



BANK ĊENTRALI TA' MALTA
EUROSISTEMA
CENTRAL BANK OF MALTA

CENTRAL BANK OF MALTA

DIRECTIVE NO 2

in terms of the

CENTRAL BANK OF MALTA ACT
(CAP. 204)

PAYMENT AND SECURITIES SETTLEMENT SYSTEMS

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Issued on 31 October 2002

Amended on: 15 April 2003, 31 October 2003, 19 January 2004, 31 May 2004, 12 October 2005
and 13 October 2008

INTRODUCTION

1. In terms of article 34(5) of the Central Bank of Malta Act (*Cap.204*) (hereinafter referred to as “the Act”), the Central Bank of Malta (hereinafter referred to as “the Bank”) has been empowered to make directives in respect of, *inter alia*, payments and security settlement systems. For the purposes of this Directive, terms used in this Directive shall have the same meaning as is assigned to them under the Act.
2. This Directive seeks to reduce the legal and systemic risks associated with participation in payment systems and securities settlement systems, and aims to minimise the disruption to a system caused by insolvency proceedings against a participant in that system.
3. This Directive limits the applicability of article 34 (6) of the Act to those payment systems which by virtue of paragraph (5) hereunder are deemed to be payment systems falling within the scope of this Directive.
4. The Directive is modelled on the requisites of the EU Directive 98/26/EC on settlement finality in payment and securities settlement systems.

SCOPE AND APPLICATION

5. This Directive applies to the operation of, and the participation in, domestic payment and securities settlement systems as well as any form of cash or security transactions, whether domestic or cross-border, that may be involved therein.

Provided that, for the purposes of this Directive, a payment system shall be deemed to be a payment system falling within the scope of this Directive if it is listed in the Annex attached to this Directive.

DEFINITIONS

6. In this Directive, unless the context otherwise requires:

“central counterparty” means an entity which is interposed between institutions in a system and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;

“clearing house” means an entity responsible for, or an arrangement providing for, the calculation of the net positions of participants in a system;

“credit institution” has the same meaning assigned to the term in the Banking Act (Cap. 371), and includes equivalent institutions licensed by the competent authority of a Member State or an EEA State;

“collateral security” shall mean all realisable assets provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system;

“EEA State” means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2nd May, 1992 as amended by the Protocol signed at Brussels on 17th March, 1993 and as amended from time to time;

“European Union” means the European Union referred to in the Treaty;

“financial institution” has the same meaning assigned to the term in the Financial Institutions Act (Cap. 376), and includes equivalent institutions licensed by the competent authority of a Member State or an EEA State;

“indirect participant” means a credit institution with a contractual relationship with an institution participating in a system executing transfer orders, which enables the above-mentioned credit institution to pass transfer orders through the system;

“insolvency proceedings” means any collective measure provided for by the law applicable in Malta or any other country either to wind up the participant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments;

“institution” means:

- a) a credit or financial institution, or an institution licensed under the Investment Services Act (Cap. 370) to conduct investment services (hereinafter referred to as “investment institution”), including any undertaking whose functions correspond to those of a credit, financial or investment institution, as the case may be, which is licensed or otherwise authorised under the laws of a Member State or an EEA State; or
- b) a public authority or publicly guaranteed undertaking;

which may participate in a payment and security settlement system and which is responsible for discharging the financial obligations arising from transfer orders within such system;

“Member State” means a state which is a member of the European Union;

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

“restrictions imposed by the Competent Authority” means any type of restrictions or impediments which the Competent Authority, nominated under the Banking Act (Cap. 371), the Financial Institutions Act (Cap. 376) and the Investment Services Act (Cap. 370),

may impose on credit institutions, financial institutions and investment services providers as listed under the said Acts.

“securities” means transferable securities traded on an authorised local stock exchange or on a foreign stock exchange authorised under the laws of a Member State or an EEA State;

“settlement agent” shall mean an entity providing to institutions and, or a central counterparty participating in systems, settlement accounts through which transfer orders within such systems are settled and, as the case may be, extending credit to those institutions and, or central counterparties for settlement purposes;

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

“transfer order” means any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, settlement agent or the Bank, or any instruction which results in the assumption or discharge of a payment obligation, or any instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;

“the Treaty” has the same meaning assigned to it by the European Union Act (Cap. 460).

