

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

The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
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	Act ¹	A: 212a N: b	system ²	The scope of the provisions of Directive 98/26/EC (hereinafter "The Directive") is restricted to systems governed by the law of a Member State. "Systems of non-Member States, even if a bank located in the EU participates in such a system, fall beyond the scope of the Directive". The provisions of the Directive therefore are exclusively legally valid within the EU and do not have extra-community effect." ³ "It follows from the structure of the Directive that systems will be designated and that the provisions of the Directive will also apply to participants in such systems.

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						With that the system is obliged to make a choice for the law of one of the Member States of the European Union. Consequently, institutions from outside the EU participating in such a system are bound by this choice. The choice of the law of one of the participants does however not imply the applicability of one law on solvency for all participants. Every participant shall remain governed by the insolvency law(s) of its state.” ^{4 5}
A: 1 N: b	(b) any participant in such a system;	N	Act	A: 212a N: f	participant	Cf. supra the remark at section 1(a) of the Directive.

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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	Act	A: 212b P: 3	(...) a proprietary security provided by an institution for the purpose of the participation in a system to a central bank or to another institution which participates in the system.	The definition in the Directive of “collateral security” has not been followed in the Act. Instead, the words “proprietary security” have been used. The original legislative proposal however did contain the definition used by the Directive. The Council of State recommended clarifying these words in a way that made clear that for the applicability of the due provisions all proprietary securities would fall within the scope of the definition “collateral security” even though this would infringe the terminology used by the Dutch Civil Code. ⁶ The Government however chose

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						to not follow the wording “collateral security” but instead to use the words “proprietary securities” thus clarifying that all proprietary securities would fall within the scope of the due provision. ⁷ Cf. infra remark at section 2(m).
A: 2	For the purpose of this directive:		Act	A: 212a	For the purpose of this chapter:	

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A: 2 N: a S: 1	'system' shall mean a formal arrangement:	N	Act	A: 212a N: b P: 1 and 2	system shall mean: 1: a system designated by the minister of Finance on the basis of section 212d; 2: a formal arrangement which is governed by the law of a Member State of the European Union and which has been notified by another Member State to the Commission of the European Communities as a system as defined by directive nr. 98/26/ EC of the European Parliament and the Council of the European Union of 19 May 1998 (OJEC L 166);	“The definition of section 212a(b) is to be read in conjunction with section 212d. (...) Furthermore section 212a(b) provides that in the definition of system are included systems designated by other Member States and notified to the Commission. As a consequence of this payment orders which have been given to such systems fall within the scope of the Act.” ⁸ “Consequently, payment orders which have been given by Dutch institutions and which have been entered into systems designated and notified by other Member States for processing cannot be reversed.” ⁹

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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	Act	A: 212d P: 1	The Minister of Finance may, heard the Dutch Central Bank N.V., designate as a system a formal arrangement between	When designating systems as defined in the legislative proposal, apart from the formal requirements, the relative size and the importance of a system for the proper functioning of payment transfers will be taken into account. For now smaller systems will probably not be designated. ¹⁰ The designated systems are the formal agreements for the carrying out of transfer orders: a. in the transfer of payments concluded between the Dutch Central Bank N.V. and its opposite parties as has been laid down in the rules of the top giro gross payment system «TOP».

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						<p>b. in the transfer of payments concluded between Interpay Nederland B.V. or one of its subsidiaries and their opposite parties as has been laid down in the rules of Interpay.</p> <p>c. In the transfer of securities concluded between AEX-Effectenclearing B.V. and the institutions admitted as clearing member by Amsterdam Exchanges N.V. as has been laid down in the rules of AEX-Effectenclearing B.V.</p> <p>d. in the transfer of securities concluded between AEX-Optieclearing B.V. and the institutions admitted as clearing member by Amsterdam Exchanges N.V. as has been laid down in the</p>

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						<p>rules of AEX-Optieclearing B.V.</p> <p>e. in the transfer of securities concluded between ASAS Servicing Company and its opposite parties as has been laid down in the General Conditions for Operations.</p> <p>f. in the securities giro transfer concluded between Necigef (Dutch Central Institute or Giro Securities Trade) and the joined institutions as has been laid down in the Act on the Securities Giro Transfer</p> <p>g. in the securities giro transfer concluded between NIEC B.V. and its opposite parties as has been laid down in the rules of NIEC.¹¹</p> <p>Cf. supra the remark at</p>

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						<p>section 1(a) of the Directive.</p> <p>The merger of the exchanges of Paris, Brussels and Amsterdam exchanges has lead to a joinder of the trade platform. In February 2001, the clearing activities have legally been incorporated in Clearnet, subsidiary of Euronext. Clearnet already is the legal owner of the settlement activities, but intergrating the operational activities still will take some time. In October 2002¹², Clearnet Amsterdam, the operational name, not a separate entity, is planned to enter the joint operational platform "Clearnet 21". Such wording is used to indicate that although Clearnet takes</p>

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						care of the clearing, the processing and netting of trade orders still separately takes place per Exchange. Clearnet has gone through the notification procedure as referred to in section 31 and 32 of the Act on the Supervision of the Credit System 1992. ¹³ As regards the AEX-Effectenclearing and the AEX-Optieclearing: since Clearnet became as from 1 February 2001 the sole clearing house for all operations executed on the cash and derivatives markets ¹⁴ , the clearing systems organized by Euronext Amsterdam N.V. ¹⁵ should be removed from the list of designated systems as has been laid down in the

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						<p>Implementation Bankruptcy Act¹⁶ by the Minister on basis of section 212a Bankruptcy Act by the Minister.¹⁷ Integrating the settlement activities will be given shape by the takeover of the securities settlement platforms Necigef, Sicovam and CIK by Euroclear, an International Securities Settlement Institute, located in Belgium. Euroclear has now become the legal owner, but the operational integration still will take some time. As is presently scheduled, the integration of Necigef and CIK will be perfected at the Implementation Bankruptcy Act¹⁸ by the Minister on basis of section 212a Bankruptcy Act by the Minister.¹⁹</p>

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						<p>On the basis of the Euronext Clearing Rule Book²⁰ the legal relationships between Clearnet and its Members are governed by French law. Security interests are mentioned in article 8 of this Euronext Clearing Rule Book.²¹ Clearnet states local provisions for France, Belgium and The Netherlands, whereby the Dutch provisions in some respect deviate from the more equal French and Belgian provisions. In the framework of the Clearnet clearing system, in case of <i>e.g.</i> securities on financial instruments granted by Dutch clearing members of Clearnet, entered in an account, register or</p>

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						centralized deposit on behalf of Clearnet in the Netherlands with Necigef, Dutch law will apply as regards the validity and opposability of the securities on those financial instruments, on the basis of section 212f Bankruptcy Act.

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						However, lex contractus will govern the contractual modalities for the constitution of the securities. From the Euronext Clearing Rule Book applicable rules, it cannot indisputably be derived without further specification whether Dutch or French law is the lex contractus. In practice, it is therefore advised to submit the securities granted by the Dutch clearing members explicitly to Dutch law, as to avoid the applicability of both Dutch and French law to granted securities.

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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	Act	A; 212d P: 1	(...) governed by the law of a Member State of the European Union chosen by the participants in which at least one the participants has its head office.	The provisions of the directive replace the Rome Convention on the Law Applicable to Contractual Obligations ²² (hereinafter: "the Convention") insofar they are applicable. Furthermore, cf. supra the remark at section 1(a) of the Directive. (...) " [t]he rights and obligations of an institution declared bankrupt in the Netherlands towards the participant in the system are governed by the law that on the basis of a choice of law by the participants governs the system." ²³ Cf. supra remark at section 1(a) of the Directive.

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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	Act	A: 212d P: 6	Cf. infra at section 10 of the Directive section 212d (6).	
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	n .a	n.a	n.a.	Due to the limited period of time available for the implementation of the Directive (cf. infra endnote 2), it was decided not to transpose section 2(a)(1) of the Directive.

