

Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems

Luxembourg - final report

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
SCOPE AND DEFINITIONS						

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 1 N: a	The provisions of this Directive shall apply to: (a) any system as defined in Article 2(a), governed by the law of a Member State and operating in any currency, the EURO or in various currencies which the system converts one against another;	N		A:	The Law applies to any payment and securities settlement systems supervised in Luxembourg. Some provisions apply to: - Luxembourg participants, foreign participants included in systems authorised in Luxembourg - Luxembourg institutions participating in European systems notified to the European Commission	The Law ¹ goes beyond what is stipulated in the Directive. The Law provides for Luxembourg systems which want to benefit from the Law to be granted a Ministerial authorisation and to be subject to prudential supervision. The Law also creates a new category of professionals of the financial sector (named system operators) who are also requested to obtain a Ministerial authorisation and to be subject to prudential supervision to perform their activities.

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						<p>Consequently, the architecture of the Law differs from that of the Directive and there is not a single scope of application defined for the Law as a whole.</p> <p>According to recital 7 of the Directive, Member States may apply the provisions of the Directive to those of their domestic institutions that participate directly in <i>third country systems</i> and to collateral security provided in connection with participation in such systems. The Law does not provide for such a provision.</p>
A: 1	(b) any participant in such a system;	N				

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N: b						
A: 1 N: c	(c) collateral security provided in connection with: -participation in a system, or -operations of the central banks of the Member States in their functions as central banks.	N				

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A: 2	For the purpose of this directive:			A: 34-2	<p>“CHAPTER 5: AUTHORISATION OF PAYMENT AND SECURITIES SETTLEMENT SYSTEMS”</p> <p>Definitions For the purpose of this chapter and of articles 37-1, 41, 42, 47-1, 52 and 61-2 to 61-4,</p>	This chapter and articles contained in the new dispositions inserted in the law of 5 April 1993 with the exception of article 28-2 which describes systems operators as PFS.
A: 2 N: a S: 1	‘system’ shall mean a formal arrangement:	N		A: 34-2 N: a	<p>a) ‘system’ means a formal arrangement governed:</p> <ul style="list-style-type: none"> - by Luxembourg law, authorized as payment or securities settlement system and as such notified to the European Commission, or - by the law of a Member State, defined as a system and notified to the European Commission by a Member State. 	
A: 2 N: a S: 1		N		A: 34-4 N: 1	May be authorised as a payment or securities settlement system a formal arrangement :	Authorisation and supervision have been considered as measures justified by

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	-between three or more participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the execution of transfer orders between the participants,				-between three or more participants, without counting a settlement agent, a central counterparty, a clearing house or an indirect participant, with common rules and standardised arrangements for the execution of transfer orders between the participants,	the negative consequential effects that default of a system may have on the financial situation of the participants, possible serial defaults and disruption of others systems, money and capital markets ² . "possible" has been removed in the Law.
A: 2 N: a S: 1	-governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and	N			-that the participants have chosen to submit to Luxembourg law, -in which at least one of its participants is a legal entity whose registered office is in Luxembourg, -which designates a system operator,	The Law requires an additional condition which is the formal designation of a system operator (see

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						<p>definitions infra art 34-2 h)).</p> <p>The BCL has further defined operator in its “Summary paper on the oversight of payment and securities settlement systems” as the central system organisation providing products and services.</p> <p>Moreover, the BCL who is responsible for the oversight of some of the systems has further defined system³.</p>

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A: 2 N: a S: 1	-designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.	N		A: 34-3 A: 34-3 S:1 A: 34-3 S: 2 A: 34-4 N:2	<p>Scope</p> <p>The current chapter applies to any payment and securities settlement system authorised in Luxembourg.</p> <p>However it does not apply to payment and securities settlement systems governed by Luxembourg law the participants of which are Central Bank of Luxembourg or any other entity that is part of the European system of central banks. These systems are considered to be authorised in Luxembourg as from their notification by Central Bank of Luxembourg to the European Commission.</p> <p>(2) The Minister having the Commission within his competence is the competent authority to grant authorisation to the systems. The Commission notifies to the European Commission systems authorised by the Minister.</p>	<p>The scope and “current chapter” refers to the authorisation to be requested for systems in order to benefit from the Law.</p> <p>The more stringent conditions included are the necessity of obtaining an authorisation and being subject to prudential supervision (for both the systems and system operators) In this respect, some competencies have been granted to the Commission de Surveillance du Secteur Financier (CSSF) and others to the Central Bank of Luxembourg (BCL)</p> <p>⁴.</p>

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: a S: 2	Subject to the conditions in the first subparagraph, a Member State may designate as a system such a formal arrangement 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, when that Member State considers that such a designation is warranted on grounds of systemic risk.	D		A: 34-4 N: 1 P: 2	Subject to the fulfilment of the conditions in the first subparagraph, may be authorised a formal arrangement 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.	The Law has implemented the option proposed by the Directive.

