

FINAL REPORT

CONTRACT N° ETD/2001/B5-3001/C/78

**STUDY INTO THE TRANSPOSITION BY
MEMBER STATES OF DIRECTIVE 98/26/EEC**

On behalf of:

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**FINAL REPORT ON THE STUDY TO REVIEW
THE TRANSPOSITION BY MEMBER STATES OF THE
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SECTION 1: INTRODUCTION

**FINAL REPORT ON THE STUDY TO REVIEW
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SECTION 1: INTRODUCTION

- 1.1 The Consortium formed by PricewaterhouseCoopers and Landwell is pleased to present for consideration by the Commission its Final Report on the study verifying common and coherent transposition and application of Settlement Finality Directive 98/26/EEC on settlement finality in payment and securities settlement systems (“the SFD”) in the 15 Member States, including the territories of those Member States having a separate legal system. In accordance with the contract, it is intended that this report should provide the Commission with a clear overview of the legal transposition process and the actual application of the SFD, including an assessment of any incomplete or incorrect transposition and of any wrongful application by the institutions involved or by Member State authorities. For practical reasons, our transposition study only covers the period up until the date of submission of our Interim Report (1 July 2002). An analysis comparing the data in the various Member States is included in this report. This Final Report incorporates the Commission’s detailed comments on the Draft Final Report for each Member State and meetings have been held in this regard with the competent authorities.
- 1.2 Transposition tables and executive summaries have been adapted in line with the Commission’s comments on the Draft Final Report for each Member State; interviews and meetings have been held with the relevant authorities.

Purpose of the Study

- 1.3 Under Article 211 (ex Article 155) of the Treaty, the European Commission needs to ensure that measures taken by Community institutions are applied. It therefore has power to monitor the transposition of Community directives into national law and, where appropriate, initiate infringement procedures under Article 226 (ex Article 169) of the Treaty. This study is intended, therefore, to assist the Commission in its assessment of the conformity of national implementation measures transposing Directive 98/26/EEC.

Content of the Study

- 1.4 The Tender Specifications state that the study should include detailed transposition tables for all Member States, clearly setting out:
- the national implementing measures (national legislation transposing the Settlement Finality Directive as well as any secondary acts (e.g. central bank rules), including where the SFD gives the Member States an option or discretion, and related national case law),
 - comments on these measures (a comparison of national and Community provisions),
 - identification of any discrepancies –with regard to both the transposition and the actual application – between the provisions of the SFD and national legislation, including where the transposing legislation or secondary acts go beyond what is stipulated in the SFD,
 - an assessment of the impact of such discrepancies as are identified.

The Tender Specifications furthermore specify that the various teams in the Member States should contact the relevant public authorities in those Member States with a view to establishing a dialogue on points that remain unclear after examination of the transposing legislation.

Methodology

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1.5 We have undertaken the study in a number of phases, as indicated in our proposal:

PHASE	ACTION
PHASE I <i>Preparation</i>	Preparatory phase: <ul style="list-style-type: none"> ➤ Determination of specific objectives: preliminary meeting with European Commission ➤ Preparation of transposition tables ➤ Accumulation of data ➤ Issue of relevant instructions to the team members in the 15 Member States
PHASE II <i>Initial Analysis</i>	<ul style="list-style-type: none"> ➤ Analysis of the implementing measures in the 15 Member States including preliminary assessment of any divergences and the quality of transposition in each Member State ➤ Contact with the relevant public authorities in the various Member States with a view to establishing a dialogue on any point(s) that remain(s) unclear after examination of the transposing legislation
PHASE III <i>Central Review</i>	<ul style="list-style-type: none"> ➤ Central review of analysis undertaken to identify, <i>inter alia</i>, any areas of inconsistency in the findings to date ➤ Development of approach for further discussions with competent authorities
PHASE IV <i>Detailed Analysis</i>	<ul style="list-style-type: none"> ➤ Detailed analysis and assessment of disparities in the Member States following discussions with competent public authorities
PHASE V <i>Report Preparation</i>	<ul style="list-style-type: none"> ➤ Preparation and submission of interim report and work programme for the final stages of the study ➤ Analysis of the Commission's comments on the Interim Report; Meeting with the Commission
PHASE VI <i>Final Report</i>	<ul style="list-style-type: none"> ➤ Draft final report to be submitted to the Commission ➤ Comments from the Commission ➤ Final report

Final Status of the Study

- 1.6 We have finalised the work (Phase VI in the above table) in the 15 Member States, including the territories of those Member States having a separate legal system, and the findings included in this Final Report reflect this.
- 1.7 This Final Report is the definitive version and contains an analysis of transposition of the SFD on a country-by-country basis, including executive summaries of the major transposition discrepancies within the EU Member States and the territories of those Member States with separate legal treatment.
- 1.8 Certain provisions of the SFD, such as article 4 sentences 1 and 2, article 2 (a) sentences 2 and 3, and article 2 (b) sentence 2 are optional ('may' provisions). For ease of comparison, we have completed a table for all countries regarding the optional provisions of the SFD. A template of this table is attached in annex 1 to this report.

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- 1.9 The Final Report focuses especially on cross-border issues, as the purpose (ratio legis) of the SFD was precisely to secure clearing and settlement systems by *inter alia* adopting conflict of laws rules that would apply rationally and consistently to cross-border situations.
- 1.10 In general, the coherence of the Report has been improved by making sure that all major issues that are addressed in the transposition study of one country are also covered in the analysis of transposition by the other countries where similar situations exist or might occur. Unnecessary repetitions have been avoided by way of cross-references.

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**SECTION 2:
EXECUTIVE SUMMARY**

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SECTION 2: EXECUTIVE SUMMARY

2.1 General Executive Summary

- 2.1.1 Northern Ireland has not yet implemented the SFD. The Office of the First Minister and Deputy First Minister have already confirmed that they should re-examine whether the Northern Ireland Assembly will have to implement local legislation or whether representations will be made to London in order to have the relevant statutory instrument extended to Northern Ireland.
- 2.1.2 The SFD has been transposed in Gibraltar during the final stage of this project. The Legislation Unit of the Government of Gibraltar has implemented the SFD by way of a Financial Services Ordinance of 28 November 2002 (the Financial Markets and Insolvency (Settlement Finality) Regulations 2002). Since the SFD has only been implemented in Gibraltar during the final stage of this project, the Gibraltar implementation is not further analysed, but a copy of this legislation is annexed (annex 3).
- 2.1.3 At this stage, it appears that all other Member States or territories within these Member States having a separate legal system are compliant in their practical implementation of the SFD, except for explicit exceptions mentioned below in the executive summaries and transposition tables relevant to the various Member States. If the Member States, or territories within the Member States having a separate legal system, are not compliant with the SFD in their practical implementation, this is mainly due to the present wording of the SFD.
- 2.1.4 The transposition of the SFD in the Member States and other territories within these Member States having a separate legal system has led to several terminological discrepancies, which mostly involve no or only minor practical issues. Only those discrepancies in the transposition of definitions in the SFD that lie at the basis of practical issues have been mentioned in the Final Report.
- 2.1.5 According to the European Central Bank (the “ECB”), the provisions of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the “Hague Convention”) require substantial changes to articles 3, 5, 7 P (1) and 9 (2) of the SFD. This is not necessarily the case according to our analysis. The Hague Convention is to a large extent complementary to the relevant provisions of the SFD in so far that it builds further on the SFD by determining the place of the relevant intermediary. The question whether and to what extent the Hague Convention requires substantial changes to the relevant provisions of the SFD, has to be further analysed, but is outside the scope of this report. In general the National Central Banks (the “NCB’s”) and other relevant authorities of the Member States expressed reserves about this issue, and indicated that they expect an initiative of the Commission in this respect (see section 3.7 of this Report).
- 2.1.6 In section 3 of this report, several other issues have been examined in the various member states as a result of concerns expressed by the ECB, NCB’s or local participants.
- 2.1.7 The ECB raised comments in respect of the transposition of the definition of “system”, as set out in Article 2 (a) of the SFD, which in the view of the ECB does not necessarily allow the various existing types of systems or arrangements, or such systems as are already in an advanced stage of planning, to be covered. It was the explicit policy of the SFD, however, that the inclusion of systems in the scope of the SFD should be part of the competence of the Member States. It is the Member States that have to specify those systems that have to be included within the scope of the SFD and it is they that have to notify these systems to the Commission (Article 10 of the SFD). The question of whether or not certain “systems” have to be included within the scope of the SFD is based on an assessment of the systemic risks by the relevant NCB’s along with the finance ministries in the various Member States. We did not as a result identify any major transposition issues in this respect (see section 3.1 of this Report).

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- 2.1.8 The ECB also raised concerns as to the types of instruments that are covered by the SFD, in particular in connection with the obligation to define the moment of irrevocability. Since the SFD refers for its definition of “securities” to the limited list in section B of the annex to Investment Service Directive 93/22/EEG (the “ISD”), and since the scope of the definition of securities in the context of Article 5 SFD (finality of transfer orders) is limited to securities that can be transferred through transfer orders executed by a system, the above definitions in the member states for the most part sufficiently cover all securities for the purpose of the relevant articles of the SFD (see section 3.2 of this Report). This is not the case, however, for the definition of securities (all realisable assets) in the sense of Article 9(2) of the SFD (see section 3.4 of this Report).
- 2.1.9 The ECB also raised concerns regarding the definition of insolvency proceedings. As regards Article 2(j) of the SFD, the term “*insolvency proceedings*” within the meaning of this provision is fairly wide, also encompassing *inter alia* preliminary measures, both under judicial insolvency law and under the law governing administrations in insolvency situations (like supervisory moratoria, appointment of state commissioners with specific suspending powers, judicial preliminary freezes, etc.). It was thus important to examine in the framework of this report whether the implementation laws of all the Member States cover these proceedings in a sufficiently wide manner. According to our analysis, this seems to be an issue in certain Member States (see section 3.3 of this Report).
- 2.1.10 Certain NCB’s raised concerns as to the definition of collateral securities, which under Article 2(m) SFD should cover “*all realisable assets*” provided under techniques going beyond mere pledges and repurchase agreements, including other techniques used to provide collateral to central banks (like fiduciary transfers, fixed and floating charges, with or without possession/control by the collateral-taker). During our analysis, we identified narrow interpretations of this article in certain Member States, which, according to our contacts with local participants and NCB’s, give rise to issues in that certain contractual collateral securities are not covered by the Acts implementing the SFD (see section 3.4 of this Report).
- 2.1.11 With respect to the definition of participants, the interpretative notes regarding EMI’s and the Czech problem give rise to issues and/ or uncertainty in certain Member States. As a result, the Governing Council of the ECB has decided that EMIs should not be granted access to national RGTS systems. In the same vein, the scope of the SFD does not include entities such as Dutch “single-purpose asset-protection trusts”, which are used for the deposit of foreign securities for clients of Dutch credit institutions. As a result, access by such entities to securities settlement systems is systematically refused by NCB’s, which leads to a distortion of the competitiveness of these entities (see section 3.5 of this Report).
- 2.1.12 With respect to systems governed by the law of one Member State, but reported by another Member State as a system under the law of the latter (Clearnet, Crest, Euro1, Step1 and similar situations), we identified a large number of issues, most of which, however, result from misinterpretations by local participants (see section 3.6 of this Report).
- 2.1.13 Article 9 (2) of the SFD is subject to narrow interpretation in many Member States, and moreover no interpretation exists in Member States of what a “securities account” is precisely meant to be and how the relevant account can be identified. The issues regarding Article 9 (2) will to a large extent be solved by the Hague Convention and the collateral directive, which might require a redrafting of Article 9 (2) of the SFD (see section 3.8 of this Report).

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2.2 Country-by-Country Executive Summary

2.2.1 Belgium (BE)

Belgium complies almost fully with the SFD. Only as to the scope might some improvements be required. Where Belgian law does still pose problems, this is mainly due to the present wording of the SFD.

2.2.2 Germany (DE)

Rather than adopting a separate Act by which the provisions of the SFD were transposed into domestic law, the German legislature opted for a rather selective form of transposition. The provisions of the SFD were transposed by amending a number of existing German statutes, e.g. the Insolvency Act, the Securities Safe Custody Act and the Banking Act. For the definition of "systems", reference is made to Art. 2 a of the SFD so as to ensure that only systems governed by the SFD are encompassed by the German legislation. A major objective of the SFD, which was to increase the insolvency stability of settlement systems, has been achieved by also enabling the off-setting of claims within systems in insolvency situations, by restricting the collection rights of the liquidator and by curtailing rescission rights during insolvency proceedings. Further, conflict provisions have been adopted in order to determine the law applicable to systems in the event of the insolvency of one of their participants and to state a new *lex-conto-sitae* rule for securities processed by a system. Finally, the reporting and publishing requirements of the SFD have been transposed by amending the German Banking Act; accordingly, the German Bundesbank is obliged to report payment and securities settlement systems to the ECB.

The most problematic areas are as follows (see section 4.2 of this Report):

- Non-possessory collateral techniques;
- Implied transposition of supervisory moratoria under legislation governing building societies and insurers;
- Entry of orders into a system post-insolvency;
- Failure of Sec. 116 ss. 3 of the Insolvency Act to address the relationship between a recipient bank and a recipient.

2.2.3 Denmark (DK)

When the SFD was adopted, the Danish Securities Act comprised a number of provisions which already in whole or in part covered the provisions of the SFD.

We have been informed by the Danish Financial Supervisory Authority that, as the SFD gave rise to doubt concerning interpretation on a number of points and at that time there was reason to believe that those doubts would be resolved in what has now been adopted as Collateral Directive 2002/47/EC, it was decided that in principle the implementation should not exceed what was necessary and that the SFD should be transposed into the existing Securities Trading Act.

The Financial Supervisory Authority has informed us that there has been some uncertainty as to whether the SFD is a minimum standard directive or a harmonisation directive or both and, if the latter, which provisions are which. This applies particularly in relation to article 4 of the SFD, which according to its wording only applies to the actual winding-up date. This is a problem in relation to the settlement routines of Værdipapircentralen and must – according to the Danish Supervisory Authority – give rise to considerations in all systems operating with a 3-day settlement period.

Generally, Denmark complies with the requirements of the SFD except for:

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- Article 10 (4) of the SFD;
- Articles 6 (2) and (3) have not explicitly been transposed into Danish law. The Danish Supervisory Authority has informed us that Articles 6 (2) and 6 (3), which pursuant to Danish law apply without explicit implementation, will be expressly implemented, for the sake of completeness, together with Article 10 (4) in connection with the implementation of Collateral Directive 2002/47/EC;
- Article 7 of the SFD has not been transposed into Danish law. According to the Danish Supervisory Authority, this is because insolvency proceedings pursuant to Danish law do not include any provisions on retroactivity, as that would be in conflict with fundamental principles of Danish law.

Moreover, while some rules have been adopted into Danish law that go beyond what is stipulated in the SFD, other rules remain unclear as to their exact interpretation.

2.2.4 Greece (EL)

The SFD was transposed in Greece by virtue of Law 2789/2000. Law 2789/2000 essentially reproduced in most parts the text of the SFD, whereas in other parts where it was considered necessary (e.g. the definition of Systems, Instruments, Collateral, Bankruptcy etc.) the Law proceeded with the necessary adjustments for Greek law purposes. As a result, Greece appears to be in line with the SFD.

Furthermore, almost all covered Systems (HERMES, EURO-HERMES, SAT, DEMATERIALISED TITLES Clearing and Settlement System of Transactions On Derivatives, the Athens Netting Office and the INTERLINKING mechanism of the TARGET to and from HERMES) appear to be in compliance with the Law and the SFD, with minor exceptions mentioned below, which however pose minimal practical difficulties and have not as of today raised any real issues.

Finally, no issues resulting from the “Czech-Problem”, conflict of laws and/or the Electronic Money Directive seem to exist as concerns Greece.

2.2.5 Spain (ES)

Spain complies almost fully with the requirements of the SFD. The provisions of the Spanish legislation implementing the SFD accurately effect practical implementation of the SFD, except for minor terminological differences that mostly involve issues that are rather irrelevant to the transposition study as confirmed with the relevant authorities and the operators of the Spanish Securities Settlement and Clearing System.

On a cross-border basis, we are aware of certain significant problems and issues detected in other jurisdictions. However, Spain does not seem to have a number of the practical problems or issues that have been identified in those jurisdictions (i.e. the Czech problem, Electronic Money institutions (“EMIs”), etc.), either because some of these problems have no practical impact within the settlement and clearing systems already operating or because local legislation has been implemented within the Spanish legal framework in order to avoid certain discrepancies (i.e. status of “credit entities” for EMIs in Spain).

According to the changes made by the Hague Convention, the Spanish legislation implementing the SFD should be examined in order for it to be adapted accordingly, as will probably happen with the current wording of Article 9(2) of the SFD, which seems to be incompatible with the final text of the Hague Convention.

The transposition study reflects the fact that “problematic” areas referred to are mainly non-relevant issues that mostly are of no practical effect. Our analysis shows the following list of issues, which have been analysed in the present Report:

- No definition of an “indirect participant” as in the SFD, but recognition under valid systems covered by the transposition Law 41/1999.

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- Rigorous and literal implementation of Article 9(2) of the SFD into Article 15 of Spanish transposition Law 41/1999 versus those interpretations that go beyond the literal scope of the SFD.
- Impact of the Hague Convention on the current wording of Article 9(2) of the SFD, which should be adapted accordingly, and subsequent amendments to the implementing Article 15 of Law 41/1999.
- Non-exercise of the discretionary rights provided to Member States in Article 2 (a) sentence 3 and Article 2 (b) sentence 2 of the SFD.

2.2.6 France (FR)

The SFD has been duly transposed into French law.

Some of the practical notification procedures are not yet in force. A Decree has been drafted (but not yet enacted) to ensure complete transposition of the SFD in France. The French authorities take the view that this pending Decree is intended only to clarify internal procedures, which means that implementation of the SFD has already been completed.

Regarding the number of participants in a system, there exists a discrepancy between the SFD and French law. The definition under the French systems is broader since a system can exist with only two participants. However, currently no such system does exist in France. If they did exist, they would not be notified.

2.2.7 Ireland (IR)

The SFD has been substantially transposed into Irish national law without any material issues of concern. Some definition/ terminological discrepancies arise, as discussed below.

- The Irish Regulations' transposition of the definition of the term "system" differs from that contained in the SFD and may give rise to some uncertainty.
- The Irish Regulations' transposition of the definition of "institution" (as contained in the SFD) also may give rise to some uncertainty.

2.2.8 Italy (IT)

The Italian implementation of the SFD goes beyond the Directive in a bid to eliminate or, at least, reduce all kinds of systemic risk while also taking into account certain particular aspects of Italian law. Italy has therefore fully transposed the scope of the SFD into Italian law according to the intention of the Community legislature.

The only problematic areas are:

- EMIs are not covered expressly by Legislative Decree no. 210 of 12 April 2001 (hereinafter referred to as "L.D. 210/2001"). It remains to be seen if they will eventually be covered by the residuary clause of Article 1 (h) of L.D. 210/2001 or by a regulation issued by the Treasury Ministry.
- A future problem will be the coming into force of the Hague Convention, which is incompatible with the SFD and Article 9 of the L.D. 210/2001. Whether the Hague Convention will apply also depends on what measures are eventually taken by the European Commission.

2.2.9 Luxembourg (LU)

Luxembourg fully complies with the requirements of the SFD and has adopted several provisions that go beyond what is stipulated in the SFD.

Under Luxembourg law, there is an authorization process, which requires the designation of a system operator. "System operators" are a new category of Professionals of the Financial Sector (PSF), which are regulated professionals. Supervisory and oversight competencies are allocated between the BCL and the CSSF.

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No problematic areas have been identified in Luxembourg. If Luxembourg still poses problems, these are mainly due to the present wording of the SFD.

2.2.10 The Netherlands (NL)

The SFD has been implemented in The Netherlands by amending the existing Bankruptcy Act and the Credit System Supervision Act. Most provisions in the SFD have been implemented *verbatim*. Subject to some terminological differences in interpretation and issues of practical implication as discussed below, The Netherlands complies with the SFD.

The only problematic areas are:

- The Netherlands has narrowly interpreted and implemented article 9(2) of the SFD. Future legislation is expected to provide the broad interpretation of article 9(2) SFD;
- The EMIs: this problematic area was dealt with a practical solution as follows: the exemption or discharge of an EMI from certain obligations arising out of the Credit System Supervision Act was made subject to provisions regarding the applicability of the Act implementing the SFD. The EMIs do not fall within the scope of the provisions concerning mutual recognition and therefore do not have a 'European Passport.' Such credit institutions or companies as are exempted or discharged in another Member State are likewise not allowed to open a branch in The Netherlands;
- As regards Clearnet, conflict of law problems may arise in respect of the law governing the validity and opposability of securities that have been granted versus the *lex contractus*. In cases where Dutch law applies as regards the validity and enforceability of securities on financial instruments, on the basis of section 212f Bankruptcy Act, it is advisable, as in the case of Belgium, that securities granted by Dutch clearing members should be submitted expressly to Dutch law, so as to avoid the possibility of both Dutch and French law applying to securities that have been granted, whether it is Dutch or French law that is the *lex contractus*. However, this interpretation may still lead to major problems with respect to *inter alia* the use of standardised contracts such as ISMA and the "Global Master Repurchase Agreement", governed by English law.

2.2.11 Austria (ÖS)

Austria complies almost fully with the requirements of the SFD as the SFD has been transposed into Austrian law nearly word by word. Any differences between the SFD and the Finality Act are only in syntax and so the different words used cover the full scope of the requirements of the SFD.

The Austrian Finality Act does not cover EMIs. The Austrian National Bank have advised that, in their view at present, they will not accept an EMI as a participant.

Apart from the existing SSS (Vienna Stock Exchange) and PSS (ARTIS), we do not expect that any additional systems will be set up due to the small size of the market. Therefore, only those instruments that can be settled at the Vienna Stock Exchange are protected by the SFD, whereas other instruments that are conceptually within the scope of the SFD are not protected.

We do not expect that the issues identified will have a significant impact in Austria. The existing Systems are within the scope of the Finality Act. In our opinion, the transposing law in Austria is a sufficiently wide interpretation of the SFD.

2.2.12 Portugal (PO)

In general, apart from some minor details, the SFD has been faithfully transposed into Portuguese law.

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Some concepts have not been transposed in the way in which they were foreseen in the SFD. This will not, however, have any practical implications in the application of Portuguese law. Examples of these concepts include collateral securities and settlement accounts.

2.2.13 Finland (SF)

Finland complies with the requirements of the SFD. In many instances, the scope of the transposing Act is broader than that which the SFD requires. As such:

- The definition of a “system” is broader than in the SFD;
- The Act is applied to the participants in a system in general (they do not have to meet the conditions set by the SFD). Thus, the Finnish Implementing Act provides protection for EMIs. Furthermore, the Czech problem is not an issue;
- The Act is applied to netting regardless of whether it has been carried out in a settlement system;
- The Act regulates the effects of netting on execution;
- The Act contains detailed provisions about the required rules of the system.

The most problematic areas are the sections implementing Article 9(2) of the SFD, which are not in accordance with the Hague Convention.

2.2.14 Sweden (SV)

The transposition of the provisions of the SFD into Swedish law has been carried out without raising any practical issues. No secondary regulations or case law regarding the implemented legislation have yet been produced. Only three systems have been notified so far to the European Commission by the Swedish Financial Supervisory Authority.

The discrepancies and sometimes either wider or stricter interpretation in Sweden of the provisions under the SFD have, in our opinion, not raised any serious concerns.

The SFD contains a number of definitions of undertakings with different positions and roles within the system as referred to in Article 2 (a) sentence 1 of the SFD, such as institutions, central counter parties, settlement agents and clearing organisations, but the SFD is silent regarding these undertakings’ obligations within the system. This has been seen as a shortcoming of the SFD and, according to the Swedish Implementing Act, a system covered by the scope of the SFD must have an administrator. By appointing an administrator, the question as to what undertaking is responsible for the operation of the system, the links to other systems, to third parties and to the authorities is regulated beforehand, and this will presumably create more certainty in the system.

The most problematic area is the implementation of the term “participant” in the Swedish Implementing Act, which does create an uncertainty regarding the applicability of the Act to EMIs. This definition of participants might lead to a discrepancy in that systems that would have been covered by the SFD will not be considered as covered by the Implementing Act. Furthermore the Swedish Implementing Act imposes the requirement for systems to have an administrator, which may lead to the consequence that systems that may be considered as falling under the scope of the SFD in other Member States do not qualify as systems under the Swedish Implementing Act.

2.2.15 United Kingdom (UK)

The United Kingdom has transposed the SFD into English law without major issues of concern. Minor areas of concern include the common law rules that apply notwithstanding the SFD, and minor terminology issues.

The only problematic areas are:

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- The transposition of the SFD into English law does not take account of the requirement that an indirect participant should be “known to the system”;
- English common law permits liquidators to attack a transaction where directors of a company have breached their fiduciary duties by defrauding creditors, notwithstanding the SFD.

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SECTION 3: ANALYSIS OF MAIN ISSUES IN THE DIFFERENT MEMBER STATES

A. Terminological comments

3.1 Definition of systems

The ECB raised comments in respect of the transposition of the definition of “system”, as set out in Article 2 (a) of the SFD, which does not necessarily allow the various existing types of systems or arrangements, or such systems as are already in an advanced stage of planning to be covered. Since this topic lies at the root of potential issues, it should be considered addressing this topic in this report.

It has, as a general comment, to be underlined that it was the explicit policy of the SFD that the inclusion of systems in the scope of the SFD should be part of the competence of the Member States. It is the Member States that have to specify those systems that have to be included within the scope of the SFD and it is they that have to notify these systems to the Commission (Article 10 SFD). The question of whether or not certain “systems” have to be included within the scope of the SFD is based on an assessment by the relevant NCB’s along with the finance ministries in the various Member States of the systemic risks.

3.1.1 Belgium (BE)

Article 2 (a) of the SFD was transposed in Belgian law by Section 2 (1) of the Act of 28 April 1999 (the ‘Act’). Article 2 (1) of the Act contains a list of, on the one hand, ‘payment systems’ and, on the other hand, ‘securities settlement systems’ complying with the definition of article 2 (a) of the SFD. These systems comply with the general criteria of the SFD in that they contain common rules and standardised arrangements for the execution of transfer orders between the participants¹. Due to the general nature of the criteria of the SFD, Belgian law did not expressly reproduce these criteria for recognition of these systems or organise a specific procedure for the recognition of systems complying with the criteria laid down in the SFD. Instead, a list was added of securities systems complying with the conditions of the SFD that are active in Belgium, and power was granted to the King to amend the list of systems referred to in that article.

The question of whether other systems such as Banksys, Europay, the Fortis payment system and central custodians such as BNP Paribas have to be included in the scope of the SFD gave rise to numerous discussions and detailed reports to the Ministry of Finance by the Belgian National Bank, which is entrusted with oversight of these systems. Based on an analysis of possible systemic risks, the decision has been taken not to include these systems in the scope of the SFD.

3.1.2 Germany (DE)

Section 96 (2) sentences 2 and 3 of the German Insolvency Act refers to Article 2 (a) of the SFD. The German law did not incorporate a separate definition of “system” into the Insolvency Act. Rather, it included a reference to the definition used in the SFD in order to ensure consistent interpretation.

3.1.3 Denmark (DK)

The Danish legislation implementing the SFD does not give a definition of a “system”, as stated in Article 2 (a) of the SFD. The Danish Supervisory Authority has informed us that this is due to the fact that systems may be constructed in many different ways. Therefore, it has been the intention to produce a form of framework legislation that would still allow systems to be constructed in different ways.

3.1.4 Greece (EL)

¹ Explanatory Memorandum to the Act, p. 5.

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The definition of “system” as set out in Article 2 (a) of the SFD has been transposed into Greek law in Article 1 (a) of Law 2789/2000, which is almost an exact reproduction of Article 2 of the SFD. Furthermore, Article 2 of Law 2789/2000 enumerates the Systems to which said Law currently applies and which are: (a) the system entitled “Settlement System of Payment Orders in Real Time” (“HERMES”), (b) the system entitled “Settlement System of Payment Orders in Euro in Real Time” (“EURO-HERMES”), (c) payments through the INTERLINKING mechanism of the Trans-European System for Settlement Payment Orders in Real Time (TARGET) to and from HERMES, (d) the system entitled “System of Monitoring Transaction on Titles in Book Entry Form” (“DEMATERIALIZED TITLES”), (e) the Athens Netting Office, (f) the system entitled “Dematerialised Securities System” (SAT), and (g) the system entitled “Clearing and Settlement System of Transactions On Derivatives”. All of the above systems are covered by the definition of “system” as set out in Article 2 (a) of the SFD and Article 1 (a) of Law 2789/2000.

3.1.5 Spain (ES)

The Spanish transposition Law, 41/1999, provides a definition of “system” that is in line with the SFD definition set out in Article 2 (a). Under the Spanish transposition law, for a valid procedure or agreement to be recognized as a “system”, it is required that certain requirements laid down in the Spanish transposition law be fulfilled, and these are in compliance with the requirements laid down by the SFD in Article 2 (a). Indeed, the transposition of the definition of “system” into Spanish law does not allow for any terminological differences that could involve relevant practical issues.

3.1.6 France (FR)

Under French law, a system for interbank settlements or the settlement and delivery of financial instruments is defined as a national or international procedure that organises the relationship between at least two parties that have the status of a credit institution (or that are specific undertakings such as the Treasury, the *Banque de France*, the Public Trustee Office, etc.), an investment company or a member of a clearing house or any undertaking whose head office is outside the European Community and that has a comparable status, that customarily, by netting out or otherwise, deals with payments and, with regard to systems for the settlement and delivery of financial instruments, the delivery of securities between said parties.

The system must either have been set up by a public authority or be governed by the terms of a framework agreement that respects the general principles of a market framework agreement or standard agreement.

The fact that the definition mentions only two parties (instead of three parties) does not lead to any practical issues since no such two-party system exists currently in France. Even if one were to exist, it would not be notified to the European Commission and, thus, it would not benefit from the provisions of the SFD.

3.1.7 Ireland (IR)

The Irish Regulations refer to a “payment system” as opposed to a “system”. In defining the term “payment system”, the Regulations have adopted the definition contained in a separate piece of Irish legislation, the Central Bank Act of 1997 (the “Act”) which defines a “payment system” as follows:

“Payment system” means a system established in the State, or proposed to be established in the State, by any person, in which credit institutions or financial institutions participate and which provides for-

- (a) *all or any of the following, namely, the processing, handling, clearance and settlement of any means of payment or of any securities, or*
- (b) *the payment of any moneys by that means of payment, by or as between the members of the system or third parties, whether or not the processing, handling, clearance, settlement or payment of any of the moneys takes place in part or in whole within the State or outside the State.”*

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The Act provides for the Central Bank of Ireland (“CBI”) to be the regulator of all such payment systems. Due to the fact that this legislation was in force in Ireland prior to the introduction of the Regulations and already contained a definition of “payment system”, the definition contained in the SFD was not reproduced in the Regulations. The view of the governmental department responsible for introducing the Regulations was that, in order to maintain clarity and consistency within national legislation, only one definition of “payment system” or “system” should appear in Irish legislation.

The definition in the Regulations refers to a “*system established in the State, or proposed to be established in the State*”. It appears, therefore, that payment systems that are not established in Ireland would not fall within the ambit of the Regulations. This would appear to be a discrepancy from the definition of “system” in the SFD. For instance, a system established outside Ireland but that has Irish participants and that has chosen to be governed by the laws of Ireland could, in theory, be deemed to be outside the ambit of the Regulations. The definition has not given rise to any practical problems in Ireland to date.

However, despite this uncertainty, the CBI has taken the view in its practical application of the Regulations that, if a system has Irish institutions among its participants or members, the CBI has an interest in having it designated under the Regulations to afford the participants the protection of the Regulations.

No other practical problems arising from the definition of “system” have been encountered in Ireland.

3.1.8 Italy (IT)

The Italian Legislative Decree, 210/2001, implementing the SFD contains three definitions in relation to what constitutes a “system”:

- the general definition of “*system*” in Article 1 (r) of L.D. 210/2001 in accordance with Article 2 (a) sentence 1 of the SFD, which also takes into consideration the optional provision of Article 2 (a) sentence 3 of the SFD;
- a more specific definition of the “*Italian system*” in Article 1 (s) of L.D. 210/2001, which is defined as one of the systems indicated in the Annex to L.D. 210/2001 or designated in accordance with Article 10 of L.D. 210/2001; and
- a definition regarding a “*system outside the European Union*”, which is defined in Article 1 (w) of L.D. 210/2001 as a payment or securities settlement system of a state not belonging to the European Union.

With the last of these definitions, Italian law meets the requirements of the market regarding the finality of transactions executed by Italian institutions in third country systems. Protection under the provisions of the SFD regarding the finality of a transaction is subject to the condition of agreements between the competent authorities providing for reciprocity of the conditions applicable to the systems (Article 10 (5) of L.D. 210/2001).

The systems presently existing in Italy and indicated in the Annex to L.D. 210/2001 (i.e. BI-REL, BI-COMP, LDT, EXPRESS and the clearing and guarantee systems for the derivative market managed by Cassa di Compensazione e Garanzia S.p.A.) are Italian systems according to Article 1 (s) and Article 10 (1) of L.D. 210/2001 and are therefore subject to L.D. 210/2001.

Pursuant to Article 10 (2) of L.D. 210/2001, the Bank of Italy can designate new systems as Italian systems. This provision opens up the possibility of covering all systems coming into existence in Italy in the future and could therefore apply in the case of designation of the future systems, (new) BI-REL and EXPRESS II, unless they are already considered as Italian systems. How the Bank of Italy acts on this issue remains to be seen.

3.1.9 Luxembourg (LU)

The following mechanisms are not covered by the definition of “system” as under the SFD, but are subject to oversight by the Central Bank of Luxembourg (“BCL”).

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According to the BCL there are a number of other payment mechanisms “OPMs” (OPMs are defined as those payment mechanisms that currently exist, e.g. credit and debit cards, electronic payments and electronic money, etc. or new payment or securities settlement related products and services that may appear in the future) that have a direct or indirect impact on the main payment systems for gross and net settlement. These mechanisms are changing as deregulation and new technologies create new solutions. Accordingly, the BCL regards these mechanisms and any developments as being important for reasons of efficiency and stability. As such, these and new similar systems are subject to oversight of the BCL.

3.1.10 The Netherlands (NL)

For the purposes of the Dutch Implementing Act, the definition of “system” includes systems designated as such by the Minister of Finance and systems that have been designated as such by another Member State on the basis of the SFD and that have been notified to the European Commission. As regards The Netherlands, this definition covers the existing systems.

3.1.11 Austria (ÖS)

The definition of “system” as set out in Article 2 (a) of the SFD is implemented by Article 2 (1) of the Austrian Finality Act. A system covers all payment settlement systems and securities settlement systems if the members are institutions within the meaning of the Austrian Finality Act. Currently, these are the ARTIS payment settlement system of the OeNB and the WSB (Wertpapiersammelbank) securities settlement system of the Vienna Stock Exchange. These systems have already been notified to the European Commission. Besides these systems, the OeNB is the supervisory authority for other payment settlement systems, such as e-money systems or multilateral small-payment systems. These systems are neither within the scope of the Finality Act nor within the scope of the SFD at the moment.

3.1.12 Portugal (PO)

Portuguese law can recognize as systems those that fulfil the requirements established by Portuguese law, which are the same as those established by the SFD.

3.1.13 Finland (SV)

The definition of a settlement system in the transposing Act is significantly broader than that referred to in the SFD. In addition to the systems described in the SFD, the Act is applicable to the following systems, even though they do not comply with the conditions set by the SFD:

- systems comparable to the systems within the meaning of the SFD subject to an approval by the Ministry of Finance;
- settlement systems maintained by Finnish credit institutions, clearing houses, option corporations or comparable foreign organizations;
- settlement systems that determine and execute monetary obligations and transfer cover for payment systems through an account with a central bank.

According to the Government’s Proposal, the definition of a system is set broad in order to cover existing and new kinds of settlement systems.

3.1.14 Sweden (SV)

According to the Swedish implementation of the SFD only be a number of entities that are referred to in the Swedish Implementing Act (Act on Systems for the Settlement of Obligations on the Financial Market) may be participants in a “system”. These entities correspond more or less to entities that fall under the definition of an “institution” under the SFD. Compared to the definition of “system” under the SFD, which also covers systems with other participants than

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those covered by the definition of “institution”, such as “settlement agents”, “central counterparties”, “clearing houses” or “indirect participants”, the Swedish implementation seems to exclude systems with both types of entities, i.e. entities covered by the definition under the SFD as “institutions” and entities covered by the definition in the SFD as “settlement agents” etc., unless the latter also belong to one of the categories of entities referred to under the Implementing Act as “participants”.

According to the Implementing Act, only systems that are administered by an “administrator” are covered by the scope of the SFD. Only entities that are referred to in the Implementing Act and that may be defined as a participant in a system under the Implementing Act may be registered as an administrator of a system. Excluded from the definition are some of the entities that may be participants in systems under the Implementation Act such as the Swedish Central Bank, the Swedish National Debt Office and other foreign public institutions that, in their respective countries, operate similar businesses to the Office, foreign companies that may be participants in a system, and legal entities that for their own account settle obligations to deliver financial instruments in a system. A system that would have been covered by the scope of the SFD may therefore not fall under the scope of the Swedish Implementing Act. This discrepancy between the definition of “system” under the SFD and the Swedish Implementing Act is nevertheless clearly addressed in the preparatory work to the Implementing Act, where it is also stated that the absence in the SFD of rules concerning the entity administrating the system or of a clear definition of such entity is considered as a shortcoming of the SFD itself.

According to the above, the implementation of the notion of “system” under the Swedish Implementing Act is more restrictive than the definition provided for under the SFD.

3.1.15 United Kingdom (UK)

With respect to England and Wales, the UK Regulations define a “system” quite broadly, to include any body corporate or unincorporated association with respect to which a designation order has been made by the UK Financial Services Authority or the Bank of England. This would appear to catch all types of systems.

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3.2 Definition of securities

The ECB also raised concerns as to the types of instruments that are covered by the SFD, in particular in connection with the obligation to define the moment of irrevocability. This topic should also be addressed as it lies at the basis of possible practical issues.

Article 2 (h) of the SFD refers for its definition of “securities” to section B of the annex to Investment Service Directive 93/22/EEG (the ‘ISD’).

According to this section B, securities are:

1. Transferable securities: According to Article 1.4° of the Directive 93/22/EEC, transferable securities means:

- shares in companies and other securities equivalent to shares in companies,
- bonds and other forms of securitized debt that are negotiable on the capital market, and
- any other securities normally dealt in giving the right to acquire any such transferable securities by subscription or exchange or giving rise to a cash settlement excluding instruments of payment.

2. Units in collective investment undertakings.

3. Money-market instruments.

4. Financial-futures contracts, including equivalent cash-settled instruments.

5. Forward interest-rate agreements (FRAs).

6. Interest-rate, currency and equity swaps.

7. Options to acquire or dispose of any instruments falling within this section of the Annex, including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates.

3.2.1 Belgium (BE)

The Implementing Act does not give a definition of securities. The Act refers to “financial instruments” instead of securities. Financial instruments should be understood within the meaning of the Act of 2 August 2002 transposing the ISD:

According to Article 2 of the Act of 2 August 2002, a financial instrument is any security or right belonging to one of the following categories:

- a) shares in companies and other securities equivalent to shares in companies;
- b) bonds and other debt instruments that are negotiable on capital markets;
- c) any other securities normally traded giving the right to acquire such financial instruments as fall under (a) or (b) by means of subscription or exchange or giving rise to a cash settlement, excluding instruments of payment;
- d) units in collective investment undertakings;
- e) instruments that are normally traded on the money market;
- f) financial-futures contracts, including equivalent cash-settled financial instruments;
- g) forward interest-rate agreements;
- h) interest-rate, currency and equity swaps;
- i) options to acquire or dispose of any financial instruments or any financial instruments falling within sections (a) to (h), including equivalent cash-settled financial instruments;
- j) for the application of articles 25, 32, 39 and 40 and other articles, the King may, on the advice of the BFC, identify instruments derived from commodities;
- k) other securities or rights determined by the King on the advice of the BFC, for such provisions as may be indicated by him.

A “related financial instrument” is any financial instrument linked to a certain financial instrument in any of the following ways:

- a) it is convertible into or exchangeable for the financial instrument concerned;
- b) it gives a right to the holder to acquire or subscribe for the financial instrument concerned;

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- c) it has been issued or guaranteed by the issuer or the guarantor of the financial instrument concerned where an important correlation exists between the stock prices of both instruments;
- d) it is a certificate representing the financial instrument concerned or representing its counter-value.

Since the scope of the definition of securities in the context of Article 5 SFD (finality of transfer orders) is limited to securities that can be transferred through transfer orders executed by a system, the above definition sufficiently covers all securities for the purpose of the relevant articles of the SFD. This is not the case, however, for the definition of securities (all realisable assets) in the sense of Article 9(2) SFD (see section 3.4.1 of this Report).

3.2.2 Germany (DE)

The German implementing legislation does not make any mention of a definition of 'securities'. It could thus be inferred that the legislature considered the definition of 'securities' in sec. 1 of the German Securities Deposit Act to be compatible with that of the SFD.

The objective of rendering netting transactions irrevocable in the event of insolvency was achieved by amending the Insolvency Act. A new Sec. 96 para. 2 was added, as a result of which set-off is no longer inadmissible even if an insolvency creditor has been allowed a set-off through means of a voidable legal act. A set-off declaration used to be rendered ineffective if the set-off scenario had been created in a manner open to rescission, i.e. if it had been created in the last month before the filing of an insolvency application, with resultant serious consequences for the payment systems. As a consequence of the introduction of Sec. 96 para. 2, such automatic ineffectiveness of the set-off has been removed, thus rendering the netting transactions irrevocable.