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A: 2 N: a S: 3	A Member State may also on a case-by-case basis designate as a system such a formal arrangement between two participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, when that Member State considers that such a designation is warranted on the grounds of systemic risk;	D	Act	A: 212d P: 2	If this is necessary for the purpose of avoiding systemic risks, the Minister of Finance, heard the Dutch Central Bank N.V., designate as a system a formal arrangement between two participants, without counting a settlement agent, a central counterparty, a clearing house or an indirect participant, common rules and standardised arrangements for the execution of transfer orders between the participants, governed by the law of a Member State chosen by the participants in which at least one the participants has its head office	At the beginning of 2002 a risk analysis has been executed based on the so-called “core principles” set out by the Board of Executives of the ECB. On the basis of the result of that analysis, priorities concerning the oversight activities of the Dutch Central Bank in the field of the operations if the most essential part of the Dutch payment system, i.e. Interpay, (Cf. supra the remark at section 2 (a) of the Directive) have been set out. These will mainly concern the operations of Interpay of which the possible defects could have the most significant impact on the economy. ²⁴

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A: 2 N: b S: 1	<p>‘institution’ shall mean:</p> <ul style="list-style-type: none"> -a credit institution as defined in the first indent of Article 1 of Directive 77/780/EEC including the institutions set out in the list in Article 2(2) thereof, or -an investment firm as defined in point 2 of Article 1 of Directive 93/22/EEC excluding the institutions set out in the list in Article 2(2)a to (k) thereof, or -public authorities and publicly guaranteed undertakings, or -any undertaking whose head office is outside the Community and whose functions correspond to those of the Community credit institutions or investment firms as defined in the first and second indent, which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders within that system. 	N	Act	<p>A: 212a N: a P: 1, 2, 3, 4, 5 and 6 A: 281g N: a, b, c, d, e, f, g, h, i, j and k.</p>	<p>Section 212a: institution shall mean:</p> <ul style="list-style-type: none"> 1: a credit institution as referred to in section 1(1)(a) of the Act on the Supervision of the Credit System 1992; 2: a financial institution as referred to in section 1(1)(c) of the Act on the Supervision of the Credit System 1992; 3: a securities institution as referred to in section (1)(1)(d) of the Act on the Supervision of the Securities markets 1995; 4: a central counterparty, if it acquires within the scope of participation in the system securities credit balances on the basis of a transfer order; 5: public authorities and publicly guaranteed undertakings; 6: any undertaking established in a state which is not a member State of the European Union or an institution which carries on the business of credit 	<p>“The Directive states in section 2(b) four categories of institutions to which the Directive is applicable. By having included in the definition of “institution” in section 212a(a) of the Act credit institutions, financial institutions, securities institutions public authorities or publicly guaranteed undertakings and in a non-EU Member State located undertakings or institutions which carry on the business of credit institution or securities institution by means of a branch (office) in the European Union, all categories mentioned in the Directive have been transposed.”²⁵</p>

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					<p>institution or securities institution by means of a branch (office) in the Netherlands.</p> <p>Section 281 g: “This chapter applies to:</p> <p>a. a credit institution that has been exempted by the Minister of Finance from the prohibition of section 6(1) of the Act of the Supervision of the Credit System 1992 on the basis of section 6(2) of that Act;</p> <p>b. a credit institution that has been exempted by the Minister of Finance from the prohibition of section 31(1) of the Act of the Supervision of the Credit System 1992 on the basis of section 31(1) of that Act;</p> <p>c. a credit institution that has been exempted by the Minister of Finance from the prohibition of section 38(1) of the Act of the Supervision of the Credit System 1992 on the basis of</p>	<p>“Since the object of the Directive is to minimise the consequences of a disturbance of a system caused by an insolvency procedure against a participant in that system, “central counterparty” has also been included in the definition of “institution”, if within the scope of participation in the system on the basis of a transfer order this central counterparty obtains securities balances. After all, this central counterparty obtains securities balances that in case of insolvency will fall into its bankrupt’s estate, which may cause disturbance of the operation of the system.”²⁶</p>

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					<p>section 38(3) of that Act;</p> <p>d. a credit institution that has been discharged by the Dutch Central Bank N.V. Minister of Finance from the prohibition of section 6(1) of the Act of the Supervision of the Credit System 1992 on the basis of section 6(3) of that Act;</p> <p>e. a credit institution that has been discharged by the Dutch Central Bank N.V. Minister of Finance from the prohibition of section 31(1) of the Act of the Supervision of the Credit System 1992 on the basis of section 31(5) of that Act;</p> <p>f. a credit institution that has been discharged by the Dutch Central Bank N.V. Minister of Finance from the prohibition of section 38(1) of the Act of the Supervision of the Credit System 1992 on the basis of section 38(4) of that Act;</p> <p>g. a financial institution as referred to</p>	<p>Ad par. 1 and 2: “credit institution” as defined in Directive 77/780/EEC²⁷ has been transposed into Dutch legislation in section 1 (1)(a) and 1 (1)(c) of the Act on the Supervision of the Credit System 1992 (hereinafter: “Credit System Supervision Act”) to which par.1 and 2 refer.²⁸</p> <p>Ad par. 3: “investment firm” as defined in Directive 93/22/EEC has been transposed into Dutch legislation in section 1 (1)(d) of the Act on the Supervision of the Securities Markets 1995 (hereinafter: “Securities Markets Supervision Act”) to which par.3 refers.²⁹</p>

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					<p>in section 1 (1) (c) of the Act of the Supervision of the Credit System 1992</p> <p>h. a securities institution as referred to in section 1 (d) of the Act of the Supervision of the Securities markets 1995;</p> <p>i. a central counterparty, if this central counterparty acquires within the scope of participation in the system a securities credit balance on the basis of a transfer order;</p> <p>j. public authorities or publicly guaranteed undertakings;</p> <p>any undertaking established in a state which is not a Member State of the European Union or an institution which carries on the business of credit institution or securities institution by means of a branch (office) in the Netherlands.</p>	<p>On 1 July 2002³⁰, the Act on the Supervision of the Credit System and the Bankruptcy Act have been amended to implement the Directive 2000/46/EC.³¹ E-money institutions or companies may now be exempted/ discharged by the Minister of Finance. Such exemption/ discharge can be subject to provisions. Point of attention is the question whether the provisions of section 70 of the Act on the Supervision of the Credit System 1992 apply to the exempted or discharged institutions or companies. Therefore with all exemptions or discharges it shall be specified whether the institution or company will fall within the scope of article</p>

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						70 of the Act on the Supervision of the Credit System 1992 or the provisions on the suspension of payment in the meaning of the Bankruptcy Act. From the system of the Act on the Supervision of the Credit System 1992, it maybe derived that such credit institutions or companies do not fall within the scope of the provisions concerning the mutual recognition and do therefore not have a 'European Passport.' Such credit institutions or companies exempted or discharged in another Member State are likewise not allowed to open a branch (office) in The Netherlands. ³²

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A: 2 N: b S: 2	If a system is supervised in accordance with national legislation and only executes transfer orders as defined in the second indent of (i), as well as payments resulting from such orders, a Member State 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	n.a.	n.a.	n.a.	Due to the limited period of time available for the implementation of the Directive (cf. infra endnote 2), it was decided not to transpose section 2(b)(2).

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 212a 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;	The almost verbatim text of the Directive has been implemented.
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	Act	A: 212a N: d	settlement agent shall mean: an entity providing to institutions or a central counterparty participating in systems, settlement accounts through which transfer orders within such systems are settled;	The almost verbatim text of the Directive has been implemented.
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	Act	A: 212a N: e	clearing house shall mean: an entity responsible for the calculation of the net positions of institutions, a possible central counterparty or possible settlement agent;	The almost verbatim text of the Directive has been implemented.

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 212a N: f	participant shall mean: an institution, a central counterparty, a settlement agent or a clearing house	The almost verbatim text of the Directive has been implemented.
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	n.a.	n.a.	n.a.	Due to the limited period of time available for the implementation of the Directive (cf. infra endnote 2), it was decided not to transpose section 2(f)(3).