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A: 2 N: a S: 3	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;	D		A: 34-4 N: 1 P: 3	May also be authorised a formal arrangement between two participants, without counting a settlement agent, a central counterparty, 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 ;	The Law has implemented this option. In particular, formal arrangements such as “correspondent banking” relationships may be authorised. ⁵ The definition is such that the main Luxembourg systems as they existed before the Law will be authorised. The BCL according to article 34-3 has notified on February,12, 2001 to the European Commission ⁶ : -LIPS Gross. -LIPS-Net - a securities settlement system which operator is Clearstream banking

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						Luxembourg ("Clearstream")
A: 2 N: b S: 1	`institution´ shall mean: -a credit institution as defined in the first indent of Article 1 of Directive 77/780/EEC including the institutions set out in the list in Article 2(2) thereof, or -an investment firm as defined in point 2 of Article 1 of Directive 93/22/EEC excluding the institutions set out in the	N		A: 34-2 N: b	b) "Institution" means: - 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, - an investment firm authorized in a Member State, excluding the institutions set out in the list in Article 2 (2) (a) to (k) of Directive 93/22/EEC, or	

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	list in Article 2(2)a to (k) thereof, or -public authorities and publicly guaranteed undertakings, or -any undertaking whose head office is outside the Community and whose functions correspond to those of the Community credit institutions or investment firms as defined in the first and second indent, which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders within that system.				<ul style="list-style-type: none"> - a public entity and publicly guaranteed undertakings, or - any undertaking whose registered office is outside the territory of the European Community and whose functions correspond to those of the Community credit institutions or investment firms indicated in the previous indents <p>which participates in a system and which is responsible for discharging the obligations arising from transfer orders within that system.</p>	“financial” has been removed in the Law. No specific comment are made in that respect in the parliamentary bills.
A: 2 N: b S: 2	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	D			Undertakings -which participate in a system supervised in accordance with the law of a Member Sate and only execute transfer orders as defined in 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,	The Law has implemented this option proposed by the Directive.

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	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 referred to in the first subparagraph and that such a decision is warranted on grounds of systemic risk;				can be considered institutions, provided that at least three participants of this system are covered by the categories referred to in the first subparagraph <i>as long as this assimilation</i> is warranted on grounds of systemic risk ;	
A: 2 N: c	`Central counterparty' shall mean an entity which is interposed between the institutions in a system and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;	N			c) "Central counterparty" means an entity which is interposed between the institutions in a system and which acts as the exclusive counterparty of these institutions with regard to their transfer orders ;	There are no recognised central counterparty system operators in Luxembourg ⁷ .
A: 2 N: d	`settlement agent' shall mean an entity providing to institutions and/or a central counterparty participating in systems, settlement accounts through which transfer orders within such systems are settled and, as the case may be, extending credit to those institutions and/or central counterparties for settlement purposes.	N			d) "settlement agent" means an entity which put at disposal of institutions or a central counterparty participating in settlement accounts systems through which transfer orders within these systems are settled and, as the case may be, granting credit to those institutions or central counterparties for settlement purposes ;	
A: 2	`clearing house' shall mean an entity	N			e) "clearing house" means an entity responsible	

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N: e	responsible for the calculation of the net positions of institutions, a possible central counterparty and/or possible settlement agent;				for the calculation of the net positions of institutions, of a possible central counterparty or of a possible settlement agent;	
A: 2 N: f S: 1, 2	`participant´ shall mean an institution, a central counterparty, a settlement agent or a clearing house. According to the rules of the system, the same participant may act as a central counterparty, a settlement agent or a clearing house or carry out part or all of these tasks.	N		A:34-2 N: f S:01 A:34-2 N: f S:2	f) “participant” means an institution, a central counterparty, a settlement agent or a clearing house. According to the rules of the system, the same participant may act as a central counterparty, a settlement agent or a clearing house or perform part or all of these tasks.	
A: 2 N: f S: 3	A Member State may decide that for the purposes of this Directive an indirect participant may be considered a participant if it is warranted on the grounds of systemic risk and on condition that the indirect participant is known to the system;	D		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 ;	The Law makes use of the possibility granted by section 2 (f) third sentence of the Directive.
A: 2 N: g	`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	N		A:34-2 N: g	g) “indirect participant” means a credit institution as defined in b) with a contractual relationship with an institution participating in a system executing transfer orders as defined in j) which enables the abovementioned credit	

