

Directive 2002/47/EC of the European Parliament and of the
Council of 6 June 2002 on financial collateral arrangements

DIRECTIVE 2002/47/EC OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL

of 6 June 2002

on financial collateral arrangements

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the European Central Bank⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽⁴⁾,

Whereas:

- (1) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems⁽⁵⁾ constituted a milestone in establishing a sound legal framework for payment and securities settlement systems. Implementation of that Directive has demonstrated the importance of limiting systemic risk inherent in such systems stemming from the different influence of several jurisdictions, and the benefits of common rules in relation to collateral constituted to such systems.
- (2) In its communication of 11 May 1999 to the European Parliament and to the Council on financial services: implementing the framework for financial markets: action plan, the Commission undertook, after consultation with market experts and national authorities, to work on further proposals for legislative action on collateral urging further progress in the field of collateral, beyond Directive 98/26/EC.
- (3) A Community regime should be created for the provision of securities and cash as collateral under both security interest and title transfer structures including repurchase agreements (repos). This will contribute to the integration and cost-efficiency of the financial market as well as to the stability of the financial system in the Community, thereby supporting the freedom to provide services and the free movement of capital in the single market in financial services. This Directive focuses on bilateral financial collateral arrangements.
- (4) This Directive is adopted in a European legal context which consists in particular of the said Directive 98/26/EC as well as Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit

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institutions⁽⁶⁾, Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings⁽⁷⁾ and Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings⁽⁸⁾. This Directive is in line with the general pattern of these previous legal acts and is not opposed to it. Indeed, this Directive complements these existing legal acts by dealing with further issues and going beyond them in connection with particular matters already dealt with by these legal acts.

- (5) In order to improve the legal certainty of financial collateral arrangements, Member States should ensure that certain provisions of insolvency law do not apply to such arrangements, in particular, those that would inhibit the effective realisation of financial collateral or cast doubt on the validity of current techniques such as bilateral close-out netting, the provision of additional collateral in the form of top-up collateral and substitution of collateral.
- (6) This Directive does not address rights which any person may have in respect of assets provided as financial collateral, and which arise otherwise than under the terms of the financial collateral arrangement and otherwise than on the basis of any legal provision or rule of law arising by reason of the commencement or continuation of winding-up proceedings or reorganisation measures, such as restitution arising from mistake, error or lack of capacity.
- (7) The principle in Directive 98/26/EC, whereby 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, should be extended in order to create legal certainty regarding the use of such securities held in a cross-border context and used as financial collateral under the scope of this Directive.
- (8) The *lex rei sitae* rule, according to which the applicable law for determining whether a financial collateral arrangement is properly perfected and therefore good against third parties is the law of the country where the financial collateral is located, is currently recognised by all Member States. Without affecting the application of this Directive to directly-held securities, the location of book entry securities provided as financial collateral and held through one or more intermediaries should be determined. If the collateral taker has a valid and effective collateral arrangement according to the governing law of the country in which the relevant account is maintained, then the validity against any competing title or interest and the enforceability of the collateral should be governed solely by the law of that country, thus preventing legal uncertainty as a result of other unforeseen legislation.
- [^{F1}(9) In order to limit the administrative burdens for parties using financial collateral under the scope of this Directive, the only perfection requirement regarding parties which national law may impose in respect of financial collateral should be that the financial collateral is under the control of the collateral taker or of a person acting on the collateral taker's behalf while not excluding collateral techniques where the collateral provider is allowed to substitute collateral or to withdraw excess collateral. This Directive should not prohibit Member States from requiring that a credit claim be delivered by means of inclusion in a list of claims.]