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 212a	indirect participant shall mean: a credit institution as referred to in section 1(1)(c) of the Act on the Supervision of the Credit System 1992 or a financial institution as referred to in section 1(1)(c) of the Act on the Supervision of the Credit System 1992 which on the basis a contractual relationship with an institution participating in a system is enabled to pass transfer orders through the system by means of an entry in the account of a credit institution, a financial institution, a central bank or a settlement agent.	Cf. supra the remark at section 2(b) first sentence of the Directive

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: h	`securities' shall mean all instruments referred to in section B of the Annex to Directive 93/22/EEC;	N	Act	A: 212a N: j	securities shall mean: securities as referred to in section 1(a) of the Act on the Supervision of the Securities Markets 1995;	Regarding the meaning of the term "securities", the following has to be noted: Dutch law does not exhaustively enumerate what should fall within the definition of securities. The Finality Directive states that the definition of securities is the one as referred to in Directive 93/22EEC. This Directive 93/22EEC has been implemented into Dutch legislation in section 1(a) of the Securities Markets Supervision Act. ³³

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: i	`transfer order` shall mean: -any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or -an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;	N	Act	A: 212a N: k	Transfer order shall mean: 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 any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;	The almost verbatim text of the Directive has been implemented.
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	Act	A: 212a N: l	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 organise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments;	The almost verbatim text of the Directive has been implemented.

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

The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 212a N: m	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;	The almost verbatim text of the Directive has been implemented.
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	Act	A: 212a N: n	settlement account shall mean: an account at a central bank, a settlement agent or a central counter party used to hold funds and securities and to settle transactions between participants in a system;	The almost verbatim text of the Directive has been implemented.

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: m	`collateral security` shall mean all realisable assets provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the European central bank.	N	Act	A: 212b N: 3 A: 212f	<p>Section 213b(3): (...) a proprietary security provided by an institution for the purpose of the participation in a system to a central bank or to another institution which participates in the system.</p> <p>Section 212f: When in connection with participation in the system, proprietary security has been provided to a participant or a central bank or to a third party acting on behalf of a participant or a central bank on securities or on interest in securities and such securities or interest in such securities have on the basis of a legal provision been entered in a register, account or centralised deposit system located Union or in another state which is party to the Agreement on the European Economic Area, (...).</p>	<p>Cf. supra the remark at section 1(c) of the Directive.</p> <p>In the system of the Dutch Civil Code, collateral security would be translated as follows: <i>“Zakelijke zekerheden”</i>. These are also the words used in the official Dutch translation of the Directive. However, the words <i>“zakelijke zekerheden”</i> in the terminology of the Dutch Civil Code imply that security interests involved could only be vested on objects, this is to say: tangible objects susceptible to human control, thereby excluding rights and interests in rights. By using the words <i>“goederenrechtelijke zekerheden”</i>, translated as</p>

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						“proprietary security”, rights and interest in rights fall within the scope of the due provision. ³⁴ Proprietary security ³⁵ to the central bank for example is provided by means of a rights of pledge on the basis of art. 42 of the Act on the Securities Giro Transfer. ³⁶
	NETTING AND TRANSFER ORDERS					

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 71 P: 9 A: 212b P: 1	<p>Section 71(9): Notwithstanding the last sentence of subsection 8, the court order referred to in subsection 1 or 2 does not have retroactive effect in respect of a transfer order, netting order or any payment, delivery, netting or other legal act arising from any such order necessary to completely carry out the order in a system as referred to in section 212b(a) of the Bankruptcy Act, issued by a credit institution prior to the moment of the issued court order.</p> <p>Section 212b(1): Notwithstanding sections 23 and 35, the bankruptcy order of an institution does not have retroactive effect from the start if the day on which it is declared in respect of a transfer order, netting order or any payment, delivery, netting or other legal act arising from any such order necessary to complete carry out the</p>	<p>The legislative proposal contained an exception to the 00.00-hour rule that provides that bankruptcy orders have retroactive effect from the moment of declaration of the bankruptcy order to 00.00-hour before. This equally applies to the Temporary Arrangement and the granting of a suspension of payments for institutions as referred to in section 2821g of the Act. (Cf. supra section 281g of the Act at section 2(b)(1) of the Directive.)</p> <p>“Although the Directive offered the possibility for Member States to enable a trustee or administrator to revendicate from an institution or the ultimate</p>

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					order in the system issued by a credit institution prior to the moment of the bankruptcy order of the institution.	beneficiary payments received by them through a system, it was chosen not to use this discretionary power for the following reasons: first, the Netherlands would then put itself in a special position with respect to the other Member States. Secondly, due to the 00.00-hour rule the Netherlands would not be able to meet the agreement made between the central banks in connection with the EMI concerning the structuring of a direct gross settlement system for inter-banking payments in which payments would be solid. Thirdly, as regards the liquidity it should be prevented that institutions would have to pay back

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>payments, which they received and which have already been used for other transactions. Fourthly, European institutions would set sterner requirements to the participations of the Dutch institutions in the system than to other institutions.³⁷</p> <p>Section 212b(1) deviates from section 23³⁸ and 35³⁹ Bankruptcy Act.⁴⁰</p>

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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.	N	Act	A: 71 P: 10 A: 212b P: 2	Section 71(10): The last sentence of subsection 8 and section 72(1) can not be invoked against third parties in respect of a transfer order, netting order or any payment, delivery, netting or other legal act arising from any such order necessary to completely carry out/ execute the order issued by a credit institution after to the moment on which the court has issued the order referred to in subsection 1 and 2, if the order is carried out in a system as referred to in section 212b(a) if the Bankruptcy Act on the day that the court has issued the order and the central counterparty, the settlement agent or the clearing house referred to in section 212a Bankruptcy Act can prove that it on the time of the carrying out of the order was not aware, nor should have been aware, of the issued court order.	None of the sections referred to can be invoked against third parties if the central counterparty, the settlement agent or the clearing house can prove that it on the time of the carrying out of the order was not aware, nor should have been aware, of the issued court order. This is why in sections 71(10) and 212b(2) of the Act there is no need to refer to section 3:86 and 3:238 Dutch Civil Code (which contain the general provision on 'good faith'). This mutates mutandis equally applies to section 228(2) Bankruptcy Act concerning the suspension of payments. Cf. Section 281h ⁴¹ the Act.

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
					Section 212b(2): sections 23, 24, 35, 53(1) and 54(2) of this Act, as well as section 72 opening words and under a of Book 3 Dutch Civil Code can not be invoked against third parties in respect of a transfer order, netting order or any payment, delivery, netting or other legal act arising from any such order necessary to completely carry out/ execute the order issued by an institution after the time of the bankruptcy order, if the order is carried out in the system on the day of the bankruptcy order and the central counter party, the settlement agent or the clearing house can prove that on the time of the clearing house can prove that on the time of the carrying out of the order it was not ware, nor should have been aware of the bankruptcy order.	

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

The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 3 P: 2	No law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the moment of opening of insolvency proceedings, as defined in Article 6(1) shall lead to the unwinding of a netting.	N	Act	A: 71 P: 9 A: 212b P: 1	Cf. supra section 71(9) of the Act and section 212b(1) at section 3(1)(1) of the Directive.	In Dutch law there are three forms of netting: a. (Payment) netting as provided in section 6:127 ⁴² et seq. Dutch Civil Code. b. Debt novation as provided in section 6:160 ⁴³ et seq. Dutch Civil Code. c. Netting at the fulfilment of a resolutive condition as provided in section 6:22 ⁴⁴ et seq. Dutch Civil Code. All forms of netting in the Netherlands are legally enforceable, provided the execution of the netting agreement is impeded in the event of application of the Temporary Agreement, suspension of payment or bankruptcy of one of the parties. Insofar this results

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						from the 00.00-hour rule, this Act prevents this impediment to take effect. By including an exception to the 00.00-hour rule in the Credit System Supervision Act, insofar as it concerns the payment and securities transfer between institutions, netting will be legally enforceable in all events. ⁴⁵
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	Act	A: 71 P: 10 A: 212b P: 2	Cf. supra section 71(10) and section 212b(2) at section 3(1)(2) of the Directive	“The order is considered to be given by the institutions and to be entered into the system for processing on the moment that the order cannot be revoked, that is to say on the moment that the order has passed the point as from which the system does no longer allow revocation.” ⁴⁶ “A system can be designated

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>as a formal agreement between participants. The participants are free to determine what to include in this agreement. It is fair to assume that the agreement will contain a provision defining the moment after which revocation is not possible anymore. This moment will depend on the technical impossibility to reverse an order that has already started being processed. Whether this provision will be agreed upon and how its wording will be, is let to the free will of the parties.”⁴⁷</p> <p>Cf. infra the remark at section 5 of the Directive.</p>

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	n.a.	n.a.	n.a.	Due to the limited period of time available for the implementation of the Directive (cf. infra endnote 2), it was decided not to transpose section 4(1).
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	n.a.	n.a.	n.a.	Due to the limited period of time available for the implementation of the Directive (cf. infra endnote 2), it was decided not to transpose section 4(2).

