

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

Ireland – final report

Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refer- ence	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	N/A	N/A	N/A	The Regulations ¹ do not contain a provision equivalent to Article 1 of the Directive. However, the Explanatory Memorandum accompanying the Regulations states as follows:- <i>“This Statutory Instrument transposes the mandatory provisions of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.</i> <i>The primary aim of the Directive is to reduce the legal risks associated with participation in settlement systems, in particular as regards the legality of netting agreements and the enforceability of collateral security.</i> <i>The Directive's provisions apply to any EC payment or securities settlements system operating in any currency or the euro, any EC institution which participates in such a system, collateral security provided in connection with participation in such a system, and collateral security provided in connection with monetary policy operations.”</i>
A: 1 N: b	(b) any participant in such a system;	N	As above	As above	As above	As above

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 1 N: c	(c) collateral security provided in connection with: -participation in a system, or -operations of the central banks of the Member States in their functions as central banks.	N	As above	As above	As above	As above
A: 2	For the purpose of this directive:					

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: a S: 1	'system' shall mean a formal arrangement:	N	Regul- ations	A:2 P:1 S:8	"payment system" has the meaning set out in section 5 of the Central Bank Act, 1997 (No. 8 of 1997);	<p>The Regulations refer to a “payment system” as opposed to “system”. In defining the term “payment system”, the Regulations have adopted the definition contained in a separate piece of Irish legislation, the Central Bank Act, 1997 (the “Act”) which defines a “payment system” as follows:</p> <p><i>““payment system” means a system established in the State, or proposed to be established in the State, by any person, in which credit institutions or financial institutions participate and which provides for-</i></p> <p><i>(a) all or any of the following, namely, the processing, handling, clearance and settlement of any means of payment or of any securities, or</i></p> <p><i>(b) the payment of any moneys by that means of payment, by or as between the members of the system or third parties, whether or not the processing, handling, clearance, settlement or payment of any of the moneys takes place in part or in whole within the State or outside the State.”</i></p> <p>The Act provides that the Central Bank of Ireland (“CBI”) shall be the regulator of all such payment systems. Due to the fact that this legislation was in force in Ireland prior to the introduction of the Regulations already contained a definition of “payment system”, the definition contained in the Directive was not reproduced in the Regulations. The view of the governmental department responsible for introducing the Regulations² was that in order to maintain clarity and consistency within national legislation, only on definition of “payment system” or “system”</p>

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						<p>should appear in Irish legislation.</p> <p>The definition in the Regulations refers to a “system established in the State, or proposed to be established in the State”. It appears, therefore, that payment systems which are not established in Ireland would not fall within the ambit of the Regulations. This would appear to be a discrepancy from the definition of “system” in the Directive. For instance, a system established outside Ireland but which has Irish participants and which has chosen to be governed by the laws of Ireland, could, in theory, be deemed to be outside the ambit of the Regulations.</p> <p>However, despite this uncertainty, the CBI in its practical application of the Regulations, has taken the view that if a system has Irish institutions among its participants or members, the CBI has an interest in having it designated under the Regulations to afford the participants the protection of the Regulations. For example, the CBI has designated CREST³ as a system to be included in the scope of the Regulations. Although CREST is operated in the UK, at the time of designation three Irish settlement banks were participants and the CBI took the view that, on this basis, it should be designated. Since designation, CREST has introduced the delivery versus payment system. Under this system, trades are only settld in the UK, the result of which is that the three Irish banks are no longer direct participants in CREST but use UK banks as agents to settle within the system on their behalf.</p>