3.2.3 Denmark (DK)

In relation to Article 2 (h) of the SFD, the terminology of Article 2 (1) of the Danish Securities Trading Act ("the Act") differs from the terminology contained in the ISD, as further specification of the instruments subject to the Act has been made instead. The list of instruments is not final as Article 2 (1) 12) of the Act gives the Danish Securities Council authorisation to add further instruments to the list. The specific delimitation of the instruments has been based on the ISD's definition of securities, but in addition to those, commodity instruments etc. have been included, as well as negotiable mortgage deeds on real property or bills of sale.

3.2.4 Greece (EL)

All types of instruments recorded in the Greek Securities Settlement Systems are covered by the SFD and Law 2789/2000. More specifically, Law 2789/2000 covers all instruments referred to in Article 2 (1) (a) of Law 2396/1996, which transposed the ISD. According to Article 2 (1) (a) of Law 2396/1996 on Investment Services in Securities, Capital Adequacy of Investment Firms and Credit Institutions and Dematerialised Shares, "financial Instruments" are:

- (a) securities, including, without prejudice to the generality, shares, bonds and any other "security" that is the object of trading and that grants a right to acquire another security through a registration or exchange or that grants a right for cash settlement;
- (b) units in collective investment undertakings;
- (c) those classes of financial instruments that are normally traded on the money market (money market instruments);
- (d) financial futures contracts, including equivalent cash-settled financial instruments;
- (e) forward interest-rate agreements ('FRAs');
- (f) interest-rate, currency and equity swaps
- (g) options to acquire or dispose of any financial instruments mentioned above, including equivalent cash-settled financial instruments; this category includes in particular options on currency and interest rates.

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Currently, only instruments under (a), (c) (d) and (g) are cleared and settled through Greek Securities Settlement Systems.

In particular, in connection with the obligation to define the moment of irrevocability in the Greek Securities Settlement Systems, we do not envisage any potential practical or legal issues.

3.2.5 Spain (ES)

The Spanish Implementing Act ('the Act') refers to Payment, Clearance and Settlement systems of "securities" and "financial derivative instruments" without any specific transposition of the definition of "security". Securities under the Act should be understood as 'negotiable securities' as defined by the Spanish Securities Market Act (Law 24/1988, as amended by Law 37/1998).

Under the Spanish Securities Market Regulation (Article 2 of the Securities Market Act and Article 2 of RD 291/1992) on the issue of securities, the concept of a "transferable security" comprises:

- a) Shares in public limited companies and participative quotas of Savings Banks and the Association of Spanish Savings Banks, as well as any other securities, like subscription rights, warrants or similar, that may directly or indirectly provide a subscription or acquisition right.
- b) Liabilities and similar securities that represent parts of a loan, issued by individuals or private or public entities, with either an express or an implied return, that confer a direct or indirect right to the acquisition thereof, and derivative securities providing a right to one or more principal amounts or the redemption of interest.
- c) Bills of exchange, promissory notes, certificates of deposit and any other similar instruments, except if they are drawn individually and they also derive from previous business transactions that do not involve the raising of redeemable funds from the public.
- d) Certificates, bonds, and mortgage bond holdings.
- e) Units of mutual funds, whatever their nature.
- f) Any other right to a monetary entitlement, howsoever called and based on its own legal configuration and transfer regime, that can be widely and impersonally traded on a financial market. In particular, shares or transferable rights relating to securities or loans will be included in this section.

Money market instruments may be transferable securities provided they comply with the requirements laid down by the aforementioned Article 2 (f) of Royal Decree 291/1992.

The following 'financial derivative instruments' qualify as 'financial instruments': (i) any kind of contracts or agreements negotiated on an official secondary market or otherwise, financial forward agreements, options, swaps, provided their objects are negotiable securities, indexes, currencies, interest rates, or any other underlying financial asset regardless of how they are settled and whether or not they are traded on an official secondary market; (ii) contracts or transactions involving other instruments different from those mentioned above provided they may be traded on a secondary market, whether or not it is an official one, and whether or not their underlying asset is financial in nature (comprises goods, commodities or any other fungible property).

Additionally, Article 10 of the Spanish transposition law provides a clear definition of the moment of irrevocability for transfer orders of securities and funds. According to said Article, the exact moment of irrevocability for a participant who has ordered the instruction is once it has been received and accepted by the system, in accordance with its rules.

Irrevocable orders are final, binding and legally payable by the participant required to comply and defensible against third parties and may not be cancelled by virtue of Article 878 of the Code of Commerce or challenged or nullified in any other manner.

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To these effects, the transposition of the SFD into Spanish law does not contemplate material discrepancies that could lead to relevant practical issues.

3.2.6 France (FR)

Pursuant to Article L. 211-1 of the French Monetary and Financial Code, “financial instruments” are:

- Shares and other securities that afford or may afford direct or indirect access to equity or voting rights, transferable by book entry or by physical delivery;
- Debt securities transferable by book entry or by physical delivery, each representing a claim on the legal person that issues it, other than trade bills and loan notes;
- Units or shares in collective investment undertakings;
- Financials futures (financial futures and forward contracts involving any bills, securities, indices or currencies, including equivalent cash-settled instruments);
- All instruments equivalent to the foregoing issued under foreign laws.

Article L. 211-1 of the French Monetary and Financial Code defines the term “financial instruments” whereas Article L. 211-2 of the Code defines the term “securities”. The definition of “securities” appearing in the ISD does not cover units in UCITS while the French legal definition of “securities” does include units issued by UCITS.

3.2.7 Ireland (IR)

- The term ‘securities’ in the SFD has the same meaning in the Irish Regulations (i.e. those referred to in Section B of the Annex to the ISD).
- The moment of irrevocability is the time specified in the rules of the payment system as that at which a transfer order is considered to have been entered into the payment system.

3.2.8 Italy (IT)

The instruments referred to in Article 1 (h) of the SFD and therein defined as those indicated in Section B of the Annex to the ISD, are reported as “financial instruments” in Article 1 (2) of the Consolidated Law on Financial Intermediation.

Generally speaking, these can be divided into derivatives (Article 1 (3) of the Consolidated Law on Financial Intermediation) and non-derivative instruments. This distinction continues in Articles 69 and 70 of the Consolidated Law on Financial Intermediation. Article 69 deals with the clearing and settlement of transactions involving financial instruments other than derivatives, whereas Article 70 concerns derivatives.

Accordingly, the Italian securities systems are similarly divided into LDT and Express for financial instruments other than derivatives, and Clearing and guarantee systems for the derivative market and for MTS managed by Cassa di Compensazione e Garanzia S.p.A. covering all the financial instruments listed in Article 1 (2) of the Consolidated Law on Financial Intermediation.

For the sake of uniformity, the Bank of Italy issued in conjunction with Consob a Regulation on 30 September 2002, published in Official Gazette no. 238 of 10 October 2002, laying down the general principles for fixing the moment when a transfer order enters into the Italian securities settlement systems.

According to Article 1 of this Regulation, the Italian systems have to fix such moment in such a way as guarantees its exact and objective determination in observance of the requirements of settlement risk control and ensuring the unitary and consistent nature of the various phases of the process regarding the execution of transfer orders.

Article 2 of this Regulation specifies that this specific moment should not be prior to the moment at which:

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- a) according to the rules of the respective gross or net settlement system, the transfer orders become irrevocably binding on participants; or
- b) with regard to systems with a central counterparty, the latter assumes the position of a contractual counterparty.

Article 3 finally provides that the moment in which transfer orders not concerning operations on regulated markets enter the settlement system cannot be prior to the relevant moment in respect of transfer orders regarding operations executed on the same date on a regulated market and having as their object the same financial instruments and, in any event, cannot be prior to the third day following the date of settlement.

With reference to the systemic risk, it can be said that the Bank of Italy considers the moment at which the transfer order enters the system as being contemporaneous with or subsequently to the moment of irrevocability of same. The individual systems already provide in their individual regulations for entry of transfer orders into the systems and for determination of the moment of irrevocability in accordance with L.D. 210/2001. Unless it has already happened, each system will issue a new regulation in the near future in order to better define such moments pursuant to the aforementioned Regulation.

The Bank of Italy is entrusted with the evaluation of a similar regulation applicable to other systems.

3.2.9 Luxembourg (LU)

Article 34-2 of the Luxembourg Implementing Act has defined “securities” as all instruments referred to in section B of annex II to the Financial Sector Act of 5 April 1993, which covers:

Instruments

- 1.(a) Transferable securities
- (b) Units in collective investment undertakings
- 2. Money-market instruments
- 3. Financial futures contracts, including equivalent cash settled instruments
- 4. Forward interest-rate agreements (FRAs)
- 5. Interest-rate, currency and equity swaps
- 6. Options to acquire or dispose of any instruments falling within this section of the annex, including equivalent cash-settled instruments. This category includes in particular options on currencies and on interest rates.

Clearstream Banking Luxembourg (CBL), which operates the securities settlement system, provides information to their customers regarding in particular the types of securities available for clearing and settlement and the settlement times and deadlines for the delivery of instructions. The irrevocability of an instruction appears to be determined as follows: cancellation or amendment of an instruction may be sent before the deadline for the relevant transaction type; an instruction cannot be cancelled if it has been released for settlement with a domestic counterparty or if it has been reported in the report sent to the customer of CBL as settled. Regarding transactions with counterparties in Euroclear (bridge transactions), it appears that deliveries cannot be cancelled where the customer’s account has been debited during the settlement process and confirmation of the transaction has not yet been received from the counterparty.

3.2.10 The Netherlands (NL)

As regards the Dutch implementation of the SFD, participants are free to determine what to include in the agreement constituting the system. It is fair to assume that the agreement will contain a provision defining the moment after which revocation is no longer possible. This moment will depend on the technical impossibility of reversing an order whose processing has already been started. Under Dutch law it is assumed that the person that has issued the order after a start has been made on carrying into effect cannot revoke the order. Regarding the term “securities” in Article 2 (h) of the SFD, Dutch law does not exhaustively enumerate what it is that should fall within the definition of that term. In any case, according to Article 1 (a) of the Securities Markets Supervision

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Act, “securities” refer to share certificates, debt certificates, profit-sharing or founders’ certificates, option certificates, warrants and similar documents of value, rights of joint ownership, options, futures, entries in share and debt registers and similar rights, conditional or otherwise, certificates representing securities as referred to above, scrips representing securities as referred to above. As such, according to the drafters of the Dutch law, possible issues arising in this respect are not expected. As regards Clearnet², it is noted that for Clearing Members that do not use the Dutch Central Bank to provide proprietary security to Clearnet, zero coupons and strips debt securities will not be accepted as Collateral.

3.2.11 Austria (ÖS)

According to Article 10 (1) Z 2 of the Austrian Finality Act, the instruments that are covered by this Act are defined as “securities”. Securities in this context are documents that give rise to a civil right. The execution of these securities is dependent on representation of the document. Therefore the Austrian definition of instruments seems to be a wide interpretation as it also includes instruments such as bills of exchange and OTC products. This implies that all kinds of instruments are indirectly limited by the rules of the system as, in Austria, only listed securities (i.e. stocks, bonds, investment certificates) are within the scope of the Austrian Finality Act.

3.2.12 Portugal (PO)

The Portuguese implementing legislation sets out certain types of securities. Also, it lays down that the Portuguese authorities, the Portuguese Securities Market Commission (by way of regulation) and the Bank of Portugal (by way of notice) may discretionarily recognize other financial instruments as securities, in addition to the securities referred in the Portuguese Securities Code (CVM).

3.2.13 Finland (SF)

“Securities” within the meaning of the transposing Act are defined by reference to investment instruments described in the Act on Investment Firms (and not to Section B of the Annex to the ISD, as required by the SFD). However, the definition in the Act on Investment Firms is equivalent to that in Section B of the Annex to the SFD. The implementing Act also applies to securities and derivatives contracts comparable to the instruments described in the Act on Investment Firms. Thus, the concept of securities is broad.

Pursuant to Section 13 of the Act, a settlement system has to have written rules indicating the time after which a party to the settlement system may not unilaterally withdraw an order relating to an obligation declared for settlement.

3.2.14 Sweden (SV)

The definition of “securities” under the SFD as referring to all instruments referred to in section B of the Annex to the ISD comprises a number of instruments that are not, in general, referred to as securities in the Swedish language, such as derivatives. The Implementing Act (‘the Act’) states that it applies to all systems that settle payments or the delivery of financial instruments. “Financial instruments” were defined, already before the implementation of the SFD, in the Swedish Financial Instruments Trading Act as traded securities and other rights and obligations intended for trading on a securities market. We believe that this definition complies with the definition of “securities” under the SFD.

The moment of irrevocability of a transfer order and netting of transfer orders is, according to the SFD, to be decided by the rules of the system as far the participants’ or a third party’s right to revoke a transfer order is concerned. It is furthermore by the rules of the system that it is to be decided when a transfer order is entered into

² See also the Dutch comments under Section 3 ‘Analysis of the main issues in the various Member States’, I.B. 3.4, and The Netherlands Transposition Table at article 2(m) of the SFD, especially endnote 35, referring to Instruction I.5-1, article 4, 5 and 6 of Clearnet.

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a system. The rules of the system do however in this respect have to be in compliance with the rules under the law governing the system. The SFD furthermore states that a transfer order will be legally enforceable in the event of insolvency proceeding against a participant provided that the transfer order was entered into a system before the time the insolvency proceeding commenced.

According to general principles of Swedish law an agreement between participants to a system as to when, according to the rules of the system, a transfer order is to be considered as entered into the system is binding. An agreement on the moment of entry into a system that does not unfairly treat an insolvent participant it also legally binding on the participant's bankruptcy estate or a third party. For determining the moment of entry into the system, this means that the participants may with binding effect agree on when a transfer order is to be considered as having been entered into the system and thereby on the irrevocability thereof. As stated in the preparatory work to the Implementing Act, the Government did not consider that there was any need to further lay down rules on when a transfer order should be considered as entered into a system or when a transfer order should be considered as irrevocable.

It may be noted that a transfer order in respect of a financial instrument is legally enforceable according to the Swedish Financial Instruments Account Act when a notice of the transfer of the financial instrument is registered. From that time, the instrument may not be attacked by the transferor's creditors in respect of their rights other than such as were registered at the time the notice was registered, subject to the transferor being entitled to dispose of the financial instrument at the time of the transfer. If at the moment of transfer the transferor was for example in bankruptcy, the transfer will only be legally enforceable if at the time of the transfer the transferor was registered on a Swedish CSD book-entry account as the owner and the acquirer did not know or ought not to have known at that time that the transferor did not own the financial instrument.

3.2.15 United Kingdom (UK)

The types of investments covered by the SFD are defined in the SFD, and transposed by the UK Regulations, as the instruments referred to in section B of the Annex to the ISD, to wit:

- 1) a) Transferable securities;
b) Units in collective investment undertakings;
- 2) Money-Market instruments;
- 3) Financial Futures Contracts, including equivalent cash settled instruments;
- 4) Forward interest rate agreements (FRAs)
- 5) Interest-rate, currency and equity swaps; and
- 6) Options to acquire or dispose of any instruments falling within the aforementioned instruments, including equivalent cash-settled instruments, and including in particular options on currency and on interest rates.

The "moment of irrevocability" is defined by the rules of the designated system, as set out in Articles 5 of the SFD and in regulation 5(c) of the Schedule to the UK Regulations.

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B. Scope of the SFD and the implementing legislation

3.3 Definition of insolvency (Article 2(j) of the SFD)

As regards Article 2(j) SFD, the term “*insolvency proceedings*” within the meaning of this provision is fairly wide, also encompassing inter alia preliminary measures both under judicial insolvency law and under the law governing administrations in insolvency situations (like supervisory moratoria, appointment of state commissioners with specific suspending powers, judicial preliminary freezes, etc.). It is thus important to examine in the framework of this report whether the implementation laws of all the Member States cover these proceedings in a sufficiently wide manner.

3.3.1 Belgium (BE)

The definition of “insolvency” laid down in the SFD was adopted in Article 7 (3) of the Implementing Act. It was not sufficient to refer in this context to Belgian concepts. This definition also incorporates concepts, provisions and procedures organised in other Member States or third countries. According to article 7 (3) of the Implementing Act: “*Insolvency proceedings within the meaning of this article are defined as any bankruptcy, composition, moratorium, suspension of payments and, generally, any collective measure provided for by the laws of a Member State or a third state for the purposes of either liquidating a participant or reorganising it where such measure entails the suspension of or a limitation on all or part of the transfer orders or relative payments*”. In our view, the Belgian Implementing Act thus sufficiently covers all proceedings covered by the SFD.

3.3.2 Germany (DE)

While it is noted that the definition of insolvency proceedings under Art 2 lit j. of Dir. 98/26 is (with a view to the multitude of different proceedings existing under Member States’ laws) rather broad and that Germany implemented the Directive not only in relation to “plain vanilla” insolvency proceedings but also in relation to supervisory moratoria under the Banking Act (sec. 46a), supervisory moratoria under other supervisory acts (building societies, insurers) were not addressed. Moreover, Sec. 21 (2) of the Insolvency Code allowing a preliminary insolvency freeze to be imposed by the *insolvency court* could also have been amended explicitly (like sec. 46a of the Banking Act) to the effect of leaving collateral and settlement finality unaffected. In the absence of an explicit amendment practitioners rely on an “a fortiori” argument (“what cannot be challenged in the main proceedings will not be subject to challenge in any preliminary proceedings”). An explicit codification would have been desirable.

According to Article 1 of the Insolvency Act, insolvency proceedings mean proceedings for the joint satisfaction of all creditors of an insolvent debtor through the realisation of his/her assets and their just distribution among the creditors. It formally starts with an application to a court of law to have a debtor declared insolvent and continues with an assessment of whether there are sufficient assets to cover the costs of the proceedings. However, before the court makes an order to formally open the insolvency proceedings, it may order preliminary measures to protect the remaining assets of the debtor.

3.3.3 Denmark (DK)

Specific references have been made to the Danish types of insolvency proceedings in the Danish Securities Trading Act instead of implementing the definition directly.

We have been informed by the Danish Supervisory Authority that, in the light of the Final Report and the ECB’s comments, the Supervisory Authority has reassessed the need for a reference to the wide definition of insolvency proceedings contained in the SFD and has reached the conclusion that it would probably be expedient for section

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57 (e) of the Danish Securities Trading Act specifically to provide that, in foreign bankruptcy cases, there may be situations where actions which are not embraced by the terms bankruptcy, suspension of payments and composition may also be relevant.

Furthermore, the Danish Supervisory Authority states that, if all Member States have implemented the SFD correctly or the authorities otherwise comply with the SFD (which they are obliged to do even without implementation), the current wording should not give rise to problems as a specific policy has been laid down with regard to Danish participants.

The Danish Supervisory Authority has informed us that the issue will be addressed in connection with the general reassessment of the provisions implementing the SFD.

3.3.4 Greece (EL)

The definition of “insolvency” laid down in the SFD was implemented by article 1 (j) of Law 2789/2000. Pursuant to the above article 1 (j) of Law 2789/2000, “*Insolvency proceedings shall mean any collective measure provided for in the law of a Member State, or a third country, which involves the suspending of, or imposing limitations on, the power to dispose such as bankruptcy, special insolvent liquidation or reorganisation/administration*”. In our opinion, this definition is wide enough to cover all proceedings covered by the SFD.

3.3.5 Spain (ES)

The definition of “insolvency” laid down in the SFD was implemented by article 12 of the Spanish Implementing Act. This Article not only refers to Spanish concepts but also to procedures organised in other Member States or third countries. Article 12 of the Transposition Law provides that: “*For the purposes of this Law, insolvency proceedings are deemed to consist of bankruptcy or suspension of payment procedures, and any other universal measures provided by Spanish or foreign legislation regarding the liquidation or restructuring of a company which are intended to suspend transfer orders or payments that the participant may or must make, or which impose any limitations on such payments.*”

Implementation of the SFD by the Spanish transposition law sufficiently covers all proceedings covered by the SFD.

3.3.6 France (FR)

The laws of March 1, 1984 on the prevention and amicable settlement of business difficulties and of January 25, 1985 on Business Reorganisation and Bankruptcy are codified in Articles L. 611-1 et seq. of the French Commercial Code. Under French law, the term “*insolvency proceedings*” covers:

- out-of-court settlement – pre-insolvency proceedings (“*règlement amiable*”);
- judicial receivership (“*redressement judiciaire*”);
- judicial liquidation (“*liquidation judiciaire*”)
- bankruptcy proceedings (“*faillite*”).

The French notion of “*insolvency proceedings*” is wide enough to cover the definition laid down in the SFD.

3.3.7 Ireland (IR)

The term “insolvency proceedings” is not separately defined in the Irish Regulations. It may be caught by the “catch-all” provision in the Regulations, which states, in summary, that words and expressions used in both the Regulations and the SFD shall, unless the contrary intention is expressed, have the same meaning. However, in the definition of “the opening of insolvency proceedings” the Regulations restrict this to “the granting by the High Court of an order for the winding-up of a member of a payment system”. This does not deal with the

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concepts of “examinership” or “arrangements” in Ireland. “Examinership” is where a court places a company under its protection to enable the court-appointed examiner to investigate the company’s affairs and to report to the court on its prospect of survival. “Arrangement” is where three quarters of the members or creditors of a company vote in favour of a compromise in respect of what is owing to them, and the court sanctions the proposals. By not dealing with these issues in the definition of “the opening of insolvency proceedings”, it could be interpreted that the Regulations do, in fact, express a contrary intention of what constitutes on “insolvency” to that which is contained in the SFD and, as a consequence, may not cover the wide meaning contained in the SFD. However, this would be an extremely restrictive interpretation of the provision and one which we would consider unlikely. No practical examples, of which we are aware, have occurred to test the interpretation.

3.3.8 Italy (IT)

Article 1 (p) of L.D. 210/2001 provides as follows: *“insolvency proceedings’ shall mean compulsory administrative liquidation, bankruptcy, suspension of payments of liabilities and restitution of assets to third parties as set forth in Article 74, Article 77 paragraph 2, Article 107 paragraph 6 of the Consolidated Banking Law and Article 56 paragraph 3 of the Consolidated Law on Financial Intermediation and any other measure provided for by Italian law or, if applicable, by the law of one of the Member States of the European Union or of a state outside the European Union, which provides for the suspension or termination of payments or liabilities and the restitution of assets to third parties.”*

The Italian definition of 'insolvency proceedings' is more technical than the definition in the SFD and, due to the enumeration, seems to be a little bit stricter, which in fact is not the case, because not all of the Italian procedures indicated above are insolvency procedures in the full sense of the term but are other types of special procedures that may play a role where an undertaking gets into economic difficulties. Finally, the residuary clause *“and any other measure provided for by Italian law”* ensures that all kinds of proceedings, even precautionary and temporary ones, are covered by this provision of the law.

Apart from Italian insolvency proceedings, Article 1 (p) of L.D. 210/2001 also broadly and generally takes into account any measure provided for by the law of a Member State of the European Union or a third country, provided that such measures provide for the suspension or termination of payments of liabilities and the restitution of assets to third parties. Therefore, in our view, Article 1 (p) of L.D. 210/2001 squares with the fairly wide meaning of, and covers all proceedings intended by, the SFD.

3.3.9 Luxembourg (LU)

The definitions of “insolvency” and “moment of opening of insolvency” laid down in articles 2 (j) and 6, respectively, of the SFD were adopted under articles 34-2 (k) and 34-2 (l) of the Implementing Act.

In Luxembourg these provisions are only measures under judicial insolvency law since there are no administrative measures involving the suspending of, or imposition of limitations on transfers of payment. However, we consider that, given their wording, these provisions should be applicable to administrative measures taken against participants located in another Member state or a third country where such administrative measures exist (since the definition of the “moment of opening of insolvency proceedings” refers to: *“the relevant judicial or administrative authority”*).

3.3.10 The Netherlands (NL)

The definition of “insolvency proceedings” laid down as in the SFD was adopted in article 212a of the Implementing Act, by implementing the text verbatim. Since, as has been stated by the Commission, the term *“insolvency proceedings”* within the meaning of this provision is fairly wide, including inter alia also preliminary measures both under judicial insolvency law and under supervisory law in cases of insolvency situations (like supervisory moratoria, the appointment of state commissioners with specific suspending powers, judicial

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preliminary freezes, etc.) in our view, the Dutch Implementing Act sufficiently covers all proceedings covered by the SFD.

3.3.11 Austria (ÖS)

The definition of “insolvency” is covered by Art. 11 Austrian Finality Act and refers to any collective measure provided for by the laws of a Member State or a third state for the purpose of either liquidation or reorganization where such a measure entails the suspension of or a limitation on all or part of the transfer orders or relative payments. In our opinion, this definition is a wide interpretation and therefore sufficiently covers the concept of the SFD. Apart from the types of insolvency proceedings defined in Austrian law (composition-decree, company reorganization proceeding, bankruptcy proceeding, business supervisory proceeding), this concept also incorporates concepts, provisions and procedures organised in other Member States or third countries.

3.3.12 Portugal (PO)

The Portuguese provisions regarding the concept of bankruptcy proceedings are broad, as the national provisions do not refer exclusively to bankruptcy proceedings but also to actions for recovery of a company or an equivalent decision.

3.3.13 Finland (SF)

Pursuant to Section 2 paragraph 7 of the implementing Act, the opening of insolvency proceedings refers to the opening of bankruptcy proceedings, a company restructuring or the restructuring of the debts of a private person or a decision to interrupt the operations, liquidate, close or withdraw the authorization of a credit institution or any other decision of an authority on the commencement of enforcement proceedings. According to the GP (99/1999), the definition of the opening of insolvency proceedings is to be interpreted similarly to under the SFD. Thus, the concept of the opening of insolvency proceedings is broad and sufficiently covers insolvency proceedings within the meaning of the SFD.

However, it should be noted that the implementing Act explicitly only governs the legal consequences of

1. bankruptcy proceedings
2. company restructurings or the restructuring of the debts of a private person
3. insolvency proceedings of a credit institution
4. execution.

Thus, it is unclear what the legal consequences would be if the Finnish law were applied to a system and foreign insolvency proceedings not mentioned in 1, 2, 3, or 4 were opened against a foreign participant. However, as confirmed in our discussions with the representative from the Ministry of Justice, the Act should also be applied to such insolvency proceedings in addition to insolvency proceedings 1, 2, 3, and 4 based on the ratio legis of the Act.

3.3.14 Sweden (SV)

The definition of “insolvency” under the SFD is defined by Article 2 (6) of the Swedish Implementing Act, as a collective insolvency proceeding such as bankruptcy, reconstruction or other comparable proceedings. This definition covers all proceedings aimed at winding up the participant or reorganising the participant where such proceedings suspend the participant’s right to dispose of its assets or where the participant’s right to dispose of its assets is limited. According to the preparatory work to the Swedish Implementing Act, the definition only covers proceedings that affect more or less all of the participant’s assets and not proceedings that only concern part of the participants’ assets or where assets are only made use of by some of the participant’s creditors, which in our opinion is in line with the definition under the SFD. Furthermore the definition under the Swedish Implementing Act is intended to cover all collective insolvency proceedings comparable to bankruptcy and reconstruction

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organised in other Member States or third countries. In our view, the Swedish Implementing Act thus sufficiently covers all proceedings covered by the SFD.

3.3.15 United Kingdom (UK)

The definition of “insolvency” laid down in the SFD was adopted by regulations 5.2(1) and 5.2(2) of the UK Regulations. In English law, insolvency proceedings include winding-up, provisional liquidation, company administration and, in relation to individuals, bankruptcy, interim receivership or, for a deceased individual, administration of an insolvent estate. This appears to be sufficiently broad to capture the definition of “insolvency” as set out in the SFD.

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3.4 Definition of *collateral security* (Article 2(m) of the SFD)

Under Article 2(m) SFD, “*collateral security*” means “*all realisable assets 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*”.

According to our contacts with local participants, central counterparties and clearing houses, there would be problems in certain countries resulting from a narrow interpretation of the SFD and therefore some forms of contractual securities would not be covered by the Acts implementing the SFD.

In the same vein, the legal techniques covered by this provision go beyond mere pledges and repurchase agreements, but also include other techniques under national law used to provide collateral to central banks (like fiduciary transfers, fixed and floating charges, with or without possession/control by the collateral-taker). It should be examined whether the implementation laws of all Member States cover these proceedings in a sufficiently wide manner.

These two issues merit further investigation.

In this respect, it should be mentioned that according to recital 9 of the SFD regulation in national law of the kind of collateral security, which can be used should not be affected by the definition of collateral security in the SFD.

3.4.1 Belgium (BE)

1. Definition of collateral security

According to Article 2 (m) of the SFD, “*collateral security*” means “*all realisable assets 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*”. According to Article 8 (3) of the Belgian Act of 28 April 1999 transposing Directive 98/26/EC (“the Act”), on the other hand, a collateral security is “*any pledge or special preference or special preference over cash or financial instruments*”. “Financial instruments” under the Act refers to the instruments listed in Article 2 of the Act of 2 August 2002 on the supervision of the financial sector and financial services. It is clear that “cash or financial instruments” does not cover “all realisable assets” that can be provided under a pledge, a repurchase or similar agreement, or otherwise.

As a result, assets such as bills of exchange, which are commonly traded financial instruments under German law, will not benefit from the protection of the SFD in Belgium since they are not included in the above list of financial instruments. Similarly, receivables assigned to credit institutions under the French Act of 2 January 1981 (“Daily Act”) will not be considered to be financial instruments and will therefore not be eligible for protection under the SFD in Belgium. The same discussion goes for commercial paper issued under Belgian law through promissory notes.

2. Techniques under national law used to provide collateral to central banks

In conformity with article 2 (m) of the SFD, article 8 (3) of the Act refers in particular to³:

³ E.g. the securities to be provided to Clearenet under the Euronext Clearing Rule Book are the following:
- each clearing member has to provide sufficient collateral to Clearenet for the performance of the obligations by the clearing members. The amount of collateral is determined daily by Clearenet for each clearing member (Article 1.5.2).
- secondly each clearing member is obliged to contribute to the Clearing Fund, the collective system for collateralisation of commitments. Once a month Clearenet determines the size of the Clearing Fund and the level of each individual Member’s

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- *Pledge*: more particularly to the pledge of fungible assets as regulated by article 5 of R.D. no. 62 of 10 November 1967 promoting the circulation of securities⁴, and to a pledge of dematerialised government debt securities, or dematerialised treasury notes and certificates of deposit as governed by the Act of 2 January 1991 on the market for public debt securities and monetary policy instruments⁵.
- *Special preferential rights* in favour of the Belgian National Bank (article 7 of the Act of 22 February 1998 providing for the organic statute of the National Bank of Belgium⁶), and in favour of the institutions that manage a system for the clearing and settlement of financial instruments, governed by article 41⁷ of the Act

contribution. The amount to be contributed by a clearing member has to be correlated with the risk associated with the open positions (uncovered risks) (Section. 1.6.1). In the event that a clearing member is in default, calls may be made on the clearing fund. The defaulting clearing member's share in the clearing fund will be used in the first instance. If a need remains thereafter, the other clearing members' shares in the clearing fund will be used pro rata to their respective contributions for that monthly period (Section. 1.6.2).

The Euronext Clearing Rule Book refers to securities under the term "collateral" and defines this term very broadly as "*any security, cash, or central bank guarantee, as specified in an Instruction, pledged, granted or transferred outright to Clearnet by the clearing member or to the clearing member by its clients, trading members or associated trading members, in order to secure the performance of obligations*" (Section 1.1.0.19). As such, Clearnet still has the possibility to issue "Instructions" to specify or modify the type of securities that the clearing members need to constitute. An Instruction refers to "*any document issued as such by Clearnet, amended from time to time, whereby the provisions of the Clearing Rule book are interpreted or implemented and which is binding upon clearing members generally or to any category of clearing members in particular*" (Section 1.1.0.37).

For these securities constituted by clearing members within the clearing system organised by Clearnet, the principles of the SFD, as transposed in French law, are applicable.

⁴ Royal Decree no. 62 of 10 November 1967 promoting the circulation of the securities, *official gazette*, 14 November 1967. According to Article 5 (1) of this Royal Decree "*for the constitution of a civil or commercial pledge over fungibles in circulation with the CIK or with affiliated members, possession shall be validly transferred by entering said securities in a special account opened with an affiliated member in the name of an agreed person. The securities over which the pledge is granted are identified according to their nature and without any numerical reference. The pledge thus constituted is legally valid and is enforceable vis-à-vis third parties without further formality*".

The pledgee creditor can proceed to realise the securities over which the pledge is granted, listed on an official market or traded on a regulated market, without any prior legal authorisation after a written summons has been sent to the debtor. The pledgee creditor needs to effect realisation as soon as possible taking into account the volume of transactions and retransfer any balance back to the debtor (Article 5 (2) of the RD of 10 November 1967).

⁵ Act of 2 January 1991 on the market for public debt securities and monetary policy instruments, *official gazette*, 25 January 1991. The procedure for realisation of a pledge of dematerialised government debt securities was simplified by the Act of 18 June 1996. Article 4 of the Act of 18 June 1996 inserted Article 7, third sentence, in the above mentioned Act of 2 January 1991, authorising the pledgee creditor to proceed automatically, after mere written summons to the debtor and without any prior legal decision, with realisation of the securities over which the pledge is granted, notwithstanding the bankruptcy of the debtor or any situation of concurrence between creditors and the debtor. The creditor has to realise the securities at the most reasonable price possible and as soon as possible, taking into account the volume of the transactions.

⁶ The Act of 18 June 1996 (Article 3) conferred a special preferential right on the National Bank of Belgium of the same ranking as the preferential right of the pledgee creditor, for all the securities that its debtor holds on account, as own assets, in the books of the NBB or with its securities clearing system, in order to guarantee the payment of claims deriving from credit operations. This preferential right is entered in Article 7 of the Act of 22 February 1998 providing for the organic statute of the National Bank of Belgium. The same simplified procedure for the realisation of securities applies as for the pledge of dematerialised government debt securities (Act of 22 February 1998 providing for the organic statute of the National Bank of Belgium, *official gazette*, 28 March 1998).

⁷ This provision was initially introduced into Belgian law by articles 29 and 68 of the Act of 4 December 1990 on secondary markets, which have been replaced by Article 41 of the Act of 6 April 1995. These provisions were essential milestones for the improvement of the Belgian internal regime of sureties on securities in connection with financial transactions. According to Article 32 of the Act of 2 August 2002 on the supervision of the financial sector and financial services, "*intermediaries and investment advisers and institutions that manage a system for clearing and settlement of financial instruments have preferential rights with respect to all the financial instruments, monies and other rights that these institutions hold on account, as own assets of a participant. These preferential rights guarantee any claim of these institutions on a participant in the clearing or settlement system, arising in connection with the clearing or settlement of subscriptions for financial instruments, or of transactions in financial instruments. In addition, these same institutions benefit from preferential rights for all the financial instruments, monies and other rights which they hold on account as assets of clients of a participant, provided that these clients have given to a participant the authorisation to deposit these assets into an account with the above-mentioned institutions. These preferential rights exclusively guarantee the claims of these institutions on a participant in the clearing or*

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of 6 April 1995 on secondary markets, the legal status and supervision of investment firms, intermediaries and investment advisers.

- *Repurchase Agreements*⁸ and the transfer of property in financial instruments as security⁹, as governed by articles 23 to 26 of the Act of 2 January 1991 on the market for public debt securities and monetary policy instruments; and
- *any other similar form of guarantee* organised by foreign law.

3.4.2 Germany (DE)

1. Definition of collateral security

Unlike Article 2 (m) of the SFD, which defines 'collateral security' for the purposes of the SFD, German law does not have a statutory definition of 'collateral security'. 'Collateral security' is generally understood as meaning a legal position of a person who accepts an asset as security, which is designed to safeguard performance of the secured legal relationship. Thus, generally, 'collateral security' encompasses all assets (including those created on

settlement system, arising in connection with the clearing or settlement of subscriptions for financial instruments or of transactions in financial instruments effected by the participant on behalf of clients".

⁸ In 1991 the Belgian legislator intervened in order to explicitly confirm the validity of repurchase agreements, in order to avoid the legal validity of such repurchase transactions being questioned, notably in the context of the controversy surrounding the transfer of ownership as a security. According to Article 23 of the Act of 2 January 1991 on the market for public debt securities and monetary policy instruments, (*official gazette*, 25 January 1991), repurchase agreements are "*cash sales of securities within the meaning of the Secondary Markets, Investments Undertakings (Status and Supervision), Brokers and Investment Advisers Act of 6 April 1995 that are entered into between the same parties with simultaneous repurchase at a fixed or undetermined point in time of securities with the same characteristics and in the same amount, regardless of the agreed price, delivery or term conditions. The price conditions relating to repurchase transactions within the meaning of this article include transfers of securities or monies destined to maintain the agreed balance between the parties' performances during the term of the agreement, whether for a given transaction or jointly for all transactions between the opposing parties or for a portion thereof. The delivery conditions within the meaning of this provision include the replacement of securities that initially were delivered in implementation of the cash sale by new securities, during the term of the agreement*". Repurchase transactions are characterised under Belgian law as a transfer of fiduciary ownership as a security, because the purpose of the transaction is to guarantee the repayment of the agreed countervalue of the securities concerned (*Printed doc.*, Senate, 1101-1 (1990-91), 22 and 23). In order to avoid discussions regarding the validity of such repurchase transactions, article 23 of the abovementioned Act of 2 January 1991 explicitly states that the rules regarding the constitution of a civil or commercial pledge do not apply to repurchase transactions. The reason for this can be found in Article 24 of this Act, according to which, in the case of non-payment, the transferred securities have to be sold as soon as possible. This is an explicit condition subsequent, which is not allowed in the case of pledges (Article 2078 Belgian Civil Code and Articles 4 and 10 of the Commercial Pledges Act of 5 May 1872).

⁹ The Law of 15 July 1998 inserted Article 25bis in the above mentioned Act of 2 January 1991, extending the legal regime applicable to repurchase transactions (see endnote 26) to "*all transfers of ownership of securities entered on account and monies that are effected in order to guarantee the obligations of a credit institution, an investment company, an insurance or reinsurance company, a pension fund, a collective investment undertaking, the National Bank of Belgium, the Re-discounting and Guarantee Institute, the Pension Fund (Rentenfonds) or companies that, even in an ancillary manner, carry out investment activities for their own account or for the account of third parties, or foreign companies or institutions of similar status and that contain an obligation on the part of the transferee to retransfer the transferred securities or monies or securities or assets of equivalent value, except in the event of full or partial non-performance of the guaranteed obligation. The same applies to transfers of securities entered on account or monies intended during the term of the agreement to guarantee the balance between the performances of the parties, either with regard to a given transaction or globally with regard to all or a part of the transactions between the opposing parties, and for substitution during the term of the agreement of the originally transferred securities for new securities or other monies*". The purpose of this Article is to ensure the validity and the effectiveness towards third parties of transfers of ownership of financial instruments or moneys as a security for transactions entered into by financial institutions, notwithstanding the bankruptcy of the debtor or any collective measure involving the suspension of or imposing limitations on transfers of payments. Examples of such transactions are master agreements regarding forward transactions such as swaps, repos and stock lending. In the case of default by the debtor, the creditor is allowed to keep the securities or to sell them on the stock market, and to set off its claim with the value of the securities. Moreover, according to Article 26 of the above Act, Article 17 of the Bankruptcy Act relating to the non-effectiveness towards third parties of transactions carried out during the suspicious period does not apply to transactions referred to in Articles 23 and 25 bis of this Act.

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the basis of foreign law) that can be realised by the person who accepts them as security. In the context of the SFD, this means that 'collateral security' comprises those assets that are accepted by the participants of the respective system.

2. Techniques under national law used to provide collateral to central banks

As a result of the lack of a definition of "collateral security" in German law, there are no limitations as to the types of "collateral security" encompassed by the SFD. Accordingly, there are no legal restrictions on collateral security which are provided to the German Bundesbank other than the general restrictions and demands made by the ECB on refinancable securities, as laid down in chapter 6 of the 'General Documentation of the Eurosystem Monetary Policy Instruments and Procedures'. The transposition of the SFD has therefore no direct consequences on the types of collateral security provided to and accepted by the Bundesbank. Chapter 6 of the 'General Documentation' distinguishes two categories of collateral security: category 1 encompasses marketable debts which meet uniform criteria as determined by the ECB for all of EMU; category 2 encompasses such marketable and non-marketable debts as are of particular importance for the national financial markets and banking systems and for which the national banks set the criteria beyond the ECB minimum standards. Germany (as well as France and Austria) has included non-marketable collateral securities in category 2 (trade bills and commercial debt); here, specific requirements must be met, e.g. the debtor must be located in Germany.

It is unclear whether the provision of collateral to a central bank other than the Bundesbank is encompassed by the implementing legislation, as it does not contain any reference to this issue.

3.4.3 Denmark (DK)

1. Definition of collateral security

The definition of securities in section 2 of the Danish Securities Trading Act does not cover all the examples mentioned above under 3.4.1.1. However, this is not relevant under Danish law as "collateral security" in section 57 b is not limited to securities as defined in section 2. Thus, there are no limitations under Danish law in respect of the types of "collateral security" that benefit from the protection of the SFD.

2. Techniques under national law used to provide collateral to central banks

The techniques that may be used to provide collateral have not been defined in the Danish Securities Trading Act. It seems that the primary concern of the report is whether it will give rise to problems in using repo agreements, which is allowed in Denmark.

The Supervisory Authority has informed us that there have been no examples of systems wishing to use non-authorized techniques.

According to the Supervisory Authority problems of this type will be solved in any circumstances when the Collateral Directive 2002/47/EC is implemented.

3.4.4 Greece (EL)

1. Definition of collateral security

The definition of "collateral security" in Greek law 2789/2000 (Article 2 (m)) covers "all realisable assets" as referred to in Article 2 (m) of the SFD, as it is almost an exact translation of the SFD.

