



STATUTORY INSTRUMENTS.

S.I. No. 88 of 2008



EUROPEAN COMMUNITIES (SETTLEMENT FINALITY)
REGULATIONS 2008

(Prn. A8/0424)

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I, BRIAN COWEN, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving further effect to Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998¹, hereby make the following Regulations:

Citation and commencement

1. (1) These Regulations may be cited as the European Communities (Settlement Finality) Regulations 2008.

(2) These Regulations come into operation on the day after the date on which their publication is notified in the *Iris Oifigiúil*.

Interpretation

2. (1) In these Regulations, except where the context otherwise requires—

“Bank” means the Central Bank and Financial Services Authority of Ireland;

“banking licence” means a licence issued under section 9 of the Central Bank Act 1971 (No. 24 of 1971);

“central bank” means the European Central Bank or a central bank of a Member State;

“collateral security” means all realisable assets (including money) provided under a pledge, repurchase or similar agreement for the purpose of securing rights and obligations potentially arising in connection with a relevant system or provided to central banks of the Member States or to the European Central Bank;

“commencement”—

(a) in relation to insolvency proceedings under the law of the State involving a body corporate, means—

(i) the making by the High Court of an order for the appointment of an examiner in respect of the body, or

(ii) the making by the High Court of an order for the winding up of the body, or

¹OJ. L 166, 11 June 1998, p. 45

*Notice of the making of this Statutory Instrument was published in
“Iris Oifigiúil” of 8th April, 2008.*

- (iii) the passing by the members of the body of a resolution for the voluntary winding up (either creditors' or members') of the body, or
- (b) in relation to insolvency proceedings under the law of the State involving a natural person, means—
 - (i) the making of an order of the High Court adjudicating the person bankrupt, or
 - (ii) if the person dies insolvent, the making by the High Court of an order for the administration in bankruptcy of the person's estate, or
 - (iii) the making by the High Court of an order providing for the protection of the person and the person's property under an arrangement controlled by the Court, or
- (c) in relation to insolvency proceedings under the law of another Member State or third country involving a body corporate or a natural person, the opening of insolvency proceedings against the body or person as provided by Article 6 of the Settlement Finality Directive;

“credit institution” means an undertaking, other than a credit union or friendly society, whose business it is to receive deposits or other repayable funds from the public and to grant credit on its own account;

“default arrangements” means the arrangements established in respect of a relevant system to limit systemic and other types of risks that may arise when a participant is apparently unable, or is apparently likely to become unable, to meet the participant's obligations in respect of a transfer order, and includes—

- (a) rules that enable action to be taken in respect of unperformed contracts to which the participant is party, and
- (b) arrangements for netting, and
- (c) arrangements for closing-out of open positions, and
- (d) arrangements for the application or transfer of collateral security;

“equivalent overseas order” means an order that has the equivalent effect as a transfer order made through a system designated by another Member State for the purposes of the Settlement Finality Directive;

“equivalent overseas security” means any realisable asset (including money) that is provided under a pledge, a repurchase or similar agreement for the purpose of securing rights and obligations potentially arising in connection with a system through which equivalent overseas orders are made;

“financial institution” means an undertaking (other than a credit institution) that provides one or more of the financial services specified in the Schedule to the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395 of 1992);

“insolvency proceedings”—

- (a) if under the law of the State and involving a body corporate, means—
 - (i) proceedings for the appointment of an examiner in respect of the body, or
 - (ii) proceedings for the compulsory winding up of the body, or
 - (iii) a voluntary winding up (either creditors’ or members’) of the body, or
- (b) if under the law of the State and involving a natural person, means—
 - (i) proceedings under which the person is adjudicated bankrupt, or
 - (ii) if the person dies insolvent, proceedings for the administration in bankruptcy of the person’s estate, or
 - (iii) proceedings involving the protection by a court of the person and the person’s property from any action or other process, or
- (c) if under the law of another Member State or a third country, means any collective measure provided for in the law of that other Member State or third country either to wind up or reorganise a person if the measure involves the suspending of, or imposing limitations on, relevant transfers or payments;

“Member State” means a Member State of the European Communities, and, where relevant, includes a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992² (as adjusted by the Protocol signed at Brussels on 17 March 1993³), as amended from time to time;

“Minister” means the Minister for Finance;

“netting” means the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders within a relevant system that a participant or participants either issue to, or receive from, one or more other participants in the system with the result that only a net claim can be demanded or a net obligation be owed;

“other Member State” means a Member State other than the State;

“participant” means—

²OJ. L 1, 3 January 1994, p. 3.

