

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

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Italy – final report

Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
	SCOPE AND DEFINITIONS					
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	Legis- lative De- cree 210/ 2001 ¹			The Italian Legisla- tive Decree does not specifically provide the applicability of the provisions to: a) the system
A: 1 N: b	(b) any participant in such a system;	N				b) the participants
A: 1 N: c	(c) collateral security provided in con- nection with: -participation in a system, or -operations of the central banks of the Member States in their functions as cen- tral banks.	N				c) the collateral, but this is implied in all the provisions and in particular in the defi- nitions of each single term mentioned above under let. a) to c).
A: 2	For the purpose of this directive:		L.D.	A: 1 ²	For the purpose of this legislative decree:	
A: 2 N: a S: 1	'system' shall mean a formal arrange- ment:	N	L.D.	A: 1 N: r	'system' shall mean the provisions of contrac- tual or authoritative nature as a whole pursuant to those transfer orders with common rules and standardised arrangements will be executed be- tween the participants, which are at the same	The L.D. contains three definitions in relation to system: the more general one, as defined in Art. 1 let. r) (please refer to

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					time:	the left column) and a more specific one in Art. 1 let. s) (see note 2) concerning only the 'Italian system', defined as a system indicated in the Annex to the L.D. or designated in accordance with Article 10 of the L.D ³ . The third definition regards a 'system outside the European Union' as defined in Article 1, let. w) (see note 2). With the latter definition the Italian legislator met the requirements of the market regarding the finality of the transactions executed by Italian institutions in third country systems. The chance to take advantage of the provisions of the Di-

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						rective regarding the finality of the transaction is subject to the condition of agreements between the competent authorities providing the reciprocity of conditions applicable to the systems (see also Article 10, paragraph 5 of the L.D.).
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	L.D.	A: 1 N: r N: 1) S: 1	1) applicable to three or more participants, without counting a possible settlement agent, a central counterparty, a clearing house or a indirect participant;	
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	L.D.	A: 1 N: r N: 2)	2) governed by the law of one of the Member States of the European Union, chosen by the participants or provided by the rules governing the system, where at least one of the participants has its registered offices;	The second and additional alternative provided by the L.D. takes an aspect into consideration, which is missing in the Di-

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						rective: the parties did not choose the applicable law. If it was the intention of the European legislator that in this case the Rome Convention on the applicable law to contractual obligations shall apply, the provision of the L.D. goes conform with the latter.
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	L.D.	A: 1 N: r N 3)	3) designated as a system and notified to the European Commission by the Member State of the European Union, whose law is applicable;	Due to the fact that there are no special conditions under Italian law for the designation of the systems, and all systems presently existing in Italy have been designated, the part of the sentence " <i>without prejudice to other more stringent conditions of general application laid down by national law...</i> " was

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						not transposed into national law.
A: 2 N: a S: 2	Subject to the conditions in the first subparagraph, a Member State may designate as a system such a formal arrangement whose business consists of the execution of transfer orders as defined in the second indent of (i) and which to a limited extent executes orders relating to other financial instruments, when that Member State considers that such a designation is warranted on grounds of systemic risk.	D				
A: 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	L.D.	A: 1 N: r N: 1) S: 2	or applicable to two participants, if this is warranted on grounds of control of systemic risk, however it concerns Italian systems, or in case that other Member States of the European Union made use of the possibility to limit the number of participants to two.	According to information of the Ministry of Treasury there should be the possibility to consider bilateral agreements, and in particular agreements over the counter, as Italian systems, if necessary on grounds of systemic risk, but so far

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						it was not made use of such possibility. The second alternative (another Member State recognizes systems of two participants), which is not provided by the Directive, shall lead to a broader range of application. For example, such alternative could refer to the Finnish or French law. Article 330-1 of the French Code defines a system as being composed of two participants. These systems, however, according to the French authorities are not to be notified to the Commission. Such interpretation of the French authorities might lead to the non-application to the

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						French two party systems, because Article 1 let. r) of the L.D. also in this case requires the compliance with the other two conditions. The third condition provides the notification of the system to the Commission by the Member State whose law is applicable.
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	N	L.D.	A: 2 N: h	'institution' shall mean one of the following bodies which participate in a system while discharging obligations arising from transfer orders within such system: 1) an Italian or Community bank as defined in Article 1, paragraph 2, let. a) and b) of the Consolidated Banking Law ⁴⁺⁵ as well as the bodies indicated in Article 2, paragraph 3 of the directive 2000/12/EC ⁶ ; 2) a <i>società di intermediazione mobiliare</i> (securities investment firm) as defined in Article 1, let. e), or a Community investment firm as de-	The L.D. provides only the 'discharge of obligations' and not 'the discharge of financial obligations' as set forth in the Directive, because the word 'financial' is a relic of the of the original Commission's proposal regarding payment systems only. Given the special fact that the <i>agenti di</i>

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	-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.				<p>defined in Article 1, let. f) of the Consolidated Law on Financial Intermediation^{7,8}, except for the institutions indicated in Article 2, paragraph 2, let. a) – k) of the directive 93/22/EEC, as well as an <i>agente di cambio</i>;</p> <p>3) a public authority or a public undertaking as defined in Article 8 of the regulation no. 3603/93 of the European Community Council dated 13 December 1993⁹ as well as an undertaking whose business is publicly guaranteed;</p> <p>4) any undertaking whose registered offices are not in the territory of the European Union and whose business is similar to those of the institutions defined in number 1) and 2);</p> <p>5) any other body, determined in accordance with the Community provisions, which participates in an Italian system or a system of another State of the European Union, if its business is important on grounds of systemic risk;</p>	<p><i>cambio</i>, mentioned in no. 2, still participate in Italian systems, these <i>agenti di cambio</i>, contrary to Article 2, paragraph 2, let. l) of the directive 93/22/EC, had to be included in the term 'institution'¹⁰. The term 'public undertaking' was added to no. 3 for reasons of necessity. Article 6, paragraph 1 of the Bank of Italy Regulation on Clearing and settlement of transactions in non-derivative financial instruments under Article 69 of the Consolidated Law on Financial Intermediation¹¹ indicates among others also Poste Italiana S.p.A. and Cassa Depositi e</p>

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						<p>Prestiti, both compa-nies with public au-thorities as sole shareholders.</p> <p>No. 5 is a residuary clause in order to include all those pos-sible bodies and in-stitutions that are not covered by the other forth alternatives or which cannot un-equivocally be classi-fied¹².</p>
A: 2 N: b S: 2	If a system is supervised in accordance with national legislation and only exe-cutes transfer orders as defined in the second indent of (i), as well as pay-ments resulting from such orders, a Member State may decide that under-takings which participate in such a sys-tem and which have responsibility for discharging the financial obligations arising from transfer orders within this system, can be considered institutions,	D				Like the majority of the Member States Italy did not trans-pose this optional provision into na-tional law.

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	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;					
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	L.D.	A: 1 N: g	'central counterparty' shall mean an entity which is interposed between the institutions in a system and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;	The <i>Cassa di Compensazione e Garanzia</i> (CC&G), an Italian joint-stock company, is the central counterparty of all contracts executed on the regulated derivatives markets (IDEM and MIF) and since December 2002 also for the MTS and stock market. Such mechanism removes the counterparty risk inherent in transactions, by allowing the CC&G to become the sole guarantor of every future and option contract negotiated by its members.

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						Whereas the central counterparty can be considered as kind of a guarantee system e.g. for the derivatives market, a different type of guarantee systems has been established in Italy for other regulated markets, where a central counterparty is missing. Pursuant to Article 68, paragraph 1 ¹³ , and Article 69, paragraph 2 ¹⁴ , of the Consolidated Law on Financial Intermediation a Contracts Guarantee Fund and the Guaranteed Settlement Fund have been set up, both also performed by CC&G, which is an Italian particularity (please refer to the definition 'guarantee system' in

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						Article 1, let. t) of the L.D. as well as to Article 8, paragraph 7 of the same). The Funds are mutual and CC&G, in this case, does not cover losses caused from insolvency with own resources, but uses the margins pledged by the member and, if insufficient, those pledged by the other members to the Funds.
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	L.D.	A: 1 N: d	'settlement agent' shall mean the entity which places accounts at the disposal of the participants for the settlement of the transfer orders within such system, and which can extend credits to the same participants for this purpose;	

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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	L.D.	A: 1 N: u	'clearing house' shall mean an entity responsible for the calculation of the net positions of the participants in the system;	CC&G acts as Clearing House with regard to the derivatives market.
A: 2 N: f S: 1, 2	`participant` shall mean an institution, a central counterparty, a settlement agent or a clearing house. According to the rules of the system, the same participant may act as a central counterparty, a settlement agent or a clearing house or carry out part or all of these tasks.	N	L.D.	A: 1 N: n	'participant' shall mean an institution, a clearing house, a central counterparty, a settlement agent, a guarantee system, participating in a system;	As the guarantee systems as defined in Article 1, let. t) of the L.D. also participate in the Italian systems, these had to be added to the list of participants set forth by the Directive ¹⁵ .
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	L.D.	A: 10 P: 4	4. If required by the characteristics of a system having as its object the execution of transfer orders as defined in Article 1, paragraph 1, let. m), number 1), and for the requirement of risk control, the Bank of Italy can for the scope of application of this legislative decree equalise the indirect participant to the participant of such system.	The Ministry of Treasury confirmed that there were only technical reasons for the slightly different wording, because no instructions to Bank of Italy can be given on this issue. The condition that the indirect participant has to be known to