2. Techniques under national law used to provide collateral to central banks

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In conformity with article 2 (m) of the SFD, article 1 (m) of Law 2789/2000 refers in particular to: “*a pledge or a guarantee or a repurchase agreement 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*”. The techniques under Greek law used to provide collateral to the Bank Of Greece are: (a) pledge, both by virtue of contract and by virtue of law, (b) repurchase agreements, (c) guarantee and in certain exceptional cases (d) mortgages on immovables (Article 58 of the Bank of Greece Statute).

The definition of “collateral security” for the purposes of Law 2789/2000 is almost an exact translation into Greek of the definition provided in article 2 (m) of the SFD. As far as Greek law is concerned, this provision of Law 2789/2000 is very wide and covers all kinds of security, which may be, potentially, granted, and are currently granted under Greek law.

3.4.5 Spain (ES)

1. Definition of collateral security

As indicated in the Spanish Transposition Table, the definition of “collateral securities” for the scope of the transposition law, 41/1999, covers “all realisable assets” as referred to in Article 2 (m) of the SFD. In particular, article 2.1.d.2 of the implementing Act defines collateral securities as all “*realisable assets, including money, provided under a deposit, pledge, a repurchase agreement, subject to withholding or any other legal transaction, for the purpose of securing rights and obligations deriving from the system’s operations, or from monetary policy transactions, or in connection with a system’s settlements, carried out with the Bank of Spain, the European Central Bank or other Central Banks in European Union countries*”.

2. Techniques under national law used to provide collateral to central banks

According to the amendments introduced by Law 44/2002 of 22 November on measures for the Reform of the Financial System, a new Additional Provision VI is introduced into Law 13/1994 of 1 June on the Bank of Spain’s Autonomy. Said AP VI provides a clear and statutory definition of techniques to provide collateral to the Bank of Spain, the European Central Bank and the national Central Banks of the EU Member States.

According to the new AP VI of Law 13/1994 of 1 June on the Bank of Spain’s Autonomy, collateral provided in favour of central banks is considered as being “*any deposit, pledge, sell/buy-back, repurchase agreement, special preferential rights (“afección”), right of withholding or otherwise which may subject to any realisable assets, including cash, for the purposes of securing rights and obligations arising from any present or future transaction executed with the Bank of Spain, the European Central Bank or any Central Bank of the EU Member States.*”

Since article 2.1.d.2 of the implementing Act refers to deposits, pledges, repurchase agreements, subject to withholding or any other legal transaction, the Spanish implanting Act covers all techniques in a sufficiently wide manner.

3.4.6 France (FR)

1. Definition of collateral security

Under French law, the “realisable assets” referred to in Article 2 (m) of the SFD are duly listed in Article L. 330-2 of the French Monetary and Financial Code.

Article L. 330-2 provides that regulations, framework or standard agreements used for any interbank settlement system or any system for the settlement and delivery of financial instruments as set forth in L. 330-1 may, where they concern more than two parties, demand of those undertakings participating either directly or indirectly in said systems, and in addition to the creation of a pledge over financial instruments as set forth in article L. 431-4,

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the handing-over of stocks and securities, notes, claims or cash, or the creation of collaterals in respect of said stocks and securities, notes, claims or cash, to meet the payment obligations resulting from participation in those systems. The above are assigned with proprietary rights as a guarantee, this being binding on third parties with no further formality.

It appears that this list of assets benefiting from protection under French law seems broader than, for example, the list contained in the Belgian law, but still is not broad enough to cover 'all realisable assets'.

2. Techniques under national law used to provide collateral to central banks

The techniques used under French law to provide collateral in favour of the *Banque de France* and national central banks that are members of the European System of Central Banks (ESCB) are:

- Pledge;
- assignment with proprietary rights or otherwise of financial instruments, securities, claims or cash.

Pursuant to articles 6.49 and 6.50 of the operating rules of Euroclear (securities settlement system RGV2), participants in a system may mobilize financial instruments as collateral with the *Banque de France*. In practice, the mechanism is called a "*pension livrée*" (repurchase agreement) as regulated by article L. 432-12 of the French Monetary and Financial Code.

Another mechanism commonly used is an assignment of claims to credit institutions under the Act of 2 January 1981 ("*cession Daily*"), as codified in the French Monetary and Financial Code under articles L. 313-23 and seq. (TBF payment system).

3.4.7 Ireland (IR)

1. Definition of collateral security

The definition of "collateral security" under Irish law covers "all realisable assets" as referred to in Article 2 (m) of the SFD, as no material amendments have been made in the transposition of this Article.

2. Techniques under national law used to provide collateral to central banks

There is such a wide variety of ways in which collateral is given in the banking market, it is not possible to provide a definitive response within the budget for this project without specific information on the circumstances of a particular transaction.

We understand that the Irish authorities are currently considering the issue of collateral security under the SFD.

3.4.8 Italy (IT)

1. Definition of collateral security

The term 'collateral security' in Article 2 (m) of the SFD is replaced by 'collateral' ('*garanzia*') in Article 1 (i) of L.D. 210/2001, which has a broader meaning than the SFD:

'collateral' shall mean every right having as its object, or every right in relation to, money, financial instruments or other assets immediately convertible by anyone and issued in whichever manner and form in order to guarantee the performance of the present and future obligations arising from transfer orders within a system or from operations in connection with the functions of the central bank.

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Due to the fact that the scope of Recital (9) of the SFD only effects a minimum of harmonisation in order to avoid any interference with national regulations and national concepts of collateral securities, Italy – not only with regard to the present situation, but also with reference to future developments – has decided that all types of (contractual and legal) guarantees, even those granted independently from a settlement system and from operations of the central banks, should be included in the definition in order to provide a wide range of protection against systemic risks.

2. Techniques under national law used to provide collateral to central banks

The above-mentioned broad definition covers all possible techniques to provide collateral to the Bank of Italy, like for example the assignment of a claim.

Notwithstanding the fact that L.D. 210/2001 covers all kinds of techniques, presently collaterals are provided to the Bank of Italy either in the form of a pledge or a repurchase agreement (repo).

A pledge is the collateral used for short term, intraday and overnight cash credits. Financial securities are pledged to the Bank of Italy on the legal basis of a standard contract executed between the Bank of Italy and the provider.

Repurchase Agreements are used to exchange cash temporarily for securities for a period of two weeks. The Repurchase Agreements of the Bank of Italy are governed by standard contracts, which are broadly inspired by existing market documentation.

3.4.9 Luxembourg (LU)

1. Definition of collateral security

The definition of collateral securities is given in Article 61-3 of the Law (transposing Article 2 (m) of the SFD) and refers to “*all realisable assets, including money, provided under a pledge, a repurchase, a fiduciary transfer or a similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system within the meaning of Article 34-2 (a) or provided to central banks of the Member States or to the European Central Bank.*”

2. Techniques under national law used to provide collateral to central banks

Pursuant to the Law of 23 December 1998 concerning the monetary status and the Central Bank of Luxembourg, article 4 (4) – which was inspired by article 7 of the organic law on the National Bank of Belgium – states:

“Loans by the Central Bank and by the ECB or any other national Central Bank forming an integral part of the ESCB resulting from operations in connection with common monetary or exchange rate policies shall have a preferred claim over all assets of the debtor, whether with the Central Bank or with a securities settlement system or any other counterpart in Luxembourg. This preference shall rank equally with that of a secured creditor.”

This provision allows the Central Bank of Luxembourg to reinforce its financial basis by protecting it against the risks arising from its operations with the financial sector. The purpose of article 4 (4) is to set up a preference equivalent to that of a secured creditor, which is granted to all entities composing the ESCB over assets held in Luxembourg, and those assets serve as guarantees for operations undertaken in the framework of the common monetary and exchange policy of the EU.

In addition, article 21 of the law of 23 December 1998 states that: “*In order to carry out its tasks, the Central Bank may open accounts with credit institutions, public bodies and other market participants and accepts assets, including book-entry securities, as guarantees.*”

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Since article 6 1 –3 of the Implementing Act covers all realisable assets, including money, provided under a pledge, a repurchase, a fiduciary transfer or a similar agreement, or otherwise, the implementing Act covers all techniques in a sufficiently wide manner.

3.4.10 The Netherlands (NL)

1. Definition of collateral security

The definition of “collateral security” in the SFD has not been followed in the implementing Act in The Netherlands. Instead, the words “proprietary security” have been used. Said concept covers all realisable assets in the sense of Article 2(m) of the SFD.

2. Techniques under national law used to provide collateral to central banks

In conformity with article 2(m) of the SFD, article 213b(3) of the Dutch Implementing Act refers to: “(...) *a proprietary security provided by an institution for the purpose of participation in a system, to a central bank or to another institution which participates in the system*” and article 212f of the Implementing Act states that: “*When in connection with participation in the system, a proprietary security has been provided to a participant or a central bank or to a third party acting on behalf of a participant or a central bank on securities or on interests in securities and such securities or interests in such securities have on the basis of a legal provision been entered in a register, account or centralised deposit system located in the Union or in another state which is party to the Agreement on the European Economic Area, (...)*”. These articles refer to all techniques under national law used to provide collateral to central banks.¹⁰ As regards repurchase agreements, article 2a of the Act on the Securities Markets¹¹ provides: “*The circumstance that the purchaser of securities has undertaken upon purchase to later transfer ownership of an equal amount of securities of the same kind to the seller does not imply that such a purchase, in contravention of article 84(3) of Book 3 of the Dutch Civil Code, is intended to effect a fiduciary transfer of ownership of the securities or that it lacks the effect of, after the transfer, having the securities fall within the property of the purchaser, unless the securities remain in the hands of the seller after delivery.*” Buy-and-sell-back transactions and securities lending fall within the scope of this article¹². For security provided to the Dutch Central Bank, the accounts kept at Necigef are used. Proprietary security¹³ is provided to the central bank by clearing members by means¹⁴ of right(s) of pledge on the basis of article 42 of the Act on Securities Giros¹⁵.

Thus, the Dutch implementing Act covers all proceedings in a sufficiently wide manner.

3.4.11 Austria (ÖS)

¹⁰ The holder of a depositary receipt of shares (excluding the holder of a depositary receipt of registered shares), or the holder of a depositary receipt of debts can have a joint right of pledge on such shares or debts on the basis of article 3:259(2) of the Dutch Civil Code: “If the original shares have been registered or if the debts can be designated as nominative and if the depositary receipts have been issued in collaboration with the issuer of the original shares or debts, then the holders of the depositary receipts jointly acquire a right of pledge on such shares or debts. If the depositary receipts for nominative debts have been issued without collaboration of the debtor, then the holders of the depositary receipts acquire such a right of pledge by notification of the issue to the debtor. If the depositary receipts been issued for bearer shares or bearer debts, then the holders of the depositary receipts acquire such a right of pledge, without the paper having to be put under the control of the holders of the depositary receipts or a third party.”

¹¹ Act of 17 December 1998 regulating the replacement of references in agreements, articles of association and wills to the Amsterdam Interbank Offered Rate and other reference interest rates, and amending the Act on the Supervision of the Securities Markets 1995, in relation to participation by The Netherlands in Economic and Monetary Union (Act replacing reference interest rates), Bulletin of Acts and Decrees, 23 December 1998, no. 716.

¹² Explanatory Note 26124, no. 5, par. 3, p. 3.

¹³ Cf. Comments in The Netherlands Transposition Table of 13-01-2003 at article 2(m) SFD, especially endnote 35.

¹⁴ Instruction I.5-1, article 4, 5 and 6, as published by Notice 2002-00367 of 3 April 2002.

¹⁵ Act of 8 June 1977 concerning provisions on the giro transfer of securities, as lately amended by the Act of 2 November 2000, Bulletin of Acts and Decrees 485.

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1. Definition of collateral security

In Austria, the implementing Act applies to the collateral security provided in connection with participation in a system. According to Austrian law, securities are “*all realisable assets 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 of the EEA or to the European central bank*”. In general the terms of the implementing Act comply with the SFD apart from one issue, that national law does not include collateralisation of rights. National law does not use the word “collateral” and also does not include the collateralisation of “rights”. According to the Austrian legal system, the term “obligation” covers obligations of participants in the system as well as obligations of the system to the participants. Therefore, there is no deviation from the SFD.

2. Techniques under national law used to provide collateral to central banks

In conformity with article 2 (m) of the SFD, article 14 Finality Act refers in particular to collateral provided by pledges, repurchasing agreements, similar agreements or in any other way to the system or to a central bank of the EEA or to the ECB (like fiduciary transfers, fixed and floating charges, with or without possession/control of the collateral-taker)¹⁶. The Finality Act therefore covers a sufficiently wide range of techniques to provide collateral to central banks.

3.4.12 Portugal (PO)

1. Definition of collateral security

Article 1 of Act 1 (Decree law no. 486/99, Portuguese Securities Code), transposing Article 9 (2) SFD, refers for its definition of securities that can be provided as collateral securities in the context of the PRIMA rule of article 9 (2) SFD to the definition of securities in article 1 (1) of the said law. This article gives the following enumeration of securities:

“In addition to others qualified as such by the Law, Securities are:

- a) Shares;*
- b) Obligations;*
- c) Equity Security;*
- d) Units in collective investment undertakings;*
- e) Rights to subscription, acquisition or disposal of securities referred to in the previous numbers that have been issued autonomously.*
- f) Rights detached from the securities referred to in the previous numbers a) to d) provided that the same*
- g) applies to all the issue or series or is foreseen upon issue”.*

This list clearly does not cover “all realisable assets” as defined in the SFD. However, According to Article 1 (2) of the same law: “*Other instruments representing homogeneous legal situations used, directly or indirectly, in the financing of public or private entities and that are issued for public distribution and in circumstances that assure the interests of the potential purchasers, can be recognised as securities by regulation of the Securities Market Commission, referred to hereinafter as CMVM, or, in case of monetary instruments, by notice of the Bank of Portugal*”.

The definition of collateral securities in Law 2 (Decree-Law no. 221/2000 of 9 September 2000) is an exact translation of the SFD, and thus fully covers all realisable assets as mentioned in article 2 (m) SFD.

2. Techniques used to provide collateral to central banks

¹⁶ The terms of contract of the Vienna stock exchange require the participants to hold deposits at the Vienna Stock Exchange without the requirement of a formal pledge or collateralization.

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With respect to the techniques that are used to provide collateral to central banks in the context of Article 9 (2) SFD, Article 284 of Act 1 (Decree law no. 486/99, Portuguese Securities Code), transposing Article 9 (2) SFD, provides an ad hoc definition by defining collateral securities as pledges and rights arising from repurchase and other similar contracts. The latter can be considered as a catch-all section that sufficiently covers all techniques covered by the SFD.

3.4.13 Finland (SF)

1. Definition of collateral security

The Act applies to *collateral* deposited with a contracting party or a party to a settlement system.

The Act does not refer to the concept of *collateral security*. As the term ‘collateral security’ is not defined in the Act, the general concept of collateral in Finnish law is applied. It is deemed to include items referred to in Art. 2 (m) of the SFD. Thus, the term collateral in the Act would also cover “créances Loi Dailly”, as described in section 3.4.1.1 of this Report.

Section 12 (3) of the implementing Act, implementing Article 9 (2) of the SFD does not refer to “collateral securities”, but to “securities” in general. Securities within this meaning are defined by referring to the list of section 2 of the Act on investment firms (579/1996). This list does not cover “all realisable assets” in the sense of the SFD.

2. Techniques under national law used to provide collateral to central banks

Based on our conversations with a Bank of Finland representative, the only judicial mechanisms to provide collateral to the Bank of Finland (in the context of payment systems) is pledging of securities and repo agreements.

Section 12 (2) of the implementing Act, implementing Article 9 (2) of the SFD refers to “a pledge or other right on the security”. As a result this section covers all possible techniques to provide collateral to central banks

3.4.14 Sweden (SV)

1. Definition of collateral security

The concept of “collateral security” referred to in Article 2 (m) of the SFD is not defined in the Swedish Implementing Act. As the term ‘collateral security’ is not defined in the Swedish Implementing Act, the general concept of collateral securities in Swedish law is applied, which is deemed to include items referred to in Art. 2 (m) of the SFD. According to the preparatory work to the Swedish Implementing Act, Article 2 (m) is further explained in Recital 9 of the SFD. Recital 9 states that the definition under national law regarding the types of collateral securities that may be used in connection with systems covered by the SFD shall not be less unaffected by the definition of “collateral securities” under the SFD.

Under Swedish law the Article 9 (1) of the SFD has been interpreted as requiring that it should be *possible* for a system covered by the scope of the SFD and its participants to use securities provided by a participant that is subject to insolvency proceedings and that the legislator is thus required under the SFD to provide for collateral securities that are both unaffected by insolvency proceedings and effective as collaterals. However the SFD has not been interpreted as stating that all collateral securities that may be provided in a system covered by the scope of the SFD have to meet these requirements.

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Since the types of collateral securities that most likely will be used in connection with systems covered by the SFD as stated in the preparatory work to the Swedish Implementing Act are pledges of financial instruments and currency and different forms of repurchase agreements, the Swedish legislation has been amended in order to ensure that pledges of currency and financial instruments fulfil the requirements posed on collective securities under the SFD.

According to Swedish law, a trustee in bankruptcy has a pre-emption right over pledged property. In general, it therefore is not possible to use pledged property immediately without first offering the pledge to the trustee. In order to enable effective collateral securities in connection with systems covered by the scope of the SFD, an exemption from the aforementioned rule has been made in the Swedish Bankruptcy Act for pledged financial instruments and currency.

In the preparatory work to the Swedish Implementing Act, it was briefly mentioned that the Swedish version of Article 9 (1) did not cover collateral securities provided by third parties. This would however be more accurate to interpret from the wording of Recital 9. It was, however, clearly noted that both Article 9 (1) and Article 9 (2) are intended to cover securities provided by third parties.

Even if the wording of the Swedish version of the SFD (Recital 9) could be interpreted as excluding securities provided by third parties, the implementation of the SFD has not been focused on this discrepancy. We have understood the amended Article in the Swedish Bankruptcy Act as covering all pledges of financial instruments and currency. In our opinion it is not likely that this issue will generate any problems or specific issues.

2. Techniques under national law used to provide collateral to central banks

Techniques under national Swedish law used to provide collateral to central banks are mainly pledges of dematerialised or immobilised securities registered at a Swedish or foreign exchanges or authorised market places or with a central securities depository or that are issued by a state or a central bank or other official or governmental entity including promissory notes as well as government bonds and other debt securities, or dematerialised treasury notes and certificates of deposit or pledges of foreign currency as regulated by the Financial Instruments Accounts Act. The Swedish Central Bank may also accept securities in the form of a repurchase agreement.

Section C (3) of the Implementing Act, implementing Article 9(2) of the SFD refers to transfer, pledge, *or other handling of financial instruments*, which seems to sufficiently cover the techniques covered by the SFD.

See also our comments regarding the implementation of Article 9(1) under point 1, which is mainly focussed on pledges and repo's.

3.4.15 United Kingdom (UK)

1. Definition of collateral security

Collateral securities refer in England and Wales to **all realisable assets** provided under a charge or a repurchase or similar agreement or otherwise (including money provided under a charge) (a) for the purpose of securing rights and obligations potentially arising in connection with a designated system ("collateral security in connection with participation in a designated system") or (b) to a central bank for the purpose of securing rights and obligations in connection with its operations in carrying out its functions as a central bank ("collateral security in connection with the functions of a central bank").

2. Techniques under national law used to provide collateral to central banks

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There are a huge variety of ways in which collateral is given in the inter-bank market. In order to provide you with an appropriate answer, we would need more specific information than is provided here. For example, the type of transaction, the type of facility and the circumstances of the transaction.

Nevertheless, the definition of “collateral security in connection with the functions of a central bank” set out in regulation 2(1) of the UK Regulations is very broad and would appear to catch all techniques used under English law to provide collateral to central banks.

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3.5 Definition of participants: Electronic Money Institutions and similar issues

3.5.1 Electronic Money Institutions

This issue concerns whether EMIs are covered by the regime established by the SFD. The European Central Bank has raised concerns in this respect. The protection of EMIs by the provisions of the SFD is very important for the ECB, particularly with a view to the soundness of systems. As a consequence of the existing legal uncertainty that was triggered by the Commission's interpretation that EMIs would not be covered by the SFD, the Governing Council of the ECB has decided that EMIs should not be granted access to national RGTS systems.

Similarly, the scope of the SFD does not include entities such as Dutch "Single purpose asset protection trusts", which are used for the deposit of foreign securities for clients of Dutch credit institutions. As a result, access by these trusts to securities settlement systems is systematically refused (e.g. by the Belgian central bank), which leads to a distortion of the competitiveness of these entities.

(i) At EU level

According to the interpretative note of the European Commission (Interpretative Note of the European Commission dated 7 June 2002), the SFD does not include EMIs in its scope. Article 2(1) of Directive 2000/46/EC (the Electronic Money Directive) lays down a limitation about the applicability of Banking Directives to EMIs by stating that:

"Save where otherwise expressly provided for, only references to credit institutions in Directive 91/308/EEC and Directive 2000/12/EC except Title V, Chapter 2 thereof shall apply to electronic money institutions".

As the SFD defines an "institution" as "a credit institution as defined in the first indent of Article 1 of Directive 77/780", which was repealed and replaced by the Banking Directive, EMIs do not fall under the scope of the SFD. The fact that the Banking Directive has been amended in order to include EMIs, does not change the applicability of the SFD, since EMIs are explicitly excluded from the scope of the SFD by the Electronic money Directive. The SFD is not mentioned in the Electronic Money Directive. The Commission will however prepare the necessary legislative amendments.

(ii) At Member States' level

3.5.1.1 Belgium (BE)

Since the Act of 28 April 1999 transposing Directive 98/26/EC ("the Act") defines institutions as a "credit institution" as defined in the Act of 22 March 1993 on the legal status and supervision of credit institutions, EMIs do not benefit from the protection of the SFD in Belgium. However, according to draft legislation implementing the Electronic Money Directive, the Act of 22 March 1993 will be modified in order to include EMIs in the definition of credit institution. If this draft legislation is adopted, the Act will include EMIs in its scope.

Since Electronic Payment Institutions participate in payment systems, the fact that EMIs are not covered by the regime established by the SFD raises concerns by the National Bank of Belgium ('NBB'), which is responsible for the effective and proper functioning of the clearing and payment systems in Belgium. The scope of the SFD should be as broad as possible in order to avoid systemic risk and ensure an effective protection under the SFD and to exclude any 'knock-on effects' that could be generated by unprotected participants. As a result of this, the ECB has decided to refuse the access by EMIs to national RTGS systems linked to TARGET.

3.5.1.2 Germany (DE)

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EMIs do benefit from the protection of the SFD under German Law. They enjoy the same protection as other participants in systems as defined by the SFD. The protection of EMIs is achieved through the provision of Sec. 1 (1) No. 11 of the German Banking Act (Kreditwesengesetz – KWG), which provides that the issuance and administration of e-money is considered to be banking business so that EMIs must be licensed and qualify as banks, i.e. credit institutions within the meaning of Article 2 (b) (1) of the SFD. This means for EMIs in other EU Member States that are not licensed that they could not operate in Germany under the passport provisions. Accordingly, they would have to be refused access to systems by the Supervisory Authority.

3.5.1.3 Denmark (DK)

The Financial Supervisory Authority has informed us that there have been no specific examples of the problem in question.

As the problem is similar to the one described under the above question on the Czech problem, reference is made thereto, with an example of an “unauthorised” participant possibly being an EMI that does not fall within the SFD’s definition of participants.

3.5.1.4 Greece (EL)

Greek law does not at present contain any provisions as concerns EMIs. It should be noted, however, that a draft law implementing the Electronic Money Directive in Greece has already been prepared and has been submitted to the Greek Parliament for adoption. The draft law is formulated in such a manner as to bring EMIs within the scope of Law 2789/2000, which has transposed the SFD. This means that, once the draft law is adopted, EMIs will be covered by the provisions of the SFD. To the best of our knowledge, adoption of the draft law implementing the Electronic Money Directive by the Greek Parliament is imminent.

3.5.1.5 Spain (ES)

The Law 44/2002 of 22 November 2002, transposing the Directives 2000/46/EC and 2000/28/EC, introduces a new list of entities deemed to be “credit entities” in article 1 of Royal Decree 1298/1986, of 28 June. The new list extends the status of “credit institution” in the sense of Directive 2000/12/CE, to *“an undertaking or any other legal person, other than those whose regular activity is the collection of funds from the public by means of deposit, loans, temporary assets assignment or the similar with the obligation of refunding them, applying them on its own behalf to the granting of loans or other similar transactions, which issues means of payment in the form of electronic money”*.

Therefore, EMIs, as defined under the terms of the Electronic Money Directive (*an undertaking or any other legal person, other than a credit institution as defined in Article 1, point 1, first subparagraph (a) of Directive 2000/12/EC which issues means of payment in the form of electronic money*), fall under the scope of the Spanish transposition Law of the SFD in the credit entity category, as participant.

3.5.1.6 France (FR)

According to Article 1 (3) of the Electronic Money Directive, an EMI means an undertaking or any other legal person, other than a credit institution, which issues means of payment in the form of electronic money.

According to Articles L. 311-1 and L. 311-3 of the French Monetary and Financial Code, banking operations are (i) to carry out credit operations, (ii) to receive funds from the public at sight or less than two years' term and (iii) to make available to the public means of payment and/or to administrate means of payment (all instruments which irrespective of the medium or technical procedure used enable a person to transfer funds i.e. credit cards, cheques, etc.).

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Due to discrepancies between the various European Directives concerning the definitions of the E-money institutions and the credit institutions, determining whether or not an EMI could benefit from the protection of the SFD is a complex matter.

As discussed with the French Central Bank ("Banque de France"), please note that, in France:

- (i) the French EMIs are credit institutions;
- (ii) only credit institutions or undertakings as defined by article L. 518-1 of the French Monetary and Financial Code (see Transposition Table-Art. 2-a-1), investment companies or members of a clearing house or any non-resident undertakings with comparable status can participate in a system;
- (iii) there is no specific protection for French EMIs in France. They would only benefit from protection if they participated as "participants" in a system duly notified.

3.5.1.7 Ireland (IR)

As regards whether or not such EMIs benefit from the protection of the SFD under Irish law, it is our interpretation that they do not. A credit institution in the SFD is defined under Statutory Instrument No. 395 of 1992, European Communities (Licensing & Supervision of Credit Institutions) Regulations 1992 as meaning: -

"an undertaking, other than a credit union or friendly society, whose business it is to receive deposits or other repayable funds from the public and to grant credit on its own account".

The European Communities (Electronic Money) Regulations, 2002, which give effect to Directive 2000/28/EC and Directive 2000/46/EC, amend the definition of credit institutions to include EMIs; however, this extension of the definition is specifically restricted to certain specified provisions of the European Communities (Licensing & Supervision of Credit Institutions) Regulations, 1992 only. The amending provision does not include the Irish Regulations as one or the pieces of legislation to which the extended definition applies.

EMIs, therefore, in our view are not accommodated in the Irish Regulations and we have confirmed that this is consistent with the view of the Department of Finance, who had responsibility for drafting the Irish Regulations.

3.5.1.8 Italy (IT)

Italy implemented the Electronic Money Directive with Law no. 39 of 1 March 2002, published in official gazette no. 72 dated 26 March 2002.

Article 55 of this Law provides for an amendment to the Consolidated Banking Law with regard to EMIs. Apart from the definitions of EMIs and Electronic Money inserted as Article 1 (h) *bis* and Article 1 (h) *-ter* in the Consolidated Banking Law, a whole new section, dealing only with EMIs, has been amended.

Following the route taken by the Community legislature, the Italian legislature has also implemented the Electronic Money Directive without any link to the SFD. Therefore, these new legal provisions do not make any reference to or modify L.D. 210/2001, which implemented the SFD. Consequently EMIs are not expressly contained in the list of institutions set forth in Article 1 (h) of L.D. 210/2001.

Taking into account the fact that both the Electronic Money Directive and the Italian law are subsequent legislation to the SFD and L.D. 210/2001, the concern that EMIs are not subject to the SFD cannot simply be set aside.

The new Article 114-*quater* of the Consolidated Banking Law regarding the supervision of EMIs, with explicit reference to Article 146 of the same Law concerning the oversight of payment and settlement systems, empowers

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the Bank of Italy to enact rules for the development of Electronic Money, safeguarding its reliability and the due functioning of its circulation.

Furthermore, with regard to L.D. 210/2001, it was the intention of the Italian legislature to implement the SFD in such a broad way that the scope of the SFD, reduction of systemic risk and the stability of the systems are guaranteed at all times. For this reason some provisions of L.D. 210/2001 already go beyond those of the SFD.

This was also the reason why the Italian legislature provided in Article 1 (h), number 5, of L.D. 210/2001 a residual clause, in order to cover all institutions that are not covered by the other four alternatives of the same provision such as national and community banks and securities investment firms as well as public authorities and undertakings. Article 1 (h), number 5, of L.D. 210/2001 deals with all other bodies, determined in accordance with the Community provisions, that participate in Italian or Community systems, if their business is sizeable on grounds of systemic risk. This residual clause could apply to EMIs, which therefore could be considered subject to L.D. 210/2001. Confirmation of this theory remains to be seen by the competent authorities, legal writers and case law.

In this regard it can be pointed out that EMIs might eventually also be subject to a Regulation pursuant to Article 12 of L.D. 210/2001 by the Treasury Ministry in accordance with Bank of Italy and Consob. Such a hypothesis could be examined by the Treasury Ministry, if it has considered regulating for a possible solution in the event that EMIs still need to be covered by the Italian L.D.

Please note that the above are only hypotheses and have to be carefully examined prior to being taken into consideration.

3.5.1.9 Luxembourg (LU)

The Luxembourg implementing Act appears to have extended the scope of application beyond what has been stated in the SFD with respect to the definition regarding "Institution". Article 34 -2 (b) of the Law, transposing Article 2 (b) of the SFD, defines institutions as:

"A credit institution authorized in a Member State, including the institutions set out in the list in Article 2 (2) of Directive 77/780/EEC, or...."

However it is not clear whether this extension has been made on purpose, since we could not find any particular comments made on this matter.

The Luxembourg law of 14 May 2002, which has implemented the Electronic Money Directive in Luxembourg, states that EMIs are credit institutions with special provisions.

Consequently, they should be included within the scope of article 34-2 (b) of the said Law.

3.5.1.10 The Netherlands (NL)

On 1 July 2002, the Act on the Supervision of the Credit System 1992 (hereinafter the "Credit System Supervision Act") and the Bankruptcy Act were amended to implement the Electronic Money Directive. E-money institutions or companies may now be exempted/discharged by the Minister of Finance. Such exemption/discharge can be subject to certain provisions. A point for attention is whether the provisions of section 70 of the Credit System Supervision Act apply to the exempted or discharged institutions or companies. Therefore all exemptions or discharges have to specify whether the institution or company will fall within the scope of article 70 of the Credit System Supervision Act or the provisions of the Bankruptcy Act on the suspension of payments. From the system under the Credit System Supervision Act, it may be inferred that such credit institutions or companies do not fall within the scope of the provisions concerning mutual recognition and

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therefore do not have a 'European Passport'. Such credit institutions or companies exempted or discharged in another Member State are likewise not allowed to open a branch (office) in The Netherlands.

The protection of EMIs in The Netherlands by the SFD will thus be determined by the Ministry of Finance on a case-by-case basis at the moment of the granting of a license or an exemption of license. This decision is subject to publication in the Dutch Official Gazette.

3.5.1.11 Austria (ÖS)

The Austrian Finality Act defines an "institution" on the one hand as an "Austrian credit institution" and on the other hand also as a foreign credit institution as defined in the first indent of Article 1 of Directive 77/780. Austrian credit institutions are defined as entities that provide banking services according to Sec. 1 (1) 1-20 Austrian Banking Act. . The issuing of electronic money is listed in this catalogue of banking activities (Sec. 1 (1) 20 Austrian Banking Act). This definition of institutions also includes EMIs according to the Electronic Money Directive as long as they are resident in Austria. EMIs that are not resident in Austria are not within the scope of the Finality Act, because they are not within the scope of Directive 77/780.

According to information from the Austrian supervisory authority for payment and security settlement systems, the Austrian National Bank (OeNB), EMIs will not be adopted as direct or indirect participants of a system as defined in the Finality Act, whether they are resident in Austria or not.

3.5.1.12 Portugal (PO)

The Portuguese law defines Institutions in an indirect way as it refers to the concept of "Institutions" as set forth in the Legal Framework of Credit Institutions and Financial Companies (**RGIC** – Regime Geral das Instituições de Crédito), where "Institutions" are defined.

According to the SFD an Institution means, among other things, a credit institution and according to the Portuguese law (RGIC) a Credit Institution means an undertaking whose business is to receive deposits or other repayable funds from the public in order to invest them on its own account, by granting credit, or an undertaking having as its object the issuing of means of payment in the form of electronic money.

So, the Portuguese law includes EMIs in its definition of Credit Institutions and Credit Institutions fall within the scope of the SFD, which means that, under the Portuguese law, EMIs benefit from the protection of the SFD by being considered as Credit Institutions under Portuguese law.

3.5.1.13 Finland (SF)

As the Act is applied to "systems described in the SFD", the definitions of the SFD are applicable with regard to such systems. However, in addition, the Act is applicable to

- (i) systems comparable to the systems in the SFD subject to approval by the Ministry of Finance;
- (ii) the settlement systems maintained by Finnish credit institutions, clearing houses, option corporations or comparable foreign organizations;
- (iii) the settlement systems that determine and execute monetary obligations and transfer the cover of payment systems through an account with a central bank.

The definitions of the SFD are not relevant in systems (i), (ii), or (iii). Even if EMIs were not regarded as institutions within the meaning of SFD, they would benefit from the protection of the SFD under Finnish law if they participated in settlement systems (i), (ii) or (iii).

The SFD is applicable to institutions, central counterparties, settlement agents and clearing houses. The Act is applicable to parties to a settlement system. *A party to a settlement system* means a party maintaining a settlement

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system and an organization participating in the operation of a settlement system. It includes, *but is not limited to*, institutions, central counterparties, settlement agents and clearing houses, within the meaning of the SFD. (Central counterparties, settlement agents or clearing houses are not even defined in the Act.)

If Finnish law is the law of the system and if the EMI is a participant in one of settlement systems (i), (ii) or (iii), it will benefit from the protection of Finnish law. Thus, the fact that these institutions do not benefit from protection in other countries should not generate any problems in Finland. However, it could be argued that this fact might have an impact on the decision by the Ministry of Finance on whether to approve or disapprove a system (i). However, this cannot be stated with certainty. Systems (ii) or (iii) need not be approved by the Ministry of Finance in order to be regarded as systems within the meaning of the Act. Thus, if the system is such system, access by the EMI cannot be "refused".

3.5.1.14 Sweden (SV)

Under the Swedish Implementing Act, the definition of "institutions" under Article 2 (b) of the FSD has been implemented by referring to clearing organisations as defined under the Securities Exchange and Clearing Operations Act, central securities depositories as defined under the Financial Instruments Accounts Act, companies with permission under chapter 1 (2) the Banking Business Act and companies with permission under chapter 1 (3) (1) of the Securities Operations Act. By this reference, EMIs seem not to be covered by the implementing Swedish legislation.

According to the Securities Exchange and Clearing Operations Act (SFS 1992:543), a clearing operation is "*any operation on a regular basis which consists in effecting net settlements on behalf of clearing members regarding their obligations to deliver financial instruments or to make payments in Swedish or foreign currency; or guaranteeing the performance of obligations by entering into agreements or acting as guarantor; or in some other significant manner causing obligations to be settled through the transfer of funds or instruments*".

Sweden has not amended its definition of credit institution to expressly include the definition of EMI as provided in article 1 (1) (b) of the Banking Directive. It is therefore uncertain if EMIs benefit from the protection of the SFD under Swedish law.

3.5.1.15 United Kingdom (UK)

An issue has been raised as to whether the SFD applies to EMIs.

The SFD does not refer to EMIs, but rather to Credit Institutions as defined in Article 1(1)(a) of Directive 2000/12/EC, and consequently the UK Regulations, as amended by the Electronic Money (Miscellaneous Amendments) Regulations 2002 (SI 2002/765), provide in section 2(1) that "Credit institution means a credit institution as defined in Article 1(1)(a) of Directive 2000/12/EC of the European Parliament and Council, including the bodies set out in the list at Article 2(3)".

The definition of a credit institution at Article 1(1)(a) of Directive 2000/12/EC (the "Banking Consolidation Directive") excludes an electronic money market institution, which is set out separately at Article 1(1)(b) of the Banking Consolidation Directive.

The UK Regulations used to refer to "Directive 77/780/EEC" but this was amended in November 2000 by the Banking Consolidation Directive (Consequential Amendments) Regulations 2000 (SI 2000/2952). Therefore, EMIs do not enjoy the protections set out in the SFD as transcribed by the UK Regulations into English law.

If it is the ECB's wish that the SFD apply to EMIs, the SFD should be amended accordingly.

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3.5.2 Czech problem

A question was raised by the Czech National Bank as to whether the participation of a “clearing house” of a securities settlement system in a payment settlement system is permitted under the SFD if the clearing house is not an institution in the sense of Article 2 (b), first sub-paragraph, of the SFD and does not play the role of a clearing house, a settlement agent, or a central counterparty in the payment settlement system under consideration. The issue at stake was that the clearing house’s participation should not be detrimental to the protection provided by the SFD to the payment settlement system run by the Czech National Bank.

At first, the Commission refused the protection provided by the SFD to these institutions in a draft interpretation note on Article 2 (b) of the SFD¹⁷. However, after opposition by the central banks, the Commission changed its position and formally withdrew the interpretation note.

3.5.2.1 Belgium (BE)

The interpretation note could create uncertainty in Belgium as regards the protection of certain participants. An example of how a too restrictive interpretation could lead to problems is the CIK. The CIK could participate in the NBB SSS (securities settlement system) or in another system. Since however the CIK does not qualify as an institution in the sense of Article 2 (b) of the SFD, and does not play the role of a clearing house, a settlement agent, or a central counterparty in the system concerned, the original interpretation note could be problematic. The withdrawal of the interpretation note seems to have solved the problem in Belgium. The NBB would however prefer the SFD to be adapted in order to avoid any future discussions.

3.5.2.2 Germany (DE)

The issue of whether or not the participation of a clearing house of a securities settlement system in a payment system is permitted under the SFD, if the clearing house is not an institution within the meaning of Article 2 (b) (1) of the SFD and does not play the role of a clearing house, a settlement agent or a central counterparty in the payment settlement system did not arise in Germany, as here the clearing houses are institutions within the meaning of Article 2 (b) (1) of the SFD. As a result, the draft interpretation note of the European Commission did not create any uncertainty.

3.5.2.3 Denmark (DK)

The Financial Supervisory Authority has informed us that there have been no specific examples of the problem in question.

Furthermore, when the SFD was implemented in Danish law, there was general agreement – according to the Supervisory Authority – that systems may be organised very differently without that necessarily impairing the security of the systems. At the same time it was agreed that it should be possible also in the future for the market to adapt the systems to the needs of the market. In order to ensure that the systems are properly organised, both registered payments and securities settlement systems, which are notified pursuant to the SFD, have to be registered with or authorised by the Danish Financial Supervisory Authority, which, in connection with the registration or authorisation, assesses whether the rules of the system can be considered satisfactory.

It is defined in sections 54, 57 a and 62 of the Danish Securities Trading Act who can be participants in a clearing centre, a registered payment system and a securities centre.

¹⁷ Draft interpretation note on Article 2 of the Settlement Finality Directive, Markt/211/2001, European Commission, Internal Market DG Financial institutions, retail issues and payment systems.

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In respect of clearing centres, it is further the case pursuant to section 54(3) of the same Act that the clearing centre may decide that others may be participants. However, it will be possible for the Supervisory Authority to overrule such a decision if such participation is to be considered as inflicting a special risk on the system. In respect of registered payment systems, pursuant to section 57 a(1), participants may be public authorities or others that, in the assessment of the Supervisory Authority, are of significant importance to payment settlement. Finally, foreign securities centres and depository centres that are under public supervision by the Supervisory Authority may be authorised to make reports for registration with a securities centre.

According to the Supervisory Authority, it cannot be ruled out that the possibilities given under Danish law for participation in systems may lead to the participation of institutions outside the definitions in the SFD, and in addition to this there are special authorisation possibilities in Article 2 b, 2nd paragraph and Article 2 f, 3rd paragraph of the SFD.

As it has never been determined whether the SFD is a minimum directive or a harmonisation directive, the Supervisory Authority has based implementation on the presumption that the SFD is a minimum directive.

It is thus the immediate opinion of the Supervisory Authority that authorisation of Danish institutions which do not fall with certainty within the SFD, with the effect that pursuant to Danish law they are protected under the SFD, should not give rise to any problems as such institutions will be subject to Danish insolvency law with the result that all participants in the system in question will be treated equally.

The problem arises if participants which are not subject to the provisions of the SFD and which are resident in other EU Member States are authorised as participants. In that case, it will be of importance whether on this point the SFD is considered a minimum directive or a harmonisation directive.

If it is a minimum directive, it is the opinion of the Supervisory Authority that a foreign insolvent estate must acknowledge that the participant in question (or rather the system participated in) is protected under the SFD.

If it is a harmonisation directive, there is hardly any doubt according to the Supervisory Authority that the opposite will be the case.

In the latter case the question furthermore arises whether the participation of a person who falls outside the definitions of the SFD may bring the entire system and the participants therein outside the protection of the SFD.

In that situation the Supervisory Authority will attach importance to whether the participant that is not protected by the definitions of the SFD will be protected by the laws of the country of residence, e.g. because that country has chosen to adopt a broad interpretation of the SFD.

As mentioned, the problem has not specifically arisen in Denmark. With the existing uncertainty, the Supervisory Authority will probably feel precluded from authorising or accepting a foreign participant in a system if the participants does not fall within the SFD's definitions of who can participate.

Thus, the Supervisory Authority would welcome an interpretation note on these questions.

3.5.2.4 Greece (EL)

Due to the mechanisms provided by Greek law for local Securities Settlement Systems, the 'Czech problem' considerations do not seem to apply as far as Greece is concerned, since the Systems operate through clearing banks that qualify as credit institutions, i.e. as participants.

