

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

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	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			Art. 1 is a preamble referring to the concepts defined/applied elsewhere in the Directive. Therefore, art. 1 has not been implemented separately.	The object appears from the explanatory memorandum to the Act implementing the Directive ¹ . When the Directive was adopted, the Danish Securities Trading Act - the Act - comprised a number of provisions which already in whole or in part covered the provisions of the Directive. We have been

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						informed by the Danish Financial Supervisory Authority that as the Directive on a number of points gave rise to doubt concerning the interpretation and it was expected that those questions of doubt would be solved in what has now been adopted as the Collateral Directive, it was decided that in principle the implementation should not exceed what was necessary and that the Di-

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						<p>rective should be implemented in the existing Securities Trading Act².</p> <p>The main Act from 1995 was primarily an implementation of the Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field but at the same time formed part of a Danish stock market reform.</p> <p>The Act among</p>

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						other things laid down the frame- work of multilat- eral as well as bilateral “netting” in respect of clearing centres and payment sys- tems.
A: 1 N: b	(b) any participant in such a system;	N				
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				
A: 2	For the purpose of this directive:					
A: 2 N: a S: 1	‘system’ shall mean a formal arrange- ment:	N				The Danish legis- lation does not give a definition of a system ³ .

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A: 2 N: a S: 1	-between three or more participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the execution of transfer orders between the participants,	N				
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				
A: 2 N: a S: 1	-designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.	N				
A: 2 N: a	Subject to the conditions in the first subparagraph, a Member State may des-	D				There are no specific provisions of

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S: 2	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.					the Act which implement the words of the Directive. However, this is not a requirement pursuant to the wording of the Directive.
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				There are no specific provisions of the Act which implement the words of the Directive. However, this is not a requirement pursuant to the wording of the Directive. It lies within the authorisation power of the Su-

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						pervisory Author- ity to characterise a formal ar- rangement with two participants as a system ⁴ .
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 guaran- teed undertakings, or -any undertaking whose head office is outside the Community and whose functions correspond to those of the Community credit institutions or in- vestment firms as defined in the first	N				It appears from art. 54 of the Act who shall be per- mitted to enter into participation agreements with a clearing centre. On the face of it this shall include the institutions mentioned in art. 2, number b, ex- cept for undertak- ings whose head office is outside the Community mentioned in the

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	and second indent, which participates in a system and which is responsible for discharging the financial obligations arising from trans- fer orders within that system.					last indent. Pursu- ant to art. 54, paragraph 3, last sentence of the Act, the clearing centre may decide that others shall be permitted to enter into a participation agreement which means that also the undertakings mentioned in the last indent of art. 2, number b may be permitted to participate. Notwithstanding that this technically opens up the possibility for anybody to

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						<p>participate (to which, however, they have no legal claim whether or not they are institutions as mentioned in art. 2, number b) the form of implementation is not very expedient.</p> <p>For payment systems it appears from art. 57 a, paragraph 1 of the Act that the institutions, etc. mentioned in art. 2, number b, indents 1 to 3 shall be permitted</p>

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						to participate in a payment system. Furthermore, the provision makes possible the participation of others who the Supervisory Authority considers as being of significant importance to the payment settlement which means that also the undertakings mentioned in the last indent of art. 2, number b may be given the possibility to participate. Notwithstanding

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						<p>that this technically opens up the possibility for anybody to participate (to which, however, they have no legal claim whether or not they are institutions as mentioned in art. 2, number b) the form of implementation is not very expedient.</p> <p>In respect of the Czech problem and Electronic Money institutions - see end note⁵</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				There are no specific provisions of the Act which implement the words of the Directive. However, this is not a requirement pursuant to the wording of the Directive. ⁶
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				The Supervisory Authority has informed us that in respect of number c, f, i, j, l, and m, it has not been considered neces-

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						<p>sary to repeat those definitions, which are necessary for the reading of the Directive, in the Danish legislation.</p> <p>Thus, in respect of number c, the term 'central counterparty' does not at all occur in the Act or anywhere else in Danish law. Therefore it is uncertain what rules regulate the activity as central counterparty.</p> <p>However, the</p>

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						Danish Supervi- sory Authority has informed us that in its opinion there can be no uncertainty as the application of a central counter- party is simply one of more risk management models that can be used by a sys- tem. In connec- tion with the Su- pervisory Author- ity's approval of systems the appli- cation of a central counterparty will be part the Super- visory Authority's assessment of

