



EUROPEAN COMMISSION

Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS
Financial markets infrastructure

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**Subject: Directive 2002/47/EC on Financial Collateral Arrangements
Questionnaire to Member States
For the drafting of the Evaluation Report**

1. INTRODUCTION

Article 10 of Directive 2002/47/EC on Financial Collateral Arrangements stipulates that, "Not later than 27 December 2006, the Commission shall present a report to the European Parliament and the Council on the application of this Directive, in particular on the application of Article 1(3), Article 4(3) and Article 5, accompanied where appropriate by proposals for its revision." (Particular emphasis is given accordingly to the questions on these provisions.)

This questionnaire is intended to ensure that the Commission receives full information of the Directive's application and possible weaknesses in its wording or transposition in the Member States. On the basis of the replies to this questionnaire, the Commission intends to present a report which describes how the Directive has been implemented in the Member States, provides Member States with useful practical information of each other's national laws, and evaluates the application of the Directive.

Note: the bulk of this questionnaire follows the scheme of the Directive, article by article. Experience has shown that this approach, although lengthy, is necessary, if specific points of difficulty in implementation, interpretation or effect are to be revealed by the process. Please therefore in providing your replies highlight any such points that have arisen. When replying to the questions as regards the different articles of the Directive, please also identify the corresponding provision in your national law.

It would be most helpful if all Member States would reply to all questions – and do their utmost to meet our deadline which is set at **March 31, 2006**. This date is set in order for the Commission to meet its intended delivery date of October 31, 2006 for the Report.

Some of the questions - essentially those that seek to establish the overall effect of the Directive or to reveal specific points difficulty - in the annexed questionnaire are aimed at industry and other private sector parties. The Member States are requested to forward that questionnaire to their relevant industry and the private sector. The Commission will also retain the right to contact some representatives from the relevant industry directly and to put the questionnaire on the WEB.

2. GENERAL QUESTIONS

- (1) Please give a general description of the approach taken to transposing the Directive (e.g. amendments to an existing legal framework or introduction of a new freestanding legal regime),
- (2) Please comment on the extent to which the Directive was consistent with existing domestic law,
- (3) In transposing the Directive, did you go beyond its requirements, by passing legislation that widens the scope of its application and if so in what respect?
- (4) What in your view have been the positive impacts of the Directive?
- (5) Have those whom the Directive was intended to benefit encountered a reduction of burdens as a result of the new regime?
- (6) Have those whom the Directive was intended to benefit encountered favourable effects for their risk management as a result of the new regime?
- (7) Has the use of financial collateral been increased in the EU?
- (8) Do you have any materials that reveal the extent to which the achievement of the objectives of the Directive may be measured (for example, statistics about use of collateral)?
- (9) Are you aware of any developments or innovations in market practice that would justify reviewing the effectiveness of the Directive?
- (10) Are there in your view any negative impacts of the Directive?
- (11) Is there any implementation cost due to the Directive?
- (12) Please specify any major problems of transposition or interpretation that occurred
- (13) Please stipulate the date or dates on which any legislation passed in order to transpose the Directive came into force.
- (14) Please specify any significant experiences about the application of the Directive by courts.
- (15) Do you have any suggestions for specific revisions to the Directive? If so, please explain what they are.
- (16) Please indicate any other interlocutors, especially in the private sector, from whom the Commission should aim to seek information in the preparation of its Report on the application of the Directive.

- (17) Please provide an English translation of the law(s) or other legal acts implementing the Directive 2002/47/EC, if you have one easily available.
- (18) Please provide a correspondence table showing the national provisions which exist or are introduced in respect of each Article of the Directive 2002/47/EC.
- (19) Were there any delays, difficulties in achieving a timely implementation into national law in your Member State? If yes, for what reason?
- (20) The Directive, 2002/47/EC, is valid throughout EU 25. Do you see a need to try to expand the validity of the principles of the Directive outside the EU-area through bilateral/multilateral agreements with third countries?