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	n.a	n.a	n.a	<p>Cf. supra the remark at section 3(3) of the Directive.</p> <p>“The system defines the moment when revocation shall no longer be allowed. Section 5 of the Directive compels Member States to see to it that their national law does not contain any provisions, which might affect this rule. Dutch law does not contain any such provisions. It is assumed that he who has issued the order after it has been started to carry into effect cannot revoke the order. This will in any case be the moment when an order is entered into the above-mentioned system. For the implementation of section 5 of the Directive therefore</p>

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						no further regulation is necessary. However, it is noted for the record that this restriction of the right of revocation does not imply that the consequences of a payment might never be reversed. In certain determinable circumstances this possibility exists, such as for instance the possibility to reverse the consequences of an automatic debt collection within 30 days. The initial order however is not revoked and cancelled, but followed by a new order on the basis of which the amount that had been transferred earlier on is reversed.” ⁴⁸
	PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS					

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 71 P: 12 A: 212b P: 4	Section 71(12): In the decision the court will specify the time of the bankruptcy order to the minute. Section 212b(14): In the decision the court will specify the time of the bankruptcy order to the minute.	“Section 6(1) of the Directive states that the moment of opening of the insolvency proceedings is the moment of the issue of the order by the competent court. In the Netherlands this is the moment when the judge in the legal proceedings declares the application of the Temporary Arrangement, the granting of a suspension of payments or the bankruptcy.” ⁴⁹

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 71 P: 13 A: 212c P: 1	<p>Section 71(13): The court's clerk immediately informs the Bank⁵⁰ of the decision. The bank subsequently immediately informs the systems designated by Our Minister on the basis of section 212d of the Bankruptcy Act, as well as the competent authorities of the other Member States of the European Union and of the other states party to the Agreement on the European Economic Area of the decision.</p> <p>Section 212c(1): The court's clerk immediately informs the Dutch Central Bank N.V. of the bankruptcy order.</p>	<p>“In practice, a very short time, say a few minutes, shall pass between the decision and the notice to the Dutch Central Bank. The time stated in the decision and the time of notice therefore is not exactly the same. In practice this will not lead to significant problems, especially not concerning credit institutions and financial institutions, since the Dutch Central Bank as regards these institutions has already been informed of the process of the request for application of the Temporary suspension of payment or the request for bankruptcy.”⁵¹</p> <p>On the meaning of the word “immediately”, considering</p>

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						that a bank will not or seldom go bankrupt, it was not deemed necessary to make any specifying additional provisions. "Immediately" will in practice mean notification per for example telefax. ⁵²
A: 6 P: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N	Act	A: 71 P: 13 A: 212c P: 2	Section 71(13): cf. supra section 71(13) at section 6(2) of the Directive. Section 212c(2): The Dutch Central Bank N.V. subsequently immediately informs the systems designated by Our Minister in the basis of section 212d, as well as the competent authorities if the other Member States of the European Union and of the other states party to the Agreement on the European Economic Area of the bankruptcy order.	

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 71 P: 9, 10 A: 212b P: 1, 2	Cf. supra section 71(9) and (10) and 212b(1) and (2) at section 3(1)(1) and 3(1)(2) of the Directive.	Cf. supra the remark at section 3 of the Directive.

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 212e	In the event of insolvency proceedings being opened against an institution, the rights and obligations arising from, or in connection with, participation in that system shall be determined by the law governing that system.	“Section 212e of the Act does not directly indicate the applicable law. Reference is made to the provision in section 2(a), second indent of the Directive, as has been implemented in section 212d(1). That section contains the provisions that by choice of law it is determined what law governs the system. This concerns both the law of contracts as well as the law of property. This means that the law that on the basis of choice of law governs the system governs the rights and obligations of an institution declared bankrupt in the Netherlands against the participants of the system.” ⁵³ Cf. supra the remark at section 1(a) of the

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
	INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FORM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER					Directive.

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 9 P: 1	<p>The rights of:</p> <ul style="list-style-type: none"> - 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	n.a	n.a	n.a	<p>Cf. supra the remark at section 1(a) of the Directive.</p> <p>“The Directive does not state a general rule on the law governing proprietary securities. In view of the complexity of this matter and the urgency involved in the drawing up of the Directive, it had been decided not to state such a rule. However, it was considered wise to determine in section 9(1) of the Directive that proprietary securities cannot be affected on the sole basis of an insolvency proceeding being opened. (...) Regarding the Netherlands it is not necessary to transpose this provision of the Directive; on the basis of section 57</p>

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						Bankruptcy Act pledgees and mortgagees can execute their right as if there were no bankruptcy.” ⁵⁴ In this view, the following can be noted concerning present law: in its judgement of 16 May 1997, the Supreme Court of the Netherlands ⁵⁵ considered in so many words that a choice of law made by assignor and assignee in accordance with section 3 of the Rome Convention also included the proprietary aspects of the assignment. “If the line in this judgement is continued to the creation of a security interest on receivables, it may be assumed that the law chosen by the parties will govern the creation of a security interest.” ⁵⁶ However, the

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>judgement was (inter) nationally highly criticised.⁵⁷ It was thus noted that the Court of Justice of the European Communities had not yet decided upon the interpretation of the Rome Convention. Should that Court come to another interpretation then that interpretation will apply.^{58 59}</p> <p>“In short: the system is governed by the law of a Member State chosen by the participants. This law also governs the rights and obligations of a participant which arise due to its participation in the system, except when participants in or a central bank acquire proprietary security interests</p>

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>in the form of securities recorded in a register, an account or a centralised securities deposit located in a Member State. That being the case, the determination of the rights of these persons as holders of proprietary security interest in such securities is governed by the Law of that Member State.”⁶⁰</p> <p>Cf. infra section 9(2) of the Directive.</p>

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
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	Act	A: 212f	Section 212f: When in connection with participation in the system, proprietary security has been provided to a participant or a central bank or to a third party acting on behalf of a participant or a central bank on securities or on interest in securities and such securities or interest in such securities have on the basis of a legal provision been entered in a register, account or centralised deposit system located in a Member State of the European Union or in another state which is party to the Agreement on the European Economic Area, the determination if the rights of such persons as holders of proprietary security interests shall be governed by the law if that Member State, respectively that other Member State.	Cf. supra the remark at section 9(1) of the Directive. “Concerning proprietary security interests, the Directive does indicate the applicable law in a specific event, being the event that a participant in the system or a central bank acquires a proprietary security interest in the form of securities or of interests in securities, when their interests in those securities have legally been recorded in a register, an account or a centralised securities deposit located in a Member State. Is this the case, the determination of those interests is governed by the law of the Member State where the register, the

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						account or the securities deposit has been located. As regards the place where such a register, account or centralised securities deposit has been located an answer to that question cannot be given by one Member State alone. As regards the word “legally recorded” it is noted that this does not concern recording required by law, but recording governed by law.” ⁶¹
FINAL PROVISIONS						

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The Netherlands – final report

Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 212a P: b, N: 1 and 2 A: 212d, P:1, 2 and 6	Cf. supra at section 1(a) and 2(a)(1) of the Directive for section 212a(b)(1) and (2). Cf. supra at section 2(a)(1), 2(a)(3) of the Directive for section 212d(1) and (2). Section 212d(6): The Minister of Finance notifies the designated systems to the Commission of the European Communities	Cf. the remarks at section 2(a)(1) of the Directive.
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	Act	A: 212d P: 4	The system informs the Minister of Finance of the institutions who directly or indirectly participate in the system, as well as each start and termination of participation by an institution in the system	The almost verbatim text of the Directive has been implemented.