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	defined in the first indent of (i) which enables the abovementioned credit institution to pass transfer orders through the system;				institution to pass transfer orders through the system ;	
A: 2 N: h	`securities´ shall mean all instruments referred to in section B of the Annex to Directive 93/22/EEC;	N		A:34-2 N: i	i) “securities” means all instruments referred to in section B of annexe II of the present law;	Section B of annexe II of the law of 5 April 1993 is identical to section B of the Annex to Directive 93/22/EEC ⁸
A: 2 N: i	`transfer order´ shall mean: -any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or -an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a	N		A:34-2 N: j	j) “transfer order” means; - an instruction given by a participant to place at the disposal of a recipient an amount of money by means of a book entry in the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or - an instruction given by a participant to	The Law adds in the second indent book

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	book entry on a register, or otherwise;				transfer the ownership of one or several securities or rights to one or several securities, by means of a book entry on a register, on an account, or otherwise ;	entries on "an account".
A: 2 N: j	`insolvency proceedings' shall mean any collective measure provided for in the law of a Member State, or a third country, either to wind up the participant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments;	N		A:34-2 N: k A:34.-2 N: l	k) "insolvency proceedings" means any collective settlement measure provided for in the law of a Member State, or a third country, either to wind up the participant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments; l) " moment of opening of insolvency proceedings" means the moment when the relevant judicial or administrative authority of a Member state or a third country hands down its decision ;	The definition " moment of opening of insolvency proceedings" corresponds to Article 6 of section III of the Directive.
A: 2 N: k	`netting' shall mean the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive	N		A:34-2 N: m	m) "netting" means the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants	

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	from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed;				with the result that only a net claim can be demanded or a net obligation be owed ;	
A: 2 N: 1	`settlement account´ shall mean an account at a central bank, a settlement agent or a central counterparty used to hold funds and securities and to settle transactions between participants in a system;	N		A:34-2 N: k A: 34-2 S: o	n) “settlement account” means an account at a central bank, a settlement agent or a central counterparty used to hold funds and securities as well as to settle transactions between participants in a system; o) “Member state” means a Member state of the European Community or another State party to the Agreement on the European Economic Area within the limits defined by this agreement and the acts relating to this agreement.	
A: 2 N: m	`collateral security´ shall mean 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	N		A: 61-3	The scope of this article covers the specific rules in relation to the insulation of the rights of holders of collateral security in connection with the community payment systems or securities settlement systems or in the operations of central bank of the Member States or of the European Central Bank from the effects of the insolvency of the holder.	

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	the Member States or to the European central bank.			A: 61-3 N:1	For the purpose of the current article, collateral security means all realisable assets, including money, provided under a pledge, a repurchase, a fiduciary transfer or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system in the meaning of article 34-2 (a), or provided to central banks of the Member States or to the European central bank.	
	NETTING AND TRANSFER ORDERS					
A: 3 P: 1 S: 1	Transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant, shall be binding on third parties, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6(1).	N		A: 61-2 N: 2 P:1	Even in the event of insolvency proceedings against a participant, transfer orders and netting in systems authorized in Luxembourg shall be legally enforceable between the parties and binding on third parties, provided that transfer orders were entered into the system before the moment of opening of insolvency proceedings as defined in Article 34-2, 1).	
A: 3 P: 1	Where, exceptionally, transfer orders are entered into a system after the	N		A: 61-2	Transfer orders entered into a system after the moment of opening of insolvency proceedings	

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S: 2	moment of opening of insolvency proceedings and are carried out on the day of opening of such proceedings, they shall be legally enforceable and binding on third parties only if, after the time of settlement, the settlement agent, the central counterparty or the clearing house can prove that they were not aware, nor should have been aware, of the opening of such proceedings.			N: 2 P: 2	and carried out on the day of opening of such proceedings, shall be legally enforceable between the parties and binding on third parties only if the system operator, the settlement agent, the central counterparty or the clearing house can prove, after the time of settlement, that they were not aware, nor should have been aware, of the opening of such proceedings.	
A: 3 P: 2	No law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the moment of opening of insolvency proceedings, as defined in Article 6(1) shall lead to the unwinding of a netting.	N		A: 61-2 N: 1 S: 2	...In addition, as from this moment, the netting may not be challenged any longer for any reason whatsoever, notwithstanding any legal, regulatory, contractual or common provision providing for nullity of contracts and transactions concluded before the moment of opening of insolvency proceedings as defined in Article 34-2, 1).	The moment referred to in this sentence is the moment of the transfer order entry in the system. Cf. A:61-2 N1 S1 next to A.5 of the Directive in the present comparative table.
A: 3 P: 3	The moment of entry of a transfer order into a system shall be defined by the rules of that system. If there are	N		A: 61-2 N: 1 S: 3	..The moment of entry of a transfer order into a system authorized in Luxembourg shall be defined by the rules of the said system.	