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
						<p>The CREST system can be differentiated from other clearing and settlement systems such as Clearnet in that it settles securities constituted under the laws of various jurisdictions which have amended their legislation to provide for the evidencing and transfer of title to such securities by means of a particular system, such as the CREST system. In Ireland, the relevant amending legislation is the Companies Act, 1990 (Uncertified Securities) Regulations 1996 (S.I. No. 68 of 1996).</p> <p>So whilst CREST is operated in the UK and is a single settlement system from a technological and infrastructure perspective it comprises of various separate 'relevant systems' from a legal viewpoint as established under the law of the various jurisdictions. Effectively this means that from a legal perspective the CREST systems accommodates the fact that a different legal code governs the transfer of title to Irish constituted securities to that which governs the transfer of title to English constituted securities.</p> <p>As with similar systems CREST is based on a set of rules and CREST Rule 13 defines the 'CREST Irish system' and the 'CREST UK system'. Rule 13 sets out the legal distinction between the two systems. It expressly stipulates that for the purpose of Article 2(a) of the Directive the governing law of the CREST Irish system is Irish Law and that the relevant governing law of the CREST UK system is English law.</p>

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						<p>Consequently, as the CREST system has directly dealt with the issue of which governing law applies the Irish authorities have not experienced any cross-border problems arising as a result of confusion as regards the applicable law.</p> <p>The designation of CREST has not been reviewed since this development. It is interesting to note however that, despite the fact that CREST is not “established” in Ireland, it was designated because the three Irish regulated banks were participants and, therefore, the view was taken that the Irish regulator would have an interest in having it designated under the Regulations.</p>
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				Not transposed. See remarks on definition of “payment system” above.
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				Not transposed. See remarks on definition of “payment system” above.
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				Not transposed. See remarks on definition of “payment system” above.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
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				Not transposed. No such system has been designated by the CBI.
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				Not transposed. No such system has been designated by the CBI.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: b S: 1	<p>‘institution’ shall mean:</p> <ul style="list-style-type: none"> -a credit institution as defined in the first indent of Article 1 of Directive 77/780/EEC including the institutions set out in the list in Article 2(2) thereof, or -an investment firm as defined in point 2 of Article 1 of Directive 93/22/EEC excluding the institutions set out in the list in Article 2(2)a to (k) thereof, or -public authorities and publicly guaranteed undertakings, or -any undertaking whose head office is outside the Community and whose functions correspond to those of the Community credit institutions or investment firms as defined in the first and second indent, <p>which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders within that system.</p>	N	Regul- ations	A:2 P:2	<p>"credit institution" has the meaning assigned to it by the European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992 (S.I. No. 395 of 1992);⁴</p> <p>"financial institution" means an undertaking other than a credit institution providing any one or more of the financial services set out in the Schedule to the European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992, (S.I. No. 395 of 1992);⁵</p>	<p>The Regulations do not define “institution” but define “credit institution” and “financial institution” instead. These terms are only used in the Regulations in the definition of “member” (which itself is the term used in the Regulations equivalent to the term “participant” in the Directive).</p> <p>There is a discrepancy between the Regulations and the Directive on this point as it is clear that the definition of “credit institution” and “financial institution” in the Regulations does not equate to the definition of “institution” in the Directive. It is possible therefore, that a participant of a system, as envisaged by the Directive, would not correspond to a member of a payment system under the Regulations.</p> <p>As stated above, this discrepancy only applies to the definition of “member” as this is the only place in the Regulations where the terms “credit institution” or “financial institution” are used instead of “institution”. Elsewhere in the Regulations the term “institution” is used and where so used, it is deemed, under Article 2(2) of the Regulations, to have the same meaning as it has in the Directive. This in itself causes a potential discrepancy as the use of the term “institution” in such definitions as “settlement agent” and “central counterparty”, does not correspond to the definition of “credit institution” and “financial institution” in the definition of “member”.</p> <p>The Irish authorities have not to date experienced any practical problems due to the discrepancy in the implementation of the definition of ‘institution’.</p>

