

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

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France – final report

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

<b>SCOPE AND DEFINITIONS</b>						
A: 1 N: a	The provisions of this Directive shall apply to: (a) any <u>system</u> 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				For more information concerning the “system”, <i>cf. infra</i> , comments on Article 2.a.1 and subs of the Directive.
A: 1 N: b	(b) any <u>participant</u> in such a system;	N				For more information concerning the “participant”, <i>cf. infra</i> , comments on Articles 2.f.1 and 2.f.2 of the Directive.

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A: 1 N: c	(c) <u>collateral security</u> 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				For more information concerning the “collateral security”, <i>cf. infra</i> , comments on Article 9.1 of the Directive.

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A: 2	For the purpose of this Directive:					
A: 2 N: a S: 1	"system" shall mean a formal arrangement:	N	Code	L.330-1 I  P : 1	A system for inter-bank settlements or the settlement and delivery of financial instruments shall mean a national or <u>international</u> procedure which organises the relationship	

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 2 N: a S: 1	-between <u>three or more participants</u> , <u>without counting</u> 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,	N	Code	A : L.330-1 I P : 1	between <u>at least two parties</u> which have the status of credit institution or undertaking as defined by article L. 518-1 <sup>3</sup> , investment company or member of a clearing house or any non-resident undertaking with comparable status which 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.	As far as the number of participants in a system is concerned, there exists a discrepancy between the Directive and French Law. The definition of the French systems is broader. Indeed, as from 1993 (for inter-bank settlement) and as from 1998 (for settlement and delivery of financial instruments), a system of only two participants may already exist. Such systems do not exist. If they existed, they would not be notified.

<sup>3</sup> In conformity with Article 518-1 of the Code, those credit institutions and undertakings are: 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*).

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code	A : L.330-1 I P : 3	In the event of insolvency proceedings commenced against one of the parties to an inter-bank 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 <u>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.</u>	French law does not specifically provide for the law applicable to the system. However, (i) French law recognises international systems (either within or outside the EEA), (ii) in case of insolvency proceedings, French law expressly organises conflict of law rules on the basis of which the law applicable to the system and organising the participants' duties and obligations may exclusively be either French law or a law of a EEA Member State.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 2 N: a S: 1	- <u>designated</u> , without prejudice to other more stringent conditions of general application laid down by national law, as a system and <u>notified</u> to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the <u>adequacy</u> of the rules of the system.	N	Code	A : L.330-1 I P : 2	Notwithstanding the provisions of 4, IV of article L. 622-7 <sup>4</sup> , the system must either have been set up by a public authority or be governed by the terms of a framework agreement which respects the general principles of a market framework agreement or standard agreement. <u>The economy Minister provides the European Commission with a list of the systems which benefit from these provisions.</u>	For the time being, the systems already duly notified to the European Commission are (the “ <b>Systems</b> ”): a) <u>Payment systems:</u> - TBF - PNS b) <u>Securities settlement systems:</u> - Clearing 21 - Relit - Relit + - RGV <sup>5</sup> . The notification of the payment system “SIT” is currently in progress.

<sup>4</sup> Article 62-7, IV, 4 of the Code mentions that: the General Regulations of the Financial Markets Council (in French, *Conseil des Marchés Financiers*, the “**CMF**”) shall set forth the

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general organisational and operational principles of financial instrument settlement and delivery systems and the conditions under which the CMF approves the operating rules of such systems, without prejudice to the powers granted to the *Banque de France* by Article L. 141-4 of the Code which provides that the *Banque de France* is responsible for the proper functioning and the security of payment systems, in the context of the role of the European System of Central Banks.

