



STATUTORY INSTRUMENTS.

S.I. No. 624 of 2010

EUROPEAN COMMUNITIES (SETTLEMENT FINALITY)
REGULATIONS 2010

(Prn. A10/1913)

EUROPEAN COMMUNITIES (SETTLEMENT FINALITY)
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S.I. No. 624 of 2010

EUROPEAN COMMUNITIES (SETTLEMENT FINALITY)
REGULATIONS 2010

I, BRIAN LENIHAN, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving effect to Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998¹ (as amended by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009²), hereby make the following Regulations:

Citation, commencement and application

1. (1) These Regulations may be cited as the European Communities (Settlement Finality) Regulations 2010.

(2) These Regulations come into operation on 30 June 2011.

(3) These Regulations apply to—

(a) designated systems that are subject to the law of the State (regardless of the currency or currencies in which such systems operate),

(b) participants in systems referred to in subparagraph (a), and

(c) collateral security provided in connection with participation in such a system, or operations of a central bank in the context of its function as a central bank.

Interpretation

2. (1) In these Regulations—

“Bank” means the Central Bank of Ireland;

“business day” for a designated system has the meaning given to it in the rules of that system and, for the avoidance of doubt, covers both day and night-time settlements in that system and includes all events happening during a business cycle of that system;

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

“collateral security” means a realisable asset of any kind (including, without limitation, financial collateral referred to in Article 1(4)(a) of Directive

¹O.J. L 166, 11.6.1998, p. 45.

²O.J. L 146, 10.6.2009, p. 37.

*Notice of the making of this Statutory Instrument was published in
“Iris Oifigiúil” of 28th December, 2010.*

2002/47/EC of the European Parliament and of the Council of 6 June 2002³) provided under a pledge, a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations that may arise in connection with a designated system, or provided to a central bank, and includes money provided under a pledge for that purpose;

“commencement of proceedings” has the meaning given by Regulation 3;

“Court” means the High Court;

“credit institution” means a credit institution (within the meaning of Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006⁴), and includes the institutions listed in Article 2 of that Directive;

“default arrangements” means the arrangements established by the operator of a designated 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 its 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,
- (b) arrangements for netting,
- (c) arrangements for the closing-out of open positions, and
- (d) arrangements for the application or transfer of collateral security;

“designated system” means a system that has been designated by the Minister, and notified to the European Commission, under Regulation 4, and includes a system referred to in Regulation 16, but does not include a formal arrangement entered into between interoperable systems;

“indirect participant” means an institution, a central counterparty, a settlement agent, a clearing house or a system operator with a contractual relationship with a participant in a designated system which enables the indirect participant to pass transfer orders through the designated system, provided that the indirect participant is known to the system operator;

“insolvency proceedings”—

- (a) if under the law of the State and in relation to 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

³O.J. L 168, 27.6.2002, p. 43

⁴O.J. L 177, 30.6.2006, p. 1.

- (iii) a voluntary winding up (either creditors' or members') of the body, or
 - (iv) proceedings for the appointment of an administrator in respect of the body, or
- (b) if under the law of the State and in relation to a natural person, means—
- (i) proceedings under which the person is or may be adjudicated bankrupt, or
 - (ii) if the person has died insolvent, proceedings for the administration in bankruptcy of the person's estate, or
 - (iii) proceedings with the objective of 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 a Member State other than the State, or a third country, means any collective measure provided for in the law of that Member State or third country to wind up or reorganise a person if the measure involves suspending or imposing limitations on relevant transfers or payments;

“institution” means a credit institution, investment firm, public authority or publicly guaranteed undertaking, or an undertaking whose head office is outside the European Union;

“interoperable systems” means 2 or more systems whose system operators have entered into an arrangement with one another that involves cross-system execution of transfer orders;

“investment firm” means an investment firm as defined in Article 4(1)(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004⁵, but does not include the institutions set out in Article 2(1) of that Directive;

“Member State” means each Member State of the European Union and Iceland, Norway and Liechtenstein;

“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 designated system;

“participant” means—

⁵O J L 145, 30.4.2004, p. 1.