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						whether the system meets the legal requirements and whether the system's rules can be considered adequate within the meaning of the Directive. The Danish system FUTOP Clearingscentralen A/S which has been notified to the Commission as a system under the Finality Directive is thus a system with a central counterparty.
A: 2 N: d	`settlement agent' shall mean an entity providing to institutions and/or a central counterparty participating in systems,	N	Act	A: 57a P: 2 N: 7	[The Supervisory Authority shall ensure that the prevailing rules and participation agreements for the system and participants include	The Act does not define `settlement agent', but the

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	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.				provisions stipulation] 7) terms and conditions in any agreement concluded by the system with a settlement agent or a clearing house as defined in the European Parliament and Council Directive 98/26/EC, art. 2, nos. d) and e).	term is used with a specific refer-ence to art. 2, number d).
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 settle-ment agent;	N	Act	A: 57a P: 2 N: 7	Cf. above Directive, art. 2, number d).	
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 set-tlement agent or a clearing house or carry out part or all of these tasks.	N				The term `partici-pant´ is not de-fined in the Act. However, in rela-tion to Danish legislative tradi-tion this would not seem to be necessary.
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 partici-	D				There are no spe-cific provisions of the Act which

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	pant if it is warranted on the grounds of systemic risk and on condition that the indirect participant is known to the system;					implement the words of the Directive. However, this is not a requirement pursuant to the wording of the Directive.
A: 2 N: g	`indirect participant´ shall mean a credit institution as defined in the first indent of (b) with a contractual relationship with an institution participating in a system executing transfer orders as defined in the first indent of (i) which enables the abovementioned credit institution to pass transfer orders through the system;	N	Act	A: 50 P: 7 A: 57 a P: 1 S: 2	An “indirect participant” shall mean a credit institution as specified in Art. 1, the first indent of Directive 77/780/EEC, which has concluded an agreement with an institution participating in a payment system which is registered pursuant to Art. 57a, or corresponding business carried out by Danmarks Nationalbank which renders the credit institution capable of sending transfer orders through the system. Participants in the payments system shall be credit institutions as defined in Art. 1, first indent of Directive 77/780/EEC, investment	The provision is not considered to be relevant as an indirect participant and security provided by an indirect participant are subject to the authorisation power of the Supervisory Authority ⁷ .

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					companies as defined in Art. 1, no. 2 of Directive 93/22/EEC, public authorities, or others, who the Supervisory Authority considers as having significant importance to the payment process. Indirect participants in the payment system shall be credit institutions as defined in Art. 1, first indent of Directive 77/780/EEC.	
A: 2 N: h	`securities' shall mean all instruments referred to in section B of the Annex to Directive 93/22/EEC;	N	Act	A: 2 P: 1	The provisions of this Act with respect to securities shall apply to the following instruments: 1) Shares and other negotiable securities equivalent to these, 2) bonds and other negotiable securities equivalent to these, 3) any other securities normally dealt in giving the right to acquire such securities as listed in item 1 or 2 hereof by subscription or exchange or giving rise to a cash settlement, 4) units in collective investment undertakings and special-purpose associations, 5) money-market instruments listed on a stock exchange as well as certificates of deposit and commercial papers,	The terminology of the Act differs from the one applied in the Investment Service Directive 93/22/EEC, as a further specification of the instruments subject to the Act has been made in stead, but the list of instruments is not final as no.

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					6) financial-futures contracts and similar instruments, 7) future interest-rate agreements (FRAs), 8) interest-rate, currency and equity swaps, 9) commodity instruments, etc., including similar cash-settled instruments, 10) options to acquire or dispose of any securities under items 1 to 9 and options for equity and bond indices, including equivalent cash-settled instruments, 11) negotiable mortgage deeds on real property or bills of sale, and 12) other instruments and contracts as decided by the Danish Securities Council (Fondbørseret).	12) gives the Danish Securities Council authorisation ⁸ to include further instruments on the list. The specific delimitation of the instruments has been based on the Directive 93/22/EEC's definition of securities, but in addition to those commodity instruments, etc. have been included as well as negotiable mortgage deeds on real property or bills of sale.

