

# EUROPEAN PARLIAMENT

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*Committee on Economic and Monetary Affairs*

**2008/0082(COD)**

30.7.2008

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## **DRAFT REPORT**

on 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 (COM(2008)0213 – C6-0181/2008 – 2008/0082(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Piia-Noora Kauppi

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on 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**

**(COM(2008)0213 – C6-0181/2008 – 2008/0082(COD))**

**(Codecision procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2008)0213),
  - having regard to Article 251(2) and Article 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0181/2008),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Economic and Monetary Affairs (A6-0000/2008),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

### **Amendment 1**

**Proposal for a directive – amending act**

**Article 1 – point -1 (new)**

Directive 98/26/EC

Recital 8

*Text proposed by the Commission*

*Amendment*

***(-1) Recital 8 shall be deleted.***

Or. en

### *Justification*

*The 1998 SFD explicitly allowed Member States to notify systems that were active in commodity derivatives. This explicit reference was necessary as commodity derivatives were not covered by the 1993 Investment Services Directive. Since then, MiFID has replaced the*

*ISD and commodity derivatives are fully covered. Preamble 8 of the SFD has therefore lost its relevance and is therefore deleted.*

## **Amendment 2**

### **Proposal for a directive – amending act**

#### **Article 1 – point -1 a (new)**

Directive 98/26/EC

Recital 14 a (new)

*Text proposed by the Commission*

*Amendment*

***(-1a) The following recital shall be inserted after Recital 14:***

***"(14a) Whereas in case of interoperable systems, a lack of coordination as to which rules on the moment of entry/irrevocability apply may expose participants in one system, or even the system operator itself, to the spill-over effects of a default in the other 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 that they operate."***

Or. en

### *Justification*

*Coordination of entry/irrevocability times is necessary in order to limit systemic risks and to avoid ex-post legal disputes.*

## **Amendment 3**

### **Proposal for a directive – amending act**

#### **Article 1 – point -1 b (new)**

Directive 98/26/EC

Recital 14 b (new)

*Text proposed by the Commission*

*Amendment*

***(-1b) The following recital shall be inserted after Recital 14a:***

***"(14b) Whereas as regards rules on the moment of entry in interoperable systems,***

*which should be coordinated by the systems that are party to the interoperable system, national supervisors should ensure, before approving the establishment of an interoperable system, that the operators of the systems establishing the interoperable system have agreed on common rules."*

Or. en

#### *Justification*

*The supervisors should ensure in advance that the rules on the moment of entry in an interoperable system are coordinated in order to avoid legal uncertainty in case of a default of a participating system.*

#### **Amendment 4**

##### **Proposal for a directive – amending act**

##### **Article 1 – point 2 – point -a (new)**

Directive 98/26/EC

Article 2 – point a – paragraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***(-a) In point (a) the following paragraph shall be added:***

***"An arrangement entered into between interoperable systems shall not constitute a system."***

Or. en

#### *Justification*

*Clarifies the meaning of a "system" and of an "interoperable system" for the purposes of the Directive.*

#### **Amendment 5**

##### **Proposal for a directive – amending act**

##### **Article 1 – point 2 – point b**

Directive 98/26/EC

Article 2 – point f – paragraph 1

*Text proposed by the Commission*

(b) In point (f), *the words*

***"'participant' shall mean an institution, a central counterparty, a settlement agent or a clearing house."***

*are* replaced by the following:

"'participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system."

*Amendment*

(b) In point (f), ***the first paragraph shall be*** replaced by the following:

"'participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system ***operator***."

Or. en

*Justification*

*The amendment clarifies that it is not the system but the system operator - which is a legal person - that is considered a participant.*

**Amendment 6**

**Proposal for a directive – amending act**

**Article 1 – point 2 – point c**

Directive 98/26/EC

Article 2 – point g

*Text proposed by the Commission*

(g) 'indirect participant' shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system with a contractual relationship with an institution participating in a system executing transfer orders which enables the indirect participant to pass transfer orders through the system;

*Amendment*

(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 an institution participating 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***;

Or. en



### *Justification*

*The amendment clarifies that it is not the system but the system operator - which is a legal person - that is considered a participant. The latter part brings clarity to the position of the system operator who must have knowledge of whom they have responsibilities towards.*

