SURVEY ON THE IMPLEMENTATION OF DIRECTIVE 2002/47/EC ON FINANCIAL COLLATERAL ARRANGMENTS

A REPORT BY THE

EUROPEAN FINANCIAL MARKET LAWYERS GROUP

EFMLG

March 2006

NOTICE

This Report is published by the European Financial Market Lawyers Group (EFMLG). The members of the EFMLG, whose names are set out in the Annex II, are each expert in the field of financial markets law in the legal system of their Member State with a high degree of practical experience. However, the members of the EFMLG participate in the work of the Group on a strictly personal basis. The views expressed in this paper are those of the members and do not necessarily reflect those of their institutions.

Comments are welcome and can be sent by post to the European Financial Market Lawyers Group for the attention of Klaus Löber, EFMLG Secretary, Postfach 16 03 19, 600 66 Frankfurt am Main, Germany, or by e-mail to:

secretariat@efmlg.org

SURVEY ON THE IMPLEMENTATION OF DIRECTIVE 2002/47/EC ON FINANCIAL COLLATERAL ARRANGMENTS

Contents

Introduction

This Report presents the findings of the European Financial Markets Lawyers Group (EFMLG) survey on the implementation of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (the 'Collateral Directive')[1]. The Report is a follow-up to the June 2000 EFMLG report 'Proposal for an EU Directive on collateralisation'[2] on the creation of a harmonised framework with regard to collateralisation in Europe. The June 2000 EFMLG report was circulated to the relevant European institutions and constituted one of the background documents used by the European Commission when preparing its proposal for the Collateral Directive. The EFMLG is pleased to note that most of the concerns raised in the first EFMLG report are addressed in the Collateral Directive. However, as the Collateral Directive gives Member States some leeway as regards its implementation, it is important to examine the way in which it is implemented by Member States and whether the EU legal framework concerning collateralisation should be further developed.

Creation of a harmonised framework

Collateral is increasingly used throughout the EU in all types of transactions, including in capital markets, bank treasury and funding, payment and clearing systems and general bank lending. The collateral provided is most often in the form of cash or securities, namely government bonds or high quality corporate bonds or other securities, in certificated, immobilised or dematerialised form and frequently held in or through accounts with custodians and clearing systems.

The Collateral Directive clearly demonstrates the EU's commitment to creating a clear, uniform, pan-EU legal framework for the use of collateral and to contributing to the greater integration and cost-efficiency of EU financial markets. It was prepared within an extremely short timeframe, with the active involvement of market participants. A 'Forum Group' of market experts advised the Commission on the problems inherent in cross-border collateralisation before the Commission submitted its first draft proposal for a directive on 30 March 2001[3]. It then took only one year of debate in a Council Working Group and within the European Parliament to reach a Common Position. The Collateral Directive was adopted on 6 June 2002 and entered into force on 27 June 2002[4]. The deadline for the implementation of the Collateral Directive expired for the 'old' 15 EU Member States on 27 December 2003[5]. The ten 'new'

---

1 OJ L 168, 27.6. 2002, p. 43.

2 See http://www.efmlg.org/documents.htm.

3 OJ C 180 E, 26.6.2001, p. 312.

4 Article 12 of the Collateral Directive.

5 Article 11 of the Collateral Directive.

Member States were required to implement the Collateral Directive by the time of accession, i.e. 1 May 2004[6].

Although the implementation process was slow and marked by sometimes heated debates, by the end of 2005 all 25 EU Member States had implemented the Collateral Directive. This will significantly harmonise and simplify the legal framework for collateral transactions in the Member States. However, the sometimes diverging scope of national implementation measures accentuates the need to pay particular attention to the details of such measures in each Member State, as set out below.

At least three reasons can be pointed to that explain why legislative change was necessary. Firstly, the national collateral laws in the Member States failed to provide an acceptable minimum standard of certainty, particularly for cross-border transactions. This resulted in costs and delays, as creditors were forced to obtain legal opinions on a case-by-case basis. Contrary to purely domestic situations (where the legal background is usually known and the law chosen normally coincides with the applicable insolvency laws), in a cross-border transaction the laws of different Member States may apply to different parts of the transaction. For example, the assets provided by the debtor may be situated in one Member State, the debt may be governed by the law of another Member State and the debtor may be incorporated in a third Member State. The cross-border use of securities, together with the international nature of institutions participating in the financial markets, make it increasingly difficult to identify which Member States' laws apply and to which parts of the transaction. Secondly, new legislation in the EU was considered necessary in order to simplify and strengthen the laws relating to collateralisation, thereby reducing credit risk and the use of credit lines and balance sheets, and at the same time freeing up capital for further business. It would also reduce systemic risk in many different areas. Thirdly, simpler and more flexible laws relating to the provision and reuse of collateral were considered important for increasing liquidity in the securities markets and making them more efficient, resulting in lower costs for participants and ultimately for consumers[7].

Summary of the provisions

The stated aims of the Collateral Directive are the removal of major obstacles to the (cross-border) use of collateral, the limitation of administrative burdens, formal acts and cumbersome procedures and the creation of a clear and simple legal framework.

As to the personal scope of application, the Directive applies if the parties to a collateral transaction (collateral taker and collateral provider) belong to one of the following categories: public sector bodies (excluding publicly guaranteed undertakings), central banks and international financial institutions, supervised financial institutions, central counterparties, settlement agents and clearing houses. A further

6 The same obligation applies to future accession countries.

7 European Financial Market Lawyers Group: Proposal for an EU Directive on collateralisation, June 2000, p. 5.

category, whose inclusion may be opted out of by Member States, is 'corporates'[8], provided the other party is one of the aforementioned entities.

The material scope of application of the Directive covers financial collateral in the form of financial instruments[9] and cash. It furthermore applies to the creation of collateral under arrangements either involving the transfer of title (such as repurchase transactions or credit support arrangements) or where a collateral provider provides financial collateral by way of security to a collateral taker, with the full ownership of the financial collateral remaining with the collateral provider when the security right is established (e.g. a pledge, charge, lien, etc.).