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						It is thus a broader definition of securities than given by the Finality Directive. Therefore the Supervisory Authority, when notifying the Commission of clearing centres and registered payment systems, shall ensure that the system settled securities covered by the Finality Directive.
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	N				The term `transfer order´ is not defined in the Act. However, in rela-

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	the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or -an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;					tion to Danish legislative tradi-tion this would not seem to be necessary.
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 partici-pant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments;	N				Specific reference has been made to the Danish types of insolvency proceedings in the Act instead of implementing the definition di-rectly ⁹ .
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	N	Act	A: 50 P: 3	“Netting” as specified in Art. 57 shall mean conversion to net claims or net obligations of claims and obligations occasioned by transfer orders issued to or received from one or more	With reference to art. 57 of the Act it has been further specified that the

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	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;				participants by one or more of the other partici-pants with the result that claims can only be made with regards to net claims or net obliga-tions.	definition con-cerns the bi- and multilateral net-ting which is tak-ing place in the payment and se-curities settlement systems and which is made on the basis of trans-fer orders sent by the participants to the system.
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				Cf. above under art. 2, number c.
A: 2 N: m	`collateral security´ shall mean all real-isable assets provided under a pledge (including money provided under a pledge), a repurchase or similar agree-	N				Cf. above under art. 2, number c. The definition of

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Directive 98/26/EC			Member State's Legislation			
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Article ⁱ	Text	Appli- cability ⁱⁱ	Refe- rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
	ment, 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.					securities in section 2 of the Danish Securities Trading Act does not cover all the examples mentioned in Belgian Executive Summary point A. However, this is not relevant under Danish law as “collateral security” in section 57 b is not limited to securities as defined in section 2. Thus, there are no limitations under Danish law in respect of the types of “collateral security” that bene-

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						<p>fit from the protection of the Directive.</p> <p>There is no definition in the Act of which techniques that may be used to provide collateral.¹⁰</p> <p>The Supervisory Authority has informed us that there have been no examples of systems wishing to use non- authorised techniques.</p>

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Directive 98/26/EC			Member State's Legislation			
1	2	3	4	5	6	7
Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
	NETTING AND TRANSFER ORDERS					
A: 3 P: 1 S: 1	Transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant, shall be binding on third parties, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6(1).	N	Act	A: 57 P: 1 A: 57 P: 4	An agreement between two or more parties to the effect that all proved claims pertaining to securities clearing business carried out by a clearing centre, cf. art. 50, paragraph 5, or pertaining to clearing of payments carried out by Danmarks Nationalbank or a payment system under art. 57a shall be set off against each other (netted), may with legal effect towards the estate and creditors also include a provision to the effect that such claims shall be netted, cleared and settled or reversed in full if one of the parties is ordered to be wound up, or a notice of suspension of payments has been given, or negotiations for a compulsory composition are opened. Agreements as specified in Paragraph 1 (and 3) hereof shall in order to have legal effect against the estate and creditors be submitted to the Supervisory Authority prior to the winding-up, notification of suspension of payments, and	Cf. remarks to art. 6, paragraph 1 below.

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
					opening of the negotiations for a compulsory composition.	
				A: 57 P: 5	Agreements pursuant to subsections 1 and 3 hereof shall contain objective conditions pertaining to the cases in which claims, which have been entered into the system, but not yet satisfied shall either 1) be satisfied in accordance with the netting agreement or 2) be reversed in full	
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	The Danish Insolvency Act	A: 30 P: 1	After expiry of the day on which the announcement of the opening of insolvency proceedings has been made in the Danish official gazette, the debtor's inability to manage his own affairs shall have legal effect for anybody who is aware, or should have been aware, of the opening of such proceedings.	Thus Denmark has maintained a broader wording in the Insolvency Act, i.a. by maintaining a reversing burden of proof in comparison with the Directive ¹¹ . In respect of this point it has thus

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Directive 98/26/EC			Member State's Legislation			
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Article ⁱ	Text	Appli- cability ⁱⁱ	Refe- rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
						been presumed that the SFD is a minimum directive.
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				The effect of such rules in the Insolvency Act is eliminated by art. 57 of the Act.
A: 3 P: 3	The moment of entry of a transfer order into a system shall be defined by the rules of that system. If there are conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.	N	Act	A: 57c P: 1	Rules and participation agreements for a clearing centre, a payment system registered pursuant to Art. 57a or corresponding activities carried put by Danmarks Nationalbank shall include provisions on 1) when a transfer order is considered entered into the system, and 2) the point's in time after which a registered transfer order can no longer be revoked by a participant or a third party.	Danish national law does not include any provisions on the moment of entry of a transfer order.
				A: 8 P: 4	As regards a clearing centre, authorisation shall also be conditional upon the inclusion of provi-	

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Article ⁱ	Text	Appli- cability ⁱⁱ	Refe- rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
					sions pursuant to Art. 57c in the prevailing rules and participation agreement of the relevant clearing centre.	
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				So far, Denmark has chosen not to implement this provision ¹² .
A: 4 S: 2	Furthermore, Member States may also provide that such a participant's credit facility connected to the system be used against available, existing collateral security to fulfil that participant's obligations in the system.	D	Act	A: 57 b P: 2	Where collateral security as specified in subsection 1 hereof has been provided in the form of securities or deposits, this collateral security may be realised immediately if a previous agreement to this effect has been concluded and the participant has not already fulfilled his obligations towards Danmarks Nationalbank, a clearing centre or a payment system registered pursuant to Section 57 a or participants in such systems.	