³OJ. L 1, 3 January 1994, p. 572

- (a) a credit institution or financial institution, a central counterparty, a settlement agent or a clearing house that is a participant in a relevant system, or
- (b) a person that is treated by the Bank as a participant of a relevant system in accordance with Regulation 3(1);

“relevant system” means a formal arrangement that—

- (a) is made between three or more participants (excluding any possible settlement agent, central counterparty, clearing house or indirect participant), with common rules and standardised arrangements for the execution of transfer orders between the participants, and
- (b) is governed by the law of the State, and
- (c) having been designated as a relevant system by the Minister after being satisfied as to the adequacy of the rules of the system, is notified by the Minister to the European Commission,

and includes a system of the kind referred to in Regulation 14;

“settlement agent”, in relation to a relevant system, means a person—

- (a) who provides to a participant settlement accounts through which transfer orders within the system are settled, and
- (b) who may, if relevant, extend credit to a participant for settlement purposes;

“Settlement Finality Directive” means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998⁴;

“third country” means a country that is not a Member State, and includes a state, province, region or dependent territory of such a country;

“transfer order” means—

- (a) an instruction by a participant to place at the disposal of another participant an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or
- (b) an instruction that results in the assumption or discharge of a payment obligation as defined by the rules of the relevant system, or
- (c) an instruction by a participant to transfer the title to, or an interest in, a security or securities by means of a book entry on a register or by any other means,

⁴OJ. L 166, 11 June 1998, p. 45

and includes a transfer order that was in a relevant system immediately before the commencement of these Regulations.

(2) A word or expression used in these Regulations and also in the Settlement Finality Directive has, unless the contrary intention appears in these Regulations, the same meaning as it has in that Directive.

(3) Nothing in these Regulations prevents a participant from acting as, or carrying out the functions of, a central counterparty, a settlement agent or a clearing house.

Power of Bank to decide that a person should be treated as a participant in a relevant system

3. (1) Subject to paragraph (2), the Bank may decide—

- (a) that a person that participates in a relevant system and is responsible for discharging financial obligations arising from transfer orders made through the system be treated as a participant, or
- (b) that any persons belonging to a class of persons that participate in a relevant system and are responsible for discharging financial obligations arising from transfer orders made through the relevant system be treated as participants.

(2) The Bank may make a decision treating a person as a participant, or persons belonging to a class of persons as participants, only if it—

- (a) considers that the treatment is required on the grounds of systemic risk, and
- (b) the relevant system is one in which at least 3 participants (other than a person treated as a participant because of this paragraph) participate and through which transfer orders of the type defined in paragraph (c) of the definition of “transfer order” in Regulation 2(1) are made.

(3) If the Bank decides to treat a person as a participant, or to treat persons belonging to a class of persons as participants, in accordance with paragraph (1), it shall give written notice of its decision to the operator of the system in which the person is to be treated as a participant, or the persons belonging to the relevant class are to be treated as participants.

Transfer order to be binding despite insolvency proceedings

4. (1) A transfer order that has entered a relevant system is legally enforceable and binding on the participants and on third parties even if insolvency proceedings against a participant are commenced, so long as the transfer order entered the system before the commencement of the proceedings.

(2) Netting is legally enforceable and binding on participants and on third parties even if insolvency proceedings against a participant are commenced so

long as the transfer orders to which the netting relates were entered into the system before the commencement of the proceedings.

(3) If—

- (a) a transfer order entered a relevant system after the commencement of insolvency proceedings against a participant in the system, and
- (b) the order is executed on the day on which insolvency proceedings against the participant commenced,

the order is legally enforceable and binding only if, after the order is executed, the settlement agent, the central counterparty or the clearing house can prove that it did not know, and had no reason to know, that those proceedings had commenced.

(4) No law, regulation, rule or practice on the setting aside of contracts and transactions entered into before the commencement of insolvency proceedings against a participant in a relevant system has the effect of unwinding a netting.

Requirements for rules of relevant systems

5. The rules of a relevant system shall—

- (a) specify the moment at which a transfer order is to be considered to have been entered into the system, and
- (b) specify the moment after which a transfer order may not be revoked by a participant or any third party, and
- (c) prohibit the revocation by a participant or any third party of a transfer order from the moment specified in accordance with paragraph (b).

Certain matters to be notified to Bank

6. (1) In the case of a participant in a relevant system that is a body corporate, the High Court shall notify the Bank immediately after making an order under a law of the State—

- (a) for the appointment of an examiner in respect of the participant, or
- (b) for the compulsory winding up of the participant.

(2) In the case of a participant in a relevant system who is not a body corporate, the High Court shall notify the Bank immediately after making an order under a law of the State—

- (a) adjudicating the participant bankrupt, or
- (b) if the participant dies insolvent, for the administration in bankruptcy of the participant's estate, or

- (c) for an arrangement under the control of the court that involves the protection, by court order, of the participant's person and property from any action or other process.

(3) If, in the case of a participant that is a body corporate, the participant becomes subject to a creditors' or members' voluntary winding up, the participant shall notify the Bank immediately after the members have passed a resolution for the participant's winding up.

(4) Immediately after receiving such a notification, the Bank shall notify the appropriate authorities in the other Member States of the order or the passing of the resolution.