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						the system is already contained in Article 1, let. o) of the L.D. Like in Austria, also in Italy the decision of the Bank of Italy is required for the equal treatment of indirect and direct participants in Italian pay-ment systems.
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	L.D.	A: 1 N: o	'indirect participant' shall mean an entity as defined in let h), number 1), known to the system according to the rules of the same, whose transfer orders as indicated in let. m), number 1), are executed within such system by a participant in its own name on the basis of a contractual relationship;	Participants to BI-COMP can only be Italian banks, the Bank of Italy, the Ministry of Treasury and the Italian Post Office. Therefore, Community banks and Cassa Depositi e Prestiti might be indirect participants to BI-COMP. It is the Bank of Italy's intention, that in the near future it shall be possible for foreign banks and service

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						<p>providers to access BI-COMP via SWIFT.</p> <p>With regard to BI-REL, which grants access to an open and non-discriminatory basis to banks, investment firms, organisations providing clearing and settlement and public sector bodies. Indirect participants according to the TARGET guidelines shall be those institutions, which have no settlement account with the Bank of Italy and entrust their settlement to direct participants on a contractual basis. Despite the above, a large number of institutions hold BIREL accounts even though they</p>

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						settle their interbank transactions indirectly through another participant and this can be considered a peculiarity with respect to the participation forms envisaged in the TARGET Guideline. The Bank of Italy launches with the NEW BI-REL from 2003 onwards, new forms of participation in order to meet the differing needs of institutions. A part from the direct participant, two forms of indirect participation can be chosen: an "active" indirect participation with access to a limited set of system functions and the indirect participant as set forth in

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						<p>the definition in question. The new type of active indirect participant has to be considered harmonized to the definition of indirect participant, because it does not hold a settlement account with Bank of Italy and all settlements are made by a direct participant on behalf of the indirect participant.</p> <p>With regard to the securities settlement systems, please note that with respect to the scope of the Directive the L.D. extended the group of persons to be protected by the provisions of the same Directive introducing in Article 1, let. f) the figure of an 'interme-</p>

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						diary', which is either a bank or a securities investment firm or a similar undertaking, e.g. an <i>agente di cambio</i> , which are not directly participating in the securities settlement system (please also refer to Article 6 and note 2).
A: 2 N: h	`securities' shall mean all instruments referred to in section B of the Annex to Directive 93/22/EEC;	N	L.D.	A: 1 N: v)	'financial instruments' shall mean the financial instruments as to Article 1, paragraph 2 of the Consolidated Law on Financial Intermediation;	The L.D. does not use the term 'securities' (<i>'titoli'</i> in the Italian translation) as provided by the Directive, but makes reference to the terminology of the directive 98/22/EEC, which goes beyond the meaning of the of the term 'securities'. Section B of the Annex to the directive 93/22/EEC indicated as only one of the therein mentioned

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						seven 'Instruments' 'Transferable securi-ties'. The Italian legislator transposed such Annex into Article 1, paragraph 2 of the Consolidated Law of Financial Inter-mediation and defined those instruments as ' <i>strumenti finanziari</i> ' (financial instru-ments). For reason of harmonisation with the existing legisla-tion the L.D. there-fore uses the term financial instruments (<i>strumenti finanziari</i>) instead of 'securities'.
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	N	L.D.	A:1 N: m	'transfer order' shall mean any instruction by a participant within a system: 1) to place at the recipient's disposal an amount of money by means of a book entry on the ac-counts of a (Italian or Community) bank, a cen-	

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	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;				tral bank, or a settlement agent, or which determines the assumption or discharge of a payment obligation on the basis of the rules of the system, or 2) to transfer the title to, or other interest in, one or more financial instruments by means of a book entry in a book of account or in any other way;	
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	L.D.	A: 1 N: p	'insolvency proceedings' shall mean compulsory administrative liquidation, bankruptcy, suspension of payments of liabilities and restitution of assets to third parties as set forth in Article 74 ¹⁶ , Article 77, paragraph 2 ¹⁷ , Article 107, paragraph 6 ¹⁸ of the Consolidated Banking Law and Article 56, paragraph 3 of the Consolidated Law on Financial Intermediation ¹⁹ as well as any other measure provided by an Italian law or, if applicable, by the law of one of the Member States of the European Union or of a state outside the European Union, which provides the suspension or the termination of payments of liabilities and the restitution of as-	The Italian definition of 'insolvency proceedings' is more technical than the definition of the Directive and due to the enumeration seems to be a little bit stricter, which is not the case, because not all procedures are insolvency procedures in the full sense of the term. Common to all these procedures is the suspension of payments and restitution of

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					sets to third parties;	assets (with regard to the choice of words please refer to the remark below). Limitations on transfers or payments as mentioned in the Directive, are not provided due to the characteristics of such proceedings. This is also the reason why the Italian law does not make reference in general to the proceedings contained in the Italian Law 16 March 1942, no. 267 ("Bankruptcy Law") and the Consolidated Banking Law, but specifically to the compulsory administrative liquidation, bankruptcy (<i>fallimento</i>) as well as the suspension of pay-

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						ments according to Article 74 of the Consolidated Banking Law leaving apart the proceedings regarding compositions before bankruptcy and controlled administration, according to which payments are subject to the supervision of the court/receiver. The latter can not even be considered included in the term 'any other measure provided by the Italian law' contrary to the extraordinary proceedings provided by Article 78 of the Consolidated Banking Law ²⁰ , Article 51 of the Consolidated Law on Financial Intermediation ²¹ and the court order of insol-

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						<p>vency of banks (Art. 82 of the Consolidated Banking Law²²).</p> <p>The wording "restitution of assets to third parties" with reference to Article 74 of the Consolidated is not quite correct, because Article 74 provides the restitution of financial instruments to the clients. It seems that the Italian legislator accidentally used the terms of Article 83 Consolidated Banking Law, also repeated in Article 3, paragraph 1 of the L.D.</p> <p>Concerning the insolvency proceedings under a foreign law, if applicable, mentioned in this provi-</p>

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						sion it becomes clear, that this is no rule for the determination of the applicable law, but that every participant will be governed by the insolvency laws of its own state independently from the applicable law to the system (see also the executive summary of the Netherlands).
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	L.D.	A: 1 N: f	'set-off' shall mean the conversion, according to the rules of the system, into one claim or one obligation of claims and obligations of one or more participants towards one or more participants resulting from transfer orders;	The technical term 'netting' used in the Italian version of the directive had been translated into " <i>compensazione</i> " in the L.D. Although the term " <i>compensazione</i> " makes under Italian Civil Law only reference to bilateral relationships, the Italian legislator decided to

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						make use of this term instead of the more technical term netting, because already used for example by the Bank of Italy in its Regulations concerning clearing and settlement systems.
A: 2 N: 1	`settlement account´ shall mean an account at a central bank, a settlement agent or a central counterparty used to hold funds and securities and to settle transactions between participants in a system;	N				The L. D. does not explicitly provide a definition of 'settlement accounts'. But it makes use twice of such term, once in Article 1, let. d), and the second time in Article 5, paragraph 1, let. a).
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 sys-	N	L.D.	A:1 N: i	'collateral' shall mean every right having as its object, or every right in relation to, money, financial instruments or other assets immediately convertible by anyone and established in whichever manner and form in order to guarantee the performance of the present and future obligations arising from transfer orders within a	The term 'collateral security' in Article 2 (m) of the SFD is replaced by 'collateral' ('garanzia') in the L.D. and has a broader interpretation than the SFD in order

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	tem, or provided to central banks of the Member States or to the European central bank.				system or from operations in connection with the functions of the central bank;	to cover all types of guarantees. Due to the fact that the scope of Recital (9) of the SFD is only a minimum of harmonisation in order to avoid any interference with the national regulations and concepts of collateral securities, Italy – not only with regard to the present situation, but also with reference to the future developments – decided that all types of (contractual and legal) guarantees, even those granted outside a settlement system and independent from operations of the central banks should be included in the definition in order to provide a wide range of

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						protection against systemic risks. (see also Article 8 of the L.D.).
	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	L.D.	A: 2 P: 1 S: 1 N: a)	Transfer orders, set-off and the consequent payments and transfers are mandatory between the participants of a system, and in case of the opening of insolvency proceedings against a participant these shall be binding on third parties, including the authorities in charge of such proceedings, if the transfer orders: a) have been entered into the system prior to the moment of opening the insolvency proceedings;	Art. 71 of the Consolidated Law on Financial Intermediation ²³ , now repealed by Art. 13 of the L.D., already provided the finality of settlement transactions of financial instruments, now subject to the L.D. The Italian legislator decided to supersede Art. 71 of the Consolidated Law on Financial Intermediation by a provision regarding security as well as payment systems and to avoid all further doubts in re-

