

Basic information	
<b>2008/0082(COD)</b>  COD - Ordinary legislative procedure (ex-codecision procedure) Directive	Procedure completed
Banks and financial markets: settlement finality in payment and securities settlement systems; financial collateral arrangements as regards linked systems and credit claims  Amending Directive 98/26/EC <a href="#">1996/0126(COD)</a> Amending Directive 2002/47/EC <a href="#">2001/0086(COD)</a>	
<b>Subject</b>	
2.50.03 Securities and financial markets, stock exchange, CIUTS, investments 2.50.04.02 Electronic money and payments, cross-border credit transfers 2.50.10 Financial supervision	

Key players			
European Parliament	<b>Committee responsible</b>  <span style="border: 1px solid red; padding: 2px;">ECON</span> Economic and Monetary Affairs	<b>Rapporteur</b>  KAUPPI Pia-Noora (PPE-DE)	<b>Appointed</b>  20/05/2008
	<b>Committee for opinion</b>  <span style="border: 1px solid red; padding: 2px;">JURI</span> Legal Affairs	<b>Rapporteur for opinion</b>  SAKALAS Aloyzas (PSE)	<b>Appointed</b>  25/06/2008
Council of the European Union	<b>Council configuration</b>  General Affairs Economic and Financial Affairs ECOFIN	<b>Meetings</b>  2938 2894	<b>Date</b>  2009-04-27 2008-10-07
European Commission	<b>Commission DG</b>  Financial Stability, Financial Services and Capital Markets Union	<b>Commissioner</b>  MCCREEVY Charlie	

Key events			
Date	Event	Reference	Summary
23/04/2008	Legislative proposal published	COM(2008)0213 	Summary
08/05/2008	Committee referral announced in Parliament, 1st reading		

07/10/2008	Debate in Council		Summary
02/12/2008	Vote in committee, 1st reading		Summary
05/12/2008	Committee report tabled for plenary, 1st reading	A6-0480/2008	
16/12/2008	Debate in Parliament		
18/12/2008	Decision by Parliament, 1st reading	T6-0629/2008	Summary
18/12/2008	Results of vote in Parliament		
27/04/2009	Act adopted by Council after Parliament's 1st reading		
06/05/2009	Final act signed		
06/05/2009	End of procedure in Parliament		
10/06/2009	Final act published in Official Journal		

Technical information	
Procedure reference	2008/0082(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
Amendments and repeals	Amending Directive 98/26/EC <a href="#">1996/0126(COD)</a> Amending Directive 2002/47/EC <a href="#">2001/0086(COD)</a>
Legal basis	EC Treaty (after Amsterdam) EC 095
Stage reached in procedure	Procedure completed
Committee dossier	ECON/6/62416

Documentation gateway				
European Parliament				
Document type	Committee	Reference	Date	Summary
Committee draft report		PE409.769	30/07/2008	
Amendments tabled in committee		PE413.956	30/09/2008	
Committee opinion	<span style="border: 2px solid red; padding: 2px;">JURI</span>	PE414.034	05/11/2008	
Committee report tabled for plenary, 1st reading/single reading		A6-0480/2008	05/12/2008	
Text adopted by Parliament, 1st reading/single reading		T6-0629/2008	18/12/2008	Summary

Council of the EU				
Document type	Reference	Date	Summary	
Draft final act	03742/2008/LEX	06/05/2009		

European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2008)0213 	23/04/2008	<a href="#">Summary</a>
Document attached to the procedure	SEC(2008)0491 	23/04/2008	
Document attached to the procedure	SEC(2008)0492 	23/04/2008	
Commission response to text adopted in plenary	SP(2009)402	29/01/2009	

#### Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
ECB	European Central Bank: opinion, guideline, report	CON/2008/0037 OJ C 216 23.08.2008, p. 0001	07/08/2008	<a href="#">Summary</a>
EESC	Economic and Social Committee: opinion, report	CES1907/2008	03/12/2008	

#### Additional information

Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	

#### Final act

Directive 2009/0044  
OJ L 146 10.06.2009, p. 0037

[Summary](#)

## 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) - 07/10/2008

The Council approved a **general approach** on a draft 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.

It approved the text pending the opinions of the European Parliament so as to continue the contacts with the Parliament with a view to reaching a first-reading agreement.

The text provides, in particular, for the protection of Directive 98/26/EC to be extended to night-time settlement and to settlement between linked systems, given that the Directive on markets in financial instruments (Directive 2004/39/EC) and the European Code of conduct for clearing and settlement provide for the continued strengthening of the linkages and interoperability between systems.

It is also proposed to extend the scope of the protection provided by both directives to include new types of assets, such as credit claims eligible for the collateralisation of central bank credit operations, in order to facilitate their use throughout the EU. The proposed amendments seek to harmonise the legal framework in order to promote equal conditions of competition and the cross-border use of collateralisation.

## **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) - 07/08/2008 - European Central Bank: opinion, guideline, report

### **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.

## **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) - 06/05/2009 - Final act

**PURPOSE:** to extend the scope of Directive 2002/47/EC to credit claims and to clarify and simplify Directive 98/26/EC.

**LEGISLATIVE ACT:** Directive 2009/44/EC 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.

**CONTENT:** following a first reading agreement with the European Parliament, the Council adopted a directive amending Directives 98/26/EC and Directive 2002/47/EC. This Directive responds to certain changes in the area of payment and securities settlement systems. The main change 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.

The Directive points out that in the case of interoperable systems, a lack of coordination as to which rules apply on the moment of entry and 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, the Directive ensures that system operators of interoperable systems coordinate the rules on the moment of entry and irrevocability in the systems they operate. The concept of an interoperable system and the responsibility of system operators is clarified.

Accordingly, the main objective of the amendments is to bring the rules on settlement finality in payment and securities settlement systems as well as on financial collateral arrangements in line with the latest market and regulatory developments, and to strengthen the tools for managing instability and turmoil in financial markets by:

- protecting the increasing number of linkages between systems to ensure the proper functioning of settlement systems;
- establishing a harmonised legal framework for the use of credit claims as collateral in cross-border transactions to increase market liquidity and promote better availability of credit.

To achieve this, the Directive includes provisions:

- extending the protection of the settlement finality directive to night-time settlement and to settlement between interoperable systems;
- broadening the scope of the protection provided by Directive 98/26/EC and Directive 2002/47/EC to include credit claims in order to facilitate their use throughout the EU;
- introducing a number of simplifications and clarifications to facilitate the application of the two Directives (for instance the mobilisation of credit claims can no longer be invalidated on the grounds that it was not registered or that the debtor has not been notified).

**ENTRY INTO FORCE:** 30/06/2009.

**TRANSPOSITION:** 30/12/2010.

## **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 Pia-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.

## **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".
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- 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 responsible 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.