State law relating to insolvency or insolvency proceedings not to affect certain rights and obligations

7. (1) No law of the State relating to insolvency or insolvency proceedings invalidates or otherwise affects—

- (a) the rights and obligations of a participant arising from participation before the commencement of insolvency proceedings against the participant, or
- (b) a transfer order or a disposition of property made under such an order, or
- (c) the default arrangements of the system, or action taken under those arrangements, or
- (d) the rules of a relevant system as to the settlement of transfer orders not dealt with under the system's default arrangements, or
- (e) the provision of collateral security, or
- (f) a contract, scheme or arrangement that provides for realising, or any action taken to realise, collateral security in connection with—
 - (i) participation in a relevant system otherwise than under its default arrangements, or
 - (ii) the functions of a central bank,

or any disposition of property made as result of such a contract, scheme or arrangement, or any such action.

(2) The powers of a liquidator, provisional liquidator, examiner, Official Assignee, trustee in bankruptcy or other insolvency official appointed under a law of the State, and the powers of a court under a law of the State relating to insolvency or insolvency proceedings, may not be exercised so as to prevent or interfere with—

- (a) the settlement, in accordance with the rules of a relevant system, of a transfer order not dealt with under the system's default arrangements, or
- (b) action taken under a relevant system's default arrangements, or
- (c) action taken to realise collateral security in connection with—
 - (i) participation in a relevant system otherwise than under the system's default arrangements, or
 - (ii) the functions of a central bank.

Certain questions to be determined in accordance with foreign law

8. (1) If insolvency proceedings are commenced against a person who participates, or has participated, in a system designated for the purposes of the Settlement Finality Directive, any question that—

- (a) relates to the rights and obligations arising from, or in connection with, that participation, and
- (b) falls to be determined by a court in the State,

is to be decided in accordance with the law governing the system. This paragraph is subject to Regulation 9.

(2) If an equivalent overseas order is subject to the insolvency law of the State, these Regulations apply to and in relation to that order in the same way as they apply to and in relation to a transfer order.

(3) If an equivalent overseas security is subject to the insolvency law of the State, these Regulations apply to and in relation to that security in the same way as they apply to and in relation to a collateral security connected with a relevant system.

Insolvency proceedings not to affect certain rights

9. (1) The rights of—

- (a) a participant to collateral security provided to it in connection with a relevant system, and
- (b) a central bank to collateral security provided to it,

are not affected by insolvency proceedings against the participant, or the counterparty to a central bank, that provided the collateral security, and that security may be realised for the satisfaction of those rights.

(2) If—

- (a) securities are provided as collateral security to a participant or a central bank, or to both, in accordance with paragraph (1), and

- (b) the right of the participant or central bank with respect to the securities is legally recorded in a register, account or centralised deposit system located in a Member State,

the law of that Member State governs the determination of the rights of the participant or central bank as a holder of collateral security in relation to those securities.

(3) In this Regulation—

“central bank” includes a nominee, agent or third party acting on behalf of the central bank;

“participant” includes a nominee, agent or third party acting on behalf of the participant;

“securities” includes rights in securities.

Operators to notify Bank of participation in system

10. The operator of a relevant system shall notify the Bank of the participants in the system, including any possible indirect participants, and shall immediately notify it of any change of participants in the system.

Holders of banking licences to provide information to certain persons about relevant systems

11. A holder of a banking licence shall, on being requested to do so by a person who claims to have a legitimate interest in the relevant systems in which the holder is a participant, provide the person with information about the main rules governing the functioning of those systems.

Commencement of insolvency proceedings against participant not to prevent certain funds and securities from being used to fulfil participant's obligations

12. The commencement of insolvency proceedings against a participant in a relevant system does not prevent funds or securities available on the settlement account of the participant from being used to fulfil the participant's obligations in the system on the day on which those proceedings were commenced. Furthermore, the participant's credit facility connected to the system may be used against available, existing collateral security to fulfil the participant's obligations under the system.

Revocation of Regulations

13. The European Communities (Finality of Settlement in Payment and Securities Settlement Systems) Regulations 1998 (S.I. No. 539 of 1998) are revoked.

Transitional arrangement

14. A system is taken to be a relevant system for the purposes of these Regulations if—

- (a) the Minister had, before the commencement of these Regulations, notified the system to the European Commission for the purposes of the Settlement Finality Directive, and
- (b) its designation as such a system had not been revoked before that commencement.



GIVEN under my Official Seal,
1 April 2008

BRIAN COWEN
Minister for Finance

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation).

This Statutory Instrument transposes the mandatory provisions of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

The primary aim of the Directive is to reduce the legal risks associated with participation in settlement systems, in particular as regards the legality of netting agreements and the enforceability of collateral security.

The Directive's provisions apply to any European Community payment or securities settlements system operating in any currency or the euro, any European Community institution that participates in such a system, collateral security provided in connection with participation in such a system, and collateral security provided in connection with monetary policy operations.

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