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						lation to the former interpretation of Article 71 of the Consolidated Law on Financial Intermediation. Almost identical provision implemented in the Spanish and Portuguese law.
A: 3 P: 1 S: 2	Where, exceptionally, transfer orders are entered into a system after the moment of opening of insolvency proceedings and are carried out on the day of opening of such proceedings, they shall be legally enforceable and binding on third parties only if, after the time of settlement, the settlement agent, the central counterparty or the clearing house can prove that they were not aware, nor should have been aware, of the opening of such proceedings.	N	L.D.	A: 2 P: 1 S: 1 N: b)	b) have been entered into the system after the moment of opening of insolvency proceedings and carried out on the same day of the opening of such proceedings, if the settlement agent, the central counterparty, or the clearing house proves that at the moment of the entry of the transfer order they were not aware of the opening of the insolvency proceedings or could not have been aware of it.	This rule provides an exemption to the common rules of Italian bankruptcy law stating that after the deposit of the respective decision all payments and transfers are not binding for third parties, even in case the of unawareness of the opening of the bankruptcy proceedings. Although it seems that according to the L.D. the central counterparty, the set-

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						tlement agent or the clearing house have not only to demonstrate, but to give evidence of their unawareness of the opening of the insolvency proceedings, which, in fact, is impossible, the Ministry of Treasury pointed out that the provision of the L.D. contains a presumption of the unawareness, which can be destroyed by means of a counter-proof ²⁴ .
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	L.D.	A: 2 P: 3	Nothing, including nullity, can prevent the finality of the transfer orders, the set-off and the subsequent payments and transfers as defined in paragraph 1 towards the system.	
A: 3 P: 3	The moment of entry of a transfer order into a system shall be defined by the	N	L.D.	A: 2 P: 2	The Italian systems define the moment of entry of a transfer order into the same system in ac-	The moment of entry of a transfer order

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	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.				cordance with the provisions given by the Bank of Italy and Consob pursuant to their respective competence.	into the payment systems is defined by the respective Italian systems in the following Regulations: - To BI-REL apply the guidelines of BI-REL/TARGET ²⁵ . - BI-COMP does not have any formal regulations, but it is governed by the terms and conditions of the contracts executed with the participants of such system, because it is managed by the Bank of Italy itself ²⁶ . For the scope of uniformity Bank of Italy in accordance with Consob issued a Regulation on 30 September 2002, published in the Official Gazette no. 238 of 10 October 2002,

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						<p>providing the general principles for the determination of the moment, when the transfer order enters into the Italian securities settlement systems.</p> <p>According to Article 1 of this Regulation the Italian systems have to fix such moment in such a way which guarantees the exact and objective determination of the same, in observance of the requirements of settlement risk control and ensuring the unitariness and consistency of the various phases of the process regarding the execution of the transfer orders.</p> <p>Article 2 of this Regulation specifies</p>

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						that the this specific moment has not to be prior to moment, in which a) according to the rules of the respective gross or net settlement system, the transfer orders become irrevocably binding for the participants, or b) with regard to systems with a central counterparty, the latter assumes the position of a contractual counterpart. Article 3 finally provides that the moment in which transfer orders not concerning operations on regulated markets are entering the settlement system can not be prior to the relevant moment in re-

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						<p>spect to transfer orders regarding operations executed on the same date on a regulated market and having as its object the same financial instruments and, in any way, not prior to third day following the date of the settlement. With reference to the systemic risk Bank of Italy considers that the moment of entry of the transfer order coincides with or it is subsequent to the moment of irrevocability of the same. The single systems already providing in their single regulations the entry of the transfer order into the systems as well as determination of the moment of irrevoca-</p>

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						bility in accordance with the L.D. 210/2001. Unless already happened, each system will issue a new regulation in the near future in order to better define such moments pursuant to the above mentioned Regulation.
A: 4 S: 1	Member States may provide that the opening of insolvency proceedings against a participant shall not prevent funds or securities available on the settlement account of that participant from being used to fulfil the participant's obligations in the system on the day of the opening of the insolvency proceedings.	D	L.D.	A: 5 P: 1 S:1 N: a	Following the opening of the insolvency proceedings, the settlement agent, in the name and on behalf of the participant, and for the scope of the performance of the obligations of the insolvent participant in connection with the participation in the system arisen prior to the opening of the insolvency proceedings, can make use of: a) funds and financial instruments available on the settlement account of the participant;	
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 se-	D	L.D.	A: 5 P: 1 S: 1 N: b	b) credit lines granted to the participant against an existing collateral and appropriated to fulfil the obligations of such participant against the system; this collateral shall be subject to the	

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	curity to fulfil that participant's obligations in the system.				provisions of Article 8.	
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	L.D.	A: 4 P: 1	A transfer order may not be revoked from the moment as defined by the rules governing the Italian systems.	The moment of irrevocability is defined in the Regulations of the following Italian systems: - Article 12 of operating rules of gross settlement service designated Express of Montetitoli S.p.A. (see note 33); - Regulation of Cassa di Compensazione e Garanzia S.p.A. in conjunction with the L.D. ²⁷ To BI-REL apply the guidelines of BI-REL/TARGET- according to which the moment of irrevocability is the moment of the settlement of the various positions on the accounts,

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						<p>which coincides with those terms applica- ble within the Euro- pean Union;²⁸. BI-COMP and LDT, both managed by Bank of Italy do not have any formal Regulations. Bank of Italy considers that the moment of ir- revocability and the moment of the en- trance of the transfer orders into the sys- tems are identical, which means:</p> <ul style="list-style-type: none"> - BI-COMP as the moment of daily net- ting; and - LDT as the mo- ment of purchase of the final obligations in relation to various markets <p>Bank of Italy is work- ing on the modi- fication of the terms</p>

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						and conditions of the contracts to be executed with the participants of the system BI-COMP. For LDT no modifications are provided, because this is going to be replaced by Express II in the near future.
	PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS					
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	L.D.	A: 3 P: 1, 2, 3 and 7, 8, 9	<p>1. For the purpose of this legislative decree, the moment of the opening of an insolvency proceeding in Italy shall be the day, the hour and the minute when the suspension of payments of the liabilities and the suspension of the restitution of assets to third parties according to the provisions applicable to each single procedure will become effective.</p> <p>2. In case of compulsory administrative liquidation as set forth by the Consolidated Banking Law and the Consolidated Law on Financial</p>	Slightly different from the provision of the Directive and for reasons of the existing national law, the moment of opening is generally considered the moment of suspension of payments and transfers of assets and not the moment of the issuing of the administrative or judicial decision. These

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					<p>Intermediation the effectiveness as defined in paragraph 1 shall start with the installation of the liquidators and in any way on the third day following the date of the liquidation decree. The moment of the installation of the liquidators is determined/collected by the Bank of Italy in accordance with the procès-verbal as to Article 85 of the Consolidated Banking Law.</p> <p>3. In case of an order of the judicial authorities, the effectiveness as defined in paragraph 1 shall start at the moment of the deposit of the decision, which, for such purpose, has to be testified at the bottom [of the decision] by the clerk, indicating also the hour and minute of the deposit.</p> <p>7. The moment of opening of the insolvency proceedings in another Member State of the European Union shall be considered the day, the hour and the minute when the insolvency proceedings become effective, if the notice set forth in paragraph 5 will receive the Bank of</p>	<p>are, at least according to Italian Banking Law, two different moments. With regard to the systemic risk the moment of the suspension of payment and transfers is decisive and therefore considered as moment of opening of the insolvency proceedings by the L.D. The respective general rule for the moment of the opening is laid down in Article 3, paragraph 1. The special rule in paragraph 2 refers to administrative and in paragraph 3 to judicial proceedings. Article 3, paragraph 2, follows the provision set forth in Article 83, paragraph 1 of the Consolidated</p>

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					<p>Italy on the same day. In any other case the moment of opening shall be considered the moment, when, in any event, the Italian systems have been informed about the opening of the insolvency proceedings.</p> <p>8. In case, the opening of insolvency proceedings in a state not belonging to the European Union shall have the same effect on Italian territory as set forth in paragraph 1, the moment of opening of the proceedings shall be the moment when the Italian systems have been informed of the opening of such proceedings.</p> <p>9. In the events defined in paragraph 7, sentence 2, and paragraph 8, the Italian systems shall immediately notify to the Bank of Italy the moment and the circumstances under which they have been informed of the opening of the proceedings.</p>	<p>Banking Law²⁹ in relation to the compulsory administrative liquidation. According to this the decree opening the proceedings will be issued by the Ministry of Treasury, but the effectiveness of the suspension of payments and transfers of assets is only given from the moment of the installation of the liquidators or on the third day following the issuing date of the decree, if earlier³⁰.</p> <p>The judicial proceedings as set forth in Article 3, paragraph 3, of the L.D. apply practically almost only in the case of bankruptcy of an <i>agente di cambio</i>, due</p>

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						to the fact that mainly special administrative proceedings are provided for the other types of institutions under this L.D. The moment of opening of the judicial bankruptcy proceedings coincides with the moment of deposit of the bankruptcy decision with the clerk of the administrative office of the court, who is obliged to affix the date and hour of the deposit of the decision on the same. This indication is equal to the moment of the opening of the insolvency proceedings. Article 3, paragraph 3, therefore is the only provision, which determines exactly the