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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
	conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.					
A: 4 S: 1	Member States may provide that the opening of insolvency proceedings against a participant shall not prevent funds or securities available on the 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.	D		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.	
A: 4 S: 2	Furthermore, Member States may also provide that such a participant's credit facility connected to the system be used against available, existing collateral security to fulfil that participant's obligations in the system.	D		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 that participant's obligations in the system.	
A: 5	A transfer order may not be revoked by a participant in a system, nor by a third party, from the moment defined by the rules of that system.	N		A: 61-2 N: 1 S: 1	A transfer order may not be revoked or challenged any longer by a participant in a system authorized in Luxembourg nor by a third party as from the moment of its entry in	

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² N = normal (mandatory requirement to be transposed); O = option (mandatory requirement with an option for transposition); D = discretion; n. a. = not applicable

Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
					the said system.	
	PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS			A: 61-4	Provisions specific to the opening of an insolvency proceedings against a payment or securities settlement system's participant	
A: 6 P: 1	For the purpose of this Directive, the moment of opening of insolvency proceedings shall be the moment when the relevant judicial or administrative authority handed down its decision.	N			Cf supra A: 34-2 N: L	
A: 6 P: 2	When the decision has been taken in accordance with paragraph 1, the relevant judicial or administrative authority shall immediately notify that decision to the appropriate authority chosen by its Member State.	N		A: 61-4 N: (2)	When, in relation with a Luxembourg participant in the meaning of article 34-2 a), the court which is competent in commercial matters has received a petition or hands down a judgment that, in accordance with article 60 and 61 of the current law or with provisions referred to in article 61 (13), will produce the effect of suspending the payments of this participant, the clerk of the court notifies immediately to the Commission the said petition or decision, with the precision of the time at which it was filed, handed down respectively.	

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
					The clerk of the court shall notify in the same manner to the Commission any further decision which effect would be to put an end to the payment suspension of the participant, or to modify the legal basis respectively.	
				A.61-4 N: (3) S:1	The Commission shall notify without delay to the central bank of Luxembourg and to the system operator authorised in Luxembourg the petition or the decision opening an insolvency proceedings against a Luxembourg participant.	
A: 6 P: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N		A: 61-4 N:(3) S: 2	Where it concerns a Luxembourg participant in a system of another member State the Commission shall notify the decision without delay to the relevant authority of the other Member States indicated for this purpose.	
A: 7	Insolvency proceedings shall not have retroactive effects on the rights and obligations of a participant arising from, or in connection with, its participation in a system earlier than the moment of opening of such proceedings as defined	N		A: 61-2 N: 3	Insolvency proceedings shall not have, on the rights and obligations of a participant that arise from, or are in connection with its participation in a system, retroactive effects earlier than the moment of opening of such proceedings as defined in Article 34-2, 1).	

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
	in Article 6(1).					
A: 8	In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system.	N		A: 61-4 N: 1	In the event of insolvency proceedings being opened against a participant in a system authorized in Luxembourg, the rights and obligations arising from, or in connection with, its participation shall be determined by Luxembourg law.	This provision is in accordance with international private law principles according to which, the rights and obligations of the participant linked to its participation in a foreign system will be governed by the law applicable to the said system, and not by the law of the bankrupt participant.
				A: 61-4 N: 2	In the event of insolvency proceedings being opened against a Luxembourg participant in a system in the meaning of article 34-2, a) governed by the laws of another Member state, the rights and obligations arising from, or in connection with, its participation shall be determined by the law applicable to the said system.	