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A: 2 N: b S: 2	If a system is supervised in accordance with national legislation and only executes transfer orders as defined in the second indent of (i), as well as payments resulting from such orders, a Member State may decide that undertakings which participate in such a system and which have responsibility for discharging the financial obligations arising from transfer orders within this system, can be considered institutions, provided that at least three participants of this system are covered by the categories referred to in the first subparagraph and that such a decision is warranted on grounds of systemic risk;	D				Not transposed. No such undertakings have been considered institutions by the CBI.
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	Regulations	A:2 P:2	A word or expression that is used in these Regulations and is also used in Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, shall, unless the contrary intention is expressed, have in these Regulations the same meaning that it has in that Directive.	This clause applies to the definition of “central counterparty” as no other alternative definition or contrary intention is expressed.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: d	`settlement agent' shall mean an entity providing to institutions and/or a central counterparty participating in systems, settlement accounts through which transfer orders within such systems are settled and, as the case may be, extending credit to those institutions and/or central counterparties for settlement purposes.	N	Regul- ations	A:2 P:(1) S:9	"settlement agent" means an entity providing to institutions or to a central counterparty participating in a payment system settlement accounts through which transfer orders within such systems are settled and, as the case may be, extending credit to those institutions and central counterparties for settlement purposes;	No material amendments have been made in the transposition of this definition.
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	Regul- ations	A:2 P:2	A word or expression that is used in these Regulations and is also used in Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, shall, unless the contrary intention is expressed, have in these Regulations the same meaning that it has in that Directive.	This clause applies to the definition of "clearing house" as no other alternative definition or contrary intention is expressed.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: f S: 1, 2	`participant` shall mean an institution, a central counterparty, a settlement agent or a clearing house. According to the rules of the system, the same participant may act as a central counterparty, a settlement agent or a clearing house or carry out part or all of these tasks.	N	Regul- ations	A:2 P:1 S:5	"member" means a credit institution or financial institution, a central counterparty, a settlement agent or a clearing house which is a member of a payment system and nothing in these Regulations shall prevent a member acting as a central counterparty, a settlement agent or a clearing house or carrying out part or all of these tasks;	The only significant discrepancy in the transposition of the definition of "participant" (apart from the fact that the Regulations use the term "member" instead of "participant") is the reference to "credit institutions or financial institutions" in the Regulations in place of "institutions". This is discussed under Article 2(2) of the Regulations above.
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				Not transposed. The Regulations do not provide for "indirect participants". There is no relevant membership class in payment systems in Ireland that would correspond to an "indirect participant".
A: 2 N: g	`indirect participant` shall mean a credit institution as defined in the first indent of (b) with a contractual relationship with an institution participating in a system executing transfer orders as defined in the first indent of (i) which enables the abovementioned credit institution to pass transfer orders through the system;	N	Regul- ations	A:2 P:2	A word or expression that is used in these Regulations and is also used in Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, shall, unless the contrary intention is expressed, have in these Regulations the same meaning that it has in that Directive.	This clause applies to the definition of "indirect participant" as no other alternative definition or contrary intention is expressed.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: h	`securities` shall mean all instruments referred to in section B of the Annex to Directive 93/22/EEC;	N	Regul- ations	A:2 P:2	A word or expression that is used in these Regulations and is also used in Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, shall, unless the contrary intention is expressed, have in these Regulations the same meaning that it has in that Directive.	This clause applies to the definition of “securities” as no other alternative definition or contrary intention is expressed.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: i	<p>“transfer order” shall mean:</p> <p>-any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or</p> <p>-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;</p>	N	Regul- ations	A:2 P:1 S:10	<p>"transfer order" means -</p> <p>(a) any instruction by a member to place at the disposal of another member an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or</p> <p>(b) an instruction by a member to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise.</p>	The only discrepancy in this definition is the use of the phrase “at the disposal of another member” in the Regulations in place of “at the disposal of a recipient” in the Directive.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: j	`insolvency proceedings' shall mean any collective measure provided for in the law of a Member State, or a third country, either to wind up the participant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments;	N	Regul- ations	A:2 P:2	A word or expression that is used in these Regulations and is also used in Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, shall, unless the contrary intention is expressed, have in these Regulations the same meaning that it has in that Directive.	This clause may apply to the definition of “insolvency proceedings” as no other alternative definition or contrary intention is expressed. However, in the definition of “the opening of insolvency proceedings” the Regulations restrict this to “the granting by the High Court of an order for the winding-up of a member of a payment system”. This does not deal with the concepts of “examinership” or “arrangements” in Ireland. “Examinership” is where a court places a company under its protection to enable the court appointed examiner to investigate the company’s affairs and to report to the court on its prospect of survival. “Arrangement” is where three quarters of the members or creditors of a company vote in favour of a compromise in respect of what is owing to them, and the court sanctions the proposals. By not dealing with these issues in the definition of “the opening of insolvency proceedings” it could be interpreted that the Regulations do, in fact express a contrary intention of what constitutes on “insolvency” to that which is contained in the SFD and as a consequence may not cover the wide meaning contained in that SFD. However, this would be an extremely restrictive interpretation of the provision and one which we would consider unlikely. No practical examples, of which we are aware, have occurred to test the interpretation.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: k	`netting` shall mean the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed;	N	Regul- ations	A:2 P:1 S:7	"netting" means the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders within a payment system that a member or members either issue to, or receive from, one or more other members of the payment system with the result that only a net claim can be demanded or a net obligation be owed;	The only discrepancy in this definition is that the Regulations clarify that the transfer orders to which reference is made, are transfer orders "within a payment system".
A: 2 N: l	`settlement account` shall mean an account at a central bank, a settlement agent or a central counterparty used to hold funds and securities and to settle transactions between participants in a system;	N	Regul- ations	A:2 P:2	A word or expression that is used in these Regulations and is also used in Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, shall, unless the contrary intention is expressed, have in these Regulations the same meaning that it has in that Directive.	This clause applies to the definition of "settlement account" as no other alternative definition or contrary intention is expressed.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 2 N: m	`collateral security' shall mean all realisable assets provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the European central bank.	N	Regul- ations	A:2 P:1 S:2	"collateral security" means 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 payment system or provided to central banks of the Member States of the European Union or to the European Central Bank;	No material amendments have been made in the transposition of this Article.