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
A: 5	A transfer order may not be revoked by a participant in a system, nor by a third party, from the moment defined by the rules of that system.	N	Act	A: 57 c P: 1	<p>Rules and participation agreements for a clearing centre, a payment system registered pursuant to Section 57 a or corresponding activities carried out by Danmarks Nationalbank shall include provisions on</p> <p>1) when a transfer order is considered entered into the system, and</p> <p>2) the point/s in time after which a registered transfer order can no longer be revoked by a participant or a third party.</p>	Cf. above Direc-tive art. 3, para-graph 3.

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
	PROVISIONS CONCERNING IN-SOLVENCY 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	The Danish Insolvency Act	A: 29 P: 1	When the winding-up order is made, the debtor shall lose the right to transfer or assign his property, to receive payment or other consideration, to accept notices of resignation, complaints, and similar declarations, and to incur obligations or in any other way dispose of his property with legal effect for the estate.	With reference to art. 29 of the Danish Insolvency Act the cut-off time shall be considered to be the date of the notice of suspension of payments, the winding-up order, or the opening of negotiations for a compulsory composition.
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			Does not seem to have been implemented in the Act. ¹³	The Danish Supervisory Authority has informed us that Article 6(2), which pursuant to

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
						Danish law apply without explicit implementation, for the sake of completeness will be explicitly implemented in connection with the implementation of the Collateral Directive 2002/47/EC.
A: 6 P: 3	The Member State referred to in paragraph 2 shall immediately notify other Member States.	N			Does not seem to have been implemented in the Act.	It appears from the Explanatory Memorandum to art. 57 d, which implements art. 10 of the Directive, that the Supervisory Authority shall notify the Commission of

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Article ⁱ	Text	Appli- cability ⁱⁱ	Refe- rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
						<p>the systems pursuant to art. 57 d¹⁴. The Danish Supervisory Authority has informed us that Article 6(3), which pursuant to Danish law apply without explicit implementation, for the sake of completeness will be explicitly implemented in connection with the implementation of the Collateral Directive 2002/47/EC.</p>

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
A: 7	Insolvency proceedings shall not have retroactive effects on the rights and obligations of a participant arising from, or in connection with, its participation in a system earlier than the moment of opening of such proceedings as defined in Article 6(1).	N				The provision has not been implemented in Danish law as the insolvency proceedings pursuant to Danish law do not include any provisions on retrospective application .
A: 8	In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system.	N	Act	A. 57e P: 1	Where a participant in a clearing centre, a payment system registered pursuant to Section 57 a, or corresponding business carried out by Danmarks Nationalbank is ordered to be wound up, gives a notice of suspension of payments, or opens negotiations for a compulsory composition, the rights and obligations occasioned by or associated with participation in the system shall be determined by the law governing that system. This shall apply correspondingly to Danish participants in foreign clearing centres and payment systems registered with European	

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Article ⁱ	Text	Appli- cability ⁱⁱ	Refe- rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
					Commission pursuant to Art. 10, first para- graph of the European Parliament and Council Directive 98/26/EU.	

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
	INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FORM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER					
A: 9 P: 1	The rights of: - a participant to collateral security provided to it in connection with a system, and - central banks of the Member States or the European central bank to collateral security provided to them, shall not be affected by insolvency proceedings against the participant or counterparty to central banks of the Member States or the European central bank which provided the collateral security. Such collateral security may be realised for the satisfaction of these rights.	N	Act	A: 57b P: 1 A: 57b	Transactions involving collateral security provided towards Danmarks Nationalbank, a clearing centre, a payment centre registered pursuant to Section 57 a, or participants in such systems cannot be rendered null and void pursuant to Section 70 (1) and Section 72 (2) of the Danish Bankruptcy Act. However, collateral security may be rendered null and void if 1) it has been provided without undue delay after the lack of such collateral security has been established, or 2) it has been provided under such circumstances that it does not appear to be ordinary. Where collateral security as specified in subsection 1 hereof has been provided in the form of securities or deposits, this collateral security	