3.5.2.5 Spain (ES)

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We have been informed by the Bank of Spain and the Spanish Clearing and Settlement Service (“SCLV”) that there have not been any specific examples of **the Czech problem in Spain, which cannot be considered as an issue in Spain.**

In this sense, paragraph 3 of article 2.c of the Transposition Law states that, provided they fulfil its applicable rules, participation in a system, may be granted to “(...) a clearing house which is defined as an undertaking responsible for calculating the netting positions held by participants in a system.”

3.5.2.6 France (FR)

An entity that participates in a system without qualifying as a participant (as defined by Article L. 330-1 of the French Monetary and Financial Code) may not benefit from the provisions of Article L. 330-1.

Please note that French law also considers indirect participants, since Article L. 330-1-II provides that: "Notwithstanding any contrary legal provisions, until the end of the day on which a decision to commence insolvency proceedings against an undertaking which participates either directly or indirectly in such a system, payments and deliveries of financial instruments made in the context of inter-bank payment systems or systems for the payment and delivery of financial instruments may not be cancelled on the grounds of this decision."

There is no legal definition of the term “indirect participant” under French law. An "indirect participant" has access to the systems via a direct participant. However, the rules and instructions of the various French systems contain provisions relating to indirect participants.

3.5.2.7 Ireland (IR)

According to the information obtained from our contacts at the Irish authorities, entities that do not qualify as institutions in the sense of Article 2(b) of the SFD but that may act as a clearing house, a settlement agent or a central counterparty in a payment settlement system are entitled to participate in another system and benefit from the protection of the SFD.

As the interpretation note of the Commission was withdrawn, any uncertainty to which it gave rise is no longer an issue.

3.5.2.8 Italy (IT)

The Czech National Bank (CNB) submitted to the European Commission the question of whether a clearing house of a securities settlement system can participate in the payment settlement systems run by the CNB.

This question gave rise to a narrow interpretation by the European Commission of the term “participant”, which led to some discussion. Briefly, the term “participant” in a system as set forth in Article 2 (f) concerns only “a central counterparty”, “a settlement agent” or “a clearing house” with reference to the system in consideration, which means either a securities or a payment settlement system. However, upon the intervention of the central banks, pointing out that such a relationship with either system cannot be justified with regard to the indefinite article “a” before the indication of each participant, the Commission withdrew its interpretation note.

Article 1 (n) of L.D. 210/2001 could have implemented the definition in accordance with the narrow interpretation of the European Commission, stating: “participant is an institution, a clearing house, a central counterparty, a settlement agent, a guarantee system, which participates in a system”. The addition of the words “participates in a system” is not quite clear and could be intended as meaning participating in a payment or a securities settlement system (narrow interpretation). It can also be seen as a simple addition for linguistic reasons without any specific meaning and, in particular, without any specific reference to either system. The indeterminate wording “a system” can also be interpreted – as has also been done by the Central banks with regard

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to participants – in a more generic way, allowing the conclusion to be drawn that it is sufficient to be a participant in any system.

Following the narrow interpretation, this does not lead to a gap in Italian law as in the case submitted by the CNB, which would have caused a potential systemic risk. The definition of the term “institution” set forth in Article 1 (h) of L.D. 210/2001 provides a residual clause in order to cover all possible participants in a system, which could cause a systemic risk, and to guarantee overall protection of the systems by L.D. 210/2001.

3.5.2.9 Luxembourg (LU)

Luxembourg law has transposed the SFD in exactly the same wording and consequently Luxembourg law should be interpreted in the same way as the SFD. The issue of whether or not the participation of a clearing house of a securities settlement system in a payment system is permitted under the SFD, if the clearing house is not an institution within the meaning of Article 2 (b) (1) of the SFD and does not play the role of a clearing house, a settlement agent or a central counterparty in the payment settlement system, has not created uncertainty in Luxembourg and has no practical impact (specifying that the clearing house, Clearstream Banking Luxembourg, is an institution within the meaning of Article 2 (b) (1) of the SFD).

3.5.2.10 The Netherlands (NL)

No particular comments have been found regarding this matter.

3.5.2.11 Austria (ÖS)

There is no requirement under Austrian law and more particularly in Article 7 of the Implementing Act according to which central counterparties, settlement agents or clearing houses have to be central counterparties, settlement agents or clearing houses in the payment settlement system under consideration in order for them to be protected under the Act implementing the SFD.

The only Securities Settlement System in Austria is run by the Österreichische Kontrollbank (ÖKB), which acts as a Clearing House for the Vienna Stock Exchange and central custodian (Wertpapiersammelbank) in Austria. This Securities Settlement System has not yet been adopted as a system and therefore it has not been notified to the Commission. According to the information of the ÖKB, this will be done by the end of this year. Due to the small market in Austria, we do not expect that a second Securities Settlement System will be implemented.

The Czech Problem results from the fact that the Czech clearing house does not qualify as an institution in the sense of Art 2 (b) of the SFD. As the ÖKB (ÖKB) is a credit institution in the sense of SFD 77/780, the Czech Problem as described in the Belgian section has no implication in Austria.

3.5.2.12 Portugal (PO)

In this regard, Portuguese law has transposed the SFD in exactly the same wording. As a result, Portuguese law should be interpreted in the same way as the SFD in this matter. However, according to informal information obtained from the Bank of Portugal, no situation similar to Czech problem exists in Portugal. Therefore, as far as we are aware, the interpretation by the Commission is not an issue.

3.5.2.13 Finland (SF)

As the Act is applied to “systems described in the SFD”, the definitions of the SFD are applicable concerning such systems. However, in addition, the Act is applicable to:

(i) systems comparable to the systems in the SFD subject to an approval by the Ministry of Finance;

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(ii) settlement systems maintained by Finnish credit institutions, clearing houses, option corporations or comparable foreign organizations;

(iii) settlement systems that determine and execute monetary obligations and transfer the cover of payment systems through an account with a central bank.

The definitions of the SFD are not relevant in systems (i), (ii), or (iii).

The SFD is applicable to institutions, central counterparties, settlement agents and clearing houses. The Act is applicable to parties to a settlement system. A party to a settlement system means a party maintaining a settlement system and an organization participating in the operation of a settlement system. It includes, but is not limited to, institutions, central counterparties, settlement agents and clearing houses, within the meaning of the SFD. (As stated above, central counterparties, settlement agents or clearing houses are not defined in the Act, either.) Even if a participant were not an institution, central counterparty, settlement agent or clearing house within the meaning of the SFD, the Act could be applicable, if the system were a system (i), (ii) or (iii).

Thus, the so-called Czech problem is not an issue. Participants that participate in a system but that do not qualify as institutions in the sense of Article 2 (b) of the SFD, and that do not play the role of a clearing house, a settlement agent, or a central counterparty in the payment settlement system concerned, can benefit from the protection of the SFD based on the implementing Act, if the system is a system (i), (ii) or (iii).

The interpretation note by the Commission, which was withdrawn afterwards, should not create any uncertainty in Finland.

3.5.2.14 Sweden (SV)

According to the Swedish Implementing Act a clearing house that is not considered as an institution under Article 2 (b) of the SFD and that does not have the role of a clearing house, a settlement agent or a central security depository or a central counterparty in the payment settlement system under consideration may be considered as a participant under Swedish law if the clearing house is covered by the definition of one of the entities referred to under the Implementing Act as possible participants (see section 4.14 below).

The implementation under Swedish law of what entities may participate in payment or currency settlement systems covered by the scope of the SFD is effected by referring to a number of entities that normally operate as clearing houses, settlement agents or central counterparties and they thus gain the protection of the SFD even if not participating in the system as a clearing house etc.

The issue described as the Czech problem has not been raised under Swedish law since clearing houses that are conduction business under the Swedish Securities and Exchange Act are, by dint of being clearing organisations, institutions within the meaning of Article 2 (b) (1) of the SFD.

3.5.2.15 United Kingdom (UK)

The UK Regulations have transcribed the definition of “participant” to include “a body corporate or unincorporated association which carries out any combination of the functions of a central counterparty, a settlement agent or a clearing house, with respect to a system.” This supports the interpretation of the European Central Bank that a central counterparty, a clearing house or a settlement agent of one system could participate in another system and fall within the definition of “participant” in the SFD.

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B. Conflict of law rules

3.6 Clearnet, Crest, Euro1, Step1 and similar situations

3.6.1 Belgium: the Clearnet situation

Due to the general nature of the criteria of the SFD for the recognition of systems, Belgian law did not expressly reproduce these criteria, or organise a specific procedure for the recognition of systems complying with the criteria laid down in the SFD. Instead, a list was added with securities systems complying with the terms of the SFD that are active in Belgium (Article 2 of the Act), and power was granted to the King to amend the list of systems under the terms laid down in Article 2 of the SFD.

The “Clearing and Settlement” system organised by the Brussels Stock Exchange Company is mentioned in the list of systems subject to Belgian law. As a result of the merger of the stock exchanges of Paris, Amsterdam and Brussels, on 1 February 2001, Clearnet, a subsidiary of Euronext Paris, became the sole clearing house for all operations executed on the cash and derivatives markets organised by Euronext Paris, Euronext Amsterdam and Euronext Brussels. Clearnet is governed by French law since:

- the registered office of Clearnet is established in France;
- according to section 1.2.3 of the Euronext Clearing Rule Book, the rules set forth in that Rule book are governed by and construed in accordance with the laws of France unless explicitly stated otherwise
- pursuant to Article 2 (a) of the SFD, France notified the Commission of the Clearnet clearing system as a French law system on 31 January 2001, in accordance with the procedure covered in Article 10 of the SFD.

a) Problems relating to Article 8

The cumulative application of the Royal Decree of 18 August 1999 and Article 2 (1) (b) (4) of the Act could, according to certain Belgian participants, lead to the strange situation that Clearnet could qualify by operation of law as a system under the Belgian Act. This could lead to the cumulative application of both French and Belgian law. In the event of insolvency proceedings initiated against a German clearing member, for example, the German courts could hesitate as to whether to apply either French law or Belgian law. Even if it can be argued that the Royal Decree of 18 August 1999 has only a limited scope and was passed to enable the BXS restructuring and the Act seems only to apply to systems located in Belgium, the Belgian courts may still effectively consider Clearnet as a Belgian system.

Since the purpose (*ratio legis*) of the SFD was to secure the systems by, *inter alia*, appointing one applicable law in the case of the insolvency of a participant in the system, this purpose is thwarted if one system is governed by different laws for each country concerned.

Since Clearnet is governed by French law, the reference to the Brussels Stock exchange in the Belgian Act has become completely obsolete, and the clearing and settlement system organised by Euronext Brussels should be removed from the list of Belgian securities settlement systems by repealing section 2 (1) (a) (4^o) of the Act (see also our comments regarding Article 2 (a) 1 of the SFD in the transposition table).

b) Problems relating to the interpretation of Article 9 (2)

According to section 8 (2) of the Act transposing Article 9 (2) of the SFD, “*where financial instruments, including the rights relating to the delivery or return of financial instruments held elsewhere are subject to a security in favour of participants or a central bank of a Member State of the European Union or the Central European Bank and the said financial instruments (or the rights relating to said financial instruments) are entered in an account, register or centralised deposit system situated in a Member State of the European Union in accordance with the laws of that State, a determination of the rights of the participants or central banks in their*

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capacity as security-holders is governed exclusively by the laws of the Member State where the account, register or centralised deposit system in which the security is entered is situated”.

The term “exclusively” in section 8 (2) of the Act only refers to the fact that the rights of the participants or central banks in their capacity as security holders are governed by the laws of the Member State where the account, register or centralised deposit system in which the security is entered is situated, irrespective of the place where these securities are physically located (e.g. in the case of sub-deposits) (Place of the Relevant Intermediary Approach, PRIMA).

In the case of, say “repurchase agreements (repos)”, the rule in section 8 (2) of the Act means that the validity and the enforceability of the transfer of ownership of securities will be governed by the law of the EU Member State where the securities were transferred into a securities account, without prejudice to the applicability of the law governing the transaction on the contractual terms and conditions.

However, as a result of a misinterpretation by Clearnet, the Clearnet Clearing Instructions seem to indicate that the term “exclusively” has been misinterpreted by Clearnet (see also our comments under section 8 (2) of the Act in the transposition table). According to these instructions, when a Clearing Member pays its contribution or provides its Collateral to Clearnet to an account held in France, Belgium or the Netherlands, the law of the respective country will also govern the transaction on the contractual terms and conditions. These instructions seem to indicate that there is no room for the *lex contractus* in addition to the law governing the rights of the participants or the central banks in their capacity as security holders, which of course goes against the purpose of the SFD. This interpretation would lead to important problems with respect to, amongst other things, the use of standardised contracts such as ISMA and the “Global Master Repurchase Agreement” governed by English law.

c) Problems relating to the identification of the most relevant account under PRIMA

According to section 8 (2) of the Act transposing Article 9 (2) of the SFD, the rights of participants or central banks in their capacity as security holders are governed exclusively by the laws of the Member State where the account, register or centralised deposit system in which the security is entered is situated. According to the interpretation of the CIK, the rights of Clearnet with respect to the collateral deposited in its name at the CIK and at Clearnet will be governed exclusively by Belgian law, since the account in which the securities are entered is located in Belgium. Nevertheless the NBB has requested that this account be opened in the name of the Belgian branch of Clearnet, which gives rise to discussions between Clearnet and the NBB regarding the identification and location of the relevant intermediary.

The reason for this request from the NBB is the fact that the security technique used by Clearnet, is based on the preferential rights of Article 41 (1) of the aforementioned Act of 6 April 1995. According to this disposition, the institutions which manage a system for the clearing or settlement of financial instruments have preferential rights with respect to the financial instruments, monies and other rights which these institutions hold in account, as own assets owned by a participant. These preferential rights guarantee the claims of these institutions on a participant in the clearing and settlement system, arising in connection with the clearing or settlement of subscriptions for financial instruments, or of transactions in financial instruments.

According to Article 9 (2) of the SFD, the collateral securities provided to participants, or a central bank of a Member State, are governed by the law of the relevant intermediary (PRIMA). In the case at hand, the most relevant account is the account in the books of Clearnet (France) and not the account in the books of the CIK. Since collateral securities are governed by the law of the intermediary in whose books the security interest is vested (lowest possible tier), the law governing the security interest will be French law and not Belgian law. This means that the security technique referred to in Article 41 (1) of the Act 6 April 1995 will not be effective, since this Article is only applicable to securities held in Belgium. For this purpose, the NBB requested that the securities be entered into the books of the Belgian Branch of Clearnet, that there be a separate securities

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accounting in Belgium, and that at a higher level, the accounts at the CIK and at Clearnet be opened in the name of the Belgian branch of Clearnet.

The Hague Convention should resolve future similar discussions regarding the identification of the most relevant account. This issue could have been prevented if Clearnet had accepted all the consequences of a proper application of Article 9 (2) of the SFD (Article 8 (2) of the Act), and if Clearnet had agreed with the Belgian participants to use French law and French collateral securities.

In the meantime, this issue has been solved through a tripartite agreement between the NBB, Clearnet and the respective participants, according to which:

- the collateral of the relevant participant present at the NBB (or the collateral obtained by the NBB from the relevant participant following a Margin call) will be blocked in the books of the NBB;
- the NBB will provide a bank guarantee at first demand to Clearnet based on the security of Article 7 of the NBB's General Provisions Act¹⁸.

d) Lex rei sitae versus lex concursus

In the context of the Clearnet clearing system, there is, according to some local participants, still a possible issue regarding the respective ambits of the law of the system governing the participation of a participant in case of insolvency of that participant designated by section 8 of the SFD (French law) and the law applicable to the securities, referred to in section 9 of the SFD (Belgian law), on the fate of the guarantees over stocks constituted by a Belgian member of the settlement system administered by Clearnet in the event of the member's insolvency. It is however clear that this issue has been solved by both the insolvency regulation and the SFD. According to both the SFD (art. 8) and the insolvency regulation¹⁹ (art.4) the rights and obligations in connection with the participation of a participant in a system will in case of insolvency proceedings being opened against that participant be governed by the system. Both the SFD and the insolvency regulation introduce an exception for the realisation of securities: the *lex rei sitae* prevails, even in case of insolvency proceedings (art. 5, 1^o insolvency regulations, art. 9 §2 of the SFD). In this case, the law of the most relevant intermediary prevails over the law of the system, which continues to apply to questions linked to the other rights and obligations flowing from participation in the system by the insolvent participant. Belgian law should therefore apply as the *lex rei sitae*, to the exclusion of the law of the system, in the event of the insolvency of a Belgian member of the settlement system for matters linked to the realisation of the securities over financial instruments or cash granted in favour of Clearnet, in so far as the guarantees provided by the Belgian settlement system member (by the deposit of financial instruments into an account, register or centralised deposit system or in cash) are indeed located in Belgium in accordance with the principles of PRIMA. As confirmed by the NBB, this potential conflict has thus been settled by the SFD, the collateral directive, the insolvency regulation and the directive on the winding up of credit institutions, and does not give rise to any problems in Belgium: in collateral realisation, *lex rei sitae* prevails. The law applicable to a system is only relevant for the protection of payments (including netting and securities transactions) in the system. If e.g. a Belgian participant to a French system goes bankrupt, but has

¹⁸ According to article 7 of the NBB's General Provisions Act, the receivables of the NBB that result from credit transactions are privileged over all securities that the debtor holds as own funds in an account with the NBB or with the security clearing system of the Bank. This preference has the same rank as the preference of the pledgee creditor. If the debts vis-à-vis the NBB referred to above are not paid, the NBB has the right, after having declared the debtor in default in writing, *ipso jure* and without a prior court decision being required, to cash in the securities to which its preference relates, notwithstanding the bankruptcy of the debtor or any other situation of concurrence with the creditors of the latter, as the case may be. The NBB has to endeavour to sell the securities at the best price possible and as soon as possible, taking into account the volume of the transactions. The proceeds of the sale are to be allocated to the principal of the receivable held by the NBB, and the related interest and expenses. Any credit balance after the debts have been settled, accrue to the debtor. On the basis of this preference, the NBB can block the securities concerned and provide a guarantee at first demand to Clearnet.

¹⁹ Council Regulation N° 1346/2000 of 29 May 2000 on Insolvency Proceedings, *Official Journal L 160*, 30/06/2000, P. 0001-0018

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collateral in favour of the system in Luxembourg, the finality of payments will be dealt with under French law. Luxembourg law will be applicable to collateral realisation. Belgian law will organise the bankruptcy procedure.

3.6.2 Germany (DE)

- a) The cross-border aspects relating to the fact that the settlement systems (Euro1, Step1 and, when operational, Step2) run by the Euro Banking Association (an institution governed by French Law) were reported by the German authorities as a system under German law to be included in the scope of the SFD by application of article 2 (a) sentence 1 and article 10 sentence 1 of the SFD, concern the issue of which law applies in the event of a foreign system participant becoming insolvent. The newly created Sec. 102 (4) of the Insolvency Act states that in the event that insolvency proceedings have been opened vis-a-vis the assets of a foreign bank which participates in a domestic payment system the rights and obligations in relation to that system shall be governed by domestic law. This means that the applicable insolvency rules of the home state of the participant are superseded by the provisions of German insolvency law. The same consequences apply to the obverse situation that a domestic bank becomes insolvent which participates in a foreign payment system: the legal consequences in relation to the foreign system are governed by foreign insolvency law. Further, the above conflict rule applies to preliminary insolvency measures as well.
- b) As regards the securities settlement systems, the relevant conflict rule is Sec. 17 a of the Deposit Act. This provision, whereby Art. 9 (2) of the SFD was transposed into German law, states that disposals of securities or shares in accumulative assets which are registered or booked on an account with causal legal effect underlie the law of the state supervising the register in which the entry is made directly for the recipient or that of the account keeping central office or local branch of the depository which credits the disposal in favour of the recipient. Sec. 17 a thus states that the law of the venue shall apply where the recipient receives the credit entry. This provision covers situations in which securities are bought by means of a genuine cross-border transaction, i.e. in the event that they are acquired abroad and credited in the home country of the recipient. It also covers the scenario of genuine cross-border deliveries of securities via deposit links with foreign central depositories. In these cases where transactions occur at several deposit levels both domestically as well as abroad the only law to apply shall be the law of the venue of the deposit or account of the recipient (*lex conto sitae*).

3.6.3 France (FR)

- Euro Banking Association

According to Article L. 330-1 of the French Monetary and Financial Code: "[...] In the event of insolvency proceedings commenced against one of the parties to an interbank settlement system or system for the settlement and delivery of financial instruments in the European Economic Area, the rights and duties arising as a result of said party's participation or connected with participation in said system are assessed in the light of the law applicable to the system, subject to this law being that of a State party to the Agreement on the European Economic Area. [...]"

The Euro Banking Association's settlement systems (Euro1, Step1 and when operational Step2) being governed by German law, the rights and duties mentioned above are to be assessed in the light of German law.

According to our contacts with the French Central Bank ("Banque de France" – "Payment and securities settlement systems policy and oversight division"), legal opinions were issued by lawyers in order to testify that German law is applicable to the above systems.

3.6.4 The Netherlands (NL)

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Clearnet is a system governed by French law. Clearnet S.A. has gone through the notification procedure as referred to in sections 31 and 32 of the Act on the Supervision of the Credit System 1992, on the basis of which it may open a branch (office) in the Netherlands and may carry on the business of a credit institution. The former designated systems are still to be withdrawn officially. On the basis of the Euronext Clearing Rule Book as at 29 April 2002, French law governs the legal relationships between Clearnet and its Members.

In the framework of the Clearnet clearing system, in the case of *e.g.* securities on financial instruments granted by Dutch clearing members of Clearnet, entered in an account, register or centralized deposit on behalf of Clearnet in the Netherlands with Necigef, Dutch law will apply as regards the validity and binding nature of the securities on those financial instruments, on the basis of section 212f Bankruptcy Act. However, *lex contractus* will govern the contractual procedures for the constitution of the securities. From the applicable Euronext Clearing Rules, it cannot indisputably be inferred without further specification whether Dutch or French law is the *lex contractus*.

In cases such as *e.g.* securities on financial instruments granted by Dutch clearing members of Clearnet, entered in an account, register or centralized deposit on behalf of Clearnet in the Netherlands with Necigef, when Dutch law applies as regards the validity and binding nature of the securities over those financial instruments, on the basis of section 212f Bankruptcy Act, it is advisable to submit the securities granted by the Dutch clearing members expressly to Dutch law, so as to avoid the applicability of both Dutch and French law to the securities granted. However, this interpretation will still lead to major problems with respect to, amongst other things, the use of standardised contracts such as ISMA and the “Global Master Repurchase Agreement” governed by English law (see in this respect section 4.10.3.B).

3.6.5 United Kingdom (UK)

- The “Crest Issue”

Crest qualifies as a designated system under English law and, according to Irish counsel, Crest also qualifies as a designated system under Irish law. The Crest Rules separately define the “Crest UK System” and the “Crest Irish System” and apply English law to the former and Irish law to the latter.

In the event of insolvency proceedings, an English court might hesitate in deciding whether to apply English or Irish law.

Irish authorities have designated Crest as a system to be included in the scope of their regulations. The direct participation of three Irish settlement banks in Crest served as the original justification for designating Crest. This justification no longer applies as the Irish banks in question now deal with Crest through UK banks.

However, the Irish government has not yet amended its regulations.

Where a designated system such as Crest is subject to two different legal systems, a conflict of laws issue may arise. In such case, reference will be made by an English Court to English conflict of laws principles and the wording of the SFD.

The current state of the conflict of laws jurisprudence in England on transactions made through a settlement system is unclear, at best.

Generally, the domestic law that governs a contract is the law chosen by the parties to the contract, and no “*renvoi*” is permitted to the law of another country. Where the parties do not make a choice of law, the law of the country with which it is most closely connected will govern the contract.

However, where investors in certain securities maintain an account with an intermediary or broker and if it is accepted that the expectation of all parties to the transaction is that the investor has a proprietary interest which is

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capable in principle of being assigned, and that the rules for choice of law should seek where possible to accommodate this reasonable expectation, the better view would be that the investor's proprietary rights are located at the place where his account with the depositary is maintained, and the law which governs and deals with these rights is the law which governs his relationship with the broker²⁰.

The wording of the UK Regulations at section 24 provides that rights and obligations arising in an insolvency will be "determined in accordance with the law governing that system." Crest Rule 13 defines the 'Crest Irish System' and the 'Crest UK System'. Rule 13 sets out the legal distinction between the two systems. It expressly stipulates that, for the purpose of Article 2(a) of the SFD, the governing law of the Crest Irish System is Irish law and that the relevant governing law of the Crest UK System is English law. Consequently Irish law governs the transfer of title to Irish constituted securities, while English law will govern the transfer of title of other securities. It is not clear how this would be interpreted where two different legal regimes claimed to govern the system in question. The conflict of law principals set out above will most certainly be considered.

The FSA has discretion under Article 2(b) of the SFD to treat as an institution an undertaking which does not fall within a defined class of institutions. The FSA has used this discretion to designate Crest as a designated system.

The Hague Convention sets out as its primary rule that the law applicable will be the law of the state whose law governs the various issues surrounding securities held by an intermediary or the law of the state in which the securities account is maintained. If this Hague Convention is ratified by the United Kingdom and enacted into domestic English law using similar language, this may help to clarify the conflict of laws doctrine in these circumstances.

²⁰ Dicey & Morris (2001), p.986

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3.7 The Hague Convention was adopted on Friday 13 December 2002.

The Hague Convention's main rule on how to substantiate PRIMA and hence to establish the applicable law can be summarized as follows:

- Article 4: The first step is to look to the law expressly agreed between the account-holder and its direct (relevant) intermediary to govern the securities account in their account agreement. It is important to note that the law chosen by the parties to the account agreement as the law governing the *contractual* issues relating to the account agreement will also govern *proprietary* issues in the absence of a provision in the agreement to the contrary. In other words, the PRIMA Convention makes it possible for the parties to the account agreement to choose one law to govern *contractual* issues and a different law to govern *proprietary* issues. The range of possible chosen laws is limited by the reality test. The reality test should prevent the parties from choosing a jurisdiction's law that did not have any connection to the relevant intermediary's business and operations. The reality test provides that (i) the relevant intermediary must have an office in that jurisdiction, and (ii) that office must either alone or together with other offices of the relevant intermediary, or with other persons acting for the relevant intermediary, engage in a business or other regular activity of maintaining securities accounts. But the office does not need to maintain the specific account that is governed by the account agreement because it would not have been possible for a counterparty to a disposition of securities held with that relevant intermediary, and sometimes not even for the intermediary itself, to match a single office with, or determine which of a number of offices maintains, a single account. Also note that Article 4 contains a black list of activities, which by themselves do not qualify as elements of maintaining securities accounts.
- Article 5(1): If the previous rule does not apply, but there is a written account agreement that "expressly and unambiguously" states that the relevant intermediary entered into the account agreement through a particular office, the applicable law reality test is fulfilled.
- Article 5(2) and (3): If this test also provides no answer, the Hague Convention looks, as a fallback, to the law of the place of incorporation or organization of the relevant intermediary.

According to the ECB the above provisions of the Hague Convention require substantial changes to articles 3, 5, 7 P (1) and 9 (2) of the SFD. This is not necessarily the case according to our analysis. The Hague Convention is to a large extent complementary to the relevant provisions of the SFD in so far as it builds further on the SFD by determining the place of the relevant intermediary. The question of whether and to what extent the Hague Convention requires substantial changes to the relevant provisions of the SFD has to be further analysed, but is outside the scope of this report. In general the NCB's and other relevant authorities of the Member States expressed reserves about this issue, and indicated that they expect an initiative by the Commission in this respect.

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3.8 Interpretation of Article 9 (2) of the SFD in national legislation

Article 9 (2) concerns a provision intended to clarify the application of established conflict of law rules where securities are taken as collaterals (the law of the Member State where the most relevant securities account is located). The interpretation of this Article led to several discussions in the past regarding indirect holding systems and more particularly in the context of the effect of sub-deposits on the applicable law. As mentioned above, the final text of the Hague Convention might require the amendment of Article 9(2) of the SFD, and will be of prime importance for the future interpretation of Article 9 (2) of the SFD (see in this respect the Bernasconi Report of November 2000 regarding the place of the relevant intermediary approach or PRIMA versus the place of the underlying securities or “look-through” approach, which is especially problematic in the case of fungible accounts (omnibus accounts)). As mentioned above, Article 9(2) could be incompatible with the final version of the Hague Convention and might thus have to be adapted accordingly.

Article 9 (2) of the SFD could be considered as a strict application of PRIMA. However, the scope of this provision is qualified by the definition of collateral security in Article 2 (m) of the SFD.

As a result, different interpretations of Article 9 (2) of the SFD can be identified:²¹

- (i) Under one view – the narrow view – Article 9 (2) would only eliminate this aspect of legal risk for certain collateral takers (central banks of member states, the ECB and those participants providing liquidity to an EU payment or securities settlement system to which the SFD applies).
- (ii) Under another view – the broad view – Article 9 (2) would eliminate this aspect of legal risk for all participants in a EU settlement system.
- (iii) Among proponents of the broad view, some argue that Article 9 (2) should apply to all direct and indirect participants of EU payment and securities settlement systems. Others argue that the principle in Article 9 (2) should apply to all direct and indirect participants of all payment and securities systems, whether or not they are EU systems.

For a good understanding of the transposition of Article 9 (2) of the SFD, it seems indicated to further investigate whether national legislation has adopted a narrow or broad interpretation of Article 9 (2) of the SFD and to analyze the future interpretation of Article 9 (2) after the ratification of the Hague Convention in the context of the regime of investor’s interests in securities held with an intermediary or a custodian in national law (direct interest through non fungible segregated accounts, a contractual right, or a co-ownership interest or an equivalent proprietary right in a fungible pool of securities).

Moreover, no interpretation exists in Member States of what a “securities account” is precisely meant to be and how the relevant account can be identified. Since this issue is crucial for the determination of the applicable law as well as for regulatory and other questions, further investigation seems to be warranted²².

3.8.1 Belgium (BE)

1. Narrow or broad interpretation of Article 9(2)

Under the Belgian Royal Decree No. 62 of 1967 as amended in 1995, the nature of a person’s interest in securities held through indirect holding systems is regarded as a *co-proprietary right to a portion of a notional pool of securities of the same type* held by the intermediary on behalf of the collective interest holders.

²¹ Richard Potok, ‘Legal Uncertainty for Securities Held as Collateral’, 18 INT’L FIN.L. REV. 12, 12 (Dec 1999).

²² See also the comments of the ECB in their letter dated 3 December 2002.

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The Royal Decree has expressly transformed what would have been mere personal contractual claims against Belgian intermediaries into *coproprietary* rights in *notional* pools of securities evidenced solely by book entries on the records of the intermediary, regardless of where the individual securities or actual pools of fungible securities are located. The Royal Decree also grants the investor a right of *revendication*, exercisable in the event of the insolvency of the intermediary²³.

With respect to the conflict of laws rule that will apply to this approach, the above legal regime will automatically result in the PRIMA principle. Since the investor's interest is represented solely by book entries on the accounts of the immediate intermediary, the investor's interest is held to be located where the accounts are located. With respect to the transposition of the SFD, Belgium has clearly opted for the broad implementation of Article 9 (2) of the SFD in its implementing legislation. Article 8(2) of the Belgian Act of 28 April 1999 transposing the SFD ("the Act") restates almost verbatim the terms of article 9(2), but omits the words according to which the security should have to be granted in connection with a system or have to be held in an EU system. The interpretation adopted by Belgium's implementing legislation is therefore the broadest interpretation of the SFD, and PRIMA is deployed in its most stringent format.

2. Interpretation of securities account

No definition exists under Belgian law of securities accounts. There is however established doctrine regarding the nature and definition. According to Belgian legal authors, securities accounts are "sui generis" contracts.

Contracts governing bank accounts are contracts *sui generis* that bear the characteristics of a loan contract and a contract of deposit but constitute an original legal transaction.²⁴

3. Identification of the relevant account.

Since under Belgian law securities are contractual in nature, the parties to this contract have the contractual authority to determine which account is the relevant immediate intermediary account, and where this relevant account will be located. This choice is formalised through the account number.

3.8.2 Germany (DE)

1. Narrow or broad interpretation of Article 9(2)

Art. 9 (2) of the SFD has been implemented by sec. 17a of the Securities Deposit Act. This provision is intended to solve problems which arise in relation to the applicable law in scenarios in which the governing law is unclear. Art. 9(2) was thus implemented in such a way as to ensure that the place of account entry or registration determines the applicable law. In order to identify the place of account entry as the relevant link, recourse is had to the branch or head office which administrates the account. This branch or head office is the one which issues in its own name to the customer the securities deposit certificate or the deposit slips.

However, if the security is recorded in a register (non-German securities might be recorded in such a register), the law of the state applies which supervises the register, provided that the recipient of the security obtains title by being entered in the register.

Further, if securities are kept as individualised paper instruments in segregated custody individualising the owner (Streifbandverwahrung), the above conflict rule does not apply. Although a deposit certificate or deposit slip is issued by the depositary, the function of this document is different, as it is not required to determine the

²³ 'The law applicable to dispositions of securities held through indirect holding systems', Report prepared by Christophe Benasconi, p. 22.

²⁴ J. Van Ryn and J. Heenen, *Principes de droit commercial*, Brussels, Bruylant, 1960, vol. III, 2050 *et seq.* K. Byttebier, *Handboek Financieel Recht*, Kluwer, 1995, 345-347.

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applicable law. This is because the applicable law is clearly determined by the location where the securities are kept, whereas in the above situation the securities can be kept at different locations, which would justify the application of several different laws.

The issue of whether Article 9 (2) intends to set out the governing law applicable only in the event of insolvency on the part of one of the participants (narrow interpretation) or whether, rather more generally, the provision is designed to determine the governing law in relation to all disposals of securities, which are centrally deposited (broad interpretation), was resolved in favour of the latter in the interest of legal certainty also outside of insolvency proceedings. As Sec. 17 a of the Securities Deposit Act seeks to mirror Article 9 (2) of the SFD, we have taken the view that the broadest interpretation of Article 9 (2) has been chosen.

2. Interpretation of “securities accounts”

A "securities account" is an internal account which serves to record the acquisition by a bank of securities at cost prices.

3. Identification of the relevant account

German makes no reference to a relevant account.

3.8.3 Denmark (DK)

1. Narrow or broad interpretation of Article 9(2)

Denmark has adopted a strict interpretation of Article 9 (2) of the SFD in section 57 b (5) of the Danish Securities Trading Act.

The Supervisory Authority has confirmed that, according to the Explanatory Memorandum to section 57 b, PRIMA must be considered also to be applicable outside the scope of the SFD.

An exception might, however, in our opinion apply if the underlying owner of a security held through a clearing system can be identified e.g. because there is only one owner of that type of security in the clearing system. In that case it is not certain – and there is in any event no case law to indicate – that a probate court will, in connection with the bankruptcy of a pledgor, view PRIMA as the choice of law but might instead choose the law under which the security had been issued, which law may well be the same as the *lex concursus*.

Thus the implementation of the Hague Convention would entail certainty that the PRIMA choice principle would prevail over the uncertainties described above.

2. Interpretation of “securities accounts”

The Danish Financial Supervisory Authority has informed us that it is correct as stated by ECB that no definition has been included in respect of either “securities accounts” or “the relevant account” in connection with the implementation of the SFD.

According to the Supervisory Authority, Article 9 (2) comprises in itself a kind of definition of securities account as the article deals with accounts on which rights to securities are registered (...and their right with respect to the securities is legally registered on a register, account or centralised deposit system ...).

Section 57b (5) of the Danish Securities Trading Act is an only slightly paraphrased version of Article 9 (2).

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The Danish Financial Supervisory Authority has informed us that Denmark has chosen the so-called narrow implementation but it appears from the explanatory works that contrary conclusions cannot be made outside the scope of the SFD. The work with the Hague Convention had been initiated at the time of the transposition and, according to the Supervisory Authority, the transposition of Article 9 (2), which is worded in very general terms, was also characterised by an expectation of a subsequent specification/expansion of the SFD in respect of section 57b (5), especially in the light of the expected Hague Convention.

3. Identification of the relevant account

The “relevant account” is not defined as section 57b (5) in reality is a translation of Article 9 (2).

3.8.4 Greece (EL)

1. Narrow or broad interpretation of Article 9(2)

Article 9 (2) of the SFD was transposed by the newly adopted Sec. 17 a of the Securities Deposit Act. The issue of whether Article 9 (2) intends to set out the governing law applicable only in the event of insolvency on the part of one of the participants (narrow interpretation) or whether, rather more generally, the provision is designed to determine the governing law in relation to all disposals of securities, which are centrally deposited (broad interpretation), was resolved in favour of the latter in the interest of legal certainty also outside the realm of insolvency proceedings. As Sec. 17 a of the Securities Deposit Act seeks to mirror Article 9 (2) of the SFD, we have taken the view that the broadest interpretation of Article 9 (2) has been chosen.

2. Interpretation of “securities accounts”

No interpretation or definition exists in Law 2789/2000 of what a “securities account” is precisely meant to be. What is considered as a securities account or, more precisely, as an “account” for the purposes of article 9 (2) of the SFD and article 9 (4) of Law 2789/2000, i.e. the account in which the collateral security right over securities of a participant is “legally recorded”, is basically defined in the relevant Greek legislation (Law 2198/1994, Law 2396/1996) and elaborated on in the Regulations of each Securities Settlement System to which said Law applies.

Said laws and the Regulations include, by way of indication, detailed provisions for the opening of said accounts, their structure and sub-divisions (e.g. in the system entitled “Dematerialised Securities System” (SAT), which is administered by the Central Securities Depository, each securities account has a special sub-account for the recording of pledged securities) and the legal effect of the book-entry recording of relevant securities in the account and its sub-accounts as to the proprietary rights of the holder of the account and any third parties. Generally, only direct proprietary rights to an asset, i.e. the securities, may be constituted under Greek law (there is no distinction between legal and beneficial ownership), so that only the direct holder of the relevant security account kept in the Greek System is considered as both the legal and beneficial owner of the securities recorded therein and, accordingly, only the direct holder of a collateral security right, which is appropriately recorded in its own name in the owner’s security account kept within the System, is considered as the pledgee. Hence, generally, where securities recorded in a Greek Securities Settlement System (not rights in such securities) are provided as collateral security under Greek law to a pledgee, this necessarily and exclusively means the recording/registration of said pledge right in favour of the pledgee in the pledgor’s securities account (e.g. in the special sub-account) maintained in the relevant Greek Securities Settlement System and in accordance to the rules of said System. In that sense, the answer to the question of what constitutes a security account under Greek law, for the purposes of the SFD and the Law, i.e. which is the account (or register) in which the collateral security right over securities of a participant is “legally recorded”, is that only securities accounts maintained in the relevant Greek Securities Settlement Systems may be considered as such securities accounts.

Exceptionally, as to securities (e.g. government bonds) recorded in the “System of Monitoring Transaction on Titles in Book Entry Form” (“DEMATERIALISED TITLES”) and held by an investor through a participant in

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the system, by virtue of Law 2198/1994 Article 6 paras. 5 and 9, the investor's title to said securities (vis-à-vis the participant and all third parties, but not the Bank of Greece, which is the operator of the system) is recorded (rooted) in the securities account kept in the books of said participant (para. 5) and, accordingly, collateral security interests on said securities are legally recorded in the special pledge account, also kept in the books of said participant (para. 9). Hence, by way of exception, said securities accounts maintained in the books of said participants also constitute a security account under Greek law, for the purposes of the SFD and the Law.

Since there is no express provision in the SFD to the effect that the transposing laws should include an express definition of a securities account, but at the same time what constitutes a security account in respect to the book-entry for the purposes of the SFD and the Law is clearly defined in the relevant laws and regulations of the Greek Securities Settlement Systems, in our opinion, said Law also does not deviate from the wording or from the intentions of the SFD.

3. Identification of the relevant account

The relevant account, for the purposes of the private international law rule of Article 9 (2) of the SFD and Article 9 para 4 of the Law, can be easily identified in view of the above analysis and, in our opinion does not raise any issues, as far as Greek law is concerned.

3.8.5 Spain (ES)

1. Narrow or broad interpretation of Article 9(2)

Spain has clearly opted for a rigorous and literal implementation of Article 9(2) of the SFD in its transposition law. Considering that Article 9(2) of the SFD is contained under Section 4 "Insulation of the rights of holders of collateral security from the effects of the insolvency of the provider", Article 15 of the Spanish Law 41/1999 of 12 November, transposing Article 9(2) of the SFD is in compliance with the scope determined by said Article 9(2) without going beyond the referred scope laid down in the SFD. The literal transposition made by the Spanish legislation may not lead one to understand that Spain has adopted a narrow or a broad interpretation of article 9(2) of the SFD.

Despite certain interpretations provided at an international level, which have considered that Spain's initial position was to restrict the implementation to the narrowest possible view, confining Article 9 (2) of the SFD only to cases involving bankruptcy, it should be pointed out that such interpretations have been made under the perspective that Article 9(2) of the SFD is necessarily subject to a broad or a narrow interpretation. However, as a matter of fact, the Spanish position in this particular regard is to consider that Article 9 (2) was placed under Section 4 of the SFD, which refers to insolvency. It does not mean that Spanish implementation legislation poses a narrow view of this issue.

The Spanish Settlement and Clearing Securities Service ("SCLV") has confirmed that it is of the opinion that there is no point in identifying a narrow or a broad interpretation of article 9(2) of the SFD in the implementing Law 41/1999. The question is much more simple: the Spanish implementing Law is in compliance with implementation of the SFD in this issue through a rigorous and literal transposition of article 9(2) that avoids any terminological discrepancy.

The Spanish Settlement and Clearing Securities Service ("SCLV") has also confirmed that it is of the opinion that the current wording of Article 9(2) of the SFD is incompatible with the final text of the Hague Convention. Therefore, said article should be adapted according to the applicability of the "*lex contractus*" as stated by the said Hague Convention versus the PRIMA approach of Article 9(2) of the SFD, and consequently article 15 of the Spanish transposition Law 41/1999 is also to be subject to further adaptations in accordance with this new approach.