NETTING AND TRANSFER ORDERS

7. (1) Any transfer order and netting entered into by a participant in a system shall be legally enforceable and binding on third parties, and shall not be affected in any manner by the insolvency or bankruptcy of any participant nor shall it be affected by any court orders or restrictions imposed by the Competent Authority which have the effect of interrupting payment or netting of obligations, provided that transfer order was entered into the system before the moment of opening of insolvency proceedings as defined in paragraph 9.

(2) Where, exceptionally, a transfer order is entered into a system after the moment of opening of insolvency proceedings and is carried out on the day of opening of such proceedings, it shall be legally enforceable and binding on third parties only if, after the time of settlement, the clearing house or the central counterparty or the settlement agent can prove that it was not aware, nor shall have been aware, of such proceedings.

8. (1) The moment of entry of a transfer order into a system shall be defined by the rules of that system.

(2) A transfer order shall not be revoked by a participant in a system, nor by a third party, from the moment determined by the rules of that system.

INSOLVENCY PROCEEDINGS

9. (1) For the purposes of this Directive, the moment of opening of insolvency proceedings shall be the moment when the court delivers its decision ordering the winding up and dissolution, or a creditors' voluntary winding up resolution is passed, in respect of a participant in a system.

Provided that, in the case of a credit or financial institution which participates in a system and in respect of which insolvency proceedings have been commenced upon the order of the competent authority under article 29 of the Banking Act (Cap. 371) and article 18 of the Financial Institutions Act (Cap. 376) respectively, then the moment of opening of insolvency proceedings shall be the moment when the competent authority issues an order requiring the credit or financial institution to wind up its business or to wind up its business in Malta.

(2) The expressions used in this paragraph shall have the same meaning in this Directive as is assigned to them under the Companies Act (Cap. 386), the Banking Act (Cap. 371) and the Financial Institutions Act (Cap. 376), respectively.

10. Without prejudice to paragraph 7, insolvency proceedings shall not have any retroactive effects on the rights and obligations of a participant arising from, or in connection with, its participation in a system earlier than the moment of opening of such proceedings as defined in paragraph 9.
11. The opening of insolvency proceedings against a participant shall not prevent funds or securities available on the settlement account of that participant from being used to fulfil that participant's obligations in the system on the day of the opening of insolvency proceedings and such a participant's credit facility connected to the system may be used against available, existing collateral security to fulfil that participant's obligations in the system.
12. In the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system.
13. (1) On the opening of insolvency proceedings against a participant, the court or, in the case of a creditors' voluntary winding up, the participant, shall without delay notify the Bank and the system of the opening of such proceedings. In the case of a winding up order under the Banking Act (Cap. 371) or Financial Institutions Act (Cap. 376), this obligation to notify the Bank shall devolve upon the competent authority.

(2) Upon receipt of such notification, the Bank shall immediately notify the appropriate authorities in the Member States and, or EEA States of the opening of insolvency proceedings against the participant in question.

COLLATERAL SECURITY

14. (1) Collateral security provided by any participant or by a third party in the name of that participant, in relation to the participant's operations within a system shall not be affected in any manner by restrictions imposed by the Competent Authority or by the insolvency or bankruptcy of that participant or any other party nor shall it form part of the proceedings relating to such participant or other party except for any excess after close out of the collateralised transactions.

(2) A participant shall not provide as collateral security in relation to its operations within a system, assets which are subject to a pledge, hypothec or any other encumbrance in favour of a third party, without obtaining the prior release or waiver from the third party.

15. Without prejudice to the law applicable to the creation of and rights arising from or in securities, the law of the place where the register, account or centralised depository system is located and where the right is registered shall apply to the determination of the validity and effectiveness of any encumbrances granted by means of or within such register, account or centralised depository system.

GENERAL

16. Nothing in this Directive shall be construed to prevent systems testing, before the netting takes place, whether orders that have entered the system comply with the rules of that system and allow the settlement of that system to take place.
17. This Directive shall not prejudice participants in a system, or any other party, from exercising any right or claim resulting from the underlying transaction which is available to them at law as long as this does not result in the unwinding of netting or the revocation of the transfer order in a system.
18. This Directive shall become effective on 13 October 2008.

INTERPRETATION

19. Requests for interpretation of matters relating to this Directive are to be addressed to the Bank.

ANNEX

DESIGNATED SYSTEMICALLY IMPORTANT PAYMENT AND/OR SECURITIES SETTLEMENT SYSTEMS

- TARGET2Malta
- MaltaClear