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
				P: 2 A: 57b P: 3	may be realised immediately ¹⁵ if a previous agreement to this effect has been concluded and the participant has not already fulfilled his obligations towards Danmarks Nationabank, a clearing centre or a payment system registered pursuant to Section 57 a or participants in such systems. Subsections 1 and 2 hereof shall apply correspondingly t collateral security provided in connection with clearing centres and payment systems which have been registered with the Commission pursuant to Art. 10, first paragraph of the European Parliament and Council Directive 98/26/EU where said collateral security is provided in accordance with the regulations of the (relevant) clearing centre or payment system. This shall apply correspondingly to collateral security provided towards central banks in their capacity as central banks within the European Union or countries with which the Union has made an agreement.	

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
A: 9 P: 2	Where securities (including rights in securities) are provided as collateral security to participants and/or central banks of the Member States or the European central bank as described in paragraph 1, and their right (or that of any nominee, agent or third party acting on their behalf) with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.	N	Act	A: 57b P: 5	Where collateral security provided towards Danmarks Nationalbank, a payment system registered pursuant to Section 57 a, a clearing centre, or participants in such systems are provided in securities or rights to securities which are listed in a register, on an account, or with a central securities depository in a Member State in the European Union or countries with which the Union has made a co-operation agreement, all matters concerning protection of the collateral security and protection of the collateral security against legal proceedings and transferees shall be decided by the law in the country of domicile of the said register, account, or central securities depository.	Denmark has adopted a strict interpretation and the Supervisory Authority has confirmed that according to the Explanatory Memorandum to section 57 b PRIMA must be considered applicable also outside the scope of the Directive ^{16,17} .

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
	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	Act	A: 57d P: 1 A: 57d P: 2	<p>The Supervisory Authority shall draw up a list of the clearing centres and payment systems with which operative agreements may be concluded pursuant to the provisions laid down in section 57 (1) and section 57 b (1) and (2). Such list shall be published by executive order.</p> <p>The Supervisory Authority shall give notice of the clearing centres and payment systems under subsection 1 hereof, as well as payment systems and clearing systems operated by Danmarks Nationalbank to the European Commission, cf. Art. 10 of the European Parliament and Council directive 98/27/EU.</p>	It appears from art. 57, paragraph 2 ¹⁸ and art. 57 B, paragraph 3 ¹⁹ of the Act that also foreign systems are protected, and from art. 57 e, in fine, that also Danish participants in foreign clearing centres and payment systems are protected.
A:10 S: 2	The system shall indicate to the Member State whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them.	N	Act	A: 57a P: 5	The system shall submit notification to the Supervisory Authority specifying the direct and indirect participants in the system and any changes therein.	In respect of clearing centres the authorisation granted by the Supervisory Authority will include an obliga-

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Article ⁱ	Text	Appli- cability ⁱⁱ	Refe- rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
						tion to notify the Supervisory Authority of any new participants ²⁰ .
A: 10 S: 3	In addition to the indication provided for in the second subparagraph, Member States may impose supervision or authorisation requirements on systems which fall under their jurisdiction.	D	Act	A: 84 P: 1 A: 86 P: 1	<p>The Danish Securities Council and the Supervisory Authority shall ensure that this Act and the rules issued in pursuance of this Act are observed, except section 12 (2) and (4) of this Act. The Supervisory Authority shall moreover act as secretariat for the Danish Securities Council and shall represent it in this connection.</p> <p>The Supervisory Authority shall supervise that the business activities of securities dealers, stock exchanges, clearing centres, central securities depositories, account controllers, authorised markets, money-market brokers and securities brokers and that their rules, procedures, control and safeguard arrangements, also in respect of electronic data processing, are adequate and in conformity with this Act and the provisions laid down in</p>	

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					pursuance hereof. The Supervisory Authority may stipulate requirements regarding the capital basis of a payment system, requirements regarding management, cf. Section 9, requirements regarding audits and preparation of operation plans, administrative procedures, and adequate control measures and security measures, including measures within IT	
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			Does not seem to have been implemented directly in the Act.	The Danish Supervisory Authority has informed us that Article 10(4) will be explicitly implemented in connection with the implementation of the Collateral Directive 2002/47/EC.