<sup>5</sup> Since December 19, 2001, the new RGV2 operating rules have been approved by the CMF and supersede the former rules of Relit, Relit + and RGV (for more information, *cf. supra*, Introduction)

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Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 2 N: a S: 2	Subject to the conditions in the first subparagraph, a Member State <u>may</u> 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 <u>relating to other financial instruments</u> , when that Member State considers that such a designation is warranted on grounds of systemic risk.	D				France did not designate such a system.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 2 N: a S: 3	A Member State <u>may also on a case-by-case basis</u> designate as a system such a formal arrangement between <u>two participants</u> , 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 <u>grounds of systemic risk</u> ;	D	Code	A : L.330-1	For the content of Article 330-1 of the Code, <i>cf. supra</i> , comments on Article 2.a.1 of the Directive.	Article L.330-1 of the Code defines the French system as being composed out of merely two participants. This definition is general and the number of merely two participants is not justified upon grounds of any risks of systemic disturbances. This provision was enacted before the publication of the Directive and the French legislator did not modify it as he considered it as being broader <sup>6</sup> (for more information, <i>cf. supra</i> , Introduction).

<sup>6</sup> According to the meetings we had with the French authorities, those systems of two participants are not to be notified to the European Commission.

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A: 2 N: b S: 1	<p>`institution` shall mean:</p> <ul style="list-style-type: none"> <li>-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</li> <li>-an investment firm as defined in point 2 of Article 1 of Directive 93/22/EEC excluding the institutions set out in the list in Article 2(2)a to (k) thereof, or</li> <li>-public authorities and publicly guaranteed undertakings, or</li> <li>-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.</li> </ul>	N	Code	A : L.330-1 I P : 1	<ul style="list-style-type: none"> <li>-credit institution or undertaking as defined by article L. 518-1<sup>7</sup> of the Code,</li> <li>-investment company,</li> <li>-member of a clearing house, or</li> <li>-any non-resident undertaking with comparable status which 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.</li> </ul>	The terms “public authorities and publicly guaranteed undertakings” referred to in Article 2.b.1 of the Directive do not appear in Article L. 330-1 of the Code. According to the French authorities, the only public authorities and publicly guaranteed undertakings that may participate to a system are already mentioned in Article L.518-1 of the Code.

<sup>7</sup> For the content of Article L. 518-1 of the Code, *cf. supra*, footnote nr 3.

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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 <u>may</u> 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 referred to in the first subparagraph and that such a decision is warranted on grounds of systemic risk;	D				There is no transposition of such Article under French Law.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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				There is no legal definition of the term “central counterparty” in French law. However, Section 1.3.5 of the Clearnet Rules (Articles 1.3.5.1. to 1.3.5.5 included) <sup>8</sup> describes the role of Clearnet as central counterparty.

<sup>8</sup> According to Article 1.3.4.1 of the Clearnet Rules, Clearnet acts as central counterparty between the Clearing Member of the buyer and the Clearing Member of the seller. Article 1.3.5.3. of the Clearnet Rules provides the following: “Upon registration by Clearnet of Transactions submitted to it by or on behalf of its original counterparties, the original Transaction is novated and Clearnet therefore becomes exclusively entitled to the rights and subject to the obligations arising under the Transaction in place of each of the original counterparties.”

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks

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				There is no legal definition of the term “settlement agent” in French law. However, in France, this function is actually ensured by both <i>Banque de France</i> and Euroclear France.
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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 2 N: e	`clearing house` shall mean an entity responsible for the calculation of the net positions of institutions, a possible central counterparty and/or possible settlement agent;	N	Code	A : L.442-1 P : 1	Clearing houses ensure the supervision of positions, margin calls and, where necessary, the automatic closing of positions.	Article 4.8.1.2 of the Clearnet Rules specifies that, on the basis of the registered transactions, Clearnet calculates a net position per Clearing Member, per Financial Instrument and per settlement date.  The Directive makes a clear distinction between « central counterparty » and « clearing house ». In France, however, the roles of « central counterparty » and « clearing hoouse » are, in practice, assimilated.