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						moment of the opening of the insolvency proceedings, also avoiding in such way the different interpretations by Italian case law ³¹ and scholars existing in relation to decision in the ordinary judicial bankruptcy proceedings. The different opinions are taking into consideration either the date of the decision or the date of deposit of the same in the administrative office of the court as well as in relation to the hour the application of the zero hour rule or the exact time of the deposit. The administrative proceedings of the suspension of payments according to Article

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>74 of the Consolidated Banking Law are indicated neither in paragraph 2 nor 3. This requires that the notice of the date and time of the effectiveness of the suspension of payments is made according to Article 3 (1) and 3 (4) of the L.D. or due to respective instructions by Bank of Italy.</p> <p>With regard to the opening of the insolvency proceedings in other Member States, paragraphs 7 and 8 provide a presumption for the opening of the insolvency proceedings abroad in order to avoid any retroactive effect, which could raise due to the time lag for the</p>

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						communication of the same.
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	L.D.	A: 3 P: 4	The competent judicial or administrative authority notifies immediately, also by means of data communication, the opening of the insolvency proceedings to the Bank of Italy.	The term "administrative authority" has to be interpreted in a broad way: Although there are other persons involved in the insolvency proceedings, this paragraph only mentions judicial and administrative authorities as notifying bodies. The liquidators, in charge of the cumulative administrative liquidation and the suspension of payments, both insolvency proceedings indicated under Article 1, let. p) of the L.D., are only be appointed by the administrative authority, but not part of it. Due to the fact that it can be said that

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1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						these are determining for the moment of opening of the insolvency proceedings, they also must have the right to communicate such event to the Bank of Italy. With regard to the administrative character of the insolvency proceedings, they have to be considered in a very broad manner "administrative authority". The Bank of Italy is going to issue new regulations and terms and conditions for the adoption of all relevant provisions of the L.D.
A: 6 P: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N	L.D.	A: 3 P: 5, 6	5. The Bank of Italy shall receive notice of the opening of insolvency proceedings in other Member States of the European Union.	

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
					6. The Bank of Italy shall immediately notify the opening of insolvency proceedings in Italy to Consob and the other Italian systems as well as to the authorities chosen by the other Member States of the European Union and to the European Central Bank. The Bank of Italy shall immediately notify the opening of insolvency proceedings in another Member State of the European Union notified as set forth in paragraph 5, to Consob and the other Italian systems.	
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	L.D.	A: 2 P: 4	The opening of insolvency proceedings shall not have retroactive effects on the rights and obligations of participants in connection with their participation in a system, which they obtained earlier than the moment of the opening of such proceedings.	In the past, Art. 71 of the Consolidated Law on Financial Intermediation, now repealed by Article 13 of the L.D., already provided that the clearing, settlement and guaranteeing of transactions carried out through the intervention of the systems regulated pursuant to Articles 69 and

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						70 shall be final and may not be declared ineffectual with regard to the retroactive effect of the opening of bankruptcy proceedings, even where the participants are subject to such proceedings.
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 law governing that system shall determine the participation of that participant.	N	L.D.	A: 7 P: 1	In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, such participation are subject to the governing law of the system.	On 31 May 2002 the Council Regulation No. 1346/2000 on insolvency proceedings has entered into force determining jurisdiction and applicable law on insolvency proceedings. The Regulation 1346/2000 especially provides in Article 9 in conjunction with Recital 27 that the special provisions of the Directive/L.D. take precedence over the general rule of the

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
	INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FORM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER					Regulation.
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	L.D.	A: 8 P: 1, 2, 3, 4, 5, 6 and 7	1. In case of insolvency proceedings being opened against a participant in a system or against an intermediary, on whose behalf the participant carries out transfer orders as set forth in Article 6, or against a counterparty to central banks, the collateral issued prior to the moment of the opening of insolvency proceedings for credits of definitive operations as defined in Article 2, or connected with functions of the central bank, can be realised for the exclusive satisfaction of the guaranteed credits. 2. The realisation of the collateral, including those provided under a pledge, shall be occur according to the legal and contractual provisions applicable, even in derogation of the provisions of the insolvency proceedings, except for what is set forth in paragraph 3.	The task of Article 8 is the separation of the collateral from the insolvency estate, in order that the participant can make use of it without the necessity of any court order or any other authorisation, but directly by itself. This also means that the Bank of Italy as settlement agent in the netting systems does not have to start the so called unwinding of the transfer orders for the termination of the daily settlement

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					<p>3. In relation to time contracts executed between participants in a system or between counterparties of central banks and central banks Article 203 of the Consolidated Law on Financial Intermediation³² shall apply in any case, the participant or the counterparty of the central banks are subject to insolvency proceedings. For the application of Article 203, paragraph 2, of the Consolidated Law of Financial Intermediation the market values shall be calculated with reference to the opening day of the insolvency proceedings. The credits and debts arising from the termination of the time contracts shall be compensated.</p> <p>4. The creditor notifies without delay to the authorities in charge of the insolvency proceedings the outcome of the operations as set forth in the paragraphs above.</p> <p>5. The amount exceeding the realised credit as set forth in paragraph 2 or the debit balance resulting from operations as to paragraph 3 shall be transferred to the insolvency proceedings. The credit not sufficient for the realisation ac-</p>	<p>process, but can continue the settlement process as usually. Article 203 of the Consolidated Law on Financial Intermediation, first of all, makes reference to the special administrative proceedings regarding banks and in a second moment also provides for the application of Article 76 of the Italian Bankruptcy Law to derivatives, and similar financial instruments as well as different types of time contracts. In case the contract provides the termination after the opening of the insolvency proceedings, Article 76 causes the termination of the contracts on the day</p>

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					<p>according to paragraph 2 or the credit balance resulting from operations as to paragraph 3 can be asserted against the insolvency proceedings according to the provisions generally applicable to the same.</p> <p>6. No claim, including the claim of nullity, can prejudice the system to realise the collateral according to paragraph 1.</p> <p>7. This Article shall apply to the interventions of the guarantee systems provided in Articles 68 and 69 of the Consolidated Law on Financial Intermediation.</p>	<p>of the opening of the insolvency proceedings and the difference between the contractual price and the value of the derivatives on the day of the opening of the insolvency proceedings will be handled, if negative, as ordinary debt of the insolvency proceedings, if positive, as part of the bankrupt's estate. Article 203, paragraph 2 of the Consolidated Law on Financial Intermediation concedes to make reference to the replacement cost risk (criteria for the evaluation of obligations terminated due to insolvency proceedings) with regard to the derivatives. In</p>

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>this case the market values are calculated as of the date of the opening of the insolvency proceedings and debts and credits resulting from the termination of the contract are compensated.</p> <p>The reference to Art. 203 of the Consolidated Law on Financial Intermediation shall render the avail of international types of contracts simpler in Italy providing European legal standards in relation to e.g. close out netting clauses in Master Agreements regarding derivatives or time contracts over the counter.</p> <p>Finally, the last paragraph of this Article</p>

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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>makes reference to the Guarantee Funds (please also refer to the remark next to the definition of clearing house above), to which Article 8 also applies. Pursuant to Article 68, paragraph 1, and Article 69, paragraph 2, of the Consolidated Law on Financial Intermediation a Contracts Guarantee Fund and the Guaranteed Settlement Fund have been set up, both also performed by CC&G, which is an Italian particularity (please refer to the definition 'guarantee system' in Article 1, let. t) of the L.D.).</p> <p>The first one is destined to assure the good aim of contracts</p>

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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						having as objects shares, convertible debentures, warrant, covered warrant and certificates representing shares of closed warrants or real estate investment funds traded on the Stock Exchange or New Market. The Contracts Guarantee Fund will be activated in case of insolvency of the stock exchange. The Ministry of Treasury explained that for reasons of non-discrimination the Contracts Guarantee Fund was also referred to in this Article. The Guaranteed Settlement Fund aims to guarantee the successful clearing and settlement of con-

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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						tracts for shares, convertible bonds, warrants, covered warrants, and certificates representing shares of closed warrants or real estate investment funds traded on the Stock Exchange or New Market, aware, however, that the contracts specified in article 6, letter d) of CONSOB regulations approved by resolution 11768 of 23/12/1998, to be settled after more than 5 days or at prices which are more than 10% greater than the official prices in the market of trade and for carryover contracts opened on the settlement day in which a default takes place

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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>place are not subject to this guarantee.</p> <p>In case of insolvency of a participant to a system, upon request CC&G intervenes on behalf of the Guaranteed Settlement Fund on the multilateral positions at the clearing house succeeding in the contractual positions of the insolvent participant guaranteeing the payment of debts of the same.</p> <p>The Funds are mutual and CC&G, in this case, does not cover losses caused from insolvency with own resources, but uses the margins pledged by the member and, if insufficient, those pledged by the other members to the</p>

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						Funds. Participation to the Funds is mandatory for all participants who use the clearing and settlement service in order to settle the contracts specified in article 1, paragraph 1 of the Provision of the Governor of the Bank of Italy, in agreement with Consob, dated 16 June 1999.
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	N	L.D.	A: 9 P: 1, 2	When the rights having as its object, or when the rights in relation to financial instruments are resulting from registrations or annotations to a book of account, an account or an administration or centralised deposit system located in one of the Member States of the European Union, the conditions to transfer such rights as well as the establishment and the realisation of the collaterals and any other binding obligations on the same are exclusively governed by	Article 9, paragraph 2 of the Directive provides for the determination of the applicable law the criteria of place of relevant intermediary approach (PRIMA). The Italian legislator interpreted Art. 9, paragraph 2, of the Directive in a "broad view", not limiting its

