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

Belgium - final report

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

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Arti-cle[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: 2 P: 1 S: 1	This Act applies to the payment and securities settlement systems subject to Belgian law, hereinafter referred to as "systems".	Article 1, (a) of the Directive states that its provisions apply to any system governed by the law of a *Member State*, which means that the Belgian Act by which the Directive is transposed into Belgian national law also applies to the participation by a Belgian participant in a system governed by the law of another Member State[2].
			Act	A: 2 P: 4	This Act also applies as regards any determination under Belgian law of the rights and obligations flowing from the participation of a "participant" subject to Belgian law in a system in a Member State of the European Union as notified by the relevant authorities of the said State to the European Commission or in a third state.	
			Act	A: 7 P: 1	The effects of insolvency proceedings commenced against a participant subject to the law of another Member State of the European Union or of a third state on the rights and obligations of that participant linked to its participation in a Belgian system are governed exclusively by Belgian law, and in particular by this Act.	According to recital 7 of the Directive, Member States may apply the provisions of the Directive to those of their domestic institutions that participate directly in *third country systems* and to collateral security provided in connection with participation in such systems.

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
			Act	A: 7 P: 2	In the case of a participant subject to Belgian law participating in a system governed by the laws of another Member State of the European Union or a third state, the rights and obligations of that participant linked to its participation in the foreign system are governed exclusively by the foreign law applicable to the said system.	Under the Explanatory Memorandum to the Act, this means that, in cases of "bankruptcy" of participants subject to Belgian law participating in a system of a *third country*, the institutions in that latter system will be able to invoke the protective measures of the Directive as a result of the extra-territorial effects of Belgian law. This should facilitate the participation of Belgian participants in systems of third countries. On the other hand, in the case of the bankruptcy of a participant of a third country participating in a Belgian system, the protective measures of the Directive

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						should be able to prevent the liquidator of a third country from contesting the rules of a Belgian system, on the basis of its incompatibility with the bankruptcy laws of that third country. The protective measures of the Directive will be considered as rules of Belgian international public policy, on the basis of which the application of conflicting rules of third countries can be refused. In practice, however, we see that not all the problems of conflicting rules have been solved. The fact that Clearnet is mentioned under article 2 of the Act in the list of systems subject to Belgian law could

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						result in the cumulative application of Belgian and French law, since Clearnet is a system located in France and subject to French law (see our remarks regarding the clearing and settlement system organised by the Société de la bourse de valeurs mobilières de Bruxelles mentioned under article 2 of the Act, article 2 (a) 1 of the Directive).
A: 1 N: b	(b) any participant in such a system;	N	Act	A: 2 P: 2	This Act is applicable to any participant in the "systems" referred to in sub-article 1.	
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: 8 P: 3	Cf. infra (Article 8 (3) of the Act; Article 2 (m) of the Directive).	

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A: 2	For the purpose of this directive:					
A: 2 N: a S: 1	'system´ shall mean a formal arrangement:	N	Act	A: 2 P: 1 S: 1	"Systems" are designated as follows:	Article 2 (1) of the Act contains a list with on the one hand 'payment systems' and on the other hand 'securities settlement systems' complying with the definition of article 2 of the Directive. These systems comply with the general criteria of the European Directive in that they contain common rules and standardised arrangements for the execution of transfer orders between the participants[3]. Due to the general nature of the criteria of the Directive, Belgian law did not expressly reproduce these criteria for recognition of these systems, or organise a specific procedure for the recognition of systems complying with the criteria laid down in the

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						Directive. Instead, a list was added with securities systems complying with the conditions of the Directive that are active in Belgium, and power was granted to the King to amend the list of systems referred to in this article (see also our remarks regarding article 2 (5) of the Act).

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
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: 2 P: 1 N: a	a) Payment systems 1° the system entitled "Electronic Large Value Interbank Payment System" ("ELLIPS"), held by the non-profit association of the same name and administered by the National Bank of Belgium; 2° the system entitled "*Centre d'échange et de compensation*"/"*Uitwisselings- en verrekeningscentrum*" ("*CEC*"/"*UCV*") (Exchange and Clearing Centre), held by the non-profit association of the same name and administered by the National Bank of Belgium; 3° the *Chambre de compensation de Belgique/Belgische Verrekenkamer* (Belgian Clearing House), a contractual	"ELLIPS" is a payment system for large amounts charged with *real time* settlement of "gross amounts" (without netting) regarding inter-banking cash payment orders. It constitutes the Belgian component of TARGET, the European payment system. "CEC / UCV" is a payment system for small amounts ("*retail payments*") based on settlement at the end of the day via netting (a "net" settlement system) of inter-banking payment orders. The "Chambre de Compensation/ Belgische Verrekenkamer" was

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					association administered by the National Bank of Belgium;	historically the first payment system via clearing in Belgium, and in a transitional stage continues to be charged with settlement, through end-of-the-day clearing, of inter-banking payment orders on a paper support (cheques or commercial bills of exchange, etc.).
			Act	A: 2 P: 1 N: b	b) Securities settlement systems 1° the cashless giro system for financial instruments administered by the multi-disciplinary body entitled "*Caisse interprofessionnelle de dépôts et de virement de titres"/"Interprofessionele effectendeposito- en girokas"* ("*CIK"*), in implementation of Royal Decree no. 62 of 10 November 1967 promoting the circulation of the securities;	The "CIK" system deals with the custody, settlement and trading of shares, bonds, debt instruments and other securities issued by private entities. The Belgian National Bank is charged with the payments as the CIK is not allowed to perform cash transactions.[4]

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					2° the securities settlement system of the National Bank of Belgium (*"Clearing BNB"/"NBB Clearing"*), governed by the Public Debt Securities Market and Monetary Policy Instruments Act of 2 January 1991 and the aforementioned Royal Decree no. 62 of 10 November 1967 promoting the circulation of the securities; 3° the Euroclear System, held by Euroclear System Plc, a company incorporated according to the laws of England and Wales, and administered by the public limited company incorporated according to Belgian law Euroclear Bank;	"Clearing BNB/ NBB Clearing" deals mainly with dematerialised debt securities issued by the public sector, pursuant to the Act of 2 January 1991 on the market of public debt securities and monetary policy instruments. The "Euroclear system" administered by the Belgian public limited liability company Euroclear Bank, is an international system of securities settlement (like the Cedel system in Luxembourg) and is charged with the clearing and settlement of Belgian and foreign securities payments, via account transfers within the conditions laid down in Royal Decree No. 62 of 10 November 1967 promoting the

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						circulation of the securities, on the creation of the CIK. The participants in this system are Belgian and foreign financial institutions.[5]
					4° the clearing and settlement system organised by the *Société de la bourse de valeurs mobilières de Bruxelles/ Effectenbeursvennootschap van Brussel* (Brussels Stock Exchange Company), as the case may be, through the intermediary of an entity designated for that purpose by the King.	At the time of the entry into force of the Act, the "Clearing and Settlement" system organised by the Brussels Stock Exchange Company was the system of the cooperative for the liquidation of markets of the Brussels Stock Exchange (the "Liquidation Cooperative") which was charged with the clearing and settlement of transactions concluded on or outside the markets organised by the stock exchange. The powers of the Liquidation Cooperative were repealed with the creation of an

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						integrated system linking certain services of Belfox, CIK and the Liquidation Cooperative. For this purpose Belfox cv, which in the past was responsible for the clearing of transactions involving derivatives, has been transformed to BXS Clearing NV which was also entrusted with the clearing of transactions carried out in respect of financial instruments registered in the markets organised by the "Effectenbeursvennootschap van Brussel NV" (E.B.V.B./S.B.V.M.B.; commercial name "B.X.S."), whether carried on or off said markets. This new entity, BXS Clearing NV, offered better safety guarantees and was

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						better suited to the complexity of the transactions. As a result of the merger of the stock exchanges of Paris, Amsterdam and Brussels, Clearnet, a subsidiary of Euronext Paris became, as from the 1st of February 2001 the sole clearing house for all operations executed on the cash and derivatives markets organised by Euronext Paris, Euronext Amsterdam and Euronext Brussels. Since Clearnet is governed by French law[6], the clearing and settlement system organised by Euronext Brussels should be removed from the list of Belgian securities settlement systems by repealing article 2 (1) a) 4° of the Act (see also our comments regarding article 2

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						(a) 1 of the Directive).[7] The fact that Clearnet is mentioned under article 2 of the Act in the list of systems subject to Belgian law, could result in the cumulative applicability of Belgian and French law, since Clearnet is also a system located in France and subject to French law which, of course, goes against the purposes of the Settlement Finality Directive (see also our comments regarding article 1 (a) of the Directive, last part of article 2, (1) 1 of the Act).
					[5° the clearing and settlement system for transactions involving financial instruments administered by *Bourse belge des futures et options sc/Belgische future- en optiebeurs cv* (*"Belfox sc"/"Belfox cv"*)	Article 2 (1) a) 5° was repealed by article 6 of the Royal Decree of 18 August 1999.[8]

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					pursuant to the Royal Decree of 22 December 1995 conferring a licence on Belfox sc/cv].	