NETTING AND TRANSFER ORDERS						
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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	Regul- ations	A:3 P:1&2	<p>(1) A transfer order within a payment system shall be binding, even in the event of insolvency proceedings against a member, and shall be binding on third parties, where the transfer order was entered into the payment system before the moment of opening of insolvency proceedings against the member.</p> <p>(2) Netting within a payment system shall be binding on members, even in the event of insolvency proceedings against a member, and shall be binding on third parties, where the transfer orders were entered into the payment system before the moment of opening of insolvency proceedings against the member.</p>	<p>This text has been substantially transposed by the Regulations with some minor changes. Article 3 of the Regulations has dealt separately with “transfer orders” and “netting”. Also, the words “within a payment system” have been added after the words “transfer order” and “netting” respectively for clarification.</p> <p>Also, as the term “the opening of insolvency proceedings” has been separately defined in the definitions section of the Regulations, there is no specific cross-reference to the definition (see Article 6(1) of the Directive below).</p>

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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	Regul- ations	A:3 P:3	Where a transfer order is entered into a payment system after the moment of opening of insolvency proceedings against a member of the payment system and the order is executed on the day of opening of insolvency proceedings against the member, the order shall be legally binding only if, after the order is executed, the settlement agent, the central counterparty or the clearing house can prove that they were not aware, and should not have been aware, of the opening of insolvency proceedings against the member.	The Regulations clarify that the insolvency proceedings referred to in this Article are insolvency proceedings “against a member of the payment system”. The Regulations refer to the transfer order being “executed” as opposed to “carried out”, which is more consistent with the terminology used within the relevant payment systems. The Regulations do not specify that the transfer order shall be “legally enforceable and binding on third party” rather it merely states that the order “shall be legally binding”.
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	Regul- ations	A:3 P:4	No law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the moment of the opening of insolvency proceedings against a member of a payment system shall lead to the unwinding of a netting.	This Article has been directly transposed with the exception of the clarification in the Regulations that the insolvency proceedings to which reference is made are insolvency proceedings “against a member of a payment system”.