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² N = normal (mandatory requirement to be transposed); O = option (mandatory requirement with an option for transposition); D = discretion; n. a. = not applicable

Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
	INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FORM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER			A: 61-3	Provisions specific to the insulation of the rights of holders of collateral security provided, in connection with a European payment or securities settlement systems or in connection with central banks of the Member States or ECB' s transactions, from the effects of the insolvency of the provider	
A: 9 P: 1	The rights of: - a participant to collateral security provided to it in connection with a system, and - central banks of the Member States or the European central bank to collateral security provided to them, shall not be affected by insolvency proceedings against the participant or counterparty to central banks of the Member States or the European central bank which provided the collateral security. Such collateral security may be realised for the satisfaction of these rights.	N		A: 61-3 N: 2	The rights of: - a participant to collateral security provided to it in connection with a system in the meaning of article 34-2 a), 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 shall not be affected by insolvency proceedings against the participant or counterparty to said central banks which provided the collateral security. Notwithstanding contrary provisions in the law applicable to the insolvency proceedings, such collateral security may be realised for the satisfaction of the rights covered by these	

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Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					collateral security.	
A: 9 P: 2	Where securities (including rights in securities) are provided as collateral security to participants and/or central banks of the Member States or the European central bank as described in paragraph 1, and their right (or that of any nominee, agent or third party acting on their behalf) with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.	N		A: 61-3 N: 3	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.	
	FINAL PROVISIONS					
A: 10 S: 1	Member States shall specify the systems, which are to be included in the scope of this Directive and shall notify them to the Commission and inform the Commission of the authorities they have	N		A: 34-3 A: 34-3 S: 1 A: 34-3	Scope The current chapter applies to any payment and securities settlement system authorised in Luxembourg. However it does not apply to payment and	Luxembourg has exercised the option to impose authorisation and supervision

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
	chosen in accordance with Article 6(2).			S: 2	<p>securities settlement systems governed by Luxembourg law the participants of which are Central Bank of Luxembourg or any other entity that is part of the European system of central banks. These systems are considered to be authorised in Luxembourg as from their notification by Central Bank of Luxembourg to the European Commission.</p> <p>Art. 47-1</p> <p>Prudential Supervision of payment and securities settlement systems authorised in Luxembourg.</p> <p>Without prejudice to the tasks and competencies 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,</p>	<p>requirements on the systems, and system operators, , who wish to benefit from the protection of the law. CF Supra A: 34-3 S:2 and 34-4 N:L</p> <p>A: 34-4 to A: 34-7, please see pages 31- 35</p>

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					<p>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 stability of the financial system in its entirety. In this respect, the Commission watches over the application of functioning rules and the implementation of settlement procedures and risk management procedures that are encompassed within the systems it supervises.</p> <p>(I) it is inserted in paragraph (I) of article 52 a new third phrase and a new fourth phrase of the following terms:</p> <p>The Commission, in addition, is responsible for the official table of the prudential supervision of payment and securities settlement systems authorised by the Ministry. The official table</p>	

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					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.	
A:10 S: 2	The system shall indicate to the Member State whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them.	N				
A: 10 S: 3	In addition to the indication provided for in the second subparagraph, Member States may impose supervision or authorisation requirements on systems which fall under their jurisdiction.	D				
A: 10 S: 4	Anyone with a legitimate interest may require an institution to inform him of the systems in which it participates and to provide information about the main rules governing the functioning of those systems.	N		A: 37-1	Anyone with a legitimate interest may require a Luxembourg institution to inform him of the payment and securities settlement systems in which it participates and to provide information about the main rules governing the functioning of those systems.	This article is inserted in Part II of the law of 5 April 1993 regarding professional duties, prudential rules and rules of conduct in the financial sector

¹ A = article; P = paragraph; S = sentence; N = number ;

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Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 11 P: 1 S: 1,2	Member States shall bring into force the laws regulations and administrative provisions necessary to comply with this Directive before 11 December 1999. They shall forthwith inform the Commission thereof.	N				
A: 11 P: 1 S: 3,4	When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.	N				
A: 11 P: 2	Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive. In this Communication, Member States shall provide a table of correspondence showing the national provisions which exist or are introduced in respect of each Article of this	N				

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
	Directive.					
A: 12	No later than three years after the date mentioned in Article 11(1), the Commission shall present a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.	n. a.				
A. 13	This Directive shall enter into force on the day of its publication in the <i>Official Journal of the European Communities</i> .	n. a.				
A: 14	This Directive is addressed to the Member States.	n. a.				

The Law contains articles that are not a direct transposition of an equivalent provision of the Directive :

- Articles in relation with the creation of system operators as a new category of professionals of the financial sector.

A: 28-2. payment and securities settlement systems operators (This article is inserted in Part I Chapter 2: Section 2 of the law of 1993 relating to the authorisation of the PSF).

(1) Is an operator of payment and securities settlement systems authorised in Luxembourg the person who is responsible for the functioning of the system and is the interlocutor of the authorities referred to in Article 34-4 et 34-5. He may be a participant in the system.

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

(2) This section does not apply neither to Central bank of Luxembourg nor to any other entity who is part of the European system of central banks.