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Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code	A : L.330-1 P : I S : 1	A system for inter-bank settlements or the settlement and delivery of financial instruments shall mean a national or international procedure which organises the relationship between at least two parties which have the status of <u>credit institution or undertaking as defined by article L. 518-1<sup>9</sup>, investment company or member of a clearing house or any non-resident undertaking with comparable status which 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 <u>participants</u>.</u>	For more information, <i>cf. supra</i> , comments about Article 2.b.1 of the Directive.

<sup>9</sup> Article L. 518-1 of the Code: for the content of this Article, *cf. supra*, footnote nr 3.

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A: 2 N: f S: 3	A Member State <u>may</u> decide that for the purposes of this Directive <u>an indirect participant</u> may be considered a participant <u>if it is warranted on the grounds of systemic risk and on condition that the indirect participant is known to the system</u> ;	D	Code	A : L.330-1 P : II  A : L.330-2 P : I	II. – Notwithstanding any contrary legal provisions, until the end of the day on which a decision to commence insolvency proceedings against an undertaking which participates <u>either directly or indirectly</u> 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  I. – Regulations, framework or standard agreements used for any inter-bank 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 <u>either directly or indirectly</u> in said systems and in addition to the creation of a pledge over financial instruments as set forth in article L. 431-4, the handing over of stocks and securities, claims or cash given as collateral to meet the payment obligations resulting from participation in these systems. The above are assigned with proprietary rights as a guarantee, this being binding on third parties with no further formality.	French Law expressly recognises the intervention of indirect participants but does not expressly subordinate this notion to both conditions referred to in the Directive (i.e. systemic risks and acquaintance by the system).

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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 defined in the first indent of (i) which enables the abovementioned credit institution to pass transfer orders through the system;	N				There is no legal definition of the term “indirect participant” under French law. However, rules and instructions of the various French systems contain provisions related to indirect participants.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 2 N: h	`securities` shall mean all instruments referred to in section B of the Annex to Directive 93/22/EEC;	N	Code	A : L.211-1	<p>Financial instruments are :</p> <p>I. 1. 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 ;</p> <p>2. Debt securities transferable by book entry or by physical delivery, each representing a claim on the legal person which issues it, other than trade bills and loan notes ;</p> <p>3. Units or shares in collective investment undertakings ;</p> <p>4. Financials futures ;</p> <p>5. And all instruments equivalent to the foregoing issued under foreign laws.</p> <p>II. Financial futures are :</p> <p>1. Financial futures and forward contracts involving any bills, securities, indices or currencies, including equivalent cash-settled instruments ;</p>	Article L. 211-1 of the 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 Directive 93/22/CEE does not cover the units of UCITS while the French legal definition of "securities" includes units issued by UCITS.

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					2. Forward interest-rate agreements ; 3. Swaps ; 4. Commodities futures and forwards ; 5. Options to acquire or dispose of financial instruments ; 6. And all other futures and forward market instruments.  III. Financial instruments may be issued only by the State, a legal person, an unincorporated mutual fund or a securitization vehicle.	

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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 book entry on a register, or otherwise;	N				The definition of the term “transfer order” laid down in the Directive is not explicitly defined under French Law. However, the expressions payment instructions and delivery instructions are known and actually appear in the Code (e.g. Art. 330-1, III) and in the operating rules governing French systems.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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				The definition of the term “insolvency proceedings” laid down in the Directive is not defined as such in the Code. However, Articles L. 611-1 and subs. <sup>10</sup> of the French Commercial Code describe such procedures.

<sup>10</sup> The laws of March 1, 1984 on the prevention and amicable settlement of business difficulties and of January 25, 1985 on the Business Reorganisation and Bankruptcy are codified in Articles L. 611-1 and subs of the French Commercial Code. Under French Law, the term “collective procedure” covers (i) the amicable settlement (in French, the “règlement amiable”) (ii) the judicial receivership (in French, the “redressement judiciaire”) or the judicial liquidation (in French, the “liquidation judiciaire”) (iii) the bankruptcy proceedings.