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Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	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	Act No. 283 of 26 April 2000 ²¹ .	A: 2 P: 1 A: 2 P: 2	The amendment act to the Act will take effect as from 1 May 2000, cf. however art 1, no. 12. The Danish Minister of Economic Affairs shall fix the effective date of art. 1, no. 12 ²² .	Does not require implementation.
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	Bill No. 117 introduced on 2 December 1999.		The Bill implements the European Parliament and Council Directive 98/26/EC of 19 May 1998 on Settlement Finality in Payment and Securities Settlement Systems ²³ .	
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	N				

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1	2	3	4	5	6	7
Article ⁱ	Text	Appli-cability ⁱⁱ	Refe-rence	Article (A; P; S; N) ⁱ	Content ⁱⁱⁱ	Remarks
	showing the national provisions which exist or are introduced in respect of each Article of this Directive.					
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.				

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

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

ⁱⁱⁱ "Content" contains quotes from the Danish Securities Trading Act (hereinafter "the Act") have been taken from the homepage of the Danish Financial Supervisory Authority, www.ftnet.dk

Member State: Denmark

¹ Explanatory Memorandum to Act No. 283 of 26 April 2000.

² According to the Danish Financial Supervisory Authority.

³ The Supervisory Authority has informed us that this is due to the fact that systems may be constructed in many different ways, e.g. in respect of capital base, participant structure, risk handling (central counterparty/non-central counterparty, loss distribution agreements, provision of security, margin security, etc.). Therefore, it has been the intention to make a framework legislation which would still allow system to be constructed in different ways. The Supervisory Authority which is the competent authority in Denmark shall therefore authorise payment as well as securities settlement systems (clearing centres). In connection with the authorisation procedure the Supervisory Authority ensures that the rules, etc. of the system in question are adequate pursuant to art. 2 a, 3rd indent of the Finality Directive. In the Danish implementation a distinction is made between clearing centres (securities settlement) and payment systems. Pursuant to art. 8, paragraph 1 of the Act it applies to clearing centres that they cannot commence activities as clearing centres until they have obtained an authorisation from the Supervisory Authority. Paragraph 2 of the same article lays down a number of basic requirements which must always be met:

- The activities shall be carried out in a public limited company (A/S) registered with the Danish Commerce and Companies Agency.
- The share capital shall amount to at least DKK 40 million.
- Operation plan, procedures, safeguard and control arrangements shall have been prepared.
- The clearing centre's protocol shall include rules in accordance with art. 57 c of the Act.

Pursuant to art. 8, paragraph 1 of the Act the Supervisory Authority shall, before granting the authorisation, make an assessment of whether the system's rules are adequate. This assessment will among other things include a review of the system's structure, capital position, risks, participants, conditions of participation, risk handling, accordance with the Finality Directive, etc.

Payment systems may in principle be operated by anybody and in any form. However, if a payment system is to be comprised by the protection of the Finality Directive, it must be registered. The basic conditions of registration of a payment system appear from art. 57 a, paragraphs 1 and 2 of the Act, which contains provisions concerning:

- participants
- that the system's protocol shall include rules stipulating:
 - that the system shall be subject to Danish law
 - who may be indirect participants in the system
 - the conditions governing direct participants' representation of indirect participants
 - which requirements the systems makes concerning security and collateral with a view to ensuring settlement within the system
 - what shall apply in relation to the matters mentioned in art. 57 c of the Act
 - terms and conditions in any agreement concluded by the system with a settlement agent or a clearing as defined in art. 2, numbers d and e of the Finality Directive.

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Pursuant to art. 57 a, paragraphs 2 and 3 the Supervisory Authority may direct a payment system to amend its rules, and the Supervisory Authority may also make requirements on the system's capital position, management, procedures, etc. The Supervisory Authority will therefore do an overall assessment of whether the risks related to a system are handled properly and ensure that the rules of the system are adequate before the system is registered.

⁴ According to the Supervisory Authority.

⁵ The Financial Supervisory Authority has informed us that there have been no specific examples of the problem in question.

Furthermore, when the Finality Directive was implemented in Danish law, there was general agreement - according to the Supervisory Authority - that systems may be organised very differently without that necessarily impairing the security of the systems. At the same time it was agreed that it should be possible also in the future for the market to adapt the systems to the needs of the market. In order to ensure that the systems are properly organised, both registered payments and securities settlement systems, which are notified pursuant to the SFD, shall be registered with or authorised by the Danish Financial Supervisory Authority which in connection with the registration or authorisation shall assess whether the rules of the system can be considered satisfactory.

It is defined in sections 54, 57 a and 62 of the Danish Securities Trading Act who can be a participant in a clearing centre, a registered payment system and a securities centre.

