

Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 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 (Text with EEA relevance)

DIRECTIVE 2009/44/EC OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL

of 6 May 2009

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Central Bank⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽³⁾,

Whereas:

- (1) Directive 98/26/EC of the European Parliament and of the Council⁽⁴⁾ established a regime under which the finality of transfer orders and netting, as well as the enforceability of collateral security, are ensured in respect of both domestic and foreign participants in the payment and securities settlement systems.
- (2) The Evaluation Report from the Commission of 7 April 2006 on the Settlement Finality Directive 98/26/EC concluded that Directive 98/26/EC is functioning well in general. The report highlighted that some important changes may be underway in the area of payment and securities settlement systems and also concluded that there is some need to clarify and simplify Directive 98/26/EC.
- (3) The main change, however, 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. This change is one of the results of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments⁽⁵⁾, and the European Code of conduct for clearing and settlement. In order to adapt to those developments, the concept of an interoperable system and the responsibility of system operators should be clarified.

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- (4) Directive 2002/47/EC of the European Parliament and of the Council⁽⁶⁾ created a uniform Community legal framework for the cross-border use of financial collateral and thus abolished most of the formal requirements traditionally imposed on collateral arrangements.
- (5) The European Central Bank decided to introduce credit claims as an eligible type of collateral for Eurosystem credit operations from 1 January 2007. In order to maximise the economic impact of the use of credit claims, the European Central Bank recommended an extension of the scope of Directive 2002/47/EC. The Commission Evaluation Report of 20 December 2006 on the Financial Collateral Arrangements Directive (2002/47/EC) addressed this issue and subscribed to the opinion of the European Central Bank. The use of credit claims will increase the pool of available collateral. Moreover, further harmonisation in the area of payment and securities settlement systems would further contribute to a level playing field among credit institutions in all Member States. If the use of credit claims as collateral were to be facilitated further, consumers and debtors would also benefit as the use of credit claims as collateral could ultimately lead to more intense competition and better availability of credit.
- (6) In order to facilitate the use of credit claims, it is important to abolish or prohibit any administrative rules, such as notification and registration obligations, that would make the assignments of credit claims impracticable. Similarly, in order not to compromise the position of collateral takers, debtors should be able validly to waive their set-off rights vis-à-vis creditors. The same rationale should also apply to the need to introduce the possibility for the debtor to waive bank secrecy rules, because otherwise the collateral taker may have insufficient information with which properly to assess the value of the underlying credit claims. Those provisions should be without prejudice to Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers⁽⁷⁾.
- (7) Member States have made no use of the possibility under Article 4(3) of Directive 2002/47/EC to opt out of the right of appropriation of the collateral taker. That provision should therefore be deleted.
- (8) Directives 98/26/EC and 2002/47/EC should therefore be amended accordingly.
- (9) In accordance with point 34 of the Interinstitutional agreement on better law-making⁽⁸⁾, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

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- (1) [OJ C 216, 23.8.2008, p. 1.](#)
- (2) Opinion of 3 December 2008 (not yet published in the Official Journal).
- (3) Opinion of the European Parliament of 18 December 2008 (not yet published in the Official Journal) and Council Decision of 27 April 2009.
- (4) [OJ L 166, 11.6.1998, p. 45.](#)
- (5) [OJ L 145, 30.4.2004, p. 1.](#)
- (6) [OJ L 168, 27.6.2002, p. 43.](#)
- (7) [OJ L 133, 22.5.2008, p. 66.](#)
- (8) [OJ C 321, 31.12.2003, p. 1.](#)