

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)

*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

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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)<sup>(1)</sup> 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<sup>(2)</sup>, excluding the institutions set out in Article 2(1) thereof,;

(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.;

(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

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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<sup>(3)</sup>, 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;;
- (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.;

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(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 participant's 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.

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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<sup>(4)</sup> 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..

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- (1) [OJ L 177, 30.6.2006, p. 1.](#)
- (2) [OJ L 145, 30.4.2004, p. 1.](#)’;
- (3) [OJ L 168, 27.6.2002, p. 43.](#)’;
- (4) [OJ L 146, 10.6.2009, p. 37.](#)