition of an interoperable system to cover situations where system (be they payment systems, securities settlement systems, clear houses or central counterparties) are linked by means of interoperability to facilitate cross-system clearing, settlement and delivery versus payment (DVP) arrangement.

- A new definition of system operator is introduced in order to clarify who is in charge of running the system and who bears legal responsibility for its operation.
- An amendment removing any uncertainty about the status of night-time settlement services has been introduced. Similarly, a new reference to the “system operator” has been inserted in a bit to clarify who is responsive for the opening of insolvency proceedings (settlement agent, central counterparty or clearing house.)
- In order to update the SFD with the interoperability links that may materialise as a result of the Code, the proposal seeks to clarify the moment of entry in the case of interoperable systems. A lack of clarity as to which system’s rules apply is a growing problem.
- Rules concerning the “moment of revocation” of one system will not be affected by rules of the other systems with which it is interoperable.
- A reference is made regarding participants that provide collateral on an automated bases as well as to the system where a collateral pool is established in order to safeguard settlement in case of failure.

Changes to the Financial Collateral Arrangements Directive (FCD):

- Credit claims eligible for the collateralisation of central bank credit operations will be added as a third category for the entire Community.
- The Commission proposes to include a list of claims submitted to the collateral taker. This list will not need to specify in detail the mobilisation of credit claims provided as collateral or the methods of identification. The list may be submitted in writing or in a legally equivalent manner (including electronic means) given that some national central banks use electronic lists.
- The “right of use” will not apply to credit claims.
- A broader definition of “credit claims” is proposed.
- 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 that 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).
- The proposal states 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 an agreement (this consent should prevail over any conflicting provisions of national law).
- The proposal also states that debtors should be able to validly waive their banking secrecy related rights vis-à-vis the creditor for the purpose of mobilising the credit claim by way of agreement. Neither of these provisions should affect the rights of individual consumers as reflected in the proposed Consumer Credit Directive.