EUROPEISKA GEMENSKAPERNAS KOMMISSION

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EUROPAPALAMENTETS OCH RÅDETS DIREKTIV

om avvecklingens slutgiltighet och säkerheter

(framlagt av Kommissionen)

EXPLANATORY MEMORANDUM

I. Background

The present proposal for a directive is the result of a process which can be summarised as follows:

The Lamfalussy Report of 1990[1] highlighted the important systemic risks inherent in payment systems which operate on the basis of one or more legal types of *payment netting*[2]. The Commission's attention was drawn to these matters by one of its advisory committees on payment systems, the Payment Systems Technical Development Group.

In its March 1992 working document[3], the Commission noted that certain features of the law in a number of Member States, together with the differences between Member States' laws relating to payment systems in general, were a source of uncertainties and risks. This view was endorsed by the Committee of Governors of the central banks of the EC[4].

Work began on these issues in a group of government legal experts and central bank representatives, chaired by the Commission, early in 1993. The first phase of the work has consisted of establishing an inventory of the legal situation in the areas of payment netting and settlement finality in all Member States, which has led to a more precise identification of these problems. An extensive study[5], ordered by the Commission and delivered in February 1994, supported these preliminary conclusions. A first consultation hearing with the European Credit Sector Industry was held in the spring of 1994.

In a second phase (since 1994) different solutions have been discussed and examined within the group of government experts. They are listed under point II.3. A second consultation hearing with the European Credit Sector Industry was held in October 1995, which confirmed the overall validity of the approach.

In the light of this process, the Commission has reached operational conclusions, in particular as regards the questions pertaining to settlement finality and collateral security. It therefore considers that a directive should be proposed. No operational conclusions have been reached relating to securities settlement systems. These issues remain, however, under consideration within the Commission. It may be necessary to make a further proposal covering these issues in the future.

Overall assessment

The Commission Strategic Programme for the Internal Market clearly identified the establishment of effective cross-border payment systems as one of the few requirements that still need to be met to ensure the functioning of the Internal Market. This requires modernisation of systems, which affects both central banks and commercial banks, and consequent investment on the part of the industry. This

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1 Report to the Governors of the central banks of the Group of Ten countries, Basel, November 1990

2 For the purposes of the present Proposal, "payment netting" means the conversion into one net claim or one net obligation of claims and obligations resulting from payment orders which an institution either issues or receives, with the result that only the net claim can be demanded or the net obligation be owed.

3 "Easier cross-border payments: Breaking down the barriers", SEC(92)621 final of 27 March 1992.

4 "Issues of common concern to EC Central Banks in the field of payment systems", by the Ad Hoc Working Group on EC payment systems, September 1992.

5 The laws on credit transfers and their settlement in Member States of the EU: Report for the European Commission (DG XV), Wilde Sapte - Brussels, February 1994.

process is already under way. Moreover a number of the large value payment systems which primarily serve the domestic market in their countries are increasingly gaining member banks from other Member States.

The legal issues which are the subject of the present proposal have an important underlying influence on the design of the necessary systems and linkages, both those which are specifically conceived to transmit payments across borders and those which have a "cross-border membership". The resolution of these issues will provide a valuable foundation of certainty and serve to minimise legal risks of a systemic kind, as well as the costs which such risks entail.

The need for action in this domain is all the more urgent as progress is made towards full Economic and Monetary Union. The European Council, meeting in Madrid on 15 and 16 December, has stressed that the payment system's infrastructure needs to be in place so as to ensure the smooth functioning of an area-wide money market based on the single currency.

II. Subsidiarity assessment

1. What are the objectives of the directive, having regard to Community obligations?

The principal objectives are threefold:

- to reduce legal risks associated with participation in payment systems, as was pointed out in the Lamfalussy report of 1990, in particular as regards the legal validity of netting agreements and the enforceability of collateral security;
- to ensure that in the Internal Market payments may be made free of impediments, thus contributing to the efficiency and the cost-effective operation of cross-border payment arrangements in the European Union;
- by taking into account collateral constituted for monetary policy purposes, to contribute to developing the necessary legal framework in which the future European Central Bank may develop its monetary policy.

The present directive also

- leads to further integration of EC banks in the domestic payment systems of other EC States. The directive therefore supports the free movement of capital stated in Article 73B to 73G and the freedom to provide services under Article 59 of the Treaty;
- contributes to the preparation of the third stage of EMU, for which efficient payment mechanisms are indispensable.

2. Does the action envisaged stem from an exclusive competence of the Community?

Exclusive competence: Article 100A, in conjunction with Article 7A.