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
	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.				<p>the law where the book of account, the account or the administrative or the centralised deposit system, subject to registrations and annotations directly in favour of the holder of the right, is situated.</p> <p>2. If the book of account, the account or the administrative or centralised deposit system are located in Italy and the financial instruments are not introduced into an Italian system by means of dematerialization pursuant to Article 28 of the legislative decree no. 213 dated 24 June 1998, the conditions for the transfer of rights as well as the establishment and the binding obligations and collaterals on the same are governed by the provisions of Chapter V of same legislative decree n. 213/1998, as far as applicable.</p>	<p>application to the participants, central banks or the European Central Bank, but to all holders of legally recorded rights, in order to extent the protection of the systems against systemic risk. In this respect not only the holding, but also the conditions of transfer, realisation and all other rights concerning the collateral are exclusively governed by the law of the place of the registration.</p> <p>Furthermore, the term 'rights in securities', implemented by L.D. as rights in relation to financial instruments, as well as the general term "any other binding obligations on the</p>

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>same” opens the possibility to the national legislator to include for example statutory liens. This also in context with the broad definition of collateral (Article 1, let. i) of the L.D.), which already includes other types, such as the <i>pegno irregolare</i> (irregular pledge).</p> <p>Finally it has to be outlined that the Directive provides that registration is decisive not only for the applicable law, but also for the existence of the collateral security. The last concept has not been transposed into Italian law, due to the fact that there are statutory liens under Ital-</p>

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						ian law, which do not require any registration (Article 2761, paragraphs 2 and 3 of the Italian Civil Code). The Italian legislator deemed it more correct to implement Article 9, paragraph 2 of the Directive only as provision regarding the applicable law. In addition to Article 9 (1) of the L.D. 210/2001, Article 9 (2) provides a special rule, in case Italian law applies according to the PRIMA principle, and the book of account, the account or the administrative or centralised deposit systems are situated in Italy, but the financial instruments are not entered into

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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>an Italian system for dematerialized in-struments. The word-ing of the provision is – probably for stylistic reasons – not very clear and the words administrative or centralised deposit sys-tems would have to be repeated with regard to the Italian systems.</p> <p>With respect to this amendment, the in-terpretation of this provision still re-mains unclear due to its double entendre, which lead to the following under-standings:</p> <p>In the case that the dematerialization is denied for an Italian system, the applica-</p>

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						<p>tion of the provisions concerning dematerialised financial instruments on embodied financial instruments would lead to the creation of a fluent pledge on embodied financial instruments (e.g. covered warrants issued in the UK and introduced into the system of Montetitoli by an Italian intermediary).</p> <p>If the denial affects the Italian system, which means that the financial instruments have been introduced into a foreign system, Article 9, paragraph 2, of the L.D. 210/2001 will only confirm the application of the PRIMA principle in this case.</p>

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						<p>Further it provides general application of the provision regarding dematerialised financial instruments in Italian administrative or centralised deposit systems, which for the time being is only the system of Montetitoli. Such interpretation would be important with regard to the Eurolinks Network, in which Montetitoli, the Italian CDS, participates.</p> <p>The Italian legislature intended the second interpretation and regulated only the perfection of collateral pursuant to Italian law on financial instruments issued in accordance with the</p>

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
						Italian system of dematerialization in another legislation. Moreover, Article 9 (2) of the L.D. 210/2001 also rules that, as far as applicable, Articles 28 to 46 of the L.D. 213/1998 concerning the dematerialization of financial instruments shall apply to the establishment and transfer of such collaterals.
	FINAL PROVISIONS					
A: 10 S: 1	Member States shall specify the systems, which are to be included in the scope of this Directive and shall notify them to the Commission and inform the Commission of the authorities they have chosen in accordance with Article 6(2).	N	L.D.	A: 10 ³³ P: 1, 2 and 3	1. The systems indicated in the attachment are considered as Italian systems in accordance with this legislative decree. 2. The Bank of Italy designates the systems for the execution of the transfer orders as defined in Article 1, paragraph 1, let. m), number 1), and in agreement with Consob the systems for the execution of transfer orders as defined Arti-	The Ministry of Treasury notified to the Commission the Italian systems indicated in the Annex of the L.D., because these are all systems presently existing in Italy (no cross-border systems as Clear-

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					cle 1, paragraph 1, let. m), number 2), to which the provisions of this legislative decree shall be applicable. Under the same conditions the designation of the systems can be revoked, therein contained those indicated in the first paragraph. 3. The Ministry of Treasury, Budget and Economic Planning shall notify to the European Commission the Italian systems designated pursuant to this Article.	stream). For this reason there is no necessity at the moment for the Bank of Italy to designate systems to which this L.D. shall apply ³⁴ . It is provided that in June 2003 a new BI-REL system and EXPRESS II shall start working.
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	L.D.	A: 11 P: 1 N: a), b)	In the decree enacted in accordance with the proceedings indicated in Article 10, paragraph 2, are provided the conditions pursuant to which a) each Italian system shall notify to the Bank of Italy its own participants and care for the prompt updating of such communication; b) each Italian authority shall notify to the Bank of Italy the systems to which it participates;	Bank of Italy is evaluating possibilities for the modification of its rules and its terms and conditions provided in the contracts for the participation in the systems in order to implement the provisions of the L.D.
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,	D				The Italian payment systems are already subject to the oversight of the Bank of

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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
	which fall under their jurisdiction.					Italy (Article 146 of the Consolidated Banking Law with regard to payment systems ³⁵). Bank of Italy together with Consob supervise the security settlement systems and guarantee funds (Article 77 of the Consolidated Law on Financial Intermediaries ³⁶). Furthermore, companies with registered offices in Italy, which intend to manage clearing and settlement services and the gross settlement services have to request an authorisation from Bank of Italy in agreement with CONSOB according to the Regulation of the same concerning the Clearing and set-

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Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
						tlement of transac-tions in non-deriva-tive financial instru-ments, under Article 69 of the Consoli-dated Law on Finan-cial Intermediation. Such an authorisation has been granted to Montetitoli S.p.A. for Express. Authorisa-tion is also required for the derivatives market according to the respective Regu-lation of Bank of It-aly and has been granted to CC&G.
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	L.D.	A: 11 P: 1 N: c)	c) anyone with a legitimate interest may require a participant to inform him of his systems and to provide information about the main rules governing the functioning of such system.	The L.D. adopted the transparency rule of the Directive in the broad manner as re-quested by the Euro-pean Parliament in order to include all possible requests from consumers.

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

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

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

Italy – final report

Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
A: 11 P: 1 S: 1,2	Member States shall bring into force the laws regulations and administrative provisions necessary to comply with this Directive before 11 December 1999. They shall forthwith inform the Commission thereof.	N				The L.D. entered into force on 22 June 2001. According to Article 7 of the decree of the President of the Italian Republic acts, legislative decrees and other legislative acts enter into force on the 15 th day following the publication of the same in the official gazette (<i>Gazzetta Ufficiale</i>), unless otherwise provided. The L.D. had been published on 7 June 2001 ³⁷ .
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	L.D.	Pre- amble	Legislative Decree of 12 April 2001, no. 210, published in the official gazette (<i>Gazzetta Ufficiale</i>) no. 130, dated 7 June 2001 – implementation of the Directive 98/26/EC on settlement finality in payment and securities systems The President of the Republic With reference to Articles 76 and 87 of the	The directives for the preambles are laid down in Article 3 of the decree of the President of the Italian Republic of 28 December 1985, no. 1092, providing the formula according to

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

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

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks
					<p>Constitution; with reference to the directive 98/26/EC of European Parliament and the Counsel of 19 May 1998 on settlement finality in payment and securities systems; with reference to the Law of 21 December 1999, no. 526, carrying the provisions for the performance of the obligations arising from the Italian membership in the European Community (Community Law 1999) and in particular Articles 1 and 18 concerning the execution of the legislative delegation for the implementation of the directive; with reference to the Consolidated Banking Law, passed by legislative decree on 1 September 1993, no. 385; with reference to the Consolidated Law on Financial Intermediation, passed by legislative decree on 24 February 1998, no. 58; with reference to the preliminary resolutions of the Council of Ministers taken at the meeting on 28 December 2000; in admittance of the expert's opinions of the</p>	<p>which the preamble of the L.D. has been set up.</p>

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

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
					competent parliamentary commissions; with reference to the resolution of the Council of Ministers taken at the meeting on 2 March 2001; on proposal of the Minister of European Community Politics and the Minister of Treasury, Budget and Economic Planning, in agreement with the Minister of Foreign Affairs and the Minister of Justice; ENACTS the following legislative decree:	
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	n. a.				

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

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli-cability ²	Refe-rence	Article (A; P; S; N) ¹	Content	Remarks
	European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.					
A. 13	This Directive shall enter into force on the day of its publication in the <i>Official Journal of the European Communities</i> .	n. a.				
A: 14	This Directive is addressed to the Member States.	n. a.				