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Act	A: 212d P: 3	The Minister of Finance may attach conditions to the decision to designation as a system	

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 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	Decre e Provis ion of Infor matio n Credit Institu tions ⁶²	A: 1 P: 1 And 2 A: 2	Section 1: 1. A credit institution which pursuant to section 52(2) under a, b or c of the Act on the Supervision of the Credit System 1992 has been registered, provides on request of any person with a legitimate interest information on the systems as referred to in section 212a of the Bankruptcy Act in which the institution participates. 2. A credit institution which pursuant to section 52(2) under a, b or c of the Act on the Supervision of the Credit System 1992 has been registered, provides on request of any person with a legitimate interest information on the most important rules governing the operation of the systems as referred to in section 212a of the Bankruptcy Act in which the institution participates. 2: Section 27 of the Decree Supervision Securities Markets 1995	“The fourth paragraph of section 10 provides that any person with a legitimate interest can require an institution to be informed of the systems in which the institution participates and to be supplied the person with information rules governing the operation of the system. This paragraph shall be transposed in inferior regulations. Section 11(1) Securities Markets Supervision Act and section 85a of the Credit System Supervision Act provide the possibility to set rules on informing the public. In these inferior regulations it will be included that on the request of a client or another person with a legitimate interest, an

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
					<p>shall be amended as follows: ahead of the present text, the indication «1.» shall be put. A second and a third subsection shall be added, read as followed:</p> <p>2. A securities institution provides on request of any person with legitimate interest information on the systems as referred to in section 212a of the Bankruptcy Act in which the institution participates.</p> <p>3. A securities institution which pursuant to section 52(2) under a, b or c of the Act on the Supervision of the Credit System 1992 has been registered, provides on request of any person with legitimate interest information on the most important rules governing the operation of the system as referred to in section 212a of the Bankruptcy Act in which the institution participates.</p>	<p>institution shall be obliged to provide information on the systems the institution participates in and on the most important of the system.”⁶³</p>

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

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 11 P: 1 S: 1,2	Member States shall bring into force the laws regulations and administrative provisions necessary to comply with this Directive before 11 December 1999. They shall forthwith inform the Commission thereof.	N	Decre e Entry into Force Act ⁶⁴	A: 1	The Act on the amendment of the Act on the Supervision of the Credit System 1992 and the Bankruptcy Act, concerning the settlement finality in payment and securities settlement systems (Bulletin of Acts and Decrees 714) shall enter into force as of 1 January 1999.	The Act entered into force 1 January 1999, 10 days after its publication in the Bulletin of Acts and Decrees.
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	Act			<i>“Whereas we have considered that if is necessary for the implementation of Directive 98/26/EC of the European Parliament and the Council of the European Union of 19 May 1998 OJEC L166/45 et. seq.”⁶⁵</i>

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 11 P: 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				
A: 12	No later than three years after the date mentioned in Article 11(1), the Commission shall present a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.	n. a.				
A. 13	This Directive shall enter into force on the day of its publication in the <i>Official Journal of the European Communities</i> .	n. a.				

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 14	This Directive is addressed to the Member States.	n. a.				

¹ Act of 17 December 1998 on the Amendment of the Act on the Supervision of the Credit System 1992 and the Bankruptcy Act, concerning the settlement finality in payment and securities settlement systems (hereinafter: the “Act”), entry into force 1 January 1999, *Bulletin of Acts and Decrees* 22 December 1998, 714 and 715.

² Although concerning the contents the Act does not diverge the Directive, its framework however does. Reasons were as follows: at the start of the 90-‘s the publication of the Lamfalussy-report resulted some time later in as decision on a European level to construct a “solid” payment and settlement system in which every payment would be final. “The Netherlands in the meanwhile had started a study on the possible consequences these developments might have for Dutch law. The result of this stuffy was that the Dutch rule on bankruptcy law, stating that a bankruptcy order has retroactive effect from the moment of issuing of the bankruptcy order to 00.00 hour prior to that moment, the so-called 00.00-hour rule, affects the possibility to enter into netting of the receivables and that the 00.00-hour rule would interfere with the requirements of “solid” payment and settlement systems, that every payment shall have to be final and can not be reversed. In cooperation with the Ministry of Justice, the Ministry of Finance prepared a legislative proposal to repeal the 00.00-hour rule. The most significant problem was how such an exception on the 00.00-hour rule for transfer orders processed by payment and settlement systems would have to be fitted into the structure of the Bankruptcy Act. Several Alternatives were possible, varying from at the one hand the trustee being able to revendicate all money transfers to at the other hand the trustee not being able to revendicate any money transfer at all. It was difficult to come to a compromise. Furthermore, the possible outcome of the discussion in Brussels on a directive governing the matter remained unclear. Although negotiations on the Directive had not been finished, it was decided in May 1997 to submit a legislative proposal on repealing the 00.00-hour rule to the European Monetary Institute for consultation. In this legislative proposal the trustee retained the possibility to afterwards revendicate all transferred money’s. After six months, the Emi gave an advice containing highly critical comments: the systemic risk would inadequately be obviated, as a result of the fact the trustee being able to afterwards revendicate all transferred money’s. By now negotiations in Brussels on a directive on this matter had reached

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Directive 98/26/EC			Member State's Legislation			
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an advanced phase. Since the legislative proposal submitted to the EMI had to be adopted on several points, this might lead to the situation in which two legislative proposals on the same matter would be submitted to Parliament shortly after each other. In view of the complexity of the matter, efficiency of legislation and clarity towards the public, this was considered not to be expedient. It was then decided to integrate the adapted version of the legislative proposal which had been submitted to the EMI in a legislative proposal on implementing Directive 98/26/EC of the European Parliament and the Council of the European Union of 19 May 1998 (OJEC L166/45) concerning the settlement finality in payment and securities systems. The adoption of this Directive eventually took longer than expected and finally took place only 19 May 1998. The preparations of the legislative proposal were concluded immediately afterwards, so as to enable it to be discussed by the Council of Ministers of 19 June 1998. Next, the Council of State was asked for “fast-track” advice. This advice being received, work was expeditiously continued so as to include this advice in the legislative proposal. The proposal was then discussed again in the Council of Ministers on 9 October [.]” and finally adopted by Parliament. Cf. Explanatory Note 26260, nr. 7, pag. 1 and 2.

³ Explanatory Note 26260, nr. 3, par. 3, pag. 3.

⁴ “Given the purpose of the Directive, as well as requirements of the ECB, it is reasonable to expect that, regarding the 00.00-hour rule guarantees will be requested of participants in a system if this rule has not been laid down in local regulations.” Cf. Explanatory Note 26260, nr. 5, par. 3, pag. 4. Regarding the remark of the Government that every participant will continue to be governed by the insolvency laws of its own state, we clarify as follows: it does not imply any problems and/ or specific issues regarding the implementation of the Finality Directive in particular in respect of article 8. The participant will not completely be governed by the insolvency law of the state which law governs the system, but only the rights and obligations arising from, or in connection with, the participation in the system.

⁵ European legislation does not apply to The Netherlands Antilles and Aruba, the territories within the Kingdom of the Netherlands with a separate legal system. However, those territories are involved in intensive international transfers of payments. It would do well to the banking position of The Netherlands Antilles and Aruba if the 00.00-hour rule were to be cancelled in a similar way as in The Netherlands for banking transactions. Cf. G.C. van Daal, *De ontwerp aanpassingen van het faillissementsbesluit 1931*, Tijdschrift voor Antilliaans recht – Justicia, 2001/3, pag. 10, Curaçao 2001, The Netherlands Antilles.

⁶ Explanatory Note 26260, nr. A, par. 2, pag. 2.

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

⁷ Explanatory Note 26260, nr. A, par. 2, pag. 2. The practical implication of the discrepancy between the Dutch legal concept of collateral security and the legal concept the Directive uses can be described as follows: the Directive considers collateral security to be “all realisable assets provided under (...)” Dutch law considers collateral security to be: “corporeal or tangible objects susceptible to human control (cars, bikes, machines etc.) provided under...” Realisable assets such as receivables and other (interests in) rights are not considered to be “corporeal or tangible objects susceptible to human control.”