The Collateral Directive prohibits Member States from imposing any formalities and administrative procedures in relation to the creation, validity, perfection, enforceability or admissibility in evidence of financial collateral arrangements or the provision of financial collateral under such arrangement (e.g. notarial deeds, registration requirements, notification requirements, public announcements or other formal certifications (data certa))[10]. On the occurrence of an enforcement event (in or outside insolvency), realisation of security financial collateral arrangements will be possible by sale or appropriation (if agreed) of the financial instruments and set-off or application in discharge of the relevant financial obligation, without prior notice, court authorisation, public auction or waiting period[11].

The Directive requires the recognition of the right to reuse pledged collateral, defined as a contractually agreed right of the collateral taker to use financial collateral provided under a security financial collateral arrangement as if the collateral taker were the full owner (i.e. sell, pledge on, lend, etc.). As soon as the right of use is exercised, the collateral taker incurs an obligation to transfer back equivalent collateral, which, once transferred back, will be treated as if it were original financial collateral (also in the case of insolvency). The obligation to retransfer may be subject to a close-out netting provision. Whilst reuse is of relevance for financial intermediaries in the context of ensuring an efficient and liquid securities market, it clearly affects the legal position of an investor holding such securities. Thus, for transparency reasons such right of use is subject to the express agreement of the parties to the collateral arrangement[12].
The Collateral Directive provides for wide-ranging protection against the effects of insolvency proceedings on financial collateral arrangements. This includes the validity of such arrangements even when insolvency proceedings are opened against one of the parties to the transaction, as required by

---

8 Defined as 'persons other than natural persons, unincorporated firms and partnerships', Article 1(2)(e) of the Collateral Directive.

9 Financial instruments are defined as shares in companies and equivalent securities, bonds, other forms of debt instruments if these are negotiable on the capital market, 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, see Article 2(1)(e) of the Collateral Directive.

10 Article 3 of the Collateral Directive.

11 Article 4 of the Collateral Directive.

12 Article 5 of the Collateral Directive.

Articles 4(5) and 8 of the Directive. Moreover, it encompasses the express recognition of close-out netting arrangements (whether statutory or contractual) in accordance with Article 7 of the Directive. Article 8 of the Directive protects certain typical risk control elements inherent in collateral arrangements, i.e. the substitution of assets or asset-price related mark-to-market. Finally, it extends the conflict of law principle of Article 9(2) of the Settlement Finality Directive[13] (i.e. the *lex conto sitae* rule) to all collateral in the form of book-entry securities.

I. Summary overview of the review

The outcome of the EFMLG Report is summarised below and is also set out in the table at Annex I.

The deadline for implementing the Collateral Directive expired on 27 December 2003 and as of December 2005 has been implemented in all Member States. The Collateral Directive has been implemented in various ways, i.e. by integrating new provisions into existing relevant national legislation, by executive order or regulations or as a combination of both methods.

Implementation of the personal scope of the Collateral Directive as set out in Article 1(2), i.e. potential parties to financial collateral arrangements, varies widely among Member States. Only Austria used the full opt-out option provided for under Article 1(3). Other Member States chose a personal scope that either provides for more nuanced limitations or for a wider application than foreseen by the Collateral Directive.

In terms of the material scope of the Collateral Directive, most Member States use a concept of 'financial instruments' that is identical or very close to that contained in the Collateral Directive; in some countries the definition is wider (e.g. covering credit claims and receivables, swaps and futures, cash-settled derivatives and financial commodity derivatives).

The right to reuse pledged collateral is now recognised in all 25 Member States. To this end, almost all Member States (except Germany) introduced specific provisions in their national legislation allowing a right of reuse in accordance with the Collateral Directive, in some cases using the exact wording contained in Article 5 and in other cases by adapting the rule to the national context.

Member States have not used the opt-out possibility provided for in Article 5 regarding the possibility of appropriation by collateral takers in case of an enforcement event.

All Member States, except Estonia, implemented Article 7 of the Collateral Directive, which recognises the possibility for close-out netting. In Estonia, the enforceability of such provisions remains questionable in the insolvency context.

---

[13] Directive 98/26/EC of the European Parliament and Council of 19 May 1998 on settlement finality in payment and securities

Article 9 of the Collateral Directive harmonises the conflict of laws rules concerning collateralisation. All Member States implemented Article 9, thus providing a clear and reliable basis for determining the law applicable to collateral transactions throughout the EU.

II. Review of the national implementing measures

The Collateral Directive provides for minimum harmonisation and gives Member States leeway to implement its provisions. Nevertheless, there are some provisions which require full harmonisation. Compared with many earlier legislative measures in the single market, the Collateral Directive differs in scope, emphasising elements of harmonisation of substantive law rules rather than focusing on the principle of minimum harmonisation and mutual recognition. Member States were obliged to implement all of its provisions, but were able to maintain or introduce more stringent regulatory standards than those prescribed by Community law, provided that these were compatible with the Treaty establishing the European Community and secondary legislation.

Member States had some discretion when implementing the Collateral Directive, e.g. it was possible to extend its protection beyond the scope as set out in the Directive. For example, the definition of 'financial instrument' in Article 2(1)(e) of the Collateral Directive provides a non-exhaustive list of financial instruments such as shares, bonds, warrants, units in funds and money market instruments. This definition serves only as an outline with the final form and interpretation dependant upon the Member States. Therefore, it seems unavoidable that Member States differ in terms of the method in which they interpret the Directive.

1. Description of the national implementing measures and the method of implementation

By December 2005 all 25 Member States implemented the Collateral Directive. The 15 'old' Member States were obliged to do so by 27 December 2003 at the latest and the 10 'new' Member States were obliged to do so by 1 May 2004 at the latest[14]. Further, the provisions of the Collateral Directive are likely to be incorporated into the Agreement on the European Economic Area (EEA Agreement), thereby

settlement systems, OJ L 166, 11.6.1998, p. 45.