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 3 P: 3	The moment of entry of a transfer order into a system shall be defined by the rules of that system. If there are conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.	N	Regul- ations	A:4 P:1	The rules of a payment system shall specify the moment at which a transfer order shall be considered to have been entered into the payment system.	Section 7 of the Act provides that a payment system may not be established or operated in Ireland unless the rules for such a system have been submitted to and have been approved by the CBI. In reviewing and approving such rules, the CBI will ensure that adequate provision is contained in such rules to specify the moment of entry to the system of transfer order. ⁶
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				Not transposed. No such provision has been made.
A: 4 S: 2	Furthermore, Member States may also provide that such a participant's credit facility connected to the system be used against available, existing collateral security to fulfil that participant's obligations in the system.	D				Not transposed. No such provision has been made.
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	Regul- ations	A:4 P:2	A transfer order may not be revoked from the moment specified in accordance with paragraph (1) of this Regulation	The cross-reference to paragraph (1) of this Regulation is to the time specified in the rules of the payment system at which a transfer order shall be considered to have been entered into the payment system.
	PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS					

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 6 P: 1	For the purpose of this Directive, the moment of opening of insolvency proceedings shall be the moment when the relevant judicial or administrative authority handed down its decision.	N	Regul- ations	A:2 P:1 S:6	"the opening of insolvency proceedings" means the granting by the High Court of an order for the winding-up of a member of a payment system;	The High Court is the relevant judicial authority in Ireland which hears and grants orders in relation to insolvency proceedings. See also comment in relation to Article 2(j) of the Directive.
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	Regul- ations	A:5 P:1	The High Court shall notify the Bank immediately upon granting an order for the winding up of a member of a payment system.	The reference to the "Bank" in this Article is a reference to the CBI.
A: 6 P: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N	Regul- ations	A:5 P:2	Upon receipt of such notification, the Bank shall immediately notify the appropriate authorities in the other Member States of the European Union of the order.	This Section 5(2) of the Regulations clarifies that the CBI shall notify the "appropriate authorities" in other Member States immediately upon receipt of the relevant notification.
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	Regul- ations	A:5 A:3	In the event of the opening of insolvency proceedings against a member of a payment system, the rights and obligations of the member of the payment system arising from membership of the payment system prior to the opening of insolvency proceedings against the member shall not be affected in any way by the opening of insolvency proceedings against the member.	Although not transposed directly, Section 5(3) of the Regulations substantially gives effect to Article 7 of the Directive.

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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 8	In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system.	N	Regul- ations	A:6	Notwithstanding any provision to the contrary contained in the law of the State relating to bankruptcy, receivership, examinership or liquidation, where insolvency proceedings are commenced under the law of the State against a member of a payment system, the rights and obligations of the member arising from the participation of that member in the payment system shall be determined in accordance with the law of the Member State under which the payment system operates.	Section 6 of the Regulations specifically provides that it will supercede any provision to the contrary contained in Irish law relating to bankruptcy, receivership, examinership ⁷ or liquidation. This is an express recognition that the law governing the relevant system will determine the rights and obligations of the member against whom insolvency proceedings have been initiated.
	INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FROM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER					

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1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
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	Regul- ations	A:7 P:1	The rights of - (a) a member of a payment system to collateral security provided to it in connection with its participation in the payment system, and (b) central banks of the Member States and of the European Central Bank to collateral security provided to them, shall not be affected by insolvency proceedings against the member or against a counterparty to a central bank of a Member State or the European Central Bank which provided the collateral security and such collateral security may be realised for the satisfaction of those rights.	No material amendments have been made in the transposition of this Article.