Provisions of the L.D., which have no equivalent in the Directive:

- According to the principles and criteria lay down by the Italian law 526/1999 the L.D. should also contain provisions to reduce the risks connected with the relationships between the participants and the intermediaries/brokers on whose behalf the participants are operating. This provision is necessary due to the peculiarity of the Italian securities settlement system, which imposes on the participants all risks of the settlement as well as the obligation of settlement even in case of the insolvency or default of the intermediary. In order to assure the scope of the Directive and in particular the finality of the transfer orders without any exception in the Italian securities settlement system and also taking into account the Italian bankruptcy provisions, a special provision for the insolvency of an intermediary was necessary. In case of the insolvency of the

Due to this reason the L.D. provides in its **Article 6** the following:

"1. In the event of insolvency proceedings being opened against an intermediary on whose behalf the participant carries out transfer orders as defined in Article 1, paragraph 1, let. m), no. 2), the respective agreements between the participant and the intermediary shall not terminate. The liquidator or the liquidating body shall subrogate into the rights and obligations arising out of the agreement until their complete performance. In case of default,

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

and in derogation of the provisions presently in force, the participant can receive payment of the capital, the interests and of the costs by making use of the amount or the price of the financial instruments received for the orders carried out in good faith and for which the participant has the right to retention for its own credits. The amounts of the provision for the execution of the transfer orders and the amount resulting from the realisation of the guarantee or from guarantee systems with the purpose to guarantee the successful clearing and settlement are deducted.³⁸

2. The participant shall immediately notify the terms and conditions of the transaction to the liquidator or the liquidating bodies indicating the total amounts used for the satisfaction of his own credit. The residual amount shall be an ordinary debt with regard to the insolvency proceedings.

3. The provisions of Article 8 apply to the collaterals granted to the participant prior to the moment of the opening of the insolvency proceedings for credits arising from finality settlements as defined in Article 2 and the rights as set forth in paragraph 2.

4. In case of partial performance of the orders the liquidators can not contest towards the participant the payment of money and of the fulfilment of the debts connected with the performance of the transfer orders."

□ **Article 12 of the L.D.** sets forth:

"With Decree of the Ministry of Treasury, Budget and Economic Planning, in accordance with the Ministry of Justice, the Bank of Italy and Consob can be enacted technical provisions in order to facilitate the application of this L.D."³⁹

□ **Article 13 of the L.D.** provides:

"1. On the date this L.D. will enter into force, Article 71 of the Consolidated Law on Financial Intermediation will have been repealed.

2. Article 72, paragraph 6, of the Consolidated Law on Financial Intermediation will be superseded by the following:

'6. For the liquidation of market insolvency the provisions of the L.D. implementing the directive 98/26/EC of the European Parliament and the Council of 19 May 1998 on the settlement finality in payment and securities settlement systems."

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

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

- ¹ Legislative Decree of 12 April 2001, no. 210, published in the official gazette (*Gazzetta Ufficiale*) no. 130, dated 7 June 2001 (hereinafter referred to as "L.D."), transposed the Directive 98/26/EC on settlement finality in payment and securities systems (hereinafter referred to as "Directive") into Italian law.
According to the possible procedures of legislation provided by the Italian Constitution, the Directive was not implemented by an Act of Parliament, but by a legislative decree, having the force of law, drafted by the Government and enacted by the President of the Italian Republic:
With reference to Article 76 of the Italian Constitution, on 21 December 1999, 10 days after expiration of the implementation term set forth in Article 11 of the Directive, with law no. 526 of the same day, published in the official gazette of 16 January 2000, the Italian Parliament delegated to the Government the implementation of the Directive 98/26/EC instructing the same to make use of the options as provided in Article 4 of the Directive. Under leadership of the Minister of Treasury, Budget and Economic Planning the L.D. was drafted in co-operation with the Ministry of Justice. It was finally approved by the Council of Ministers on 2 March 2001 and enacted by the President of the Italian Republic, as provided by Article 87 of the Italian Constitution, on 12 April 2001.
- ² **Article 1** of the L.D. contains some more definitions not contained in the Directive, which are the following:
- "a) 'Consolidated Banking Law' shall mean the legislative decree 1 September 1993, no. 385 and subsequent modifications;
 - b) 'Consolidated Law on Financial Intermediation' shall mean the legislative decree 24 February 1998, no. 58 and subsequent modifications;
 - c) 'Consob' shall mean the Companies and Stock Exchange Commission (*Commissione Nazionale per le Società e la Borsa*);
 - e) 'central banks' shall mean the European Central Bank and the national central banks of the Member States of the European Union;
 - f) 'intermediary' shall mean one of the institutions as defined in let. h) no. 1), 2) and 4), which does not participate in the system;
 - q) 'gross settlement' shall mean the settlement transaction for the transaction of transfer orders without any set-off;
 - s) 'Italian system' shall mean one of the systems indicated in the Annex to this L.D. as well as one of the systems designated according to Article 10;
 - t) 'guarantee system' shall mean one of the systems pursuant to Article 68, paragraph 1, and Article 69, paragraph 2, of the Consolidated Law on Financial Intermediation;
 - w) 'system outside the European Union' shall mean a payment or securities settlement system of a state not belonging to the European Union.
- ³ Pursuant to the indications in the Annex the 'Italian systems' are the following:
- payment systems: BI-REL and BI-COMP
 - security systems: LDT and EXPRESS
 - Clearing and guarantee systems for the derivative market managed by Cassa di Compensazione e Garanzia S.p.A.
- ⁴ Legislative decree 1 September 1993, no. 385 (Consolidated law on banking and credit issues).
- ⁵ **Article 1, paragraph 2, let. a) of the Consolidated Banking Law**
'Italian bank' shall mean a bank having its registered office in Italy.

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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Article 1, paragraph 2, let. b) of the Consolidated Banking Law

'EC bank' shall mean a bank having its registered office and head office in any one member state other than Italy.

The L.D. makes use of the term 'Italian and Community bank' instead of 'credit institution' as set forth in the first indent of the Art. 2 let. b) of the Directive. Banks according to Art. 10 of Consolidated Banking Law are the only undertakings to carry out banking activities, which are 'fund-raising on a public basis and the granting of credit' (Article 10, paragraph 1 of the Consolidated Banking Law). These banking activities are the same as those provided in Article 1, paragraph 1 of the directive 77/780/EC, now Article 1, paragraph 1 of the directive 2000/12/EC.

With regard to territorial restriction to Italian and Community banks the L.D. only expressly states the requirements of the bank's registered office in one of the Member States, now contained in Article 6 of the directive 2000/12/EC.

⁶ The directive 2000/12/EC combines all previous directives on banking issues into one single act. Art. 2 (2) of the directive 77/780/E, which is no longer in force, is now Article 2 (3) of the directive 2000/12/EC.

⁷ Legislative decree 24 February 1998, no. 58 (Consolidated law on financial intermediation according to the articles 8 and 21 of law 6 February 1996, no. 52).

⁸ Article 1, paragraph 1, let. e) of the Consolidated Law on Financial Intermediation

'*società di intermediazione mobiliare*' (SIM) shall mean an undertaking, other than a bank or a financial intermediary entered in the register referred to in Article 107 of the Banking Law, authorised to provide investment services having its registered office and head office in Italy.

Article 1, paragraph 1, let. f) of the Consolidated Law on Financial Intermediation

'EU investment firm' shall mean an undertaking, other than a bank, authorised to provide investment services having its registered office and head office in the same member state of the European Union, other than Italy.

The Consolidated Law on Financial Intermediation contains the provisions of the Italian legislative decree of 23 July 1996, no. 415, which implemented the directive 93/22/EC. The terms *società di intermediazione mobiliare* and EU investment firm are therefore the implementations of the term investment firm of said directive.

⁹ Article 8 of the EC-Regulation 3603/93

1. For the purposes of Articles 104 and 104b (1) of the Treaty, 'public undertaking' shall be defined as any undertaking over which the State or other regional or local authorities may directly or indirectly exercise a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

- (a) hold the major part of the undertaking's subscribed capital;
- (b) control the majority of the votes attaching to shares issued by the undertaking; or
- (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

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

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

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2. For the purposes of Articles 104 and 104b (1) of the Treaty, the European Central Bank and the national central banks do not form part of the public sector.

¹⁰ *Agenti di cambio* are a special Italian category of financial intermediaries, which are allowed to carry out investment services for third parties. With the introduction of securities investment firms in 1991, the figure of the *agente di cambio* was abolished for the future. Therefore this special figure is going to die out.

¹¹ Bank of Italy Regulation on Clearing and settlement of transactions in non-derivative financial instruments, under Article 69 of the Consolidated Law on Financial Intermediation, of 8 September 2000 defines in its Article 6 the participants of the systems, among which are also mentioned the Italian Post Office (Poste Italiane S.p.A.) and Cassa Depositi e Prestiti, both have been privatised and are now private companies with public authorities as shareholders. These companies are public undertakings pursuant to Article 8 of the EC-Regulation 3603/93, a category not provided by the Directive, which had to be added for such reasons.

The addition of public undertaking to the institutions in the L.D. does not violate the Directive due to the fact that this a combination of the public authorities and private companies, both indicated by the Directive.

