

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

England and Wales –final report

Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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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 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	S.I. 1999 / 2979 <sup>1</sup>	A: 4 N: 1	Where:  (a) an application has been duly made under regulation 3;  (b) the applicant has paid any fee charged by virtue of regulation 5(1); and  (c) the designating authority is satisfied that the requirements of the Schedule are satisfied with respect to the system to which the application relates;  the designating authority may make an order (a "designation order") declaring the system to be a designated system for the purposes of these Regulations.	Regulation 3 sets out the procedure for an application for designation.  Regulation 5(1) provides that the designating authority may charge a fee to an applicant.  The Schedule to the Regulations sets out the requirements for the designation of a system.  No mention is made of currency type.

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				A: 2 N: 1 P: 13	<p>“designating authority” means –</p> <p>(a) in the case of a system</p> <p>(i) which is, or the operator of which is, a recognised investment exchange or a recognised clearing house for the purposes of the 1986 Act;</p> <p>(ii) which is, or the operator of which is, a listed person within the meaning of the Financial Markets and Insolvency (Money Market) Regulations 1995, or</p> <p>(iii) through which securities transfer orders are effected (whether or not payment transfer orders are also effected through that system),</p> <p>the Financial Services Authority;</p>	<p>The Financial Services Act 1986 was repealed on December 1 2001 and replaced by the Financial Services and Markets Act 2000 (“FSMA”).<sup>2</sup></p> <p>This part of the Financial Markets and Insolvency (Money Market) Regulations 1995 continues to have effect despite the repeal of these regulations in 2001.<sup>3</sup></p>

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				A: 2 N: 1 P: 13 (cont'd)	(b) in any other case, the Bank of England.	
				A: 2 N: 1 P: 12	“designated system” means a system which is declared by a designation order for the time being in force to be a designated system for the purposes of these Regulations.	
				A: 2 N: 4	References in these Regulations to things done, or required to be done, by or in relation to a designated system shall, in the case of a designated system which is neither a body corporate nor an unincorporated association, be treated as references to things done, or required to be done, by or in relation to the operator of that system.	

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A: 1 N: b	(b) any participant in such a system;	N		A:13 N: 2 P: a	Those provisions apply in relation to:  (a) insolvency proceedings in respect of a participant in a designated system  but not in relation to any other insolvency proceedings, notwithstanding that rights or liabilities arising from transfer orders or collateral security fall to be dealt with in the proceedings.	Regulation 13(2)(a) refers to the provisions of Part III of the regulations, which deal with “transfer orders effected through a designated system and collateral security”.

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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		A:13 N: 2 P: b	Those provisions apply in relation to:  (b) insolvency proceedings in respect of a provider of collateral security in connection with the functions of a central bank, in so far as the proceedings affect the rights of the central bank to the collateral security;  but not in relation to any other insolvency proceedings, notwithstanding that rights or liabilities arising from transfer orders or collateral security fall to be dealt with in the proceedings.	Regulation 13(2)(b) refers to the provisions of Part III of the regulations, which deal with “transfer orders effected through a designated system and collateral security”.

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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		A: 3 N: 1	Any body corporate or unincorporated association may apply to the designating authority for an order declaring it, or any system of which it is the operator, to be a designated system for the purposes of these Regulations.	
A: 2 N: a S: 1	-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,	N		Schedule A:1 N:2	There must be not less than three institutions participating in the system, unless otherwise determined by the designating authority in any case where: <ul style="list-style-type: none"> <li>(a) there are two institutions participating in a system; and</li> <li>(b) the designating authority considers that designation is required on the grounds of systemic risk.</li> </ul>	
				Schedule A:1 N:3	The system must be a system through which transfer orders are effected.	

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				Schedule A:5 N:1	<p>(1) The rules of the system must:</p> <ul style="list-style-type: none"> <li>(a) specify the point at which a transfer order takes effect as having been entered into the system;</li> <li>(b) specify the point after which a transfer order may not be revoked by a participant or any other party; and</li> <li>(c) prohibit the revocation by a participant or any other party of a transfer order from the point specified in accordance with paragraph (b).</li> </ul>	<p>Although there is no direct reference to the provision of common rules and standardised arrangements for the execution of transfer orders between the participants, the Schedule, setting forth the requirements for designation of a system clearly contemplates that these will be adopted.</p> <p>Under section 287 and 288 of FSMA, any</p>

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						applicant to become a recognised investment exchange or clearing house must submit a copy of its rules to the UK Financial Services Authority as part of the application process. The FSA Handbook contains a specialist sourcebook governing Recognised Investment Exchanges and

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						Recognised Clearing Houses that sets out requirements for the rules of such entities.
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		Schedule A:1 N:1	The head office of at least one of the participants in the system must be in Great Britain and the law of England and Wales or Scotland must be the governing law of the system.	“Great Britain” comprises England, Scotland and Wales.

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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: 3 N: 1	Any body corporate or unincorporated association may apply to the designating authority for an order declaring it, or any system of which it is the operator, to be a designated system for the purposes of these Regulations	The Regulations do not state that the FSA is required to notify the Commission.  The Regulations set out in greater detail than the Directive the procedure for applications for a designation order.

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				A: 3 N: 2	Any such application:  (a) shall be made in such manner as the designating authority may direct;  (b) shall be accompanied by such information as the designating authority may reasonably require for the purpose of determining the application.	
				A: 3 N: 3	At any time after receiving an application and before determining it, the designating authority may require the applicant to furnish additional information.	
				A: 3 N: 4	The directions and requirements given or imposed under paragraphs (2) and (3) may differ as between different applications.	

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				A: 3 N: 5	Any information to be furnished the designating authority under this regulation shall be in such form or verified in such manner as it may specify.	
				A: 3 N: 6	Every application shall be accompanied by copies of the rules of the system to which the application relates and any guidance relating to that system.	
				A: 2 N: 1 P: 16	“guidance”, in relation to a designated system, means guidance issued or any recommendation made by it which is intended to have continuing effect and is issued in writing or other legible form to all or any class of its participants or users or persons seeking to participate in the system or to use its facilities and which would, if it were a rule, come within the definition of a rule.	

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				A: 4 N: 1	<p>Where:</p> <ul style="list-style-type: none"> <li>(a) an application has been duly made under regulation 3;</li> <li>(b) the applicant has paid any fee charged by virtue of regulation 5(1); and</li> <li>(c) the designating authority is satisfied that the requirements of the Schedule are satisfied with respect to the system to which the application relates;</li> </ul> <p>the designating authority may make an order (a "designation order") declaring the system to be a designated system for the purposes of these Regulations.</p>	
				A: 4 N: 2	<p>In determining whether to make a designation order, the designating authority shall have regard to systemic risks.</p>	

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				A: 4 N: 3	Where an application has been made to the Financial Services Authority under regulation 3 in relation to a system through which both securities transfer orders and payment transfer orders are effected, the Authority shall consult the Bank of England before deciding whether to make a designation order.	The Directive makes no mention of fees.
				A: 4 N: 4	A designation order shall state the date on which it takes effect.	
				A: 4 N: 5	Where the designating authority refuses an application for a designation order it shall give the applicant written notice to that effect stating the reasons for the refusal.	
				A: 5 N: 1	The designating authority may charge a fee to an applicant for a designation order.	
				A: 5 N: 2	The designating authority may charge a designated system a periodical fee.	

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				A: 5 N: 3	<p>Fees chargeable by the designating authority under this regulation shall not exceed an amount which reasonably represents the amount of costs incurred or likely to be incurred:</p> <p>(a) in the case of a fee charged to an applicant for a designation order, in determining whether the designation order should be made; and</p> <p>(b) in the case of a periodical fee, in satisfying itself that the designated system continues to meet the requirements of the Schedule and is complying with any obligations to which it is subject by virtue of these Regulations.</p>	

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				A: 6 N: 1	Subject to paragraph (2), an investment exchange or clearing house declared by an order for the time being in force to be a recognised investment exchange or recognised clearing house for the purposes of the 2000 Act, whether that order was made before or is made after the coming into force of these Regulations, shall be deemed to satisfy the requirements in paragraphs 2 and 3 of the Schedule.	
				A: 6 N: 2	Paragraph (1) does not apply to overseas investment exchanges or overseas clearing houses within the meaning of the 1986 Act.	

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				A: 7 N: 1	<p>A designation order may be revoked by a further order made by the designating authority if at any time it appears to the designating authority:</p> <ul style="list-style-type: none"> <li>(a) that any requirement of the Schedule is not satisfied in the case of the system to which the designation order relates; or</li> <li>(b) that the system has failed to comply with any obligation to which it is subject by virtue of these Regulations.</li> </ul>	The Directive does not provide for the revoking of a designation order.

