

Banks: settlement finality in payment and securities settlement systems

1996/0126(COD) - 13/10/1997 - Council position

The common position of the Council is in keeping with the spirit of a large number of amendments proposed by the European Parliament, primarily with regard to the following points: - the inclusion of systems for the regulation of securities operations within the scope of the directive; - the fact that the directive is applied to systems operating in various currencies which the system converts one against another; - the inclusion of a clause determining the moment at which an insolvency procedure is considered opened for the purpose of the directive; - the establishment of a notification procedure within the framework of which the competent authorities are to be informed of the insolvency of a participant in the system. It should be noted that, in comparison with the Commission's proposal, the common position: - does not cover the participation of Community institutions in third-country systems, but restricts the scope of the directive to systems governed by the legislation of a Member State; - does not specifically refer to monetary policy operations in the definition of the applicability to constituted guarantees, though it does refer to the operations of banks when the latter act *ex officio*. The common position also differs from the Commission's proposal in respect of definitions: a) the common position is based on the definitions of "payment system" and "Community payment system", but amends these definitions by adding certain legal guarantees. In particular: - a system must be a formal agreement which comprises common rules and standard procedures for the execution of transfer orders between participants; - the minimum number of participants is fixed at three institutions rather than two; - the legislation governing the system is defined as legislation chosen by the participants (the Council has not accepted Parliament's amendment relating to the place where a settlement or book entry takes place); - it is required that the designation as a system be undertaken by the Member State whose legislation is applicable; - the Member State designating a system ensure that the operating rules of the system are adequate; - only those systems are covered which enforce orders relating to money or securities, as defined by the directive; b) in order to reinforce the stability of the systems covered by the directive, the common position introduces certain criteria determining which enterprises may participate in a system: c) the common position adds a new element by giving Member States the choice of incorporating indirect participants in their systems, under certain conditions; d) following the introduction, in the amended proposal, of securities settlement systems, the definition of "payment order" has been amended and replaced by the term "transfer order", which henceforth includes transfers of money and securities. As far as compensation and transfer orders are concerned, the common position: - sets out the key element in the directive, namely that compensation and transfer orders take effect in law and can be used in evidence by third parties even in the case of insolvency proceedings against a participant; - introduces a new measure specifying that transfer orders executed after the opening of insolvency proceedings are treated as transfer orders entered into a system prior to the opening of insolvency proceedings provided that the system did not have prior knowledge of the opening of these proceedings; - lays down specific rules governing the definition of the moment of introduction of a transfer order into a system; - leaves it to the system to define the rules governing the cancellation of a transfer order. As regards measures relating to insolvency proceedings, the common position: - introduces a provision defining the moment of opening of insolvency proceedings as the moment when the judicial or administrative authority hands down its decision; - requires that each Member State designate an authority which shall be informed by the judicial or administrative authority of the decision it has taken; - requests the Member State in which the insolvency proceedings have been opened to notify all other Member States of these proceedings; - states that the insolvency proceedings against a participant in a system may not have a retroactive effect on the rights and obligations of a participant. Lastly, the common position fixes the date of entry into force by reference to the date of publication of the directive.