Article 6 - Participants

1. The following may participate in the settlement services in their own name for own account or in their own name for customer account:

- a) banks authorized in Italy to provide investment services and banks that may provide such services subject to mutual recognition;
- b) investment firms authorized in Italy to provide investment services and investment firms that may provide such services subject to mutual recognition;
- c) asset management companies, exclusively for the activity of managing investment portfolios on a client-by-client basis;
- d) financial intermediaries entered in the list referred to in Article 107 of the Consolidated Banking Law that are authorized to engage in the activity referred to in Article 1.5 c) of the Consolidated Law on Financial Intermediation or, exclusively for activity in derivative financial instruments, authorized to deal for own account;
- e) stockbrokers entered in the single national roll referred to in Article 201 of the Consolidated Law on Financial Intermediation;
- f) organizations that manage clearing and guarantee systems for transactions in derivative financial instruments referred to in Article 70 of the Consolidated Law on Financial Intermediation;
- g) persons that manage guarantee systems referred to in Article 69.2 of the Consolidated Law on Financial Intermediation;
- h) the Bank of Italy;
- i) Poste Italiane S.p.A.;
- j) Cassa Depositi e Prestiti;
- k) the Ministry of the Treasury.

2. In addition, the following may participate in the settlement services in their own name for own account or in their own name for customer account:

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

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

a) foreign organisations that carry on the activity of central depository or settlement of financial instruments, provided they are subject to supervisory measures equivalent to those established in Italian legislation and their respective supervisory authorities have agreed to exchange information and apply reciprocity;

b) managers of foreign clearing and guarantee systems for transactions in financial instruments, provided they are subject to supervisory measures equivalent to those established in Italian legislation and their respective supervisory authorities have agreed to exchange information and apply reciprocity;

c) managers of guarantee systems referred to in Article 68.1 of the Consolidated Law on Financial Intermediation, provided they are authorised by the Bank of Italy in agreement with Consob.

3. The company shall exclude participants who cease to belong to the categories referred to in the preceding paragraphs.

4. The company may suspend the persons referred to in paragraphs 1 and 2, except for the Bank of Italy and the Ministry of the Treasury, where they do not comply with the operating procedures referred to in Article 4.2e) or do not satisfy any additional technical requirements established by the operating rules referred to in Article 4."

¹² The Ministry of Treasury indicated as an example the privatisation of a public institution.

¹³ **Article 68 of the Consolidated Law on Financial Intermediation - Contract guarantee systems**

1. The Bank of Italy, in agreement with Consob, may regulate the establishment and operation of systems designed to ensure the performance of transactions in financial instruments other than derivatives carried out in regulated markets, including the issue of rules on the establishment of guarantee funds financed with contributions from their participants.

2. The capital of each fund shall be kept separate from that of the body that administers it and from that of other funds. Funds may not be the object of actions, seizures or attachments by the creditors of the body administering them or creditors of the individual participants or in the interests of such creditors. Funds may not be included in bankruptcy proceedings involving the body administering them or the individual participants. Legal and judicial set-off shall not apply and voluntary set-off shall not be allowed between credit balances in the deposit accounts of the funds and any debts that the administrator of the funds may have with the custodian. "

¹⁴ **Article 69 of the Consolidated Law on Financial Intermediation - Clearing and settlement of transactions involving financial instruments other than derivatives**

1. The Bank of Italy, in agreement with Consob, shall regulate the operation of the clearing and settlement service and the gross settlement service for transactions involving financial instruments other than derivatives, including the establishment of time limits and preliminary and supplementary duties. Such regulations may provide for the clearing and settlement service and the gross settlement service, excluding final settlement of the cash portion of transactions, to be managed by a company authorized by the Bank of Italy in agreement with Consob. For the transfer of registered collateral, including those different from shares, final endorsement may be effected in accordance with Articles 15(1) and 15(3) of Royal Decree 239 of 29 March 1942.

2. The Bank of Italy, in agreement with Consob, may regulate the institution and operation of systems to ensure the performance of clearing and settlement of the transactions referred to in paragraph 1 and may issue instructions concerning the establishment and administration of guarantee funds financed with contributions from participants.

3. Article 68(2) shall apply to the guarantee funds referred to in paragraph 2."

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

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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¹⁵ As provided in Article 68, paragraph 1, and Article 69, paragraph 2 of the Consolidated Law on Financial Intermediation and in accordance with the general distinction of the Consolidated Law on Financial Intermediation between trading and settlement there are two guarantee systems (guarantee funds), the contracts guarantee fund and the guaranteed settlement fund, which are both managed by Cassa di Compensazione e Garanzia S.p.A. At this point, it has to be outlined that as a particularity of the Italian law and Italian market Cassa di Compensazione e Garanzia S.p.A. performs therefore a dual role as manager of the funds as well as central counterparty in relation to the clearing and guarantee of the contracts negotiated on derivative markets.

The contracts guarantee fund has to assure the good aim of contracts having as their object shares, convertible debentures, warrant, covered warrant and certificate representative of movable deep quotas and real estate sluices negotiation, in case of assessed insolvency of one of the operating participants. The second, the guaranteed settlement fund, guarantees the good aim of the clearing and of the liquidation of contracts having to object shares, convertible debentures, warrant and certified representative of movable deep quotas and real estate sluices negotiation.

According to Article 8 of the L.D. the participants can make demands to the above-mentioned funds in case of insolvency of another participant in order to realise the guarantees for the exclusive satisfaction of their rights. The fund, having performed the obligation of the insolvent participant, will then subrogate into the rights of the latter in order to recover the payment and costs.

For this reason as well as for the fact that these are also offering collateral, the funds are also participants to the systems.

The Ministry of Treasury therefore confirmed the necessity to extend the participants to the guarantee systems in order to avoid any lack of regulation, which could lead to a systemic risk. The extension of the participants can therefore be considered in compliance with the Directive.

¹⁶ **Art. 74 of the Consolidated Banking Law**

1. In exceptional circumstances the special administrators, in order to protect the interests of creditors, may suspend payment of the bank's liabilities of whatever kind and the restitution to customers of financial instruments connected with services referred to in the legislative decree transposing Directive 93/22/EEC. The measure shall be adopted after consulting the oversight committee and subject to authorisation by the Bank of Italy, which may issue directions for its implementation. The suspension shall be for a period of up to one month, which may be extended in the same manner for an additional two months.

2. During the suspension period forced executions or actions to perfect security interests involving the bank's properties or customers' securities may not be initiated or prosecuted. During the same period mortgages may not be registered on the bank's immovable property nor may any other rights of preference on the bank's movable property be acquired, except in the case of enforceable court orders issued prior to the beginning of the suspension period.

3. The suspension shall not constitute insolvency.

¹⁷ **Article 77 of the Consolidated Banking Law**

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

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

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

1. In the case of special administration of branches of non-EC banks established in Italy, the special administrators and the oversight committee shall assume the powers of the administrative and control bodies of the parent bank with regard to such branches.

2. The provisions of this Section shall apply insofar as they are compatible."

¹⁸ **Art. 107 of the Consolidated Banking Law**

1. The Minister of the Treasury, after consulting the Bank of Italy and Consob, shall establish objective standards with reference to the activity carried on, the volume of business and the ratio of debt to equity capital, on the basis of which to determine the financial intermediaries which must be entered in a special register kept by the Bank of Italy.

2. The Bank of Italy, in compliance with the resolutions of the Credit Committee, shall issue directions to financial intermediaries entered in the special register concerning capital adequacy and the limitation of risk in its various forms as well as administrative and accounting procedures and internal control mechanisms. Where necessary, the Bank of Italy may adopt measures concerning individual intermediaries in such matters. With reference to certain kinds of activity the Bank of Italy may also issue regulations aimed at ensuring that they are carried on in a regular manner.

3. Intermediaries shall send the Bank of Italy, in the manner and within the time limits it establishes, periodic returns, as well as any other figures or documents it may request.

4. The Bank of Italy may carry out inspections with the power to request the exhibition of documents and records deemed necessary.

4-bis. The Bank of Italy may prohibit intermediaries from undertaking new transactions for violation of laws or regulations issued pursuant to this decree.

5. Financial intermediaries entered in the special register shall remain entered in the general register; paragraphs 6 and 7 of Article 106 shall not apply to such intermediaries.

6. Financial intermediaries entered in the special register, where they have been authorised to provide investment services or acquired repayable funds in an amount exceeding their capital, shall be subject to the provisions of Title IV, Chapter I, Sections I and III; Article 57, paragraphs 4 and 5, of the Consolidated Law on Financial Intermediation issued pursuant to Article 21 of Law 52 of 6 February 1999 shall apply in place of Article 86, paragraphs 6 and 7, and Article 87, paragraph 1.

7. Article 47 shall apply to intermediaries entered in the register established by paragraph 1 that engage in the granting of loans in whatever form."

¹⁹ **Article 56 of the Consolidated Law on Financial Intermediation**

1. The Minister of the Treasury, acting on a proposal from the Bank of Italy or Consob, within the scope of their respective authority, may issue a decree dissolving the administrative and control bodies of a SIM, an asset management company or a SICAV where:

a) serious administrative irregularities or serious violations of laws, regulations or bylaws governing its activity are found;

b) serious capital losses are expected;

c) the dissolution has been the object of a reasoned request by the administrative bodies, an extraordinary meeting of shareholders or the provisional administrator appointed pursuant to Article 53.