⁸ Explanatory Note 26260, nr. 3, par. 8, pag. 20.

⁹ Explanatory Note 26260, nr. 3, par. 5, pag. 18.

¹⁰ Explanatory Note 26260, nr. 5, par. 4, pag. 9.

¹¹ *Official Gazette* 1999, nr. 159, pag. 7.

¹² Quarterly Report Dutch Central Bank, June 2002, pag. 25.

¹³ On the basis of going through the notification procedure, it may open a branch (office) in the Netherlands and may carry out the business of credit institution.

¹⁴ Implementation of the Act on the Supervision of the Credit System 1992, *Official Gazette* 2001, nr. 99, pag. 54: “On the basis of going through the notification procedure as referred to in section 31 respectively 32 of the Credit System Supervision Act, the Dutch Central Bank has recorded the following institutions in the register as referred to in section 52(1) of the Credit System Supervision Act: Banque Centrale de Compensation S.A. Clearnet, located in Paris, in The Netherlands: Amsterdam.”

¹⁵ Amendment of the Regulation on the Designation of Empowered Authorities of the Act on the Supervision of the Securities Markets 1995, *Official Gazette* 2000, nr. 184, pag. 15.

¹⁶ Implementation of the Bankruptcy Act, *Official Gazette* 1999, nr. 159, pag. 7.

¹⁷ At the start of 2001, the consolidation of the clearing system of Euronext into the French Clearnet has been reviewed. It was ascertained whether the position of Clearnet had taken from 1 February 2001 as a central counterparty, met the requirements laid down in the Oversight framework of the Dutch Central Bank. Within the scope of the legal merger, one point of particular interest was the need to implement the Directive for the French clearing

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Directive 98/26/EC			Member State's Legislation			
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system, so as to also guarantee the finality of the transactions concluded on Euronext Amsterdam after the consolidation. Annual Report Dutch Central Bank 2001, pag. 159.

¹⁸ Implementation of the Bankruptcy Act, *Official Gazette* 1999, nr. 159, pag. 7.

¹⁹ At the start of 2001, the consolidation of the clearing system of Euronext into the French Clearnet has been reviewed. It was ascertained whether the position of Clearnet had taken from 1 February 2001 as a central counterparty, met the requirements laid down in the Oversight framework of the Dutch Central Bank. Within the scope of the legal merger, one point of particular interest was the need to implement the Directive for the French clearing system, so as to also guarantee the finality of the transactions concluded on Euronext Amsterdam after the consolidation. Annual Report Dutch Central Bank 2001, pag. 159.

²⁰ Euronext Clearing Rule Book per 29 April 2002, English version, pag. 31: “French law shall govern the Local Provisions and the legal relationships that originate from these provisions, unless explicitly stated otherwise.”

²¹ *Idem*, pag. 46: “(...) 8.4 As collateral to secure compliance with all their obligations to Clearnet, whether arising under these Rules or not, Dutch Clearing Member herewith pledge to Clearnet all their existing and any future pledge in favor of Clearnet concerning the claims referred to in this clause. 8.5 The Dutch Clearing member shall at all times ensure that it is authorized to make each pledge as provided for in these Rules and guarantees that the pledged assets are not encumbered with any attachments and are not otherwise subject to a pledge or any other restricted or personal right. Section 249 and 252 Book 3 of the Netherlands Dutch Civil Code shall not apply to pledges under these rules.”

²² Rome Convention on the Law Applicable to Contractual Obligations, Rome 19 June 1980.

²³ Explanatory Note 26260, nr. 3, par. 4.4, pag. 15.

²⁴ Annual Report Dutch Central Bank 2001, pag. 159.

²⁵ Explanatory Note 26260, nr. 3, par. 8, pag. 19.

²⁶ Explanatory Note 26260, nr. 3, par. 8, pag. 20.

²⁷ Directive 77/780/EEC is no longer in force. It has been repealed by Directive 2000/12/EC of the European Parliament and the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJEC L126/1), implemented into Dutch legislation by the Act of 12

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
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December 2001 on the Replacement of the Reference to European Directives which have been repealed by Directive nr. 2000/12/EC of the European Parliament and the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJEC L126/1) in the Act on the Supervision of the Credit System 1992 and in a few other Acts by a Reference to this Directive, *Bulletins of Acts and Decrees* 17 January 2001, 21.

²⁸ Credit System Supervision Act section 1(1)a: “*credit institution: an enterprise or institution whose business is to receive funds repayable on demand or subject to notice being given, and to grant credits or investments for its own account.*; section 1(1)(c): “*financial institution : an enterprise or institution other than a credit institution the principal activity of which is to carry on one or more of the activities listed under 2 to 12 in the Annex 1 of the Directive or to acquire or hold participations.*” Regarding the scope of the Directive and E-money institutions, it should be noted that the Dutch legislation has copied the Directive, as a result of which E-money institutions do not fall within the definition of institution to which the Directive applies.

²⁹ Securities Markets Supervision Act section 1(1)(d): “ ‘*securities institution*’ shall mean a securities broker or portfolio manager.”

³⁰ Act of 20 June 2002 on the amendment of the Act on the Supervision of the Credit System 1992 in relation to the business economics supervision on institutions for electronic money, *Bulletin of Acts and Decrees* 27 June 2002, 330. Entry into force: 1 July 2002 by the Decree of 25 June 2002 on the adoption of the Date of entry into force of the Act on concerning the amendment of the Act on the Supervision of the Credit System 1992 in relation to the business economics supervision on institutions for electronic money (Bulletin of Acts and Decrees, 330) and the decree of 28 May 2002 (Bulletin of Acts and Decrees 2002, 273), on the designation of services within the framework of the Act Disclosed Transactions and on the amendment of the Royal Decree of 29 July 1994 on the designation of financial institutions and financial services within the framework of the Act Identification Financial Services 1993, *Bulletin of Acts and Decrees* 28 June 2002, 336.

³¹ Directive 2000/46/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions, *Official Journal of the European Communities* L275/39.

³² Explanatory Note 28189, nr. 3, par. 4.7, pag. 10.

³³ Securities Markets Supervision Act section 1(a): “ ‘*securities*’ shall mean:

1°. *share certificates, debt certificates, profit-sharing or founders’ certificates, option certificates, warrants and similar documents of value;*

2°. *rights of joint ownership, options, futures, entries in share and debt registers, and similar rights, conditional or otherwise;*

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3°. *certificates representing securities as referred to above;*

4°. *scrips representing securities as referred to above.* ”

³⁴ The holder of a depositary receipt of shares (excluding the holder of a depositary receipt of nominative shares), or the holder of a depositary receipt of debts can have a joint right of pledge on such shares or debts on the basis of article 3:259(2) of the Dutch Civil Code: *“Have the original shares been registered or can the debts be designated as nominative and have the depositary receipts been issued in collaboration with the issuer of the original shares or debts, then the holders of the depositary receipts jointly acquire a rights of pledge on such shares or debts. Have the depositary receipts for nominative debts been issued without collaboration of the debtor, then the holders of the depositary receipts acquire such a right of pledge by notification of the issue to the debtor. Have the depositary receipts been issued for bearer shares or bearer debts, then the holders of the depositary receipts acquire such a right of pledge, without the paper having to be put under the control of the holders of the depositary receipts or a third party.”*

³⁵ Instruction I.5-1, articles 4, 5 and 6, as has been published in Notice 2002-0036, 3 April 2002: Article 4: *“Pursuant to Directive 98/26/EC1 on settlement finality in payment and securities settlement systems the validity and enforceability of a guarantee (i.e a security interest) on book-entry Securities is assessed according to the law of the European member state where the account where the rights with respect to the relevant Securities are recorded. According to that:*

- when a Clearing Member provides its Collateral to Clearnet, directly or indirectly via an agent, by providing cash or Securities, to an account held in France, by virtue of article L 442-6 of the French Monetary and Financial Code, ownership of the Collateral is transferred to Clearnet at the moment Clearnet's account is credited.