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				A: 7 N: 2	<p>Subsections (1) to (7) of section 298 of the 2000 Act shall apply in relation to the revocation of a designation order under paragraph (1) as they apply in relation to the revocation of a recognition order section 297(2) of that Act; and in those subsections as they so apply:</p> <ul style="list-style-type: none"> <li>(a) any reference to a recognised body shall be taken to be a reference to a designated system; and</li> <li>(b) any reference to members of a recognised body shall be taken to be a reference to participants in a designated system;</li> <li>(c) references to the Authority shall, in cases where the Bank of England is the designating authority, be taken to be a reference to the Bank of England; and</li> <li>(d) subsection (4)(a) shall have effect as if for "two months" there were substituted "three months".</li> </ul>	

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				A: 11 N: 1	Neither the designating authority nor any person who is, or is acting as, a member, officer or member of staff of the designating authority shall be liable in damages for anything done or omitted in the discharge, or purported discharge, of the designating authority's functions under these Regulations.	The Directive does not provide any protection for the actions of the designating authority or its members, officers or staff.
				A: 11 N: 2	Paragraph (1) does not apply: <ul style="list-style-type: none"> <li>(a) if the act or omission is shown to have been in bad faith; or</li> <li>(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998 (acts of public authorities).</li> </ul>	Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

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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		Schedule A:1 N: 3	The system must be a system through which transfer orders are effected.	The Schedule to the Regulations sets out the requirements for a system to be designated.
				Schedule A:1 N: 4	Where orders relating to financial instruments other than securities are effected through the system:  (a) the system must primarily be a system through which securities transfer orders are effected; and  (b) the designating authority must consider that designation is required on grounds of systemic risk.	

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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		Schedule A: 1 N: 2	There must be not less than three institutions participating in the system, unless otherwise determined by the designating authority in any case where: <ul style="list-style-type: none"> <li>(a) there are two institutions participating in a system; and</li> <li>(b) the designating authority considers that designation is required on the grounds of systemic risk.</li> </ul>	The definition of “institution” in the Regulations does not include central counterparties, clearing houses and indirect participants.

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A: 2 N: b S: 1	<p>‘institution’ shall mean:</p> <p>-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</p> <p>-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</p> <p>-public authorities and publicly guaranteed undertakings, or</p> <p>-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,</p>	N		A: 2 N: 1 P:18	<p>"Institution" means:</p> <p>(a) a credit institution;</p> <p>(b) an investment firm as defined in point 2 of Article 1 of Council Directive 93/22/EEC excluding the bodies set out in the list in Article 2(2)(a) to (k);</p> <p>(c) a public authority or publicly guaranteed undertaking;</p> <p>(d) any undertaking whose head office is outside the European Community and whose functions correspond to those of a credit institution or investment firm as defined in (a) and (b) above; or</p>	

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# Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement 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
	which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders within that system.			A:2 N: 1 P:18  (cont'd)  A: 2 N: 1 P: 8	(e) any undertaking which is treated by the designating authority as an institution in accordance with regulation 8(1),  which participates in a designated system and which is responsible for discharging the financial obligations arising from transfer orders which are effected through the system.  “Credit institution” means a credit institution as defined in Article 1(1)(a) of Directive 2000/12/EC of the European Parliament and Council, including the bodies set out in the list at Article 2(3).	Regulation 2(1)(18)(e) is in addition to the definition set out in the Directive  This definition does not include electronic money institutions defined as credit institutions under Article 1(1)(b) of Directive 2000/12/EC.

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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: 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 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		A:8 N: 1	A designating authority may treat as an institution any undertaking which participates in a designated system and which is responsible for discharging financial obligations arising from transfer orders effected through that system, provided that: <ul style="list-style-type: none"> <li>(a) the designating authority considers such treatment to be required on grounds of systemic risk, and</li> <li>(b) the designated system is one in which at least three institutions (other than any undertaking treated as an institution by virtue of this paragraph) participate and through which securities transfer orders are effected.</li> </ul>	Restricted to "under and which responsible for discharging financial obligation".
				A: 8 N: 2	Where a designating authority decides to treat an undertaking as an institution in accordance with paragraph (1), it shall give written notice of that decision to the designated system in which the undertaking is to be treated as a participant.	The Directive does not require notice to be given to the designated 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: 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		A:2 N: 1 P:3	"central counterparty" means a body corporate or unincorporated association interposed between the institutions in a designated system and which acts as the exclusive counterparty of those institutions with regard to transfer orders.	
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		A:2 N: 1 P:26	"settlement agent" means a body corporate or unincorporated association providing settlement accounts to the institutions and any central counterparty in a designated system for the settlement of transfer orders within the system, as the case may be, for extending credit to such institutions and any such central counterparty for settlement purposes.	
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		A:2 N:1 P:5	"clearing house" means a body corporate or unincorporated association which is responsible for the calculation of the net positions of institutions and any central counterparty or settlement agent in a designated system.	

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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: 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:2 N: 1 P:21	"participant" means:  (a) an institution;  (b) a body corporate or unincorporated association which carries out any combination of the functions of a central counterparty, a settlement agent or a clearing house, with respect to a system; or  (c) an indirect participant which is treated as a participant, or is a member of a class of indirect participants which are treated as participants, in accordance with regulation 9.	“Institution” is defined above.  This suggests that any one of these of one system could participate in another system and fall within the definition of “participant”, above. “Indirect participant” is defined below.

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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: 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:9	<p>A designating authority may treat:</p> <ul style="list-style-type: none"> <li>(a) an indirect participant as a participant in a designated system; or</li> <li>(b) a class of indirect participants as participants in a designated system,</li> </ul> <p>where it considers this to be required on grounds of systemic risk, and shall give written notice of any decision to that effect to the designated system.</p>	<p>The Directive imposes a requirement that the indirect participant is “known to the system.”</p> <p>The Regulations do not specifically require participants to notify the system as to the identity of indirect participants. The Rules of the London Clearing House do so require.</p>

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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
						However, the Rules of CREST do not require that participants notify the system as to the identity of indirect participants.
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		A:2 N: 1 P:17	"indirect participant" means a credit institution for which payment transfer orders are capable of being effected through a designated system pursuant to its contractual relationship with an institution.	See the definitions of "credit institution" defined above, and "transfer order" defined below.

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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		A: 2 N: 1 P:25  A: 2 N: 1 P: 4	"securities" means (except for the purposes of the definition of "charge") any instruments referred to in section B of the Annex to Council Directive 93/22/EEC.  "charge" means any form of security, including a mortgage.	Exclusion for definition of charge.

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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	<p>‘transfer order’ shall mean:</p> <ul style="list-style-type: none"> <li>-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</li> <li>-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;</li> </ul>	N		A:2 N: 1 P:29	<p>"transfer order" means:</p> <ul style="list-style-type: none"> <li>(a) an 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 an instruction which results in the assumption or discharge of a payment obligation as defined by the rules of a designated system ("a payment transfer order"); or</li> <li>(b) an instruction by a participant to transfer the title to, or interest in, securities by means of a book entry on a register, or otherwise ("a securities transfer order").</li> </ul>	

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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		A: 2 N: 3  A:2 N: 1 P:30	Subject to paragraph (1), expressions used in these Regulations which are also used in the Settlement Finality Directive have the same meaning in these Regulations as they have in the Settlement Finality Directive.  "winding up" means  (a) winding up by the court; or  (b) creditors' voluntary winding up,  within the meaning of the Insolvency Act 1986 (but does not include members' voluntary winding up within the meaning of that Act).	The term "insolvency proceedings" has the meaning specified in the Directive.  In English law, insolvency proceedings include winding up (as defined below), provisional liquidation, company administration, and in relation to individuals, bankruptcy, interim receivership or, for a deceased individual, administration of an insolvent estate.

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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: 1 P: 9	“creditors’ voluntary winding-up resolution” means a resolution for voluntary winding up (within the meaning of the Insolvency Act 1986) where the winding up is a creditor’s winding up (within the meaning of that Act).	<p>The term “winding up” is limited to the following insolvency proceedings: compulsory winding-up and creditors’ voluntary winding-up. It excludes administration.</p> <p>The directive refers to a third country, the Regulations do not.</p> <p>“members’ voluntary winding up” is excluded.<sup>4</sup></p>

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Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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: 2	<p>In these Regulations:</p> <p>(a) references to the law of insolvency include references to every provision made by or under the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985; and in relation to a building society references to insolvency law or to any provision of the Insolvency Act 1986 are to that law or provision as modified by the Building Societies Act 1986;</p> <p>(b) in relation to Scotland, references to:</p> <p>(i) sequestration include references to the administration by a judicial factor of the insolvent estate of a deceased person,</p>	

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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
					(ii) an interim or permanent trustee include references to a judicial factor on the insolvent estate of a deceased person, and  (iii) "set off" include compensation.	
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		A:2 N: 1 P:19	"netting" means the conversion into one net claim or obligation of different claims or obligations between participants resulting from the issue and receipt of transfer orders between them, whether on a bilateral or multilateral basis and whether through the interposition of a clearing house, central counterparty or settlement agent or otherwise.	