3. What are the possibilities of action available to the Community

A number of alternatives were considered:

First, the minimalist approach of developing a solution within the current state of the national laws was examined. The question in that context was to examine whether it was possible to design a model contract which could be used by members of a payment system and which could remedy the problems concerned. This approach was rejected for two reasons:

- This solution concerns only the parties to the contract, while it is necessary that third parties be legally bound. This is illustrated by the following case: a Country A bank participates in a multilateral netting system with a central settlement agent in Country B. The Country A bank goes bankrupt. In that case, the creditors -or the liquidator- of the bankrupt Country A bank, attempting to recover part of their claims against that bank, are likely to challenge the netting agreement under Country A law, since that law may not necessarily recognise multilateral netting. If such action were successful, it could jeopardise the whole netting system.
- Insolvency law contains so-called "ordre public" rules which can overrule contractually stipulated provisions. Even if a payment system agreement stipulated that in case of insolvency of a member the payment orders introduced before the moment of pronouncement of insolvency proceedings cannot be unwound, a zero-hour-rule e.g., as it exists in a number of Member States, would overrule that contractual arrangement. Consequently, unwinding could happen, with potentially far-reaching and damaging consequences for the payment system concerned.

A second possible solution consisted of the private international law approach, under which it is possible to agree that a payment system established under the laws of Country A, a country whose commercial law recognises netting and whose bankruptcy laws do not interfere with the proper operation of payment systems, would be governed entirely - including all its members from EU countries - by the laws of country A. Whether Member State B's law recognises the finality of netting applicable to bank B, or whether that State's insolvency law has provisions "d'ordre public", like the zero-hour rule, would no longer be relevant. Such an approach did not in the final analysis, however, prove to be attractive. If chosen, it would mean that the courts in every Member State would in principle need to be in a position to interpret and apply the different branches of law (commercial law, insolvency law, etc.) of all other Member States. Such a solution, at least when standing alone, seemed unnecessarily cumbersome.

A third possibility was to recommend to the Member States, without any binding obligations, the necessary modifications in their laws. This approach has some procedural attractions in largely bypassing the EU legislative process but it would not substantially assist the governments of Member States, who would still have to draft and implement any necessary legislation. From the point of view of the financial institutions and payment systems, the solution would lack transparency and legal certainty. Any slight advantage of proceeding in this way was felt to be outweighed by the disadvantages.

Therefore, as explained in detail in section I above, a binding instrument is now deemed both timely and necessary.

4. Is uniform legislation necessary or is a directive setting out the general objective and leaving implementation thereof to the Member States sufficient?

Uniform legislation is not necessary. A directive setting out the general objectives, as they are outlined hereunder, is sufficient.

Section I of the directive deals with the scope of the directive and defines the necessary terms;

Section II of the directive lays down the general principle, the objective of which is to ensure that payment netting is made legally enforceable under all jurisdictions and its effects binding on third parties;

Section III provides for the irrevocability of payment orders in accordance with the rules of the payment system concerned;

Section IV of the directive lays down the general principle, the objective of which is to :

- ensure that insolvency proceedings or any other rule or practice do not have a retroactive effect on the rights and obligations of participants.
- determine which insolvency law is applicable to the rights and obligations in connection with direct participation in a payment system in the event of insolvency proceedings against a participant in that payment system.

Section V of the directive lays down the general principle, the objective of which is to insulate collateral security from the effects of the insolvency law of the Member State of a failed participant.

These provisions set out the general objective pursued, thus leaving implementation to the Member States; where appropriate, institutions are free to determine the precise contents of these general principles.

III. Detailed commentary on the articles

Article 1

This Directive's main goal is to reduce the systemic risk associated with participation in Payment Systems. There was a general consensus that this directive should have the widest scope possible. To this effect, the directive covers cross-border payment systems as well as domestic systems. Furthermore, it applies to the following two categories:

- EC institutions which are participants in third country payment systems and collateral security constituted for such a payment system
- Third country institutions which participate in an EC Payment System and the collateral security constituted in favour of that payment system

The inclusion of the first category in the directive's scope implies that the benefits of this Directive are extended to third country payment systems as far as their EC participants are concerned. Third country payment systems as such are of course not covered by the directive, but their participants are insofar as they are EC institutions within the meaning of Article 2 (i).

As far as the second category is concerned, the essential interest of its inclusion in the directive's scope lies in the fact that it makes it possible to insulate collateral security, pledged by a third country institution in an EC Member State, from a possibly universal insolvency law of that third country.

Finally, with a view to the establishment of the future European Central Bank, the pledging of collateral security will increasingly be cross-border. The same problems arise in that respect as in the case of the pledging of collateral in the framework of payments systems. Therefore, the scope of this proposal has been extended to collateral security, pledged in connection with monetary policy operations.

Article 2

"institution" has been given a wide scope, so as to include not only credit institutions in the sense of the first Banking Directive, but also investment banks, giro and postal banks and any other undertaking which participates directly in a payment system.