Article 34-2(h) “system operator” means an entity that is responsible, alone or with others, of the efficient functioning of the system and who is the interlocutor assigned by the authorities. They may also be a system participant.

- Articles in relation with the authorisation and the prudential supervision of the payment and securities settlement systems

Article 34-4

May be authorised as a payment or securities settlement system a formal arrangement:

-between three or more participants, without counting a settlement agent, a central counterparty, a clearing house or an indirect participant, with common rules and standardised arrangements for the execution of transfer orders between the participants,

-that the participants have chosen to submit to Luxembourg law,

-in which at least one of its participants is a legal entity whose registered office is in Luxembourg,

-which designates a system operator,

(2) The Minister having the Commission within his competence is the competent authority to grant authorisation to the systems. The Commission notifies to the European Commission systems authorised by the Minister.

¹ A = article; P = paragraph; S = sentence; N = number ;

² N = normal (mandatory requirement to be transposed); O = option (mandatory requirement with an option for transposition); D = discretion; n. a. = not applicable

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

Subject to the fulfilment of the conditions in the first subparagraph, may be authorised a formal arrangement 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.

May also be authorised a formal arrangement between two participants, without counting a settlement agent, a central counterparty, 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;

Art: 34-5 Authorisation Procedure

- (1) The authorisation is granted on written request from the system operator and following instruction from the Commission under such conditions required by current law, the Central Bank of Luxembourg is requested its advice from the point of view of systemic risk.
- (2) The term of the authorisation is unlimited.
- (3) The request for authorisation must be attached with all information required for the evaluation.
- (4) An authorisation is required before any change of formal arrangement constituting the authorised system.
- (5) The decision taken on a request for authorisation must be justified and notified to the applicant within the six months following receipt of the request or, if the request is incomplete, within the six months following receipt of the information required for such decision to be made. In any case, it is decided within the twelve months following receipt of the request, and the absence of a decision amounts to a notification for refusal. The decision may be referred, within a period of one month under penalty of preclusion, to the administrative court, who shall judge upon the merits of the case.

Art: 34-6 Conditions of Authorisation

¹ A = article; P = paragraph; S = sentence; N = number ;

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

- (1) The systems must be organised in such a way as to ensure the settlement processing of the transfer orders.
- (2) The authorisation of the system is subject to the condition that the system operator has its registered office in Luxembourg or in another Member State.
- (3) The authorisation of the system is subject to the condition that the system operator is authorised as a credit institution in Luxembourg or in another Member State, either authorised as a “PSF” in Luxembourg or as an investment company in another Member State, or authorised to exercise the function of system operator in another Member State and is subject to the same supervision as exercised by the Commission regarding the authorised operators in Luxembourg.
- (4) The system operating rules must be sufficiently detailed and appropriate with respect to the nature and the volume of activity and the number of anticipated participants. These rules must include:
 - defining the systems participants’ admission and exclusion conditions,
 - defining the rights and obligations of the participants to ensure their participation in the system,
 - defining the time where the transfer order is introduced into the system,
 - setting the time when a transfer order can no longer be revoked by either a system participant or a third party,
 - specifying the settlement method of transfer orders,
 - establishing the settlement procedure applicable in both regular and crisis situations,
 - establishing risk management procedures,
 - stating the competent jurisdiction with respect to litigation,
 - appointing the individual(s) responsible for informing the Commission with respect to the system participants as well as any changes to the participants.

Art: 34-7 Authorisation Withdrawal

¹ A = article; P = paragraph; S = sentence; N = number ;

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

- (1) The Minister having the Commission within his competence may withdraw authorisation if the conditions for the authorisation approval are not fulfilled anymore. The Commission shall immediately inform the European Commission of the withdrawal of authorisation.
- (2) The decision regarding the withdrawal may be referred, within a period of one month under penalty of preclusion, to the administrative court, who shall judge on the merits of the case.

(D) Paragraph (1) of article 35 has been modified to the following:

“ (1) With the exception of article 36bis and article 37-1, the current part applies to all credit institutions and “PSF” permitted to exercise their activities by virtue of chapters 1, 2 or 3 of Part I of the current law”.

An additional paragraph (3) has been added to Article 35 with the following terms:

“ (3) Article 37-1 is applicable to all institutions which are in accordance with article 34-2, letter b established in Luxembourg.

(E) In part II a new article 37-1 has the following terms:

“Art.37-1. The right to information with respect to Luxembourg institutions participating in payment and securities settlement systems.

All persons having a legitimate interest can require an institution, established in Luxembourg, to indicate to them the payment and securities settlement systems in which they participate, and to provide them with information on the principal rules governing the functioning of such systems.