- (a) an institution, a central counterparty, a settlement agent, a clearing house, or a system operator that is a participant in a designated system, or
- (b) a person that is treated by the Bank, in accordance with Regulation 5(1), as a participant in a designated system;

“securities” means instruments of the kinds listed in section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004⁵;

“settlement agent”, in relation to a designated system, means a person who provides settlement accounts through which transfer orders are settled (whether or not the person extends credit to participants for settlement purposes);

“settlement account” means an account at the Bank, a central bank, a settlement agent or a central counterparty used to hold funds or securities and to settle transactions between participants in a designated system;

“Settlement Finality Directive” means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998¹;

“system” means a formal arrangement—

- (a) between 3 or more participants (other than the operator of the system, any settlement agent, any central counterparty, any clearing house or any indirect participant),
- (b) with common rules and standardised arrangements for the clearing (whether or not through a central counterparty) or execution of transfer orders between the participants,
- (c) governed by the law of a Member State chosen by the participants (being a Member State in which at least one of those participants has its head office),

that has been designated and notified to the European Commission for the purposes of the Settlement Finality Directive;

“system operator” means the entity or entities legally responsible for the operation of a system;

“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 an amount of money at the disposal of a recipient by means of a book entry on the accounts of a credit institution, a central bank, a central counterparty or a settlement agent,

- (b) an instruction that results in the assumption or discharge of a payment obligation as defined by the rules of a designated 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.

(2) A word or expression used in these Regulations and also in the Settlement Finality Directive has, in these Regulations, 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.

(4) Nothing in these Regulations prevents a system operator from acting as a settlement agent, central counterparty or clearing house.

References to commencement of insolvency proceedings

3. (1) For the purposes of these Regulations references to the commencement of insolvency proceedings shall be construed in accordance with this Regulation.

(2) “Commencement” of insolvency proceedings under the law of the State in relation to a body corporate means—

- (a) the making by the Court of an order for the appointment of an examiner in respect of the body, or
- (b) the making by the Court of an order for the winding up of the body, or
- (c) the passing by the members of the body of a resolution for the voluntary winding up (whether creditors’ or members’) of the body.

(3) “Commencement” of insolvency proceedings under the law of the State in relation to a natural person means—

- (a) the making of an order of the Court adjudicating the person bankrupt, or
- (b) if the person dies insolvent, the making by the Court of an order for the administration in bankruptcy of the person’s estate, or
- (c) the making by the Court of an order providing for the protection of the person and the person’s property under an arrangement controlled by the Court.

(4) “Commencement” of insolvency proceedings under the law of a Member State (other than the State) or a third country (whether in relation to a body corporate or a natural person) means the opening (within the meaning given by

Article 6 of the Settlement Finality Directive) of insolvency proceedings against the body or person.

Designation of designated systems, etc

4. (1) The Minister may designate a system as a designated system if—
 - (a) he or she is satisfied that the rules of the system comply with Regulation 7, and
 - (b) the system is governed by the law of the State.
- (2) If the Minister designates a system he or she—
 - (a) shall so notify the European Commission, and
 - (b) shall notify the European Commission of the system operator.

Bank may decide that person should be treated as participant in designated system

5. (1) Subject to paragraph (2), the Bank may decide—
 - (a) that a person that participates in a designated system and is responsible for discharging financial obligations arising from transfer orders made through the system is to be treated as a participant, or
 - (b) that persons belonging to a class of persons that participate in a designated system and are responsible for discharging financial obligations arising from transfer orders made through the designated system are to be treated as participants.
- (2) The Bank may decide to treat a person as a participant, or persons belonging to a class of persons as participants, under paragraph (1) only if—
 - (a) the Bank considers that the treatment is justified on the grounds of systemic risk, and
 - (b) the designated system is one—
 - (i) in which at least 3 participants (other than a person to be treated as a participant because of that decision) participate, and
 - (ii) through which transfer orders of the kind referred to in paragraph (c) of the definition of “transfer order” 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 a designated system in accordance with paragraph (1), it shall give written notice of its decision to the operator of the system.
- (4) An indirect participant shall be taken to be a participant in a designated system only if so doing is justified on the grounds of systemic risk.