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

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

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Directive 98/26/EC			Member State's Legislation (Legislative Decree no. 210 of 12 April 2001)			
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Article ¹	Text	Appli- cability ²	Refe- rence	Article (A; P; S; N) ¹	Content	Remarks

2. The measure provided for in paragraph 1 may also be adopted with respect to the Italian branches of non-EU investment firms. In this case the special administrators and the oversight committee shall assume the powers of the investment firm's administrative and control bodies with respect to such branches.

3. The Bank of Italy shall be responsible for the direction of the procedure and all the related formalities. Insofar as they are compatible, Articles 70(2-6), 71, 72, 73, 74 and 75 of the Banking Law shall apply; where such provisions shall be understood to refer to investors instead of depositors and to SIMs, non-EU investment firms, asset management companies and SICAVs instead of banks; and the term "financial instruments" shall refer to financial instruments and cash.

4. Title IV of the Bankruptcy Law shall not apply to SIMs, asset management companies or SICAVs.

²⁰ **Article 78 of the Consolidated Banking Law**

1. The Bank of Italy may prohibit banks authorised in Italy from undertaking new transactions or order the closure of branches for violation of laws, regulations or bylaws governing their activities, for management irregularities or, in the case of branches of non-EC banks, for insufficiency of funds.

²¹ **Article 51 of the Consolidated Law on Financial Intermediation**

1. In the event of violations by SIMs, non-EU investment firms and banks, asset management companies, SICAVs or banks authorised to provide investment services having their registered office in Italy of the provisions applicable to them under this decree, the Bank of Italy or Consob, within the scope of their respective authority, may order them to put an end to such irregularities.

2. The supervisory authority which takes action may also, after consulting the other authority, prohibit the persons referred to in paragraph 1 from engaging in new transactions involving single services or activities, at single branches or establishments of the intermediary or otherwise where:

a) the violations are likely to prejudice interests of a general nature;

b) it is a matter of urgency to protect the interests of investors.

²² **Art. 82 of the Consolidated Banking Law**

1. Where a bank not subject to compulsory administrative liquidation is insolvent, the court of the place where the bank has its registered office, upon request by one or more creditors, upon petition of the public prosecutor or on its own authority, shall declare insolvency by way of a ruling in camera after consulting the Bank of Italy and the legal representatives of the bank. Where the bank is under special administration, the court may also declare insolvency upon petition of the special administrators after consulting the special administrators, the Bank of Italy and the superseded legal representatives of the bank. The provisions of the first paragraph, second sentence, and of the third, fourth, fifth, sixth and eighth paragraphs of Article 195 of the Bankruptcy Law shall apply.

2. Where a bank, even if it is of a public nature, is insolvent at the time a compulsory administrative liquidation decree is issued and insolvency has not been declared under paragraph 1, the court of the place where the bank has its registered office, upon petition of the liquidators or of the public prosecutor or on its own authority, shall issue a finding of insolvency

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

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

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by way of a ruling in camera after consulting the Bank of Italy and the superseded legal representatives of the bank. The provisions of the third, fourth, fifth and sixth paragraphs of Article 195 of the Bankruptcy Law shall apply.

3. A judicial declaration of insolvency under the preceding paragraphs shall have the effects referred to in Article 203 of the Bankruptcy Law.

²³ **Article 71 of the Consolidated Law on Financial Intermediation**

1. The clearing, settlement and guaranteeing of transactions carried out through the intervention of the systems regulated pursuant to Articles 69 and 70 shall be final and may not be declared ineffectual with regard to the retroactive effect of the opening of bankruptcy proceedings, even where the participants are subject to such proceedings.

²⁴ It is possible that this alternative does not have much relevance in practice due to the fact that in case of insolvency of banks the moment of the opening of such proceedings is determined according to Article 83 of the Consolidated Banking Law not as the moment of the issuing of the liquidation decree- by the Ministry of Treasury, but as the moment of installation of the liquidators or at least on the third consecutive day following the date of the liquidation decree. The decision can be considered as a warning so that it might be that no or almost no transfer orders will be executed afterwards, if known to the participants, so the point of view of the Bank of Italy.

²⁵ The guidelines BIREL/TARGET do not provide explicitly the moment of entry of transfer orders into the system, but the Bank of Italy is working on the transposition of the L.D.

²⁶ The Bank of Italy Regulation of 8 September 2000 providing the authorisation for business of the settlement company and of its regulations by Bank of Italy are not applied, because Bank of Italy is at the same time competent authority and settlement system.

Bank of Italy is working on the modification of the terms and conditions of the contracts to be executed with the participants of the system BI-COMP. For LDT no modifications are provided, because this is going to be replaced by Express II in the near future.

²⁷ According to Article 2.4.1. of the Regulation of Cassa di Compensazione and Garanzia S.p.A., approved by the Bank of Italy on 15 May 2001 in accordance with the Regulation of the Bank of Italy of 8 September 2000 on Clearing and guarantee of transactions in derivative financial instruments, under Article 70 of the Consolidated Law of Financial Intermediation, in conjunction with the Article 5 of the L.D. Cassa di Compensazione considers the moment of irrevocability of transfer orders the moment of "reception from the Market of the particulars of contracts and simultaneous checking of the same ...".

²⁸ The guidelines BIREL/TARGET do not provide explicitly the moment of entry of transfer orders into the system, but the Bank of Italy is working on the transposition of the L.D.

²⁹ **Art. 83 (paragraph 1) of the Consolidated Banking Law**

1. From the date of the installation of the liquidating bodies pursuant to Article 85, and in any case from the third day following the date of issue of the compulsory administrative liquidation decree, payment of liabilities of whatever kind and the restitution of third parties' assets shall be suspended.

³⁰ Even in this case there might be no suspension of payment and therefore no systemic risk, if an authorisation will be granted to continue the business pursuant to **Article 90, paragraph 3 of the Consolidated Banking Law**, which provides:

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3. Where necessary and to assure the best realization of the bank's assets, the liquidators, subject to authorization by the Bank of Italy, may continue the business of the undertaking or of certain branches of activity, in accordance with the cautionary recommendations of the oversight committee. The continuation of the business of the undertaking decided at the installation of the liquidating bodies within the time limit established by Article 83, paragraph 1, excludes the dissolution by operation of law of pre-existing legal relationships that is provided for in the legislation referred to in paragraph 2 of such article."

³¹ Tribunal of Catania, 9 September 1997; Italian Supreme Court 5 May 1985, no. 3338; 18 August 1976, no. 3047; 3 May 1956, no. 1883.

³² **Article 203 of the Consolidated Banking Law - Forward contracts**

1. Without prejudice to the time limits for the effects of compulsory administrative liquidation referred to in Article 83 of the Banking Law and to the provisions of Article 90(3) thereof, Article 76 of the Bankruptcy Law shall apply to derivative financial instruments, to the analogous instruments identified pursuant to Article 18(5a), to foreign exchange forward transactions, securities lending transactions, repurchase agreements and stock exchange repos. All contracts concluded, even if not yet executed in full or in part, by the date of declaration of bankruptcy or the date from which the decree of compulsory administrative liquidation has effect shall be included for the purposes of this article.

2. For the application of Article 76 of the Bankruptcy Law to financial instruments and transactions specified in paragraph 1, reference may also be made to the replacement cost of the same, calculated according to market values at the date of declaration of bankruptcy or the date from which the decree of compulsory administrative liquidation has effect.

³³ **Article 10** has a **fifth paragraph** stating the following: "5. The Ministry of Treasury after having heard the Bank of Italy and Consob can execute agreements with the competent authorities of a state not belonging to the European Union for the application of the provisions of this legislative decree to the Italian authorities who are participating in the system of the foreign state on the basis of reciprocity."

³⁴ The Bank of Italy confirmed that from its point of view there is no necessity to issue any regulations regarding the designation of systems at the moment.

³⁵ **Article 146 of the Consolidated Banking Law – Oversight of Payment Systems**

1. The Bank of Italy shall promote the regular operation of payment systems. For this purpose it may issue regulations to ensure the efficiency and reliability of clearing and payment systems.

³⁶ **Article 77 of the Consolidated Law on Financial Intermediation – Supervision of clearing, settlement and guarantee systems**

1. The supervision of the systems referred to in Articles 68, 69(2) and 70, of the persons that administer such systems and of the company referred to in Article 69(1) shall be carried out by the Bank of Italy and Consob. To this end, the Bank of Italy and Consob may require system managers, the company and market participants to provide information and records concerning the clearing and settlement of transactions and may carry out inspections.

³⁷ Due to such infringement for failure to implement the Directive on time the European Commission already sent a reasoned opinion on 29 December 2000 to Italy. According to the information received such infringement proceedings should have been terminated, when the L.D. was notified to the European Commission.

³⁸ In case of default are applicable Section 1721 and 2761 of the Italian Civil Code.

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³⁹ According to the information received by the Ministry of Treasury and the Bank of Italy at the moment there is no intention to draft any technical provisions, e.g., which might concern the co-ordination of the finality and the principles of Italian bankruptcy law.

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