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2. Interpretation of “securities accounts”

3. Identification of the relevant account

Under the new framework as provided by the Hague Convention, signed on 13 December 2002, neither informal nor official interpretations have been received from the Bank of Spain or SCLV on what “securities accounts” precisely means or how the relevant account concerned can be identified.

3.8.6 France (FR)

1. Narrow or broad interpretation of Article 9(2)

Nothing would prevent us from considering that France has adopted a broad interpretation of Article 9 (2) of the SFD.

Please note that we have contacted the French authorities on this issue. The French authorities are now studying the possible influence of the Hague Convention. Our contacts at the Treasury and *Banque de France* told us that the Hague Convention will indeed have an impact on the French legislation but this is currently being discussed. The discussions involve the central banks more particularly.

The analysis of this subject matter may be considered as being twofold:

- General vs. specific provisions: one may consider that the French provisions are specific ones (in opposition to the general provisions of the Hague Convention).

- Cumulative application: application of both French law provisions and provisions of the Hague Convention may lead to discrepancies.

2. Interpretation of “securities accounts”

There is no legal definition of "securities accounts" under French law. The operating rules of Euroclear (securities settlement system RGV2) refer to the opening and management of "securities accounts" but do not give any definition. However, Decision no. 98-08 dated 9 December 1998 of the "*Conseil des marches financiers*" (supervisory authority of the financial markets) relates to the obligatory clauses to be included in service-provision and account-opening agreements. Thus, some guidelines relating to the opening and running of "securities accounts" are provided by said Decision no. 98-08. According to Decision no. 98-08, any agreement must contain certain clauses such as (i) the investment services and equated services covered by the agreement and (ii) the categories of financial instrument for which the services are provided.

3. Identification of the relevant account

French law makes no reference to the "relevant account".

3.8.7 Ireland (IR)

1. Narrow or broad interpretation of Article 9(2)

The Irish Regulations transpose the provision of Article 9(2) substantially identically (with the exception of the use of the term “members” instead of “participants”, which is discussed in the Country Summary for Ireland).

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In relation to the ratification of the Hague Convention, we are advised by our contacts in the Irish authorities that it is their view that the wording provides sufficient flexibility for Irish authorities to overcome any issues which the Irish authorities may have and they do not envisage that its ratification will cause any difficulties in Ireland.

2. Interpretation of “securities accounts”

The Hague Convention needs to be incorporated into Irish law by the Irish Parliament. If it requires a change to Irish law, a Statutory Instrument must be passed to incorporate its terms into Irish law. Accordingly, until it is adopted into Irish law it is not possible to ascertain how it will be interpreted in the context of existing legislation.

3. Identification of the relevant account

Please see response to paragraph 2 above.

3.8.8 Italy (IT)

1. Narrow or broad interpretation of Article 9(2)

The Italian legislature has implemented Article 9 (2) of the SFD by providing for the principle of PRIMA (place of the relevant intermediary approach) with regard to determination of the applicable law governing the rights of holders of collateral in the event of the insolvency of the provider in Article 9 (1) of L.D. 210/2001.

The national provision is not limited either to the case of the insolvency of the provider as appearing from the title of Section 4 of the SFD or to that of the participants in the settlement system, a central bank or the European Central Bank as indicated in Article 9 (2) of the SFD. Furthermore, Article 9 (1) is not only applicable to the rights of the holders of collateral, but also to the transfer of such rights, their constitution, realisation and other binding obligations on the same.

The Italian legislature therefore supports the so-called “broad view”.

With respect to the controversy as to whether Article 9 (2) of the SFD is to apply to the direct and indirect participants of all payment and securities systems or only to those of EU systems, Italian writers, notwithstanding the clear reference to the location of the account in a Member State of the European Union in Article 9 (1) of L.D. 210/2001, seem to be more in favour of the first view. Such Italian opinion suggests that an Italian court should apply the PRIMA principle to systems of third party countries by way of analogy.

2. Interpretation of “securities accounts”

The term "account" used in Article 9 (1) of L.D. 210/2001 is not defined and its interpretation results from the identification of the same according to the features as set forth in Article 9 (1) of L.D. 210/2001 (please refer to the remark below).

3. Identification of the relevant account

The Italian legislature has explicitly ruled in article 9 (1) of L.D. 210/2001 that the law exclusively applicable to the transfer of rights of financial instruments or of the rights to the same and to the constitution and the realisation of the collaterals and any other limitation on rights of the same shall always be the law where the books of account, the accounts or the centralised deposit system is situated in which the registrations and annotations in favour of the holder of the right are directly made.

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The account is therefore determined by Italian law as being that account from which the registration or annotation results which gives rise to entitlement to the collateral, independently from whether such registration or annotation has been made in exchange with payment systems or with a central bank.

Although such legal criteria are already leading to certainty and clarity with regard to the applicable law, in some cases it might be difficult to determine the exact location of the books of account or accounts. This is especially so in cases of electronic accounts or electronic files. The location could for example be either the offices of the branch having access to the account, the registered offices of the financial institution, the place where the registrations and annotations are made through a computer terminal or even the place to which the account statements are sent. Certainly, problems for the determination of the applicable law will only arise if such locations are situated in various states.

Whereas the Hague Convention provides for more detailed criteria for the determination of the account, in Italy, if a court had to decide this question, it could locate the account on the basis of the *lex fori*, applying Article 1834 of the Italian Civil Code for locating the bank deposit and coming to the conclusion that the place of the account would be at the registered offices of the branch administering the account. The Italian supervisory rules for banks require that such a branch must be open to the public. Another view, which apparently favours the location closest to the holder, would presumably come to the same result.

The concept differs from the definition of "securities account" in Article 1 (b) of the Hague Convention, which makes reference to the account where the securities may be credited or debited.

Article 9 (1) of L.D. 210/2001 refers to the account where the collateral entitlement is registered or annotated. With reference to the Italian centralised deposit system for dematerialised financial instruments, Article 34 of Italian law no. 213 of 24 June 1998, and in this regard Article 45 and 46 of the Consob-Regulation 11768/98, provide that custodians have to open special accounts to register the financial instruments owned by each account-holder that are subject to liens or to a fluent pledge. This results in registrations/annotations being necessary in two accounts.

3.8.9 Luxembourg (LU)

1. Narrow or broad interpretation of Article 9(2)

According to section 61-3 (3) of the Law transposing Article 9 (2) of the SFD:

“Where securities (including rights in securities) are provided as collateral security to participants or central banks of the Member States or the European central bank as described in the previous paragraph, 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”.

It has been detailed in a Luxembourg parliamentary bill²⁵ that the rights of the participants or central banks in their capacity as security-holders are governed by the laws of the Member State where the account, register or centralised deposit system in which the securities are entered is situated and that this law is not necessarily the law of the country where the securities are issued or physically located.

The BCL has made further comments regarding this provision²⁶. The BCL notes that, according to Article 12 of the Act of 1 August 2001 on the circulation of securities and other fungible instruments, the sub-deposit of

²⁵ Parliamentary Bill no.4611/00 (comments on the articles).

²⁶ Cf. Bulletin BCL 2001/2 p. 53, “la protection des systèmes de paiement et de règlement-titres. Analyse de la Directive 98/26/ce et de sa transposition en droit luxembourgeois”.

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securities by the depositary to other depositaries, even abroad, has no effect upon the location of the securities, which are to be considered to be at the location of the depositary (*lex rei sitae*) with respect to the validity or enforceability of the collateral security.

The applicable law is determined by the location of the account. In that respect, the BCL has raised the question whether this location is necessarily where the registered office of the account holder is or whether another place of business or a branch of the account holder may equally be applied, since article 12 of the law of 1 August 2001 has not made a decision on this matter.

The collateral security is governed by the law of the country where the account is located concerning its qualification, its intrinsic validity, its validity towards third parties (“opposabilité”) and enforcement (“realisation”).

It is further noted that, in accordance with recitals 19 and 21 of the SFD, these principles should apply without prejudice to the applicability of the law of the Member State under which the securities are constituted regarding for example the creation, ownership and transfer of the securities.

Finally, the BCL emphasizes that other aspects of the transaction are to be determined according to the law governing the transaction on the contractual terms and conditions (*lex contractus*).

According to Article 61-3 (2) of the Law transposing Article 9 (1), the rights that are protected are those of:

- a participant to collateral security provided to it in connection with a system within the meaning of Article 34-2 (a) (i.e. European payment or securities settlement systems), and
- central banks of the Member States or the European Central Bank to collateral security provided to them in connection with transactions performed in their capacity as central banks (i.e. it is not required that the collateral securities be linked within the framework of a system or that the counterparty be a participant in a system).

According to the classification proposed under 3.8 above, this should be considered as a broad interpretation of Article 9 (2) of the SFD.

2. Interpretation of “securities accounts”

There appears to be no legal definition of what a securities account is in Luxembourg although the concept is used in some laws, for example in the law of 1 August 2001 on the circulation of securities and other financial instruments. This law, which has replaced a former regulation, has a wide scope of application. Article 1 states that this law is applicable to titles and other financial instruments in the broadest meaning of the term.

3. Identification of the relevant account

Please see comments under point 1 “narrow or broad interpretation of Article 9 (2) above”.

3.8.10 The Netherlands (NL)

1. Narrow or broad interpretation of Article 9(2)

Articles 9 (2) and 8 of the SFD have not been broadly implemented in national legislation in The Netherlands. In view of future legislation as presented in the Report of the Royal Committee on Private international law (article 14), the PRIMA- rule shall be broadly implemented, thereby indirectly broadly “implementing” Article 9 (2) of the SFD. This is confirmed in the footnote 165 on page 53 of the Bernasconi Report.

In respect of the identification of the “relevant intermediary”, no other problems than the general ones mentioned by the Bernasconi Report are known to occur. The Super-PRIMA-conflict of rule is not opted for. A problem

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such as the one that has led to the tripartite agreement between NBB, CIK and Clearnet as referred to in section 3.6.1c) does for that matter not exist in The Netherlands. The “relevant intermediary” as referred to in Article 9 (2) of the SFD would then be Necigef.

2. Interpretation of “securities accounts”

The Act on the Supervision of the Securities Markets 1995 governs matters concerning the securities markets. It does not include a definition of a securities account; neither do elaborating detailed rules based upon the Act. An indication as to such interpretation may be provided by the Further Regulation Supervision of Conduct Securities Markets 2002²⁷ which, as regards the definition of securities services in article 1(h)(4) provides “offering the possibility to, by the opening of an account acquire claims in securities, whereby by means of such account transactions in such securities may be effected”. However, it is clear that as such Dutch law does not provide a conclusive interpretation of “securities account”.

3. Identification of the relevant account

The Dutch Legislator has noted in its Explanatory Note to the Implementing Act²⁸, that factors such as how to identify the relevant account, as regards the place where such an account has been located, cannot be determined by one Member State alone. A possible answer however added to this was that an account is localised in the state where the account is kept. As regards the word “legally recorded”, used within this context and as has been transposed from the article 9(2) Directive into the article 212f Implementing Act, the Dutch legislator noted that this does not concern recording required by law, but recording governed by law.

In the explanatory report to the future legislation as presented in the Report of the Royal Committee on Private international law (article 14), it is provided that in a situation whereby securities are reckoned to be pertaining to a pool or fund of more than one institution, whereas such institutions hold accounts in various states, the law of the state where the account is held is applicable.

The Dutch perspective as regards PRIMA is that the transfer of securities that is effected through a series of book entries in a chain of intermediaries is not governed by the law of one state, but every book entry has been governed by the law of the intermediary in which books the transfer is entered.²⁹

3.8.11 Austria (ÖS)

1. Narrow or broad interpretation of Article 9(2)

Art. 9 (2) of the SFD was transposed into the Austrian Law implementing the PRIMA approach. Therefore the general problems mentioned in the Bernasconi Report may occur under Austrian law. The benefits of the protection offered by the Finality Act cover only the securities that are provided as collateral, but not to the instruments or claims by or against the system. Those claims or obligations are subject to the law chosen by the participants in the system according to Art 2 (1) S 2 Finality Act. In our opinion this is a narrow interpretation of the SFD.

2. Interpretation of “securities accounts”

²⁷ Further Regulation Supervision of Conduct Securities Markets 2002 of 1 September 2002, as amended on 29 August 2002, providing implementation of articles 2, 7, 12, 13, 15, 16, 17, 23, 24, 25, 28, 29, 30, 34, 35, 36, 38, 39, 40, 41, 42, 43 and 44 of Decree on the Supervision of the Securities Markets 1995.

²⁸ Explanatory Note 26260, nr. 3, par. 4.6, p 16 and 17.

²⁹ Cf. W.A.K. Rank, *Een bewezen bestaansrecht*, in: Lustrumbundel 2002, Vereniging voor Effectenrecht, Serie Van der Heijden instituut, 71, Deventer 2002, p. 327.

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Keeping securities accounts is a banking business pursuant to Article 1 Austrian Banking Act and is regulated in the Depositories Act. According to Article 11 Depositories Act, a securities account is defined as a register that the custodian has to keep for each client where the kind of securities, the nominal amount, numbers and other identification criteria for the securities are entered. If a subcustodian is being used, the name and place of the subcustodian has to be entered as well. Therefore, there was no requirement for an additional definition in the Finality Act.

3. Identification of the relevant account

In principle the relevant account for the determination of the applicable law is always the account in which the fact of collateralisation is entered and has evoked these rights. Therefore the applicable law may be different for different participants due to the implementation of the PRIMA approach. The rights of the participants or central banks as security-holders are governed by the laws of the Member State where the account, register or centralised deposit system in which the collateralisation of the securities is entered is situated and this law is not necessarily the law of the country where the securities are issued or physically located.

3.8.12 Portugal (PO)

1. Narrow or broad interpretation of Article 9(2)

The CVM regulates securities settlement systems and Decree no. 221/2000 of 9 September 2000 regulates payment systems (please see our Preliminary Note).

- Article 284, no. 1, 2 and 4 of CVM states the following:

1 - "The collateral of obligations arising from the functioning of a settlement system is not affected by the opening of bankruptcy proceedings, the recovery of a company or the recovery of the guarantor entity, and there only reverts to the bankrupt estate or to the company in recovery or under rescue any balance that might remain after performance of the collateral obligations."

2 - "The previous paragraph is applicable to collateral securities provided to Central Banks of the member States of the EC and to the European Central Bank, acting in that quality."

4 - "If the securities provided as collateral securities according to the terms of the present article are registered or deposited in a centralized system located or operating in a Member State of the EC, the determination of the rights of the beneficiaries of the collateral securities is governed by the legislation of that Member State provided that the collateral securities have been registered in the same Centralized Systems."

Decree-law 486/99 has adopted a broad interpretation, as article 284, no. 4, which transposed art. 9, no. 2 of the SFD in conjunction to nos. 1 and 2 of this article, eliminates the legal risk for the Central Banks, the European Central Bank and for every participant on a settlement system to collateral.

Therefore, the beneficiaries of collateral securities referred to in paragraph 4 of the Decree-law 486/99 are both the Central Banks (referred to in paragraph 2) and every participant to a settlement system (referred to in paragraph 1), which means that the Portuguese law has adopted a broad interpretation.

- Article 12^o, no. 3 of Decree-law no 221/2000, states the following:

"Without prejudice to special rules about the applicable law to the rights of holders of collateral securities constituted by securities or rights on securities, Portuguese law shall, when applicable, regulate all the rights and obligations arising from participation in a system, even in the event of the opening of a bankruptcy proceeding or similar proceedings."

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Decree-law no 221/2000 does not contain a specific conflict of law rule regarding this issue.

In our opinion, when this article refers to special rules about the law applicable to the rights of holders of collateral securities constituted by securities or rights on securities, it makes a reference to CVM in cases where collateral securities have been regulated.

2. Interpretation of “securities accounts”

The individual registration of book-entry securities from a centralised system consists of:

- a) an account opened with a single financial intermediary indicated by the issuer; or
- b) an account opened with the issuer or financial intermediary that represents it.

When not integrated in a centralised system, the following securities are compulsorily registered with a single financial intermediary:

- a) Bearer book-entry securities;
- b) Securities distributed through public offerings and other securities belonging to the same category;
- c) Securities issued jointly by more than one entity;
- d) Units in a collective investment scheme.

The registrar financial intermediary is indicated by the issuer or by the management entity of the collective investment scheme.

The nominative book-entry securities not integrated in a centralised system or registered with a single financial intermediary are registered with the issuer.

Registration with the issuer can be substituted by registration in the same value by a financial intermediary acting as a representative of the issuer.

3. Identification of the relevant account

Please see no. 2 above.

However, please note that Portuguese law does not make any reference to “relevant accounts”.

3.8.13 Finland (SF)

1. Narrow or broad interpretation of Article 9(2)

The Finnish transposing Act goes beyond what is required in the SFD. According to the Government’s Proposal, the scope of applicability of Section 5a paragraph 4 of the Act on Book-Entry Accounts is broader than the SFD, as the Act governs the rights pertaining to book-entries more generally, whereas the Article of the SFD is applied only where the securities are provided as collateral security to participants and/or central banks of the Member States or the European Central Bank. Furthermore, it should be noted that the scope of the Act is not qualified by the definition of collateral security, as that term is not defined in the transposing Act.

As can be seen from the wording of the Act, Section 5a paragraph 4 of the Act on Book-Entry Accounts is not only applied where the collateral is provided to participants and/or central banks of the Member States or the European Central Bank.

Thus, the Act could be seen as a broad interpretation of Article 9(2) of the SFD.

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Section 5a paragraph 4 of the Act on Book-Entry Accounts is applicable also outside the scope of the SFD or the transposing Act.

As can be seen from Section 5a, paragraph 4 of the Act on Book-Entry Accounts, a version of the PRIMA approach has been adopted with regard to *securities in a book-entry form*: if the holder of a custodial nominee account or a client of the holder keeps a register or an account of the rights pertaining to book-entries in another state, the law of that state is applicable (section 5a, paragraph 4 of the Act on Book-Entry Accounts). Thus, based on the wording of the Act and the Government's Proposal, the applicable law is that of the state where the register or account is kept. However, if the interest in the security is recorded in a custodial nominee account in this second state and the holder thereof is in a third state, the private international law of the second state decides the applicable law. As the wording of the Hague Convention differs significantly from the Act and also from Art. 9(2) of the SFD and Art 9 of the Collateral Directive, the future ratification of the Hague Convention will inevitably lead to amendments in all of these instruments. However, the wording of the Act is more compatible with the Hague convention than Article 9(2) is. As the Hague Convention falls within the realm of EU law, Finland will need to wait for common European effort to ratify the Hague Convention and transpose the current EU law.

2. Interpretation of "securities accounts"

As stated above, as to *securities in a book-entry form*, if the holder of a custodial nominee account or a client of the holder keeps a register or an account of the rights pertaining to book-entries in another state, the law of that state is applicable (section 5a, paragraph 4 of the Act on Book-Entry Accounts). The Finnish law does not stipulate how the term "account" in this section should be interpreted.

3. Identification of the relevant account

As stated above, based on the wording of the Act and the Government's Proposal, the applicable law is that of the state where the register or account is kept (related to *securities in a book-entry form*). The concept of "relevant account" holds no legal relevance at this point in the Finnish law. Ratification of the Hague convention in the Finnish legal system would mean that that concept would be introduced into Finnish law. However, it is not possible to analyse the future interpretation thereof.

3.8.14 Sweden (SV)

1. Narrow or broad interpretation of Article 9(2)

Sweden has adopted a broad interpretation of Article 9 (2) of the SFD. The Ministry of Finance, which is responsible for the implementation of the SFD, clearly committed itself to the broad view in 1999. In fact it appears that PRIMA was law under existing Swedish conflict of law principles. In spite of this, participants in the financial markets saw the implementation of Article 9 (2) as an opportunity to statutorily clarify the current legal position. The Ministry has involved market participants and other members of the financial, legal and academic communities in discussions on the implementation of the SFD. The Ministry has taken into account market demands and, although initially undertaking to include clarification only in legislative commentary, appeared to be moving towards an explicit statutory implementation of Article 9 (2). The Cabinet put the Ministry of Finance's proposal to Parliament on 28 October 1999. The new statutes came into force on 1 January 2000. The implementation of Article 9 (2) applied to PRIMA in all situations.

2. Interpretation of "securities accounts"

No definition of "securities accounts" has been provided under Swedish law, The Swedish Financial Instruments Accounts Act does however define Swedish CDS book-entry accounts as accounts in Swedish CDS registers

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maintained with the assistance of automatic processing by a central securities depository granted a licence, that are accounts opened for owners of financial instruments that are registered in accordance with the Financial Instruments Accounts Act.

The operations conducted by a central securities depository regulated under the Swedish Financial Instruments Accounts Act concerns only operations conducted in Sweden. All securities of pledges registered in a SDS book-entry account handled by a central security depository will thus always be registered in a Swedish registry and Swedish law will accordingly apply.

A central securities depository may grant the Swedish Central Bank, other central banks, Swedish and foreign clearing organisations, central securities depositories and corresponding foreign companies as well as some other entities the right to be registered as nominees in respect of financial instruments. Such a nominee must maintain one or more Swedish CSD book-entry accounts for the financial instruments managed by the nominee.

According to the preparatory work to the Swedish Implementing Act, financial instruments that are registered according to the Swedish Financial Instruments Accounts Act against nominees that conduct their operations abroad are to be considered as situated at the location of the nominee, which will also be considered as indicating the applicable law.

3. Identification of the relevant account

This issue has not yet been addressed under Swedish law following the application of PRIMA under existing Swedish conflict of law principles.

3.8.15 United Kingdom (UK)

1. Narrow or broad interpretation of Article 9(2)

As far as we have been able to ascertain, the United Kingdom has taken a narrow interpretation of Article 9(2) of the SFD by virtue of the wording of Section 23 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (the "Regulations"). In particular, the phrase "to a participant or a central bank" in the Regulations reflects the wording of the SFD. A "central bank" is defined in Section 2 of the Regulations as meaning "a central bank of an EEA State or the European Central Bank". We are not aware of any public interpretation from HM Treasury or from the FSA to indicate otherwise.

The effect of the implementation of the Hague Convention may be to widen the interpretation of Section 23 of the Regulations. However, until the Hague Convention is implemented into English law by way of a law or regulations passed by the UK Parliament, it will be difficult to predict how the Hague Convention will affect the judicial interpretation of Section 23 of the Regulations (see also section 4.15.3.B).

2. Interpretation of "securities accounts"

The Hague Convention defines "security account" as "an account maintained by an intermediary to which securities may be credited or debited." The manner in which this is to be interpreted in English law will not be known until such time as the Hague Convention is ratified and incorporated into English law by an Act of Parliament.

3. Identification of the relevant account

See 2, above.

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SECTION 4: COUNTRY-BY-COUNTRY ANALYSIS

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4.1 Belgium (BE)

4.1.1 Provisional conclusions

Belgium complies almost fully with the requirements of the SFD; only as to the scope might some improvements be required. If Belgian law still poses problems, these are mainly due to the present wording of the SFD.

4.1.2 Issues regarding incorrect national implementation

Restrictive transposition: Scope of the Implementing Act: The absence of a definition of collateral security: see section 3.4.1.

4.1.3. Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.1.

- Scope of the SFD: The Czech problem

See section 3.5.2.1.

- Scope of the SFD: Criteria for protection

According to Article 2 (b) sentence 2 of the SFD, a system has to be supervised in accordance with national legislation in order for its participants to be eligible for protection under the SFD upon the request of the relevant Member State. The interpretation of the wording “*supervised in accordance with national legislation*” gives rise to discussions, as it is not clear whether these systems have to be regulated, or whether it is sufficient for these systems to be subject just to an oversight. In this respect problems might occur in the near future with respect to the protection under the SFD of systems which are subject to the oversight but which are not regulated, since they do not perform regulated activities under Belgian Law. Until now Belgian payment institutions (such as Banksys, Europay and Proton) are only active in the transfer of payment orders to the payment systems of the NBB and not in the settlement of securities transactions, and are thus outside the scope of Article 2(b) sentence 2 of the SFD. To the extent that Belgian systems which are overseen but not submitted to prudential supervision would become active in the settlement of securities transactions in the future, this interpretation problem (regulation versus oversight) might give rise to uncertainty in the future.

- Scope of the SFD: ‘Protection of securities provided in connection with a system’

According to Article 8 (1) of the Act (Article 9 (1) of the SFD), the insolvency of a participant participating in a system will not in any way affect the validity, binding nature or preferential enforcement of securities, inclusive of any rights relating thereto, constituted in favour of another participant of a system. One of the objectives of this Article is the protection of holders of collateral securities provided in connection with a system. It is clear that it is sufficient for a collateral security to be provided by one participant to another participant to benefit from the protection of the SFD. However, it could be pretended that with respect to the equal treatment of creditors in cases of *concursum creditorum*, Article 8(1) of the Act and Article 9(1) of the SFD have to be interpreted restrictively. According to the “purists” with respect to the equal treatment of creditors in cases of *concursum creditorum* the protection provided by the SFD is only granted to securities provided in favour of the system concerned.

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B. Conflict of Law rules

- The Clearnet system

See section 3.6.1.

- The Hague Convention

See section 3.8.1.

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4.2 Germany (DE)

4.2.1. Provisional conclusion

Rather than adopting a separate Act by which the provisions of the SFD were transposed into domestic law, the German legislature opted for a rather selective form of transposition. The provisions of the SFD were transposed by amending a number of existing German statutes, e.g. the Insolvency Act, the Securities Safe Custody Act and the Banking Act. For the definition of "systems", reference is made to Art. 2 a of the SFD so as to ensure that only systems governed by the SFD are encompassed by the German legislation. A major objective of the SFD, which was to increase the insolvency stability of settlement systems, has been achieved by also enabling the off-setting of claims within systems in insolvency situations, by restricting the collection rights of the liquidator and by curtailing rescission rights during insolvency proceedings. Further, conflict provisions have been adopted in order to determine the law applicable to systems in the event of the insolvency of one of their participants and to state a new *lex-conto-sitae* rule for securities processed by a system. Finally, the reporting and publishing requirements of the SFD have been transposed by amending the German Banking Act; accordingly, the German Bundesbank is obliged to report payment and securities settlement systems to the ECB.

The most problematic areas are as follows:

- Non-possessory collateral techniques;
- Implied transposition of supervisory moratoria under legislation governing building societies and insurers;
- Entry of orders into a system post-insolvency;
- Failure of Section 116 ss. 3 of the Insolvency Act to address the relationship between a recipient bank and a recipient.

4.2.2 Issues of incorrect national implementation

Issues of incorrect national implementation could not be identified.

Nevertheless certain issues might require a more in-depth analysis (see point 3 under 4.2.4).

4.2.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Definition of collateral security

See section 3.4.2.

- Scope of the SFD: Electronic Money institutions

See section 3.5.1.2.

- Scope of the SFD: The Czech problem

See section 3.5.2.2.

B. Conflict of law rules

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- Euro 1, Step1, Step2 situations

See section 3.6.2.

- The Hague Convention

See section 3.8.2.

- Transposition of Article 9 (2) of the SFD

See section 3.9.2.

4.2.4 General comments on the German transposition

- Scope of the SFD: Securities transfers

The SFD shows a number of contact points with the Directive 97/5/EG of 27 January 1997 on cross-border credit transfers (Official Journal No. L 43 S. 25), which had to be transposed by August 1999. The new German Credit Transfer Act contains definitions of the credit transfer contracts such as payment and transfer contracts, which the transposition of the SFD had to observe. Whilst through the credit transfer contract (Sec. 676a of the German Civil Code) a bank promises to make a specific lump sum on an account available to an account payee, the payment contract affects the duty of a bank against another bank, to forward the transfer amount to a third bank (Sec. 676d of the German Civil Code). The transfer contract (Sec. 676 of the German Civil Code) affects the duty of the bank to forward securities or claims for the surrender of securities. If credit transfer contracts or payment or transfer contracts are processed by a payment system, then the present instructions determine their irrevocability by a particular point in time determined by the system.

The transposition of the SFD had to take into account the basic dogmatic re-orientation of credit transfer law, as it underlies the new Act. Under the existing dogma, the bank transfer itself does not constitute a separate agreement in terms of Secs. 675, 662 et seq. of the German Civil Code, but merely an instruction in terms of Secs. 675, 665 of the German Civil Code in the framework of a giro contract. The giro contract had been viewed as an agency/mandate contract in terms of Sec. 675 of the German Civil Code, existing as sole contract between the various parties concerned - so between the bank transferor and his bank, the bank transfer receiver and his bank and those banks included in the bank transfer as intermediaries.

These concepts could not be retained by the transposition of the Credit Transfer Directive as the bank could neither refuse the bank transfer nor modify the assignment. In future this should be possible under the Directive. With regard to the revocability of the credit transfers, the extensive revocation/termination possibilities of the existing law have by and large been retained. However, for the payment system as for other systems, provision will be made that from a specific point in time determined by the system, the credit transfer resp. the payment or transfer contract cannot be terminated, [whereupon a generous standard shall be applied to protect the system].

With the opening of the insolvency proceedings, the Giro contract would lapse according to Sec. 116 of the Insolvency Act. If, however, the bank effects a transfer in good faith, i.e. without knowing that insolvency proceedings had been opened over the sender's estate, its confidence is protected and the lapsed Giro contract continues to be effective, in accordance with Secs. 116 and 115 para. 3 of the Insolvency Act. If the account displayed a credit balance, then the debiting of the sender's account by the sending bank effected a debt discharge, in accordance with Sec. 82 of the Insolvency Act. If on the other hand the account showed a negative balance, then the claim for the reimbursement of expenses that existed for the transfer had to be filed as an ordinary insolvency claim.

The newly added Sec. 116 para. 3 of the Insolvency Act (inserted by Sec. 3 para. 3 of the Credit Transfer Act) now makes clear that the bank transfer contracts, like the payment and transfer contracts, do not expire as a result of the opening of insolvency proceedings. This must also have an effect upon the claim for the reimbursement of

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expenses, which the bank have vis-à-vis the sender. A distinction as to whether or not the account displays a credit balance would not be appropriate under the new Sec. 116 para. 3 of the Insolvency Act. If the credit transfer contract, like the payment and transfer contract, continues to be effective, then a duty of the authorised bank arises also to fulfil these contracts after the opening of the insolvency proceedings. A qualification of a claim for reimbursements as merely an insolvency demand would not do justice to the bank's obligation because in this context it is about fulfilment of a contract, which continues to be in effect after the opening of the insolvency proceedings. The claim for reimbursement payments for the bank transfer to be carried out is therefore a privileged claim against the insolvency estate with super-priority over any other creditor's claims ("Masseschuld"). This design is consistent, as one cannot create any duty for the bank to conduct a bank transfer after the opening of the insolvency proceedings, and then merely grant a marginal insolvency quota for the reimbursement of expenses.

- Amendments

In view of the above legal background, the legislation now contains the following elements:

- Restrictions for offsetting under Sec. 96 of the Insolvency Act are brought in line with the requirements under the systems protected by the SFD.
- The rescission of certain legal acts which are undertaken after insolvency proceedings have been opened is no longer possible .
- Assignments of claims for security purposes to a Central Bank of an EU Member State or the ECB should not be subject to the collection right of the official receiver nor should they be subject to any deductions in favour of the receiver or the estate. The enforcement of the security right over the assigned claim remains outside the influence of the official receiver and is hence safeguarded also in insolvency proceedings over the assignor's assets.
- The applicable law for the systems in the event of insolvency of one of the participants has been defined in Sec. 102 of the Introductory Act to the Insolvency Act.
- The reporting and publishing obligations required by the SFD have been implemented by amendments to the German Banking Act,
- Art 46 of the Banking Act has also been amended to the effect that the provisions protecting systems and central bank's collateral rights against insolvency proceedings shall also apply to supervisory moratoria.
- The amendment to the Securities Deposit Act states a special design of the *lex rei sitae* regulation for certain securities (see in more detail below).
- As stated, German law already complies with the requirements of the SFD to a great extent. For individual articles of the SFD there was, therefore, no or only a limited need for transposition into German law:
 - This applies, for instance, to the insolvency stability of netting agreements stipulated in Article 3 para. 1 sent. 1 of the SFD. Whilst Sec. 95 para. 1 sent. 3 of the Insolvency Act provides that there can be no offsetting if the claim (against which a claim is to be offset) is unconditional and becomes payable before any offsetting can be realised, any offsetting scenarios contractually created are already expressly protected, under Sec. 94, during insolvency. However, in order to remove any doubts, the protected systems are now expressly exempted from the application of Sec. 95 para. 1 sent. 3 under the newly inserted Sec. 96 para. 2 of the Insolvency Act. Under the same provision, set off would now be enforceable even if it was created in a manner open to rescission.
 - The determination of the time of entry into the system of the payment or transfer order (Article 3 para. 3 of the SFD) ultimately concerns the question of the receipt of a declaration of intent, which under German law is subject to the concept of private autonomy.
 - Article 4 of the SFD contains an option for the Member States to define, *inter alia*, that any credits or securities in the clearing account of a partner may be used after proceedings have been opened to settle

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that partner's obligations arising from the system. The legislature made use of this option by amending sec. 116 Insolvency Code.

- Article 6 para. 1 of the SFD determines the time of opening of insolvency proceedings to be the time when the competent court has made issued opening order. This is in conformity with Sec. 27 of the Insolvency Act.
- Article 7 intends to render inadmissible for the relevant systems the so-called "00-hour rule", as it is known in some countries, i.e. the retroactive effect of the opening of proceedings as of the beginning of the respective day. However, German law never recognised any such automatic retroactive effect.

- Specifically: Amendments to the Insolvency Act

One of the central objectives of the SFD was to render netting transactions in the systems stable in the event of insolvency, so that, for instance, the clearing transactions could not be voided by rescission. To that extent Article 3 para. 2 provides that an avoidance should not result in a cancellation of the netting transaction. This concept is also reflected in Recital 13 of the SFD, and therefore Sec. 96 of the Insolvency Act had to be amended.

A new Sec. 96 para. 2 was added, as a result of which a set-off is no longer inadmissible even if an insolvency creditor has been granted the possibility of set-off through a voidable legal act. The set-off declaration used to be ineffective in terms of repayment if the set-off scenario had been created in a manner open to rescission. This could have had serious consequences for the payment systems, especially if the creation of a set-off situation were to be viewed as being incongruent cover in accordance with Sec. 131 of the Insolvency Act.

A set-off would thus have always been inadmissible if the set-off situation had been created in the last month before the application for insolvency was filed. Such uncertainty would have been unacceptable for the handling process within the systems. Therefore, a situation had to be created that on the one hand the set-off within the systems was effective and, on the other hand, that the right of avoidance was not largely invalidated.

According to the former version of Sec. 96 para. 1 no. 3, the set-off declaration was rendered ineffective retroactively upon the opening of proceedings if it had been made before the opening. A set-off declaration made after the opening of proceedings was ineffective on principle. This legal consequence was irreconcilable with the intentions of the SFD. The set-offs within the systems therefore had to be stable in the event of insolvency of one partner, even if the set-off situation had been created in a manner open to rescission. This is unobjectionable also from the point of view of equal treatment of creditors, because it is general practice to work with anticipated set-off contracts in that the clearing mechanism is agreed in advance as a special form of surrogate delivery without initially actually being based on any existing clearable claims. The claims, which subsequently arise on the respective business day and are submitted for clearance, are subject to the clearing mechanism from the very time they arise.

Under Sec. 96 para. 2, the automatic invalidity, on which Sec. 96 para. 1 no. 3 is based, is no longer effective, but the official receiver must rescind the set-off separately.

However when reassessing the definitions of insolvency proceedings and collateral security under the SFD, certain issues may merit further reflection:

This seems to be the case for **non-possessory collateral techniques** like the fiduciary transfer of ownership for security purposes the realisation of which in insolvency proceedings is subject to certain constraints. It is beyond doubt that such collateral techniques are covered by the very generic language of Art 2 lit m SFD. Although the German implementing legislation was drafted under the assumption that such techniques may not be relevant in relation to financial assets (like e.g. securities where the possession can easily be acquired by the collateral taker via the clearing system) there may ultimately be constellations where such non-possessory collateral techniques may indeed become relevant for systems or central banks.

While it is noted that the **definition of insolvency proceedings** under Art 2 lit j of Dir. 98/26 (with a view to the multitude of different proceedings existing under Member States' laws) is rather broad and that Germany implemented the SFD not only in relation to "plain vanilla" insolvency proceedings but also in relation to

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supervisory moratoria under the Banking Act (Sec. 46a), supervisory moratoria under other supervisory acts (governing e.g. building societies and insurers) were not addressed. Moreover, Sec. 21 para. 2 of the Insolvency Act, which allows a preliminary insolvency freeze to be imposed by the *insolvency court*, could also have been amended explicitly (like Sec. 46a of the Banking Act) to the effect of leaving collateral and settlement finality unaffected. In the absence of an explicit amendment practitioners rely on an “a fortiori” argument (“what cannot be challenged in the main proceedings will not be subject to challenge in any preliminary proceedings”). An explicit codification would have been desirable.

The German rules implementing the SFD (Sec. 116 sent. 3 of the Insolvency Act) did not explicitly address **orders entered into the system *post insolvency***. Instead, the explanatory memorandum refers to the generic rule of Sec. 82 of the Insolvency Act protecting inter alia instructed banks executing payment orders in good faith only where the instructing party *holds a cash balance* with the instructed bank while leaving open cases where such cover consists of a (unsecured/secured) overdraft line. While a majority in legal doctrine would even include the execution on the basis of a secured credit line as a case under Sec. 82, no such protection would exist in relation to orders executed on an unsecured basis. This could become an issue precisely where such (post opening) orders form part of an end-of-day-netting. Nevertheless, legal literature seems confident that an interpretation “in conformity with community law” of a generic national legal provision like Art 82 of the Insolvency Act will help.

Finally, the language of Sec. 116 S. 3 of the Insolvency Act does not address all stages of a credit transfer since it does not explicitly mention the relationship between **the recipient bank and the recipient** (strangely enough called the “Giro” contract). The literature considers that as a non-intentional lacuna, i.e. a simple drafting error of the legislature which apparently had a problem to properly handle his own (new) terminology for credit transfers in the context of the (parallel) implementation of Dir. 98/26.

- Conflict of Law Rules

The objective of the new Sec. 17 a of the Securities Depot Act is to protect those parties who received securities under the laws of the state of the register, etc. Such protection is to be realised so as to guarantee that the validity and usability of the securities is governed exclusively by the laws of the Member State where the register is located, in particular in the event of insolvency.

Consequently, under Sec. 17 a, which transposes Article 9 para. 2 of the SFD, title to securities given as collateral in accordance with Article 9 para. 1 and for which title to such securities has been entered with legal effect in a register or booked to an account or in a central depot system, is determined by the laws of the Member State in which the register, the account or the central custody system is located. In this context the provision only applies to those registers, etc. which document title to these securities and/or the right to delivery or assignment of the securities (Recital 19).

Sec. 17 a is intended, for example, to solve problems which arise with regard to the applicable law in connection with the “global shares” whose significance will increase in the future and which, e.g. in the case of Daimler-Chrysler shares, are issued partly as a global note in Frankfurt and a global note or by registration in New York. In the event of cross-border trade and delivery between the different markets, the holdings may “shift” and, as a consequence, shares held by Clearstream Banking AG in the clearing account in New York would be added to the global note in Frankfurt with the result that the Frankfurt cover of notes in circulation would be composed in part also of shares held in deposit in New York.

The provision is also meant to contribute to finding appropriate solutions for scenarios where, for instance, Bank 1 in state A pledges part of its Eurobonds which are booked in its deposits with either Euroclear or Cedel to Bank 2 in state B. Euroclear or Cedel establish a special pledge account for this transaction, into which the Eurobonds are entered as security for the loan granted by Bank 2. The ownership titles of Bank 2 as well as the formalities to be observed by Euroclear or Cedel at the time of pledging are determined by the *lex rei sitae*. However, the question arises which *lex rei sitae* is applicable if the pledge is based on securities which have merely been booked to the account. It could be e.g. English law because the “global note” representing the entire issue of a

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Eurobond is e.g. deposited in London, or Belgian or Luxemburg law that applies because the Eurobonds are held in accounts of Euroclear or Cedel, or it could be the law of a third state.

In order to apply the relevant conflict rule, a distinction is drawn between securities that are manifested in individualised paper instruments (kept in segregated custody individualising the owner “Streifbandverwahrung”) and those, which are documented only by a global note or deposited as part of a pool of fungible instruments in central custody (“Girosammelverwahrung”).

In relation to the first group of securities, the applicable German conflict rule distinguishes between the securities' legal and in-rem statutes. While the legal statute governing securities is applicable in the event of a conflict of laws to decide what law will apply to the title documented in the security, the in-rem securities statute is applicable to questions relating to the legal status of the security as an object. The first statute is determined by the regulations governing the vested right. These will depend upon the in-rem securities statute only to the extent that they are subject to the latter. Regarding the in-rem statute, however, the conflict rules governing chattel apply, so that the security is subject to the laws of the place where they are held in deposit (*lex cartae sitae*) in terms of in rem law.

As regards securities in the form of global notes or book entry rights it is more meaningful to apply the laws of the place of booking. Any linkage to the "home location" of the security is questionable where it is not transferred by delivery or surrogate delivery, but by transferring a share of a securities portfolio by simply crediting its value, as in securities clearing transactions. In such cases, the effect of a credit should be subject to the laws governing the account management by the banks for the central depository of securities and/or the interim depository institutions.

Under German law, the customer is always a co-owner of the basic global note and/or the – fictitious – collective pool of notes (Gov. debt), even if he holds such rights via a custody account with his bank as an interim custodian institute, which in turn maintains a custody relationship for the respective stocks with a central depository of securities. For the customer, the special legal quality of this co-ownership throughout all depository levels means that in the event that his bank or the central depository bank files for insolvency he may separate and recover his jointly held titles from the insolvency estate (Sec. 47 of the Insolvency Act). In the event of individual measures of execution initiated by his bank's or the central depository's creditors into the customers co-ownership, the courts will have to decline any such motion since it would bear on third party owned assets (Sec. 771 Civil Procedure Code).