### **Amendment 7**

#### **Proposal for a directive – amending act**

#### **Article 1 – point 2 – point c a (new)**

Directive 98/26/EC

Article 2 – point g – paragraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***(ca) In point (g), the following paragraph shall be added:***

***"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."***

Or. en

### *Justification*

*Clarifies the definition of the respective responsibilities of a direct and an indirect participant.*

### **Amendment 8**

#### **Proposal for a directive – amending act**

#### **Article 1 – point 2 – point e**

Directive 98/26/EC

Article 2 – point m

*Text proposed by the Commission*

*Amendment*

(m) 'collateral security' shall mean all realisable assets, including ***credit claims eligible for the collateralisation of central bank credit operations***, provided under a pledge (including money provided under a pledge), a repurchase or similar agreement,

(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***, provided under a pledge (including money provided under a pledge), a repurchase or

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;

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;

Or. en

### *Justification*

*The amendment ensures that all collateral accepted as such in Directive 2002/47/EC is treated similarly also for the purposes of this Directive thus bringing the two Directives in line with each other.*

## **Amendment 9**

### **Proposal for a directive – amending act**

#### **Article 1 – point 2 – point e a (new)**

Directive 98/26/EC

Article 2 – point m a (new)

*Text proposed by the Commission*

*Amendment*

***(ea) The following point shall be added:***

***"(ma) 'business day' shall cover both day and night-time settlements and shall encompass all events happening during the business cycle of the system."***

Or. en

### *Justification*

*Addition to the definitions in order for the Directive to cover night time settlements as intended by the European Commission draft.*

## Amendment 10

### Proposal for a directive – amending act

#### Article 1 – point 2 – point f

Directive 98/26/EC

Article 2 – point n

#### *Text proposed by the Commission*

(n) 'interoperable system' shall mean **a** system **that enters** into an agreement **with one or more systems that entail the establishment of mutual solutions and not simply connecting to existing standard service offerings**;

#### *Amendment*

(n) 'interoperable system' shall mean **two or more systems whose** system **operators have entered** into an arrangement **between themselves, which involves cross-system execution of transfer orders**;

Or. en

#### *Justification*

*The new definition more clearly expresses that an "interoperable system" is the entity of two or more systems the existence of which is conditional upon an agreement between the system operators of the participating systems.*

## Amendment 11

### Proposal for a directive – amending act

#### Article 1 – point 2 – point f

Directive 98/26/EC

Article 2 – point o

#### *Text proposed by the Commission*

(o) 'system operator' shall mean the entity **in charge of the day to day** operation of a system. A system operator may also act as a settlement agent, central counterparty or clearing house.

#### *Amendment*

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

Or. en

#### *Justification*

*The amendment adds to legal certainty by clarifying the definition.*

## Amendment 12

### Proposal for a directive – amending act

#### Article 1 – point 3 – point a

Directive 98/26/EC

Article 3 – paragraph 1

#### *Text proposed by the Commission*

1. Transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant ***or an interoperable system, shall be binding on third parties***, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6(1).

Where, ***exceptionally***, 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, ***after the time of settlement***, the system operator can prove that it was not aware, nor should have been aware, of the opening of such proceedings.

#### *Amendment*

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 a 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 a 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, they shall be legally enforceable and binding on third parties only if the system operator can prove that ***at the time such transfer orders become irrevocable***, it was not aware, nor should have been aware, of the opening of such proceedings.

Or. en

#### *Justification*

*The amendment clarifies the wording and brings it line with the changes in definitions of Article 2, points (f), (g) and (n).*

## Amendment 13

### Proposal for a directive – amending act

#### Article 1 – point 3 – point b

Directive 98/26/EC

Article 3 – paragraph 4

#### *Text proposed by the Commission*

4. In case of interoperable systems, each system determines its own rules **on** the moment of entry in its system. One system's rules on moment of entry shall not be affected by any rules of the other systems with which it is interoperable.

#### *Amendment*

4. In case of interoperable systems, each system determines **in** its own rules the moment of entry in its system **in order to ensure, as far as possible, that the rules of all systems that are party to the interoperable system are coordinated in this regard. Unless expressly provided for by the rules of the 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.