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
A: 2 N: a S: 1	-governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and	N	Act	A: 2 P: 1 N: a, b	Cf. supra (Article 2 (1) (a), (b) of the Act; Article 2 (a), sentence 1 of the Directive).	According to the Explanatory Memorandum of the Act, all systems listed in article 2, §1 of the Act are governed by Belgian law.[9] However, since the Clearnet clearing system operated within Euronext in France, the Netherlands and Belgium is a French Law system for the three countries concerned, a change to article 2 (b) of the Act would seem to us to be necessary in order to remove all reference to the Euronext Brussels clearing system. This amendment could be made by Royal Decree, in accordance with the powers conferred on the King in article 2 (5) 1° of the Act.

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
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: 2 P: 5 N: 3	The Minister of Finance is charged with *notifying* the European Commission of the systems covered by this Act and the authority referred to in article 5 below.	Article 5 below refers to the authority to which insolvency declarations to participants have to be notified.
			Act 22/02/ '98[10]	A: 8 S: 1	The Belgian National Bank *supervises* the appropriate operation of the clearing and payment systems and ascertains their efficiency and reliability.	In its role as the supervisor of clearing and payment systems[11], the Belgian National Bank oversees the adequacy of the rules of the systems in Belgium.
			Act	A: 2 P: 5 N: 1	The King may amend the list of systems referred to in the first sub-section and publishes same annually in the Moniteur belge/ Belgisch Staatsblad (official gazette).	The Belgian Act did not organise a specific procedure for the recognition of other systems complying with the criteria laid down in the Directive. In practice, these additional systems should apply in this respect to the Ministry of Finance to be brought under the Act by virtue of a Royal Decree (Article 2

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						(5) 1° of the Act) after a compliance check with the conditions laid down in the European Directive in co-operation with the Belgian National Bank in its role as the supervisor of clearing and payment systems.[12]
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	Act	A: 2 P: 5 N: a	The King may amend the list of systems referred to in the first sub-section and publishes same annually in the Moniteur belge/ Belgisch Staatsblad (official gazette).	

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
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: 2 P: 5 N: 1	The King may amend the list of systems referred to in the first sub-section and publishes same annually in the Moniteur belge/ Belgisch Staatsblad (official gazette).	

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
A: 2 N: b S: 1	`institution´ shall mean: -a credit institution as defined in the first indent of Article 1 of Directive 77/780/EEC including the institutions set out in the list in Article 2(2) thereof, or -an investment firm as defined in point 2 of Article 1 of Directive 93/22/EEC excluding the institutions set out in the 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	A: 2 P: 2 S: 1	This Act is applicable to any participant in the systems, which may include: -credit institutions within the meaning of the Credit Institutions (Status and Supervision) Act of 22 March 1993[13], -investment undertakings within the meaning of the Secondary Markets, Investment Undertakings (Status and Supervision) and Investment Intermediaries and Advisers Act of 6 April 1995[14], -any Belgian or foreign public law person or; -any controlled undertaking operating under a government guarantee and ; -any undertaking having its registered office outside the territory of the European Union whose functions correspond to that of the aforementioned credit institutions or investment undertakings.	

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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	Act Act	A: 2 P: 2 A: 2 P: 5 N: 2	Cf. infra (Article 2 (2) of the Act; Article 2 (f) sentences 1 and 2 of the Directive). The King may extend the list of participants in such systems, as defined in sub-sections 2 [and 3], under the terms set down in Article 2 of Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems.	According to article 2 (5) of the Act, the King is also allowed to amend the list of participants under the terms laid down in the Directive (article 2). The Explanatory Memorandum to the Act refers in this context to the possibility to extend the list of participants to non-financial undertakings that could participate in security settlement systems or the bilateral relations between correspondent banks[15] on grounds of "systemic risk" or in order to prevent the "domino risk", *i.e.* the risk that the insolvency of one participant results in the insolvency of the other participants.

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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: 2 P: 2 S: 2	Cf. infra (Article 2 (2), sentence 2, of the Act; Article 2 (f) sentences 1 and 2 of the Directive).	
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: 2 P: 2 S: 2	Cf. infra (Article 2 (2), sentence 2, of the Act; Article 2 (f) sentences 1 and 2 of the Directive).	

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
A: 2 N: e	`clearing house´ shall mean an entity responsible for the calculation of the net positions of institutions, a possible central counterparty and/or possible settlement agent;	N	Act RD 18/08/ '99	A: 2 P: 2 S: 2 A: 1 N: 1	Cf. infra (Article 2 (2) sentence 2 of the Act; Article 2 (f) sentences 1 and 2 of the Directive). Clearing shall mean the activity of the clearing body, which covers at least the following transactions: Booking transactions and calculating Positions, Measuring the risk for each Position, Fixing and calling on the hedges from Clearing System Members on the basis of the calculated risk, Performance guarantee for the Positions by constituting itself as a counterparty of the buyer's and seller's Clearing System Members, Administering the Default procedures for the Clearing System Members, Determining and communicating the settlement instructions to the settlement body or bodies.[16]	
A: 2 N: f S: 1,	`participant´ shall mean an institution, a central counterparty, a settlement agent or a clearing	N	Act	A: 2 P: 2 S: 2	The term "participant" as used in this Act shall also cover any manager, paying agent or entity responsible for the systems falling	

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
2	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.				hereunder, including the National Bank of Belgium, ELLIPS ASBL/VZW, CEC ASBL/UCV VZW, the CIK, [Belfox sc/Belfox cv], the Belgian branch of the American bank, Morgan Guaranty Trust Company of New York, and the managers of the securities settlement systems designated by other Member States of the Union and notified as such to the European Commission, together with such other central banks, whether of Member States of the European Union or otherwise, as may be required, and the Central European Bank.	
			Act	A: 2 P: 2 S: 1	Cf. also supra (Article 2 (2) sentence 1 of the Act; Article 2 (f) sentences 1 and 2 of the Directive).	
			Act	A: 2 P: 5 N: 2	The King may extend the list of participants in such systems, as defined in sub-sections 2 and 3, under the terms set down in Article 2 of Directive 98/26/EC of	

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Directive 98/26/EC			Member State's Legislation			
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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
					19 May 1998 on settlement finality in payment and securities settlement systems.	
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	Act	A: 2 P: 3	The term participant within the meaning of this Act shall also be deemed to cover any credit institution within the meaning laid down in the foregoing sub--section whose cash payment orders are carried out via a participant in a payment system pursuant to a commission agreement or a power of attorney. The credit institution acting thus through the intervention of a participant in a payment system must be known to the bodies in charge of the said system.	Article 2 (3) of the Act makes use of the possibility granted by article 2, (f) third sentence of the Directive, but only for credit institutions executing their transfer orders through the intervention of a participant, only in payment systems (not securities settlement systems), and only in the framework of a commission agreement or a power of attorney. In practice such an indirect participant is always known to the system, since the permission of the body managing the system is always required in order to be allowed to represent an undertaking. Since in certain systems direct participants

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						represent up to 20 indirect participants, it is clear that this extension to indirect participants is essential in order to avoid the consequences of the insolvency of an indirect participant on the validity of the transfer orders executed by a direct participant for the account of such insolvent participant.
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: 2 P: 3	Cf. supra (Article 2 (3) of the Act; Article 2 (f), sentence 3 of the Directive)	The Explanatory Memorandum to the Act refers in this context to credit institutions that do not comply with all requirements to become a direct participant (amongst other things level of own funds, minimum operational volume, system requirements, etc.), or that do not wish to become a direct participant[17].

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Arti-cle[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			The Act does not give a definition of securities. The Act refers to "financial instruments" instead of securities. Financial instruments should be understood within the meaning of the Act of 2 August 2002 on the supervision of the financial sector and the financial services[18].

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Directive 98/26/EC			Member State's Legislation			
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Arti-cle[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				The definition of "transfer order" laid down in the European Directive was not explicitly adopted in the Act.