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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: 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:2 N: 1 P:26	"settlement account" means an account at a central bank, a settlement agent or a central counterparty used to hold funds or securities (or both) and to settle transactions between participants in a designated 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
	<b>NETTING AND TRANSFER ORDERS</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: 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:13 N: 1	The general law of insolvency has effect in relation to: <ul style="list-style-type: none"> <li>(a) transfer orders effected through a designated system and action taken under the rules of a designated system with respect to such orders; and</li> <li>(b) collateral security,</li> </ul> subject to the provisions of this Part.	The “provisions of this Part” refers to Part III of the Regulations, titled “Transfer Orders Effected Through a Designated System and Collateral Security”. This part modifies the law of insolvency in England and Wales as it applies to transfer orders made through a designated system and related collateral security.
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 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.			A: 13 N: 2	Those provisions apply in relation to: <ul style="list-style-type: none"> <li>(a) insolvency proceedings in respect of a participant in a designated system; and</li> </ul>	

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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: 13 N: 2 (cont'd)	(b) insolvency proceedings in respect of a provider of collateral security in connection with the functions of a central bank, in so far as the proceedings affect the rights of the central bank to the collateral security;  but not in relation to any other insolvency proceedings, notwithstanding that rights or liabilities arising from transfer orders or collateral security fall to be dealt with in the proceedings.	The Directive specifies that the transfer orders must have been entered into before “the opening of such insolvency proceedings.”  Regulation 20 provides that the modifications to the law of insolvency generally ceases to apply to a transfer order entered into a designated system after insolvency.

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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: 13 N: 3	Subject to Regulation 21, nothing in this Part shall have the effect of disapplying Part VII.	“Part VII” is a reference to the Companies Act 1989.
				A: 2 N: 1 P: 20	“Part VII” means Part VII of the Companies Act 1989.	
				A:14 N: 1	None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to the distribution of the assets of a person on bankruptcy, winding up, sequestration or under a protected trust deed, or in the administration of an insolvent estate:  (a) a transfer order;  (b) the default arrangements of a designated system;	The general law of insolvency in England and Wales prohibits the distribution of assets of a person on winding up or bankruptcy except in accordance with a prescribed order of payment. This provision alters the general law to ensure that transfer orders etc

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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
					(c) the rules of a designated system as to the settlement of transfer orders not dealt with under its default arrangements;  (d) a contract for the purpose of realising collateral security in connection with participation in a designated system otherwise than pursuant to its default arrangements; or  (e) a contract for the purpose of realising collateral security in connection with the functions of a central bank.	are legally valid notwithstanding the insolvency.  “default arrangements” are defined below.  Collateral security issues are dealt with below.

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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:20 N: 1	<p>This Part does not apply in relation to any transfer order given by a participant which is entered into a designated system after:</p> <ul style="list-style-type: none"> <li>(a) a court has made an order of a type referred to in regulation 22 in respect of that participant; or</li> <li>(b) that participant has passed a creditors' voluntary winding-up resolution; or</li> <li>(c) a trust deed granted by that participant has become a protected trust deed,</li> </ul> <p>unless the conditions mentioned in paragraph (2) are satisfied.</p>	<p>“This Part” refers to Part III of the Regulations, titled “Transfer Orders Effected Through a Designated System and Collateral Security”.</p> <p>Regulation 22 refers to an order by the court for bankruptcy, sequestration, administration or winding up in respect of a participant in a designated system.</p>

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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:20 N: 2	<p>The conditions referred to in paragraph (1) are that:</p> <ul style="list-style-type: none"> <li>(a) the transfer order is carried out on the same day that the event specified in paragraph (1)(a), (b) or (c) occurs; and</li> <li>(b) the settlement agent, the central counterparty or the clearing house can show that it did not have notice of that event at the time of settlement of the transfer order.</li> </ul>	
				A:20 N: 3	<p>For the purposes of paragraph (2)(b), the relevant settlement agent, central counterparty or clearing house shall be taken to have notice of an event specified in paragraph (1), (b) or (c) if it deliberately failed to make enquiries as to that matter in circumstances in which a reasonable and honest person would have done so.</p>	

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Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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 the moment of opening of insolvency proceedings, as defined in Article 6(1) shall lead to the unwinding of a netting.	N		A: 15 N: 1	The following provisions apply with respect to any sum which is owed on completion of action taken under default arrangements by or to a defaulter but do not apply to any sum which (or to the extent that it) arises from a transfer order which is also a market contract within the meaning of Part VII, in which case sections 162 and 163 of the Companies Act 1989 apply subject to the modification made by regulation 21.	Part VII of the Companies Act defines “market contract”. <sup>5</sup>
				A: 2 N: 1 P: 11	“defaulter” means a person in respect of whom action has been taken by a designated system under its default arrangements.	Section 162 of the Companies Act 1989 deals with reporting proceedings under default rules. <sup>6</sup>
				A: 15 N: 2	If, in England and Wales, a bankruptcy or winding-up order has been made or a creditor’s voluntary winding-up resolution has been passed, the debt –	Section 163 of the Companies Act 1989 deals with the sum to be payable by or to a defaulter. <sup>7</sup>

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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			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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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
					<p>(a) is provable in the bankruptcy or winding up or, as the case may be, is payable to the relevant office-holder; and</p> <p>(b) shall be taken into account, where appropriate, under section 323 of the Insolvency Act 1986 (mutual dealings and set-off) or the corresponding provision applicable in the case of winding up;</p> <p>in the same way as a debt due before the commencement of a bankruptcy, the date on which the body corporate goes into liquidation (within the meaning of section 247 of the Insolvency Act 1986) or, in the case of a partnership, the date of the winding-up order.</p>	<p>“relevant office-holder” defined below.</p> <p>Section 323 of the Insolvency Act 1986 deals with set-off and mutual dealing.<sup>8</sup></p> <p>The “corresponding provision applicable in the case of winding up” refers to Rule 4.90 of the Insolvency Rules 1986.<sup>9</sup></p> <p>“goes into liquidation” is defined by section 247 of the Insolvency Act 1986.<sup>10</sup></p>

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England and Wales –final report

Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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 P: 23	<p>“relevant office-holder” means –</p> <ul style="list-style-type: none"> <li>(a) the official receiver;</li> <li>(b) any person acting in relation to a company as its liquidator, provisional liquidator, or administrator;</li> <li>(c) any person acting in relation to an individual (or in Scotland, any debtor within the meaning of the Bankruptcy (Scotland) Act 1985) as his trustee in bankruptcy or interim receiver of his property or as permanent or interim trustee in the sequestration of his estate or as his trustee under a protected trust deed; or</li> <li>(d) any person acting as administrator of an insolvent estate of a deceased person;</li> </ul> <p>and in sub-paragraph (b), “company” means any company, society, association, partnership or other body which may be wound up under the Insolvency Act 1986.</p>	

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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: 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		A: 12 N: 1 P: 24  Schedule A:5 N: 1 P: (a)	<p>“rules”, in relation to a designated system, means rules or conditions governing the system with respect to the matters dealt with in these Regulations.</p> <p>The rules of the system must:</p> <p>(a) specify the point at which a transfer order takes effect as having been entered into the system;</p>	

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Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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: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: 2 N: 1 P: 10	<p>“default arrangements” means the arrangements put in place by a designated system to limit systemic risk and other types of risk which arise in the event of a participant appearing to be unable, or likely to become unable, to meet its obligations in respect of a transfer order, including, for example, any default rules within the meaning of Part VII or any other arrangements for –</p> <ul style="list-style-type: none"> <li>(a) netting,</li> <li>(b) the closing out of open positions, or</li> <li>(c) the application or transfer of collateral security.</li> </ul>	

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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:14 N: 1 P: (a), (b), (c)	None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to the distribution of the assets of a person on bankruptcy, winding up, sequestration or under a protected trust deed, or in the administration of an insolvent estate:  <ul style="list-style-type: none"> <li>(a) a transfer order;</li> <li>(b) the default arrangements of a designated system;</li> <li>(c) the rules of a designated system as to the settlement of transfer orders not dealt with under its default arrangements;</li> </ul>	“default arrangements” defined above.

