

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

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OPINION OF THE EUROPEAN CENTRAL BANK on a proposal for a directive amending Directive 98/26/EC and Directive 2002/47/EC.

On 22 May 2008 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Directive 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.

Amendments to Directive 98/26/EC

Night-time settlement: the ECB supports extending the protection of Article 3(1) of Directive 98/26/EC to night-time settlement services.

Protection of collateral from the effects of insolvency: the ECB recommends clarifying the wording of Article 9(1) of Directive 98/26/EC in order to ensure the harmonised insulation of collateral security provided to central banks by any third party including, but not limited to, affiliates of the participants in a central bank operated system or central bank counterparties.

Participation in a system: a proviso should be introduced into the definition of ‘indirect participant’ requiring that indirect participants should **be known to the system operator**. The definitions of both participant and indirect participant should also be amended to clarify that these definitions are exhaustive and include only the specific kinds of entities enumerated by the defined terms. Moreover, the term ‘system’ in the definitions of participant and indirect participant should be replaced, where appropriate, by the newly defined term ‘**system operator**’.

The definition of a system: the definition of a system should refer to a formal arrangement ‘**comprising**’, instead of ‘between’, three or more participants. Moreover, under the current definition, it is unclear whether clearing systems such as central counterparties or clearing houses are protected against systemic risk. Therefore, the words ‘**clearing or**’ should be added before ‘execution of transfer orders’ in the first indent of Article 2(a).

Furthermore, the term system should be defined flexibly in order to cover any future developments in the organisation of systems. In particular, it should be sufficiently widely defined so as to cover any future system that may be developed by the Eurosystem or designated by the ECB when established by an ECB legal instrument which is binding on participants by virtue of an arrangement entered into with the ECB and governed by the law of a Member State.

Moment of entry, irrevocability and interoperable systems: the ECB recommends clarifying Article 3 (4) to remove any ambiguity surrounding the fact that systems do have a certain degree of discretion in specifying the appropriate moment of entry, without being constrained in this respect by national law. Similar considerations apply to the concept of irrevocability. Furthermore, the ECB suggests replacing the

term 'system' in the definition of 'interoperable system' with '**arrangements**' between two or more systems to cater for all possible types of connections while at the same time avoiding giving the impression that a new category of systems is created.

Notification of system operators and oversight: the ECB agrees to the proposal to amend Article 10 of Directive 98/26/EC so that Member States, in addition to notifying systems to the Commission, will also indicate the operator of the system. However, paragraph 1 of Article 10 should be amended to allow Member States or the ECB, as appropriate, to notify systems and system operators to the Commission. The ECB also considers that Article 10(3) and (4), which are omitted from the Commission proposal, should be reinstated. In addition, Article 10(3) should state that the oversight competence of central banks, based on their financial stability tasks, should be respected.

E-money institutions as participants of systems: the definition of 'credit institution' in amended Article 2(b) of Directive 98/26/EC has the effect of enabling e-money institutions to become participants in systems, provided the e-money institutions are regulated as credit institutions. The ECB regards this as a positive legislative amendment that will enhance the stability of systems.

Conflict of laws: the ECB considers that a clear and simple conflict of laws rule for all aspects of book entry securities is important for the efficient and secure cross-border holding and transfer of financial instruments. However, the Community regime still does not deliver the highest possible degree of predictability and certainty as to which laws apply. Therefore, the ECB is following with great interest the Commission's initiative to improve the clarity of the existing Community regime. Given the complexity of this matter, the ECB considers that such a general review should not take place in the context of the proposed directive.

Amendments to Directive 2002/47/EC

Credit claims: the ECB strongly welcomes the proposed amendments to Directive 2002/47/EC, where they are aimed at facilitating the use of credit claims as collateral by central banks. In order to ensure legal certainty and a level playing field across the EU, the ECB recommends that a simple and uniform definition for credit claims covered by Directive 2002/47/EC should be established, which does not link such credit claims to eligibility criteria used by the central banks. Such a definition of credit claims should be broad enough to include credit claims made eligible by the Eurosystem.

Netting: the ECB considers that there is a need for further progress on the treatment of netting, not just in Directive 2002/47/EC, but also generally across the EU financial acquis. It would be beneficial, for instance, if greater consistency could be achieved between the various definitions of netting and set-off across different EU legal acts.