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.

(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].

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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.

(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 [1], 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:

Article 1

Amendments to Directive 98/26/EC

Directive 98/26/EC is hereby amended as follows:

(1) Recital 8 shall be deleted.

(2) The following recital shall be inserted:

'(14a) Whereas national competent authorities or supervisors should ensure that 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. National competent authorities or supervisors should ensure that the rules on the moment of entry into an interoperable system are coordinated insofar as possible and necessary in order to avoid legal uncertainty in the event of default of a participating system.'.

(3) The following recital shall be inserted:

'(22a) Whereas 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, it is desirable to provide that system operators of interoperable systems coordinate the rules on the moment of entry and irrevocability in the systems they operate.'.

(4) Article 1 shall be amended as follows:

(a) in point (a), the word 'ecu' shall be replaced by the word 'euro';

(b) in point (c), the second indent shall be replaced by the following:

'— operations of the central banks of the Member States or the European Central Bank in the context of their function as central banks.'.

(5) Article 2 shall be amended as follows:

(a) point (a) shall be amended as follows:

(i) the first indent shall be replaced by the following:

'— between three or more participants, excluding 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,';

(ii) the following subparagraph is added:

'An arrangement entered into between interoperable systems shall not constitute a system.';

(b) in point (b), the first and second indents are replaced by the following:

'— a credit institution as defined in Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (*) including the institutions listed in Article 2 of that Directive,

— an investment firm as defined in Article 4(1)(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (**), excluding the institutions set out in Article 2(1) thereof,

(*) OJ L 177, 30.6.2006, p. 1.
(**) OJ L 145, 30.4.2004, p. 1.';

(c) point (f) shall be amended as follows:

(i) the first subparagraph shall be replaced by the following:

'(f) "participant" shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system operator.';

[1] OJ C 321, 31.12.2003, p. 1.

(ii) the third subparagraph shall be replaced by the following:

'A Member State may decide that, for the purposes of this Directive, an indirect participant may be considered a participant if that is justified on the grounds of systemic risk. 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.';

(d) point (g) shall be replaced by the following:

'(g) "indirect participant" shall mean 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 that the indirect participant is known to the system operator.';

(e) point (h) shall be replaced by the following:

'(h) "securities" shall mean all instruments referred to in section C of Annex I to Directive 2004/39/EC;';

(f) in point (i), the first indent shall be replaced by the following:

'— any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank, a central counterparty or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or';

(g) point (l) shall be replaced by the following:

'(l) "settlement account" shall mean an account at a central bank, a settlement agent or a central counterparty used to hold funds or securities and to settle transactions between participants in a system;';

(h) point (m) shall be replaced by the following:

'(m) "collateral security" shall mean all realisable assets, including, without limitations, financial collateral referred to in Article 1(4)(a) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (*), provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the European Central Bank;

(*) OJ L 168, 27.6.2002, p. 43.';

(i) the following points shall be added:

'(n) "business day" shall cover both day and night-time settlements and shall encompass all events happening during the business cycle of a system;

(o) "interoperable systems" shall mean two or more systems whose system operators have entered into an arrangement with one another that involves cross-system execution of transfer orders;

(p) "system operator" shall mean the entity or entities legally responsible for the operation of a system. A system operator may also act as a settlement agent, central counterparty or clearing house.'.

(6) Article 3 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

'1. Transfer orders and netting shall be legally enforceable and binding on third parties even in the event of insolvency proceedings against a participant, provided that transfer orders were entered into the system before the moment of opening of such insolvency proceedings as defined in Article 6(1). This shall apply even in the event of insolvency proceedings against a participant (in the system concerned or in an interoperable system) or against the system operator of an interoperable system which is not a participant.

Where transfer orders are entered into a system after the moment of opening of insolvency proceedings and are carried out within the business day, as defined by the rules of the system, during which the opening of such proceedings occur, they shall be legally enforceable and binding on third parties only if the system operator can prove that, at the time that such transfer orders become irrevocable, it was neither aware, nor should have been aware, of the opening of such proceedings.';

(b) the following paragraph is added:

'4. In the case of interoperable systems, each system determines in its own rules the moment of entry into its system, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, 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.'.

(7) Article 4 shall be replaced by the following:

'*Article 4*

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 participant4s obligations in the system or in an interoperable system on the business day of the opening of the insolvency proceedings. 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.'.

(8) In Article 5, the following paragraph shall be added:

'In the case of interoperable systems, each system determines in its own rules the moment of irrevocability, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, one system's rules on the moment of irrevocability shall not be affected by any rules of the other systems with which it is interoperable.'.

(9) Article 7 shall be replaced by the following:

'*Article 7*

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 before the moment of opening of such proceedings as defined in Article 6(1). This shall apply, *inter alia*, 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.'.

(10) Article 9 shall be replaced by the following:

'*Article 9*

1. 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; or

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

Such collateral security may be realised for the satisfaction of those rights.

2. Where securities including rights in securities are provided as collateral security to participants, system operators or to central banks of the Member States or the European Central Bank as described in paragraph 1, 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.'.

(11) Article 10 shall be replaced by the following:

'*Article 10*

1. Member States shall specify the systems, and the respective system operators, which are to be included in the scope of this Directive and shall notify them to the Commission and inform the Commission of the authorities they have chosen in accordance with Article 6(2).

The system operator shall indicate to the Member State whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them.

In addition to the indication provided for in the second subparagraph, Member States may impose supervision or authorisation requirements on systems which fall under their jurisdiction.

An institution shall, on request, inform anyone with a legitimate interest of the systems in which it participates and provide information about the main rules governing the functioning of those systems.