[14] Bulgaria and Romania are expected to implement the Directive by 1 January 2007 at the latest.

obliging Member States to implement it into national law[15] (Iceland and Norway have implemented most of the provisions)[16].

The following are observations on the ways in which the Collateral Directive was transposed within the 25 Member States:

- In 18 Member States the Collateral Directive has been implemented in the form of a law: Austria[17], Belgium[18], Czech Republic[19], Cyprus[20], Denmark[21], Estonia[22], Finland[23], Germany[24], Greece[25], Hungary[26], Latvia[27], Lithuania[28], Luxemburg[29], the Netherlands[30], Poland[31], Slovakia[32], Slovenia[33] and Sweden[34].

---

[15] The Agreement creating the European Economic Area was negotiated between the Community and seven member countries of EFTA and signed in May 1992. Subsequently, after a referendum, Switzerland decided not to participate and three others joined the EU. The EEA Agreement entered into force on 1 January 1994. The EEA was maintained because of the wish of the three remaining - Norway, Iceland and Liechtenstein - to participate in the Single Market, while not assuming the full responsibilities of EU membership: http://europa.eu.int/comm/external_relations/eea/ .

[16] In addition, Switzerland and Romania voluntarily implemented specific legal provisions on collateral and insolvency adopted in relation to financial collateral arrangements.

[17] Finanzsicherheitengesetz published on 16 December 2003; BGBl I 2003/117.

[18] Law of 15 December 2004 on financial collateral, published and entered into force on 1 February 2005; Belgian Official Gazette of 1 February 2005.

[19] Law on the supplementary supervision of banks, savings and credit cooperatives, electronic money institutions, insurance undertakings and investment firms in a financial conglomerate, entered into force on 29 September 2005, also implementing the Collateral Directive; http://www.mvcr.cz/sbirka/2005/sb132-05.pdf.

[20] Law on financial collateral arrangements of 2004. Official Gazette of the Republic No 3823 of 19.3.2004, Appendix 1(I) pp. 511-520 (Law 43(I)/2004), entered into force on 1 May 2004.

[21] Amendment to the Law on trading in securities that entered into force on 1 January 2004.

[22] Law amending the Law on property, Law on the central register for securities, Law on credit institutions, Law on insurance activities, Law on bankruptcy, Law on obligations, Law on private international law and Law on the securities market, passed by the Estonian Parliament on 22 April 2004 and entered into force on 1 May 2004.

[23] Law on financial collateral approved by the Finnish Parliament in December 2003; new legislation entered into force on 1 February 2004.

[24] Law of 5 April 2004 transposing Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements and amending the Mortgage Bank Act and other laws (*Gesetz zur Umsetzung der Richtlinie 2002/47/EG vom 6. Juni 2002 über Finanzsicherheiten und zur Änderung des Hypothekenbankgesetzes und anderer Gesetze vom 5. April 2004)*, entered into force on 9 April 2004; BGBl I of 8 April 2004, p. 502.

[25] Implementing Law 3301/12004, published on 9 December 2004 and entered into force on 23 December 2004; Official Gazette Vol. A Issue 263.

[26] Law XXVII of 2004 on the codification modification of certain financial legislative acts, which modified the Civil Code, the Law on bankruptcy and liquidation and the Law on private international law, adopted by Parliament on 19 April 2004 and Law XLVIII of 2004, which amended the Capital Market Act, adopted by Parliament on 2 June 2004.

[27] Law on financial collateral adopted by the Parliament on 21 April 2005, entered into force on 25 May 2005; *Latvijas Vestnesis* (11 May 2005). Simultaneous amendments to the Law on the insolvency of undertakings and companies (adopted on 17 March 2005) and amendments to the Law on commercial pledges (21 April 2005) necessary in order to ensure the application of the Law on financial collateral, already entered into force.

[28] Law No IX-2127 on the financial collateral arrangements adopted by Lithuania's Seimas on 15 April 2004 and entered into force on 1 May 2004; *Valstybės žinios*, No 61-2183, 2004.

[29] Loi du 5 août 2005 sur les contrats de garantie financière adopted on 12 July 2005 and entered into force on 19 August 2005; http://www.legilux.public.lu/leg/a/archives/2005/1281608/1281608.pdf.

[30] The Law implementing the Collateral Directive (Wet tot uitvoering van Richtlijn nr. 2002/47/EG betreffende financiëlezekerheidsovereenkomsten) was adopted by the Second Chamber of the Dutch Parliament on 23 December 2005.

[31] Law on financial collateral entered into force on 1 May 2004.

- In 4 Member States in the form of an executive order (decree/ordinance): France[35], Italy[36], Portugal[37] and Spain[38].
- In 3 Member States in the form of a regulation: Ireland[39], Malta[40] and the United Kingdom[41].

The form of a single act has been used by 12 Member States (Cyprus, Estonia, Finland, Greece, Ireland, Italy, Lithuania, Luxemburg, Malta, Portugal, Slovenia and the United Kingdom) and in 10 Member States the Directive has been implemented by amending existing provisions or integrating new provisions into existing national legislation (Belgium, Czech Republic, Denmark, Germany, France, Hungary, the Netherlands, Slovakia, Spain and Sweden). A combination of both methods has been applied by 3 Member States (Austria, Latvia and Poland).

Verbatim implementation of Collateral Directive provisions has been applied by Cyprus, Ireland, Malta and the United Kingdom.

2. Personal scope of the Directive (Article 1(3))

Parties to arrangements on financial collateral that are subject to the provisions of the Collateral Directive are specific financial market institutions, including public sector bodies, supervised financial institutions (credit institutions, investment firms, insurance undertakings, etc.), central counterparties, settlements agents and clearing houses[42]. In addition to those institutions, persons other than natural persons, including unincorporated firms and partnerships, may participate in such arrangements provided that the

---

32 Law 7/2005 on bankruptcy and reconstruction, together with Law No 566/2001 on securities and investment services, Law No 483/2001 on Banks, Law No 510/2002 on payment systems.