Such legal result achieved by the co-ownership solution under the German Safe Custody Act is (intended to be) copied by the trusteeship solutions common under Anglo-Saxon law and in Belgium and Luxemburg, according to which the client has a claim for delivery arising from contract only, but where his claim is covered by a special estate in case of insolvency which is comprised of the same securities which the bank holds via the depository bank. Belgium and Luxembourg have enacted specific statutes to that effect.

While under both systems the transfer may be done by crediting the securities accounts of the banks and/or the depository banks (such credits are interpreted as settlement by right in rem with claim to the title in Germany, while other legal systems have special laws in that respect), there are differences with pledges, for example, which in most EU Member States are subject to more extensive formal requirements than in Germany. In practice there is the problem that, for instance, a German bank which plans to use securities issued in Spain but which the German bank credited to its local customer's safe custody account (on the German bank's books) as collateral within the scope of a lien created under German Bankers' standard business terms or within a private contract has to decide whether it will have to observe the formal conditions required under Spanish law. The same applies to the enforcement of the lien over such securities. Article 9 para. 2 of the SFD is intended precisely to overcome such difficulties by determining that the German bank may rely on German laws. Vice versa, neither does the Spanish bank have to abide by German law in the event that it wishes to enforce foreign issued securities of its customer kept in safe custody with the Spanish bank as collateral. So far the German banking industry has relied for cross-border custody on the technique of non-collective holding (on a trust basis = "Wertpapierrechnung"), whereby the bank retained title to such securities or held comparable rights to the securities in accordance with the relevant legal system (e.g. securities entitlement) and the customer only held a claim for delivery against the bank arising from contract which nevertheless (under the heading of a German law

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trust) resulted in the customer's right to separation and full recovery of assets in the event of the bank becoming insolvent (Sec. 47 of the Insolvency Act: under a German law trust the trustor's "beneficial ownership" would entitle him to segregate his assets from the trustee's estate as if the trustor was the legal owner; same for individual measures of execution, Sec. 771 C.P.C.).

In implementing Article 9 para. 2 it was initially necessary to resolve the basic issue of whether this might merely be an issue of international insolvency law, i.e. Article 9 para. 2 intends to set out the governing law applicable only in the case of insolvency on the part of one of the partners. As demonstrated by the preceding examples, however, this approach would have been inadequate. For the sake of legal certainty it must be clear – also outside insolvency proceedings – which legal system determines the effectiveness of any disposals of securities. This also meant that the implementation legislation had to go beyond the actual sphere of application of the SFD and that it had to be given general applicability for certain types of disposal of securities.

In accordance with Article 9 para. 2 of the SFD, the place of account entry or registration is to determine the applicable law. In that way the process is based on a criterion, which as a rule can easily be recognised by third parties. In order to define more precisely the place of account entry as the relevant link, the branch or main office administrating the account should be the relevant anchor point. The linkage to a branch office or to the depository's place of business was rejected, because these terms might be too restrictive in certain circumstances to allow the inclusion of all possible national and international locations where accounts are managed. As with the term "depository", the terms "branch or head office" were based on the terminology of the Safe Custody Act. Regarding the question as to the identity of the branch or head office of the depository managing the account, this may be determined by the identity of the branch or head office issuing to the customer in its own name the securities deposit certificate or the deposit slips. US law, for instance, is also based on this linkage.

Since securities are in practice normally held via a number of interim depositories, a decision had to be made which legal system was to apply: the legal system of the depository making the account entry on behalf of the disposing party, or the right of the depository making the account entry on behalf of the party benefiting from the disposal. The legislature chose the second alternative. Otherwise, there might have been uncertainties e.g. in the case of disposals with regard to securities accounts containing investments which are deposited with various central depositories in different countries ("heterogeneous deposits"). Any linkage with the law of account entry by the central or interim depository would result in a situation where the party disposing and the party benefiting from the disposal would have to observe in rem disposal requirements under several legal systems, although the parties only intend to carry out a uniform transfer. On the other hand, in the event that the law of the depository making the account entry for the party benefiting from a disposal should apply, then disposals concerning a so-called "heterogeneous deposit" would be subject to the requirements of a legal system, which as a rule is easily determined by the parties.

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4.3 Denmark (DK)

4.3.1 Provisional conclusions

Denmark complies with the requirements of the SFD except for Article 10 (4) of the SFD, which were not implemented into Danish law. While some rules were adopted in Danish law that go beyond what is stipulated in the SFD, other rules remain unclear as to their exact interpretation.

4.3.2 Issues regarding incorrect, narrow or broad national implementation

- Incomplete or incorrect transposition

The Danish legislation does not give a definition of a 'system', as stated in Article 2 (1) (a) of the SFD. The Danish Supervisory Authority has informed us that this is due to the fact that systems may be constructed in many different ways. Therefore, it has been the intention to make a form of framework legislation, which would still allow the system to be constructed in different ways.

The Act does not define 'settlement agent' and 'clearing house', as stated in Article 2 (d) and (e) but the term is used in Article 57a, paragraph 2, number 7 with a specific reference to Article 2, number d and e.

In relation to Article 2 (h) the terminology of the Act differs from the one applied in the Investment Service Directive 93/22/EEC, as a further specification of the instruments subject to the Act has been made in stead. The list of instruments is not final as no. 12) gives the Danish Securities Council authorisation to include further instruments in the list. The specific delimitation of the instruments has been based on the Directive 93/22/EEC's definition of securities, but in addition to those commodity instruments, etc. have been included as well as negotiable mortgage deeds on real property or bills of sale. Articles 6 (2) and (3) of the SFD were not explicitly transposed into Danish law. Moreover, Article 10 (4) of the SFD was not transposed into Danish law.

The Danish Supervisory Authority has informed us that Articles 6 (2), 6 (3) and 10 (4) will be explicitly implemented in connection with the implementation of the Collateral Directive 2002/47/EC.

Furthermore, Article 7 of the SFD was not transposed into Danish law. The Danish Supervisory Authority has informed us that Article 7 of the SFD was not transposed because insolvency proceedings pursuant to Danish law do not include any provisions on retroactivity as that would be in conflict with fundamental Danish principles of law.

- Transposing rules that go beyond what is stipulated in the SFD

With regard to Article 3 (1) sentence 2, Denmark has maintained a broader wording in the Danish Insolvency Act, *inter alia* by maintaining a reversal of the burden of proof as against the SFD.

Between the time the winding-up order is made and until midnight on the date when the opening of the winding-up proceedings are announced in the Danish official gazette, the winding-up is of legal effect against any third party if he is acting in bad faith. The burden of proving bad faith lies with the estate contrary to Article 3 (1) sentence 2 of the SFD, where the burden of proof lies with the system.

- Narrow interpretation of the SFD

The Supervisory Authority has informed us that there has been some uncertainty as to whether the SFD is a minimum standard directive or a harmonisation directive or both, and if so which provisions are which. This applies particularly in relation to article 4 of the SFD, which according to its wording only applies to the actual winding-up date. This is a problem in relation to the settlement routines of Værdipapircentralen and must –

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according to the Supervisory Authority – – give rise to considerations in all systems operating with a 3-day settlement period.

4.3.3 Issues resulting from shortcomings of the SFD

A. Terminological issues

The Danish Supervisory Authority has informed us that in respect of Article 2 (c), (f), (i), (j), (l), and (m) of the SFD, it has not been considered necessary to repeat those definitions, which are necessary for the reading of the SFD, in the Danish legislation.

Thus, in respect of Article 2 (c) of the SFD, the term ‘central counterparty’ does not at all occur in the Act or anywhere else in Danish law. Therefore it is uncertain what rules regulate activity as the central counterparty.

However, the Danish Supervisory Authority has informed us that in its opinion there can be no uncertainty as the application of a central counterparty is simply one of several risk management models that can be used by a system. In connection with the Supervisory Authority’s approval of systems the application of a central counterparty will be part the Supervisory Authority’s assessment of whether the system meets the legal requirements and whether the system’s rules can be considered adequate within the meaning of the SFD. The Danish system FUTOP Clearingscentralen A/S, which has been notified to the Commission as a system under the SFD is thus a system with a central counterparty.

B. Scope of the SFD

- Scope of the SFD: Definition of Securities

See section 3.2.3.

- Scope of the SFD: Electronic Money institutions

See section 3.5.1.3.

- Scope of the SFD: the Czech problem

See section 3.5.2.3.

C. Conflict of law rules

- Transposition of Article 9 (2) of the SFD

See section 3.8.3.

- The Hague Convention

According to the Danish Financial Supervisory authority, the basis of both Article 9 (2) of the SFD and the Hague Convention was PRIMA, i.e. “the place of the relevant intermediary”. In Article 9 (2) this has resulted in the account’s physical position being the basis while the work with the Hague Convention has shown that the most operational basis in a number of situations was to let what has been agreed between the parties be decisive provided that the intermediary has an actual physical presence at the place in question.

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The basis of Article 9 (2) corresponds to what is a fall-back provision in the Hague Convention. According to the Supervisory Authority in most practical cases the results obtained pursuant to the two provisions will be the same, but there may also be situations where this is not the case.

However, the idea behind the two set of rules is the same and it may be stated that Article 9 (2) was a formulation of the general principle to which everybody agreed while the Hague Convention was to be negotiated on the basis of an in-depth analysis of how the principle most expediently could be formulated in more detail.

Thus it is the opinion of the Supervisory Authority that it is crucial that the problems of the application of Article 9 (2) of the SFD and Article 9 of the Collateral Directive as well in connection with the Hague Convention are solved.

D. Others

In relation to Article 3 (1) sentence 1, the standard agreement of the Danish Securities Centre (Værdipapircentralen) provides that settlement of transfer orders must take place if they were entered in the system prior to the bankruptcy, suspension of payments etc.

Danish national law does not include any provisions on the time of entry of a transfer order. In accordance with Articles 3 (3) and (5) of the SFD section 57c of the Danish Securities Trading Act stipulates that:

Rules and participation agreements for a clearing centre, a payment system registered pursuant to section 57a or corresponding activities carried out by Danmarks Nationalbank shall include provisions on

- 1) when a transfer order is considered entered into the system, and
- 2) the point in time after which a registered transfer order can no longer be revoked by a participant or a third party.

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4.4 Greece (EL)

4.4.1 Provisional conclusions

Greece complies with the requirements of the SFD, except for certain specific rules regarding the SAT and Hermes systems, Article 3 (3) and Article 5 of the SFD.

4.4.2 Issues regarding incorrect or incomplete national implementation

- SAT

In the case of the SAT (Dematerialised Securities System), there seems to be a discrepancy as to the rule established in Article 3 (1) sentence 1 of the SFD. Article 29 of Act 2579/1998 states the following: *"Following a decision, the Board of Directors of the Athens Stock Exchange may declare as void a trade (on-exchange transaction) which was concluded through the OASHS if according to its judgment the declaring such trade void is necessary for the proper functioning of the market or the protection of the interests of the investing public, such as in the event that the conclusion of a trade is the product of fraud in the judgment of the Board of Directors of the Athens Stock Exchange. The aforementioned decision of the Board of Directors of the Athens Stock Exchange is taken at the latest by the next working day following the date of conclusion of the relevant trade and is announced immediately to the Capital Markets Commission. The Capital Markets Commission may, following a decision by its executive committee, annul the decision announced by the Board of Directors of the Athens Stock Exchange following a decision which must be taken within the next working day following the announcement of the decision of the Board of Directors of the Athens Stock Exchange, failing which the trade which had been declared void shall be of no legal effect whatsoever and in particular as against the Member counter parties and their clients."*

Furthermore, pursuant to Article 27 (4) of the SAT Regulation *"After finality has been reached, the CSD is precluded from modifying, correcting or supplementing the trades. By way of exception and in accordance with Art. 29 Act 2579/1998, transactions concluded may be characterized as void and declared so. In such a case, the ASE should communicate to the CSD its decision thereon by the end of the day. Upon receipt of the relevant notice, these trades are separated from the multilateral settlement and characterized as void. ... If the Capital Market Commission sustains and ratifies the decision of the ASE, the CSD characterizes these trades as finally void in the SAT. The trades characterized as void are of no further effect in the SAT."*

The obvious effect of these provisions is that, contrary to Article 3 (1) sentence 1 of the SFD and Greek Law 2789/2000, a transfer order may be revoked or cancelled on the basis of third party claims even after its entry into the system.

However, in discussions with the relevant authorities, we were informed that that provision has never been applied in the past and that, in view of Act 2789/2000 (transposing the SFD), it is not likely to be applied in the future. We have also been informed that the authorities have launched an initiative to repeal these provisions.

In addition, since Act 2789/2000 contains provisions that are in direct conflict with the provisions of Article 29 of Act 2579/1998 and since it was passed at a later point in time and furthermore contains provisions of the SFD, which introduces "superior" legal rules, it can be validly argued that it overrules the provisions of Article 29 of Act 2579/1998.

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- Hermes

Concerning Hermes, pursuant to Annex 1 to Monetary Policy Council Act 46/21.12.2000 (the Hermes Regulations), a “payment order” is an order or instruction, by a sending participant pursuant to the Hermes/Target Regulations, to place at the disposal of a receiving participant, including National Central Banks or the ECB, a monetary sum by means of a book-entry in an account characterised as HERMES/TARGET. Furthermore, a “Hermes payment order” is a payment order that is transmitted by one participant to another participant by means of a SWIFT message through the Hermes System and is settled in real time. Also, pursuant to Monetary Policy Council Act 50/31.7.2002 Article 1(e), a payment order is “any order in pursuance of which a monetary sum is placed by the sender at the disposal of a recipient, including National Central Banks or the ECB, by means of a book-entry in the accounts of a credit institution, the Bank of Greece or a settlement agent, or any order which results in the discharge of a debt, as determined by the rules of the payment system.” “Settlement” is defined as an act of transfer of funds or securities by which an obligation between two or more participants is discharged. The Regulations stipulate in said Annex 1, as well as in Chapter I (6), that “the time of settlement of a final payment is the point in time of the debit of the settlement account of the sending participant”.

The Hermes Regulations, in Chapter I (6) provide that “payment orders become irrevocable from the moment that the settlement account of the sending participant is debited”, and that “the payment becomes final upon settlement”. Accordingly, in Chapter VII(ii) paras 31 and 33 it is stipulated that a payment order “may be revoked by the sending participant only if its settlement account has not been debited”, but “may not be revoked from the moment it is debited, in which case any revocation order would be rejected,” and in Chapter VIII para 49 that a payment order “that has become final may not be revoked or disputed by the sending participant, the receiving participant or any third party”. Finally, the Hermes Regulations in their definition of “finality of settlement” in Annex 1 provide the following: *“The payment order becomes final and irrevocable from the moment of the debit to the settlement account of the sending participant. The settlement of the payment order cannot be revoked, reversed or nullified by the sending participant or any third party, even in the case of the commencement of insolvency proceedings against a participant.”. However, in said definition it is provided that: “An exception is made for cases where a taint exists in the underlying transaction or where the payment orders are products of criminal or fraudulent acts, pursuant to a decision by a competent court or any other competent adjudicating authority. Where insolvency proceedings have commenced, any discriminatory treatment or transactions at prices lower than the competition during the suspect period are deemed to be fraudulent acts.”*

Hence, the definition of “finality of settlement” in the HERMES Regulations needs to be seen in the light of Art. 3 and of Recital (13) of the SFD, and of Art. 3 of Law 2789/2000.

The obvious effect of this provision is that, contrary to Article 3 of the SFD and Article 3 para. 1 and, especially, para 2 of Law 2789/2000, the settlement of a payment order may be revoked, reversed or nullified by the sending participant or any third party in the cases specifically mentioned therein.

Nevertheless, in discussions with the relevant authorities, we have been informed that that provision has never been applied in the past and that, from a practical and technical point of view, once a settlement has been carried out, it is technically impossible to unwind it, so that the provision is very unlikely to be applied.

Furthermore, since Law 2789/2000 (which is a Parliamentary Act) contains provisions that are in direct conflict with this provision of the Hermes Regulations (which is an administrative act) and since a statute supersedes administrative acts, it can be validly argued that the Act abolishes this provision of the Hermes Regulations.

- Various

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None of the regulations of any of the systems covered by Law 2789/2000, with the exception of Hermes, contains a specific provision as to what they consider to be the exact moment of entry of a transfer order into the relevant System.

Although the Operators, Participants and other relevant parties have a clear view of what they consider to be a “transfer order” for the purposes of the SFD and the Act and what is the exact moment of entry of such a transfer order into the relevant System, the fact remains that the Act (pursuant to the one referred to in the SFD) specifically requires explicit, clear rules governing each System on the issue of the moment of entry of such a transfer order into the relevant System, and hence the absence of such clear provisions in the Regulations of the Systems, with the exception of Hermes, constitutes a deviation from the provisions of Law 2789/2000.

It seems that the step required for a full implementation is the insertion of relevant provisions into the Regulations governing the Systems for the purposes of clarity.

Concerning Article 5 of the SFD and the Athens Netting Office, whose operation is governed by its Articles of Incorporation, there is no clear rule as to the moment in time from which a transfer order is considered final and irrevocable.

Although the Operator, Participants and other relevant parties have a clear view as to the moment in time from which a transfer order is considered final and irrevocable for the purposes of the SFD and the Law, the fact remains that the Law (pursuant to the one referred to in the SFD) specifically requires explicit, clear rules to govern each System on this issue, and hence the absence of such clear provisions in the Articles of Incorporation of the Athens Netting Office constitutes a deviation from the provisions of Act 2789/2000.

It seems that the step required for a full implementation is the insertion of a relevant provision into the Articles of Incorporation of the Athens Netting Office for the purposes of clarity.

Since the relevant regulations and legal texts do not provide for any specific definition of the exact moment of entry of a transfer order, with the exception of Hermes, in theory, it could be said that there is some degree of legal uncertainty. However, in practice, we have come to the conclusion following the discussion held with all the relevant authorities that they consider that no such uncertainty exists, since those authorities are certain as to what is the exact moment of entry of such a transfer order into the relevant System, based on the technical specifications and operation of the relevant System. Nevertheless, in our view, a certain interpretation should also be expressly incorporated in the relevant regulations for the purposes of transparency and completeness.

4.3.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Definition of Securities

See section 3.2.4.

- Scope of the SFD: Electronic Money institutions

See section 3.5.1.4.

- Scope of the SFD: the Czech problem

See section 3.5.2.4.

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4.5 Spain (ES)

4.5.1 Provisional conclusions

Spain complies with the requirements of the SFD. Our transposition analysis reflects that the SFD has been fully transposed into local legislation without detecting any significant discrepancy. The transposition of the SFD in Spain has led to a high level of compliance between the terms and definitions of the SFD and those contained within the Spanish transposition Law 41/1999, of 12 November. Only minor terminological differences may involve minor practical issues without relevant impacts and certain non-mandatory provisions of the SFD are not contemplated in the Spanish transposition Law.

Recent Law 44/2002 of 22 November, on measures for the Reform of the Financial System has completed the process of legal changes introduced in, among other things, the Spanish legal framework on clearing and settlement of securities traded in the Spanish Financial Markets. Indeed, the measures adopted for the reform of the Spanish financial system comprises, among other things, the final launching of the Spanish Central Securities Depository (“CSD”) which will integrate administration of the registration, clearing and settlement systems in Spain. At a first Stage, the Spanish CSD will integrate the Spanish Securities Settlement and Clearing Service (“SCLV”) which is in charge of registering, clearing and settling private fixed-income instruments and equities, and the Spanish Public Debt Central Depository (“CADE”) which is a department within the Bank of Spain responsible for registering, clearing and settling Public Debt on behalf of the Spanish Treasury. These two relevant settlement and clearing systems will be managed together under the newly launched “Management Company for the Register, Clearing and Settlement Systems” (“*Sociedad de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores*”), so-called the “Systems Corporation” (“*Sociedad de Sistemas*”). Said entity will manage the clearing and settlement procedures for securities traded in the Spanish Stock Exchanges, and the public and private fixed income securities. Other existing clearing and settlement Systems (e.g. clearing and settlement systems for derivatives, or those managed by the Stock Exchanges of Barcelona, Bilbao and Valencia) may form part of the Systems Corporation in the near future.

At this stage, Spain seems not to have certain of the practical problems or issues that have been identified in other jurisdictions (i.e. the Czech problem, EMIs, etc.).

4.5.2 Issues regarding incorrect national implementation

Spanish legislation transposing the SFD reflects the non-existence of any issue regarding incorrect national implementation. A few differences have been detected, but no discrepancies, and these differences are exclusively related to the implementation of non-mandatory requirements (‘may provisions’) of the SFD without having any practical impact: Article 2 (a) sentence 3 of the SFD, and in Article 2 (b) sentence 2 of the SFD.

According to Article 2(a) sentence 3 of the SFD “*A Member State may also on a case-by-case basis designate as a system such a formal arrangement between two participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, when that Member State considers that such a designation is warranted on the grounds of systemic risk.*” According to Article 3 of (b) of the Spanish Law 41/1999 transposing the SFD for an arrangement to be recognized as a valid system under Spanish law it shall be necessary to involve -at least- three participants as defined in the transposing Law. It is clear that in Spain a formal arrangement between two participants as defined in and under the considerations referred to in the SFD is not covered as a valid system under Spanish transposing Law of the SFD.

According to Article 2 (b) sentence 2 of the SFD “*If a system is supervised in accordance with national legislation and only executes transfer orders as defined in the second indent of (i), as well as payments resulting from such orders, a Member State may decide that undertakings which participate in such a system and which have responsibility for discharging the financial obligations arising from transfer orders within this system, can be considered institutions, provided that at least three participants of this system are covered by the categories*

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referred to in the first subparagraph and that such a decision is warranted on grounds of systemic risk.” The Spanish transposition law does not contemplate any similar provision in order to extend the protection of the SFD over “undertakings” that comply with the prerequisites mentioned in the SFD.

4.5.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Definition of securities

See section 3.2.5.

The Spanish definition of “collateral securities” covered the scope of the transposition law 41/1999 covers “all realizable assets” as referred to in Article 2 (m) of the SFD. Please see section 3.4.5.1.

- Scope of the SFD: Definition of “indirect participant”

Article 2(g) of the SFD provides a clear definition of what an “indirect participant” means under the scope covered by the SFD. In this sense, *“indirect participant” shall mean a credit institution as defined in the first indent of (b) with a contractual relationship with an institution participating in a system executing transfer orders as defined in the first indent of (i) which enables the abovementioned credit institution to pass transfer orders through the system;*” According to the Spanish transposition law, there is no definition of “indirect participant” for the purposes of Spanish systems recognized under the implementing regulation. However, this does not mean that Spanish implementing regulation does not contemplate the status of an “indirect participant”. Indeed, the concept of “indirect participant” in terms of the SFD may be acceptable under the current terms used by the transposition law in article 2.1(c) sentence 1 which provides the concept of the *“contracting parties in (...) those transactions related to settlements under a system (...)”*.

As a matter of fact, and within their internal regulations, certain systems covered under the Spanish transposition law 41/1999 (the Spanish Interbank Payment System, *SPI*; and the Settlement Service of the Bank of Spain, *SLBE*) contemplate the status of either direct or indirect participants.

Therefore, we may conclude that the inexistence of an express definition of “indirect participant” as it exists under the SFD, can not lead to a relevant discrepancy due to terminological issues that have not relevant impacts under the systems covered by Law 41/1999 in Spain.

- Scope of the SFD: Electronic Money institutions

See section 3.5.1.5.

Following the legal reform introduced by Law 44/2002, of 22 November, transposing Directives 2000/46/EC and 2000/28/EC, the Bank of Spain (Payment Systems Department) has confirmed, as regards the legal status of EMIs in Spain, that article 21 of the Law 44/2002 literally incorporates the provisions of the latter Directive. According to said practical implementation, the status of credit institution in the sense of Directive 2000/12/CE also applies to *“an undertaking or any other legal person, other than those whose regular activity is the collection of funds from the public by means of deposit, loans, temporary asset assignment or the like, with the obligation of refunding them, applying them on its own behalf to the granting of loans or other similar transactions, which issues means of payment in the form of electronic money”*. Therefore, EMIs benefit from the protection of the SFD in Spain under the category of credit entities (as participants in the systems).

- Scope of the SFD: The Czech problem

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See section 3.5.2.5.

After the feedback received from the Bank of Spain and the Spanish Settlement and Clearing of Securities Service (“SCLV”) we may conclude that the Czech problem is not an issue in Spain.

Spanish transposition Law 41/1999 is very clear in Article 2.c 3rd paragraph, when it states the following: *“Likewise the qualification of participant in a system (provided they fulfil its rules) can be granted to (among others) ...a clearing house which is defined as an undertaking responsible for calculating net positions held by participants in a certain system.”*

B. Conflict of law rule

- Transposition of Article 9 (2) of the SFD

See section 3.8.5.

As already mentioned, Spain has clearly opted for a rigorous and literal implementation of Article 9(2) of the SFD in its transposition law. The practical implementation conducted by the Spanish transposition Law 41/1999 in Article 15 may not lead to the categorical conclusion that Spanish transposition regulations have been restricted the implementation of this particular provision to the narrowest possible view, confining Article 9 (2) of the SFD only to cases involving bankruptcy.

In this sense, Spain’s position has been that, as a matter of fact, Article 9 (2) of the SFD was placed under Section 4 “Insulation of the rights of holders of collateral security from the effects of the insolvency of the provider” of the SFD, which refers to insolvency.

Article 15 of the Spanish Law 41/1999 of 12 November, transposing Article 9(2) of the SFD is in compliance with the scope determined by said Article 9(2) without going beyond the referred scope. The literal transposition made by the Spanish legislation, may not be inferred as meaning that Spain has adopted a narrow or broad interpretation of article 9(2) of the SFD.

Under the practical implementation of Sentence 2, Paragraph 2 of Article 15 of the transposition law, it should be necessary to analyse what happens in those cases of guarantees lawfully formed under the terms of said provision but without having published rules concerning the proper links and reconciliations for ensuring the coherence of the entries made into the foreign register and those relating to the Spanish register for the securities concerned and the legal effectiveness of the guarantees constituted in this respect. Following the feedback received from the Spanish Securities Settlement and Clearing Service (“SCLV”), we have confirmed that there is not any regulation that has been established by the Spanish authorities in order to establish procedures that undertake adequate links and reconciliations. Given on the importance of this issue, the criteria of the Spanish Regulator, should be obtained in this respect. The opinion to be requested is the confirmation that in the case of securities issued in accordance with Spanish legislation and registered in another EU country the legislation in force will fully apply, even though no reconciliation system rules have been published so far.

Finally, it should be noted that the SCLV has also confirmed that is to be of the opinion that the current wording of Article 9(2) of the SFD is incompatible with the final text of the Hague Convention. Therefore, said article should be adapted according to the *“lex contractus”* stated by the afore-mentioned Hague Convention to be applicable against the PRIMA approach of Article 9(2) of the SFD, and consequently article 15 of the Spanish transposition Law 41/1999 will also be subject to further amendments in accordance with this new approach.

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4.6 France (FR)

4.6.1 Provisional conclusions

French law already contained the major part of the provisions of the SFD before its actual coming into force. Arts. 6(3), 10(2) and 10(4) of the SFD are in the process of being transposed. A Draft Decree has been submitted to the Government for approval. The French authorities consider that this Draft Decree is not necessary to ensure the complete transposition because this Draft Decree is aimed only at detailing French internal proceedings (cf. infra "Others").

4.6.2 Issues regarding incorrect national implementation

No such issues could be identified.

4.6.3 Issues resulting from shortcomings of the SFD

A. Terminological comments

The terms "public authorities and publicly guaranteed undertakings" referred to in Article 2 (b) of the SFD do not appear in the French provisions. This does not, however, result in any practical issue: the public authorities and publicly guaranteed undertakings that may participate in a system are already mentioned in Article L.518-1 of the Financial and Monetary Code (i.e. the treasury, the *Banque de France*, the Financial Services of the Post Office, the Monetary Institutes for the French overseas territories (in French, *Institut d'Emission des Départements d'Outre-Mer*) and the public trustee office (in French, the *Caisse des Dépôts et Consignations*).

Although the notions of central counterparty and clearing house referred to in Article 2 (c) and (e) of the SFD are assimilated under French law, this does not lead to any practical issues.

There is no legal definition in French law of the term "settlement agent" contained in Article 2 (d) of the SFD. In France, this function is actually carried out by both the Banque de France and Euroclear France. It does not lead to any practical issues.

There is no legal definition in French law of the term "indirect participant" in Article 2 (g) and (i) of the SFD. However, rules governing the various French systems contain provisions relating to indirect participants and this does not lead to any practical issues.

In France, there is no provision explicitly defining the multilateral netting referred to in Article 2 (k) of the SFD. However the term "netting" appears in the Civil Code (bilateral netting), in Article 431-7 of the Financial and Monetary Code (multilateral netting) and in Article 2.1.8 of the general regulations of the Financial Markets Council. No practical issues are involved.

B. Scope of the SFD

- Scope of the SFD: definition of systems

See section 3.1.6.

With reference to Article 2 (a) sentences 1 and 3 of the SFD, French law is broader: Article 330-1 of the French Code defines the French system as being composed of 2 participants, without any justification upon grounds of systemic risks. According to the French authorities, it appears that systems composed of only two (2) participants do not exist in France. If such systems existed, they would not be notified to the Commission. According to

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Article 10 sentence 1 of the SFD, the Member States determine which systems are to be included in the scope of the SFD and are accordingly to be notified to the Commission.

- Scope of the SFD: Definition of securities

See section 3.3.6.

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.6.

- Scope of the SFD: The Czech problem

See section 3.5.2.6.

C. Conflict of law rules

- Euro Banking Association

See section 3.6.3.

- Interpretation of Article 9 (2) of the SFD

See section 3.8.6.

D. Others

The practical notification procedures referred to in Article 6 (3) of the SFD are not yet in force in French law.

A Decree has been drafted (not yet enacted – “Draft Decree”) in order to ensure the transposition of Article 6 (3) of the SFD. Our opinion is that the non-transposition of Article 6 (3) should not lead to any difficulties insofar as the purpose of the Draft Decree is to identify the French authority empowered to proceed with the notification.

Please note that a new version of the Draft Decree has recently been transmitted to the French Government. According to a very recent phone conversation and exchange of e-mails we have had with the French authorities, it has been confirmed to us that the Draft Decree should be finalised soon and come into force in the next few weeks.

Article 10 (2) of the SFD is in the process of being transposed. The Draft Decree has recently been transmitted to the French Government.

Article 10 (4) of the SFD is in the process of being transposed. The Draft Decree has recently been transmitted to the French Government.

Please note that the French authorities consider that the afore-mentioned Draft Decree is intended to clarify French internal procedures and is not intended as such to ensure the implementation of Articles 6 (3), 10 (2) and 10 (4) of the SFD.

4.6.4 Monaco

According to Article 11 (2) of the Monegasque ‘Ordonnance souveraine’ no. 15.185 of 14 January 2002, the Principality of Monaco applies the provisions adopted by France in order to transpose Community acts relating to

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the activity and control of credit institutions and the prevention of systemic risk in payment systems and settlement systems and the delivery of securities appearing in annex A.

A copy of this Ordonnance has been attached in annex of this Report (annex 4). According to our local contacts, the application in Monaco of the provisions adopted by France in order to transpose the SFD does not give rise to any issues that are different from those mentioned with respect to the transposition of the SFD in France.

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4.7 Ireland (IR)

4.7.1 Provisional conclusions

Ireland complies with the SFD subject to the terminological specifications below.

4.7.2 Issues regarding incorrect national implementation

The following issues are not necessarily examples of “incorrect” implementation of the relevant provisions, but rather, are potential discrepancies between the SFD and the Irish Regulations.

1. One potential issue which may arise is in the use of the term “insolvency”. *The term “insolvency proceedings” is not separately defined in the Irish Regulations. It may be caught by the “catch all” provision in the Regulations which states, in summary, that words and expressions used in both the Regulations and the SFD shall, unless the contrary intention is expressed, have the same meaning. However, in the definition of “the opening of insolvency proceedings” the Regulations restrict this to “the granting by the High Court of an order for the winding-up of a member of a payment system”. This does not deal with the concepts of “examinership” or “arrangements” in Ireland. “Examinership” is where a court places a company under its protection to enable the court appointed examiner to investigate the company’s affairs and to report to the court on its prospect of survival. “Arrangement” is where three quarters of the members or creditors of a company vote in favour of a compromise in respect of what is owing to them, and the court sanctions the proposals. By not dealing with these issues in the definition of “the opening of insolvency proceedings” it could be interpreted that the Regulations do, in fact express a contrary intention of what constitutes on “insolvency” to that which is contained in the SFD and as a consequence may not cover the wide meaning contained in that SFD. However, this issue is inconclusive as no practical examples, of which we are aware, have occurred to test the interpretation.*

2. The Irish Regulations refer to a “payment system” as opposed to a “system” as referred to in Article 2 (a) sentence 1 of the SFD. In defining the term “payment system”, the Regulations have adopted the definition contained in a separate piece of Irish legislation, the Central Bank Act, 1997 (the “Act”) which defines a “payment system” as follows:

“Payment system means a system established in the State, or proposed to be established in the State, by any person, in which credit institutions or financial institutions participate and which provides for-

(a) all or any of the following, namely, the processing, handling, clearance and settlement of any means of payment or of any securities, or

(b) the payment of any moneys by that means of payment, by or as between the members of the system or third parties, whether or not the processing, handling, clearance, settlement or payment of any of the moneys takes place in part or in whole within the State or outside the State.”

The Act provides that the Central Bank of Ireland (“CBI”) is the regulator of all such payment systems. Due to the fact that this legislation was in force in Ireland prior to the introduction of the Regulations and already contained a definition of “payment system”, the definition contained in the SFD was not reproduced in the Regulations. The view of the governmental department responsible for introducing the Regulations was that, in order to maintain clarity and consistency within national legislation, only one definition of “payment system” or “system” should appear in Irish legislation.

The definition in the Regulations refers to a “system established in the State, or proposed to be established in the State”. It appears, therefore, that payment systems that are not established in Ireland would not fall within the ambit of the Regulations. This would appear to be a deviation from the definition of “system” in the SFD. For

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instance, a system established outside Ireland but which has Irish participants and which has chosen to be governed by the laws of Ireland could, in theory, be deemed to be outside the ambit of the Regulations.

However, despite this uncertainty, in its practical application of the Regulations the CBI has taken the view that, if a system has Irish institutions among its participants or members, the CBI has an interest in having it designated under the Regulations in order to afford the participants the protection of the Regulations. For example, the CBI has designated CREST as a system to be included in the scope of the Regulations.

Although CREST is operated in the UK, at the time of designation three Irish settlement banks were participants and the CBI took the view that, on this basis, it should be designated. Since designation, CREST has introduced the delivery versus payment system. Under this system, trades are only settled in the UK, the result of which is that the three Irish banks are no longer direct participants in CREST but use UK banks as agents to settle within the system on their behalf. The designation of CREST has not been reviewed since this development. It is interesting to note however that, despite the fact that CREST is not “established” in Ireland, it was designated because the three Irish regulated banks were participants and, therefore, the view was taken that the Irish regulator would have an interest in having it designated under the Regulations.

CREST is operated in the UK and is a single settlement system from a technological and infrastructure perspective but it comprises of various separate ‘relevant systems’ from a legal viewpoint as established under the law of the various jurisdictions. Effectively this means that from a legal perspective the CREST systems expressly accommodates the fact that a different legal code governs the transfer of title of Irish constituted securities to that which governs the transfer of title in respect of securities constituted under the laws of England and Wales.

As with similar systems CREST is based on a set of rules and CREST Rule 13 defines the ‘CREST Irish system’ and the ‘CREST UK system’. Rule 13 sets out the legal distinction between the two systems. It expressly stipulates that for the purpose of Article 2(a) of the SFD the governing law of the CREST Irish system is Irish Law and that the relevant governing law of the CREST UK system is the English law. Consequently Irish law governs the transfer of title to Irish constituted securities.

Consequently, as the issue of the governing law has been expressly dealt with the Irish authorities have not experienced any cross-border problems arising as a result of confusion as regards the applicable law.

3. The Regulations do not define “institution” but define “credit institution” and “financial institution” instead.

There is a discrepancy between the Regulations and the SFD on this point as it is clear that the definitions of “credit institution” and “financial institution” in the Regulations do not correlate to the wording used to define “institution” in the SFD.

These terms are only used in the Regulations in the context of the definition of “member” which itself is the term used in the Regulations as an equivalent to the term “participant” in the SFD. (The Irish authorities had used the phrase ‘members’ as opposed to ‘participants’ in the Central Bank Act 1997 and consequently adopted the term ‘member’ instead of ‘participant’ for the purposes of continuity when implementing the SFD.)

The issue of concern with the discrepancy is that it is possible that a participant in a system, as envisaged by the SFD, may not be considered a member of a payment system under the Regulations. To date the Irish authorities have not experienced any significant practical difficulties on this issue.

As stated above, this discrepancy only applies in the context of definition of “member”, as this is the only place in the Regulations where the terms “credit institution” or “financial institution” are used instead of “institution”. Elsewhere in the Regulations the term “institution” is used and, where used, it is deemed, under Article 2(2) of the Regulations, to have the same meaning as it has in the SFD. This in itself causes a potential discrepancy, as

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the use of the term “institution” in such definitions as “settlement agent” and “central counter party” does not correspond to the definition of “credit institution” and “financial institution” in the definition of “member”. The Irish authorities have not experienced any practical issues or problems arising from this discrepancy to date.

4.7.3 Issues Resulting from Shortcomings of SFD

A. Scope of SFD

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.7.

- Scope of SFD: the Czech problem

See section 3.5.2.7.

B. Conflict of law rule:

- Transposition of Article 9(2) of the SFD

See section 3.8.7.

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4.8 Italy (IT)

4.8.1 Provisional conclusions

Italy uses several terms that differ from those used in the SFD but that generally have the same meaning. There are no significant transposition problems nor is there any incoherence in the general transposition of the SFD.

4.8.2 Issues regarding incorrect national implementation

Article 1 of the SFD was not explicitly transposed, but is indirectly contained in the provisions of Legislative Decree 210/2001.

As like in Denmark, the term ‘settlement account’ as referred to in Article 2 (1) of the SFD was not defined in the Legislative Decree, although it is used twice in it. Contrary to the Danish legislature, which did not consider it necessary to repeat this definition – among others - the fact that the number definitions contained in L.D. 210/2001, even exceeding the number of definitions in the SFD, shows that the Italian legislature’s failure to implement this definition was accidental.

However, such missing implementation does not cause any legal problems and can therefore be ignored.

4.8.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.8.

- Scope of the SFD: the Czech problem

See section 3.5.2.8.

B. Conflict of law rules

- Interpretation of Article 9 (2) of the SFD

See section 3.8.8.

In addition to Article 9 (1) of L.D. 210/2001, Article 9 (2) provides a special rule for where Italian law applies according to the PRIMA principle, and the book of account, the account or the administrative or centralised deposit systems are situated in Italy, but the financial instruments have not been entered into an Italian system for dematerialized instruments.

The wording of the provision is – probably for stylistic reasons – not very clear and the words administrative or centralised deposit systems would have to be repeated with regard to the Italian systems.

With respect to this amendment, the interpretation of this provision still remains unclear due to its ambiguity, which lead to the following understandings:

In the case that the dematerialization is denied for an Italian system, the application of the provisions concerning dematerialised financial instruments on paper financial instruments would lead to the creation of a fluent pledge

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on embodies financial instruments (e.g. covered warrants issued in the UK and introduced into the Montetitoli system by an Italian intermediary).

If the denial affects the Italian system, which means that the financial instruments have been introduced into a foreign system, Article 9, paragraph 2, of L.D. 210/2001 will only confirm the application of the PRIMA principle in this case. Further it provides general application of the provision regarding dematerialised financial instruments in Italian administrative or centralised deposit systems, which for the time being is only the system of Montetitoli. Such interpretation would be important with regard to the Eurolinks Network, in which Montetitoli, the Italian CDS, participates.

With regard to the above discussion a predominant view can now be determined that the Italian legislature intended the second interpretation and regulated only the perfection of collateral pursuant to Italian law on financial instruments issued in accordance with the Italian system of dematerialization in another legislation. Moreover, Article 9 (2) of L.D. 210/2001 also stipulates that, as far as applicable, Articles 28 to 46 of L.D. 213/1998 concerning the dematerialization of financial instruments applies to the establishment and transfer of such collaterals.

4.8.4 Other

Broader implementation by L.D. 210/2001

The Italian legislature has aimed at a broad transposition of the SFD in order to reduce the systemic risks as much as possible. For this reason and with reference to some particular aspects of Italian law, L.D. 210/2001 contains rules that go beyond what is stipulated in the SFD, and in particular:

The definition of 'institution' also contains the notion of 'public undertaking', which is added to the list of institutions contained in Article 2 (b) sentence 1 of the SFD. Although the SFD did not indicate public undertakings, they do take part in the Italian systems, for example Poste Italiane S.p.A. Furthermore Article 1(r) also provides a residual clause in order to cover all possible participants not covered by the other alternatives, subject to the condition that they can cause a systemic risk.

The list of participants (Article 2 (f) of the SFD) was amended in Article 1 (n) of L.D. 210/2001 by the guarantee systems, regarding the Italian Contracts Guarantee Fund and the Guaranteed Settlement Fund as defined in Article 1 (t) of L.D. 210/2001 These Funds are also subject to the provisions implementing Article 9 (1) of the SFD.