<sup>1</sup> A = article; P = paragraph; S = sentence; N = number ;

<sup>2</sup> 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

France – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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 from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed;	N				The term “netting” defined in the Directive refers to a multilateral netting. In France, no provision explicitly defines this term. However: (i) Art. 1289 and subs of the Civil Code refer to the bilateral netting, (ii) based upon a literal approach, one may consider that Art. 431-7 of the Code refers to the multilateral netting <sup>11</sup> , (iii) Article 2.1.8 of the CMF Rules describes the netting of financial instruments but is not deemed to give an official and general definition of the netting.

<sup>11</sup> Article 5.2.1.1. of the “Rules related to Payment and Securities Settlement Systems in France” enacted by the *Banque de France* states: “Article 431-7 of the Code

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

recognises the validity of multilateral netting performed by the clearing house for operations on financial instruments within the scope of the law”. In accordance with Art. 431-7 of the Code, may be settled in line with procedures set down by the General Regulations of the Financial Markets Council or by the framework agreements (as defined hereinafter) and may give rise to a clearing balance the following operations: (i) debts and claims connected with transactions on financial instruments, when undertaken in the framework of the General Regulations of the Financial Markets Council, (ii) debts and claims connected with transactions on financial instruments or temporary transfers of proprietorship of same where governed by one or more framework agreements which respect the general principles of national or international market framework agreements, and which concern the relationship between at least two parties, one of which is an investment services provider, or a public establishment or institution, undertaking or organism, or an undertaking benefiting from the provisions of article L. 531-2 or any undertaking whose head office is outside the Community with comparable status.

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<sup>2</sup> 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 <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code          Decree n°49-1105 of August 4, 1949	A: L.141-8 P : 3 & 4   A : 5	May hold accounts before the <i>Banque de France</i> : [...] 3. the investment services providers (“PSI”), 4. the foreign central banks and credit institutions [...].  Suppliers of investment services, banks and financial institutions may [...] affiliate to a professional body whose purpose is to facilitate the circulation of transferable securities between affiliated establishments by way of account to account transfers.  This professional body receives as a depository and records in the respective current accounts the transferable securities sent to it by affiliated establishments [...].	There is no legal definition of the term “settlement account”. However, the settlement accounts are held, on the one hand, by the <i>Banque de France</i> (cash accounts) and, on the other hand, by Euroclear France (financial instruments accounts).

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<sup>2</sup> 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 <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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 the Member States or to the European central bank.	N	Code	A : L.330-2 P : I & II	<p>I. – Regulations, framework or standard agreements used for any inter-bank 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, 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 these systems. <u>The above are assigned with proprietary rights as a guarantee</u>, this being binding on third parties with no further formality.</p> <p>II. – Regulations, framework or standard agreements set down procedures for the creation, allocation, realisation or use of financial instrument accounts or deliveries.</p>	The legal basis for collateral arrangements in payment and securities settlement systems is formed by Article 330-2 of the Code, which is applicable to the systems' participants. The collateral eligible under this specific regime is widely defined. The transfer of collateral is performed through a transfer of full ownership without any formal requirement to inform third parties and is enforceable despite the French legal provisions related to insolvency proceedings. <sup>12</sup>

<sup>12</sup> For the sake of the completeness, please note that: (i) Art. 442-6 of the Code states that: regardless of their nature, amounts deposited by principals (in

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
			Code	A : L.141-4 P : I S : 2	The enforceability against third parties and the enforcement of the rights of the national central banks which are members of the European System of Central Banks with regard to financial instruments, securities, claims or pledged amounts, assigned with proprietary rights or otherwise provided <u>as a guarantee</u> for their benefit, are not affected by the commencement of the procedures referred to in III, article L. 330-2.	Provisions applicable to the national central banks and the European Central Bank. This provision has been introduced by the Act n°2001-420 of May 15, 2001 (for more information, <i>cf. supra</i> , Introduction).