(5) An indirect participant's being taken to be a participant in a designated system under paragraph (4) does not limit the responsibility of the participant through which the indirect participant passes transfer orders to the designated system.

Transfer order and netting to be binding despite insolvency proceedings

6. (1) A transfer order that has entered a designated system is legally enforceable and binding on participants and third parties even if insolvency proceedings against a participant are commenced if (but only if) the transfer order entered the system before the commencement of the proceedings.

(2) Netting is legally enforceable and binding on participants and third parties even if insolvency proceedings against a participant are commenced if (but only if) the transfer orders to which the netting relates were entered into the system before the commencement of the proceedings.

(3) Paragraphs (1) and (2) have effect even in the case of insolvency proceedings against a participant in an interoperable system or against the system operator of an interoperable system which is not a participant.

(4) If—

(a) a transfer order entered a designated system after the commencement of insolvency proceedings against a participant in the system, and

(b) the order is executed on the business day (as defined by the rules of the designated system) on which those insolvency proceedings commenced,

the order is legally enforceable and binding only if the system operator can prove that, at the time that the transfer order became irrevocable, it did not know, and had no reason to know, that those proceedings had commenced.

(5) 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 designated system has the effect of unwinding a netting.

Requirements for rules of designated systems and interoperable systems

7. (1) The rules of a designated system shall—

(a) specify the moment at which a transfer order is to be considered to have been entered into the system,

(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).

(2) In the case of interoperable systems, the rules of each system shall specify the moment of entry into that system in such a way as to ensure, as far as

possible, that the rules of all the interoperable systems are coordinated in this regard. Unless expressly provided for by the rules of all the interoperable systems concerned, each system's rules on the moment of entry are not affected by the rules of any other system with which it is interoperable.

(3) In the case of interoperable systems, the rules of each system shall specify the moment of irrevocability from that system in such a way as to ensure, so far as possible, that the rules of all the interoperable systems are coordinated in this regard. Unless expressly provided for by the rules of all the interoperable systems concerned, each system's rules on the moment of irrevocability are not affected by the rules of any other system with which it is interoperable.

Certain matters to be notified to Bank

8. (1) The Bank is the appropriate authority in the State for the purposes of Article 6.2 of the Directive.

(2) Where a participant in a designated system is a body corporate, the Court shall notify the Bank immediately after making an order for—

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

(3) Where a participant in a designated system is not a body corporate, the Court shall notify the Bank immediately after making an order—

- (a) adjudicating the participant bankrupt,
- (b) if the participant has died 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.

(4) Where a participant in a designated system is a body corporate, if 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 that winding up.

(5) Immediately after receiving a notification under any of paragraphs (1) to (4), 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

9. (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 in a designated system before the commencement of insolvency proceedings against the participant,
- (b) a transfer order or a disposition of property made under such an order,
- (c) the default arrangements of a designated system, or an action taken under those arrangements, or
- (d) the rules of a designated system as to the settlement of transfer orders not dealt with under the system's default arrangements,
- (e) the provision of collateral security,
- (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 designated system otherwise than under its default arrangements, or
 - (ii) the operations of a central bank,
 or
- (g) any disposition of property as result of a contract, scheme or arrangement, or an action, referred to in subparagraph (f).

(2) The powers of a liquidator, provisional liquidator or examiner, the Official Assignee, or a 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 designated system, of a transfer order not dealt with under the system's default arrangements,
 - (b) action taken under a designated system's default arrangements, or
 - (c) action taken to realise collateral security in connection with—
 - (i) participation in a designated system otherwise than under the system's default arrangements, or
 - (ii) the operations of a central bank.
- (3) Paragraph (2) also applies as regards the rights and obligations of—
- (a) a participant in an interoperable system, or
 - (b) a system operator of an interoperable system which is not a participant.

(4) 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 before the moment of opening of such proceedings.

(5) Paragraph (4) also applies as regards the rights and obligations of a participant in an interoperable system, or of a system operator of an interoperable system which is not a participant.

Certain questions to be determined in accordance with foreign law

10. (1) Subject to Regulation 9, 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.