- when a Clearing Member provides its Collateral to Clearnet, directly or indirectly via an agent, by providing cash or Securities to an account belonging to Clearnet held in Belgium, with Euroclear Bank, by virtue of article 25 bis of the Belgian Act relative “au marché du titre de la dette publique et aux instruments de politique monétaire” dated January 2nd, 1991 the Collateral is transferred to Clearnet under a trust (transfer of ownership for the purpose of collateral – transfert de propriété à titre de garantie) at the moment Clearnet's account is credited.

- when a Clearing Member provides its Collateral to Clearnet by holding cash or Securities in accounts directly held by such Clearing Member with the Belgian branch of Clearnet, the Collateral is submitted to a legal privilege consisting in a first rank preferred right in favour of Clearnet, as provided in

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article 31 §2 of the Belgian Act of 2 August 2002 and Royal Decree of June 9th, 1995 relating to the realisation procedure. The Belgian branch of Clearnet in turns holds the relevant Securities accounts in CIK or BNB.”

Article 5: “Every Clearing Member established in the Netherlands which has an account with DE NEDERLANDSCHE BANK (DNB), can fulfil its Margin obligations by providing it with enough **collateral security** for the latter to issue a guarantee in favour of Clearnet. To cause DNB to issue a guarantee in favour of Clearnet to fulfil its Margin obligation, the Clearing Member must enter into arrangements providing that :

- the Clearing Member's credit capacity (i.e the amount of credit that it may draw in cash at DNB), is determined according to the cash Collateral that it has deposited in an account held by DNB and the Securities Collateral that it has transferred via Necigef. These Securities, which must be Tier 1 or Tier 2 Securities, are, by the book entry deposit pledged to DNB as provided in article 42 of the Securities Giro Act dated 1977.
- the Clearing Member will have its credit capacity partly frozen daily for the observance of its obligations towards DNB. Those Clearing Members which do not have an account with DNB but wish anyway to fulfil their Margin obligations by using the DNB offer, must enter into a contractual relation with another credit institution. The contractual arrangement must provide that the latter, which has an account in DNB, will be responsible for providing DNB with sufficient **collateral security** for DNB to deliver its guarantee to Clearnet regarding the first Clearing Member's Margin obligations and this under the same conditions as those described herein above. In this case the Clearing Member using another credit institution to fulfil its Margin obligations will be referred to as Allied Member. The provision of this paragraph are compulsory for Clearing Members that are not incorporated in the Netherlands. The amount guaranteed by DNB is reviewed every time Clearnet sends new Margin requirements to it. These arrangements will last until the membership of the Clearing Member terminates or until the Clearing Member notifies its will to change such arrangements and such a change is implemented.”

Article 6: “The Clearing Member, that does not use DNB to fulfil its Margin obligations, must provide its Collateral to Clearnet, in one of the following:

- Cash (EURO; GBP;USD);
- Debt securities issued by the French Treasury:
- Treasury bills (BTFs) issued for 13, 26 or 52 weeks with a minimum nominal value of EURO 100,000;
- Annual fixed interest rate Treasury notes (BTANs) with a minimum nominal value of EURO 100,000;

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- *Fungible Treasury Bonds (OATs) for a minimum nominal value of EURO 100,000;*
- *US Treasury Bills: debt securities issued by the American state (US) with a minimum nominal value of USD 250,000;*
- *Bunds : German debt securities (issued by the Federal state or by the Treuhandanstalt) with a minimal nominal value of EURO 100,000;*
- *Gilts : debt securities issued by the British state for a minimum nominal value of GBP 100,000;*
- *Belgian Treasury Certificates for a minimum nominal value of EURO 100,000;*
- *Belgian Linear bonds (OLOs) for a minimum nominal value of EURO 100,000;*
- *Debt securities issued by the Dutch state for a minimum nominal value of EURO 100,000;*
- ***Dutch Treasury certificates (DTCs) for a minimum nominal value of EURO 100,000;***
- ***Debt securities issued by the Italian state :***
- ***Treasury bills (BOTs and BTPs) with a minimum nominal value of EURO 100,000;***
- ***Certificates of Treasury (CCTs) with a minimum nominal value of EURO 100,000;***
- *Stocks incorporated in index CAC 40 within the limits set out by Clearnet2;*
- *Stocks incorporated in index BEL 20 within the limits set out by Clearnet2;*
- *Stocks incorporated in index AEX within the limits set out by Clearnet2;*
- *Stocks incorporated European index EURONEXT 100 within the limits set out by Clearnet2;*
- *Stocks incorporated European index DJ EURO STOXX 50 within the limits set out by Clearnet2;*
- *Stocks incorporated index DJ STOXX 50 within the limits set out by Clearnet2;*
- *Underlying stocks of options listed on Euronext markets within the limits set out by Clearnet2;*
- *Corporate bonds if the stocks of the relevant company are accepted as Collateral within the limits set out by Clearnet2. Zero coupons and strips debt securities will not be accepted as Collateral.”*

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³⁶ Act of 8 June 1977 concerning provisions on the giro transfer of securities, as lately has been amended by the Act of 2 November 2000, Bulletin of Acts and Decrees 485.

³⁷ Explanatory Note 26260, nr. 3, par. 4.3, pag. 6

³⁸ Section 23 Bankruptcy Act: “*The bankruptcy order causes a debtor to lose by operation of law his disposition to act and to manage his estate in bankruptcy, counting from the day on which the bankruptcy order has been declared, that day included.*”

³⁹ Section 35(1) Bankruptcy Act: “*1: If on the day of the bankruptcy order all the acts necessary for a transfer by the debtor have taken place, the transfer can no longer validly take place.*”

⁴⁰ Explanatory Note 26260, nr. 3, par. 4.3, pag. 8. Section 35 provides that a transfer of title cannot longer take place if on the day of the bankruptcy order not all necessary acts have been performed. If section 212b(1) of the Act did not deviate, the aim of the Directive would not be achieved.

⁴¹ Section 281 of the Act: “*section 212, subsections b to f included, and 212b to 212f included are equally applicable to the suspension of payment, provided that:*

a. *«section 23» is to be read as: section 217*

b. *«section 24» is to be read as: section 228(2)*

c. *«section 53(1)» is to be read as: section 234(1)*

d. *«section 54(2)» is to be read as: section 235(2).”*

⁴² Section 6:127 Dutch Civil Code: “*1: If a debtor who is entitled to net, declares against his creditor that he will net his debt with a claim, both obligations shall be cancelled to the amount shared.*” “*2: A debtor is entitled to net, if he has a claim to a performance which answers to his debt against the same counterparty and if he is entitled to both payment of the debt as well as to enforcement of the payment of the debt.*” “*3: The power to net does not exist as regards a claim and a debt arising from estates separated from each other.*”

⁴³ Section 6:160 Dutch Civil Code: “*1: Obligations are cancelled by a contract concluded by the creditor and the debtor by which the creditor renounces his claim.*” “*2: An offer made by the creditor to the debtor to renounce gratuitously is considered to be accepted if the debtor has taken notice of the offer and has not declined it without delay.*” “*3: Sections 48(1) and (2) and 49(1) to (3) included are equally applicable.*”

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⁴⁴ Section 6:22 Dutch Civil Code: “A suspensive condition puts the obligation into effect only at the fulfilment of the condition; a resolutive condition puts the obligation out of effect at the fulfilment of the condition.”

⁴⁵ Explanatory Note 26260, nr. 3, par. 4.4, pag. 14 and 15.

⁴⁶ Explanatory Note 26260, nr. 3, par. 4.3, pag. 8.

⁴⁷ Explanatory Note 26260, nr. 5, par. 4, pag. 8.

⁴⁸ Explanatory Note 26260, nr. 3, par. 4.2, pag. 4 and 5.

⁴⁹ Explanatory Note 26260, nr. 3, par. 4.4, pag. 13.

⁵⁰ The words: “the Bank” refer to Dutch Central Bank N.V.

⁵¹ Explanatory Note 26260, nr. 3, par. 4.3, pag. 12.