The Italian Legislative Decree introduced the concept of an 'intermediary', an indirect participant in the securities settlement system, in order to reduce the risks caused by their insolvency and thus protect the systems. A participant in the securities settlement system, executing restitution orders on behalf of the intermediary, has to perform its obligations towards the Italian system, even in the case of the insolvency of the intermediary. In order to avoid any risk to the system due to the responsibility of the participant for the intermediary, the Italian legislature has granted the participant the right to set off the credits due to the systems and its own credits due to the intermediary making use of the money or financial instruments received from the intermediary or in connection with the performance of the transfer order.

Determination of the moment of the opening of the insolvency proceedings

By slight contrast with the provisions of the SFD, but certainly within their scope, the time at which insolvency proceedings are opened is not the time when the relevant judicial or administrative authority hands down its decision, but the moment of the suspension of payments and restitution of third-party assets.

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The Treasury Ministry confirmed the intentional divergence of the Italian legislature from the wording of Article 6 (1) of the SFD, because the issue of the decision does not create a risk for the system, if it does not coincide with the suspension of payments and restitution. Therefore Article 3 states as follows:

Article 3 of L.D. 210/2001 – *Opening of the insolvency proceedings*

1. For the purpose of this legislative decree, the moment of the opening of an insolvency proceeding in Italy shall be the day, the hour and the minute when the suspension of payments of the liabilities and the suspension of the restitution of assets to third parties according to the provisions applicable to each single procedure will become effective.

2. In the case of a compulsory administrative liquidation as set forth by the Consolidated Banking Law and the Consolidated Law on Financial Intermediation, the effectiveness as defined in paragraph 1 shall start with the appointment of the liquidators and in any event on the third day following the date of the liquidation order. The moment of the appointment of the liquidators is determined by the Bank of Italy in accordance with the minute under section 85 of the Consolidated Banking Law.

3. In the case of an order by the judicial authorities, the effectiveness as defined in paragraph 1 shall start at the moment the decision is filed, which, for such purposes, has to be testified at the bottom [of the decision] by the clerk, indicating also the hour and minute of filing.

...

Article 3 (1)

Article 3 (1) lays down the general principle for the time of the opening of insolvency proceedings. Sub-articles 2 and 3 specify this general rule with reference to a compulsory administrative liquidation according to the Consolidated Banking Law and judicial proceedings.

By contrast with Article 6 (1) of the SFD, the general rule for determining the moment of the opening of insolvency proceedings does not make reference to a formal requirement such as the issue of the decision, but to the time the participant interrupts the performance of obligations to the systems, i.e. the suspension of payments of liabilities and the suspension of the restitution of assets to third parties. This is the material moment, which causes the systemic risk, the reduction of which is the aim of the SFD. This moment can coincide with formal requirements for the opening of insolvency proceedings (please refer to Article 3 (3) below), but this is not necessarily the case.

The formal act for the opening of the proceedings can also be prior to the effectiveness of the suspension of payments and restitution of assets to third parties by the participant and therefore prior to the creation of the systemic risk (please refer to Article 3 (2)). In particular, this is the case provided for by insolvency proceedings under the Consolidated Banking Law, which in general apply to almost all participants of the Italian systems, who are subject to Italian banking law. The divergence of the time of issue and the time the suspension is effective, a peculiarity of Italian law, ought to have been taken into account. The issue of the decision can be considered a preliminary phase prior to the real moment of the opening of the insolvency proceedings, which is important from the point of view of European law.

Furthermore, not all insolvency proceedings under Italian law result in a suspension of payments and of the restitution of assets causing a systemic risk but some also allow trading to continue without interruption under supervision of the competent authorities (as provided by Article 90 of the Consolidated Banking Law). In these cases, the opening of the insolvency proceedings does not cause any systemic risk as long as the business of the participant that is subject to these proceedings is continued as usual.

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The reference to the suspension of payments and restitution of assets also avoids any difficulties with regard to the interpretation of the determining factors for the state of insolvency, in general, a condition for the opening of insolvency proceedings.

A further argument supporting the decision of the Italian legislator is that the legal institution of the suspension of payments and restitution of financial instruments to clients according to Article 74 of the Consolidated Banking Law, indicated as one of the insolvency proceedings in the definition set forth in Article 1(p) of L.D. 210/2001, does not constitute a state of insolvency, but involves the systemic risk.

Similarly, it can be stated that, at the time of the order opening a compulsory administrative liquidation, it is not clear whether the liquidators will liquidate the institution or try a bail-out, which cannot be considered a real insolvency proceeding.

For the above reasons, and taking into account the scope of the SFD, the Italian legislature has decided to determine as moment of the opening of insolvency proceedings as being the time of the suspension of payments and of the restitution of assets to third parties. The Italian legislature hereby fully meets the intention giving rise to the SFD, which is to reduce the systemic risk resulting not only from insolvency proceedings in the fullest sense of the term, but also from other proceedings leading to a systemic risk due to a suspension of payment or restitution as shown by the respective definitions in Article 2(j) of the SFD.

With regard to the single types of insolvency proceedings, Articles 3 (2) and (3) determine such moment for compulsory administrative liquidation and judicial proceedings, also taking into consideration speed and their systems' requirement of stability. These provisions are therefore *lex specialis* as concerns the general provisions of Article 83 of the Consolidated Banking Law and Article 16 of the Italian Bankruptcy Law.

Article 3(2)

Compulsory administrative liquidation is one of the insolvency proceedings specifically indicated in the respective definitions in Article 1(p) of L.D. 210/2001.

The provisions regarding compulsory administrative liquidation are contained in Articles 80 *et seq.* of the Consolidated Banking Law. Article 57 of the Consolidated Law on Financial Intermediation makes reference to these provisions.

The entities subject to compulsory administrative liquidation include banks, securities investment firms and registered companies offering financial services.

The moment of the formal opening order for these proceedings does not coincide with the time at which the effects mentioned in Article 3 (1) are produced, which means the suspension of payments and of the restitution of third parties' assets.

According to one view, the date of the decree issued by the Treasury Ministry ordering the compulsory administrative liquidation (Article 80 of the Consolidated Banking Law) determines the moment of the opening of these proceedings, whereas, according to another view, this can be considered only preliminary, the opening of the proceedings being regarded as contemporaneous with the suspension of payments and restitution of assets and being effective only at a later time. The moment of suspension of payments generally provided for in Article 83 of the Consolidated Banking Law is now specifically determined for the payment and securities systems in Article 3 (2) of L.D. 210/2001 as time at which the liquidating bodies take up office.

According to the provisions of the Consolidated Banking Law, between the issuing of the ministerial decree and time it comes into effect, the Bank of Italy has to appoint the liquidators in terms of Article 81 of the Consolidated Banking Law, and the liquidators thus appointed then have to take up office by taking over the

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institution from the dissolved administrative bodies or from the ordinary liquidating bodies by means of a 'summary minute' (Article 85 (1) of the Consolidated Banking Law).

In accordance with Article 83 (1) of the Consolidated Banking Law concerning the effects of the decree on the bank, creditors and pre-existing legal relationships, Article 3 (2) determines the moment of suspension of payments as being the time when the liquidators take up office, which again is determined by the Bank of Italy on the basis of that which is set down in the summary minute of the liquidators. This summary minute has to contain the date and time of the beginning and of the end of the take-over by the liquidators. The take-over is a summary process consisting mainly of the hand-over of the company's books to the liquidators; the inventory is established afterwards. On the basis of this minute, the time the liquidators take up office is normally the moment of the beginning of the take-over of the institution as indicated in the minute.

The taking-up of office has to become effective within two days following the date issue of the ministerial order. Should it take more time for the liquidators to take up office, Article 3 (2) provides that zero hours on the third day following the issuing date shall be the moment of the opening of the insolvency proceedings.

Regarding certain practical issues, it is possible that the appointment of and taking-up of office by the liquidators may take more than two days, although in general the liquidators have in the past taken up office within that time.

Taking into account the fact that (i) it is not the Treasury Ministry that issues the liquidation order but rather the Bank of Italy that has to appoint the liquidators and, for this reason, the appointment follows the issue of the order and that (ii) the appointment requires further formalities such as checking reasons for incompatibility and the acceptance of the appointed persons, it cannot be ruled out at all that it might take more than two days for the liquidators to take up office. This leads to the conclusion that the three-day rule will apply, which means that the moment of the suspension of payments and restitution is the third day following the date of issue of the ministerial order, 00.00 hours. Such objective determination might even be a better solution, also regarding the possible problems at the moment the liquidators take up office and related problems of determining that exact moment.

The taking-up of office, and in particular the take-over of the institution, depends on the amount of business done by the institution and the co-operation of its former administrators. Although the minute has to indicate the exact time of the beginning of the take-over and its end, this might take some time as might the communication to the Bank of Italy. For precisely determining the take-up of office and the moment of the opening of the insolvency proceedings, it therefore might be appropriate that a representative of the Bank of Italy should be present when the liquidators take over the institution with a summary minute, also in order to ensure further communication to the Bank of Italy.

On the other hand, the three-day rule entails the risk that, if the order is issued on a Friday, the suspension of payments and restitution will become effective on Monday, 00.00 hours, which, due to the intervening weekend and if there is any missing information, might lead to the systems being unaware for some time. However, in this case, article 2 (1a) of L.D. 210/2001 will apply and certainly the competent authorities will have to ensure that the systems and other authorities will be informed.

Immediate notification of the opening of the insolvency proceedings by the liquidators to the Bank of Italy and by them to the other relevant authorities and systems is of great importance and will certainly have the most significant impact on the application of L.D. 210/2001.

In this regard, it is necessary to point out that the term "administrative authority" set forth in Article 3 (4) of L.D. 210/2001 has to be interpreted broadly: Although there are other persons involved in the insolvency proceedings, this sub-article only mentions judicial and administrative authorities as notifying bodies. The liquidators in charge of a cumulative administrative liquidation and the suspension of payments, both insolvency proceedings indicated under Article 1(p) of L.D. 210/2001, are only appointed by the administrative authority, but are not part

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of it. Due to the fact that it can be said that these are decisive for the time of opening the insolvency proceedings, they also have to have the right to communicate such an event to the Bank of Italy. With regard to the administrative character of the insolvency proceedings, they have to be considered an "administrative authority".

Article 3(3)

Judicial insolvency proceedings are bankruptcy proceedings (*fallimento*) according to the Italian Bankruptcy Act (Law no. 267 of 16 March 1942).

Regarding Italian institutions – only *agenti di cambio* are subject to bankruptcy proceedings (*fallimento*) because, in general, all other participants are subject to the proceedings as set forth in Consolidated Banking Law.

With regard to the moment of the opening of the bankruptcy proceedings, Italian law has intentionally not made reference to Article 16 of the Italian Bankruptcy Law regarding the decision to open bankruptcy proceedings (*fallimento*) due to the fact that the exact time of the opening is in dispute among Italian writers and the courts.

With regard to Article 16 of the Italian Bankruptcy Law, the different opinions take into consideration either the time of the decision or the date of deposit of the decision in the administrative office of the court in accordance with Article 133 of the Civil Procedure Code. Concerning the latter opinion, the exact time is also contentious: one opinion applies the zero-hour rule, whereas the other refers to the hour and precise time of filing the decision in the administrative office (chancery) in court. It can be stated that – in accordance with the zero-hour-rule – the majority view considers pursuant to Article 16 of the Italian Bankruptcy Law that the bankruptcy decision is effective as of 0.00 hours on the date of its filing in the administrative office in court.

The zero-hour rule, presuming the decision is effective as of 0.00 hours on the date of its filing, makes the decision retroactive, which is inconsistent with the principles of the finality of the transactions and the stability of systems.

In order to avoid this uncertainty under Article 16 of the Bankruptcy Law and especially to exclude the application of the zero-hour rule, it has to be highlighted that under Article 3(3), the exact moment (date, hour, minute) for the opening of the insolvency proceedings with regard to participants of payment and securities settlement systems it has been determined as follows: the court decision is filed in the administrative office of the court at the time (hour and minute) indicated by the clerk of the court administrative office at the bottom of the decision. From this moment onwards, payments are suspended as indicated in Article 3 (1) of L.D. 210/2001.

As set forth above, the exact moment of the opening of the insolvency proceedings has to be communicated immediately to the Bank of Italy by the judicial authorities (Article 3(4) of L.D. 210/2001), which in turn has to inform the systems and the other competent national and foreign authorities (Article 3(6) of L.D. 210/2001), and execution of L.D. 210/2001 seems to be fairly simple and secured. However, in this case as well, immediate notification is of great importance.

Please note that it seems that the intention of Italian law was to apply this provision only to the decision opening the bankruptcy proceedings (*fallimento*), although, according to the wording, other court decisions could be included such as a court decision pursuant to Article 195 of the Italian Bankruptcy Law, which provides for a special proceeding applicable to all participants in the systems.

According to Article 195, a court can ascertain by decision the state of insolvency of the company followed by the opening of the compulsory administrative liquidation provided for by the Consolidated Banking Law as described with regard to Article 3(2) above. In this special case, the application of Article 3 (3) would bring the moment of the opening of insolvency proceedings forward to a time when there is no systemic risk and prior to the binding decision of the Ministry of Treasury regarding the liquidation. Given that compulsory administrative liquidation proceedings, the insolvency proceeding provided for this case, follow the declaratory court decision,

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it is appropriate in consideration of the general rule to apply Article 3(2) to the administrative proceedings and not sub-article 3 to the court decision.

Further Comments

Article 3 of L.D. 210/2001 determines the moment of the suspension of payments and restitution for compulsory administrative liquidation and judicial proceedings, but not for the other insolvency proceedings as indicated in Article 1(p) of L.D. 210/2001, such as the suspension of payments as set forth in Article 74 of the Consolidated Banking Law referred to by Article 56 of the Consolidated Law on Financial Intermediation.

Article 74 of the Consolidated Banking Law does not indicate the moment at which the suspension of payments comes into effect. Suspension becomes effective upon its being executed by the liquidators, but execution requires no communication or other significant indication fixing the exact time as provided for in Article 3(1) of L.D. 210/2001 due to the fact that this is the last step after certain formalities have been complied with (order by the Bank of Italy, approval thereof by the supervisory authority).

The lack of a special legal provision concerning the suspension of payments does not create any problems due to the fact that the special administrator is required under Articles 3 (1) and 3 (4) of L.D. 210/2001 to assess the timing of the effectiveness of the suspension of payments, and to immediately inform the Bank of Italy. Furthermore, the Bank of Italy directly controls such proceedings and is empowered under Article 74 of the Consolidated Banking Law to give instructions to the liquidators. Additionally, the fact that the Bank of Italy also directly authorizes the decision of the liquidators to suspend payments guarantees immediate notification to the Bank of Italy and the Italian systems.

Finally, it has to be highlighted that Article 3 of L.D. 210/2001 not only deals with the moment of the opening of Italian insolvency proceedings, but also provides rules regarding the moment at which insolvency proceedings opened in other Member States or states outside the European Union are to be considered effective in Italy. Article 3 (7) considers the moment of the opening of the insolvency proceedings in another Member State of the European Union as being the day, the hour and the minute at which the insolvency proceedings take effect. For insolvency proceedings opened in third states producing effects in Italy, the moment of the opening of such proceedings is legally presumed to be the time at which the Italian systems are informed (Article 3 (8) of L.D. 210/2001).

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4.9 Luxembourg (LU)

4.9.1 Provisional conclusions

Luxembourg fully complies with the requirements of the SFD and has adopted several provisions that go beyond what is stipulated in the SFD.

Originally in the Parliamentary bill, only the CSSF was deemed to hold supervisory powers, as it was expressed that the CSSF was well placed to expand its surveillance to these systems as the participants are already subject to their prudential supervision. Additionally, as the CSSF is not involved in the management or the operation of these systems, they are therefore not exposed to possible conflicts of interest.

The European Central Bank (the “ECB”) and the Banque Centrale du Luxembourg (“BCL”) have expressed the opinion that there could be a conflicting situation between the BCL and the CSSF concerning the supervisory function that the BCL continues to assume within the framework of the Eurosystem, in accordance with the Treaty.

Taking into account the comments of the ECB and the BCL, the Luxembourg legislators reallocated the competencies between the CSSF and the BCL. Indeed, it was concluded in the “Rapport de la Commission des Finances et du Budget” that the Luxembourg government has amended the initial parliamentary bill recognising the sole competence of the BCL in all systems within which they participate, i.e. the most important systems. The scope of prudential supervision reserved for the CSSF is practically limited to the bilateral systems, in which the BCL do not participate.

The Conseil d’Etat in its opinion considered that *“given the separation which exists in our country between prudential control and oversight of payment systems, the amended text is acceptable. The inherent risks in the systems with the private credit institutions as participants come primarily under the supervision of the CSSF”*.

Accordingly, the Luxembourg government authorities are comfortable that due to the allocation of powers, no discrepancies should arise as a consequence of the dual authorisation and supervision powers of the BCL and the CSSF regarding the prudential control and oversight of the payment systems³⁰. In order to coordinate their actions if so needed, laws pertaining to both the CSSF and the BCL provide for possible exchange of information.

4.9.2 Issues regarding incorrect national implementation

We consider that there are no discrepancies with respect to the implementation of the SFD on a national level as Luxembourg has complied with the SFD.

4.9.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See 3.5.1.9.

- Scope of the SFD: The Czech problem

See 3.5.2.9.

³⁰ Article 47-1 of the Act of 12 January 2001

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- Scope of the SFD: Criteria for protection

a. Appointment of a system operator

According to Article 34 (4) of the Luxembourg Act transposing Article 2 a) of the SFD (A:2, N:a, S:1), “a formal arrangement may be authorised as a payment or securities settlement system where:

○ it is between three or more participants, not including a settlement agent, a central counter party, a clearing house or an indirect participant, with common rules and standardised arrangements for the execution of transfer orders between the participants,

○ the participants have chosen to submit to Luxembourg law,

○ at least one of its participants is a legal entity whose registered office is in Luxembourg,

○ it designates a system operator”.

As such, the Act requires an additional condition to the SFD, which is the formal designation of a ‘systems operator’. Systems operators are a new category of Professionals of the Financial Sector (PSF), which are regulated professionals.

Luxembourg has exercised the option to impose authorisation and supervision requirements on the systems, and on systems operators, who wish to benefit from the protection of the Act. However, according to Article 34-3 the chapter regarding the authorisation to be requested in order to benefit from the protection of the Act does not apply to payment and securities settlement systems governed by Luxembourg law whose participants are the Central Bank of Luxembourg or any other entity that is part of the European system of central banks. These systems are deemed to be authorised in Luxembourg as from the time they are notified by the Central Bank of Luxembourg to the European Commission.

b. The dual authorisation and supervision powers of the CSSF and the BCL

For general comments please see the provisional conclusion.

Article 47-1 of the Luxembourg Act regarding the prudential supervision of payment and securities settlement systems authorised in Luxembourg states the following: “Without prejudice to the tasks and powers bestowed upon the European system of central banks by the Treaty setting up the European Community and by the statutes of the European system of central banks and by the European Central Bank, in addition to those assigned to the Central Bank of Luxembourg, the Commission is the competent authority for the prudential supervision of payment and securities settlement systems authorised by the Ministry. This supervision, which covers the operational and financial stability of each system, as well as the participants in the system, has the objective of providing stability to the financial system in its entirety. In this respect, the Commission³¹ watches over the application of operating rules and the implementation of settlement procedures and risk management procedures that are encompassed within the systems it supervises.”

New third and fourth sentences were included in Article 52 (I) of the Luxembourg Act of 1993:

“The Commission, in addition, is responsible for the official table of the payment and securities settlement systems authorised by the Ministry. The official table also includes the payment and securities settlement systems authorised by the Central Bank of Luxembourg to the European Commission by virtue of Article 34-3”.

³¹ i.e the CSSF

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B. Conflict of Law rules

- Interpretation of Article 9 (2) of the SFD.

See section 3.8.9.

C. Additional comments

- Prohibition of seizure of settlement account

The Luxembourg Act contains one part that is not a direct transposition of an equivalent provision of the SFD. As such, Article A: 61-2 (5) of the Luxembourg Act states that no settlement account with a system operator or a settlement agent may be seized, sequestered or frozen in any manner whatsoever by a participant (other than the system operator or a settlement agent), a counter party or any third party.

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4.10 The Netherlands (NL)

4.10.1 Provisional conclusions

The Netherlands comply with the SFD subject to the specifications and interpretations mentioned below.

4.10.2 Issues regarding incorrect national implementation

- PRIMA conflict of law rule

In view of future legislation as presented in the Report of the Royal Committee on Private International Law (article 14), the PRIMA-rule is to be broadly implemented. This is confirmed in footnote 165 on page 53 of the Bernasconi Report.

In respect of the identification of the “relevant intermediary”, no other problems are known to arise than the general ones mentioned by the Bernasconi Report. The Super-PRIMA conflict of rules is not opted for. A problem such as the one that has led to the tripartite agreement between NBB, CIK and Cleartnet as referred to in section 3.6.1c) does not for that matter exist in The Netherlands. The “relevant intermediary” as referred to in article 9(2) of the SFD would then be Necigef.

- Narrow interpretation of the SFD

Articles 9(2) and 8 of the SFD have not been broadly implemented. As is mentioned above, future legislation will broadly implement the PRIMA conflict of rules, thereby indirectly broadly “implementing” article 9(2) of the SFD (see also 3.8.10.1).

4.10.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.10.

On 1 July 2002, the Credit System Supervision Act and the Bankruptcy Act were amended to implement Directive 2000/46/EC. E-money institutions or companies may now be exempted/discharged by the Minister of Finance. Such exemption/discharge can be subject to provisions. A point to note is whether the provisions of section 70 of Credit System Supervision Act apply to exempted or discharged institutions or companies. Therefore all exemptions or discharges have to specify whether the institution or company will fall within the scope of section 70 of the Credit System Supervision Act or the provisions of the in Bankruptcy Act on the suspension of payments. From the system under the Credit System Supervision Act, it maybe inferred that such credit institutions or companies do not fall within the scope of the provisions concerning mutual recognition and therefore do not have a ‘European Passport.’ Such credit institutions or companies exempted or discharged in another Member State are likewise not allowed to open a branch office in the Netherlands.

B. Conflict of Law Rules

- Cumulative application of Dutch and French Law; the Cleartnet System

See section 3.6.4.

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Although The Netherlands deals as regards Clearnet with the same systems and groups as Belgium and France, it is noted that on for instance the operational level the Dutch part of the operation currently is dealt with in a slightly different way than the Belgian and French parts. This is clearly stated in for example art. 1.6.3.6 of the Common Provisions of Clearnet and for an example of the practical implication resulting there from, reference is made to Instruction I.5-1³² articles 4, 5 and 6. The Clearnet local provisions as regard The Netherlands also deviate in respect of the more equal Clearnet provision regarding France and Belgium.³³ As such the Dutch analysis may sometimes be different.

Clearnet is a system governed by French law. Clearnet S.A. has gone through the notification procedure as referred to in sections 31 and 32 of the Act on the Supervision of the Credit System 1992 (“Credit System Supervision Act”), on the basis of which it may open a branch office in the Netherlands and may carry on the business of a credit institution. The former designated systems are still to be withdrawn officially. On the basis of the Euronext Clearing Rule Book per 29 April 2002, the legal relationships between Clearnet and its Members are governed by French law. In the framework of the Clearnet clearing system, in the case of *e.g.* securities on financial instruments granted by Dutch clearing members of Clearnet, entered in an account, register or centralized deposit on behalf of Clearnet in the Netherlands with Necigef, Dutch law will apply as regards the validity and enforceability of the securities on those financial instruments, on the basis of section 212f Bankruptcy Act. However, *lex contractus* will govern the contractual procedures for constituting the securities. From the applicable Euronext Clearing Rule Book rules, it cannot indisputably be concluded without further specification whether Dutch or French law is the *lex contractus*.

In cases such as *e.g.* securities on financial instruments granted by Dutch clearing members of Clearnet, entered in an account, register or centralized deposit on behalf of Clearnet in the Netherlands with Necigef, when Dutch law will apply as regards the validity and enforceability of the securities on those financial instruments, on the basis of section 212f Bankruptcy Act, it is advised just like in the Belgian situation, to submit the securities granted by the Dutch clearing members explicitly to Dutch law, so as to avoid the possible applicability of both Dutch and French law to securities that have been granted, whether it is Dutch or French law that is the *lex contractus*.

However, this interpretation may still lead to important problems with respect to, amongst other things, the use of standardised contracts such as ISMA and the “Global Master Repurchase Agreement” governed by English law.

- SFD Insolvency Regulation

The Dutch situation is similar to the Belgian situation discussed under the Clearnet situation (see section 3.6.10.1.D). According to both the SFD (art. 8) and the insolvency regulation³⁴ (art.4 jo 9) the rights and obligations in connection with the participation of a participant in a system will in case of insolvency proceedings being opened against that participant be governed by the law of the Member State applicable to that system. The SFD and the Insolvency Regulation both exclude this law governing the realisation of securities located in another Member State (art. 5(1) Insolvency Regulation and Article 9(2) SFD). The law of the most relevant intermediary prevails over the law of the system, which continues to apply to questions linked to the other rights and obligations flowing from participation in the system by the insolvent participant. The law applicable to a system is only relevant for the protection of payments (including netting and securities transactions) in the

³² Instruction I.5-1, articles 4, 5 and 6, as has been published in Notice 2002-0036, 3 April 2002

³³ See The Netherlands Transposition Table

³⁴ Council Regulation N° 1346/2000 of 29 May 2000 on Insolvency Proceedings, *Official Journal L 160*, 30/06/2000, P. 0001-0018

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system. If e.g. a Dutch participant to a French system goes bankrupt, but has collateral in favour of the system in Luxemburg, the finality of payments will be dealt with under French law. Luxemburg law will be applicable to collateral realisation. Dutch law will organise the bankruptcy procedure.

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4.11 Austria (ÖS)

4.11.1 Provisional conclusion

Austria complies almost fully with the requirements of the SFD as the SFD was transposed into Austrian law nearly word for word. The differences between the SFD and the Finality Act are only in syntax and so the different words used cover the requirements of the SFD with full scope.

4.11.2 Issues regarding incorrect national implementation

No such issues could be identified.

4.11.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See 3.5.1.11

- Scope of the SFD: The Czech Problem

See 3.5.2.11.

B. Conflict of law rules

- Transposition of Article 9 (2) of the SFD

See section 3.8.11.

4.11.4 Narrow interpretation of the SFD

The possibilities granted by Article 4 sentences 1 and 2 of the SFD were not applied in Austrian law.

4.11.5 Transposing rules that go beyond what is stipulated in the SFD

With reference to Article 2 (f) sentence 3 of the SFD, only the Austrian National Bank can determine whether an indirect participant is considered as a participant. In other words, the Austrian National Bank decides who is authorised as an indirect participant. An authorisation of the Austrian National Bank is thus necessary, and the system should be subject to Austrian law.

Furthermore, for the participants to qualify as an 'institution' in the sense of Article 2 (b) sentence 2 of the SFD, an authorisation by the Austrian National Bank is also necessary.

When the duty to inform the Austrian National Bank about status or changes in status as a participant of a system is not obtempered, Austrian law provides for a specific fine amounting to up to EUR 21,800.

The expression 'warranted on grounds of systemic risk' in Article 2 (a) sentence 2 of the SFD is replaced by 'prevention of possible systemic risk' with the same meaning and consequences.

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4.12 Portugal (PO)

4.12.1 Provisional conclusions

Portugal complies with the requirements of the SFD, except for Article 9 (2) of the SFD, which was transposed incompletely. Several concepts of the SFD were not explicitly transposed into Portuguese law but their definition can generally be extracted from other concepts in Portuguese law. Only one issue remains unclear after examination of the transposing legislation.

4.12.2 Issues regarding incomplete or incorrect transposition

A. Terminological discrepancies

None of the terminological discrepancies lie at the basis of any real issues. The following discrepancies have been identified.

- The concept of “netting” referred to in Article 2 (k) of the SFD was not transposed either by Decree-law no. 486/99, of 13 December 1999 or by Decree-law no. 221/2000. Nevertheless, we can extract this definition from the clearing house concept in Decree-law no. 221/2000 and from article 847° of the Civil Code, which reads as follows:

“When two persons are mutually debtor and creditor, either one of them can extinguish its obligation through the netting with the other party’s obligation.”

As such, when the SFD became binding on Portugal, its national legislation already complied with the netting definition in Articles 847 *et seq.* of the Civil Code. Therefore, no new legislation was needed in this respect.

- The concept of “settlement account” referred to in Article 2 (l) of the SFD was not transposed due to the codifying nature of Decree-law no. 486/99 (a collection of standards). However, Decree-law no. 486/99 has taken into account the existence of such accounts in regulating this matter. As referred to above, transposition of the SFD was effected by means of two Decree-laws (Decree-law no. 486/99 regarding securities settlement systems and Decree-law no. 221/2000 regarding payment systems). Decree-law no. 221/2000 transposed this provision, but only with regard to financial settlement (this Decree-law refers to payment systems only).

The concept of “collateral security” referred to in Article 2 (m) of the SFD is not defined in Decree-law no. 486/99 for the above reasons (this decree-law deals with the Securities Code). However, this decree-law does regulate this matter in other provisions and its scope complies with the definition provided by the SFD. Decree-law no. 221/2000 transposed this provision in a similar way. As regards the European Central Bank, no reference was needed taking into account the scope of the Decree-law (Article 1 (2) (c)), which covers the collateral provided in connection with the operations of the European Central Bank.

Regarding the definition of securities, Portuguese law, more specifically Decree-law no. 486/99 (Portuguese Securities Code), gives some examples of securities.

However this is not a limitative enumeration: the Portuguese law establishes that the Portuguese authorities, the Portuguese Securities Market Commission by way of regulation, and the bank of Portugal by way of notice, may discretionarily recognize other financial instruments as securities, in addition to the securities referred in the Portuguese Securities Code (CVM).

Hence, assets such as “créances Dailly” or bills of exchange could eventually be recognised as securities by the Portuguese authorities, in accordance with their power of discretion.

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Please note that this problem would only be relevant with regard to Decree-law no. 486/99, since the concept of securities in Decree-law no. 221/2000 is almost an exact translation of the SFD (see section 3.4.12.1).

B. Conflict of law rules

In our opinion, Decree-law no. 486/99 effected an incomplete transposition of Article 9 (2) of the SFD, as it is more restrictive than the SFD. This Decree-law has more specific requirements than the SFD. It is only applicable if the collateral securities have been registered or deposited in a centralized system, while the SFD intended to extend its scope to collateral securities that are recorded on a register, account or centralised deposit system. This means that the present provision of the CVM (Act 1) is not applicable to collateral securities deposited or recorded on a register out of a centralized system. In practice, there is a discrepancy between the SFD and the Decree-law, as the Decree-law, unlike the SFD, does not cover collateral securities deposited or recorded on a register out of a centralized system.

Thus, in our opinion, the Portuguese provisions limit the connection criteria as regards the choice of the applicable law to the rights of holders of securities, i.e. according to Portuguese law it is only possible to choose the law of the Member State where the collateral securities are registered or deposited in a centralized system and not, as foreseen in the SFD, to choose between the criteria mentioned and the law of the Member State where the collateral securities are deposited or recorded on a register or on an account.

However, according to the opinion of the CMVM, subparagraph (b) of art. 41 of Decree-law 486/99 is applicable if a security is recorded in a register out of a centralized system.

This article sets out the law applicable to securities not integrated in a centralized system, establishing in these cases a connection to the law of the Member State in which the intermediary where the securities are registered or deposited is located. So, the protective regime is also applicable to securities not integrated in a centralized system. However, we understand that it would be more accurate to insert into art. 284 a provision regarding the securities not integrated in a non-centralized system, as such would prevent future discussions regarding the applicability of no. 1 of art. 284 to the collateral securities provided out of a centralized system.

4.12.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Portuguese Payment and Settlement Systems included in the scope of the SFD

The Portuguese Securities Commission (CMVM) is the relevant authority for notifying the European Commission of the securities systems recognized by it.

According to information obtained from the Bank of Portugal, three payment systems have been notified.

Regarding the securities settlement systems, we have again contacted the Portuguese Securities Commission, and they have confirmed that they do not know which settlement systems were notified to the commission or when they were notified.

Nevertheless, in our last contact, the Portuguese Securities Commission confirmed the existence of three settlement systems, which are managed by Interbolsa as follows:

- 1 - Sistema de Liquidação Geral (General Settlement System)
- 2 - Sistema de Liquidação Plus (Plus Settlement System)
- 3 - Sistema de Liquidação Real Time (Real Time Settlement System)

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However, the Portuguese Securities Commission only recognizes the systems managed by Interbolsa, so as regards the settlement systems referred to above, Interbolsa is the management entity.

B. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.12.

- Scope of the SFD: the Czech problem

See section 3.5.2.12.

C. Conflict of law rules

- Transposition of Article 9 (2) of the SFD

See section 3.8.12.

4.12.4 Transposing rules that go beyond what is stipulated in the SFD

Decree-law no. 221/2000 of 9 September 2000 extends the scope of Article 1 (c) of the SFD to collateral securities provided in connection with the operations of the European Central Bank. However, as far as we are aware, this does not result in any practical implications.

Moreover, the Portuguese Securities Code established more cumulative requirements to be fulfilled than are provided for in Article 2 (a) sentence 1 of the SFD, as follows: *“whose managing company, where existing, has its effective head office in Portugal; Portuguese law is applicable in accordance with an express clause of the respective constitutive agreement; have adopted rules compatible with Portuguese law (provisions of the Securities Portuguese Commission and Bank of Portugal)”*.

The Portuguese provision limits the connection criteria as regards the application of Portuguese law to the choice of the law applicable to the rights of the security-holders, i.e., according to Portuguese law it is only possible to choose the law of the Member State where the collateral securities are registered or deposited in a centralized system and not, as foreseen in the SFD, to choose between the criteria mentioned and the law of the Member State where the collateral securities are deposited or recorded on a register or on an account.

The Portuguese provisions regarding the concept of bankruptcy proceedings are broad, as the national provisions do not refer exclusively to bankruptcy proceedings but also to an action for recovery of the company or an equivalent decision.

Both Decree-laws transposed Article 8 of the SFD. However, Decree-law no. 221/2000 effected a more detailed transposition than the SFD, as it safeguarded the special rules relative to the law applicable to the rights of holders of collateral securities constituted by securities or rights in securities. However, the Bank of Portugal has informed us that, as regards the special rules relating to the rights of the holders of collateral securities, this provision does not correspond to the final version proposed by the Bank of Portugal and it is not clear to them what is meant by special laws. However, as far as we are aware, this does not result in any practical implications.

Decree-law no 221/2000 with regard to payment systems, contains one Article that is not a direct transposition of an equivalent provision of the SFD, more precisely Article 7 of this Decree-law, which stipulates that the balance of the settlement accounts can only be pledged or subjected to a preventive measure if there are other suitable

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assets in the equity of the account-holder institution that serve the same purpose. This protective provision goes beyond what is stipulated in the SFD.

Besides the circumstance of the collateral securities not being affected by the opening of the bankruptcy process, reverting the remaining balance only to the bankrupt estate, the balance of the settlement account also can only be pledged if there are no other assets suitable for the same purpose.

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4.13 Finland (SF)

4.13.1 Provisional conclusions

Finland complies with the requirements of the SFD. In many instances, the scope of the transposing Act is broader than that which the SFD requires. As such:

- The definition of a “system” is broader than in the SFD;
- The Act is applied to the participants in a system in general (they do not have to meet the conditions set by the SFD). Thus, the Finnish Implementing Act provides protection for EMIs. Furthermore, the Czech problem is not an issue;
- The Act is applied to netting regardless of whether it has been carried out in a settlement system;
- The Act regulates the effects of netting on execution;
- The Act contains detailed provisions about the required rules of the system.

The most problematic areas are the sections implementing Article 9(2) of the SFD, which are not in accordance with the Hague Convention.

4.13.2 Issues regarding incorrect national implementation

We have not recognised any incomplete or incorrect transposition. However, the definitions of Article 2(b), (c), (d), (e), (g), (i) and (m) of the SFD have not been implemented explicitly. It should be noted that this does not constitute an incomplete transposition, as the broad definitions in the Finnish Act can be deemed to include the concepts defined in the SFD.

4.13.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.13.

- Scope of the SFD: the Czech problem

See section 3.5.2.13.

B. Conflict of Law rules

- Transposition of Article 9(2) of the SFD

See section 3.8.13.

Article 9(2) of the SFD was implemented by section 12, paragraph 3, of the transposing Act and section 5a, paragraph 4, of the Act on Book-Entry Accounts.

Pursuant to section 12, paragraph 3, of the transposing Act, *“if no certificate has been issued for a security or if it has been deposited with a deposit system, a pledge or other right on the security shall be governed by the laws of the country in which the right has been entered in a register or in an account. The law applicable to a right to a book-entry is governed by the provisions of section 5 a, paragraph 4 of the Act on Book-Entry Accounts”*. Pursuant to this section, *“if the holder of a custodial nominee account or a client of the holder keeps a register or an account of the rights pertaining to book-entries in another state, the law of that state shall be applicable to the rights of a right holder, unless the registrations pertaining to the account state otherwise”*.

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The custodial nominee accounts may be fungible accounts (omnibus accounts) or non-fungible accounts.

According to the Government's Proposal (through which the Act is to be interpreted), *lex rei sitae* is the generally accepted legal principle as to the applicable law in connection with proprietary aspects of a securities transaction. However, it is not always easy to define the *situs* of a security with no certificate. A book entry issued in Finland will always continue to be recorded in the Finnish Central Securities Depository even if it is, through custodial nominee accounts, in principle held in another state. Even before the implementation of the SFD, the applicable law to the proprietary issues relating to a securities holding recorded in a custodial nominee account has generally been accepted as being the law of that other state. Section 12, paragraph 3, of the Act and section 5a, paragraph 4, of the Act on Book Entry Accounts are an expression of this principle.

In cases where *the security is not in a book-entry form* but no certificate has been issued for a security or the security has been deposited with a deposit system, a pledge or other right on the security is governed by the laws of the country in which the right has been entered in a register or in an account (section 12, paragraph 3, of the Act). To our understanding, this approach corresponds to PRIMA.

As to *securities in a book-entry form*, section 5a, paragraph 4, of the Act on Book Entry Accounts is applied. As can be seen from the section 5a, paragraph 4 of the Act on Book Entry Accounts, a version of the PRIMA approach has been adopted: If the holder of a custodial nominee account or a client of the holder keeps a register or an account of the rights pertaining to book-entries in another state, the law of that state is applicable (section 5a, paragraph 4, of the Act on Book Entry Accounts). Thus, based on the wording of the Act together with the Government's Proposal, the applicable law is that of the state where the register or the account is kept. However, if the interest in the security is recorded in a custodial nominee account in this second state and the holder thereof is in a third state, the private international law of the second state decides the applicable law. Thus, the Act recognizes the common practice of lengthy custody chains which may include several PRIMAs depending on which custodial relation is scrutinized. This principle was also reflected in the preparations for the Hague Convention. As the Act was drafted well before the preparations for the Hague Convention had even begun, there are naturally significant differences between the wordings of the Act and the Convention as there are between the Hague Convention and Article 9(2) of the SFD.

An example: a security issued in Finland is recorded in a custodial nominee account in the Finnish Central Securities Depository whose account holder is the Swedish Central Securities Depository. Swedish law governs the pledges and other rights related to the security. If the interest in the securities is recorded in Sweden on an omnibus account whose holder keeps a register or an account of the rights pertaining to book-entries in a third state, the applicable law is based on the Swedish private international law rules. . In this case there are at least three PRIMAs: first between the Finnish Central Securities Depository and the Swedish Central Securities Depository, second between the Swedish Central Securities Depository and the omnibus account holder and the third between the omnibus account holder and its customers.

However, pursuant to section 5a, paragraph 4, of the Act on Book-Entry Accounts, the law of the foreign state is applicable "unless the registrations pertaining to the account state provide otherwise". According to the Government's Proposal, this means that the express registrations in the Finnish book-entry system always prevail in the case that there is a conflict with a foreign law. *E.g.* the amount of book entries in an account is determined by the Finnish account if the amount differs from that in the register or account held in another state.

It should be noted that, based on the wording of section 12, paragraph 3, of the transposing Act, the laws of the country where the security "has been entered in a register or in an account" is applied. The wording of the SFD also includes centralised deposit systems. However, the Government's Proposal implies that the section is to be interpreted in the same way as the SFD. Thus, the wording will not constitute a discrepancy from the SFD.

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The Act goes beyond what is required in the SFD. According to Government's Proposal, the scope of section 5a, paragraph 4, of the Act on Book-Entry Accounts is broader than the SFD, as the Act governs the rights pertaining to book-entries more generally, whereas the relevant SFD provision is applied only where the securities are provided as collateral security to participants and/or central banks of the Member States or the European Central Bank. Furthermore, it should be noted that the scope of the Act is not qualified by the definition of collateral security, as that term is not defined in the transposing Act.

Section 12, paragraph 3, of the Act and section 5a, paragraph 4, of the Act on Book-Entry Accounts govern the proprietary aspects of the transaction. The section does not have an effect on the law of the contract (*lex contractus*). Furthermore, it might be possible that the laws of the country where insolvency proceedings take place could govern certain rights in connection with the proceedings. According to a general principle, the procedural rules and *e.g.* ranking order of the preferential creditors are based on the laws of the country where the bankruptcy proceedings take place.

4.13.4 Transposing rules that go beyond what is stipulated in the SFD

The transposing Act is applied to the netting and other settlement of payments and other obligations in a *settlement system* as well as to the netting of obligations to pay and deliver relating to trading in securities, derivatives and currency and *not carried out in a settlement system*.

The definition of a settlement system in the transposing Act is significantly broader than that referred to in the SFD. In addition to the systems described in the SFD, the Act is applied to

- (i) systems comparable thereto subject to an approval by the Ministry of Finance;
- (ii) settlement systems maintained by Finnish credit institutions, clearing houses, option corporations or comparable foreign organizations;
- (iii) settlement systems that determine and execute monetary obligations and transfers the covers of payment systems through an account with a central bank.

The wording of the transposing Act might, in theoretical and unlikely circumstances, cover also systems that would not meet the conditions set out in the SFD if they do not include systemic risk, but the main scope of application, namely payment systems, securities settlement systems and derivatives clearing systems, are systems within the meaning of the SFD. Also, all the systems within the meaning of the SFD are systems within the meaning of the Act.