Or. en

#### *Justification*

*In the case of interoperable systems it is necessary for the rules on the moment of entry to be coordinated between the participating systems for legal certainty as well as consistency.*

## Amendment 14

### Proposal for a directive – amending act

#### Article 1 – point 3 a (new)

Directive 98/26/EC

Article 4

#### *Text proposed by the Commission*

#### *Amendment*

**(3a) 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**

participant's obligations in the 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. en

#### *Justification*

*The amendment updates the Article to cover system operators of interoperable systems that may not be participants.*

### **Amendment 15**

#### **Proposal for a directive – amending act**

##### **Article 1 – point 4**

Directive 98/26/EC

Article 5 – paragraph 1a

#### *Text proposed by the Commission*

In case of interoperable systems, each system determines its own rules on the moment of *revocation in its system*. One system's rules on moment of *revocation* shall not be affected by any rules of the other systems with which it is interoperable.

#### *Amendment*

In case of interoperable systems, each system determines its own rules on the moment of *irrevocability in order to ensure, as far as possible, that the rules of all systems that are party to the interoperable system are coordinated in this regard. Unless expressly provided for by the rules of the systems concerned*, 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.

Or. en

#### *Justification*

*In the case of interoperable systems it is necessary for the rules on the moment of irrevocability to be coordinated between the participating systems for legal certainty as well as consistency.*

## Amendment 16

### Proposal for a directive – amending act

#### Article 1 – point 4 a (new)

Directive 98/26/EC

Article 7

*Text proposed by the Commission*

*Amendment*

***(4a) 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 earlier than the moment of opening of such proceedings as defined in Article 6(1). 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."***

Or. en

*Justification*

*The amendment updates the Article to cover interoperable systems.*

## Amendment 17

### Proposal for a directive – amending act

#### Article 1 – point 5

Directive 98/26/EC

Article 9 – paragraph 1

*Text proposed by the Commission*

*Amendment*

1. The rights of a system or of a participant to collateral security provided to ***it*** in connection with a 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

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

affected by insolvency proceedings against the participant *or* counterparty to central banks of the Member States or the European Central Bank which provided the collateral security. Such collateral security may be realised for the satisfaction of these rights.

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 these rights.

Or. en

#### *Justification*

*The amendment renders the scope of the Article more accurate and updates it to account for the concept of interoperable systems.*

#### **Amendment 18**

##### **Proposal for a directive – amending act**

##### **Article 1 – point 6**

Directive 98/26/EC

Article 10

##### *Text proposed by the Commission*

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

##### *Amendment*

**I.** 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.

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.**

**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.**

***2. 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.***

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

Or. en

### *Justification*

*The amendment adds to the transparency of the systems as well as includes necessary specifications to regulate transitional conditions in the entry into force of the Directive.*

## **Amendment 19**

### **Proposal for a directive – amending act**

#### **Article 2 – point 1 – point c**

Directive 2002/47/EC

Article 1 – paragraph 4 – point a

#### *Text proposed by the Commission*

(a) The financial collateral to be provided must consist of cash, financial instruments or credit claims ***eligible for***

#### *Amendment*

(a) The financial collateral to be provided must consist of cash, financial instruments

***collateralisation of central bank credit operations.***

or credit claims.

Or. en

*Justification*

*The amendment includes also inter-bank loans in eligible collateral.*

**Amendment 20**

**Proposal for a directive – amending act**

**Article 2 – point 1 – point c a (new)**

Directive 2002/47/EC

Article 1 – paragraph 4 – point b a (new)

*Text proposed by the Commission*

*Amendment*

***(ca) In paragraph 4, the following point shall be added:***

***"(ba) 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 small enterprise as defined in Article 1 and Article 2(2) 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 to in Article 1(2)(b) of this Directive."***

***\* OJ L 133, 22.5.2008, p. 66.***

***\*\* OJ L 124, 20.5.2003, p. 36.***

Or. en

*Justification*

*It is desirable to close consumer credit as well as small enterprises' credit out of the scope of the directive because the amount of their credit claims is small.*

## Amendment 21

### Proposal for a directive – amending act

#### Article 2 – point 1 – point d

Directive 2002/47/EC

Article 1 – paragraph 5 – subparagraph 2 – last sentence

#### *Text proposed by the Commission*

For credit claims, the inclusion in a list of claims submitted in writing, or in a legally equivalent manner, including by electronic means, to the collateral taker is sufficient to prove the mobilisation and the identification of the claim provided as collateral.

#### *Amendment*

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***.