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Directive 98/26/EC			Member State's Legislation			
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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
A: 2 N: j	`insolvency proceedings´ shall mean any collective measure provided for in the law of a Member State, or a third country, either to wind up the participant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments;	N	Act	A: 7 P: 3	Insolvency proceedings within the meaning of this article are defined as any bankruptcy, composition, moratorium, suspension of payments and, generally, any collective measure provided for by the laws of a Member State or a third state for the purposes of either liquidating a participant or reorganising it where such measure entails the suspension of or a limitation on all or part of the transfer orders or relative payments.	The definition of "insolvency" laid down in the European Directive was adopted in article 7 (3) of the Act. It was not sufficient to refer in this context to Belgian concepts. This definition also incorporates concepts, provisions and procedures organised in other member states or third countries.
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				According to the Explanatory Memorandum to the Act, netting means bilateral and multilateral netting of cash or securities transfer orders. Netting also includes, "obligation netting" if such netting is effected in the framework of a system as defined by the Directive and the Act[19].

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
A: 2 N: l	`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	R.D. 18/08/ '99	A: 1 N: 5	Settlement shall mean any operation by which the settlement body or bodies effect the transfer of financial instruments and settlement in cash between the buyer's and the seller's accounts.	A settlement account is not defined by law. In the Explanatory Memorandum to the Act, a current account opened by a participant with the central bank is used as an example [20].
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: 8 P: 3	A security within the meaning of this article is any pledge or special preference over cash or financial instruments, any repurchase agreement or transfer of ownership in name of guarantee or any other similar form of guarantee organised by Belgian law or by foreign law in favour of participants or entered into in favour of a central bank of a Member State of the European Union or the Central European Bank for their central banking operations with a counterparty.	In conformity with article 2, (m) of the Directive, article 8 (3) of the Act refers in particular to[21]: *Pledge*: more particularly to the pledge of fungible assets as regulated by article 5 of R.D. no. 62 of 10 November 1967 promoting the circulation of the securities[22], and to a pledge of dematerialised government debt securities, or dematerialised treasury notes and certificates of deposit as governed by the Act of 2 January 1991 on the market of

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						public debt securities and monetary policy instruments[23]. *Special preferential rights* in favour of the Belgian National Bank (article 7 of the Act of 22 February 1998 providing for the organic statute of the National Bank of Belgium[24]), and in favour of the institutions that manage a system for clearing and settlement of financial instruments, governed by article 41[25] of the Act of 6 April 1995 on secondary markets, the legal status and supervision of investment firms, intermediaries and investment advisers. *Repurchase Agreements*[26] and the transfer of property of financial instruments as security[27] as governed by articles 23 to 26 of the Act of 2

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						January 1991 on the market of public debt securities and monetary policy instruments *and any other similar form of guarantee* organised by foreign law. According to Article 2 (m) of the Directive, "collateral security" shall mean "***all realisable assets*** *provided under a pledge ...* According to Article 8 (3) of the Act, a collateral security is "*any pledge or special preference or special preference over* ***cash or financial instruments***". "Financial instruments" under the Act refers to the instruments listed in article 1 of the Act of 6 April 1995 on secondary markets, the legal status and supervision of investment firms,

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						intermediaries and investment advisers. It is clear that "cash or financial instruments" does not cover "all realisable assets" that can be provided under a pledge, a repurchase or similar agreement, or otherwise. As a result, assets such as bills of exchange, which are commonly traded financial instruments under German law, will not benefit from the protection of the Directive in Belgium since they are not included in the above list of financial instruments. Similarly, receivables assigned to credit institutions under the French Act of 2 January 1981 ("Dailly Act") will not be considered to be financial instruments and will therefore

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						not be eligible for protection under the Directive in Belgium. The same discussion goes for commercial paper issued under Belgian Law through promissory notes.
	NETTING AND TRANSFER ORDERS					
A: 3 P: 1 S: 1	Transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant, shall be binding on third parties, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6(1).	N	Act	A: 3 P: 1	Clearing of cash or securities transfer orders and of the debts and obligations resulting from such orders within a system is valid and binding on third parties, even in the event of bankruptcy or judicial composition proceedings or in the event of concurrent claims other than under a bankruptcy against a participant provided the transfer orders in question shall have been entered into the system in accordance with its rules prior to the occurrence of the bankruptcy, judicial composition or concurrence of claims...(i)	The purpose of this article is to protect "net" settlement systems. The situations referred to in this article are those where in the past the netting transactions could be declared ineffective towards third parties i.e. in any case of concurrence of claims (*concursus creditorum)* e.g. resulting from the bankruptcy of a participant. This article confirms the enforceability against creditors of bilateral and multilateral netting

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
			Act	A: 4 P: 1 S: 1	Cash or securities transfer orders and the payments resulting therefrom are valid and binding against third parties even in the event of bankruptcy or judicial composition proceedings or in the event of concurrent claims other than under a bankruptcy against a participant provided the transfer orders in question shall have been entered into a system in accordance with its rules prior to the occurrence of the bankruptcy, judicial composition or concurrence of claims...(ii)	agreements between credit institutions and other financial institutions or establishments in charge of clearing and settlement between credit institutions of payments or financial transactions, as laid down in article 157 of the Act of 22 March 1993 on the legal status and supervision of credit institutions[28]. This article 157 remains valid, but article 3 of the Act will be the "*lex specialis*" for netting transactions as defined by the Act, in the framework of payment and securities settlement systems. It is uncertain whether this provision applies to the actio pauliana[29].
A: 3 P: 1	Where, exceptionally, transfer orders are entered into a system	N	Act	A: 3 P: 1	(i)…or if such orders have been entered and executed at a time at which the	The management body or payment agent can prove that it

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
S: 2	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.		Act	A: 4 P: 1 S: 1-2	management body or payment agent can prove that it was legitimately unaware of the prior occurrence of the bankruptcy, judicial composition or concurrence of claims vis-à-vis the participant in question[30]. (ii)... or if such orders have been entered and executed at a time at which the management body or payment agent can prove that it was legitimately unaware of the prior occurrence of the bankruptcy, judicial composition or concurrence of claims vis-à-vis the participant in question. The execution of such orders and of the payments resulting from such orders within a system, even after the bankruptcy, judicial composition proceedings or concurrence of claims against a participant, is valid and binding and may not be further challenged on any ground whatsoever[31].	was legitimately unaware of the prior occurrence of the bankruptcy, judicial composition or concurrence of claims by showing that it did not receive any notice of the bankruptcy, judicial composition or concurrence of claims of the relevant participant in accordance with Art. 5 of the Act and that the bankruptcy, judicial composition or concurrence of claims was not known about on the markets (references to news releases on Reuters and Telerate Screens, radio news, etc.). In that case, legitimate unawareness will result from unawareness of the bankruptcy, judicial composition or concurrence of claims plus extenuating practical

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						circumstances[32].
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: 3 P: 2	Clearing as referred to in sub-section 1 may not be challenged by the effect of the Judicial Compositions Act of 17 July 1997 or the Bankruptcy Act of 8 August 1997, especially articles 16 to 26 of the latter Act[33].	In execution of article 3 (2) of the Directive, the purpose of article 3 (2) of the Act is to protect netting and clearing transactions against the provisions in Belgian law governing suspicious payments executed during or after the suspect period[34].
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: 3 P: 1	Cf. supra Article 3 (1) of the Act (Article 3 (1), sentence 1 of the Directive and Article 4 (1) of the Act; Article 3 (1), sentence 1 of the Directive: "*in accordance with its rules*".	The Explanatory Memorandum to the Act refers explicitly to article 3 (3) of the Directive[35].
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	D	Act	A: 3 P: 3 S: 1	Notwithstanding the bankruptcy of or a judicial composition or the occurrence of a concurrence of claims vis-à-vis a participant in a system, the manager or the paying agent may, if it is so authorised	Article 3 (3) of the Act applies the possibility granted by article 4 of the Directive providing that funds or securities available on the

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
	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.				under the applicable contractual provisions, intromit against the settlement account of a participant that is in default in discharging its obligations, in particular for the purposes of paying off any debit balance it may have after clearing, thus allowing for final settlement of the system.	settlement account of a participant can be used to fulfil the participant's obligations in the system and especially for the clearing of his transaction position and orders, notwithstanding the bankruptcy, the judicial composition or the concurrence of the participant in the system. In case the rules of the system or of the credit opening so provide, this can occur either through the debiting of funds already recorded on the credit of said account, or through the unilateral withdrawing on the credit opening, granted by the Central Bank to the defaulting participant, - that can be a cash credit or a securities loan in a securities settlement system- without any necessary prior

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						legal authorisation. In this case, available collateral securities need to be obtained, in the sense of article 8 (3) of the Act.[36]
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	Act	A: 3 P: 3 S: 2	If required, the manager or the paying agent is also authorised, under the applicable contractual conditions, to intromit against sums or securities necessary for executing the participant's obligations, particularly with regard to payment of the debit balance of the participant in default by utilising such credit line (including a loan of securities) as might have been granted in favour of the said participant, within the limits of the guarantees attaching to the credit line on the day of settlement.	