33 Law on financial collateral of 22 April 2004, entered into force on 1 May 2004.

34 The Swedish Parliament decided on the Government's legislative report and proposal on financial collateral (*prop. 2004/05:30*), the legislative amendments entered into force on 1 May 2005.

35 Law No 2004-1343 of 9 December 2004 on the simplification of law (as published in the *Journal Officiel* of 10 December) authorises the French Government to adopt an ordinance implementing the Collateral Directive and simplifying certain collateral procedures. The ordinance was adopted on 24 February 2005 and published in the *Journal Officiel* of 25 February 2005. Further aspects are addressed by the Law on financial security of 1 August 2003 implementing Article 7 of the Collateral Directive**.**

36 Legislative Decree No 170 of 21 May 2004, entered into force on 30 July 2004.

37 Decree-Law No 105/2004 of 8 May 2004.

38 On 11 March 2005, the Government adopted Royal Decree-Law 5/2005 introducing urgent reforms to increase productivity. It entered into force 15 March 2005. The Royal Decree-Law amends Law 24/1988 on the securities market and other regulations in order to: (i) implement the Prospectus Directive (2003/71/EC); (ii) implement the Collateral Directive (2002/47/EC); and (iii) introduce some modifications to the energy sector and to the law on public procurement.

39 European Communities (Financial Collateral Arrangements) Regulations 2004 of 9 January 2004 (S.I. No 1 of 2004). Amending Regulations were adopted on 8 March 2004 (S.I. No 89 of 2004).

40 The Minister of Finance has adopted Financial Collateral Arrangements Regulations, 2004 (L.N. 177 of 2004), pursuant to the powers delegated under the Set-off and Netting on Insolvency Act, Chapter 456 of the Laws of Malta. They entered into force on 1 May 2004.

41 Financial Collateral Arrangements (No 2) Regulations 2003. SI 2003/3226, entered into force on 26 December 2003.

42 Article 1(2) of the Collateral Directive.

other party is an institution as defined above and provided Member States have made use of this option[43]. Member States under their national law may limit eligibility to the abovementioned institutions.

One objective of the Collateral Directive is that the personal scope of application should also cover unregulated corporate entities[44]. As this issue was controversial, there is an opt-out provision for those Member States that wish the scope to remain more restrictive and only apply to dealings between financial institutions. Member States may, under Article 1(3), exclude from the scope of application of the Collateral Directive, financial collateral arrangements where neither of the parties is a governmental entity or regulated financial institution.

As set out above, the implementation of the personal scope of the Collateral Directive (parties to financial collateral arrangements[45]) differs in the individual Member States.

The eight Member States which applied a broader scope than that set out in the Directive are: Belgium (include natural persons, except for title transfers), Denmark (between two corporates), Estonia (the collateral taker can be a private person), Italy (transactions involving non-profit organisations, political parties, trade unions and associations), Finland (transactions where the collateral provider is an 'institution' as defined by the Finnish implementing legislation or where collateral is provided by another type of legal entity and the collateral taker is an 'institution' as defined), Luxemburg (transactions between two corporates), the United Kingdom (transactions between two corporates, however, excluding individuals) and Spain (the other party may even be a private person if one of the parties is a financial or governmental institution (as listed in Article 1(2)(a) to (d) of the Collateral Directive);

Member States that used the opt-out possibility according to Article 1(3) can be divided into three categories, namely those that used the full opt-out, partial opt-out and diversified opt-out possibilities:

Full opt-out: Austria.

Partial opt-out: Czech Republic, (only undertakings of a certain size in terms of assets, turnover and capital are covered. If the party to a collateral arrangement is an investment firm, an insurance undertaking, a UCITS or a fund management company, the other party must be a credit institution or a public entity); Slovenia (exclusion of SME, associations and civil law legal persons); and Sweden (limitation to financial agents regarding the possibility to re-pledge assets).

Diversified opt-out: France (excluding cash collateral provided or received by undertakings); and Germany (includes transactions between two corporate entities but partial opt-out if the collateral provider is an undertaking, only financial collateral used to secure

---

43 Article 1(2)(e) of the Collateral Directive.

44 Ibid.

specifically defined financial obligations[46] is covered, thus excluding mainly long term cash loans involving undertakings).

In 11 Member States the opt-out possibility was not used and persons other than natural persons, unincorporated firms and partnerships, provided that the other party is a financial institution, have been included: Cyprus, Greece (unclear for unincorporated firms), Hungary, Ireland, Latvia, Lithuania, Malta, the Netherlands (excluding natural persons not acting in a commercial capacity[47]), Poland, Portugal and Slovakia.

3. Material scope of the Directive (Article 1(4)(b))

Pursuant to Article 1(4)(a) financial collateral must consist of cash[48] (if credited to an account) or financial instruments[49]. In compliance with Article 2(1)(e) financial instrument means: bonds, shares, other negotiable debt instruments, units in collective investment undertakings, money market instruments and claims. The collateral defined by the Collateral Directive is financial collateral - meaning cash and financial instruments, mainly securities. It does not encompass other types of collateral, *inter alia*, commercial property, plant and machinery and receivables.

Article 1(4)(b) allows Member States to exclude from their implementation measures, arrangements where the financial collateral consists of the collateral provider's own shares, shares in affiliated undertakings 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.