In respect of clearing centres it further applies pursuant to section 54(3) of the same Act that the clearing centre may decide that others may be participants. However, it will be possible for the Supervisory Authority to overrule such a decision if the participation must be considered to inflict a special risk on the system. In respect of registered payment systems it applies pursuant to section 57 a(1) that participants may be public authorities or others which in the assessment of the Supervisory Authority are of significant importance to the payments settlement. Finally, foreign securities centres and depository centres which are under public supervision by the Supervisory Authority may be authorised to make reports for registration with a securities centre.

According to the Supervisory Authority it cannot be excluded that the possibilities given under Danish law for participation in systems may lead to participation of institutions outside the definitions in the Finality Directive, and in addition to this there are special authorisation possibilities in Article 2 b, 2nd paragraph and Article 2 f, 3rd paragraph of the Directive.

As it has never been determined whether the Directive is a minimum directive or a harmonisation directive, the Supervisory Authority has based the implementation on the presumption that the Directive is a minimum directive.

It is thus the immediate opinion of the Supervisory Authority that authorisation of Danish institutions which do not with certainty fall within the Directive with the effect that pursuant to Danish law they are protected under the Directive should not give rise to any problems as such institutions will be subject to Danish insolvency law with the result that all participants in the system in question will be treated equally.

The problem arises if participants which are not subject to the provisions of the Directive and which are resident in other EU member states are authorised as participants. In that case it will be of importance whether on this point the Directive is considered a minimum directive or a harmonisation directive.

If it is a minimum directive, it is the opinion of the Supervisory Authority that a foreign insolvent estate must acknowledge that the participant in question (or rather the system participated in) is protected under the Directive.

If it is a harmonisation directive, there is hardly any doubt according to the Supervisory Authority that the opposite will be the case.

In the latter case the question furthermore arises whether the participation of a person who falls outside the definitions of the Directive may bring the entire system and the participants herein outside the protection of the Directive.

As mentioned the problem has not specifically arisen in Denmark. With the existing uncertainty the Supervisory Authority will probably feel precluded from authorising or accepting a foreign participant in a system if the participant does not fall within the Directive's definitions of who can participate.

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Thus, the Supervisory Authority would welcome a interpretation note on those questions.

⁶ The possibility mentioned in art. 2, number b, 2nd sentence to authorise undertakings, which are not mentioned in the 1st sentence, to participate in a system has - according to the Supervisory Authority - not been implemented separately as it lies within the authorisation power of the Supervisory Authority to grant such authorisation.

⁷ According to the Supervisory Authority.

⁸ This authorisation has hitherto not been exercised, According to the Supervisory Authority.

⁹ We have been informed by the Danish Supervisory Authority that in the light of the Draft Final Report and ECB's comments the Supervisory Authority has reassessed the need for a reference to the wide definition of the SFD of insolvency proceedings and has reached the conclusion that it would probably be expedient to let it appear specifically from section 57 (e) of the Danish Securities Trading Act that in foreign bankruptcy cases there may be situations where also actions which are not comprised by the terms bankruptcy, suspension of payments and composition may be relevant. Furthermore the Danish Supervisory Authority states that if all Member States have implemented the SFD correctly or the authorities otherwise comply with the SFD (which they are obligated to do even without the implementation), the current wording should not give rise to problems as a specific policy has been laid down as to Danish participants. The Danish Supervisory Authority has informed us that the issue will be addressed in connection with the general reassessment of the provisions implementing the SFD

¹⁰ According to the Supervisory Authority there is no problems with the use of repo agreements in Denmark. According to the Supervisory Authority problems of this type will be solved in any circumstances when the Collateral Directive 2002/47/EC is implemented.

¹¹ Between the time the winding-up order is made and until midnight on the date when the opening of the winding-up proceedings are announced in the Danish Official Gazette, the winding up shall have legal effect on any third party, if he is in bad faith. The burden of proof for bad faith lies with the estate contrary to art. 3 where the burden of proof lies with the system.

¹² The Supervisory Authority has informed us that there has been some uncertainty as to whether the Directive is a minimum standard directive or a harmonisation directive or both, and if so what provisions are what. Particularly in relation to art. 4, which according to its wording only applies to the actual winding up date. This is a problem in relation to the settlement routines of Værdipapircentralen and must - according to the Supervisory Authority - give rise to considerations in all systems operating with a 3-day settlement period.

