

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) - 18/12/2008 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 538 votes to 17, with 28 abstentions, a legislative resolution approving, with amendments, 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.

The report had been tabled for consideration in plenary by Piia-Noora **KAUPPI** (EPPED, FI), on behalf of the Committee on Economic and Monetary Affairs.

The amendments – adopted in first reading under the codecision procedure – are the result of a compromise between Parliament and Council.

The amendments made to Directive 98/26/EC are as follows:

In terms of **Recitals**, the compromise text highlights the following points:

- national competent authorities and supervisors should ensure that: (i) the operators of the systems establishing the interoperable systems have agreed to the extent possible on common rules on the moment of entry into the interoperable systems; (ii) the rules on the moment of entry in an interoperable systems are, insofar as possible and necessary, coordinated in order to avoid legal uncertainty in the event of default of a participating system;
- in order to limit systemic risk, it is desirable to provide that system operators of interoperable systems coordinate the rules on the moment of entry/irrevocability in the systems they operate.

Definitions: amendments were made to the following definitions:

- “system”: for the purposes of the Directive, “system” shall mean a formal agreement between three or more participants, without counting the system operator of that system, a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the clearing (whether or not through a central counterparty) or execution of transfer orders between the participants. An arrangement entered into between interoperable systems shall not constitute a system. A Member State may decide that an indirect participant may be considered a participant if it is warranted on the grounds of systemic risk;
- “indirect participant”: an institution, a central counterparty, a settlement agent, a clearing house or a system operator with a contractual relationship with a participant in a system executing transfer orders which enables the indirect participant to pass transfer orders through the system, provided, however, that the indirect participant is known to the system operator. 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 to the system;
- “settlement account”: an account at a central bank, a settlement agent or a central counterparty used to hold funds and/or securities and to settle transactions between participants in a system;

- “business day”: the notion shall cover both day and night-time settlements and shall encompass all events happening during the business cycle of a system;
- “interoperable systems”: two or more systems whose system operators have entered into an arrangement between themselves that involves cross-system execution of transfer orders.

Compensation and transfer orders:

- in the case of interoperable systems, each system determines in its own rules the moment of entry into its system, so as to ensure, as far as possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the interoperable systems concerned, one system's rules on the moment of entry shall not be affected by any rules of the other systems with which it is interoperable;
- 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 (or in an interoperable system) on the business day 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 an interoperable system);
- in the case of interoperable systems, each system determines in its own rules the moment of irrevocability, so as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard.

Insolvency proceedings: 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. 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.

Protecting the rights of holders of collateral security against the effects of insolvency of the part that makes up the security:

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

Final provisions: 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. A system designated prior to the coming into force of national provisions implementing this Directive shall continue to be designated for the purposes of this Directive, as amended. A transfer order which enters a system before the entry into force of provisions implementing this Directive, but is settled thereafter shall be deemed to be a transfer order for the purposes of the Directive.

Amendments made to Directive 2002/47/EC are as follows:

In terms of **Recitals**, the compromise text highlights the following points:

- in order to limit the administrative burdens for parties using financial collateral under the scope of this Directive, the only perfection requirement regarding parties which national law may impose in respect of financial collateral should be that the financial collateral is 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;
- the Directive does not prejudice the operation and effect of the contractual terms of financial instruments or credit claims provided as financial collateral, such as rights and obligations and other conditions contained in the terms of issue of such instruments, and any other rights and obligations and other conditions which apply between the issuers and holders of such instruments or between the debtor and the creditor of such credit claims;
- the Directive does not affect the rights of Member States to impose rules to ensure the effectiveness of financial collateral arrangements in relation to third parties as regards credit claims.

Other amendments aim to:

- enable Member States to exclude from the scope of the Directive credit claims where the debtor is a consumer as defined in Directive 2008/48/EC on credit agreements for consumers or a micro and small enterprise as defined in Commission Recommendation 2003/361/EC 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 this Directive;
- enable Member States to provide that the inclusion in a list of claims submitted in writing, or in a legally equivalent manner 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;
- introduce the definition of “security financial collateral arrangement”, which 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;
- provide that, when credit claims are provided as financial collateral, Member States shall not require that their creation, validity, perfection, priority, enforceability or admissibility in evidence 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. However, Member States may require the performance of a formal act, such as registration or notification, for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor and/or third parties. After five years from the entry into force of this Directive, the Commission shall report on the continued appropriateness of these provisions.

Transposition: Member States shall transpose the Directive into national law 18 months after its entry into force. They shall apply those provisions 6 months after the date of transposition.