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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: 14 N: 2	<p>The powers of a relevant office-holder in his capacity as such, and the powers of the court under the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985, shall not be exercised in such a way as to prevent or interfere with:</p> <ul style="list-style-type: none"> <li>(a) the settlement in accordance with the rules of a designated system of a transfer order not dealt with under its default arrangements;</li> <li>(b) any action taken under its default arrangements;</li> </ul> <p>This does not prevent the court from afterwards making any such order or decree as is mentioned in regulation 17(1) or (2).</p>	<p>The relevant office-holder can not interfere with any action taken by a designated system under its default arrangements or with the settlement of a transfer order not dealt with under its default arrangements.</p> <p>However, the English common law provides a remedy for liquidators who wish to attack a transaction, where</p>

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Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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
						<p>the Directors of a company have breached their fiduciary duties by defrauding creditors.</p> <p>Regulation 17 refers to the court's power to adjust prior transactions.</p>
				A: 14 N: 3	Nothing in the following provisions of this Part shall be construed as affecting the generality of the above provisions.	

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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: 14 N: 4  Schedule A:6	<p>A debt or other liability arising out of a transfer order which is the subject of action taken under default arrangements may not be proved in a winding up or bankruptcy, or in Scotland claimed in a winding up, sequestration or under a protected trust deed, until the completion of the action taken under default arrangements.</p> <p>A debt or other liability which by virtue of this paragraph may not be proved or claimed shall not be taken into account for the purposes of any set-off until the completion of the action taken under default arrangements.</p> <p>Schedule 6 The system must have default arrangements which are appropriate for that system in all the circumstances.</p>	

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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: 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				There does not appear to be any regulation dealing with the use of a participant's credit facility.
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		Schedule A:5 N: 1 P:(b), (c)	The rules of the system must:  (b) specify the point after which a transfer order may not be revoked by a participant or any other party; and  (c) prohibit the revocation by a participant or any other party of a transfer order from the point specified in accordance with paragraph (b).	
	<b>PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS</b>					

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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: 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		A:20 N: 1	<p>This Part does not apply in relation to any transfer order given by a participant which is entered into a designated system after:</p> <ul style="list-style-type: none"> <li>(a) a court has made an order of a type referred to in regulation 22 in respect of that participant; or</li> <li>(b) that participant has passed a creditors' voluntary wining-up resolution; or</li> <li>(c) a trust deed granted by that participant has become a protected trust deed,</li> </ul> <p>unless the conditions mentioned in paragraph (2) are satisfied.</p>	<p>“This Part” refers to Part III of the Regulations, titled “Transfer Orders Effected Through a Designated System and Collateral Security”.</p> <p>As noted above, regulation 20 provides that the modifications to the law of insolvency will generally cease to apply to a transfer order entered into a designated system after insolvency.</p>

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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:20 N: 2	The conditions referred to in paragraph (1) are that: <ul style="list-style-type: none"> <li>(a) the transfer order is carried out on the same day that the event specified in paragraph (1)(a), (b) or (c) occurs; and</li> <li>(b) the settlement agent, the central counterparty or the clearing house can show that it did not have notice of that event at the time of settlement of the transfer order.</li> </ul>	
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: 22 N: 1	Upon the making of an order for bankruptcy, sequestration, administration or winding up in respect of a participant in a designated system, the court shall forthwith notify both the system and the designating authority that such an order has been made.	

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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: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N		A: 22 N: 2	<p>Following receipt of:</p> <p style="margin-left: 40px;">(a) such notification from the court; or</p> <p style="margin-left: 40px;">(b) notification from a participant of the passing of a creditors' voluntary winding up resolution or of a trust deed becoming a protected trust deed, pursuant to paragraph 5(4) of the Schedule,</p> <p>the designating authority shall forthwith inform the Treasury of the notification.</p>	The requirement to mention the other Member States is not mentioned in the Regulations.

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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		A: 16 N: 1	<p>Sections 178, 186, 315 and 345 of the Insolvency Act 1986 (power to disclaim onerous property and court’s power to order rescission of contracts, &amp;c) do not apply in relation to –</p> <p>(a) a transfer order; or</p> <p>(b) a contract for the purpose of realising collateral security.</p> <p>In the application of this paragraph in Scotland, the reference to sections 178, 315 and 345 shall be construed as a reference to any rule of law having the like effect as those sections.</p>	Sections 178, <sup>11</sup> 186, <sup>12</sup> 315, <sup>13</sup> and 345 <sup>14</sup> of the Insolvency Act 1986 deal with the court’s power to deal with onerous property, and the rescission of contracts.

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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: 16 N: 2	In Scotland, a permanent trustee on the sequestrated estate of a defaulter or a liquidator or a trustee under a protected trust deed granted by a defaulter is bound by any transfer order given by that defaulter and by any such contract as is mentioned in paragraph (1)(b) notwithstanding section 42 of the Bankruptcy (Scotland) Act 1985 or any rule of law having the like effect applying in liquidations or any like provision or rule of law affecting the protected trust deed.	Regulation 16(2) applies to Scottish 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: 16 N: 3	Sections 127 and 285 of the Insolvency Act 1986 (avoidance of property dispositions effected after commencement of winding up or presentation of bankruptcy petition), section 32(8) of the Bankruptcy (Scotland) Act 1985 (effect of dealing with debtor relating to estate vested in permanent trustee) and any like provision or rule of law affecting a protected trust deed, do not apply to-  <ul style="list-style-type: none"> <li>(a) a transfer order, or any disposition of property in pursuance of such an order;</li> <li>(b) the provision of collateral security;</li> <li>(c) a contract for the purpose of realising collateral security or any disposition of property in pursuance of such a contract; or</li> <li>(d) any disposition of property in accordance with the rules of a designated system as to the application of collateral security.</li> </ul>	Sections 127 <sup>15</sup> and 285 <sup>16</sup> of the Insolvency Act 1986 deal with the avoidance of property dispositions effected after the commencement of winding up or presentation of a bankruptcy petition.

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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:17 N: 1	<p>No order shall be made in relation to a transaction to which this regulation applies under:</p> <ul style="list-style-type: none"> <li>(a) section 238 or 339 of the Insolvency Act 1986 (transactions at an undervalue);</li> <li>(b) section 239 or 340 of that Act (preferences); or</li> <li>(c) section 423 of that Act (transactions defrauding creditors).</li> </ul>	<p>Sections 238<sup>17</sup> and 339<sup>18</sup> of the Insolvency Act 1986 refer to transactions made at an undervalue.</p> <p>Sections 239<sup>19</sup> and 340<sup>20</sup> of the Insolvency Act 1986 refer to preferences.</p> <p>Section 423<sup>21</sup> of the Insolvency Act 1986 refers to transactions defrauding creditors.</p>

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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: 17 N: 2	As respects Scotland, no decree shall be granted in relation to any such transaction:  (a) under section 34 or 36 of the Bankruptcy (Scotland) Act 1985 or section 242 or 243 of the Insolvency Act 1986 (gratuitous alienations and unfair preferences); or  (b) at common law on grounds of gratuitous alienations or fraudulent preferences.	Regulation 17(2) applies to Scottish 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: 17 N: 3	<p>This regulation applies to:</p> <ul style="list-style-type: none"> <li>(a) a transfer order, or any disposition of property in pursuance of such an order;</li> <li>(b) the provision of collateral security;</li> <li>(c) a contract for the purpose of realising collateral security or any disposition of property in pursuance of such a contract; or</li> <li>(d) any disposition of property in accordance with the rules of a designated system as to the application of collateral security.</li> </ul>	

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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: 21 N: 1 P: (a)	The provisions of the Companies Act 1989 mentioned in paragraph 2 do not apply in relation to –  (a) a market contract which is also a transfer order effected through a designated system.	
				A: 21 N: 2	The provisions referred to in paragraph (1) are as follows –  (a) section 163 (4) to (6) (net sum payable on completion of default proceedings); <sup>22</sup>  (b) section 164 (4) to (6) (disclaimer of property, rescission of contracts, &c); <sup>23</sup> and  (c) section 175(5) and (6) (administration orders, &c) <sup>24</sup>	

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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		A:24	Where insolvency proceedings are brought in any jurisdiction against a person who participates, or has participated, in a system designated for the purposes of the settlement Finality Directive, any question relating to the rights and obligations arising from, or in connection with, that participation and falling to be determined by a court in England and Wales or in Scotland shall (subject to regulation 23) be determined in accordance with the law governing that system.	It is uncertain what would happen if two different legal regimes appeared to be the “law governing that system”. The English conflict of laws principles in this type of case is unclear, at best.
				A:25 N: 1	The references to insolvency law in section 426 of the Insolvency Act 1986 (co-operation between courts exercising jurisdiction in relation to insolvency) include, in relation to a part of the United Kingdom, this Part and, in relation to a relevant country or territory within the meaning of that section, so much of the law of that country or territory as corresponds to this Part.	Section 426 of the Insolvency Act 1986 relates to co-operation between courts exercising jurisdiction in relation to insolvency. <sup>25</sup>

<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
				A: 25 N: 2	<p>A court shall not, in pursuance of that section or any other enactment or rule of law, recognise or give effect to:</p> <p>(a) any order of a court exercising jurisdiction in relation to insolvency law in a country or territory outside the United Kingdom or</p> <p>(b) any act of a person appointed in such a country or territory to discharge any functions under insolvency law,</p> <p>in so far as the making of the order or the doing of the act would be prohibited in the case of a court in England and Wales or Scotland or a relevant office-holder by this Part.</p>	Section 426 of the Insolvency Act 1986 will not apply to enforce the insolvency order of a court in the UK if doing so would be prohibited by this Part of the Regulations.