The material scope of the Collateral Directive encompasses the types of the arrangements as defined in Article 2. Specifically, financial collateral arrangements[50] are defined as title transfer (repurchase transactions or transfer of title[51]) and security arrangements (pledges, charges or liens[52]). These two methods have different characteristics - for example, regarding the collateral provider's retention of ownership rights and the collateral taker's ability to deal with the collateral. Those methods may result in different treatment with regard to tax rules as well as accounting principles. Nonetheless, both methods have the same fundamental goal of providing security to the collateral taker against default by the collateral provider. By minimising formalities that can be imposed by Member States and standardising the enforceability of both types of financial collateral arrangements, the Collateral Directive allows the

---

45 Article 1(2) of the Collateral Directive.

46 Obligations arising from contracts or the brokering of contracts: (i) to buy or sell financial instruments; (ii) for repurchase transactions, securities lending transactions or similar transactions involving financial instruments (in particular derivatives, whereby the definition is left open to cover also innovations); or (iii) for loans to finance the acquisition of financial instruments.

47 Article 52(2) Dutch Civil Code.

48 Article 2(1)(d) of the Collateral Directive.

49 Article 2(1)(e) of the Collateral Directive.

50 Article 2(1)(a) of the Collateral Directive.

51 Article 2(1)(b) of the Collateral Directive.

52 Article 2(1)(c) of the Collateral Directive.

parties to choose whichever type of collateral arrangement that is most suitable for their particular circumstances.

The following Member States took advantage of the opt-out possibility provided for under Article 1(4)(b):

Full opt-out:	Denmark.
Partial opt-out:	Germany (if the collateral giver is an undertaking, the use of the undertaking's own assets or the use of affiliates' shares are excluded from the range of usable collateral); Ireland (shares in companies whose exclusive purpose is to own means of production that are essential for the collateral provider's business or to own real property may not be used as collateral); and Sweden (a liquidator may redeem subsidiary shares in a winding up situation).
No opt-out:	Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia, Spain and the United Kingdom.

In the Czech Republic bank loans are covered by the implementing measures. In Sweden money loans are covered. France included claims and different types of rights, provided that they are assignable.

4. Recognition of appropriation (Article 4(3))

Article 4 of the Collateral Directive grants parties to financial collateral arrangements extensive scope to agree on enforcement procedures. According to the Article 4(1) and (2) Member States must ensure that collateral takers are able to realise financial collateral provided under a security financial collateral arrangement by sale or appropriation[53] (if the collateral consists of financial instruments[54]) and by setting off (close out netting) its value against or applying its value in discharge of the relevant financial obligations.

Appropriation is only possible if the arrangement provides for the valuation[55] of the financial collateral. Consequently, the procedures may involve the sale of financial instruments, appropriation on the basis of

---

[53] Appropriation is the retention of the collateral by the collateral taker with its value being set-off against the relevant financial obligation.

[54] Financial instruments encompasses shares in companies and other securities equivalent to shares in companies, bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities that 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

[55] Member States are permitted to set the requirements under national law that realisation or valuation of collateral or the calculation of relevant obligations must be conducted in a commercially reasonable manner.

an agreed valuation and setting off the value against the relevant financial obligations. Article 4(3) gives Member States the possibility to opt-out of the appropriation provisions. Member States which did not allow appropriation (e.g. Ireland and the United Kingdom) on the commencement date of the Directive (27 June 2002) are not obliged to recognise it. Nonetheless, all 25 Member States recognised appropriation when implementing the Collateral Directive and no implementation problems have been identified.

Further, Member States must ensure that parties to a security financial collateral arrangement are able to realise the financial collateral without any requirement for prior notice, for the terms of realisation to be approved by any public authority or for the realisation to be carried out in a prescribed manner[56]. Member States are obliged to recognise such enforcement procedure subject to the terms agreed in the arrangement.

In addition, Member States must ensure that a financial collateral arrangement can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up procedures or reorganisation measures in respect of the collateral provider or collateral taker[57].

5. Reuse of pledged securities (Article 5)

Article 5 concerns the right of use under security financial collateral arrangements. A right of use is a contractually agreed right of the collateral taker to use financial collateral provided under a security financial collateral arrangement as if the collateral taker were the full owner (e.g. sell, pledge and lend). If exercised, the collateral taker incurs an obligation to transfer back equivalent collateral. Equivalent collateral transferred back will be treated as if it were original financial collateral (also in the case of insolvency). This obligation may be subject to a close-out netting provision.

The basic requirement set by the Collateral Directive is that if and to the extend that the terms of a security financial collateral arrangement so provide, Member States must ensure that the collateral taker is able to exercise a right of use[58]. Member States must ensure that this right can be exercised in relation to financial collateral provided under the security financial collateral arrangement[59]. In addition, instead of providing equivalent collateral, the collateral taker may set off the value of the equivalent collateral against the relevant financial obligations[60].

At the national level, Member States ensure that a collateral taker is entitled to exercise a right of use in relation to financial collateral provided under a security financial collateral arrangement (provision of collateral by way of security without full transfer of ownership, e.g. pledge, charges, liens) as follows. All

---

[56] Article 4(4) of the Collateral Directive.

[57] Article 4(5) of the Collateral Directive.

[58] Article 5(1) of the Collateral Directive.

[59] Article 5(4) of the Collateral Directive.

[60] Article 5(5) of the Collateral Directive.

of the Member States, except Germany, introduced specific provisions in their national legislation allowing a right of reuse in accordance with the Collateral Directive:

- Germany (the implementing legislation in Germany does not contain a specific implementation measure regarding the right of reuse and instead relies on jurisprudence and case law); Italy (even by reselling); and Slovakia (even without the pledgor's agreement).
- Verbatim transposition of Article 5 in: Austria, Cyprus, Greece, Ireland, Latvia, Malta and the United Kingdom.

6. Recognition of close-out netting (Article 7)

Enforcement of obligations by parties to a financial collateral arrangement can be simplified by the close-out netting provision, i.e. a specific event causes the mutual obligations between the parties to become due. The obligations are then converted into a monetary claim in a predefined manner and settled. A netting provision may apply to a financial collateral arrangement through a separate agreement or a statutory rule.

Member States must ensure that a close-out netting provision can take effect in accordance with its terms notwithstanding the commencement of winding-up proceedings or reorganisation measures in relation to the collateral provider, collateral-taker and/or any purported assignment or attachment in respect of such rights[61].