(F) Paragraph (1) of article 41 has been modified to the following:

¹ A = article; P = paragraph; S = sentence; N = number ;

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

“(1) The directors, members of director and regulatory bodies, managers, employees and other persons who are involved in the service of credit institutions, other professionals of the financial sector, settlement agents, clearing houses, central counterparties and foreign operators of authorised systems in Luxembourg by virtue of part I of the current law, are obliged to keep secret information which has been provided to them in their professional activity. Any disclosure of such information is punishable under Article 458 of the Penal Code.”

(G) In paragraph (1) of Article 42, the reference to Article 28-1 is replaced with the reference of Article 28-2.

- Articles in relation to specific provisions on settlement finality in payment and securities settlement systems in Luxembourg

No cash settlement account with a management body or a payment agent of a system may be distrained, sequestered or frozen in any manner whatsoever by a participant (other than the management body or a payment agent), a counterparty of any third party.

¹ Law of 12 January 2001 transposing directive 98/26/CE on settlement finality in payment and securities settlement systems, in the law of 5 April 1993 on the financial sector, as amended, and amending the law of 23 December 1998 creating a commission de surveillance du secteur financier (hereafter the Law).

² Parliamentary Bill n° 4611/00 J-1999-0-0148

³ The BCL has prepared a policy and procedure document and a summary paper as attached to Circulaire BCL 2001/168, which determines the framework of the oversight, applicable standards and duties of the systems. The BCL defines in the summary paper ‘system’, as having five distinct components. These components have been listed as the following: the operator, the participants, technical agents and suppliers (a technical agent has been defined as a supplier of service where an operator has located a significant portion of its operational or IT infrastructure or where several payment-or securities settlement-related operational or IT infrastructures are centralised), rules and contracts and, legal and regulatory environment.

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Directive 98/26/EC			Member State's Legislation			
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The BCL has set up an internal mechanism of recognition in order to facilitate the oversight process. The BCL will assess the operators/technical agents financial resources, default arrangements, rules, which make clear certain key aspects of its business activities and arrangements for monitoring and enforcing compliance with its rules.

Operators, and where relevant technical agents, must be able to meet the 10 Core principles and other recommendations and standards, adopted by the BCL, relating to payment, securities settlement and other mechanisms or give reasons for non-compliance or corrective action plans where relevant.

⁴ In the first draft of the law, the prudential supervision of Luxembourg systems was exclusively assigned to the CSSF. This choice has been justified in the parliamentary bills on several grounds:

- some of the system participants are already subject to prudential supervision of the CSSF.
- the CSSF is not involved in either the management or the operating of the systems and would therefore not be exposed to conflicts of interest.

The BCL and the ECB have been consulted on the pertinent Luxembourg parliamentary bills and have issued detailed opinions in which they have both expressed reservations on the setting up of an authorisation and a prudential supervision process, as well as such authorisation and supervision being awarded to the CSSF. The BCL has expressed reservations concerning the supervision of such systems (the directive does not make it a compulsory duty), insofar that such voluntary action may create expense and as a consequence, have a negative impact on the competitive force of Luxembourg in the financial community. Indeed, the BCL have stressed their concern over resolution on conflicting opinions expressed by the CSSF and the BCL, if such dual authorisation and supervision was so awarded.

The BCL have also objected to the intervention of the CSSF with respect to the fact that the Treaty of Rome and the Statute of the European System of Central Banks (ESCB) give the BCL such powers for the oversight of payment systems and security settlement systems. Article 105 (2) of the Treaty and Article (3) of the Statute of the ESCB state that, “ The basic tasks to be carried out through the ESCB shall be (...) to promote the smooth operation of the payment systems”. In addition, Article 22 of the Statute states that, “ The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries”. The ECB has emphasised that Article 22 is explicit on two points: the possibility for the Eurosystem to have an operational role and the possibility for the ECB to issue regulations in the field of payment systems.

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Following such comments by the BCL, it was concluded that both the CSSF and the BCL would be involved in the authorisation and supervision requirements on the systems with the BCL to be concerned with the systems and the CSSF with the institutions respectively. More specifically, the BCL would be concerned with systemic risk i.e. the risk that the failure of one participant to meet its obligations in the system will result in other participants being unable to meet their obligations, thus leading to a chain reaction, and would be responsible for the “oversight” of such systems.

Furthermore, in order to avoid the work being duplicated and any conflict concerning the competence of the BCL and the CSSF, it was proposed by the Chambre des Deputés to limit the competence of the CSSF. The proposal was two-fold (a) to limit the access of the CSSF to the systems, which the BCL do not participate in, and, (b) to define the terms of the competence of the CSSF based upon the terms established with the BCL.