"payment order" means an instruction given to carry out a transfer, be it credit or debit, by a book entry on the accounts of a credit institution or of a central bank. On the accounts of a credit institution, since it is this type of payment system which calls -from a public policy standpoint- for the kind of protection which this Proposal for a Directive provides for. On the accounts of a central bank, is added to anticipate the foreseeable development of real time gross settlement facilities, which necessitate movements on the accounts of the Central Banks.

"payment system" is defined widely, so as to include systems, regardless of whether they settle on a gross or net basis and of whether they are based on multilateral or bilateral arrangements. Of course, a *federation* of payment systems in itself is also covered by the directive.

Article 3

Many payment systems, handling very large payments ("large value") or smaller values ("retail") depend on the technique known as netting[6] or set-off. "Payment netting" is the conversion into one net claim or one net obligation of claims and obligations resulting from payment orders which an institution either issues to one or more other institutions or receives from one or more other institutions, with the result that only the net claim can be demanded or the net obligation be owed. This has the effect of reducing greatly the number of settlement transactions required to process a given number of payments. Instead of settling each payment order individually as it arises during the day the banks involved in a netting agreement settle once by paying (or receiving) a single net balance to (or from) the other members of the system.

The legal enforceability of a netting operation with institutions from different Member States ultimately depends on the law of the Member State of origin of these institutions. In a number of Member States netting, especially multilateral netting, is not enforceable under the current state of legislation. If the liquidator of a failed participant in a payment system were on that basis to challenge the netting, this would mean that he could repudiate the net settlement debt, arrived at by netting. Instead he could insists on payment to him of all the individual underlying amounts originally due to that institution. As for the amounts due from the failed institution, they will be claims on paper in the insolvency proceedings and unlikely to be met. This phenomenon of repudiating the debt and accepting the amounts originally due, is called cherry-picking. The consequence of cherry-picking is serious disruption in the payment system at best, at worst the payment system might break down (systemic risk) and cause in turn the inability of other members in the payment system to meet their obligations (knock-on effect).

Therefore, Article 3(1) provides that netting is legally enforceable and binding on third parties, even in the event of the opening of insolvency proceedings, insofar as the payment orders have been introduced into the payment system before the opening of insolvency proceedings.

Article 3(2) specifically focuses on the cases in which a participant who realises that bankruptcy is becoming inevitable, introduces payment orders into a payment system before the declaration of

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6 From the legal point of view, "netting" in this sense is the same technique as is the subject of the proposal for a directive on contractual netting. However the latter deals with unmatured obligations, netted on a bilateral basis only, whilst the present initiative concerns payment streams netted bilaterally or multilaterally. Both types of netting differ markedly from the concept of position netting, as used in the Capital Adequacy Directive.

insolvency in order to remove assets to the detriment of the creditors. Therefore, this article confirms that the directive does not shield fraudulent payment orders from invalidation. Such invalidation will, however, not be permitted to occur through the unwinding of the netting operation, something that the directive aims to avoid at all costs, but rather outside the payment system, or indeed in a subsequent netting cycle (via a reverse order).

Article 4

It is commonly agreed that the possibility of a significantly large payment being revoked can generate systemic risk, if the revocation occurs during the process leading to settlement in a payment system. It would be unacceptable, on the other hand, to disproportionately limit the freedom of operation and the freedom of contract of the various parties to a payment system in attempting to reduce or minimise this risk.

Thus, having recognised that revocation might otherwise lead to an unwinding of settlement, Article 4 (1) precludes the revocation of a payment order after a contractually agreed time, not only by the parties to the payment system agreement, but also by third parties, e.g. a sub participant. This prohibition is important not only in the case of netting, but also in the case of real time gross settlement arrangements.

This does not mean, of course, that a payment order which was not due by the originator, but has been introduced into the payment system, is forever lost to him. Article 4(2) confirms that, if the originator, i.e. a customer, has a right against the beneficiary to reclaim an amount that has been introduced into the payment system, such a right is not cancelled, but will only have to be exercised outside of the payment system, or by a reverse payment operation in the next netting cycle.

Articles 5 and 6

Irrespective of whether a payment system operates on the basis of netting or gross-settlement, the different insolvency laws in the different Member States cause further problems, where rules "d'ordre public" included in these insolvency laws would lead to the possibility of cherry-picking, with its very damaging consequences, as described above.

This is the case for the so called "zero-hour" rule, which gives retroactive effect to the pronouncement of insolvency. A consequence of this rule is that payment orders introduced after zero hour of the day of pronouncement of insolvency of a participant in a payment system but before the pronouncement of the insolvency, could be challenged by a liquidator of an insolvent institution. The latter would then be in a position to insist on payment to him of all the individual underlying amounts originally due to that institution. As for the amounts due from the failed institution, they will be claims on paper in the insolvency proceedings and unlikely to be met. In order to avoid this possibility, Article 5 provides that insolvency proceedings do not have retroactive effect.