(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 designated system.

(4) In this Regulation—

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

“equivalent overseas security” means any realisable asset (including money) that is provided under a pledge, 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.

Insolvency proceedings not to affect certain rights

11. (1) Notwithstanding the provisions of any other enactment, the rights of—

(a) a system operator or a participant to collateral security provided to it in connection with a system or any interoperable system, and

(b) a central bank to collateral security provided to it,

to realise those rights are not affected by insolvency proceedings against—

- (i) the participant (whether in the system concerned or in an interoperable system),
- (ii) the system operator of an interoperable system which is not a participant,
- (iii) the counterparty to a central bank, or
- (iv) any third party which provided the collateral security.

(2) Collateral security referred to in paragraph (1) may be realised for the satisfaction of rights referred to in that paragraph.

(3) If—

- (a) securities are provided as collateral security to any one or more of a participant, a system operator or a central bank, and
- (b) the right of the participant, system operator 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.

(4) Without prejudice to the generality of paragraphs (1) and (3) and for the avoidance of doubt, a claim of a participant or a central bank to collateral security referred to in this Regulation has, and shall be taken always to have had, priority over any claim of any other person to that collateral security including, without limitation, in an insolvency proceeding and including, without limitation, any claim—

- (a) for costs, charges and expenses referred to in sections 244 and 281 of the Companies Act 1963 (No. 33 of 1963),
- (b) for remuneration, costs, expenses and liabilities referred to in section 29 of the Companies (Amendment) Act 1990 (No. 27 of 1990),
- (c) for debts referred to in section 285(2) of the Companies Act 1963, and
- (d) of the Revenue Commissioners pursuant to section 571, 1001 or 1002 of the Taxes Consolidation Act 1997 (No. 39 of 1997),

unless, in respect of any such claim of another person, the terms on which the collateral security was provided expressly provide that that claim is to have priority to the claim of the participant or the central bank, as the case may be.

(5) In this Regulation—

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

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

“system operator” includes a nominee, agent or third party acting on behalf of a system operator;

“securities” includes rights in securities.

Operators to notify Bank of participation in system

12. The operator of a designated system shall, on designation of the system, 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.

Institutions to provide information to certain persons about designated systems

13. An institution shall, on being requested to do so by a person who claims to have a legitimate interest in the designated systems in which the institution is a participant, provide the person with information about the main rules governing the functioning of that system.

Commencement of insolvency proceedings against participant not to prevent certain funds, etc., from being used to fulfil obligations

14. (1) The commencement of insolvency proceedings against a participant or a system operator of an interoperable system does not prevent funds or securities available on the settlement account of that participant from being used to fulfil that participant’s obligations in the system or in an interoperable system on the business day of the opening of the insolvency proceedings.

(2) In the case referred to in paragraph (1), the participant’s credit facility connected to the system may be used against available, existing collateral security to fulfil the participant’s obligations in the system or in an interoperable system.

Revocation of European Communities (Settlement Finality) Regulations 2008

15. The European Communities (Settlement Finality) Regulations 2008 (S.I. No. 88 of 2008) are revoked.

Transitional arrangements

16. (1) A system shall be taken to be a designated system for the purposes of these Regulations if—

(a) the Minister had, before the commencement of these Regulations, designated the system as a relevant system within the meaning of the European Communities (Settlement Finality) Regulations 2008 (S.I. No. 88 of 2008), and

(b) that designation had not been revoked before that commencement.

(2) A transfer order which entered a system referred to in paragraph (1) before the commencement of these Regulations but is settled after that commencement shall be taken to be a transfer order for the purposes of these Regulations.



GIVEN under my Official Seal,
21 December 2010.

BRIAN LENIHAN,
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 Statutory Instrument also includes necessary revisions required by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, specifically in relation to the treatment of night-time settlement and the development of links between settlement systems. The amendments are designed to ensure that the protections offered by the Directive remain adequate in light of market changes.

The primary aim of Directive 98/26/EC 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. The Directive provides protections against systemic problems arising in the event of an institution not being able to make payments.

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Wt. (B28159). 285. 12/10. Cahill. Gr. 30-15.