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Arti-cle[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	Act	A: 4 P: 2	If the operating rules of a system provide that cash or securities transfer orders shall be irrevocable as from a certain time, such irrevocability shall be binding on the participant giving the order or on any third party in all cases.	Article 4 (2) of the Act safeguards the irrevocability of transfer orders, as provided for in the operating rules of most systems ("net" or "gross" settlement systems). Such irrevocability cannot be challenged by provisions of local law. This irrevocability applies not only to concurrence of claims situations but also in cases of revocations of transfer orders by the participant or its client[37].
	PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS					

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Arti-cle[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: 5 P: 1	- any application for judicial composition lodged by petition by that participant or by summons issued by the Crown Prosecutor; - any admission of bankruptcy and any application for a bankruptcy order; - any judgement granting, prorogating or terminating a provisional or definitive moratorium or; - any bankruptcy order pronounced by a commercial court.	
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: 5 P: 1 S: 1	In the case of a participant subject to Belgian law falling under article 2 (2) and (3) of this Act, any application for judicial composition lodged by petition by that participant or by summons issued by the Crown Prosecutor, any admission of bankruptcy and any application for a bankruptcy order, any judgement granting, prorogating or terminating a provisional or definitive moratorium or any bankruptcy order pronounced by a commercial court must be notified *ex officio* by the clerk of the relevant court by facsimile or by hand	By way of extension to the scope of the European Directive, the clerk of the relevant commercial court should give notice not only of any bankruptcy order or any judgement granting, prorogating or terminating a provisional or definitive moratorium (for judicial composition matters) as stated in article 6 (1) and (2) of the Directive, but also any

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
					delivery within one hour of its being lodged, served or pronounced to the ***National Bank of Belgium*** and, for credit institutions and investment undertakings subject to its supervision, also to the ***Commission bancaire et financière/Commissie voor het Bank- en Financiewezen*** (Banking and Finance Commission).	application for judicial composition, or any admission of, or application for, bankruptcy.
A: 6 P: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N		A: 5 P: 1 S: 2,3	The National Bank of Belgium shall in turn ensure that the application or judgement is notified without delay to the managers and payment agents of the systems and that any judgement referred to above is notified without delay to the authorities designated by the other Member States of the European Union concerned by the judicial composition or bankruptcy of the participant in question. Likewise, the National Bank of Belgium shall ensure that the said managers and payment agents are informed without delay of any decision relating to an insolvency	

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
					proceeding within the meaning of article 7(3) that might be notified to it by an authority in a Member State of the European Union.	
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: 6	Without prejudice to articles 3 and 4 of this Act or article 157 (2)[38] of the Credit Institutions (Status and Supervision) Act of 22 March 1993 as extended to other categories of financial institutions by the Royal Decree of 28 January 1998, bankruptcy proceedings may not have any retrospective effect, vis-à-vis the time at which the bankruptcy order is pronounced, on the rights and obligations of a participant in relation to its participation in a system.	The purpose of article 6 of the Act, implementing article 7 of the Directive, is to neutralise the "hour zero rule", *i.e.* the return to hour zero on the day a participant is declared bankrupt, in relation to its participation in payment systems or securities settlement systems. Under the "hour zero rule", the bankrupt participant automatically loses power of administration over all its assets as from hour zero on the day that the participant is declared bankrupt. As from that moment, any payment or transaction made or done by, to or with the bankrupt

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						participant is automatically null and void. The bankrupt participant will now be administered by a receiver appointed by the court (called a "curateur"). In order to guarantee that payments received are "final" (especially in a gross settlement system) where made by a participant that has to be able to dispose of the payments or assets received in order to be able to transfer them to another participant, article 6 of the Act states that the effects of bankruptcy proceedings may not be backdated earlier than the time at which the bankruptcy order is pronounced with regard to the rights and obligations of a participant in relation to its participation in a system. This

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						article 6 is without prejudice to article 157 (2)[39] of the Credit Institutions Act[40].
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: 7 P: 1	The effects of insolvency proceedings commenced against a participant subject to the law of another Member State of the European Union or of a third state on the rights and obligations of that participant linked to its participation in a Belgian system are governed exclusively by Belgian law, and in particular by this Act.	The Explanatory Memorandum to the Act refers in this respect to article 9 (1) of the European Convention on Bankruptcy Proceedings[41].
				A: 7 P: 2	In the case of a participant subject to Belgian law participating in a system governed by the laws of another Member State of the European Union or a third state, the rights and obligations of that participant linked to its participation in the foreign system are governed exclusively by the foreign law applicable to the said system.	This provision is important since it makes it possible to determine the rights and obligations of a bankrupt participant for all issues not explicitly regulated by the Directive. Moreover, article 7 of the Act confirms a rule of international private law that in the case of the bankruptcy of a participant, the rights and obligations of that participant linked to its

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						participation in a system will be governed by the law applicable to the said system, and not by the law of the bankrupt participant[42]. This means that e.g. in the case of the Clearnet clearing system, internal French law will apply to the rights and obligations of a Belgian insolvent or defaulting clearing member of Clearnet towards other clearing members and Clearnet for the aspects regulated by the Directive, transposed in French law by the Act of 15 May 2001 on the new economic regulations[43] as well as for the aspects not regulated by the Directive. The fact that Clearnet is also mentioned under article 2 of

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article[1]	Text	Applicability[2]	Reference	Article (A; P; S; N)[1]	Content	Remarks
						the Act in the list of systems subject to Belgian law could, however, lead to the cumulative application of French and Belgian law. In the event of insolvency proceedings initiated against an Italian clearing member for example, the Italian courts could hesitate as to whether to apply either French law or Belgian law. Such a situation clearly goes against the purposes of the Settlement Finality Directive (see our remarks under article 2 (a) sentence 1 of the directive, article 2, (1), b, 4° of the Act, regarding the clearing and settlement system organized by Euronext Brussels).

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
	INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FORM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER					
A: 9 P: 1	The rights of: - a participant to collateral security provided to it in connection with a system, and - central banks of the Member States or the European central bank to collateral security provided to them, shall not be affected by insolvency proceedings against the participant or counterparty to central banks of the Member States or the European central bank which provided the collateral security. Such collateral security may be realised for the satisfaction of these rights.	N	Act	A: 8 P: 1	The insolvency, as defined in article 7(3), of a participant subject to Belgian law or foreign law participating in a system or of a central bank counterparty, and any distraint or sequestration measure against same, shall not in any way affect the validity, binding nature or preferential enforcement of securities, inclusive of any rights relating thereto, constituted in favour of a central bank of a Member State of the European Union or the Central European Bank for their operations as central banks.	A distinction has to be made between actual protection of the securities against the insolvency of the debtor, (article 8 (1) of the Act), and determining the law governing the securities relating to financial instruments entered in an account (article 8 (2) of the Act). *a) protection of the securities[44]:* The first sub--section of article 8 has two purposes: Its *first objective* is protection of the holders of collateral

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						security provided in connection with a system, against the negative consequences of the law governing the insolvency of the debtor. In the event of the bankruptcy of the participant that has provided the collateral security (e.g. a pledge), application of the bankruptcy law and the "lex fori concursus" does not in any way affect the rights of the participant or system holding such collateral security. The *second objective* is improving the efficiency of the collateral security. The rights of the holders of such collateral securities are not affected by insolvency proceedings against the debtor. The same rule also applies to

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						security provided to central banks of the Member States or the European central bank, without the requirement of any link with a system.
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: 8 P: 2	Where financial instruments, including the rights relating to the delivery or return of financial instruments held elsewhere are subject to a security in favour of participants or a central bank of a Member State of the European Union or the Central European Bank and the said financial instruments (or the rights relating to said financial instruments) are entered in an account, register or centralised deposit system situated in a Member State of the European Union in accordance with the laws of that State, a determination of the rights of the participants or central banks in their capacity as security-holders is governed exclusively by the laws of the Member State where the account, register or centralised deposit system in which the	1. The meaning of the words "*including the rights relating to the delivery or return of financial instruments held elsewhere*" is explained in the Explanatory Memorandum to the Act. Sub-section 2 of article 8 of the Act is aimed at determining the law governing the securities relating to financial instruments entered in an account. These financial instruments are often deposited with a financial institution which, in turn, deposits these financial instruments with a sub-custodian in another