There may, however, exist other provisions "d'ordre public", beyond the so called zero-hour rules, which can potentially lead to cherry-picking. This is why Article 6 has been designed as a catch-all provision, which is to cover all those cases which have not been identified but are believed to exist. Therefore, Article 6 states that "in the event of insolvency proceedings against an institution which participates directly in a payment system, the rights and obligations arising from or in connection with participation in that payment system, shall be determined by the insolvency law of the country where the payment system is located." In practice, Article 6 does, of course, not imply that a separate insolvency proceeding has to be opened in the Member State of location of the payment system. The insolvency of a member institution would continue to fall under the insolvency law of the Member State where that institution is established, as is currently the case. If the liquidator, however, would wish to draw on insolvency provisions "d'ordre public" to challenge a payment made through the

payment system, he would have to apply the insolvency law of the Member State of location of the payment system. This approach has the advantage that the parties in a payment system only have to examine one insolvency law, namely the insolvency law of the Member State of location of the payment system, instead of having to examine and attempt to reconcile the insolvency law of the Member State of origin of every single participant. This would contribute to reducing costs and eliminating legal uncertainty.

Article 7

Finally, the directive addresses the problems associated with collateral security which supports participation in payment systems, on a cross-border basis. Its objective is to avoid a situation where in the case of insolvency of a participant in a payment system, the insolvency law of that participant's Member State would not recognise the validity of collateral security constituted in another Member State. Article 7(1) therefore provides that, in the case of insolvency of a participant, the rights of the pledgee shall not be affected by the insolvency of that participant. This rule is justified for public policy reasons. Vast sums are transferred through the payment systems on a daily basis: if one member were not able to meet its obligations and the collateral could not be realised, this could -in a worst case scenario- have disastrous consequences for the payment system as such, causing no less than the collapse of such a system, with a devastating knock-on effect in financial markets.

It should be pointed out that this Proposal does not alter the rule of law applicable to collateral security. This remains, as is the current situation, the law of the Member State where the collateral is located, in accordance with the principle of *lex rei sitae.*

In its second paragraph, Article 7 provides that in the case of a universal third country insolvency law, the effects of that law do not extend to the rights of the pledgee in connection with participation in a payment system or in connection with monetary policy operations, if that collateral security is constituted in a Member State.

EUROPAPARLAMENTET OCH EUROPEISKA UNIONENS RÅD HAR ANTAGIT DETTA DIREKTIV

med beaktande av Fördraget om upprättandet av Europeiska gemenskapen, särskilt artikel 100a i detta,

med beaktande av kommissionens förslag,

med beaktande av Ekonomiska och monetära institutets yttrande,

med beaktande av Ekonomiska och sociala kommitténs yttrande,

i enlighet med det förfarande som anges i artikel 189b i Fördraget om upprättandet av Europeiska gemenskapen, och

med beaktande av följande:

Lamfalussy-rapporten 1990 till centralbankscheferna i G10-gruppen har å ena sidan pekat på den betydande systemrisk som är förknippad med betalningssystem som arbetar på grundval av en eller flera rättsliga typer av betalningsnettning, oavsett om det är fråga om bilateral eller multilateral nettning. Å andra sidan är det ytterst viktigt att reducera de juridiska risker som är förenade med deltagande i system för bruttoavveckling av betalningar i realtid, med tanke på den ökande utvecklingen av dessa system.

Reducering av systemrisken rör framför allt avvecklingens slutgiltighet och den rättsliga giltigheten för säkerheter. Med säkerheter förstås alla de tillgångar som en deltagare i betalningssystemet har överlämnat till de andra deltagarna i betalningssystemet i syfte att trygga rättigheterna och skyldigheterna inom systemet. Dessa tillgångar inkluderar bl.a. repor (återköpsavtal) och försäkringar som tecknats av en deltagare i betalningssystemet till förmån för de andra deltagarna.

Genom att säkerställa att betalningar och kapitalrörelser kan röra sig fritt inom den inre marknaden kommer detta direktiv att bidra till att de gränsöverskridande betalningsarrangemangen inom Europeiska unionen fungerar på ett effektivt och kostnadseffektivt sätt. Direktivet kommer därigenom att främja utvecklingen mot ett fullständigt genomförande av den inre marknaden, framför allt vad gäller friheten att tillhandahålla tjänster och liberaliseringen av kapitalrörelser med sikte på genomförandet av den ekonomiska och monetära unionen.