French, « donneurs d'ordres ») with investment services providers, with a member of a clearing house or deposited by one of said members with a clearing house to hedge or guarantee financial market positions, are immediately transferred with full ownership either to the investment services provider or the member or to the clearing house concerned in order to pay, firstly, the debit balance recorded on liquidation of the positions and, secondly, any other amount due to the investment services provider, the member or the clearing house, (ii) Art. 431-4 of the Code organises the pledge of financial instruments, and (iii) Art. 431-7 of the Code specifies that, in order to guarantee obligations arising under framework agreements, the parties may also provide for the delivery, with full ownership and as a guarantee binding on third parties, any stocks and securities, financial instruments, receivables or amounts in cash, or provide guarantees over such assets and rights, which may be realised even if one of the parties is subject to one of the procedures described in paragraph 3 of the said article.

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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			
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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
	<b>NETTING AND TRANSFER ORDERS</b>					
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, <u>provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings</u> as defined in Article 6(1).	N	Code	A.: L.330-1 P : II & III	<p>II - Notwithstanding any contrary legal provisions, <u>until the end of the day</u> 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 <u>may not be cancelled</u> on the grounds of this decision.</p> <p>III - These provisions also apply to orders to pay and orders to deliver financial instruments, once they become <u>irrevocable</u> in one of the systems referred to in II. The time and means by which an order becomes irrevocable in the system are defined by the system's operating rules.</p>	The rules of the various systems specify when the orders may be considered as being irrevocable.

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 3 P: 1 S: 2	Where, exceptionally, transfer orders are entered into a system after the moment of opening of insolvency proceedings and are <u>carried out</u> 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 <u>not aware</u> , nor should have been aware, of the opening of such proceedings.	N	Code	A.: L.330-1 P : II & III	<p>II - 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.</p> <p>III - These provisions also apply to orders to pay and orders to deliver financial instruments, once they become irrevocable in one of the systems referred to in II. The time and means by which an order becomes irrevocable in the system are defined by the system's operating rules.</p>	

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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				General provisions of the Bankruptcy Law (as codified in the French Commercial Code) are not applicable in case insolvency proceedings is opened against a participant of the system ( <i>cf. supra</i> , comments on Article 3.1.1 of the Directive – Article 330-1 of the Code).

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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 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.	N	Code  CMF Regu-lations	A: L. 330-1 P: III S: 2  A: 6.4.11	The time and means by which an order becomes irrevocable in the system are defined by the system's operating rules.  The operating rules of a payment and settlement system for financial instruments shall establish the conditions, including the time, under which an instruction in the system is considered to be irrevocable, in accordance with Article 93-1 of Act 84-46 of 24 January 1984 [Article L. 330-1 of the Code].	French law does not define as such, on a general basis, the moment of entry of a transfer order into a system. However, each system's operating rules define the moment of irrevocability.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code	A : L.330-2 P : I	Regulations, framework or standard agreements used for any inter-bank 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, 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 these systems. The above are assigned with proprietary rights as a guarantee, this being binding on third parties with no further formality.	

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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 <u>collateral security</u> to fulfil that participant's obligations in the system.	D				The possibility is provided for in the systems' rules which define the modalities of cash transfer in favour of the participant's account while participant's securities are credited on Banque de France custody account.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code	A : L330-1 P : III S : 2	The time and means by which an order becomes irrevocable in the system are defined by the system's operating rules.	The definitions of the irrevocability in the different systems are given in the systems' operating rules.
	<b>PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS</b>		CMF Regu- lations	A : 6.4.11	The operating rules of a payment and settlement system for financial instruments shall establish the conditions, including the time, under which an instruction in the system is considered to be irrevocable, in accordance with Article 93-1 of Act 84-46 of 24 January 1984 [Article L. 330-1 of the Code].	

<sup>1</sup> A = article; P = paragraph; S = sentence; N = number ;

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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				Under French law, insolvency proceedings produce retroactive effects at 0 hour the day during which the decision was adopted (the so-called "0 hour rule"). As far as insolvency proceedings commenced against system's participants are concerned, the effects of such proceedings are postponed until midnight the same day.