¹³ The Supervisory Authority has informed us that the view in connection with the implementation of the Finality Directive concerning art. 6, paragraphs 2 and 3 was that the Directive merely by virtue of its adoption has effect as law in Denmark from implementation date fixed, and that the Danish authorities shall thus comply with the notification obligations of the Directive even though they are not reflected in an explicit provision of the Act. Thus it is an obligation for the relevant authorities to adapt their procedures so that notification is submitted pursuant to art. 6, 2 in case of the opening of insolvency proceedings for a participant. However, in our assertion it is questions whether it is sufficiently clear to the probate Courts that they have a duty to notify and who should be notified

¹⁴ Explanatory Memorandum to article 57 d, paragraph 1 of the Act

¹⁵ In order to give the systems the possibility to settle as planned the time-limit for realisation of 8 days laid down in art. 538a of the Danish Administration of Justice Act has been departed from.

¹⁶ An exception might however in our opinion apply if the underlying owner of a security held through a clearing system can be identified e.g. because there is one owner of that type of security in the clearing system. In that case it is not certain - and there is in any event no case law - that a probate court will in connection with the bankruptcy of a pledgor views PRIMA as the choice of law but might instead choose the law under which the security had been issued which law may well be the same as the *lex concursus*. Thus the implementation of the Hague Convention would entail certainty that the PRIMA choice principle would prevail over the uncertainties described above.

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¹⁷ The Danish Financial Supervisory Authority has informed us that it is correct as stated by ECB that no definition has been included in respect of neither “securities account” or “the relevant account” in connection with the implementation of the SFD. According to the Supervisory Authority Article 9 (2) comprises in itself a kind of definition of securities account as the article deals with accounts on which rights to securities are registered (...and their right with respect to the securities is legally registered on a register, account or centralised deposit system ...). Section 57b (5) of the Danish Securities Trading Act is an only slightly paraphrased version of Article 9 (2).

The Danish Financial Supervisory Authority has informed us that Denmark has chosen the so-called narrow implementation but it appears from the explanatory works that conclusions e contrario cannot be made outside the scope of the SFD. The work with the Hague Convention had been initiated at the time of the transposition and according to the Supervisory Authority also the transposition of Article 9 (2), which is worded in very general terms, was characterised by an expectation of a subsequent specification/expansion of the SFD, in respect of section 57b (5) especially in the light of the expected Hague Convention.

According to the Danish Financial Supervisory authority the basis of both Article 9 (2) of the SFD and the Hague Convention was PRIMA, i.e. “the place of the relevant intermediary. In Article 9 (2) this has resulted in the account’s physical position being the basis while the work with the Hague Convention has shown that the most operational basis in a number of situations was to let what has been agreed between the parties be decisive provided that the intermediary has an actual physical presence at the place in question.

The basis of Article 9 (2) corresponds to what is a fall-back provision in the Hague Convention. According to the Supervisory Authority in most practical cases the results obtained pursuant to the two provisions will be the same, but there may also be situations where this is not the case.

However, the idea behind the two set of rules is the same and it may be stated that Article 9 (2) was a formulation of the general principle to which everybody agreed while the Hague Convention was to be negotiated on the basis of an in-depth analysis of how the principle most expediently could be formulated in more detail.

Thus it is the opinion of the Supervisory Authority that it is crucial that the problems of the application of Article 9 (2) of the SFD and Article 9 of the Collateral Directive as well in connection with the Hague Convention are solved.

¹⁸ Art 57 paragraph 2 of the Act reads „Agreements on netting with foreign clearing centres and payments systems notified to the Commission pursuant to art. 10, first paragraph, of the Directive will have legal effect as the agreements specified in subsection 1 hereof“

¹⁹ Art 57 b paragraph 3 of the Act reads „Subsections 1 and 2 hereof shall apply correspondingly to collateral security provided in connection with clearing centres and payment systems which have been registered with the Commission pursuant to art. 10, first paragraph of the European Parliament and Council Directive 98/26/EU where said collateral security is provided in accordance with the regulations of the (relevant) clearing centre or payment system. This shall apply correspondingly to collateral security provided towards central banks in their capacity as central banks within the European Union or countries with which the Union has made an agreement“

²⁰ According to the Supervisory Authority.

²¹ Amending act of the Act.

²² Art. 1, no. 12 repeals the then existing art. 20, paragraph 2 of the Act and inserts new paragraphs 2 to 5 in art 20 dealing with the access to the Stock Exchange, thus having no relevance for the implementation of the Finality Directive. This amendment took effect as from 1 December 2001 by government order No. 1143 of 14 December 2000.

²³ Enacted at the 3rd reading in the Danish Parliament on 11 April 2000 as Act No. 283 of 26 April 2000.

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