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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: 25 N: 3	Paragraph (2) does not affect the recognition or enforcement of a judgment required to be recognised or enforced under or by virtue of the Civil Jurisdiction and Judgements Act 1982 or Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.	
				A:26 N: 1	Where an equivalent overseas order or equivalent overseas security is subject to the insolvency law of England and Wales or Scotland, this Part shall apply:  (a) in relation to the equivalent overseas order as it applies in relation to a transfer order; and  (b) in relation to the equivalent overseas security as it applies in relation to collateral security in connection with a designated 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: 26 N: 2	<p>In paragraph (1):</p> <p>(a) "equivalent overseas order" means an order having the like effect as a transfer order which is effected through a system designated for the purposes of the Settlement Finality Directive in another EEA State, Northern Ireland or Gibraltar; and</p> <p>(b) "equivalent overseas security" means any realisable assets provided under a charge or a repurchase or similar agreement, or otherwise (including money provided under a charge) for the purpose of securing rights and obligations potentially arising in connection with such a system.</p>	

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

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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 FROM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER</b>					
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:13 N: 1	The general law of insolvency has effect in relation to:  (a) transfer orders effected through a designated system and action taken under the rules of a designated system with respect to such orders; and  (b) collateral security,  subject to the provisions of this Part.	The “provisions of this Part” refers to Part III of the Regulations, titled “Transfer Orders Effected Through a Designated System and Collateral Security”.

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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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Article <sup>1</sup>	Text	Appli-cability <sup>2</sup>	Refe-rence	Article (A; P; S; N) <sup>1</sup>	Content	Remarks
				A:13 N: 2	<p>Those provisions apply in relation to:</p> <ul style="list-style-type: none"> <li>(a) insolvency proceedings in respect of a participant in a designated system; and</li> <li>(b) insolvency proceedings in respect of a provider of collateral security in connection with the functions of a central bank, in so far as the proceedings affect the rights of the central bank to the collateral security;</li> </ul> <p>but not in relation to any other insolvency proceedings, notwithstanding that rights or liabilities arising from transfer orders or collateral security fall to be dealt with in the proceedings.</p>	

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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:14 N: 1 P: (d), (e)	<p>None of the following shall be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to the distribution of the assets of a person on bankruptcy, winding up, sequestration or under a protected trust deed, or in the administration of an insolvent estate:</p> <p>(d) a contract for the purpose of realising collateral security in connection with participation in a designated system otherwise than pursuant to its default arrangements; or</p> <p>(e) a contract for the purpose of realising collateral security in connection with the functions of a central bank.</p>	

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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: 14 N: 2 P: (c), (d)	<p>The powers of a relevant office-holder in his capacity as such, and the powers of the court under the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985, shall not be exercised in such a way as to prevent or interfere with:</p> <p>(c) any action taken to realise collateral security in connection with participation in a designated system otherwise than pursuant to its default arrangements; or</p> <p>(d) any action taken to realise collateral security in connection with the functions of a central bank.</p> <p>This does not prevent the court from afterwards making any such order or decree as is mentioned in regulation 17(1) or (2).</p>	The relevant office-holder can not interfere either with any action taken by a designated system to realise collateral security.

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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: 14 N: 3	Nothing in the following provisions of this Part shall be construed as affecting the generality of the above provisions.	
				A: 14 N: 5	Paragraph (1) has the effect that the following provisions (which relate to preferential debts and the payment of expenses etc) apply subject to paragraph (6), namely:  (a) in the case of collateral security provided by a company (within the meaning of section 735 of the Companies Act 1985):	Section 735 of the Companies Act 1985 defines a company. <sup>26</sup>

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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
					(i) section 175 of the Insolvency Act 1986, and  (ii) where the company is one in relation to which an administration order is made, section 19(4) of the Insolvency Act 1986, section 40 (or, in Scotland, section 59 and 60(1)(e)) of that Act, and section 196 of the Companies Act 1985; and	Sections 19(4), 40 and 175 of the Insolvency Act 1986 set out provisions dealing with the priority of preferential debts. <sup>27</sup>  Section 196 of the Companies Act deals with the payment of debts out of assets subject to a floating charge. <sup>28</sup>

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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) in the case of collateral security provided by an individual, section 328(1) and (2) of the Insolvency Act 1986 or, in Scotland, in the case of collateral security provided by an individual or a partnership, section 51 of the Bankruptcy (Scotland) Act 1985 and any like provision or rule of law affecting a protected trust deed.	Section 328 of the Insolvency Act 1986 deals with the priority of the preferential debts of a bankrupt individual's estate. <sup>29</sup>

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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: 14 N: 6	<p>The claim of a participant or central bank to collateral security shall be paid in priority to –</p> <p>(a) the expenses of the winding up mentioned in sections 115 and 156 of the Insolvency Act 1986, the expenses of the bankruptcy within the meaning of that Act or, as the case may be, the remuneration and expenses of the administrator mentioned in section 19(4) of that Act, and</p> <p>(b) the preferential debts of the company or the individual (as the case may be) within the meaning given by section 386 of that Act, unless the terms on which the collateral security was provided expressly provide that such expenses, remuneration or preferential debts are to have priority.</p>	<p>Sections 115<sup>30</sup> and 156<sup>31</sup> deal with the priority of the expenses of winding up.</p> <p>Section 328(2) of the Insolvency Act deal with the priority of the expenses of the bankruptcy.<sup>32</sup></p> <p>Section 386 of the Insolvency Act sets out the categories of preferential debts.<sup>33</sup></p>

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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: 14 N: 7	As respects Scotland -  (a) the reference in paragraph (6)(a) to the expenses of bankruptcy shall be taken to be a reference to the matters mentioned in paragraphs (a) to (d) of section 51(1) of the Bankruptcy (Scotland) Act 1985, or any like provision or rule of law affecting a protected trust deed; and  (b) the reference in paragraph (6)(b) to the preferential debts of the individual shall be taken to be a reference to the preferred debts of the debtor within the meaning of the Bankruptcy (Scotland) Act 1985, or any like definition applying with respect to a protected trust deed by virtue of any provision or rule of law affecting it.	Applies to Scottish 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: 16 N: 1 P: (b)	Sections 178, 186, 315 and 345 of the Insolvency Act 1986 (power to disclaim onerous property and court’s power to order rescission of contracts, &c) do not apply in relation to –  (a) a transfer order; or  (b) a contract for the purpose of realising collateral security.  In the application of this paragraph in Scotland, the reference to sections 178, 315 and 345 shall be construed as a reference to any rule of law having the like effect as those sections.	Sections 178, <sup>34</sup> 186, <sup>35</sup> 315, <sup>36</sup> and 345 <sup>37</sup> of the Insolvency Act 1986 deal with the court’s power to deal with onerous property, and the rescission of contracts.

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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: 16 N: 3 P: (b), (c), (d)	Sections 127 and 285 of the Insolvency Act 1986 (avoidance of property dispositions effected after commencement of winding up or presentation of bankruptcy petition), section 32(8) of the Bankruptcy (Scotland) Act 1985 (effect of dealing with debtor relating to estate vested in permanent trustee) and any like provision or rule of law affecting a protected trust deed, do not apply to-  (a) a transfer order, or any disposition of property in pursuance of such an order;  (b) the provision of collateral security;  (c) a contract for the purpose of realising collateral security or any disposition of property in pursuance of such a contract; or  (d) any disposition of property in accordance with the rules of a designated system as to the application of collateral security.	Sections 127 <sup>38</sup> and 285 <sup>39</sup> of the Insolvency Act 1986 deal with the avoidance of property dispositions effected after the commencement of winding up or presentation of a bankruptcy petition.