3. SPECIFIC QUESTIONS

The following detailed questionnaire follows the structure of the Directive

Article 1 - Subject matter and Scope

1.1

Has your national law clearly implemented a system where the collateral taker and the collateral provider must each belong to one of the following categories?

(a) a public authority (excluding publicly guaranteed undertakings unless they fall under points (b) to (e)) but including:

(i) public sector bodies of Member States charged with or intervening in the management of public debt; and

(ii) public sector bodies of Member States authorised to hold accounts for customers;

(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as defined in Article 1(19) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, the International Monetary Fund and the European Investment Bank;

(c) a financial institution subject to prudential supervision including:

(i) a credit institution as defined in Article 1(1) of Directive 2000/12/EC, including the institutions listed in Article 2(3) of that Directive;

(ii) an investment firm as defined in Article 1(2) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field;

(iii) a financial institution as defined in Article 1(5) of Directive 2000/12/EC;

(iv) an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and a life assurance undertaking as defined in Article 1(a) of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance;

(v) an undertaking for collective investment in transferable securities (UCITS) as defined in Article 1(2) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);

(vi) a management company as defined in Article 1a(2) of Directive 85/611/EEC;

(d) a central counterparty, settlement agent or clearing house, as defined respectively in Article 2(c), (d) and (e) of Directive 98/26/EC, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by that Directive, and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or any institution as defined in points (a) to (d);

(e) a person other than a natural person, including unincorporated firms and partnerships, provided that the other party is an institution as defined in points (a) to (d).

1.2

(a) Has your national law excluded from the scope of the Directive financial collateral arrangements where one of the parties is a person mentioned in Article 1(2)(e)? (footnote 1)

(b) If so, (i) please explain why this approach has been taken and (ii) state the date on which the Commission was duly informed.

(c) Do financial collateral arrangements where one of the parties is a person mentioned in Article 1(2)(e) need to meet conditions not otherwise applicable in order to be covered by the national law implementing the directive?

¹ Article 10 of Directive 2002/47/EC on Financial Collateral Arrangements stipulates that the Commission's report on the application of the Directive should deal in particular with the application of Article 1(3), Article 4(3) and Article 5. Particular emphasis is given accordingly to the questions on these provisions.

(d) Does your national law take a wider personal scope than the Directive?

(e) Are there any other types of entities or individuals protected under the national implementation, that are not referred to in the Directive?

1.3

(a) Has your national law clearly implemented a system where the financial collateral to be provided must consist of cash or financial instruments?

(b) Has your national law excluded from the scope of this Directive financial collateral consisting of any of the following:

(i) the collateral provider's own shares,

(ii) shares in affiliated undertakings within the meaning of seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts(14),

(iii) and shares in undertakings whose exclusive purpose is to own means of production that are essential for the collateral provider's business or to own real property?

1.4

(a) Has your national law clearly implemented a system where the financial collateral is protected if its provision can be evidenced in writing (including recording by electronic means or any other durable medium) or in a legally equivalent manner?

(b) Please describe the relevant mechanisms.

Article 2 – Definitions

2.1

(a) Does a "financial collateral arrangement" defined by your national law covers both title transfer financial collateral arrangements and security financial collateral arrangements whether or not these are covered by a master agreement or general terms and conditions? If your definition is different, please specify.

(b) Is "title transfer financial collateral arrangement" defined by your national law as an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations? If your definition is different, please specify.

(c) Is "security financial collateral arrangement" defined as an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral

remains with the collateral provider when the security right is established? If your definition is different, please specify.

(d) Is "cash" defined by your national law as money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits? If your definition is different, please specify.

(e) Is "financial instruments" defined by your national law as shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing? If your definition is different, please specify.

(f) Is "relevant financial obligations" defined by your national law as the obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and/or delivery of financial instruments and may the financial obligations include obligations under a master agreement and consist of obligations of a specified class or kind arising from time to time or has your national law extended the scope of the directive to all types of exposure?