The transposing Act is applied to the netting of obligations, relating to trading in securities, derivatives and currency, carried out between two participants. Thus, an arrangement of two contracting parties need not be designated as a settlement system, unlike the requirements of the SFD, to be included in the scope of application. However, the obligations to be netted need to relate to trading in securities, derivatives and currency. Furthermore, the parties need to have a standardised contract, pursuant to which the obligations are to be netted as prescribed in the Act. The reference to the standard nature of the contract term sets a requirement according to which the contract shall follow a generally accepted and widely used documentation such as ISDA Model Agreement. The purpose of the application of the Act to contractual netting agreements is to secure the netting provisions in globally used standard documents. Purely bilateral tailored arrangements intended to harm creditors are not covered by the Act. Thus, in practice, the Act is applicable to trading in investment instruments between two parties that have agreed to net the obligations related thereto if they use standard documentation.

Also, the transposing Act regulates the effects of netting on execution, while the SFD is not applied to the execution procedure of a participant. Furthermore, the Act contains detailed provisions about the required rules of the settlement system.

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4.14 Sweden (SV)

4.14.1 Provisional conclusions

Sweden complies almost fully with the requirements of the SFD only with regard to the definitions of participants. There might be a discrepancy in that the Swedish Implementing Act might lead to the consequence that systems that would have been covered by the scope of the SFD will not be considered as covered by the scope of the Implementing Act. Furthermore the Swedish Implementing Act imposes the requirement for systems to have an administrator which may lead to the consequence that systems that may be considered as falling under the scope of the SFD in other Member States, does not qualify as systems under the Swedish Implementing Act.

4.14.2 Issues regarding incorrect restrictive or broad national implementation

- Restrictive transposition; Scope of the Implementing Act; the definition of participants

The definition of ‘participants’ in a system under Article 2 (f) sentences 1 and 2 of the SFD has been implemented under Swedish law by using already existing legal concepts instead of repeating the definitions in the SFD of institutions, central counter parties, settlement agents or clearing houses, but the existing legal concepts cover the terms of the definition in the SFD, in that an Administrator of a participant may have the role of a for example a CCP or a settlement agent. Implementation under Swedish law has been done with reference to undertakings which already carry on regulated business activities under Swedish law such as the Swedish Central Bank, the Swedish National Debt Office or foreign undertakings carrying on the same kinds of operations, clearing organisations, the central security depository, other undertakings that carrying on business activities under the Banking Business Act or the Security Operating Act or any foreign undertaking that conducts such business as described above if it is adequately supervised by a public authority or other proper body in their home country. Since foreign undertakings can also be participants in a Settlement System governed by Swedish law, it is clear that cross-border payments are covered by the scope of the SFD under Swedish law.

As compared to the definition under the SFD of « system » which also covers systems with participants that are either covered by the definition of an institution or by either of the definition of « settlement agent », « central counterparty », « clearing house », or « indirect participant », the Swedish implementation seems to exclude systems with both types of entities, i.e. entities covered by the definition under the SFD as « institution » and entities covered by the definition in the SFD as « settlement agent » etc, unless the later also belong to one of the entity types referred to under the Implementing Act as a « participant ».

Participants in a system according to the Swedish Implementing Act may apart from the Swedish Central Bank and the Swedish National Debts Office be the following entities;

- *clearing organisations* which are undertakings that has been licensed to conduct clearing operations such as effecting net settlements on behalf of clearing members regarding their obligations to deliver financial instruments or to make payments in Swedish or foreign currency; or guaranteeing the performance of obligations by entering into agreements or acting as guarantor; or in some other significant manner causing obligations to be settled through the transfer of funds or instruments,
- *central security depositories* by which is meant an undertaking which has been authorised to maintain accounts of financial instruments in Swedish CSD registers,
- *companies with a licences* to conduct business such as account receipt on deposits and when the balance is available for the depositor at short notice,
- *companies with a licence* for trading in financial instruments in its own name on behalf of another party.

- Wider transposition; Scope of the Implementing Act; legally binding effect of transfer orders entered into a system after the opening of an insolvency proceeding

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The term ‘netting’ referred to in Article 2 (k) of the SFD has been implemented under Swedish law as also covering close-out netting in a Settlement System, i.e. settlement of non-mature obligations since the rules have to cover every form of netting effected in a notified Settlement System. As bilateral netting, netting in a Settlement System has to be considered as based on contractual grounds. In order for the rule to be applicable, the netting must be done according to the rules of the Settlement System. Netting in a notified settlement system based on contractual grounds is legally enforceable against third parties as long as the netting is done in accordance with the rules of the system.

The definition under Article 3 (1) sentence 2 of the SFD determining when a transfer order is enforceable if it has been entered into the system (after the moment of the opening of an insolvency procedure) has been interpreted under Swedish law as a minimum requirement. This means that the procedure currently applied to the settlement of financial instruments and securities, where the settlement of a transaction is normally done on the third day after the closing of the transaction, will be covered by the scope of the SFD.

A transfer order that is entered into the system after the opening of an insolvency procedure but before the settlement day will thus be settled even if the settlement is not done on the same day as the opening of the insolvency procedure. According to the Swedish Financial Instruments Account Act, a transfer of such instruments is enforceable against third parties where the transfer has been registered. A transaction involving the transfer of financial instruments can thus be settled several days after the opening of an insolvency procedure provided that the transfer was registered before the opening of the insolvency procedure.

Interpretation of the provision as a minimum requirement allows for the continued settlement of financial instruments and securities in situations where settlement was possible before the implementation of the SFD. In accordance with the purpose (ratio legis) of the SFD, which was to reduce risks to participants in settlement systems, this interpretation has been given more weight than a strictly semantic interpretation. A discrepancy in the settlement possibilities between different national settlement systems might lead to situations where less favourable systems will be avoided for the settlement of transactions.

4.14.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.14.

Under the Swedish Implementing Act the definition “institutions” under Article 2 (b) of the FSD has been implemented by referring to clearing organisations as defined under the Securities Exchange and Clearing Operations Act, central securities depositories as defined under the Financial Instruments Accounts Act, companies with permission under chapter 1 (2) the Banking Business Act and companies with permission under chapter 1 (3) (1) of the Securities Operations Act. By this reference EMIs seems not to be covered by the implementing Swedish legislation.

According to the Securities Exchange and Clearing Operations Act (SFS 1992:543), a clearing operation is “*any operation on a regular basis which consists in effecting net settlements on behalf of clearing members regarding their obligations to deliver financial instruments or to make payments in Swedish or foreign currency; or guaranteeing the performance of obligations by entering into agreements or acting as guarantor; or in some other significant manner causing obligations to be settled through the transfer of funds or instruments*”.

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Sweden has not amended its definition of credit institution to expressly include the definition of E-money institution as provided in article 1 (1) (b) of the Banking Directive. It is therefore uncertain if E Money Institution benefits from the protection of the SFD under Swedish law.

- Scope of the SFD: The Czech problem

See section 3.5.2.14.

According to the Swedish Implementing Act a clearing house that is not considered as an institution under Article 2 (b) of the SFD and that does not have the role of a clearing house, a settlement agent or a central security depository or a central counter party in the payment settlement system under consideration may be considered as a participant under Swedish law if the clearing house is covered by the definition of one of the entities referred to under the Implementing Act as possible participants.

The implementation under Swedish law of which entities that may participate in payment or currency settlement systems covered by the scope of the SFD is made by referring to a number of entities of that normally operates as clearing houses, settlement agents or central counter parties and they will thus gain the protection of the SFD even if not participating in the system as a clearing house etc.

The issue described as the Czech problem has not been raised under Swedish law since clearing houses that are conduction business under the Swedish Securities and Exchange Act, as clearing organisations are institutions within the meaning of Article 2 (b) (1) of the SFD.

- Scope of the SFD; Requirement for Settlement Systems to have an administrator; Transposing rules that go beyond what is stipulated in the SFD Article 2 (a)

The implementation of the definition under Article 2 (a) sentence 1 of the SFD of a system that is to be covered by the scope of the SFD has been effected under Swedish law, subject to the condition that the systems comply with the definition of a *Settlement System*. The definition of a Settlement System, under the Act (1999:1309) on systems for the settlement of obligations on the financial market includes that the system in question must have an *Administrator*, apart from the conditions that are prescribed under the SFD (Article 2 (a)). An 'Administrator' is defined as an undertaking that is responsible for the operation of the Settlement System. Furthermore, it is stipulated what undertakings can become Administrators of a Settlement System. These undertakings are, for example, clearing organisations and central security depositories, i.e. undertakings that already conduct their business under a licence granted by the Swedish Authorities, and thus comply with a number of conditions regarding security, financial strength, capacity and risk management systems.

The lack of a definition of an administrator in the SFD was specifically addressed in the preparatory work to the Swedish Implementing Act and considered as a shortcoming of the SFD. By only allowing entities already operating under a licence to be registered as administrators of Settlement Systems, the system is guaranteed to be operated by an entity that meets high standards within areas such as security, financial strengths, capacity and reduction of system risk. By using the administrator's systems for the Settlement System, a more in-depth assessment of the adequacy of the rules of the system is done than is required by the SFD. Adequacy is thus a consequence of the licence that the administrator operates under. If the administrator loses its licence, it can no longer function as administrator for the Settlement System. The additional requirement aims therefore to as well as the SFD, to further reduce system risks on the financial market.

An administrator that holds a licence as a clearing organisation or a central securities depository etc. might have to comply with requirements that are required in its role as a clearing organisation etc that are not per se necessary for the administration of a Settlement System. It is doubtful if the practical consequences of the stricter requirement under the Swedish Implementing Act will be of great significance since the systems that are covered by the scope of the SFD are normally operated by an entity which may qualify as an participant under

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the Swedish Implementing Act and that acts as an administrator or operator towards third parties. The requirement has the effect however that the Swedish law might exclude operators that could administer systems covered by the SFD in other Member States.

B. Conflict of Law Rules

- Transposition of Article 9 (2) of the SFD

See section 3.8.14.

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4.15 United Kingdom (UK)

ENGLAND & WALES

4.15.1 Provisional Conclusions

Apart from the minor issues stated below, the government of the United Kingdom has successfully transposed the SFD with respect to the laws of England and Wales. The UK Financial Services Authority and HM Treasury have not identified any points that remain unclear in the application of the SFD and the application of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979, as amended) (the "UK Regulations"). The Bank of England has not commented on this issue.

4.15.2 Issues regarding incorrect national implementation

Article 2(f) sentence 3 of the SFD imposes the requirement that an indirect participant be "known to the system," but this requirement is not expressly reflected in the UK Regulations.

4.15.3 Issues resulting from shortcomings of the SFD

A. Scope of the SFD.

- Scope of the SFD: Electronic Money Institutions

See section 3.5.1.15.

Concern has been raised by the European Central Bank that the SFD does not apply to EMIs.

The SFD does not refer to EMIs, and consequently the UK Regulations as amended by the Electronic Money (Miscellaneous Amendments) Regulations 2002 (SI 2002/765) provide at section 2(1) that "Credit institution means a credit institution as defined in Article 1(1)(a) of Directive 2000/12/EC of the European Parliament and Council, including the bodies set out in the list at Article 2(3)".

The definition of a credit institution at Article 1(1)(a) of Directive 2000/12/EC (the "Banking Consolidation Directive") excludes an electronic money market institution, which is set out separately at Article 1(1)(b) of the Banking Consolidation Directive.

The UK Regulations used to refer to "Directive 77/780/EEC" but this was amended in November 2000 by the Banking Consolidation Directive (Consequential Amendments) Regulations 2000 (SI 2000/2952). Therefore, EMIs do not enjoy the protection of the SFD as transcribed by the UK Regulations.

If it is the ECB's wish that the SFD applies to EMIs, the SFD should be amended accordingly.

- Scope of the SFD: The Czech problem

See section 3.5.2.15.

The Czech National Bank queried whether the participation of a "clearing house" of a securities settlement system in a payment settlement system is permitted under the SFD if the clearing house is not an institution in the sense of Article 2 (b), first sub-paragraph, of the SFD and does not play the role of a clearing house, a settlement agent, or a central counter party in the payment settlement system under consideration. The issue at stake was

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whether the clearing house's participation was detrimental to the protection provided by the SFD to the payment settlement system run by the Czech National Bank.

At first, the Commission refused the protection provided by the SFD to these institutions in a draft interpretation note on Article 2 (b) of the SFD³⁵. However, after opposition by the central banks, the Commission changed its position and formally withdrew the interpretation note.

The UK Regulations have transcribed the definition of "participant" to include "a body corporate or unincorporated association which carries out any combination of the functions of a central counter party, a settlement agent or a clearing house, with respect to a system." This supports the interpretation of the European Central Bank that a central counter party, a clearing house or a settlement agent of one system could participate in another system and fall within the definition of "participant" in the SFD.

- Scope of the SFD: The "CREST Issue"

See section 3.6.5.

Crest qualifies as a designated system under English law and according to Irish counsel, Crest also qualifies as a designated system under Irish law. The Crest Rules separately define the "Crest UK System" and the "Crest Irish System" and applies English law to the former and Irish law to the latter.

In the event of insolvency proceedings, an English court might hesitate in deciding whether to apply English or Irish law.

Irish authorities have designated Crest as a system to be included in the scope of their regulations. The direct participation of three Irish settlement banks in Crest served as the original justification for designating Crest. This justification no longer applies as the Irish banks in question now deal with Crest through UK banks.

However, the Irish government has not yet amended its regulations.

As Crest is subject to two different legal systems, a conflict of laws issue may arise. In such case, reference will be made by an English Court to English conflict of laws principles and the wording of the SFD.

The current state of the conflict of laws jurisprudence in England on transactions made through a settlement system is unclear, at best.

Generally, the domestic law that governs a contract is the law chosen by the parties to the contract, and no "renvoi" is permitted to the law of another country. Where the parties do not make a choice of law, the law of the country with which it is most closely connected will govern the contract.

However, where investors in certain securities maintain an account with an intermediary or broker and if it is accepted that the expectation of all parties to the transaction is that the investor has a proprietary interest which is capable in principle of being assigned, and that the rules for choice of law should seek where possible to accommodate this reasonable expectation, the better view would be that the investor's proprietary rights are located at the place where his account with the depository is maintained, and the law which governs deals with these rights is the law which governs his relationship with the broker³⁶.

³⁵ Draft interpretation note on Article 2 of the Settlement Finality Directive, Markt/211/2001, European Commission, Internal Market DG Financial institutions, retail issues and payment systems

³⁶ Dicey & Morris (2001), p.986.

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The wording of the UK Regulations at section 24 provides that rights and obligations arising in an insolvency will be “determined in accordance with the law governing that system.” Crest Rule 13 defines the ‘Crest Irish System’ and the ‘Crest UK System’. Rule 13 sets out the legal distinction between the two systems. It expressly stipulates that for the purpose of Article 2(a) of the SFD the governing law of the Crest Irish System is Irish Law and that the relevant governing law of the Crest UK System is the English law. Consequently Irish law governs the transfer of title to Irish constituted securities, while English law will govern the transfer of title of other security.

The FSA has discretion under Article 2(b) of the SFD to treat as an institution an undertaking which does not fall within a defined class of institutions. The FSA has used this discretion to designate Crest as a designated system.

The Hague Convention sets out as its primary rule that the law applicable will be the law of the state whose law governs the various issues surrounding securities held by an intermediary or the law of the state in which the securities account is maintained. If this Hague Convention is ratified by the United Kingdom and enacted into domestic English law using similar language, this may help to clarify the conflict of laws doctrine in these circumstances.

B. Conflict of Law Rules

- Interpretation of Article 9(2) of the SFD

See section 3.8.15.

As far as we have been able to ascertain, the United Kingdom has taken a narrow interpretation of Article 9(2) of the SFD by virtue of the wording of Section 23 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (the "Regulations"). In particular, the phrase "to a participant or a central bank" in the Regulations reflects the wording of the SFD. A "central bank" is defined in Section 2 of the Regulations as meaning "a central bank of an EEA State or the European Central Bank". We are not aware of any public interpretation from HM Treasury or from the FSA to indicate otherwise.

Section 23 of the Regulation only refers to securities provided as collateral security to “a participant, or a central bank (including any nominee, agent or third party acting on behalf of the participant of the central bank).” Therefore, it would seem on the face of the UK Regulations that a narrow interpretation must be taken. If the EU Parliament, Commission and Council had intended that all participants in an EU settlement system or indeed all direct or indirect participants in any payment systems be subject to the determination of the applicable system of law as set out in Article 9(2) of the SFD, why does the wording of Article 9(2) of the SFD limit itself to a the short enumerated list of “participants and/or central banks of the Member State or the European Central Bank”?

- Possible influence of a future ratification of the Hague Convention in this respect

See section 3.7.

The effect of the ratification and implementation of the Hague Convention may be to widen the interpretation of Section 23 of the Regulations. However, until the Hague Convention is ratified, and implemented into English law by way of a statute or regulations passed by the UK Parliament, it will be difficult to predict how the Hague Convention will affect the judicial interpretation of Section 23 of the Regulations.

As provided above, the Hague Convention has not yet been ratified by the United Kingdom, nor incorporated into English law. The signature by a UK representative of an international convention does not cause that international instrument to become part of English law. In the first instance, the treaty must be laid before Parliament for its consideration prior to the ratification of that treaty by the executive. Additionally, if the Hague Convention requires a change to be made to the law, an Act of Parliament must incorporate the terms of the treaty

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into English law. Therefore, until the Hague Convention is ratified and implemented into English law, it is difficult to judge how the judicial interpretation of section 23 of the UK Regulations will be affected.

Article 2(1)(a) of the Hague Convention may widen the scope of Article 9(2) of the SFD / Section 23 of the UK Regulations as it seems to apply, in respect of securities held by an intermediary, to “the legal nature and effects against the intermediary and against third parties of the credit of securities to a securities account, including whether the rights resulting from such a credit are property, contract or other rights.” This scope is not limited to a particular type of intermediary or third party.

If the Hague Convention applies to English law in this fashion, then Article 4 of the Hague Convention provides that the law applicable to the aforementioned issue will be the law of the State whose law governs those issues, or the law of the State in which the securities account is maintained.

The effect of this may be to widen the scope of Article 9(2) of the SFD / Section 23 of the UK Regulations so that it applies to parties other than participants, central banks of the Member States and the European Central Bank.

Until the Hague Convention is actually implemented into English law, it will be difficult to predict how it will affect the judicial interpretation of Section 23 of the UK Regulations.

Please note that we believe that an in depth analysis of the SFD with respect to the Hague Convention goes beyond the scope and budget of this project. We would be happy to advise on this issue separately if the client is happy to agree a budget with us to do so.

CLS Bank – Cross Border Issues

We have contacted CLS Bank to discuss any cross-border issues which have arisen or might arise in the context of the SFD. We have been advised that the rules of the CLS settlement system are governed by English law and that the system has been designated by the Bank of England under the Regulations. We have not been advised of any cross-border issues that have arisen or might arise with respect to CLS in the context of the SFD.

4.15.4 Others

We have contacted payment systems and securities settlement systems in London. We have been advised, on a no-name basis, that the UK Financial Services Authority and the Bank of England are taking a strict interpretation of the implementation of the designation requirements with respect to the designation of clearing houses.

The UK designating authorities are mindful of the need to ensure that each system meets the conditions for designation laid down in the SFD and that they are themselves satisfied as to the adequacy of the rules of the System.

The UK Financial Services Authority and HM Treasury have not identified any points that remain unclear in the actual application of the SFD and the UK regulations. The Bank of England has not commented on this issue.

NORTHERN IRELAND

Article 2 of Part 1 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI No: 2979), which was used to implement the SFD in the United Kingdom, specifically excludes extension of that statutory instrument to Northern Ireland.

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According to the Office of the First Minister and Deputy First Minister of the Northern Ireland Assembly (the body responsible for implementing certain legislation within Northern Ireland), implementation of the SFD was a matter that was specifically 'reserved' to London.

On this basis the Northern Ireland Assembly did not take any steps to implement the SFD.

The Office of the First Minister and Deputy First Minister has therefore confirmed that the SFD does not currently apply to Northern Ireland and has admitted that the situation will have to be re-examined. It is envisaged that this re-examination will mean either that:

- a. the Northern Ireland Assembly will have to implement local legislation; or
- b. representations will be made to London in order to have the relevant statutory instrument extended to Northern Ireland.

The Northern Ireland body responsible for taking up the issue of implementation of the SFD is the Department for Enterprise, Trade and Investment ("DETI"). The DETI has indicated that, following our discussions it will give these matters some attention. However, at the date of writing no further action has been taken.

SCOTLAND

The major part of the UK provisions apply to Scotland as well, taking into account specific Scottish rules and legal positions.

GIBRALTAR

The Financial Markets and Insolvency (Settlement Finality) Regulations 2002 implement the SFD in Gibraltar. A copy of these Regulations is attached in annex of this Report (annex 3).

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ANNEXES

**FINAL REPORT ON THE STUDY TO REVIEW
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1. IMPLEMENTATION OF OPTIONAL PROVISIONS IN NATIONAL LEGISLATION

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Finality Directive Transposition Study: Optional provisions															
Optional provisions SFD	Austria	Belgium	Denmark	Finland	France	Germany	Greece	Ireland	Italy	Lux	Portugal	Spain	Sweden	The Netherlands	UK
A: 2 N: a S: 2	Ex ¹	Ex ²	Nex	Ex ³	Nex	Ex ⁴	Ex ⁵	Nex	Nex	Ex ⁶	Ex	Ex ⁷	Ex ⁸	Nex	Ex ⁹
A: 2 N: a S: 3	Ex ¹⁰	Ex	Nex ¹¹	Ex ¹²	Nex ¹³	Ex ¹⁴	Ex ¹⁵	Nex	Ex ¹⁶	Ex ¹⁷	Nex	Nex ¹⁸	Nex	Ex ¹⁹	Ex ²⁰
A: 2 N: b S: 2	Ex ²¹	Ex ²²	Nex	Nex	Nex	Nex	Nex	Nex	Nex	Ex ²³	Nex ²⁴	Nex	Nex ²⁵	Nex	Ex ²⁶
A: 2 N: f S: 3	Ex ²⁷	Ex ²⁸	Nex	Nex	Ex ²⁹	Nex	Nex	Nex ³⁰	Ex ³¹	Ex ³²	Nex ³³ Ex ³⁴	Tbd ³⁵	Nex ³⁶	Nex	Ex ³⁷
A: 4 S: 1	Nex	Ex ³⁸	Nex	Ex ³⁹	Ex ⁴⁰	Nex	Ex ⁴¹	Nex	Ex ⁴²	Ex ⁴³	Ex ⁴⁴	Ex ⁴⁵	Nex	Nex	Ex ⁴⁶
A: 4 S: 2	Nex	Ex ⁴⁷	Ex ⁴⁸	Ex ⁴⁹	Ex ⁵⁰	Nex	Ex ⁵¹	Nex	Ex ⁵²	Ex ⁵³	Ex ⁵⁴	Ex ⁵⁵	Nex	Nex	Nex
A: 10 S: 3	Ex ⁵⁶	Ex ⁵⁷	Ex ⁵⁸	Ex ⁵⁹	Ex ⁶⁰	Nex	Nex	Nex ⁶¹	Nex	Ex	Ex ⁶²	Ex ⁶³	Ex ⁶⁴	Ex ⁶⁵	Ex ⁶⁶

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Executed (ex) (explain shortly how the relevant option was executed into national law) / Non-executed (nex)/ To be determined (Tbd)/ NN (No need for implementation as it was already binding law before the SFD)

¹ The content of the National Law complies with the SFD, other wording.

² Art. 2 para 5, 1 of the Act of 28 April 1999: The King may amend the list of systems referred to in the first subsection and publishes same annually in the *Moniteur belge/ Belgisch Staatsblad* (official gazette).

³ The Act is applicable irrespective of the scope of application of the SFD if the system meets the criteria set in S.2, P.1, sub-paragraphs 1 or 2. If that is not the case, however, the approval by the Ministry of Finance is required for the Act's applicability in accordance with subparagraph 3.

⁴ Art. 96 para 2 sentence 2, 3 makes reference to Art. 2 (a) SFD.

⁵ Art. 1, para a, sentence 3 of Law 2789/2000 transposing Directive 98/26/EG. An arrangement or contract regulated by legislation or regulations, fulfilling the conditions of Article 1 (a) sentence 1 above and whose business consists of the execution of transfer orders as defined in the second indent of (i) and which to a limited extent executes orders relating to other financial instruments, such as derivatives contracts on merchandise, which has been characterised as a System by a Member State and has been notified to the Commission.

⁶ A: 34-4, N: P: 2. A formal arrangement may be authorised which consists of the execution of transfer orders as defined in the second indent of article 34-2, j) and which to a limited extent executes orders relating to other financial instruments, as long as the authorisation of such a system is warranted on grounds of systemic risk.

⁷ Fully transposed.

⁸ A system in which the participants execute transfer orders as defined in the second indent of (i) but relating to other financial instruments may according to Swedish law be considered as a Settlement Systems. Systems party dealing with the settlement of derivatives are covered by the Act as stated in the preparatory work to the Act (prop. 199/2000:18).

⁹ Article was transcribed into the schedule to the UK regulations as further conditions of a system.

¹⁰ The regulations of the National Law are stricter than the SFD.

¹¹ According to the Supervisory Authority it lies within the authorisation of the Supervisory Authority to characterise a formal arrangement with two participants as a system.

¹² The Act is applied to the netting of obligations to pay and deliver (relating to trading in securities, derivatives and currency) of two opposing parties. Thus, the arrangements between two participants need not be designated as a system. However, in accordance with S.2, P.1, subparagraph 3, the arrangement of two participants can be classified as a system subject to an approval by the Ministry of Finance.

¹³ Such systems do not exist in France.

¹⁴ Art. 96 para 2 sentence 2, 3 makes reference to Art. 2 (a) SFD.

¹⁵ Art. 1, para a, sentence 3 of Law 2789/2000 transposing Directive 98/26/EG.

An arrangement or contract regulated by legislation or regulations, fulfilling the conditions of Article 1 (a) s.1 above and whose business consists of the execution of transfer orders as defined in the second indent of (i) and which to a limited extent executes orders relating to other financial instruments, such as derivatives contracts on merchandise, which has been characterised as a System by a Member State and has been notified to the Commission.

¹⁶ Art. 1 (r) of the L.D. 210/2001 states the following (the optional provision in question is highlighted in **bold characters**):

'system' shall mean the provisions of contractual or authoritative nature as a whole pursuant to those transfer orders with common rules and standardised arrangements will be executed between the participants, which is at the same time:

1) applicable to three or more participants, without counting a possible settlement agent, a central counter party, a clearing house or a indirect participant; or applicable to two participants, if this is warranted on grounds of control of systemic risk, however it concerns Italian systems, or in case that other Member States of the European Union made use of the possibility to limit the number of participants down to two;

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2) governed by the law of one of the Member States of the European Union, chosen by the participants or provided by the rules governing the system, in which at least one of the participants has its registered offices;

3) designated as a system and notified to the European Commission by the Member State of the European Union whose law is applicable.

The optional provision of Article 2 (a), sentence 3 of the SFD has been implemented in the definition of system in Article 1 (r), number 1, sentence 2 of L.D. 210/2001.

The definition "System" is the most general of the three definitions concerning systems. The other definitions regard Italian systems, which means Systems operating in Italy under Italian law and which are designated by the L.D. 210/2001 and notified to the European Commission as well as systems of third country states. The general definition of Systems also includes the Italian Systems, but not the third country systems due to the application of the law of one of the Member States of the European Union as set forth under number 2). This explains why the Italian implementation of the optional provision consists of two alternatives, one regarding the Italian Systems only and the other Systems as defined in Article 1, let.r). In particular:

Art. 1, let. r), number 1), sentence 2 of L.D. 210/2001 is the second alternative of the first of the three cumulative conditions required by the definition "system". The first condition provides for the minimum number of participants to the system.

According to the first alternative (Art. 1 (r), number 1, sentence 1 of L.D. 210/2001) a system shall consist of three or more participants, without counting a possible settlement agent, a possible central counter party, a possible clearing house or a possible indirect participant. This alternative meets the general provision set forth in Article 2 (a), sentence 1 of the SFD.

The exemption, the acknowledgement of only two participants as a system, provided by the SFD only as a possible amendment, has become under Italian law an alternative due to its integrated position in the legal definition of "system" itself. Nevertheless, such formal "upgrading" and the missing explicit indication of the designation only on a case to case basis, do not lead to a different interpretation: the Italian provision is not a general provision covering all bilateral agreements, but only those, and in particular over the counter transactions, considered by Bank of Italy as a systemic risk, naturally only for the Italian Systems.

Art. 1 (r), no. 1, sentence 2 of L.D. 210/2001 provides, a part from the systemic risk, a second reason of justification for the acknowledgement of two participants as a system, which is not set forth by the SFD: other Member States of the European Union have made use of this possibility to reduce to the number of participants to two with regard to their systems. At this point, the general meaning of system becomes clear, which also refers to systems of the other Member States.

¹⁷ A: 34-4, N: 1, P: 3. A formal arrangement may also be authorised between two participants, without counting a settlement agent, a central counter party, a clearing house or an indirect participant, where the participants have chosen to submit it to Luxembourg law, in which at least one of its participants is a legal entity whose registered office is in Luxembourg, and which designates a system operator, as long as the authorisation of such arrangement is warranted on the grounds of systemic risk.

¹⁸ At least 3 participants are required under a formal arrangement to be designated as a "system" by Spanish law.

¹⁹ 212 (d) Bankruptcy Act. The Min. of Fin. may designate systems on grounds of a systemic risk.

²⁰ Article was transcribed into the schedule to the UK regulations as further conditions of a system.

²¹ The content of the National Law complies with the SFD.

²² According to Article 2 para 5, 2 of the Act of 28 April 1999, the King is allowed to amend the list of participants under the terms laid down in the SFD. The Explanatory Memorandum to the Act refers in this context to the possibility to extend the list of participants to non-financial undertakings that could participate in security settlement systems or the bilateral relations between correspondent banks on grounds of systemic risk or in order to prevent the domino risk, i.e. the risk that the insolvency of one participant results in the insolvency of the other participants.

²³ A: 34-2, N: b. Undertakings which participate in a system supervised in accordance with the law of a Member State and only execute transfer orders as defined in Art 34-2 j second indent, as well as payments resulting from such orders, and which have responsibility for discharging the financial obligations arising from transfer orders within such a system, can be considered institutions, provided that at least three participants of this system are covered by the categories referred to in the first subparagraph *as long as this assimilation* is warranted on grounds of systemic risk.

²⁴ The Portuguese securities commissions made a binding enumeration of the Institutions that could participate in a system, not allowing other Institutions besides those.

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²⁵ The Article has been interpreted as meaning that only systems in which the participants executes transfer orders as defined in the second intent of (i) may have other participants than described under Article 2 b) – 2 e) under the SFD. It has not been considered necessary to change the existing definition of which undertakings can be approved Clearing Organisations or Central Security Depositories under, Swedish law, i.e. entities that may be participants in a Settlement System, covered by the SFD, under Swedish law. The above-mentioned limitation has however been implemented under Article 8 of the Act by stating in Section 8 of the Article that a participant in a Settlement System may be such other (than in Section 1 – 7 of the Article) legal entity that for its own account settles obligations to deliver financial instruments in the system.

²⁶ Article transcribed without deviation from SFD except no reference to term “supervised” in the sentence “If a system is supervised...”.

²⁷ Only National Bank can appropriate that an indirect participant is considered as participant.

²⁸ According to Article 2 para 3 of the Act of 28 April 1999, the term participant within the meaning of this Act will also be deemed to cover any credit institution within the meaning laid down in the foregoing sub-section whose cash payment orders are carried out via a participant in a payment system pursuant to a commission agreement or a power of attorney. The credit institution acting thus through the intervention of a participant in a payment system must be known to the bodies in charge of the said system.

²⁹ French Law expressly recognises the intervention of indirect participants but does not expressly subordinate this notion to both conditions referred to in the SFD (i.e. systemic risks and acquaintance by the system).

³⁰ The Regulations do provide for “indirect participants”. There is no relevant membership class in payment systems in Ireland that would correspond to “indirect participant”.

³¹ The optional provision of Article 2 (f), sentence 3 of the SFD has been implemented into Italian law as forth paragraph of Art. 10. Article 10, pursuant to its headline, deals with the designation of Systems.

Whereas paragraphs 1 to 3 of Article 10 provide for the designation of Italian Systems by Bank of Italy together with Consob and the communication of the same by the Ministry of Treasury to the European Commission, para 4 of L.D. 210/2001 provides:

4. If required by the characteristics of a system having as its object the execution of transfer orders as defined in Article 1, paragraph 1, let. m), number 1), and for the requirement of risk control, the Bank of Italy can for the scope of application of this legislative decree equalise the indirect participant to the participant of such system.

The possibility of equal treatment of direct and indirect participants opened to Bank of Italy regards only payment systems. With reference to security systems, Article 6 of L.D. 210/2001 providing the performance of obligations towards the participant in case of insolvency of an intermediary a sort of equal treatment of direct and indirect participants can be assumed.

For sake of completeness, also the last paragraph of Article 10 shall be mentioned, which regards the possibility to extend the application of the provisions of L.D. 210/2001 to Italian intermediaries participating in third country Systems, as provided by Premis 7 of the SFD:

5. The Ministry of Treasury after having heard the Bank of Italy and Consob can execute agreements with the competent authorities of a state not belonging to the European Union for the application of the provisions of this legislative decree to the Italian authorities who are participating in the system of the foreign state on the basis of reciprocity.

³² A: 34-2, N: F, S: 3. An indirect participant shall be considered a participant subject to be known to the system, as long as this assimilation is justified for systemic risk purposes.

³³ Decree-Law no.486/99.

³⁴ Decree-Law no 221/2000. As regards the Decree-Law regarding settlement systems this provision was not transposed, however this provision was transposed by the Decree-law that regulates the payment systems.

³⁵ Execution to be determined: Although “indirect participant” is not a concept envisaged in Law 41/99, it may be that a similar concept may have been utilized. Clarifications from the SCLV have been asked in order to determine the level of discrepancy.

³⁶ The Article has not been implemented. Bilateral netting between a participant in a Settlement System and an indirect participant is protected under Swedish law, Chapter 5, Section 1, of the Financial Instruments Trading Act (SFS 1991:980) as well as according to general law on set off. According to the preparatory work (prop 199/2000:18) an implementation in the future is possible, if also foreign institutes will be indirect participants in Swedish systems.

³⁷ Article transcribed without deviation from SFD except that the UK Regulations do not require the indirect participant to be known to the system.

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³⁸ According to Article 3 para 3 sentence 1 of the Act of 28 April 1999: Notwithstanding the bankruptcy of or a judicial composition or the occurrence of a concurrence of claims vis-à-vis a participant in a system, the manager or the paying agent may, if it is so authorised under the applicable contractual provisions, intromit against the settlement account of a participant that is in default in discharging its obligations, in particular for the purposes of paying off any debit balance it may have after clearing, thus allowing for final settlement of the system.

³⁹ The assets and securities of a party to a settlement system in the settlement account of the settlement system may be used despite the insolvency proceedings for the performance of the obligations of a party to the settlement system in the settlement system. If the obligation has, under the rules of the settlement system, been declared for settlement after the opening of insolvency proceedings against the party, the assets and securities in the settlement account may, however, be used for the performance of the obligation in question only on the day of the opening of the insolvency proceedings.

⁴⁰ Art L. 330-2 of the French Monetary and Financial Code.

⁴¹ Art. 4 para 1 of Law 2789/2000 transposing Directive 98/26/EG. Funds or Securities of a Participant available on the settlement account of that participant may be used to fulfil the participant's obligations in the system, which have been borne up until and including the day of the opening of the Insolvency Proceedings.

⁴² In Article 18 of the Law 526/1999 the Italian legislator provided explicitly for the implementation of the optional provisions of Article 4 of the SFD. These are now reported in Article 5 of L.D. 210/2001.

Article 5 – Performance of obligations towards the System

1. Following the opening of the insolvency proceedings, the settlement agent, in the name and on behalf of the participant, and for the scope of the performance of the obligations of the insolvent participant in connection with the participation in the system prior to the opening of the insolvency proceedings, can make use of:

a) funds and financial instruments available on the settlement account of the participant;

b) credit lines granted to the participant against an existing guarantee and appropriate to fulfil the obligations of such participant against the system; this guarantee shall be subject to the provisions of Article 8.

2. All activities pursuant to paragraph 1 are subject to the provisions of Article 2.

Also the means to be used by the settlement agent for settlement in case of insolvency like funds still available on the accounts of the participant in the payment systems and securities available on the respective accounts in the security systems as well as the (intraday) credit facilities granted against deposit of collaterals with the Bank of Italy are subject to the finality principle provided in Article 2 of L.D. 210/2001. Therefore any settlement activity by the settlement agent can not lead to any unwinding as well as the use of the further guarantees provided by the guarantee fund as set forth in Article 8 of L.D. 210/2001.

⁴³ A: 61-2, N: 4, S: 1. The opening of insolvency proceedings against a participant shall not prevent funds or securities on the own settlement account of that participant from being used to fulfil the participant's obligations in the system on the day of the opening of the insolvency proceedings.

⁴⁴ Transposed only by Decree-Law no. 221/2000.

⁴⁵ Fully transposed.

⁴⁶ Article transcribed into the definition of "default arrangements" in the UK Regulations.

⁴⁷ According to Article 3 para 3 sentence 2 of the Act of 28 April 1999: If required, the manager or the paying agent is also authorised, under the applicable contractual conditions, to intromit against sums or securities necessary for executing the participant's obligations, particularly with regard to payment of the debit balance of the participant in default by utilising such credit line (including a loan of securities) as might have been granted in favour of the said participant, within the limits of the guarantees attaching to the credit line on the day of settlement.

⁴⁸ Implemented by art. 57 b of the Danish Securities Trading Act - The Act, "Where collateral security as specified in subsection 1 hereof has been provided in the form of securities or deposits, this collateral security may be realised immediately if a previous agreement to this effect has been concluded and the participant has not already fulfilled his obligations towards Danmarks Nationalbank, a clearing centre or a payment system registered pursuant to Section 57 a or participants in such systems"

⁴⁹ The credit facility of a party to a settlement system in connection with the settlement system may be used despite the insolvency proceedings of the party to the settlement system against the collateral available in the system for the performance of the obligations of the party in the settlement system.

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⁵⁰ This possibility is provided for in the systems' rules'.

⁵¹ Art. 4 para 1 of Law 2789/2000 transposing Directive 98/26/EG.

The credit facility granted to such a Participant in the System against available, existing collateral security may be used to fulfil that Participant's obligations in the system.

⁵² With regard to Art. 5, paragraph 1 (b) of L.D. 210/2001, please refer to the note for A: 2, S:1 above.

⁵³ A: 61-2, N: 4, S: 2. Any credit facility of the said participant connected to the system may be used against available, existing collateral security to fulfil the aforesaid participant's obligations in the system.

⁵⁴ Transposed only by the Decree-Law no 221/2000.

⁵⁵ Fully transposed.

⁵⁶ The content of the National Law complies with the SFD.

⁵⁷ According to Article 8 sentence 1 of the Act of 22 February 1998, the Belgian National Bank supervises the appropriate operation of the clearing and payment systems and ascertains their efficiency and reliability.

⁵⁸ Implemented by art. 84, para 1 of The Act, "The Danish Securities Council and the Supervisory Authority shall ensure that this Act and the rules issued in pursuance of this Act are observed, except section 12 (2) and (4) of this Act. The Supervisory Authority shall moreover act as secretariat for the Danish Securities Council and shall represent it in this connection" and Article 86 para 1 of The Act, "The Supervisory Authority shall supervise that the business activities of securities dealers, stock exchanges, clearing centres, central securities depositories, account controllers, authorised markets, money-market brokers and securities brokers and that their rules, procedures, control and safeguard arrangements, also in respect of electronic data processing, are adequate and in conformity with this Act and the provisions laid down in pursuance hereof." And art. 57 a paragraph 4 of The Act, "The Supervisory Authority may stipulate requirements regarding the capital basis of a payment system, requirements regarding management, cf. Section 9, requirements regarding audits and preparation of operation plans, administrative procedures, and adequate control measures and security measures, including measures within IT."

⁵⁹ The organization maintaining the settlement system shall notify the Ministry of Finance of the rules of the settlement system before its start of operations and of their amendments before their entry into force. The duty to notify shall, however, not apply to a central bank, a clearing house or an option corporation.

⁶⁰ Articles L. 141-4 and L. 622-7 of the French Monetary and Financial Code (Please refer to the French Transposition Table). The competent authorities are (i) Banque de France and (ii) Conseil des Marchés Financiers.

⁶¹ Under the Central Bank Act 1997, the Central Bank in Ireland **had already** been given jurisdiction regarding the supervision and the stipulation of authorization requirements relevant to payment systems. Consequently, there was no need for transposition of this part of the SFD.

⁶² Transposed by both Decree-Laws.

⁶³ Fully transposed, and adapted to the supervision and authorization requirements on a local level.

⁶⁴ Article 14 of the Act on systems for settlement of obligations on the financial market (Lag om system för avveckling av förpliktelser på finansmarknaden, SFS:1999:1309) provides for the possibility for the Government, or the Swedish Financial Supervisory Authority, after authorisation by the Government, to issue further regulations. Further regulations may be issued regarding what an application for approval of a Settlement System shall contain and regarding the obligations for the Administrator to give necessary information about the operation of the system. Such further supervision and authorisation requirements have not yet been issued by the Government or by the Swedish Financial Supervisory Authority.

⁶⁵ Ex: 212 d (3) Bankruptcy Act. The Min. of Fin. may attach conditions to the decision to designation as a system.

⁶⁶ Article transcribed by permitting any body corporate or unincorporated association to apply to the designating authority for an order declaring it to be a designated system.

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