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Directive 98/26/EC			Member State's Legislation			
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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Draft Decree	4	Before deciding on the commencement of an insolvency proceedings against a credit institution, an investment company or any other participant in a system as defined by article L. 330 –1 of the Monetary and Financial Code, the Court shall refer the matter to the Banking Commission for opinion. The Clerk of the Court shall immediately forward this demand and inform the Public Prosecutor.	This Art. 4 of the Draft Decree (not yet enacted) amends Art. 12-1 of the Decree n° 84-708 of July 24, 1984.

<sup>1</sup> A = article; P = paragraph; S = sentence; N = number ;

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 6 P: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N				Article 5 of the Draft Decree (reminder: this Decree is not yet enacted) inserts an additional Article 12-1-1 in the Decree n° 84-708 of July 24, 1984 providing that the Banking Commission shall inform the Member States' competent authorities of the opening of an insolvency proceedings and of the measures taken against a participant to a system defined in Article L. 330-1 of the Code.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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 in Article 6(1).	N	Code	A: L. 330-1 P: II	II. – 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.	Article 330-1 of the Code abolishes the “zero hour” general rule for the payment and securities settlement systems in France ( <i>cf. supra</i> , comments on Article 3.1.1 of the Directive).

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Directive 98/26/EC			Member State's Legislation			
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Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code	A: L.330-1 P : I  S: 3	In the event of insolvency proceedings commenced against one of the parties to an inter-bank settlement system or system for the settlement and delivery of financial instruments in the European Economic Area, <u>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.</u>	This provision has been introduced by the Act n°2001-420 of May 15, 2001 (for more information, <i>cf. supra</i> , Introduction). French Law is more restrictive : the law governing the system may only be chosen amongst the EEA Member State's law.

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Directive 98/26/EC			Member State's Legislation			
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Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
	<b>INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FORM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER</b>					

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Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 9 P: 1	<p>The rights of:</p> <ul style="list-style-type: none"> <li>- a participant to collateral security provided to it in connection with a system, and</li> <li>- 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.</li> </ul>	N	Code	A: L. 330-2  P: I & III	<p><i>I. – Regulations, framework or standard agreements used for any inter-bank 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, 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 these systems. The above are assigned with proprietary rights as a guarantee, this being binding on third parties with no further formality. III. – The enforcement of these provisions shall not be prevented by the provisions of Section I and Section II of Book VI of the Commercial Code or equivalent provisions applicable to all court or amicable proceedings undertaken outside of France.</i></p>	Provisions applicable to the systems' participants.

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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 9 P: 1			Code	A: L.141-4  P: 2  S: 2	The enforceability against third parties and the enforcement of the rights of the national central banks which are members of the ESCB and the European Central Bank with regard to financial instruments, securities, claims or pledged amounts, assigned with proprietary rights or otherwise provided as a guarantee for their benefit, are not affected by the commencement of the procedures referred to in III, article L. 330-2.	Provision applicable to the national central banks and the European Central Bank.  This provision has been introduced by the Act n°2001-420 of May 15, 2001 (for more information, <i>cf. supra</i> , Introduction).

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<sup>2</sup> 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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1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code	A: L.330-2  P: IV	IV. – Where financial instruments, securities, claims and cash amounts or any similar instrument issued under foreign law are recorded in a register, account or central depository or a system governed by foreign law, or centralised deposit system located in a State party to the Agreement on the European Economic Space and given as collateral to meet the payment obligations resulting from participation in an inter-bank settlement system or securities settlement and delivery system as defined by article L. 330-1, the determination of the rights of the beneficiary of said collateral security shall be governed by the law applicable in said State.	This provision related to the conflicts of law rules has been introduced by the Act n°2001-420 of May 15, 2001 (for more information, <i>cf. supra</i> , Introduction).