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
					security is entered is situated.	country. Article 8 (2) of the Act is applicable to Belgian or foreign securities that are entered in an account, register or centralised deposit system located in Belgium or in an EU Member State, irrespective of the place where these securities are physically located. According to the Explanatory Memorandum to the Act, this means that, if German or Spanish securities are "physically" held by or entered in an account of a German or Spanish sub-custodian for the account of another financial intermediary located, say, in Belgium and if the latter opens a securities account in Belgium representing the German or Spanish securities, these securities, or more particularly

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Directive 98/26/EC			Member State's Legislation			
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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						the rights attaching to such securities represented by the securities account, can be the collateral of a security exclusively governed by Belgian law and not by Spanish or German Law[45]. 2. Article 8 (2) of the Act confirms the analysis of international private law generally accepted in Belgium, that a security vested on securities entered in a securities account is exclusively governed by the law of the place where this securities account is held, and not by the law of the place where the securities in question eventually end up through a sub-custodian of the account holder[46].

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						3. In the case of "repurchase agreements (repos)" the rule of article 8 (2) of the Act means that the validity and the enforceability of the transfer of ownership of securities will be governed by the law of the EU Member State where the securities were transferred into a securities account, without prejudice to the applicability of the law governing the transaction on the contractual terms and conditions[47]. In practice the Clearnet Clearing Instructions seem to indicate that the term "exclusively" has been misinterpreted by Clearnet. According to these instructions, when a Clearing Member pays its contribution or provides its Collateral to

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						Clearnet to an account held in France, Belgium or the Netherlands, the law of the respective country will also govern the transaction on the contractual terms and conditions[48]. These instructions seem to indicate that there is no room for the lex contractus in addition to the law governing the rights of the participants or the central banks in their capacity as security holders, which of course goes against the purpose of the Settlement Finality Directive. This restrictive interpretation would lead to important problems with respect to, *inter alia*, the use of standardised contracts such as ISMA and the "Global Master Repurchase Agreement" governed by

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Directive 98/26/EC			Member State's Legislation			
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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
						English law. 4. The words *'in which the security is entered'* were added to the Belgian Act, by comparison with article 9 (2) of the Directive, in order to avoid any discussion on the exact determination of the Member State whose legislation is applicable[49]/. Since, according to this provision, the rights of participants or central banks in their capacity as security holders are governed exclusively by the laws of the Member State where the account, register or centralised deposit system in which the security is entered is situated,

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article[1]	Text	Applicability[2]	Reference	Article (A; P; S; N)[1]	Content	Remarks
						the rights of Clearnet with respect to the collateral deposited in its name at the CIK will be governed exclusively by Belgian law, since the account in which the securities are entered is located in Belgium. Nevertheless the NBB has requested that this account be opened in the name of the Belgian branch of Clearnet, which seems to indicate that in practice there are still some misunderstandings regarding the concepts relevant to the choice of the applicable rule of law[50].
	FINAL PROVISIONS					
A: 10	Member States shall specify the systems which are to be included in	N	Act	A: 2 P: 5	The Minister of Finance is charged with notifying the European Commission of the	Article 5 below refers to the authority to which insolvency

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1	2	3	4	5	6	7
Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
S: 1	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: 3	systems covered by this Act and the authority referred to in article 5 below.	declarations to participants need to be notified.
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: 5 P: 2	Each system covered by this Act shall send the National Bank of Belgium a list of the participants in the system, including any indirect participant within the sense of article 2 (3) of this Act, and shall notify it of any later changes to the list of such participants. The National Bank of Belgium must ensure that these data are kept confidential.	
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 22/02/ '98	A: 8 S: 1	The Belgian National Bank *supervises* the appropriate operation of the clearing and payment systems and ascertains their efficiency and reliability.	In its role as the supervisor of clearing and payment systems, the Belgian National Bank oversees the adequacy of the rules of the systems in Belgium.

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1	2	3	4	5	6	7
Arti-cle[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	Act	A: 5 P: 3	Any person having a legitimate interest duly evidenced by it may require a financial institution falling under article 2 (2) of this Act to inform him of the systems in which it participates and, at the costs of the party so requesting, provide him with information on the principal operating rules of the said systems.	
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	Act			The Act came into force on 11 June 1999, 10 days after its publication in the Moniteur belge / Belgisch Staatsblad (official gazette).

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks
A: 11 P: 1 S: 3,4	When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.	N	Act R.D. 18/08/ '99		Act of 28 April 1999 transposing Directive 98/26/EG of 19 May 1998 on settlement finality in payment and securities settlement systems. Royal Decree of 18 August 1999 on the creation of a settlement and clearing system of transactions concluded on or outside the markets organised by the stock exchange, and providing rules regarding its organisation and operation and amending the Act of 28 April 1999 transposing Directive 98/26/EG of 19 May 1998 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
Arti-cle[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 *Official Journal of the European Communities.*	n. a.				

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Arti-cle[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.				

The Belgian Act contains one article that is not a direct transposition of an equivalent provision of the European Directive 98/26/EC.

Article 9 of the Act states: *"No cash settlement account with a management body or payment agent of a system may be distrained, sequestrated or frozen in any manner whatsoever by a participant (other than the management body or payment agent), a counterparty or any third party"*.

The mischief of this article was to avoid inopportune, or even abusive, attachments which can close down the entire functioning of a payment and securities settlement system, through an attachment of any credit balance on the settlement account of a financial institution with the Belgian National Bank or with a clearing organism of a system, as referred to by the Act.

[1] Act of 28 April 1999 transposing Directive 98/26/EG of 19 May 1998 on settlement finality in payment and securities settlement systems (further: the "Act"), *official gazette*, 1 June 1999, 19563; Errata, *official gazette*, 17 November 1999, 42538.
[2] Explanatory Memorandum to the Act, p. 7.
[3] Explanatory Memorandum to the Act, p. 5.
[4] Royal Decree no. 62 of 10 November 1967 promoting the circulation of the securities has been amended by Royal Decree of 3 September 2000, modifying the articles of association of the CIK and introducing the commercial name "BXS-CIK".

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

[5] Article 2 (1) b) 3° of the Act was amended by Royal Decree of 20 December 2000 (Royal Decree of 20 December 2000 amending Article 2 of the Act of 28 April 1999 transposing Directive 98/26/EEC of 19 May 1998 on settlement finality in payment and securities settlement systems, *official gazette*, 14 February 2001, 4110) (see further our remarks regarding article 2 (5) of the Act).

[6] French law is applicable to the Clearnet clearing system based on the following arguments:

- the registered office of Clearnet is established in France;
-
  - according to section 1.2.3. of the Euronext Clearing Rule Book (the Euronext Clearing Rule book as approved by Ministerial Decree of 5 March 2001 approving the clearing rules of the clearing entity appointed by Euronext Brussels SA, *official gazette*, 17 May 2001, 16249 etc., and modified by Ministerial Decree of 8 April 2002, approving the modifications of the clearing rules of the clearing entity appointed by Euronext Brussels SA, *official gazette*, 28 May 2002, 22890 etc), the rules set forth in this Rule book are governed by and construed in accordance with the laws of France unless explicitly stated otherwise.
- finally the mischief of the Directive was to secure the systems by a.o. appointing one applicable law in case of insolvency of a participant to the system. The latter would be useless in case one system would be governed by different laws for each country concerned.

Pursuant to Article 2 a) of the Directive, France notified the Commission on 31 January 2001 of the Clearnet clearing system as a French law system, in accordance with the procedure covered in Article 10 of the Directive. The cumulative application of the Royal Decree of 18 August 1999 and Article 2 §1, b, 4° could lead to the strange situation that Clearnet qualifies by operation of law as a system under the Belgian Act. This could lead to the cumulative application of both French and Belgian law. Even if it can be argued that the Royal Decree of 18 August 1999 has only a limited scope and was passed to enable the BXS restructuring and the Finality Act seems only to apply to systems located in Belgium, the Belgian courts may still consider Clearnet as effectively a Belgian System. An alternative would be to amend Article 2 §1, b, 4° of the Belgian Act. In this respect the Act of 12 August 2000 authorises the King (by Royal Decree), after consultation with the BFC, to take all measures to organise and control an integrated clearing and settlement system for transactions on the Euronext markets. Such a Royal Decree can change, supplement, substitute or remove the already existing legal provisions.