2. A system designated prior to the entry into force of national provisions implementing 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 (*) shall continue to be designated for the purposes of this Directive.

A transfer order which enters a system before the entry into force of national provisions implementing Directive 2009/44/EC, but is settled thereafter shall be deemed to be a transfer order for the purposes of this Directive.

(*) OJ L 146, 10.6.2009, p. 37'.

Article 2

Amendments to Directive 2002/47/EC

Directive 2002/47/EC is hereby amended as follows:

(1) Recital 9 shall be replaced by the following:

'(9) 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.'.

(2) Recital 20 shall be replaced by the following:

'(20) This Directive does not prejudice the operation or effect of the contractual terms of financial instruments or credit claims provided as financial collateral, such as rights, obligations or other conditions contained in the terms of issue of such instruments, or any other rights, obligations or other conditions which apply between the issuers and holders of such instruments or between the debtor and the creditor of such credit claims.'.

(3) The following recital shall be added: [Recital 12 in RELEC_STO]

'(23) This 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,'.

(4) Article 1 shall be amended as follows:

(a) paragraph 2(b) shall be replaced by the following:

'(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as referred to in Annex VI, Part 1, Section 4 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (*), the International Monetary Fund and the European Investment Bank;

(*) OJ L 177, 30.6.2006, p. 1.';

(b) in paragraph 2(c), points (i) to (iv) shall be replaced by the following:

'(i) a credit institution as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that Directive;

(ii) an investment firm as defined in Article 4(1)(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (*);

(iii) a financial institution as defined in Article 4(5) of Directive 2006/48/EC;

(iv) an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance (third non-life insurance Directive) (**) and an assurance undertaking as defined in Article 1(1)(a) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (***);

(*) OJ L 145, 30.4.2004, p. 1.
(**) OJ L 228, 11.8.1992, p. 1.
(***) OJ L 345, 19.12.2002, p. 1.';

(c) paragraph 4(a) shall be replaced by the following:

'(a) The financial collateral to be provided shall consist of cash, financial instruments or credit claims;';

(d) in paragraph 4, the following point shall be added:

'(c) Member States may exclude from the scope of this Directive credit claims where the debtor is a consumer as defined in Article 3(a) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (*) or a micro or small enterprise as defined in Article 1 and Article 2(2) and (3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 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 under Article 1(2)(b) of this Directive.

(*) OJ L 133, 22.5.2008, p. 66.
(**) OJ L 124, 20.5.2003, p. 36.';

(e) paragraph 5 shall be amended as follows:

(i) in the second subparagraph, the following sentence shall be added:

'For credit claims, the inclusion in a list of claims submitted in writing, or in a legally equivalent manner, to the collateral taker is sufficient to identify the credit claim and to evidence the provision of the claim provided as financial collateral between the parties.';

(ii) the following subparagraph shall be inserted after the second subparagraph:

'Without prejudice to the second subparagraph, Member States may provide that the inclusion in a list of claims submitted in writing, or in a legally equivalent manner, to the collateral taker is also sufficient to identify the credit claim and to evidence the provision of the claim provided as financial collateral against the debtor or third parties.'.

(5) Article 2 shall be amended as follows:

(a) paragraph 1 is amended as follows:

(i) points (b) and (c) shall be replaced by the following:

'(b) "title transfer financial collateral arrangement" means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of, or full entitlement to, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations;

(c) "security financial collateral arrangement" means an arrangement under which a collateral provider provides financial collateral by way of security to or in favour of 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;';

(ii) the following point shall be added:

'(o) "credit claims" means pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan.';

(b) in paragraph 2, the second sentence shall be replaced by the following:

'Any right of substitution, right to withdraw excess financial collateral in favour of the collateral provider or, in the case of credit claims, right to collect the proceeds thereof until further notice, shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in this Directive.'.

(6) Article 3 shall be amended as follows:

(a) in paragraph 1, the following subparagraphs shall be added:

'Without prejudice to Article 1(5), when credit claims are provided as financial collateral, Member States shall not require that the creation, validity, perfection, priority, enforceability or admissibility in evidence of such financial collateral 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 or third parties.

By 30 June 2014, the Commission shall report to the European Parliament and to the Council on whether this paragraph continues to be appropriate.';

(b) the following paragraph shall be added:

'3. Without prejudice to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (*) and national provisions concerning unfair contract terms, Member States shall ensure that debtors of the credit claims may validly waive, in writing or in a legally equivalent manner:

(i) their rights of set-off vis-à-vis the creditors of the credit claim and vis-à-vis persons to whom the creditor assigned, pledged or otherwise mobilised the credit claim as collateral; and

(ii) their rights arising from banking secrecy rules that would otherwise prevent or restrict the ability of the creditor of the credit claim to provide information on the credit claim or the debtor for the purposes of using the credit claim as collateral.

(*) OJ L 95, 21.4.1993, p. 29.'.

(7) Article 4 shall be amended as follows:

(a) in paragraph 1, the following point shall be added:

'(c) credit claims, by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations.';

(b) in paragraph 2, point (b) shall be replaced by the following:

'(b) the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments and the credit claims.';

(c) paragraph 3 shall be deleted.

(8) In Article 5, the following paragraph shall be added:

'6. This Article shall not apply to credit claims.'.

(9) The following Article shall be inserted after Article 9:

'Article 9a

Directive 2008/48/EC

The provisions of this Directive shall be without prejudice to Directive 2008/48/EC.'.

Article 3

Transposition

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 30 December 2010. They shall forthwith inform the Commission thereof.

They shall apply those measures from 30 June 2011.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 6 May 2009.

For the European Parliament	*For the Council*
The President	*The President*
H.-G. PÖTTERING	J. KOHOUT