<sup>1</sup> A = article; P = paragraph; S = sentence; N = number ;

<sup>2</sup> 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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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
	<b>FINAL PROVISIONS</b>					
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 chosen in accordance with Article 6(2).	N	Code	A: L.330-1  P: I  S: 3	The economy Minister provides the European Commission with a list of the systems which benefit from these provisions.	This provision has been introduced by the Act n°2001-420 of May 15, 2001 The systems notified to the European Commission are: a) Payment systems - TBF - PNS b) Securities settlement systems - Clearnet - Relit - Relit + - RGV <sup>13</sup> The notification of the payment system "SIT" is in progress (for more information, <i>cf. supra</i> , Introduction).

<sup>13</sup> Since December 19, 2001, the new RGV2 operating rules have been approved by the CMF and supersede the former rules of Relit, Relit + and RGV.

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<sup>2</sup> 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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1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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			Article 2 of the Draft Decree: “The system managers notified to the European Commission under article L.330-1 of the Monetary and Financial Code shall immediately inform the <i>Banque de France</i> of persons participating in the system, and any changes to said persons. They shall under the same conditions also inform the <i>Conseil des marchés financiers</i> where said system involves the settlement and delivery of financial instruments. The <i>Banque de France</i> and the <i>Conseil des marchés financiers</i> shall make this information available to any person with a legitimate interest.”	The Draft Decree is not yet enacted. It is currently submitted to the Economy, Finance and Industry Ministry.

<sup>1</sup> A = article; P = paragraph; S = sentence; N = number ;

<sup>2</sup> 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 <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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	Code	A : L.141-4  P : I   A : L.622-7 P: IV 4	The <i>Banque de France</i> is responsible for the proper functioning and the security of payment systems, in the context of the role of the European System of Central Banks ( <i>ESCB</i> ) which is to encourage the proper functioning of payment systems as set down by article 105, paragraph 2 of the Treaty establishing the European Community. The enforceability against third parties and the enforcement of the rights of the national central banks which are members of the ESCB with regard to financial instruments, securities, claims or pledged amounts, assigned with proprietary rights or otherwise provided as a guarantee for their benefit, are not affected by the commencement of the procedures referred to in III, article L. 330-2.  The General Regulations of the Financial Markets Council (in French, the <i>Conseil des Marchés Financiers</i> , the "CMF") shall set forth the general organisational and operational principles of financial instrument settlement and delivery systems and the conditions under which the CMF approves the operating rules of such systems, without prejudice to the powers granted to the Banque de France by the article L. 141-4 of the Code.	

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Directive 98/26/EC			Member State's Legislation			
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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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			Article 3 of the Draft Decree: “Any person with such legitimate interest may demand that a participant in a system notified to the European Commission provide information on the main rules governing the organisation of these systems”.	The transposition of Article 10.4 of the Directive shall be ensured very soon. The Draft Decree is not yet enacted, it is currently submitted to the Economy, Finance and Industry Ministry.

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<sup>2</sup> 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 <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	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				France has ensured the transposition of the Directive, except for certain items: (i) certain provisions were adapted by the Act n°2001-420 of May 15, 2001 and (ii) some existing Articles shall be amended through the Draft Decree which is currently in the form of a draft and which shall be submitted to the Economy, Finance and Industry Ministry.

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article <sup>1</sup>	Text	Appli- cability <sup>2</sup>	Refe- rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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				When the relevant French legal provisions were already entered into force <u>before</u> the publication of the Directive or very close to it, there is no reference to the Directive. Concerning the provisions transposed <u>after</u> the said publication, it appears that, except for the Draft Decree, no reference is systematically ensured.

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<sup>2</sup> 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 <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
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 Directive.	N			According to the information published on the web-site of the European Commission (information up-dated as of July 2001), France did not communicate the text of the French laws to the Commission. However, documents were sent by the French Authorities to the French Representative to the European Union in January and February 2001. These documents are copy of the French legal provisions transposing the 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.				

<sup>1</sup> A = article; P = paragraph; S = sentence; N = number ;

<sup>2</sup> 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 <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
A: 14	This Directive is addressed to the Member States.	n. a.				

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