Close-out netting is recognised within the 24 Member States (excluding Estonia[62]) as a contractual or statutory arrangement which upon the occurrence of an enforcement event results in acceleration of the mutual obligations, their conversion into monetary amounts and/or set-off of the mutual claims.

- Hungary (under Hungarian bankruptcy legislation once debtors file for bankruptcy, under certain conditions, they may apply for a moratorium on their payment obligations. During this moratorium no legal consequences for non-payment may occur).
- Poland (doubts have been raised regarding the appropriateness of the recognition of close-out netting of financial collateral arrangements).
- Slovakia (does not cover individual public or private attachments).

---

61 Article 7(1) of the Collateral Directive.

62 The Estonian Parliament passed a law implementing the Collateral Directive (Act to Amend Law on Property Act, Estonian Central Register of Securities Act, Credit Institutions Act, Insurance Activities Act, Bankruptcy Act, Law on Obligations Act, Private International Law Act and Securities Market Act) on 22 April, 2004. The law entered into force on 1 May 2004. However netting provisions of the Collateral Directive were not implemented by this law. Although netting provisions might be theoretically introduced in contracts, it is questionable whether such clauses may be enforceable in the insolvency context with the exception of netting in payment systems.

7. Implementation of the conflict of laws rule (Article 9)

Article 9 lays down the conflicts of law principle by stipulating that the proprietary aspects of pledges or transfers of book-entry financial instruments are governed by the law of the Member State where the relevant account is held.

Where a conflict of laws issue arises in relation to book entry securities collateral, the law to be applied is the domestic law of the country where the relevant account is maintained[63]. Consequently, when parties in different Member States conclude a financial collateral arrangement and the security is transferred by the collateral provider to the collateral taker, the law of the country where the financial collateral is located applies.

Further, the matters to be decided by domestic law where the relevant account is maintained relate to the legal nature of the collateral, the requirements for perfecting a financial collateral arrangement, priority of title to book entry securities collateral and realisation of such collateral[64].

Article 9 of the Collateral Directive extends the applicability of Article 9(2) of the Settlement Finality Directive, which provides that the law applicable to book entry securities provided as collateral is the law of the jurisdiction where the relevant register, account or centralised deposit system is located.

The Collateral Directive extends the above-mentioned rule to financial collateral arrangements involving book entry securities provided as collateral, i.e. the law of the country where the relevant account is maintained shall govern certain matters relating to book entry securities[65].

Article 9 has been implemented in all 25 Member States.

---

63 Article 9(1) of the Collateral Directive.

64 Article 9(2) of the Collateral Directive.

65 It should be noted that Article 9 of the Collateral Directive will be amended to bring it into the line with the Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary.

Annex I:	**Survey on the implementation of the Collateral Directive (2002/47/EC)**						
Country / ***Question***	***Implementing measure and entry into force***	***Personal scope of the Directive*** *(Article 1(3))* Exclusion of Art 1(2)(e) ('a person other than a natural person, including unincorporated firms and partnerships') from the personal scope (i.e. opting out) or extended scope	***Material scope of the Directive*** *(Article 1(4)(b))* Member States may exclude certain arrangements	***Appropriation possible*** *(Article 4(3))*	***Reuse*** *(Article 5)* By which mechanism will it be possible to reuse pledged collateral?	***Close-out netting*** *(Article 7)*	***Conflicts of Laws*** *(Article 9)*
Austria	Finanzsicherheitengesetz published on 16 December 2003; BGBl I 2003/117.	Full opt-out. -Implementing measures do not cover entities defined in Article 1(2)(e).	No opt-out.	Yes.	Implemented: - By using the exact wording of Article 5. - Possible to sell and pledge collateral.	Implemented: - Article 9(1) No. 1 of the implementing law recognises close-out netting provisions in proceedings such as bankruptcy, winding-up, composition and reorganisation; and - Article 9(1) No. 2 recognises close-out netting provisions in case of assignments, judicial or other attachment or in case of other disposition.	Implemented.
Belgium	Law of 15 December 2004 on financial collateral, published and entered into force on 1 February 2005; Belgian Official Gazette of 1 February 2005.	Extended scope. - Natural persons (except in title transfer transactions).	No opt-out.	Yes.	Implemented: - Possible to sell and pledge the collateral.	Implemented: - Absolute protection of netting (set-off and contractual compensation).	Implemented.
	Law on financial collateral arrangements of 2004. Official	No opt-out.	No opt-out.	Yes.	Implemented:	Implemented:	Implemented.

Cyprus	Gazette of the Republic No 3823 of 19.3.2004, Appendix 1(I) pp. 511-520 (Law 43(I)/2004). Entered into force on 1 May 2004.				- By using the exact wording of Article 5. - Possible to sell and pledge collateral.	Article 7 of Directive 2002/47 has been transposed *verbatim* into the Financial Collateral Arrangements Law of 2004 as section 9 thereof.	
Czech Republic	Law on the supplementary supervision of banks, savings and credit cooperatives, electronic money institutions, insurance undertakings and investment firms in a financial conglomerate, entered into force on 29 September 2005.	Partial opt-out. - Includes only undertakings of certain size. - When one party is an investment firm, an insurance undertaking, UCITS or fund management company, the other party has to be a credit institution or a public entity. - Uncertain whether unincorporated firms and partnerships are covered.	No opt-out. Extended scope. - Bank loans are included.	Only if agreed by the parties.	Implemented: - By using the exact wording of Article 5. - Possible to sell and by appropriation.	Implemented: A statutory definition of close-out netting and netting agreement is contained in Article 197 of the Act on Trading on the Capital Markets 256 / 2004 as amended by Act 377/2005 on financial conglomerates; such agreements are protected from the effects of a bankruptcy declaration.	Implemented.
Denmark	Amendment to Law on trading in securities that entered into force on 1 January 2004.	Extended scope. - Covers transactions between two undertakings.	Full opt-out.	Yes.	Implemented: - Possible to sell and pledge collateral.	Implemented: -The Insolvency Act specifically allows priority to *lex specialis* in the case of mutually obligating contracts. The provision on close-out netting is implemented in the Act on Trading in Securities.	Implemented.
Estonia	Law amending the Law on property, Law on the central register for securities, Law on credit institutions, Law on	Extended scope. - Collateral taker may be a private person.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge	Unclear: The Law implementing the Collateral Directive does not	Implemented.