Detta direktiv skall gälla såväl inhemska som gränsöverskridande betalningssystem samt både debet- och kreditöverföringar. Direktivet är tillämpligt på EG-betalningssystem och säkerheter som systemdeltagarna, oberoende av om de är från en medlemsstat eller ett tredje land, ställer då de deltar i betalningssystemen. Direktivet omfattar även EG-institut som deltar i betalningssystem i tredje land. Finansiella flöden äger i ökande grad rum på en världsomfattande nivå. EG-institut och EG-betalningssystem måste således upprätta och bibehålla nära operationella förbindelser med betalningssystem i tredje land och delta i dem. I syfte att undvika att det på grund av bristande rättssäkerhet uppstår hinder för EG-institut att delta i betalningssystem i tredje land är det därför väsentligt att gränsöverskridande förbindelser mellan EG-institut och EG-betalningssystem å den ena sidan och betalningssystem i tredje land å den andra sidan omfattas av och underlättas genom detta direktiv. Effektiva EG-betalningssystem är av avgörande betydelse för den inre marknaden och eftersom de finansiella marknaderna är oupplösligt förbundna med varandra kan de inte fungera på ett riktigt vis utan förbindelser med betalningssystem i tredje land.

Eftersom direktivet gäller säkerheter som ställs vid monetära operationer, bistås EMI i sin uppgift att främja de gränsöverskridande betalningarnas effektivitet i syfte att förbereda den tredje etappen av den ekonomiska och monetära unionen. Därigenom bidrar direktivet till att skapa den nödvändiga rättsliga ram inom vilken den blivande europeiska centralbanken kan utveckla sin monetära politik.

Syftet med direktivet är att säkerställa att nettning har rättslig giltighet i samtliga medlemsländers lagstiftning och är bindande för tredje part. Direktivet syftar även till att säkerställa att betalningsuppdrag inte kan återkallas efter en avtalsenlig tid och att obeståndsförfarande inte har någon retroaktiv verkan på deltagarnas rättigheter och skyldigheter. Dessutom syftar direktivet - vid obeståndsförfarande mot en deltagare i betalningssystemet - till att fastställa vilken obeståndslagstiftning som skall tillämpas på rättigheterna och skyldigheterna vid direktdeltagande i betalningssystemet. Slutligen är avsikten med direktivet att undanta säkerheter från verkningarna av obeståndslagstiftning tillämplig på deltagare som inte uppfyllt sin betalningsskyldighet.

Med tanke på att direktivet också skall tillämpas på relationer mellan ett institut och en medlem i betalningssystemet som översänder till systemet betalningsorden från den förstnämnda eftersom denna relation kan anses vara, i sig själv, ett annat betalningssystem.

Antagandet av detta direktiv är det lämpligaste sättet att uppnå ovanstående målsättningar. Föreliggande förslag är nödvändigt för att uppnå dessa målsättningar och går inte heller utöver dem.

HÄRIGENOM FÖRESKRIVS FÖLJANDE.

I. RÄCKVIDD OCH DEFINITIONER

Artikel 1 - Räckvidd

Detta direktiv skall gälla för

1) varje EG-betalningssystem som arbetar i något slag av valuta och ecu, och för säkerheter som ställs vid deltagande i ett sådant system,

2) varje EG-institut som är direktdeltagare i ett betalningssystem i ett tredje land och för säkerheter som ställs vid deltagande i ett sådant system,

3) säkerheter som ställs i samband med monetära operationer.

Artikel 2 - Definitioner

I detta direktiv avses med

a) *institut:* sådana företag som anges i artikel 1 i rådets direktiv 77/780/EEG, inklusive institut angivna i förteckningen i artikel 2.2 i direktivet, och som är direktdeltagare i ett betalningssystem samt varje annat företag som är direktdeltagare i ett betalningssystem,

b) *direktdeltagande:* att med avvecklingsansvar delta i ett betalningssystem,

c) *EG-institut:* varje institut som har sitt säte i en medlemsstat,

d) *institut i tredje land:* varje institut som inte är ett EG-institut,

e) *betalningsuppdrag:* varje anvisning att ställa ett penningbelopp till en slutlig mottagares förfogande genom kontoföring på konto i ett kreditinstitut eller en centralbank,

f) *obeståndsförfarande:* åtgärder som en rättslig eller administrativ myndighet på grund av väntad eller faktisk oförmåga att uppfylla finansiella skyldigheter fastställer till en grupp borgenärers förmån och som hindrar ett institut från att utföra betalningar eller avhända sig egendom,

g) *betalningsnettning:* omvandling till en nettofordran eller en nettoskuld av sådana fordringar och skulder som härrör från betalningsuppdrag som ett institut antingen utfärdat till eller mottagit från ett eller flera andra institut, varigenom endast nettofordran kan krävas eller nettoskulden utgöra skuld,