Or. en

#### *Justification*

*The amendment clarifies that the inclusion in the list between the parties is sufficient for the identification of the claim as collateral. Additional requirements would add to complexity without bringing added benefits and hamper effective harmonisation of the use of credit claims as collateral.*

## Amendment 22

### Proposal for a directive – amending act

#### Article 2 – point 1 – point d a (new)

Directive 2002/47/EC

Article 1 – paragraph 5 – subparagraph 2 a (new)

#### *Text proposed by the Commission*

#### *Amendment*

***(da) In paragraph 5, 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 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."*

Or. en

*Justification*

*The amendment clarifies that the inclusion in the list between the parties is sufficient for the identification of the claim as collateral. Additional requirements would add to complexity without bringing added benefits and hamper effective harmonisation of the use of credit claims as collateral.*

**Amendment 23**

**Proposal for a directive – amending act**

**Article 2 – point 2 – point a – point i**

Directive 2002/47/EC

Article 2 – paragraph 1 – point b

*Text proposed by the Commission*

(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;

*Amendment*

(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 **credit claims**, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations;

Or. en

*Justification*

*The addition clarifies that in the case of credit claims, full entitlement is sufficient as ownership as such cannot be transferred.*

**Amendment 24**

**Proposal for a directive – amending act**

**Article 2 – point 2 – point a – point i a (new)**

Directive 2002/47/EC

Article 2 – paragraph 1 – point c

*Text proposed by the Commission*

*Amendment*

*(ia) Point (c) shall be replaced by the following:*

**"(c) 'security financial collateral arrangement' 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 the financial collateral remains with the collateral provider when the security right is established;"**

Or. en

*Justification*

*The amendment completes the definition as ownership rights remaining with the provider can be qualified under these arrangements.*

## **Amendment 25**

**Proposal for a directive – amending act**

**Article 2 – point 3 – point a**

Directive 2002/47/EC

Article 3 – paragraph 1 – subparagraph 2

*Text proposed by the Commission*

*Amendment*

When credit claims are provided as financial collateral, Member States shall not require that ***the*** creation, validity ***or*** admissibility in evidence ***of their provision as financial collateral under a financial collateral arrangement*** 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.

***Without prejudice to Article 1(5), when credit claims are provided as financial collateral, Member States shall not require that ***their*** creation, ***perfection***, validity, admissibility in evidence, ***or enforceability*** 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. ***For a transitional period of five years from the entry into force of this Directive, however, Member States may maintain the performance of a formal act, such as registration or notification, for purposes of perfection, priority or enforceability against the debtor and/or third parties.******

*Justification*

*Many Member States consider a public form of notification/registration of credit claims as collateral necessary for the maintenance of trust. However, this is not the practice in all Member States. Where the use of credit claims as collateral with no public registration or notification is in use, there is no evidence of wrong-doings. Therefore the exemption clause should be repealed in due time when member states gain experience of using credit claims as collateral.*

## **EXPLANATORY STATEMENT**

### **Objectives of the Commission's proposal**

The main purpose of the Commission's proposal is to bring the Directive on settlement finality in payment and securities settlement systems (SFD) and the Directive on financial collateral arrangements (FCD) in line with the latest market and regulatory developments.

First analyses of the implementation of the MiFID (directive 2004/39/EC) as well as the European Code of conduct for clearing and settlement show an increase of links and interoperability and therefore a need for extending the protection of the SFD to night-time settlement and to settlement between linked systems.

In order to recognise some practices already in use in many member states, the European Commission has broadened the scope of the protection provided by both directives to include new types of assets (i.e. credit claims) in order to facilitate their use throughout the Community.

Finally the European Commission used this recast in order to introduce a number of simplifications and clarifications to facilitate the application of the FCD and SFD.

The recent, and still ongoing, financial turmoil which requires strengthening the tools for managing instability and turmoil in financial markets, is also a strong argument in favour of this proposal.

Indeed, ensuring the proper functioning of settlement systems in rapidly evolving markets is indispensable for the stability of financial markets, even more so in times of market turmoil. Moreover, the establishment of a harmonised legal framework for the use of credit claims as collateral in cross-border transactions would help enhancing market liquidity, which has been severely hit in recent months.

### **General context**

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 Governing Council decided to include credit claims as an eligible type of collateral for Eurosystem credit operations as of 1 January 2007. However, some Member States, i.e. France, Germany, Spain, Austria and the Netherlands already accepted credit claims, although operating under different legal regimes. In order to create a level playing field among central banks and to stimulate the cross-border use of collateral, the relevant legal framework needs to be harmonised.