	insurance activities, Law on bankruptcy, Law on obligations, Law on private international law and Law on the securities market, passed by the Estonian Parliament on 22 April 2004 and entered into force on 1 May 2004.				collateral.	include the Collateral Directive's netting provisions.	
Finland	Law on financial collateral approved by the Finnish Parliament in December 2003; new legislation entered into force on 1 February 2004.	Extended scope. - Transactions where the collateral provider is an 'Institution', as defined in the implementing legislation or where the collateral is provided by another type of legal entity and the collateral taker is an 'Institution' as defined, are covered.	No opt-out.	Yes.	Implemented: - By using the exact wording of Article 5. - Possible to sell and by appropriation.	Implemented.	Implemented.
France	Law No 2004-1343 of 9 December 2004 on the simplification of law (as published in the *Journal Officiel* of 10 December) authorises the French Government to adopt an ordinance implementing the Collateral Directive and simplifying certain collateral procedures. The ordinance was adopted on 24 February 2005 and published in the *Journal Officiel* of 25 February 2005. Also Law on financial security of 1 August 2003 implementing Article 7 of the Collateral Directive.	Opt-out for undertakings. - Materialise only in respect of cash collateral provided or received by undertakings.	No opt-out Extended scope. - Includes claims and different forms of rights, provided they are assignable.	Yes.	Implemented: - Possible to sell and pledge collateral.	Implemented: - Article L. 431-7 of the French Financial and Monetary Code.	Implemented.

Germany	Law of 5 April 2004 transposing Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements and amending the Mortgage Bank Act and other laws (*Gesetz zur Umsetzung der Richtlinie 2002/47/EG vom 6. Juni 2002 über Finanzsicherheiten und zur Änderung des Hypothekenbankgesetzes und anderer Gesetze vom 5. April 2004)*, entered into force on 9 April 2004; BGBl I of 8 April 2004, p. 502.	Partial opt-out. - If collateral provider is an undertaking, only financial collateral used to secure specifically defined financial obligations is covered (excluding mainly long-term cash loans). Extension of scope. - Includes transactions between two corporate entities.	Partial opt-out. - If collateral giver is an undertaking, the use of the undertaking's own assets or the use of affiliates shares are excluded from the range of usable collateral.	Yes.	No specific implementing measure. - According to the transposition legislation: A right of reuse should already be recognised by German customary law and partially by jurisprudence.	Implemented: - Insolvency Act.	Implemented.
Greece	Implementing Law 3301/12004, published on 9 December 2004 and entered into force on 23 December 2004; Official Gazette Vol. A Issue 263.	No opt-out. - Situation for unincorporated firms unclear.	No opt-out.	Yes.	Implemented : - By using the exact wording of Article 5. - Possible to sell and by appropriation.	Implemented: - Article 16 L. 3156/2003.	Implemented.
Hungary	Law XXVII of 2004 on the codification modification of certain financial legislative acts, which has modified the Civil Code, the Law on bankruptcy and liquidation and the Law on private international law was adopted by the Parliament on 19 April 2004 and Law XLVIII of 2004, which amended the Capital Market Act, adopted by Parliament on 2 June 2004.	No opt-out.	No opt-out.	Yes.	Implemented: - Possible to sell and by appropriation.	Implemented: - Certain concerns in the context of bankruptcy proceedings. - Amendment of the Capital Market Act, effective as of 10 June 2004. - See also Act on Bankruptcy and Liquidation.	Implemented.
	European Communities (Financial Collateral Arrangements) Regulations 2004	No opt-out.	Partial opt-out. - shares in a	Yes.	Implemented: - By using the exact	Implemented: - Implemented by Regulation	Implemented.

Ireland	of 9 January 2004 (S.I. No 1 of 2004). Amending Regulations were adopted on 8 March 2004 (S.I. No 89 of 2004).		company whose exclusive purpose is to own means of production that are essential for the collateral provider's business or to own real property may not be used as collateral.		wording of Article 5. - Possible to sell and by appropriation.	13 of the European Communities (Financial Collateral Arrangements) Regulations 2004 (S.I. No. 1 of 2004), as amended (S.I. No. 89 of 2004).	
Italy	Legislative Decree No 170 of 21 May 2004, entered into force on 30 July 2004.	Extended scope. - Covers transactions involving non-profit organisations, political parties, trade unions and associations.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge collateral.	Implemented: - Article 203 *T.U. della Finanza* (consolidated financial law) which extends to financial derivatives the applicability of Article 76 r.d. n. 267/1942 (General bankruptcy law). - Article 7 of d.lgs. n. 170/2004 .	Implemented.
Latvia	Law on financial collateral adopted by the Parliament on 21 April 2005, entered into force on 25 May 2005; *Latvijas Vestnesis* (11.5.2005). Simultaneous amendments to the Law on the insolvency of undertakings and companies (adopted on 17 March 2005) and amendments to the Law on commercial pledges (21 April 2005) necessary in order to ensure the application of the Law on financial collateral, already entered into force.	No opt-out.	No opt-out.	Yes.	Implemented: - By using the exact wording of Article 5. - Possible to sell and pledge collateral.	Implemented: - Law rewrites the provisions of the Directive as to close-out netting (Article 9).	Implemented.
Lithuania	Law No IX-2127 on the financial collateral arrangements adopted by Lithuania's Seimas on 15 April 2004 and entered into force	No opt-out.	No opt-out.	Yes.	Implemented: - Possible to sell	Implemented: - Article 12 of the Law.	Implemented.