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 9 P: 2	Where securities (including rights in securities) are provided as collateral security to participants and/or central banks of the Member States or the European central bank as described in paragraph 1, and their right (or that of any nominee, agent or third party acting on their behalf) with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.	N	Regul- ations	A:7 P:2	Where securities (including rights in securities) are provided as collateral security to members or to central banks of the Member States or to the European Central Bank, and their right (or that of any nominee, agent or third party acting on their behalf) with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State of the European Union, the determination of the rights of such entities as holders of the collateral security in relation to those securities shall be governed by the law of that Member State.	No material amendments have been made in the transposition of this Article.
	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				Not transposed. However, although the Regulations have not specifically provided for this, the relevant notifications have been made by the Department of Finance designating certain systems ⁸ and designating the CBI as the relevant authority.

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A:10 S: 2	The system shall indicate to the Member State whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them.	N	Regul- ations	A:8	The operators of a payment system shall notify the Bank of the membership of the system, including any possible indirect participants, and shall immediately notify it of any change in the membership of the payment system.	Section 8 of the Regulations clarifies that this obligation to notify the CBI is on the “operators of a payment system”, rather than on the system itself.
A: 10 S: 3	In addition to the indication provided for in the second subparagraph, Member States may impose supervision or authorisation requirements on systems which fall under their jurisdiction.	D				Not transposed. This Article has not been transposed into the Regulations as the Act had already introduced the supervision and authorisation requirements relevant to payment systems which fall under the jurisdiction of the CBI. See remarks relating to Article 2(a) of the Directive above.
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	Regul- ations	A:9	A holder of a licence issued under section 9 of the Central Bank Act, 1971 (No. 24 of 1971), shall inform any person with a legitimate interest of the payment systems of which it is a member and shall provide information about the main rules governing the functioning of those payment systems.	This Section 9 of the Regulations places an <i>obligation</i> on the relevant institution to inform any person with a legitimate interest (as opposed to providing that a person with a legitimate interest may request such information). However, the relevant institution to which reference is made is confined to a licensed banking institution. Therefore any institution (such as a “financial institution”, as defined in the Regulations) which is not the holder of a banking license under Irish law, is not obliged to provide this information to persons with a legitimate interest.

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refer- ence	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	Regul- ation	A:1 P:2	These Regulations shall come into operation on the fourth day of January, 1999.	
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	Regul- ations	Introduct- ion	I, Charlie McCreevy, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act, 1972 (No. 27 of 1972), and for the purpose of giving effect to Directive 98/26EC of the European Parliament and of the Council of 19 May 1998, hereby make the following regulations:	
A: 11 P: 2	Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive. In this Communication, Member States shall provide a table of correspondence showing the national provisions which exist or are introduced in respect of each Article of this Directive.	N				Not transposed, although we understand that such information has been provided to the Commission.

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks
A: 12	No later than three years after the date mentioned in Article 11(1), the Commission shall present a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.	n. a.				
A. 13	This Directive shall enter into force on the day of its publication in the <i>Official Journal of the European Communities</i> .	n. a.				
A: 14	This Directive is addressed to the Member States.	n. a.				

¹ European Communities (Finality of Settlement In Payment and Securities Settlement Systems) Regulations, 1998 which came into operation on 4 January 1999.

² The Department of Finance.

³ CREST has statutory recognition in Ireland under the Companies Act, 1990 (Uncertified Securities) Regulations, 1996 as an operator of a system for uncertified registration and transfer of securities. Although operated by CREST Co. Limited, a company incorporated in the UK, CREST is the central securities depository for Ireland, Guernsey, the Isle of Man, Jersey and the UK.

⁴ The European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992(S.I. No. 395 of 1992) defines a credit institution as follows:-
 ““credit institution” means an undertaking, other than a credit union or friendly society, whose business it is to receive deposits or other repayable funds from the public and to grant credit on its own account.” This definition, with the exception of the additional wording “other than a credit union or friendly society”, is equivalent to the definition of credit institution in the first indent of Article 1 of Directive 77/780/EEC.