Another important development in financial markets is the increasing number of linkages between systems. This trend is expected to continue and possibly even to accelerate due to the introduction of the Code, adopted by providers of central market infrastructure services on 7 November 2006.<sup>1</sup> The aim of the Code is to improve the efficiency of European clearing and settlement systems by making the user choices enshrined by Articles 34 and 46 of MiFID a

real option rather than just a possibility. The general principles contained in Chapter IV of the Code and the detailed rules featured in the Access and Interoperability Guideline presented by providers of infrastructure services in June 2007 enable user choice of service provider by making it easier for systems to set up links, i.e. gain access to and become interoperable with systems in foreign markets. To ensure that the objectives of the SFD are upheld in this new situation, the proposal adapts the SFD to this new market place which is characterised by an increased number of links.

The two Directives on Settlement Finality and Financial Collateral Arrangements are the main Community instruments in the area of financial collateral, clearing and settlement. The rapporteur is of the opinion that the proposed changes are in line with the spirit and the provisions of the MiFID and with specific provisions on solvency ratios in the Capital Requirements Directives. Some provisions of Directive 2001/24/EC on the winding-up of credit institutions and Regulation 1346/2000 on insolvency also have a bearing on collateral arrangements.

Recognising that the lack of EU framework for dealing with interests in securities held by intermediaries may constitute a potential legal risk in cross-border transactions, the Legal Certainty Group was set up by the European Commission in January 2005 to advise on the appropriate legal framework. The final report of the Group is due by the end of 2008 and should complement the Financial Collateral Arrangements Directive and the Settlement Finality Directive and the changes envisaged in this proposal. Simultaneously, at the international level, UNIDROIT intends to convene a Diplomatic Conference in September 2008 with a view to arriving at a convention on substantive rules regarding intermediated securities. The provisions in the draft convention are in part modelled on the Financial Collateral Arrangements Directive and Settlement Finality Directive and should not give rise to any problems of incompatibility.

Furthermore, the provisions relating to credit claims are in line with the new provisions of the Consumer Credit Directive. The report supports the exclusion from the scope of the proposal of consumer loans, as defined in the Consumer Credit Directive, as well as the exclusion of loans given to small enterprises.

The rapporteur is also of the opinion that the proposal brings some useful elements of simplification and clarification to the two directives. For example, the proposal seeks to facilitate the use of credit claims as collateral by suggesting a light regime for the evidencing of the provision of credit claims as collateral instead of a lengthy (and thus costly) procedure whereby proof of each individual credit claim would be required. The proposal also suggests to delete the unused opt-out provision in Article 4 (3) FCD and seeks to eliminate the outdated references in the two directives. As regards the SFD, clarifying its provisions will simplify its application. For example, the proposal clarifies the personal scope of the SFD by clearly including Electronic Money Institutions in Article 2.

### **Main changes introduced by the report**

The rapporteur is of the opinion that the Commission proposal for a recast of both directives is sound and coherent to the existing EU legislation.

The rapporteur would nevertheless propose few substantial, as well as a number of minor clarifications. As regards the Settlement Finality Directive, several amendments to the



Commission proposal are introduced to clarify definitions of interoperable systems in order to improve legal certainty in the application of the Directive to such systems.

As regards the Financial Collateral Directive, the rapporteur proposes three substantial changes. First, consumer credit as well as credit for small enterprises is excluded from the scope of the Directive. A definition of a small enterprise is introduced in order not to exempt an unnecessarily large part of business loans from the scope of the Directive. Second, some Member States currently have requirements for a formal notification or registration of the use of credit claims as collateral. The current Council compromise does allow their maintenance. However, the experience from Member States where credit claims are already widely used as collateral does not suggest such requirements are necessary for any practical purpose. The rapporteur is of the opinion that formal notification requirement should be phased out and therefore introduces a sunset clause in five years from the entry into force of the Directive to the right for the member states to require notification or registration. Finally, the rapporteur would like this directive to have a scope as wide as possible and proposes to extend the scope of the directive to include inter-bank loans as eligible collateral, instead of just central bank loans as the original proposal suggested. These are already accepted in some Member States and their exclusion is unduly restrictive in the view of the benefits a larger collateral pool brings.