⁵² Explanatory Note 26260, nr. 5, par. 4, pag. 8. According to the third paragraph under the “discrepancies between the legal concepts and the different titles in the different languages and the legal issues” section, the following should be noted. The purpose of the Finality Directive is to reduce legal risks associated with participation in real time gross settlement systems, to reduce the risk associated with participation in securities settlement systems, to minimise the disruption to a system caused by insolvency proceedings against a participant in that system and to immediately notify other Member States of the opening of insolvency proceedings against a participant in the system. In respect of the meaning of the word “immediately” in Article 6 (2) of the Directive the Government stated as follows: considering that a bank will not or seldom go bankrupt it was not deemed necessary to make any specific additional provisions with the Association for the Administration of Justice and the banks in respect of the provision implementing article 6(2) of the Directive, that had already been laid down in article 71(13) of the Credit Supervision Act and article 212c(1) of the Bankruptcy Act. The Dutch Civil Code has given a precisely determined meaning of the word. In The Explanatory Note to Book 3 of the Dutch Civil Code (Parliamentary Records of the New Dutch Civil Code, Book 3, p. 162-163) it is noted that immediately means that the person involved should instantly, directly or at once react, whereby less respite is granted than in the wording without delay. In practice a notification per letter will take too much time; notification per fax appears to be the proper way. Since the parties involved will be notified within a period of a few minutes, it was not considered necessary to provide specific

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additional rules. The wordings used by the Dutch Government in its Explanatory Note will in practice, as can be derived from the Explanatory Note and the abovementioned not cause problems. “Immediately” will in practice mean notification per for example telefax.

⁵³ Explanatory Note 26260, nr. 3, par. 4.5, pag. 15.

⁵⁴ Explanatory Note 26260, nr. 3, par. 4.6, pag. 16

⁵⁵ Supreme Court of The Netherlands 16 May 1997, NJ 1998, 585.

⁵⁶ Explanatory Note 26260, nr. 5, par. 3, pag. 5.

⁵⁷ Cf. Inter alia: T.H.D. Struycken, *The proprietary aspects of international assignment of debts and the Rome Convention, Article 12*, Lloyd's Maritime and Commercial Law Quarterly 1998, pag. 345-355; and Dicey & Morris, *The Conflict of Laws*, Part 2, London 2000, pag. 980.

⁵⁸ Explanatory Note 26260, nr. 5, par. 3, pag.5. On 16 May 1997, the Supreme Court of The Netherlands considered that a choice of law made by the assignor and the assignee of debts in accordance with the Rome Convention on Obligations also included a choice of law for the proprietary aspects of the assignment. Should this apply to the creation of a security interest on receivables, one may assume that the law chosen by the parties will govern the creation of a security interest. However, this judgment has been (inter)nationally criticised and the Court of Justice of the EC has not yet decided on the matter. It can safely be concluded that the discussion on what conflict of laws rule should govern the transfer of interests in securities has not reached an end yet. In short the following regarding current Dutch law in respect of the implementation of the Finality Directive can be said: the law of a Member State chosen by the participants governs the system. The participants exclusively may chose the law of a Member State in which at least one of them has its principal office. This law also governs the rights and obligations of a participant that arise due to ist participation in the system. As an exception to this rule is the case when participants in or a central bank acquire proprietary security interests in the form of securities recorded in a register, an account or a centralised securities deposit located in a Member State. That being the case, the law of that Member State governs the determination of the rights of these persons as holders of proprietary security interest in such securities. In the case of the creation of a security interest on registered shares, it is noted that the prevailing doctrine, as well as the practice, assume that the complete proprietary regime is governed by the “lex societatis”, in other words the law governing the company concerned. With regard to the creation of security interests on bearer shares, traditionally they are considered equal to movable physical property and the proprietary regime is thus governed by the “lex rei sitae”, this being the law of the state where the bearer share is located on the

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moment of the transfer or the creation of a security interest. With regard to the judgment of the Supreme Court and its limited importance the following should be noted Dutch law was under construction when the Finality Directive entered into force. Part of foundations of this construction has been the judgment of the Supreme Court, on the basis of which article 10 of the Legislative Proposal of the Royal Committee on private international law has been given shape. This article 10 however does not apply to the creation of security interest. To this article 14 of the Legislative Proposal applies. The article gives a broad interpretation of article 9(2) of the Finality Directive and was supposed to have been the transposing provision for the finality Directive instead of article 212f of the Bankruptcy Act. It goes as follows: *“The proprietary regime concerning rights on delivery and transfer per giro of securities against an institution that makes its business of the custody or administration of securities and the carrying out of the transfer of securities per giro, shall be governed by the law of the State where the institution is located, or the institution’s office where the account at which the securities referred to are administrated, is located.”* However, the Dutch Government decided otherwise, in view of the relatively short implementation period. The Legislative Proposal containing the aforementioned article 14 shall probably be submitted to Parliament in May 2003. In respect of the implementation of the Finality Directive, the international criticism and the proposed legislation cross-border issues as a result of the judgment of the Supreme Court should therefore be considered of a mere theoretical level and of limited importance.

⁵⁹ For the transposition of section 9(1) of the Directive, the original proposed section 212f(91) of the Act stipulated that the interests of an institution in collateral security should not be affected by a participant in the system being subject to insolvency proceedings. It is a typical feature of proprietary securities that they cannot be affected by insolvency, cf. section 57 Bankruptcy Act. The Council recommended to clarify how the relation between on the one hand the rule that pledges and mortgages can exercise their rights as if their were no insolvency (section 57 Bankruptcy Act) and on the other hand the rule that (in the words of the Directive) collateral securities are not affected, since a participant in the system is subject to insolvency proceedings (section 9(1) of the Directive). Furthermore, the Council recommended amending the proposal on that point if necessary. The provision in the proposal that collateral securities shall not be affected by the opening of insolvency proceedings has been deleted. In theory, the text of section 9(1) of the Directive can be seen both as a rule of private international law (which instructs the judge to not apply the possible rule that securities shall be affected by the opening of insolvency proceedings) as well as an instruction to the Member States to delete such a rule in their legislation. The first interpretation is of no significance if all Member States transpose the Directive in a way that a rule that enables security interests to be affected shall no longer exist. The

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second interpretation is of no importance to The Netherlands since Dutch law does not provide any provisions on the basis of which security interests can be affected by the opening of insolvency proceedings. For that reason a provision like section 9(1) of the Directive is not necessary in the Dutch situation. The provision has therefore been deleted from the legislative proposal. Cf. Explanatory Note 26260, nr. A, par. 6, pag. 6 and 7.

⁶⁰ Explanatory Note 26260, nr. 3, par. 4.6, pag. 17. “In the case of the creation of a security interest on registered shares, it is noted that the prevailing doctrine, as well as the practice, assume that the complete proprietary regime is governed by the “lex societatis”, in other words the law governing the company concerned. With regard to the creation of security interests on bearer shares, traditionally they are considered equal to movable physical property and the proprietary regime is thus governed by the “lex rei sitae”, this being the law of the state where the bearer share is located on the moment of the transfer or the creation of a security interest.” Cf. Explanatory Note 26260, nr. 3, par. 4.6, pag. 16.

⁶¹ Explanatory Note 26260, nr. 3, par. 4.6, pag. 16. Section 9(2) of the Directive exclusively concerns the question that security interests in the form of securities are being acquired or the question that security interests in securities are being created. However, the practice of the securities trade clearly needs a similar rule concerning the transfer of securities, as well as the creation of rights of enjoyment therein. Seen that the Directive did not compel to implement such a rule, it was considered to possibly implement such a rule in the Legislative Proposal Act on the Conflict of Law concerning the Law of Property, Royal Committee for Private International Law, Report to the Minister of Justice, International Law of Property, November 1998.

⁶² Decree of 8 December 1999, containing provisions on providing information to the public by credit institutions registered pursuant to section 52(2) under a, b, or c of the Act on the Supervision of the Credit System 1992 and by securities institutions licensed as referred to in section 7(1) of the Act on the Supervision of the Securities Markets 1995, *Bulletin of Acts and Decrees*, 16 December 1999, 530.

⁶³ Explanatory Note 26260, nr. 3, par. 5, pag. 18.

⁶⁴ Decree of 17 December 1998 on the adoption of the date of entry into force of the Act of 17 December 1998 on the Amendment of the Act on the Supervision of the Credit System 1992 and the Bankruptcy Act, concerning the settlement finality in payment and securities settlement systems, *Bulletin of Acts and Decrees* 22 December 1998, 715.

⁶⁵ Preamble of the Act.

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