h) *betalningssystem:* varje skriftligt avtal mellan två eller flera institut om att utföra betalningsuppdrag,

i) *EG-betalningssystem:* ett betalningssystem som är beläget i en medlemsstat. Ett system skall betraktas vara beläget i den medlemsstat vars lag har valts att gälla av de institut som är direktdeltagare i betalningssystemet. Om något sådant val inte har gjorts, skall betalningssystemet anses vara beläget i den medlemsstat där avvecklingen äger rum,

j) *betalningssystem i tredje land:* varje betalningssystem som inte är ett EG-betalningssystem,

k) *monetär operation:* en ren köp- och säljoperation (avista och termin) på finansmarknader eller en sådan operation i samband med en repa (återköpsavtal), ut- eller inlåning av fordringar och omsättningsbara instrument, oberoende av om operationen sker i en gemenskapsvaluta eller någon annan valuta eller i ädelmetaller eller om den utförs av en medlemsstats centralbank eller den blivande europeiska centralbanken samt låneoperationer som en medlemsstats centralbank eller den blivande europeiska centralbanken utför med kreditinstitut eller andra marknadsdeltagare och som stödjer sig på fullgod säkerhet,

l) *säkerheter:* alla tillgångar som överlämnas för att trygga de rättigheter och skyldigheter som uppstår i ett betalningssystem eller som överlämnas till en medlemsstats centralbank eller till den blivande europeiska centralbanken i samband med monetära operationer.

II. BETALNINGSNETTNINGENS SLUTGILTIGHET

Artikel 3 - Betalningsnettning

1) Betalningsnettning är rättsligt giltig och skall vid obeståndsförfarande mot ett institut som är direktdeltagare i ett betalningssystem vara bindande för tredje part, förutsatt att betalningsuppdraget har registrerats i betalningssystemet innan obeståndsförfarandet inleds. Registreringstidpunkten skall fastställas genom betalningssystemets regler.

2) Bestämmelser om ogiltigförklarande av avtal som ingåtts eller transaktioner som påbörjats innan obeståndsförfarande inletts får inte leda till att nettningen backas.

III. ÅTERKALLANDE AV BETALNINGSUPPDRAG

Artikel 4 - Återkallande

1) Ett institut som är direktdeltagare i ett betalningssystem eller en tredje part får inte återkalla ett betalningsuppdrag gentemot de övriga direktdeltagarna i betalningssystemet efter den tidpunkt som fastställs i betalningssystemets regler. Denna bestämmelse gäller utan hinder av att obeståndsförfarande inletts.

2) Varje rätt till återbetalning som initiativtagaren till ett betalningsuppdrag kan ha skall utövas utan att påverka tillämpningen av punkt 1.

IV. ICKE-RETROAKTIVITET OCH TILLÄMPLIG OBESTÅNDSLAGSTIFTNING

Artikel 5 - Icke-retroaktivitet

Obeståndsförfarande får inte ha retroaktiv verkan på ett instituts rättigheter och skyldigheter i samband med direktdeltagande i ett EG-betalningssystem. Andra bestämmelser eller annan praxis som har retroaktiv verkan skall inte beaktas.

Artikel 6 - Tillämplig obeståndslagstiftning

Vid obeståndsförfarande mot ett institut som är direktdeltagare i ett betalningssystem skall de rättigheter och skyldigheter som härrör från eller står i samband med direktdeltagandet i betalningssystemet fastställas enligt obeståndslagstiftningen i det land där betalningssystemet är beläget.

V. SKYDD FÖR PANTHAVARENS RÄTTIGHETER GENTEMOT VERKNINGARNA AV BRISTANDE BETALNINGSFÖRMÅGA HOS PANTSÄTTAREN

Artikel 7 - Skydd gentemot verkningarna av bristande betalningsförmåga

1) Rättigheterna för en panthavare i samband med skyldigheter från en deltagares sida gentemot en eller flera andra deltagare i betalningssystemet eller rättigheterna för monetära myndigheter till vilka säkerheter har pantsatts i samband med monetära operationer får inte påverkas av att obeståndsförfarande inletts mot pantsättaren. Säkerheterna skall avyttras för att sådana rättigheter som är förenade med deltagandet i betalningssystemet eller med monetära operationer skall kunna tillgodoses med företräde framför samtliga andra borgenärer.

2) Då ett institut i tredje land ställer säkerheter i en medlemsstat i samband med deltagande i ett EG-betalningssystem eller i samband med monetära operationer får panthavarens rättigheter inte påverkas av att obeståndsförfarande inletts mot institutet i det tredje landet.