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks

[7] On 20 December 2000, Clearnet was designated by the board of management of Euronext Brussels as the new clearing house, intended to replace BXS-Clearing, by application of Article14 (1) of the Act of 6 April 1995 and article 2 of the Royal Decree of 18 August 1999. BXS-Clearing subsequently contributed its clearing business to Clearnet on 31 January 2001 and, since 1 February 2001 Clearnet has been carrying out all the clearing transactions for trades effected on the various Euronext markets.
It is interesting to note that article 2 (b) of the Act has not been amended to reflect the changes made to the clearing activities for trades on the markets operated by Euronext Brussels. Sub-section 4 of this article, which covers the clearing system organised by the Brussels Stock Exchange, has therefore continued to apply since the appointment of Clearnet since, as part of the Euronext integration, the Brussels Stock Exchange Company did not disappear, rather its name was changed to Euronext Brussels.
[8] Royal Decree of 18 August 1999 on the creation of a clearing and settlement system of transactions concluded on or outside the markets organised by the Stock Exchange, and providing rules regarding its organisation and operation and amending the Act of 28 April 1999 transposing Directive 98/26/EG of 19 May 1998 on settlement finality in payment and securities settlement systems, *official gazette,* 8 September 1999, 33592.
[9] Explanatory Memorandum to the Act, p. 5.
[10] Act of 22 February 1998 providing for the organic statute of the National Bank of Belgium, *official gazette,* 28 March 1998.
[11] Article 8 of the Act of 22 February 1998 providing for the organic statute of the National Bank of Belgium, *official gazette,* 28 March 1998. According to said Article 8, *„the Belgian National Bank supervises the the appropriate operation of the clearing and payment systems and ascertains their efficiency and reliability"*.
[12] The list of systems was amended by the above mentioned Royal Decree of 18 August 1999 whereby Article2 (1) (b), 5°, of the Act was repealed due to the transformation of Belfox CV, which in the past was responsible for the clearing of transactions carried out in respect of derivatives, into BXS Clearing NV, entrusted until 31 January 2001 with the clearing of transactions carried out in respect of financial instruments registered in the markets organised by EBVB NV, whether carried out on or off said markets. As from the 1st of February 2001 Clearnet became the sole clearing house and central counterparty for markets operated by Euronext France, the Netherlands and Belgium.

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Arti-cle[1]	Text	Appli-cability [2]	Refe-rence	Article (A; P; S; N)[1]	Content	Remarks

The list of systems was also amended by the above mentioned Royal Decree of 20 December 2000: Article 2 (1), (b), 3°, of the Act was substituted. The Belgian branch of the U.S.-incorporated bank "Morgan Guaranty Trust Company of New York" was substituted by the Belgian public limited liability company "Euroclear Bank".

[13] According to Article 1 (2) Act of 22 March 1993, a "credit institution" means: "*a Belgian or foreign undertaking whose business is to receive deposits or other repayable funds from the public and to grant credit for its own account"*.

[14] According to Article 44 of the Act of 6 April 1995, "investment firms" are: "*undertakings which are governed by Belgian law and whose normal business is to provide third parties with investment services on a professional basis, and to undertakings which are governed by the law of another State, and carry on such business in Belgium*". According to Article 46, 1° of the Act of 6 April 1995, "investment service" means: "*any of the services referred to hereafter that are provided to a third party:*

- *reception and transmission, on behalf of investors, of orders in relation to one or more financial instruments;*
- *execution of such orders other than for own account;*
- *bringing two or more investors into contact in order to make it possible for those investors to effect a transaction in relation to a financial instrument; trading any financial instrument for own account;*
- *managing portfolios of investments in accordance with mandates given by investors on a discriminatory, client-by-client basis where such portfolios include one or more financial instruments;*
- *underwriting in respect of issues of any financial instrument and/or the placing of such issues."*

[15] Explanatory Memorandum to the Act, p. 8.

[16] The Royal Decree of 18 August 1999 contains a first clear distinction in Belgian law between the terms *clearing* and *settlement*. See also our comments regarding article 2 (1) of the Directive.

[17] Explanatory Memorandum to the Act, p. 6.

[18] According to Article 2 of the Law of 2 August 2002 on the supervision of the financial sector and the financial services, a financial instrument is each security or right belonging to one of the following categories:

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a) shares in companies and other securities equivalent to shares in companies;
b) bonds and other debt instruments which are negotiable on capital markets;
c) any other securities normally traded giving the right to acquire such financial instruments as in a) or b) by means of subscription or exchange or giving rise to a cash settlement, excluding instruments of payment;
d) units in collective investment undertakings;
e) instruments, which are normally traded on the money market;
f) financial future contracts, including equivalent cash-settled financial instruments;
g) forward rate agreements;
h) interest-rate, currency and equity swaps;
i) options to acquire or dispose of any financial instruments or any financial instruments falling within section a) to h), including equivalent cash-settled financial instruments;
j) for the application of articles 25, 32, 39 and 40 and other articles the King may determine on advice of the BFC, instruments derived from commodities;
k) other securities or rights determined by the King on advice of the BFC, in such case for the provisions indicated by Him.
A "related financial instrument" is each financial instrument linked to a certain financial instrument in any of the following ways:
a) convertible into or exchangeable for the concerned financial instrument;
b) gives the right to the holder to acquire or subscribe for the concerned financial instrument;
c) has been issued or guaranteed by the issuer or the guarantor of the concerned financial instrument, when an important correlation exists between the stock prices of both instruments;
d) is a certificate representing the concerned financial instrument or represents its counter-value.

[19] Explanatory Memorandum to the Act, p. 9.

[20] Explanatory Memorandum to the Act, p. 12; see also under article 2 (e) of the Directive for the distinction between the terms *clearing* and *settlement*.

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[21] *E.g.* the securities to be provided to Clearnet under the Euronext Clearing Rule Book are the following:
- each clearing member has to provide sufficient collateral to Clearnet for the performance of the obligations by the clearing members. The amount of collateral is determined daily by Clearnet for each clearing member (Article 1.5.2).
- secondly each clearing member is obliged to contribute to the Clearing Fund, the collective system of collaterisation of commitments. Once a month Clearnet determines the size of the Clearing Fund and the level of each individual Member's contribution. The amount to be contributed by a clearing member has to be correlated with the risk associated with the open positions (uncovered risks) (Section. 1.6.1.). In the event that a clearing member is in default, calls may be made on the clearing fund. The defaulting clearing member's share in the clearing fund will be used in first instance. If a need remains thereafter, the other clearing member's shares in the clearing fund will be used pro rata to their respective contributions for that monthly period (Section. 1.6.2.).
The Euronext Clearing Rule Book refers to securities under the term „collateral" and defines this term very broadly as *„any security, cash, or central bank guarantee, as specified in an Instruction, pledged, granted or transferred outright to Clearnet by the clearing member or to the clearing member by its clients, trading members or associated trading members, in order to secure the performance of obligations"*(Section 1.1.0.19). As such, Clearnet still has the possibility to specify or modify through „Instructions" the type of securities that the clearing members need to constitute. Instructions refers to *„any document issued as such by Clearnet, amended from time to time, whereby the provisions of the Clearing Rule book are interpreted or implemented and which is binding upon clearing members generally or to any category of clearing members in particular*" (Section 1.1.0.37).
For these securities constituted by clearing members within the clearing system organised by Clearnet, the principles of the Directive, as transposed in French law, are applicable.
[22] Royal Decree no. 62 of 10 November 1967 promoting the circulation of the securities, *official gazette*, 14 November 1967. According to Article 5 (1) of this Royal Decree *„for the constitution of a civil or commercial pledge over fungibles in circulation with the CIK or with affiliated members, possession shall be validly transferred by entering said securities in a special account opened with an affiliated member in the name of an agreed person. The securities over which the pledge is granted are identified according to their nature and without any numerical reference. The pledge thus constituted is legally valid and is enforceable vis-à-vis third parties without further formality"*.