(g) Is "book entry securities collateral" defined by your national law as financial collateral provided under a financial collateral arrangement which consists of financial instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary? If your definition is different, please specify.

(h) Does your national law define a "relevant account" in relation to book entry securities as collateral which is subject to a financial collateral arrangement, as the register or account - which may be maintained by the collateral taker - in which the entries are made by which that book entry securities collateral is provided to the collateral taker? If your definition is different, please specify.

(i) Is "equivalent collateral" defined by your national law:

(i) in relation to cash, as a payment of the same amount and in the same currency?

(ii) in relation to financial instruments, as financial instruments of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description or, where a financial collateral arrangement provides for the transfer of other assets following the occurrence of any event relating to or affecting any financial instruments provided as financial collateral, those other assets? If your definition is different, please specify.

(j) Are "winding-up proceedings" defined by your national law as collective proceedings involving realisation of the assets and distribution of the proceeds among the creditors, shareholders or members as appropriate, which involve any intervention by administrative or judicial authorities, including where the collective proceedings

are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory? If your definition is different, please specify.

(k) Are "reorganisation measures" defined by your national law as measures which involve any intervention by administrative or judicial authorities which are intended to preserve or restore the financial situation and which affect pre-existing rights of third parties, including but not limited to measures involving a suspension of payments, suspension of enforcement measures or reduction of claims? If your definition is different, please specify.

(l) Is "enforcement event" defined by your national law as an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realise or appropriate financial collateral or a close-out netting provision comes into effect? If your definition is different, please specify.

(m) Is "right of use" defined by your national law as the right of the collateral taker to use and dispose of financial collateral provided under a security financial collateral arrangement as the owner of it in accordance with the terms of the security financial collateral arrangement? If your definition is different, please specify.

(n) Is "close-out netting provision" defined by your national law as a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or, in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise:

(i) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or

(ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party? If your definition is different, please specify.

Article 3 - Formal Requirements

3.1

(a) Does your national law require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement be dependent on the performance of any formal act?

(b) Are there any formal requirements that arise in the normal course of financial collateral arrangements that are not considered to fall under the scope of the Directive?

Article 4 - Enforcement of Financial Collateral Arrangements

4.1

Does your national law ensure that on the occurrence of an enforcement event, the collateral taker shall be able to realise in all of the following manners, any financial collateral provided under, and subject to the terms agreed in, a security financial collateral arrangement:

- (a) financial instruments by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations?
- (b) cash by setting off the amount against or applying it in discharge of the relevant financial obligations?

4.2

Is appropriation possible only if (a) this has been agreed by the parties in the security financial collateral arrangement; and (b) the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments?

4.3

Did (2) your legal system allow appropriation on 27 June 2002?

4.4

Have you made use of the option not to allow appropriation? If so, please (i) explain why this approach has been taken and (ii) state the date on which the Commission was duly informed.

4.5

What, if any, requirements remain applicable to the realisation of financial collateral?

4.6

(a) Does your national law ensure that a financial collateral arrangement can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker?

(b) Can the parties alter contractually the manner of enforcement?

4.7

² Article 10 of Directive 2002/47/EC on Financial Collateral Arrangements stipulates that the Commission's report on the application of the Directive should deal in particular with the application of Article 1(3), Article 4(3) and Article 5. Particular emphasis is given accordingly to the questions on these provisions

Is there a requirement under national law that the realisation or valuation of financial collateral and the calculation of the relevant financial obligation must be conducted in a commercially reasonable manner and, if so, what?

Article 5 - Right of Use

5.1

(a) Does your national law ensure that the collateral taker is entitled to exercise a right of use in relation to financial collateral provided under the security financial collateral arrangement and, if so, how?

(b) Does such a right exist even without contractual agreement?

5.2

(a) Does your national law ensure that when a collateral taker retransfers equivalent collateral, after having exercised a right of use, to replace the original financial collateral that collateral will be treated as having been provided at the same time as the original collateral?

(b) How is it ensured that the treatment of the equivalent collateral is identical to the original collateral?