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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:17 N: 1	No order shall be made in relation to a transaction to which this regulation applies under:  (a) section 238 or 339 of the Insolvency Act 1986 (transactions at an undervalue);  (b) section 239 or 340 of that Act (preferences); or  (c) section 423 of that Act (transactions defrauding creditors).	Sections 238 <sup>40</sup> and 339 <sup>41</sup> of the Insolvency Act 1986 refer to transactions made at an undervalue.  Sections 239 <sup>42</sup> and 340 <sup>43</sup> of the Insolvency Act 1986 refer to preferences.  Section 423 <sup>44</sup> of the Insolvency Act 1986 refers to transactions defrauding creditors.

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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: 17 N: 3	<p>This regulation applies to:</p> <ul style="list-style-type: none"> <li>(a) a transfer order, or any disposition of property in pursuance of such an order;</li> <li>(b) the provision of collateral security;</li> <li>(c) a contract for the purpose of realising collateral security or any disposition of property in pursuance of such a contract; or</li> <li>(d) any disposition of property in accordance with the rules of a designated system as to the application of collateral security.</li> </ul>	
				A:18	The general law of insolvency has effect in relation to a collateral security charge and the action taken to enforce such a charge, subject to the provisions of regulation 19.	

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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: 1 P: 7	“collateral security charge” means, where collateral security consists of realisable assets (including money) provided under a charge, that charge.	

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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:19 N:1	<p>The following provisions of the Insolvency Act 1986 (which relate to administration orders and administrators) do not apply in relation to a collateral security charge:</p> <ul style="list-style-type: none"> <li>(a) sections 10(1)(b) and 11(3)(c) (restriction on enforcement of security while petition for administration order pending or order in force); and</li> <li>(b) section 15(1) and (2) (power of administrator to deal with charged property);</li> </ul> <p>and section 11(2) of that Act (receiver to vacate office when so required by administrator) does not apply to a receiver appointed under such a charge.</p>	Sections 10, <sup>45</sup> 11, <sup>46</sup> and 15 <sup>47</sup> of the Insolvency Act 1986 deal with administration orders and administrators.

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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: 19 N: 2	However, where a collateral security charge falls to be enforced after an administration order has been made or a petition for an administration order has been presented, and there exists another charge over some or all of the same property ranking in priority to or pari passu with the collateral security charge, on the application of any person interested, the court may order that there shall be taken after enforcement of the collateral security charge such steps as the court may direct for the purpose of ensuring that the chargee under the other charge is not prejudiced by the enforcement of the collateral security charge.	

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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: 19 N: 3	Sections 127 and 284 of the Insolvency Act 1986 (avoidance of property dispositions effected after commencement of winding up or presentation of bankruptcy petition), section 32(8) of the Bankruptcy (Scotland) Act 1985 (effect of dealing with debtor relating to estate vested in permanent trustee) and any like provision or rule of law affecting a protected trust deed, do not apply to a disposition of property as a result of which the property becomes subject to a collateral security charge or any transactions pursuant to which that disposition is made.	Section 127 <sup>48</sup> and 284 <sup>49</sup> restrict the disposition of property following the commencement of the winding up (i.e. the presentation of a winding up petition) or presentation of the bankruptcy petition.

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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: 21 N: 1 P: (b)	The provisions of the Companies Act 1989 mentioned in paragraph 2 do not apply in relation to –  (b) a market charge which is also a collateral security charge.	
				A: 21 N: 2	The provisions referred to in paragraph (1) are as follows –  (d) section 163(4) to (6) (net sum payable on completion of default proceedings), <sup>50</sup>  (e) section 164 (4) to (6) (disclaimer of property, rescission of contracts, &c), <sup>51</sup> and  (f) section 175(5) and (6) (administration orders, &c) <sup>52</sup>	

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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: 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:23	<p>Where:</p> <p>(a) securities (including rights in securities) are provided as collateral security to a participant or a central bank (including any nominee, agent or third party acting on behalf of the participant or the central bank); and</p> <p>(b) a register, account or centralised deposit system located in an EEA State legally records the entitlement of that person to the collateral security,</p> <p>the rights of that person as a holder of collateral security in relation to those securities shall be governed by the law of the EEA State or, where appropriate, the law of the part of the EEA State, where the register, account, or centralised deposit system is located.</p>	This narrow transposition of the applicability of the Directive to a participant or a central bank may be widened by the ratification by the United Kingdom and the implementation into English law of the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

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

England and Wales –final report

Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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
	<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		A:4 N: 1	<p>Where:</p> <ul style="list-style-type: none"> <li>(a) an application has been duly made under regulation 3;</li> <li>(b) the applicant has paid any fee charged by virtue of regulation 5(1); and</li> <li>(c) the designating authority is satisfied that the requirements of the Schedule are satisfied with respect to the system to which the application relates;</li> </ul> <p>the designating authority may make an order (a "designation order") declaring the system to be a designated system for the purposes of these Regulations.</p>	There is no requirement in the Regulations that the Commission be notified of the Designated 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: 4 N: 2	In determining whether to make a designation order, the designating authority shall have regard to systemic risks.	
				A: 4 N: 3	Where an application has been made to the Financial Services Authority under regulation 3 in relation to a system through which both securities transfer orders and payment transfer orders are effected, the Authority shall consult the Bank of England before deciding whether to make a designation order.	
				A: 4 N: 4	A designation order shall state the date on which it takes effect.	
				A: 4 N: 5	Where the designating authority refuses an application for a designation order it shall give the applicant a written notice to that effect stating the reasons for the refusal.	

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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: 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 N: 1	A designated system shall, on being declared to be a designated system, provide to the designating authority in writing a list of its participants and shall give written notice to the designating authority of any amendment to the list within seven days of such amendment.	
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:3 N:1	Any body corporate or unincorporated association may apply to the designating authority for an order declaring it, or any system of which it is the operator, to be a designated system for the purposes of these Regulations	

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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 N: 2	The designating authority may, in writing, require a designated system to furnish to it such other information relating to that designated system as it reasonably requires for the exercise of its functions under these Regulations, within such time, in such form, at such intervals and verified in such manner as the designating authority may specify.	
				A: 10 N: 3	When a designated system amends, revokes or adds to its rules or its guidance, it shall within fourteen days give written notice to the designating authority of the amendment, revocation or addition.	
				A: 10 N: 4	A designated system shall give the designating authority at least fourteen days; written notice of any proposal to amend, revoke or add to its default arrangements.	

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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 N: 5	Nothing in this regulation shall require a designated system to give any notice or furnish any information to the Financial Services Authority which it has given or furnished to the Authority pursuant to any requirement imposed by or under section 41 of the 1986 Act (notification requirements) or any other enactment.	Section 41 of the 1986 Act has been replaced by section 293 of FSMA.
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		Schedule A:5 N: 2	The rules of the system must require each institution which participates in the system to provide upon payment of a reasonable charge the information mentioned in sub-paragraph (3) to any person who requests it, save where the request is frivolous or vexatious. The rules must require the information to be provided within fourteen days of the request being made.	The Regulations impose a deadline of fourteen days for the requested information to be produced.

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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
				Schedule A:5 N: 2	The information referred to in sub-paragraph (2) is as follows:  (a) details of the systems which are designated for the purposes of the Settlement Finality Directive in which the institution participates; and  (b) information about the main rules governing the functioning of those systems.	
				A:12	A designating authority may publish information or give advice, or arrange for the publication of information or the giving of advice, in such form and manner as it considers appropriate with respect to any matter dealt with I these Regulations.	Not required by the Directive.

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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: 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:1 N:1	These Regulations may be cited as the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and shall come into force on 11 December 1999.	No mention of a duty to inform the Commission
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:2 N: 1 P:28  Explanatory Note to the Regulation	Definition of "Settlement Finality Directive" in 2(1):  "the Settlement Finality Directive" means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement in payment and securities settlement systems.  The Regulations implement Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems (OJL166, 19.5.98, p45) (the " <b>Directive</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: 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				Not part of Regulation
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.		N/A	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.		N/A	N/A	
A: 14	This Directive is addressed to the Member States.	n. a.		N/A	N/A	

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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

## Endnotes

We have contacted the Financial Services Authority and the Bank of England as these are the relevant public authorities in England and Wales. Neither of these authorities have identified any points which remain unclear in the actual application of the settlement finality provisions.

We have contacted payment systems and securities settlement systems in London. We have been advised, on a no-name basis, that the Financial Services Authority and the Bank of England are taking a strict interpretation of the implementation of the designation requirements with respect to the designation of clearing houses.

<sup>1</sup> Statutory Instrument 1999 / 2979 (the Financial Markets and Insolvency (Settlement Finality) Regulations 1999) (the “Regulations”) implements Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems. Except as otherwise noted, references in columns 5 and 6 will be to those Regulations.