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

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

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

[25] This provision was initially introduced in Belgian Law by articles 29 and 68 of the Act of 4 December 1990 on secondary markets, which have been replaced by Article 41 of the Act of 6 April 1995. These provisions were essential milestones for the improvement of the Belgian internal regime of sureties on securities in connection with financial transactions. According to Article 41 of the Act of 6 April 1995 on secondary markets, the legal status and supervision of investment firms,"*intermediaries and investment advisers, institutions that manage a system for clearing and settlement of financial instruments have preferential rights with respect to all the financial instruments, monies and other rights that these institutions hold in account, as own assets of a participant. These preferential rights guarantee any claim of these institutions on a participant in the clearing or settlement system, arising in connection with the clearing or settlement of subscriptions for financial instruments, or of transactions in financial instruments. In addition, these same*

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*institutions benefit from preferential rights for all the financial instruments, monies and other rights which they hold in account as assets of clients of a participant, provided that these clients have given to a participant the authorisation to deposit these assets into an account with the above-mentioned institutions These preferential rights exclusively guarantee the claims of these institutions on a participant in the clearing or settlement system, arising in connection with the clearing or settlement of subscriptions for financial instruments or of transactions in financial instruments effected by the participant on behalf of client*s".

[26] In 1991 the Belgian legislator intervened in order to explicitely confirm the validity of repurchase agreements, in order to avoid that the legal validity of such repurchase transactions would be questionned notably in the context of the controversy surrounding the transfer of ownership as a security. According to Article 23 of the Act of 2 January 1991 on the market of public debt securities and monetary policy instruments, (*official gazette*, 25 January 1991), repurchase agreements are *" cash sales of securities within the meaning of the Secondary Markets, Investments Undertakings (Status and Supervision), Brokers and Investment Advisers Act of 6 April 1995 that are entered into between the same parties with simultaneous repurchase at a fixed or undetermined point in time of securities with the same characteristics and in the same amount, regardless of the agreed price, delivery or term conditions. The price conditions relating to repurchase transactions within the meaning of this article include transfers of securities or monies destined to maintain the agreed balance between the parties performances during the term of the agreement, whether for a given transaction or jointly for all transactions between the opposing parties or for a portion thereof. The delivery conditions within the meaning of this provision include the replacement of securities that initially were delivered in implementation of the cash sale by new securities, during the term of the agreement"*. Repurchase transactions are characterised under Belgian law as a transfer of fiduciary ownership as a security, because the purpose of the transaction is to guarantee the repayment of the agreed countervalue of the securities concerned (*Printed doc.*, Senate, 1101_1 (1990-91), 22 and 23). In order to avoid discussions regarding the validity of such repurchase transactions, article 23 of the abovementioned Act of 2 January 1991 explicitely states that the rules regarding the constitution of a civil or commercial pledge do not apply to repurchase transactions. The reason for this can be found in Article 24 of this Act according to which in case of non-payment the transferred securities have to be sold as soon as possible. This is an explicit resilatory condition, which is not allowed in case of pledge (Article 2078 Belgian Civil Code and Articles 4 and 10 of the Commercial pledge Act of 5 May 1872).

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[27] The Law of 15 July 1998 inserted Article 25bis in the above mentioned Act of 2 January 1991, extending the legal regime applicable to repurchase transactions (see endnote 26) to *„all transfers of ownership of securities entered on account and monies that are effected in order to guarantee the obligations of a credit institution, an investment company, an insurance or reinsurance company, a pension fund, a collective investment undertaking, the National Bank of Belgium, the Re-discounting and Guarantee Institute, the Pension Fund (Rentenfonds) or companies that, even in an ancillary manner, carry out investment activities for their own account or for the account of third parties, or foreign companies or institutions of similar status and that contain an obligation on the part of the transferee to retransfer the transferred securities or monies or securities or assets of equivalent value, except in the event of full or partial non-performance of the guaranteed obligation. The same applies to transfers of securities entered on account or monies intended during the term of the agreement to guarantee the balance between the performances of the parties, either with regard to a given transaction or globally with regard to all or a part of the transactions between the opposing parties, and for substitution during the term of the agreement of the originally transferred securities for new securities or other monies"*. The purpose of this Article is to ensure the validity and the effectiveness towards third parties, of transfers of ownership of financial instruments or moneys as a security for transactions entered into by financial institutions, and this notwithstanding the bankruptcy of the debtor or any collective measure involving the suspension of or imposing limitations on transfers of payments. Examples of such transactions are master agreements regarding forward transactions such as swaps, repo's and stock lending. In case of default of the debtor, the creditor is allowed to keep the securities or to sell them on the stock market, and to set-off its claim with the value of these securities. Moreover, according to Article 26 of the above Act, Article17 of the Bankruptcy Act relating to the non-effectiveness towards third parties of transactions carried out during the suspicious period, does not apply to transactions referred to in Articles 23 and 25 *bis* of this Act.

[28] Article 157(1) of the Act of 22 March 1993 on the legal status and supervision of credit institutions states that "*agreements on bilateral or multilateral netting and explicit close-out agreements intended to enable netting between credit institutions or between credit institutions and establishments in charge of the clearing or settlement of payments or financial transactions may, in the event of bankruptcy or other circumstances of concurrent claims, be enforceable against creditors, provided that the receivable and payable to be netted were part of the same estate at the time of the bankruptcy or the concurrence of claims, irrespective of their maturity, their substance or the currency in which they are denominated. If the agreements referred to in the first sub-section were concluded after the date on which payments were suspended as determined by the Court, or within ten days prior to that date, they*

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may not be enforceable against creditors if they relate to debts previously contracted but not yet due. For the purpose of this sub-section, the National Bank of Belgium, the European Central Bank and the 'Institut de Réescompte et de Garantie/Herdiscontering- en Waarborginstituut' are treated in the same way as credit institutions".

[29] Cfr. 1167 Civil Code. Under Belgian law, any transaction deceitfully injuring the creditor's rights, will be judged null and void regardless at what moment it was performed (Article 20 Bankruptcy Act).

[30] Section 157 (1) of the Act of 22 March 1993 on the legal status and supervision of credit institutions remains applicable with its specific conditions; Section 3 of the Act will apply as a "lex specialis" for the netting in payment and securities settlement systems referred to in this Act (cf. footnote 25).

[31] Article 157 (2) of the Act 22 March 1993 remains applicable with its specific conditions; ArticleSec 4 of the Act will apply as a "lex specialis" for the netting in payment and securities settlement systems referred to in this Act.

Article 157 (2) Act 22 March 1993 states: "*Without prejudice to the provisions of sub-article 1 and of Articles 445 to 449 of the Commercial Code, the payments, transactions and acts carried out by and payments made to a credit institution on the day it was declared bankrupt are valid if they predate the legal declaration order, or if they were carried out without knowledge of the credit institution's bankruptcy.*

For the purpose of this sub-article, the establishments in charge of the clearing or settlement between credit institutions of payments or financial transactions shall be treated in the same way as credit institutions".

[32] Explanatory Memorandum to the Act, p. 11.

[33] Articles16 to 26 of the Bankruptcy Act state the consequences of bankruptcy. The main consequences which emerge when a company is declared bankrupt by the court, are the following:

- the bankrupt company looses automatically the administration over all its assets. As from the day of the court's decision any payment or transaction done by or to the bankrupt company is automatically null and void. The bankrupt company will now be administered by a receiver appointed by the court (called "Curator");
- the insolvency procedure will lead to the total realisation of the company's assets;

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- the insolvency procedure is considered to be a collective settlement of the company's debts. From this it follows that creditors are no longer allowed to claim on their own the execution of any title they might have on the bankrupt company. Creditors can only execute their rights via the receiver. The proceeds of the realisation of the company's assets will be distributed among the creditors in proportion of their claims (i.e. pari passu distribution);
- secured creditors do not fall under the rule of collective settlement. They will receive payment from the realisation of the specific assets that the company granted to them under a security arrangement. If this realisation does not completely settle the secured creditor's claim, the secured creditor will have to realise the remaining part of the claim via the receiver and under the rules of the collective settlement as set out above;
- claims against the bankrupt company which were not yet due, will now become due.

[34] When a company is declared bankrupt, the court will determine the date when the bankrupt company stopped paying its creditors. This date cannot be situated more than 6 months before the date of the court's decision declaring the company bankrupt (Article 12 Bankruptcy Act).
The following transactions will be judged null and void by the court if performed by the company since the date the company stopped paying its creditors as determined by the court (Article 17 Bankruptcy Act) (further referred to as "Suspicious Payments"):

- all transactions, agreements and payments that are effected free of charge, or cause prejudice to the bankrupt company (i.e. if the value of the services rendered by the bankrupt company is considerably greater than the price or services received in return);
- all payments of debts that were not due;
- payments by means other than by cash or commercial paper (such as through off-setting debts);
- all mortgages and pledges vested over the assets of the bankrupt company for debts incurred by the bankrupt company before the date it stopped paying its creditors;
- all payments made by the bankrupt company with full knowledge of the fact that it was in a state of bankruptcy.