VI. SLUTBESTÄMMELSER

Artikel 8 - Genomförande

1) Medlemsstaterna skall sätta i kraft de lagar och andra författningar som är nödvändiga för att följa detta direktiv senast den 31 december 1998. De skall genast underrätta kommissionen om detta.

2) Då en medlemsstat antar dessa bestämmelser skall de innehålla en hänvisning till detta direktiv eller åtföljas av en sådan hänvisning när de offentliggörs. Närmare föreskrifter om hur hänvisningen skall göras skall varje medlemsstat själv utfärda.

3) Medlemsstaterna skall till kommissionen överlämna texterna till de lagar och andra författningar som de antar inom det område som omfattas av detta direktiv. Därvid skall medlemsstaterna även överlämna en förteckning över de befintliga eller nya bestämmelser som motsvarar var och en av artiklarna i detta direktiv.

Artikel 9 - Rapport till Europaparlamentet och rådet

Senast tre år efter den dag som anges i artikel 8.1 skall kommissionen överlämna en rapport till Europaparlamentet och rådet om genomförandet av detta direktiv, vid behov åtföljd av förslag till ändring av detta.

Artikel 10

Detta direktiv riktar sig till medlemsstaterna.

Utfärdat i Bryssel

På Europaparlamentets vägnar	På rådets vägnar
Ordförande	Ordförande

BUSINESS IMPACT ASSESSMENT

Proposal for a European Parliament and Council Directive on settlement finality and collateral security

1.a. Taking account of the principle of subsidiarity, why is Community legislation necessary and what are its main aims?

Research carried out on behalf of the Commission by banking lawyers[1], together with the analyses made by the Commission's working group, confirm that there are crucial differences between the laws of the Member States which prejudice the legal validity of certain key features of payment systems[2].

One of the central features of a sound payment system is that there must be no doubt as to when and how settlement becomes final. In the current situation, finality in a payment system whose participants are domiciled in different legal jurisdictions (as under the Treaty and the Second Banking Directive will increasingly be the case) depends ultimately on the laws of the various Member States whose institutions are members.

Another essential prerequisite is that there must be legal certainty that in the case a participant fails to meet its obligations vis-à-vis the payment system, the latter can realise the collateral security pledged by that participant. In the current situation, the only way to ensure that, is to constitute the collateral security under the same law as the payment system itself, so as to avoid conflicts of law. This is contrary to the principle of an Internal Market.

Legal certainty as to collateral security and as to finality of settlement can only be achieved if the national legislations are changed in a similar way in each Member State. The most efficient way of achieving this goal is by way of a directive laying down the necessary minimum standards.

1.b. Are there likely to be any wider benefits and disadvantages from the proposal?

If any effect is to be expected for the financial sector, it will be one of protection of current employment. The proposal's main goal is to strengthen the stability of payment systems and therewith of inter bank financial relations and to avoid the knock-on effects that currently could arise in the case of bankruptcy of a large participant in a payment system. Consequently, the loss of employment that would occur in such a case would be avoided as well.

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1 The laws on credit transfers and their settlement in Member States of the EU: Report for the European Commission (DG XV), Wilde Sapte - Brussels, 1994.

2 The key differences referred to are:
- settlement finality in netting schemes: different possibilities of unwinding the settlement;
- the effect of insolvency of a participant, on netting schemes: different powers of liquidators to prevent settlement occurring or to unwind it;
- rules on revocation: different rules on the time when a payment order becomes irrevocable

Moreover, the establishment of a legal framework in order to rule out the legal uncertainty associated with cross-border payment systems, is likely to encourage the further development of these systems. The consequent increase in the volume of business might therefore generate employment.

1.c. Were alternative proposals considered, and with what outcome (e.g. codes of conduct, voluntary arrangements)?

As explained under II. 3 of the explanatory memorandum, a number of other possibilities were considered, but these were abandoned for the reasons exposed.

2. Who will be affected by the proposal?

Which sector of business? What are the size classes and what is the total employment?

The proposal will be applicable to any undertaking which participates directly in a payment system. In practice, the large majority of these undertakings will be credit-institutions.

Are there any significant features of the business sector, e.g. dominance by a limited number of large firms?

The main feature of this sector is the hitherto lack of integration of payment systems at European level.

Are there implications for very small businesses, the craft sector or the self-employed?

Although small businesses are very unlikely to constitute a payment system among themselves, such a system would be covered by the Directive. However, as end-users of payment systems, they will benefit from the proposal and its effect of elimination of legal risks, increased efficiency and reduction of costs. These remarks apply equally to the craft sector and the self-employed.

Are there particular geographical areas in the Community where these businesses are located?

No.

3. What will businesses have to do to comply with the proposal?

What will be the compliance costs?

No costs other than the legislative ones are to be expected.

Are there other administrative procedures or forms to complete?

No.

Are licenses or marketing authorisations required?