Following such comments by the BCL, some amendments have been made to the initial parliamentary bills in order to take into account the specific role of the BCL.

In particular:

- Power to grant authorisation has been given to the ministry following the examination of the application by the CSSF and opinions of the BCL on systemic risks. Systems in which the BCL or another entity of the ESCB is a participant are deemed to be authorised as soon as the BCL notifies them to the European Commission. The systems are not subject to the aforementioned prudential supervision of the CSSF.

The parliamentary bills that have specified the ESCB, the ECB and the BCL have competence in the field of payment systems granted directly by the Treaty of Rome and statutes of the ESCB and that evidently the Luxembourg national law respects such competencies. Accordingly, it has been specified that the national competencies granted to Luxembourg authorities are exercised without prejudice to the ESCB competencies. Furthermore, Luxembourg legislators have considered firstly that, it would not be appropriate for Luxembourg law to grant powers, which have already been awarded, by European law, and secondly, it would be improper to express any opinion on the interpretation given by the ESCB on its competencies.

Furthermore, the Luxembourg legislators have taken into account the statement made by the ECB, according to which the ECB has recognised the powers the national authorities to perform prudential supervision, in that the ECB has tried to determine the scope of the prudential supervision compared to systemic supervision.

¹ A = article; P = paragraph; S = sentence; N = number ;

² N = normal (mandatory requirement to be transposed); O = option (mandatory requirement with an option for transposition); D = discretion; n. a. = not applicable

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks

Concerning the exchange of information between the CSSF and the BCL, the Luxembourg legislators have determined it unnecessary to include specific provisions, as laws pertaining to the both the CSSF and the BCL provide for such exchange.

According to the “Conseil d’Etat”, Article 10 of the Directive has not ruled on how the supervision should be organised and such absence of detailed conditions on that point could mean that a Member State may freely implement the measures they deem appropriate

⁵ Parliamentary Bill No.4611/00 J-1999-0-0148

⁶ The BCL has described the systems in the Circular 2001/168 of 5 December 2001:

Payment systems (PS): Gross and net settlement and other payment mechanism (OPMs)

LIPS-Gross is a Real Time Gross Settlement capability (RTGS). RTGS-L GIE, the operator, an economic interest group, including Luxembourg-based banks and the BCL; the BCL is the technical agent and the settlement agent. It aims in particular at large-value payments and settles payments individually in an ongoing process as they are received in the system. LIPS_Gross is a component of TARGET (Trans-European Automated Real-Time Gross settlement Express Transfer) enabling Luxembourg participants to exchange payments with TARGET participants, around 5,000 in the European Union at the end of 2001.

-LIPS-Net is a net settlement capability, which settles several times throughout the day: SYPAL-GIE, the operator, an economic interest group, including banks active in domestic business, the post office and the BCL, is responsible for the management and development of LIPS-Net and the Centre de Transferts Electronique (CETREL) is the technical agent. The BCL is the settlement agent.

OPMs which have a direct or indirect impact on the main payment systems for gross and net settlement; these include credit card, debit card and electronic-payment and electronic-money. BCL regards these mechanisms and any developments as being important for reasons of efficiency and stability and as such these and new similar systems are subject to oversight.

Securities settlement systems (SSS)

-BCL makes a distinction between SSSs-Embedded (where funds and securities transfers are embedded in the same mechanism and where the BCL and/or other ESCB NCBS are participating, having a direct impact on payment systems in Luxembourg) and SSSs-Other (where securities are processed independently from funds where the cash leg is settled first). The BCL is a participant in CBL, which has been recognised by the BCL and is subject to its oversight. This includes the following activities: CBL as provider of services for the transfer of collateral for monetary policy operations/TARGET liquidity, CBL for international securities settlement, CBL for domestic government debts settlement and CBL for domestic Luxembourg securities. As a credit institution CBL is also subject to prudential supervision performed by the CSSF.

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² N = normal (mandatory requirement to be transposed); O = option (mandatory requirement with an option for transposition); D = discretion; n. a. = not applicable

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⁷ BCL Circular 2001/168 of 5 December 2001

⁸ Section B of annexe II of the Law of 5 April 1993 refers to

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 (FRA)

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 currency and on interest rates.

¹ A = article; P = paragraph; S = sentence; N = number ;

² N = normal (mandatory requirement to be transposed); O = option (mandatory requirement with an option for transposition); D = discretion; n. a. = not applicable