5.3

(a) Does your national law ensure that the use of financial collateral by the collateral taker does not render invalid or unenforceable the rights of the collateral taker under the security financial collateral arrangement in relation to the financial collateral actually being transferred by the collateral taker to a third person?

(b) How is it ensured that the obligation to return equivalent collateral can be subject to close-out netting?

5.4

Recital 19 to the Directive records that, "This Directive provides for a right of use in case of security financial collateral arrangements, which increases liquidity in the financial market stemming from such reuse of 'pledged' securities. This reuse however should be without prejudice to national legislation about separation of assets and unfair treatment of creditors."

(a) Is there any reason to believe that the objectives of the Directive or the effectiveness of national legislation about separation of assets and unfair treatment of creditors is being jeopardised by reason of Article 5 of the Directive?

(b) Has the right of use been used in practice? Has it been tested before courts?

(c) Have there been any problems in the practical application of the new regime?

Article 6 - Recognition of Title Transfer Financial Collateral Arrangements

6.1

Does your national law ensure that a title transfer financial collateral arrangement can take effect in accordance with its terms and, if so, how?

6.2

Does your national law ensure that, if an enforcement event occurs while any obligation of the collateral taker to transfer equivalent collateral under a title transfer financial collateral arrangement remains outstanding, the obligation may be the subject of a close-out netting provision?

Article 7 - Recognition of Close-out Netting Provisions

7.1

Does your national law ensure that a close-out netting provision can take effect in accordance with its terms:

(a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider and/or the collateral taker; and/or

(b) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights?

7.2

Does your national law ensure that the operation of a close-out netting provision may not be subject to any of the requirements that are mentioned in Article 4(4), unless otherwise agreed by the parties?

7.3

Article 7 deals with close-out netting provisions, as defined. It has been suggested that articles in the Insolvency Regulation and in the Banks Winding-Up Directive which are also aimed at protecting that type of netting provision are less clear in their efficacy, meaning and scope, and that the wording of Article 7 has exacerbated this legal uncertainty by establishing within Community law a manner of description that is significantly different from that previously used.³

³ See in particular the EFMLG Report on the 'Protection for Bilateral Insolvency Set-off and Netting Agreements under European Community Law' at <http://www.efmlg.org/documents.htm>

(a) Do you agree that there is legal uncertainty on this issue, and

(b) Do you support the idea to expand the scope of Article 7 so as to capture all close-out netting schemes, regardless of whether they are in a financial collateral arrangement (or an arrangement of which a financial collateral arrangement forms part)?

Article 8 - Certain Insolvency Provisions Disapplied

8.1

Does your national law ensure, and if so in what way, that a financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided:

(a) on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement; or

(b) in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures?

8.2

Does your national law ensure, and if so in what way, that where a financial collateral arrangement or a relevant financial obligation has come into existence (or financial collateral has been provided on the day of, but after the moment of the commencement of winding-up proceedings or reorganisation measures) it shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware (nor should have been aware) of the commencement of such proceedings or measures?

8.3.

(a) Where a financial collateral arrangement contains an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, does your national law ensure, and if so in what way, that the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be treated as invalid or reversed or declared void on the sole basis that:

(i) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement or in a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or decree or the taking of any other action

or occurrence of any other event in the course of such proceedings or measures;
and/or

(ii) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral?

(b) Are general rules allowing for avoidance of transactions in the context of an insolvency or similar proceedings still applicable?

Article 9 - Conflict of Laws

9.1

In accordance with what rules does your legal system establish in which country the relevant account is maintained for the purposes of Article 9?

9.2

What steps have you taken to ensure that the same rules as yours are applied in other Member States?

9.3

In your view, is the list of matters set out in Article 9(2) sufficient to achieve its objective?

9.4

Does your legal system apply the principle of the location of the relevant account as contained in Article 9 only to financial collateral arrangements or more widely and if so in what way?

Annex: Questionnaire addressed to the private sector

February 2006