No.

Will fees be charged?

No.

4. What economic effects, costs and benefits is the proposal likely to have?

On employment?

Within the payment systems industry, the net effect, if such effect is to be expected at all, should be positive. Within the segment of SMEs, employment benefits are expected (more efficient payment services ⇒ widening of intra-EU trade potential ⇒ contribution to growth and higher employment ⇒ greater and more specialised demand for efficient payment services, etc.).

On investment and the creation or start up of new businesses?

Marginal effect, if any.

On the competitive position of businesses, both in the Community and third countries' markets?

The efficiency gains and reductions in costs for business within the Community will be positive (See paras. 1 and 4 above). Third country businesses will benefit from the advantages of this Directive inside the Community to the same extent as Community businesses do.

The unilateral extension of the benefits of this Directive to third country payment systems, e.g. the protection against undue revocation, the protection against retroactive effects of insolvency proceedings and the insulation of collateral security from foreign insolvency laws, will also benefit third country payment systems. Community businesses will indirectly benefit from the advantage of the extension of the Directive's scope to the EC participants of the third country payment systems.

Therefore, no distortion of competitiveness is to be expected.

On public authorities for implementation?

Legislative costs of passing the necessary domestic legislation.

Are there other indirect effects?

No.

What are the costs and benefits of the proposal?

- **costs:** no costs, other than the legislative ones are to be expected.
- **benefits:**

-elimination of legal risks associated with participation in payment systems, leading to more efficient and cost-effective operation of EC payment systems

-completion of the Internal Market: the proposal will also facilitate the access by banks from one EC Member State, into the payment systems of another EC Member State (remotely or via a branch).

-further integration of the EC financial sector, both domestically and cross-border, thus contributing to the free movement of capital and to the freedom of cross-border services.

-cross-border use of collateral securities is facilitated. This contributes to the free movement of capital, to the freedom of cross-border services, to the development of securities markets, to developing the necessary legal framework in which the future European Central Bank may develop its monetary policy.

- **balance:** overwhelmingly positive on the benefit side.

5. Impact on SMEs. Does the proposal contain measures to take account of the specific effect on SMEs - if not, why not? Are reduced or different requirements appropriate?

No. No direct effect on SMEs.

Consultation

6. Indicate at what stage the consultations were undertaken and the date of publication of the prior notification of an intent to introduce legislation?

The Commission has, over many years, promoted the fullest consultation of all interested parties and earliest disclosure of its line of policy in this area. This has materialised in the following steps:

-Green Paper[3] (consultation paper) of September 1990, calling for comments from all interested parties; annexed to the Green Paper was a decision to set up two consultative groups;

-setting up of two permanent consultative groups on payment systems in March 1991, with intensive frequency of meetings throughout 1991 and early 1992, leading to reports to the Commission (in February 1992) published in March 1992;

-Commission working document of March 1992[4], based on the detailed reports of these consultative groups, announcing the Commission's proposed policy, including intent to introduce legislation in this respect.

Furthermore, two consultative hearings with representatives of the European Credit Sector Industry were held in the spring of 1994 and October 1995, at key stages of the preparatory work leading to the present proposal (see Section I above; background).

List of organisations which have been consulted about the proposal and set out in detail their main views, including their concerns and objections to the final proposal. Why is it not possible or desirable to accede their concerns?

European credit sector associations : The European credit sector associations have been consulted throughout. Two "hearings" have taken place with the Commission and its working party, the latest in October 1995. There is an overall support for this proposal, which is deemed essential by the sector itself.

Government experts, including representatives of the EC central banks: Governments representatives which were members of the Commission's working group, take a positive stand on this proposal. There are differences on some technical issues, which it is not possible to resolve entirely within the working group. The main point at issue is that some delegations wished to have an (even more) ambitious approach, covering so called "securities settlement" or "obligations netting".

EMI: a representative of the EMI has been present in the working group as an observer.

Were the SME Business Organisations formally consulted? If not, why not?

No. However, SMEs and Retailer organisations were kept regularly informed of progress being made, through their representatives in the Commission's consultative groups on payment systems.

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3 Discussion paper on "Making payments in the Internal Market", COM(90)447.

4 "Easier cross-border payments: breaking down the barriers", SEC(92) 621 of 27 March 1992

Monitoring and Review

7. **Explain how the effects and compliance costs of the proposal will be monitored and reviewed. How will complaints be dealt with? Can the proposal, once it is legislation, be amended easily?**

The proposal contains in its Article 9 an undertaking on the part of the Commission to report on these matters to the European Parliament and Council. The necessary preparation for this will be done by the Commission acting with its existing two consultative groups on payment systems.

There is no comitology procedure, therefore amendments to the proposal, once this is adopted, will require normal legislative procedures.

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