<sup>2</sup> On December 1, 2001 the Financial Services Act 1986 was repealed and replaced by the Financial Services and Markets Act 2000 (“FSMA”). The Financial Markets and Insolvency (Settlement Finality) Regulations 1999 have now been amended by the Financial Services and Markets Act 2000 (Consequential Amendments) Order 2002 to reflect this change.

<sup>3</sup> The Financial Markets and Insolvency (Money Market) Regulations 1995 have been revoked by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 subject to Regulation 29 of the aforementioned regulations which continues to have effect to the extent provided for by paragraph 20(5) of Schedule 1 of the Bank of England Act 1998 (Consequential Amendments to Subordinated Legislation) Order 1998 all of which is provided by regulation 24 of the Financial Services and Markets Act 2000 (Miscellaneous Provisions) Order 2001.

<sup>4</sup> Reference to “members’ voluntary winding up” is a reference to section 89 of the Insolvency Act 1986. This provides that a members’ voluntary winding up is one which takes place pursuant to a statutory declaration made by a majority of the directors of a company and which meets the statutory requirements set out at section 89 of the Insolvency Act 1986. A winding up in a case where such a declaration is not made is a “creditors’ voluntary winding up”. The statutory declaration is a declaration of solvency. Therefore, members’ voluntary winding up is not an insolvency proceeding.

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<sup>5</sup> Part VII of the Companies Act 1989 defines “market contract” as the following: In relation to a recognised investment exchange, market contracts are contracts entered into by a member or designated non-member of a recognised investment exchange with a person other than the exchange which are either (i) contracts made on the exchange or on an exchange to whose undertaking the exchange has succeeded whether by amalgamation, merger or otherwise; or (ii) contracts in the making of which the member or designated non-member was subject to the rules of the exchange or of an exchange to whose undertaking the exchange has succeeded whether by amalgamation, merger or otherwise; and (b) contracts entered into by the exchange with its members for the purpose of enabling the rights and liabilities of that member under transactions in investments to be settled. In relation to a recognised clearing house, “market contracts” means contracts entered into by the clearing house with a member of the clearing house for the purpose of enabling the rights and liabilities of that member under transactions in investments to be settled.

<sup>6</sup> Section 162 of the Companies Act 1989 imposes an obligation on a recognised investment exchange or a recognised clearing house to report on its proceedings under its default rules in respect of each creditor or debtor, certifying the sum to be payable from or to the defaulter or, as the case may be, the fact that no sum is payable.

<sup>7</sup> Section 163 of the Companies Act 1989 relates to the net sum certified by a recognised investment exchange or recognised clearing house, upon proceedings under its default rules, to be payable by or to a defaulter.

<sup>8</sup> Section 323 of the Insolvency Act 1986 applies where before the commencement of the bankruptcy there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any creditor of the bankrupt proving or claiming to prove for a bankruptcy debt. In that case, an account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other. However, sums due from the bankrupt to another party shall not be included in the account taken if that other party had notice at the time they became due that a bankruptcy petition relating to the bankrupt was pending.

<sup>9</sup> Rule 4.90 of the Insolvency Rules 1986 provide that where there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company prior to the company going into liquidation, an account shall be taken of what is due from each party to the other in respect of the mutual dealings, the sums due from one party shall be set off against the sums from the other and only the balance (if any) of the account becomes provable in the liquidation.

<sup>10</sup> Section 247 of the Insolvency Act 1986 provides that a company goes into liquidation when it passes a resolution for voluntary winding up or an order for its winding up is made by the court at a time when it has not already gone into liquidation by passing such a resolution. This contrasts to the commencement of liquidation pursuant to section 129, where a company facing a commercial liquidation goes into liquidation when the petition is filed with the court.

<sup>11</sup> Section 178 of the Insolvency Act 1986 provides that, in relation to a company that is being wound up, the liquidator may disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavoured to sell it, or otherwise exercised rights of ownership in relation to it. Onerous property means any unprofitable contract and any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.

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<sup>12</sup> Section 186 of the Insolvency Act 1986 provides that the court may, upon the application of a person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the court thinks just.

<sup>13</sup> Section 315 of the Insolvency Act 1986 provides that, in relation to a bankrupt individual, the trustee may disclaim any onerous property in the same fashion as under Section 178 of the Insolvency Act 1986, described at Note 8, above.

<sup>14</sup> Section 345 of the Insolvency Act 1986 provides that, in relation to a contract made with a person subsequently adjudged bankrupt, the court may on the application of any other party to the contract, make an order discharging obligations under the contract on such terms as to payment by the applicant or the bankrupt of damages for non-performance or otherwise as appear to the court to be equitable.

<sup>15</sup> Section 127 of the Insolvency Act 1986 provides that in a winding up by the court, any disposition of the company’s property, and any transfer of shares, or alteration in the status of the company’s members, made after the commencement of the winding up is void, unless the court orders otherwise.

<sup>16</sup> Section 285 of the Insolvency Act 1986 provides that at any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt. Further, after the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of that debt, or before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.

<sup>17</sup> Section 238 of the Insolvency Act 1986 provides that where a company is subject to an administration order or has gone into liquidation and at a relevant time entered into a transaction with any person at an “undervalue”, the court can make an order restoring the position to what it would have been if the company had not entered into that transaction. A transaction is considered an “undervalue” if the company makes a gift to that person, enters into a transaction on terms that the company is to receive no consideration, or enters into a transaction for a consideration the value of which is significantly less than the value of the consideration provided by the company.

<sup>18</sup> Section 339 of the Insolvency Act 1986 provides that where an individual is adjudged bankrupt and he has at a relevant time entered into a transaction with any person at an undervalue, the trustee of the bankrupt’s estate may apply to the court for an order as the court thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.

<sup>19</sup> Section 239 of the Insolvency Act 1986 provides that where a company is subject to an administration order or has gone into liquidation and at a relevant time gives a preference to any person, the court may make an order restoring the position to what it would have been if the company had not given that preference. A preference is given to a person if that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities, and the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

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<sup>20</sup> Section 340 of the Insolvency Act 1986 sets out, for a bankrupt individual, a provision similar to section 339 of the Insolvency Act 1986, set out at note 15, above.

<sup>21</sup> Section 423 of the Insolvency Act 1986 relates to transactions entered into at an undervalue. For the purposes of this section, transactions are entered into at an undervalue by a person if he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration; he enters into a transaction with the other in consideration of marriage; or he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself. Where a person enters into such a transaction, the court may make an order restoring the position to what it would have been if the transaction had not been entered into, and protecting the interests of persons who are victims of the transaction. However, this provision is rarely used in relation to companies. It is easier to attack a transaction of this kind based on directors behaving improperly by defrauding creditors. If so, this is a breach of each director's common law fiduciary duty to the company.

<sup>22</sup> Section 163 of the Companies Act 1989 relates to the net sum certified by a recognised investment exchange or recognised clearing house, upon proceedings under its default rules, to be payable by or to a defaulter. Regulation 21 disapplies the following provisions of Section 163 of the Companies Act 1989 in relation to a market contract which is also a transfer order effected through a designated system or a market charge which is also a collateral security charge:

- a) Section 163 (4) which prohibits a sum to be taken into account for purposes of set-off if that sum arises from a contract entered into at a time when the creditor has notice that a bankruptcy petition was pending or that a meeting of creditors has been summoned under section 98 of the Insolvency Act 1986 or that a winding up petition was pending, and the value of any profit to the creditor arising from the sum being taken into account is recoverable from him by the relevant office-holder.
- b) Section 163 (5) which provides that section 163(4) does not apply in relation to a sum arising from a contract effected under the default rules of a recognised investment exchange or recognised clearing house.
- c) Section 163 (6) which provides that any sum which is recoverable by virtue of section 163(4) ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts.

<sup>23</sup> Section 164(4) to (6) of the Companies Act 1989 provides that where a market contract is entered into by a person who has notice that a petition has been presented for the winding up or bankruptcy or sequestration of the estate of the other party to the contract, or margin in relation to a market contract is accepted by a person who has notice that such a petition has been presented in relation to the person by whom or on whose behalf the margin is provided, then the value of any profit to him arising from the contract or, as the case may be, the amount or value of the margin is recoverable from him by the relevant office-holder unless the court directs otherwise. This will not apply if the person entering into the market contract is a recognised investment exchange or recognised clearing house acting in accordance with its rules and if that person had notice that a petition has been presented for the winding up or bankruptcy or sequestration of the estate of the other party to the contract. Any sum recovered in either case ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential or, in Scotland, preferred debts.

