



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.03.1998

COM(1998) 151 final

96/0126 (COD)

OPINION OF THE COMMISSION
pursuant to Article 189 b (2) (d) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the

proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

ON SETTLEMENT FINALITY IN PAYMENT AND SECURITIES SETTLEMENT SYSTEMS

AMENDING THE PROPOSAL OF THE COMMISSION
pursuant to Article 189 a (2) of the EC Treaty

1. BACKGROUND

1. On 30 May 1996, the Commission adopted a proposal for a Directive on Settlement Finality and Collateral Security¹. This text was forwarded to the Parliament, the Council, the Economic and Social Committee and the European Monetary Institute.
2. The Council began to examine the proposal on 20 September 1996.
3. The Economic and Social Committee unanimously adopted an opinion on the Commission proposal on 31 October 1996, in which it recommended that securities settlement systems be included in the scope of the proposal².
4. The European Monetary Institute delivered its opinion on 21 November 1996. It welcomed the proposal and stressed its crucial importance to the efficient and smooth functioning of payment systems; it also recommended that securities settlement systems should be included in the scope.
5. The European Parliament welcomed this proposal and adopted its opinion on the Commission proposal during its plenary meeting of 9 April 1997³.
6. On 4 July 1997, the Commission adopted its amended proposal⁴ in the light of the consultation of the European Parliament, the Economic and Social Committee and the European Monetary Institute.
7. On 13 October 1997, the Council adopted its common position⁵.
8. On 29 January 1998, the European Parliament adopted 3 amendments in second reading.

In accordance with Article 189b (2) (d) of the EC Treaty, the Commission has to deliver an opinion on these amendments.

¹ COM (96) 193 final, OJ N° C 207, 18.07.1996., p. 13.

² OJ N° C 56, 24.02.97., p. 1.

³ OJ N° C 132, 28.04.97.

⁴ Amended proposal for a European Parliament and Council Directive on settlement finality and collateral security (to be renamed 'On the limitation of systemic risk in payment and securities settlement systems'), COM/97/0345 final - COD 96/0126, Official journal NO. C 259 , 26/08/1997 p. 6.

⁵ OJ C 375, 10 December 1997, p. 34.

2. POSITION TAKEN BY THE COMMISSION REPRESENTATIVE AT THE PLENARY SITTING

The European Parliament proposed 3 amendments to the text of the common position of the Council. The Commission representative accepted all amendments.

(The relevant amendments are numbered 4 to 6; earlier amendments 1 to 3 were withdrawn)

3. COMMISSION OPINION ON THE AMENDMENTS VOTED BY THE EUROPEAN PARLIAMENT

Amendment 4

Amendment 4 proposes to delete Article 11 of the common position. Since the first paragraph of amendment 6 states in clearer terms what Article 11 aims at achieving, this amendment is acceptable to the Commission.

Amendment 5

Amendment 5 changes the second part of article 3 (1) of the common position. It underlines the exceptional nature of the cases in which transfer orders entered into the system after the opening of insolvency proceedings are valid. It also turns around the burden of proof: transfer orders entered after the opening of insolvency proceedings are only valid if the "system" can prove that it was unaware and should not have been aware of this opening. Finally, it specifies whose unawareness is relevant in order for a transfer order entered after the moment of opening of insolvency proceedings to be valid: transfer orders entered after that moment are only valid if the *central counterparty, the clearinghouse or the settlement agent* were unaware and should not have been aware of the opening of insolvency proceedings.

Although the Commission is of the opinion that having to provide a negative proof (proof of unawareness) can raise difficulties, it nevertheless considers that this good faith clause is workable in practice, especially in view of the procedure for notifying insolvencies as defined in the Directive.

Amendment 6

- first paragraph

The first paragraph of amendment 6 clarifies what Article 11 of the common position aimed at achieving. The Commission can therefore accept both amendment 4 (deletion of article 11) and amendment 6 (1). It should be noted that the fact that Member States can impose supervision of systems can of course in no way prejudice the powers of the European System of Central Banks as laid down in Article 22 of its statute.

- second paragraph

The second paragraph of amendment 6 aims essentially at allowing the final users of payment or securities settlement systems, namely the customer, to be informed of which system his bank or investment firms uses to transfer money or securities for his account, as well as of the main rules governing the functioning of these systems. This should allow the customer, and other parties with a legitimate interest, to be able to compare the services provided by different systems in terms of transfer time e.g. and to assess the degree of risk associated with one or other system. The higher level of transparency vis-à-vis this final user of a payment or securities transaction which is introduced by amendment 6 (2) can only be welcomed by the Commission.

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

ON SETTLEMENT FINALITY IN PAYMENT AND SECURITIES SETTLEMENT SYSTEMS

(Amendment 4)
Article 11

Article 11

Deleted

In order to protect systems, each Member State may impose more stringent conditions on systems than those laid down by this Directive.

(Amendment 5)
Article 3(1)

1. Transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant, shall be binding on third parties, provided that transfers were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6(1) or if they were carried out on the day of opening of the insolvency proceedings unless the system was aware or should have been aware of the opening of such proceedings.

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

Where, in exceptional cases, transfer orders enter into a system after the moment of opening of insolvency proceedings and were settled on the day of such opening, they shall only be legally enforceable and binding on third parties if the settlement agent, the central counterparty or the clearing house can prove, after the moment of settlement, that they were unaware and should not have been aware of the opening of the insolvency proceedings.

(Amendment 6)
Article 10, second paragraph a and b (new)

In addition to the notification provided for in the second paragraph above, Member States may impose supervision or approval on systems which fall under their jurisdiction.

Whoever has a legitimate interest may require from an institution to be informed about the system in which it participates and about the main rules governing the functioning of such systems.

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