⁵ For the purposes of the definition of “financial institution”, the financial services which are set out in the Schedule to the European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992 are the equivalent of the financial services which are set out in the Annex to Council Directive No. 89/646/EEC of 15 December 1989 and are as follows:-

“1. Acceptance of deposits and other repayable funds from the public.

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1	2	3	4	5	6	7
Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks

2. *Lending, including-*
 - (a) *consumer credit,*
 - (b) *mortgage credit,*
 - (c) *factoring, with or without recourse, and*
 - (d) *financial or commercial transactions (including forfeiting).*
3. *Financial leasing.*
4. *Money transmission services.*
5. *Issuing and administering means of payment, including credit cards, travellers' cheques and bankers' drafts.*
6. *Providing guarantees and commitments.*
7. *Trading for own account or for the account of customers in-*
 - (a) *money market instruments,*
 - (b) *foreign exchange,*
 - (c) *financial futures and options,*
 - (d) *exchange and interest rate instruments, or*
 - (e) *transferable securities.*
8. *Participating in securities issues and the provision of services related to such issues.*
9. *Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings.*
10. *Money broking.*
11. *Portfolio management and advice.*
12. *Safekeeping and administration of securities.*
13. *Credit reference services.*
14. *Safe custody services."*

⁶ No payment system, other than an existing payment system, shall be established or operated unless the persons who propose to establish the system have submitted the rules for such a proposed payment system (in this part referred to as a "proposed system") to the Bank for approval and the Bank has approved of those rules.

⁷ Examinership in Ireland is a system of temporary protection, investigation and administration of companies' affairs by court-appointed examiners. The system seeks to achieve a procedure to save all or part of the undertaking and to prevent the company from being wound up. Under the Companies Act, 1990, an examiner may be appointed by the High Court to look into the company's affairs to see if there is any real prospect of rescuing the business. Among the effects of such an appointment is the freezing of all new litigation involving

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Directive 98/26/EC			Member State's Legislation			
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Article ¹	Text	Appli- cability ²	Refer- ence	Article (A; P; S; N) ¹	Content	Remarks

the company and the prevention of creditors, secured and unsecured, from levying execution against its assets. If there is a prospect of the company's survival, the examiner reports to the court and seeks to negotiate a compromise between the creditors, the shareholders and the company.

⁸ Although the Department of Finance is the notifying party, it will generally make the relevant notification upon consultation with the Central Bank of Ireland. To date, 5 systems have been notified to the Commission. These are as follows:-

- (i) IRIS RTGS System – this is the large value clearing system operated by the Central Bank of Ireland itself;
- (ii) CREST Settlement for Irish Equities – see Endnote 3 above and remarks relating to Article 2(a) of the Directive above;
- (iii) Irish Paper Debit Clearing Co. Ltd;
- (iv) Irish Paper Credit Clearing Co. Ltd; and
- (v) Irish Retail Electronic Payment Clearing Co. Ltd.

The latter three systems are retail clearing systems.

Summary of Conclusions

The Regulations substantially implement the provisions of the Directive. The main discrepancies between the Regulations and the Directive appear in the definitions section. Definitions of “payment system”, “credit institution” and “financial institution” in the Regulations contain the most significant discrepancies as discussed above. Articles 3 to 9 of the Directive, which contain the prescriptive provisions of the Directive, have been substantially transposed by the Regulations with only some minor drafting amendments. The only Articles which have not been transposed by the Regulations are those in which Member States have a discretion as to their implementation. It appears from our discussions with the relevant governmental authorities that such Articles were included in the Directive at the request of other Member States to deal with circumstances prevailing in their jurisdictions.

No case law exists in Ireland in relation to the Regulations or the Directive. From our discussions with the relevant authorities it is also apparent that no significant regulatory issues have arisen in the practical implementation of the Regulations.

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