<sup>24</sup> Section 175 provides that in a winding up, a company's preferential debts shall be paid in priority to all other debts.

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<sup>25</sup> Section 426 of the Insolvency Act 1986 provides that courts in one part of the UK shall enforce insolvency orders made by a court in a different part of the UK (The United Kingdom is made up of the legal jurisdictions defined by its constituent countries: England & Wales, Scotland and Northern Ireland.) Section 426 also provides that courts in the UK shall assist insolvency courts outside the United Kingdom designated by the Secretary of State. This is of limited effect because the designated jurisdictions are essentially Commonwealth countries. They do not include any European jurisdictions or the United States. In any case, section 25(2) of the Regulations disapplies the effect of section 426 of the Insolvency Act 1986 if this would result in a breach of Part III of the Regulations

<sup>26</sup> Section 735 of the Companies Act 1985 defines a company as a company formed and registered under the Companies Act 1985 or a company formed and registered under former Companies Acts subject to certain exclusions.

<sup>27</sup> Sections 19(4), 40 and 175 of the Insolvency Act 1986 set out provisions dealing with the priority of preferential debts. Section 19(4) deals with the remuneration and expenses of the administrator. Section 40 provides that where the company is not at the time in course of being wound up, its preferential debts shall be paid out of the assets coming to the hands of the receiver in priority to any claims for principal or interest in respect of the debentures, and shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors. Section 175 provides that in a winding up, a company's preferential debts shall be paid in priority to all other debts.

<sup>28</sup> Section 196 of the Companies Act deals with the payment of debts out of assets subject to a floating charge. If possession is taken, by or on behalf of the holders of any of the debentures, of any property comprised in or subject to the floating charge, and the company is not at that time in course of being wound up, the company's preferential debts shall be paid out of assets coming to the hands of the person taking possession in priority to any claims for principal or interest in respect of the debentures.

<sup>29</sup> Section 328 of the Insolvency Act 1986 deals with the priority of the preferential debts of a bankrupt individual's estate. Section 328(1) provides that in the distribution of the bankrupt's estate, his preferential debts shall be paid in priority to other debts. Section 328(2) provides that preferential debts rank equally between themselves after the expenses of the bankruptcy and shall be paid in full, unless the bankrupt's estate is insufficient for meeting them, in which case they abate in equal proportions between themselves.

<sup>30</sup> Section 115 of the Insolvency Act 1986 provides that all expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

<sup>31</sup> Section 156 of the Insolvency Act 1986 provides that the court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the expenses incurred in the winding up in such order of priority as the court thinks just.

<sup>32</sup> Section 328(2) of the Insolvency Act 1986 provides that the expenses of the bankruptcy take priority before preferential debts.

<sup>33</sup> Section 386 of the Insolvency Act 1986 provides that references to preferential debts of a company or individual is a reference to money owed to the Inland Revenue for income tax deducted at source; VAT, insurance premium tax, landfill tax, climate change levy, aggregates levy, car tax, betting and gaming duties, beer duty, lottery duty, air passenger duty; social security and pension scheme contributions; remuneration etc of employees; and levies on coal and steel production.

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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 100

England and Wales –final report

Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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

<sup>34</sup> Section 178 of the Insolvency Act 1986 provides that, in relation to a company that is being wound up, the liquidator may disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavoured to sell it, or otherwise exercised rights of ownership in relation to it. Onerous property means any unprofitable contract and any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.

Section 345 of the Insolvency Act 1986 provides that, in relation to a contract made with a person subsequently adjudged bankrupt, the court may on the application of any other party to the contract, make an order discharging obligations under the contract on such terms as to payment by the applicant or the bankrupt of damages for non-performance or otherwise as appear to the court to be equitable.

<sup>35</sup> Section 186 of the Insolvency Act 1986 provides that the court may, upon the application of a person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the court thinks just.

<sup>36</sup> Section 315 of the Insolvency Act 1986 provides that, in relation to a bankrupt individual, the trustee may disclaim any onerous property in the same fashion as under Section 178 of the Insolvency Act 1986, described above.

<sup>37</sup> Section 345 of the Insolvency Act 1986 provides that, in relation to a contract made with a person subsequently adjudged bankrupt, the court may on the application of any other party to the contract, make an order discharging obligations under the contract on such terms as to payment by the applicant or the bankrupt of damages for non-performance or otherwise as appear to the court to be equitable.

<sup>38</sup> Section 127 of the Insolvency Act 1986 provides that in a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up (i.e. The presentation of a petition for the winding up of the company) is void, unless the court orders otherwise. Note that in relation to security, it is not the enforcement of the security but rather the creation of the security which violates section 127. A security interest can be enforced after the commencement of the winding up or the presentation of the bankruptcy petition without breaching section 127.

<sup>39</sup> Section 285 of the Insolvency Act 1986 provides that

<sup>40</sup> See note 16, above.

<sup>41</sup> See note 17, above.

<sup>42</sup> See note 18, above.

<sup>43</sup> See note 19, above.

<sup>44</sup> See note 20, above.

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# Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems 101

England and Wales –final report

Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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

<sup>45</sup> Section 10(1)(b) of the Insolvency Act 1986 provides that during the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition, no steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the leave of the court and subject to such terms as the court may impose.

<sup>46</sup> Section 11(3)(c) of the Insolvency Act 1986 provides that during the period for which an administration order is in force, no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as the court may impose.

<sup>47</sup> Section 15 of the Insolvency Act 1986 provides that where, on an application by the administrator, the court is satisfied that the disposal (with or without other assets) of any property of the company subject to a security to which this subsection applies, or any goods in the possession of the company under a hire-purchase agreement, would be likely to promote the purpose or one or more of the purposes specified in the administration order, the court may by order authorise the administrator to dispose of the property as if it were not subject to the security or to dispose of the goods as if all rights of the owner under the hire-purchase agreement were vested in the company. Where such a court order applies, the administrator of a company may dispose of or otherwise exercise his powers in relation to any property of the company which is subject to a security to which the court order applies as if the property were not subject to the security.

<sup>48</sup> See note 15.

<sup>49</sup> Section 284 of the Insolvency Act provides that where a person is adjudged bankrupt, any disposition of property made by that person in the relevant period is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court.

<sup>50</sup> Section 163 of the Companies Act 1989 relates to the net sum certified by a recognised investment exchange or recognised clearing house, upon proceedings under its default rules, to be payable by or to a defaulter. Regulation 21 disapplies the following provisions of Section 163 of the Companies Act 1989 in relation to a market contract which is also a transfer order effected through a designated system or a market charge which is also a collateral security charge:

- a) Section 163 (4) which prohibits a sum to be taken into account for purposes of set-off if that sum arises from a contract entered into at a time when the creditor has notice that a bankruptcy petition was pending or that a meeting of creditors has been summoned under section 98 of the Insolvency Act 1986 or that a winding up petition was pending, and the value of any profit to the creditor arising from the sum being taken into account is recoverable from him by the relevant office-holder.
- b) Section 163 (5) which provides that section 163(4) does not apply in relation to a sum arising from a contract effected under the default rules of a recognised investment exchange or recognised clearing house.
- c) Section 163 (6) which provides that any sum which is recoverable by virtue of section 163(4) ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts.

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# Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems 102

England and Wales –final report

Directive 98/26/EC			The Financial Markets and Insolvency (Settlement Finality) Regulations 1999			
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

<sup>51</sup> Section 164(4) to (6) of the Companies Act 1989 provides that where a market contract is entered into by a person who has notice that a petition has been presented for the winding up or bankruptcy or sequestration of the estate of the other party to the contract, or margin in relation to a market contract is accepted by a person who has notice that such a petition has been presented in relation to the person by whom or on whose behalf the margin is provided, then the value of any profit to him arising from the contract or, as the case may be, the amount or value of the margin is recoverable from him by the relevant office-holder unless the court directs otherwise. This will not apply if the person entering into the market contract is a recognised investment exchange or recognised clearing house acting in accordance with its rules and if that person had notice that a petition has been presented for the winding up or bankruptcy or sequestration of the estate of the other party to the contract. Any sum recovered in either case ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential or, in Scotland, preferred debts.

<sup>52</sup> Section 175(5) and (6) of the Companies Act 1989 provides that if a person (other than the chargee under the market charge) who is party to a disposition of property as a result of which the property becomes subject to a market charge or any transaction pursuant to which that disposition is made has notice at the time of the disposition that a petition has been presented for the winding up or bankruptcy or sequestration of the estate of the party making the disposition, the value of any profit to him arising from the disposition is recoverable from him by the relevant office-holder unless the court directs otherwise. Any sum so recovered ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential or, in Scotland, preferred debts.

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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