	on 1 May 2004; *Valstybės žinios*, No 61-2183, 2004.				and pledge collateral.		
Luxembourg	Loi du 5 août 2005 sur les contrats de garantie financière adopted on 12 July 2005 and entered into force on 19 August 2005.	Extended scope. - Covers transactions between two undertakings.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge the collateral.	Implemented: - Articles 18 and 19 of the Law.	Implemented.
Malta	The Minister of Finance has adopted Financial Collateral Arrangements Regulations, 2004 (L.N. 177 of 2004), pursuant to the powers delegated under the Set-off and Netting on Insolvency Act, Chapter 456 of the Laws of Malta . They entered into force on 1 May 2004.	No opt-out.	No opt-out.	Yes.	Implemented: - By using the exact wording of Article 5. - Possible to sell and pledge collateral.	Implemented: - The Set-Off and Netting on Insolvency Act recognises close-out netting in agreements between counterparties.	Implemented.
The Netherlands	The Law implementing the Collateral Directive (Wet tot uitvoering van Richtlijn nr. 2002/47/EG betreffende financiëlezekerheidsovereenkomsten) was adopted by the Second Chamber of the Dutch Parliament on 23 December 2005. Its entry into force is expected for early 2006. **[Status?]**	No opt-out.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge collateral.	Implemented: - Civil Code. - Insolvency Act.	Implemented.
Poland	Law on financial collateral entered into force on 1 May 2004.	No opt-out.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge collateral.	Implemented: - Act on some financial collateral. - Insolvency Law 2003.	Implemented.

						- In the context of bankruptcy proceedings, doubts have been regarding the appropriateness of the recognition of close-out netting.	
Portugal	Decree-Law No 105/2004 of 8 May 2004.	No opt-out.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge collateral.	Implemented: - Insolvency Code. - Articles 12 and 15 of the decree-law.	Implemented.
Slovakia	Law 7/2005 on bankruptcy and reconstruction, together with Law No 566/2001 on securities and investment services, Law No 483/2001 on Banks, Law No 510/2002 on payment systems.	No opt-out.	No opt-out.	Yes	Implemented: - Possible to sell and pledge collateral - Collateral taker can reuse pledged assets even without the pledgor's agreement.	Implemented: - Bankruptcy Act. - Excludes individual public and private attachments.	Implemented.
Slovenia	Law on financial collateral of 22 April 2004, entered into force on 1 May 2004.	Partial opt-out. - SMEs, associations, and certain civil law legal persons are excluded.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge collateral.	Implemented.	Implemented.
Spain	On 11 March 2005, the Government adopted Royal Decree-Law 5/2005 introducing urgent reforms to increase productivity. It entered into force 15 March 2005.	Extended scope. - Other party may be a natural person.	No opt-out.	Yes.	Implemented: - Possible to sell and pledge the collateral.	Implemented.	Implemented.

Sweden	The Swedish Parliament decided on the Government's legislative report and proposal on financial collateral (*prop. 2004/05:30*), the legislative amendments entered into force on 1 May 2005.	Partial opt-out. - Re-pledging of assets to financial agents is excluded.	Partial opt-out. - Subsidiary shares (liquidator may redeem them in a winding-up situation). - Extended scope. - 'Money loans' are included.	Yes.	Implemented : - Possible to sell and pledge collateral.	Implemented: - Section 1 of Chapter 5 of the Act on the trading of financial instruments (*lagen om handel med finansiella instrument*). - Section 10 of Chapter 8 of the Bankruptcy Code (*konkurslagen*).	Implemented.
United Kingdom	Financial Collateral Arrangements (No 2) Regulations 2003. SI 2003/3226, entered into force on 26 December 2003.	Extended scope. - Covers transactions between two undertakings.	No opt-out.	Yes.	Implemented: - By using the exact wording of Article 5. - Possible to sell and pledge collateral.	Implemented: The UK's implementation of the CD contains an express provision that close-out netting provisions are to take effect in accordance with their terms.	Implemented.

Annex II: Members of the EFMLG

Mr. Sáinz de Vicuña, Antonio	Chairman
Ms. Aggergaard, Birthe Mr. Mortensen, Michael (Alternate)	Nordea Bank Denmark
Ms. Alonso Jimenez, Nuria	Banco Bilbao Vizcaya Argentaria
Mr. Blokbergen, Cornelius	ING Groep
Mr. Bloom, David T.	HSBC Holdings
Ms. Butragueño, Natalia	BSCH
Mr. Daunizeau, Jean Michel Mrs. Heriaud-Chalant, Beatrice	Crédit Agricole
Mr. Ferreira Malaquias, Pedro	Uria & Menéndez (on behalf of Portuguese Euribor banks)
Ms. Gillen, Marie-Paule	Kredietbank Luxembourg
Mr. Harding, Mark	Barclays Bank
Mr. Hartenfels, Holger	Deutsche Bank
Mr. Jardel, Etienne	Société Génerale
Dr. Kienle, Christopher	Dresdner Bank
Mr. de Lillo, Emilio Mr. Stringat, Mauro (Alternate)	San Paolo IMI
Mr. Löber, Klaus	Secretary, ECB
Mr. Maladorno, Antonio	Unicredito Italiano
Mr. Mijs, Wim	ABN Amro Bank
Ms. Moran, Helen	AIB
Mr. Myhrman, Olof	SEB
Mr. Nierop, Erwin	ECB
Dr. Parche, Ulrich	HypoVereinsbank
Dr. Poggemann, Klaus	WestLB
Mr. Ross-Stewart, Charles Ms. Moir, Carol	UBS Warburg
Mr. Tillian, Frank	BankAustria Creditanstalt
Dr. Tsibanoulis, Dimitris	Tsibanoulis & partners (on behalf of Greek Euribor banks)

Mr. de Vauplane, Hubert	BNP Paribas
Ms. Viitala, Merja	Nordea Bank Finland
Mr. Vloemans, Dirk	Fortis