II

(Preparatory Acts)

ECONOMIC AND SOCIAL COMMITTEE

Opinion of the Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on financial collateral arrangements'

(2002/C 48/01)

On 26 April 2001 the Council decided to consult the Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 21 November 2001. The rapporteur was Mr Barros Vale.

At its 386th plenary session (meeting of 28 November 2001), the Economic and Social Committee adopted the following opinion by 104 votes to two with one abstention.

1. **Introduction**

1.1. The need for the proposed Directive arises from the legal uncertainty faced by payment and securities settlement systems, central banks and participants in the financial markets.

1.2. To reduce this uncertainty and protect the various participants, several Member States have introduced netting legislation or revised existing legislation in this area.

1.3. The adoption of the Directive on Settlement Finality was a milestone in establishing a sound legal framework for payment and securities settlement systems.

1.4. This Directive is to date the only piece of European legislation regulating cross-border collateral in the context of financial transactions. The adoption of a Directive on the cross-border use of collateral was therefore given top priority in the Commission's 'Financial Services Action Plan'.

1.5. The proposed Directive is to apply to cash and securities accounts and short-term transactions.

1.6. The Directive is to apply to only the following operators: public authorities or central banks; financial institutions under prudential supervision; and persons other than natural persons whose capital base exceeds EUR 100 million or whose gross assets exceed EUR 1 000 million (at the time when financial collateral is actually delivered, according to the most recently prepared accounts published within a period no greater than two years prior to that time).

1.7. According to the Commission, the objectives of the proposed Directive are:

— to ensure that effective and reasonably simple regimes exist for the creation of collateral under either title transfer or pledge structures;

— to provide limited protection of collateral arrangements from some rules of insolvency law, in particular those that would inhibit the effective realisation of collateral or cast doubt on the validity of techniques such as close-out netting, the provision of top-up collateral and substitution of collateral;

— to create legal certainty regarding the conflict of laws relating to book entry securities used as collateral in a cross-border context by extending the principle adopted in Article 9(2) of the Settlement Finality Directive;

— to limit the financial burdens affecting the use of collateral, when creating or enforcing collateral arrangements;

— to ensure that agreements permitting the collateral taker to re-use the collateral for its own purposes under pledge structures are recognised as effective, as for repos.

2. General comments

2.1. The ESC welcomes the existence of mechanisms which speed up and facilitate the process of collateral provision. However, it believes that greater attention must be given to some aspects in order to ensure compliance with the principles of market balance and equal treatment before the law.

2.2. Under this proposal for a Directive, the collateral, which currently functions as a pledge held on deposit, effectively becomes the property of the collateral taker, subject to agreement between the parties. This major change raises a number of issues:

2.2.1. The Directive will have to be transposed into the national legislation of each Member State and may prove to be incompatible with their existing legislation. Various Member States have already expressed doubts on this matter at the Council, and the requisite transposition may pose problems.

2.2.2. A real-time information system about the collaterals provided by a given entity also needs to be set up for the various operators and creditors, in order for there to be transparency regarding the assets at their disposal at any given time. Since this is a new and unprecedented mechanism, a high degree of transparency will be required to give it credibility.

2.2.3. There is also a need for clarity regarding situations that constitute non-compliance and require the enforcement of collateral arrangements. All the situations in which collateral arrangements may be enforced must be specified from the outset. Failure to do this may have serious consequences and discredit the proposed system.

3. Specific comments

3.1. It is necessary to specify what constitutes the 'real cause' for enforcing collateral arrangements, thereby avoiding abuses of the law. The lawfulness of the cause cited in such cases must also be verified.

3.2. It is necessary to make it clearer whether the assets provided as a collateral under this Directive are restricted to assets which the provider of the collateral actually owns or may also be other assets held by them on behalf of third parties.

3.3. Bearing in mind the technical and legal complexities of this subject, it is important to limit the scope of the Directive to activities performed by bodies employing professionals/specialists so as not to undermine its objectives.

3.4. It is vital to take account of this precedent, which may be extended to other types of creditors and thus pervert the principles of bankruptcy law and the corresponding protection of creditors. Account must be taken of the principle of the universality of creditors' rights and whether they are affected by the proposed provisions.

3.5. Measures to protect the collateral provider in the event of the collateral taker's insolvency must be guaranteed.

3.6. Also unclear are the conditions under which the provisions are to be applied in the event of the financial restructuring — as opposed to the bankruptcy — of the debtor. Such situations vary considerably and have different consequences, and the application of the proposed principles will have to be adapted accordingly.

4. Proposals for transparency mechanisms and general protection of creditors

4.1. The Committee thinks it unacceptable that this innovative mechanism is going to be applied without a freely-accessible mechanism for general consultation being set up at the same time to provide real-time information on all the collaterals of this type provided by the various operators concerned.

4.2. This mandatory data-base could be set up at the European Central Bank or another independent and credible institution/body and administered by the latter in accordance with rules that are based on the general principles of prudential supervision.

4.3. Only a system which is generally accessible for consultation and in which all collaterals of this kind are registered for as long as they exist will be able to provide the requisite transparency and security so that all creditors, suppliers and shareholders, etc., can have a clear picture at any one moment of the real situation regarding the collateral provider's assets.

5. **Final consideration**

5.1. Because of its importance, particularities and consequences for existing legislation, the proposal will have to be amplified. It will be necessary to make changes which make the proposal's application more transparent and secure and ensure that the principles of the general protection of creditors and the universality of their rights are not perverted. The Committee would like to give its views on a new Commission proposal which addresses the concerns expressed in this opinion.

Brussels, 28 November 2001.

The President

of the Economic and Social Committee

Göke FRERICHS

Opinion of the Economic and Social Committee on the 'XXXth Report on competition policy 2000'

(2002/C 48/02)

On 10 May 2001 the Commission decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the 'XXXth Report on competition policy 2000'.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 21 November 2001. The rapporteur was Mr Sepi.

At its 386th plenary session (meeting of 28 November 2001) the Economic and Social Committee adopted the following opinion by 108 votes to one, with one abstention.

1. **Introduction: general background**

1.1. In addition to the regular review of the activities of the Competition DG, the XXXth report on competition policy includes a series of important pointers for the future of this policy.

1.2. Major new developments at institutional level, such as the advent of the Euro, and internationally, such as the growing trend towards globalisation and imminent enlargement, and the increasingly high profile of this policy in a period of technological change and industrial mergers, have prompted the Competition DG to make a number of fundamental changes to structures and practice.

1.3. This makes it important that rather than just passing judgment on the past, this opinion should use the past as a starting point to highlight these changes and outline their possible consequences.