Any transaction deceitfully injuring the creditors' rights will be judged null and void regardless of the time at which it was performed (Article 20 Bankruptcy Act).
[35] Explanatory Memorandum to the Act, p. 10.
[36] Explanatory Memorandum to the Act, p. 12.

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[37] Explanatory Memorandum to the Act, p. 13.
[38] Cf. footnote 31.
[39] Cf. footnote 31.
[40] Article 157 (2) of the Act 22 March 1993 solved the hour zero problem through a change of the Bankruptcy Code. According to Article 157 (2), payments by financial institutions are valid if they are made before the exact moment of bankruptcy. For this reason a court that declares a financial institution bankrupt must also note the exact time of its decision. Article 157 (2) of the Act of 22 March 1993 remains applicable with its specific conditions; Article 6 of the Act will apply as a "lex specialis" for the netting in payment and securities settlement systems referred to in this Act.
[41] Convention on Insolvency Proceedings of 23 November 1995 (Council Document CONV/INSOL/X1). This draft EC Convention failed to receive the required unanimous support as, due to the underlying territorial concerns over Gibraltar, the UK failed to sign within the prescribed time. On 29 May 2000 however, the EU Council adopted the Regulation on Insolvency proceedings that will enter into force on 31 May 2002. To a great extent, this Regulation replicates the text of the draft EC Convention on Insolvency Proceedings of 23 November 1995. Art. 9,1 of this Regulation states: '*Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market*".
[42] Explanatory Memorandum to the Act, p. 16.
[43] Act n° 2001-420, 15 May 2001, *Journal officiel*, 16 May 2001.
[44] In the Explanatory Memorandum to the Act, the following illustration is given regarding the efficiency of securities given as collateral for "intraday" or "overnight" credits granted by a system administrator or central bank: These securities are generally governed by municipal law which, hypothetically, enables enforcement without prior judicial intervention of the stocks forming the collateral for the securities granted in favour of the creditor (*e.g.* pledges governed by the aforementioned Royal Decree no. 62 or by the aforementioned Act of 2 January 1991). In the event of bankruptcy or of "arrangement"-type proceedings (moratorium, judicial arrangement, receivership, time for payment, etc.), the law applicable to the loan transaction and its guarantees that in principle bind the (foreign) debtor can nevertheless be prevailed over by the application of the provisions of foreign bankruptcy law applicable to that debtor, bearing in mind the public policy nature of bankruptcy laws, assuming this foreign law is recognised in the creditor's State. That does not

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mean that the validity of the principal (here, loan) transaction or of the security (a pledge, for instance) would suddenly be governed in its entirety by a foreign law. A fundamental principle of the international private law of most States is that a security continues to be governed as regards its constitution and realisation by the law of the country where it is located (*lex rei sitae* rule). Here, the creditor's municipal law therefore continues to apply for assessing the intrinsic validity of the lien relating to the stocks "localised" in his country (cf. below regarding article 8 (2)). Nonetheless, the fact remains that the bankruptcy law of the debtor – assuming it is recognised in the State of the forum – will alone be competent for governing two questions of vital importance for the effectiveness (but not the validity) of the security in question:

- *determination of the ranking* conferred by the security on the beneficiary creditor, i.e. the order of preference over the goods subject to the lien in relation to the other preferential creditors in the foreign bankruptcy;
- the *possibility of enforcing the security*, i.e. whether or not it is necessary to get prior authorisation from the liquidator or the competent courts, and the possible suspension of any action by creditors in possession of a security, in the interests of the management of the bankruptcy (the idea here is to leave a sort of *"inventory"* period to freeze any court action or forced sale by the creditors before the liquidator has been able to determine the assets and liabilities in the bankruptcy and have disputable claims settled).

These questions are of importance for the creditor since, in the event of the bankruptcy of a foreign debtor, the thing is to be sure that the bankruptcy law of that debtor will indeed give him first ranking over the property subject to his pledge. Moreover, the creditor has to be able immediately, or at least in as short a period as possible, to realise the stocks in his possession in order to avoid running a market risk on those assets in the event of unfavourable fluctuations in prices, irrespective of the possible "margins" that he might have put aside for himself. It is this issue that is dealt with by Article 9 (1) of the Directive and Article 8 (1) of the Act.

[45] Explanatory Memorandum to the Act, p. 23.

[46] Explanatory Memorandum to the Act, p. 24, see also the Euroclear system, based on RD no 62 of 10 November 1967 promoting the circulation of the securities.

[47] Explanatory Memorandum to the Act, p. 24.

[48] See the Clearnet instructions of 3 April 2002, Notice 2002-0036, page 2/9, articles 4-6 and Notice 2002-0037, page 1/10, articles 2-5.

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[49] In the framework of the Clearnet clearing system, in case of *e.g.* securities on financial instruments granted by Belgian clearing members of Clearnet, entered in an account, register or centralised deposit on behalf of Clearnet in Belgium with the NBB or CIK, Belgian law will apply as regards the validity and opposability of the securities on those financial instruments. However, the *lex contractus* should govern the contractual modalities for the constitution of the securities. For lack of specifications in the Euronext Clearing Rule book, lex contractus would be according to 4 of the Rome Convention of 19 June 1980, the law of the country with which the contract is most closely connected. In order to help the judge find said law, the Rome Convention presumes that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence, or, in case of a body corporate or incorporate, its central administration. As it is unclear whether Clearnet or the clearing member constituting the security, effects the characteristic performance, the lex contractus remains uncertain (French law or Belgian law). In practice, it is therefore advised to submit the securities granted by the Belgian clearing members explicitly to Belgian law, when situated in Belgium, as to avoid the cumulative applicability of both Belgian and French law. However, as mentioned in our remarks under article 9(2) of the Directive, article 8 (2) of the Act, the Clearnet Clearing Instructions seem to indicate that the term "exclusively" has been misinterpreted by Clearnet. According to these instructions, when a Clearing Member pays its contribution or provides its Collateral to Clearnet to an account held in France, Belgium or the Netherlands, the law of the respective country will also govern the transaction on the contractual terms and conditions[49]. These instructions seem to indicate that there is no room for the lex contractus in addition to the law governing the rights of the participants or the central banks in their capacity as security holders, which of course goes against the purpose of the Settlement Finality Directive. This restrictive interpretation would lead to important problems with respect to, *inter alia*, the use of standardised contracts such as ISMA and the "Global Master Repurchase Agreement" governed by English law.

[50] In the context of the Clearnet clearing system, the issue of the respective ambits of the law of the system designated by Article 8 of the Act (French law) and the law applicable to the securities, referred to in Article 9 of the Act (Belgian law), on the fate of the guarantees over stocks, constituted by a Belgian member of the settlement system that is a member of the system administered by Clearnet in the event of the member's insolvency is rather delicate. It is generally accepted that the *lex rei sitae* and the *lex concursus* are both competent to govern the enforceability of the securities granted by a debtor in the event insolvency proceedings are commenced against him. We believe there has to be a distributive accumulation of the two laws, with the *lex rei sitae* having competence for determining the existence, extent and effects of the security and the *lex concursus* applying to the procedural aspects of the insolvency proceedings, such as determining the collateral, the possibility of filing a counterclaim, the existence of a preference right in favour of the holder of the security or the ranking or determination of the order of the preferential creditors. It is thus the *lex rei sitae* that governs all the questions linked to the realisation of the security, even where insolvency proceedings are commenced against the debtor. The Finality Directive deviates from the application of the law of the applicable system in accordance with Article 8 of the Act in the event of the insolvency of a participant in the system in

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favour of the *lex rei sitae*, the law of the place where the stocks or cash are situated, determined in accordance with Article 9 (2) of the Act as regards the guarantees over financial instruments. In this case it prevails over the law of the system, which continues to apply to questions linked to the other rights and obligations flowing from participation in the system by the insolvent participant. Belgian law should therefore apply as the *lex rei sitae*, to the exclusion of the law of the system, in the event of the insolvency of a Belgian member of the settlement system for matters linked to the realisation of the securities over financial instruments or cash granted in favour of Clearnet, in so far as the guarantees provided by the Belgian settlement system member (by the deposit of financial instruments into an account, register or centralised deposit system or in cash) are indeed located in Belgium.

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