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- (10) For the same reasons, 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, should not be made dependent on the performance of any formal act such as the execution of any document in a specific form or in a particular manner, the making of any filing with an official or public body or registration in a public register, advertisement in a newspaper or journal, in an official register or publication or in any other matter, notification to a public officer or the provision of evidence in a particular form as to the date of execution of a document or instrument, the amount of the relevant financial obligations or any other matter. This Directive must however provide a balance between market efficiency and the safety of the parties to the arrangement and third parties, thereby avoiding *inter alia* the risk of fraud. This balance should be achieved through the scope of this Directive covering only those financial collateral arrangements which provide for some form of dispossession, i.e. the provision of the financial collateral, and where the provision of the financial collateral can be evidenced in writing or in a durable medium, ensuring thereby the traceability of that collateral. For the purpose of this Directive, acts required under the law of a Member State as conditions for transferring or creating a security interest on financial instruments, other than book entry securities, such as endorsement in the case of instruments to order, or recording on the issuer's register in the case of registered instruments, should not be considered as formal acts.
- (11) Moreover, this Directive should protect only financial collateral arrangements which can be evidenced. Such evidence can be given in writing or in any other legally enforceable manner provided by the law which is applicable to the financial collateral arrangement.
- (12) The simplification of the use of financial collateral through the limitation of administrative burdens promotes the efficiency of the cross-border operations of the European Central Bank and the national central banks of Member States participating in the economic and monetary union, necessary for the implementation of the common monetary policy. Furthermore, the provision of limited protection of financial collateral arrangements from some rules of insolvency law in addition supports the wider aspect of the common monetary policy, where the participants in the money market balance the overall amount of liquidity in the market among themselves, by cross-border transactions backed by collateral.
- (13) This Directive seeks to protect the validity of financial collateral arrangements which are based upon the transfer of the full ownership of the financial collateral, such as by eliminating the so-called re-characterisation of such financial collateral arrangements (including repurchase agreements) as security interests.
- (14) The enforceability of bilateral close-out netting should be protected, not only as an enforcement mechanism for title transfer financial collateral arrangements including repurchase agreements but more widely, where close-out netting forms part of a financial collateral arrangement. Sound risk management practices commonly used in the financial market should be protected by enabling participants to manage and reduce their credit exposures arising from all kinds of financial transactions on a net basis,

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where the credit exposure is calculated by combining the estimated current exposures under all outstanding transactions with a counterparty, setting off reciprocal items to produce a single aggregated amount that is compared with the current value of the collateral.

- (15) This Directive should be without prejudice to any restrictions or requirements under national law on bringing into account claims, on obligations to set-off, or on netting, for example relating to their reciprocity or the fact that they have been concluded prior to when the collateral taker knew or ought to have known of the commencement (or of any mandatory legal act leading to the commencement) of winding-up proceedings or reorganisation measures in respect of the collateral provider.
- (16) The sound market practice favoured by regulators whereby participants in the financial market use top-up financial collateral arrangements to manage and limit their credit risk to each other by mark-to-market calculations of the current market value of the credit exposure and the value of the financial collateral and accordingly ask for top-up financial collateral or return the surplus of financial collateral should be protected against certain automatic avoidance rules. The same applies to the possibility of substituting for assets provided as financial collateral other assets of the same value. The intention is merely that the provision of top-up or substitution financial collateral cannot be questioned on the sole basis that the relevant financial obligations existed before that financial collateral was provided, or that the financial collateral was provided during a prescribed period. However, this does not prejudice the possibility of questioning under national law the financial collateral arrangement and the provision of financial collateral as part of the initial provision, top-up or substitution of financial collateral, for example where this has been intentionally done to the detriment of the other creditors (this covers *inter alia* actions based on fraud or similar avoidance rules which may apply in a prescribed period).
- (17) This Directive provides for rapid and non-formalistic enforcement procedures in order to safeguard financial stability and limit contagion effects in case of a default of a party to a financial collateral arrangement. However, this Directive balances the latter objectives with the protection of the collateral provider and third parties by explicitly confirming the possibility for Member States to keep or introduce in their national legislation an *a posteriori* control which the Courts can exercise in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations. Such control should allow for the judicial authorities to verify that the realisation or valuation has been conducted in a commercially reasonable manner.
- (18) It should be possible to provide cash as collateral under both title transfer and secured structures respectively protected by the recognition of netting or by the pledge of cash collateral. Cash refers only to money which is represented by a credit to an account, or similar claims on repayment of money (such as money market deposits), thus explicitly excluding banknotes.
- (19) 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

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reuse of ‘pledged’ securities. This reuse however should be without prejudice to national legislation about separation of assets and unfair treatment of creditors.

- [^{F1}(20) This Directive does not prejudice the operation or effect of the contractual terms of financial instruments or credit claims provided as financial collateral, such as rights, obligations or other conditions contained in the terms of issue of such instruments, or any other rights, obligations or other conditions which apply between the issuers and holders of such instruments or between the debtor and the creditor of such credit claims.]
- (21) This Act complies with the fundamental rights and follows the principles laid down in particular in the Charter of Fundamental Rights of the European Union.
- (22) Since the objective of the proposed action, namely to create a minimum regime relating to the use of financial collateral, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective[^{F1}.]
- [^{F2}(23) This Directive does not affect the rights of Member States to impose rules to ensure the effectiveness of financial collateral arrangements in relation to third parties as regards credit claims,]

HAVE ADOPTED THIS DIRECTIVE:

Textual Amendments

- F1** Substituted by [Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims \(Text with EEA relevance\)](#).
- F2** Inserted by [Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims \(Text with EEA relevance\)](#).

Article 1

Subject matter and scope

1 This Directive lays down a Community regime applicable to financial collateral arrangements which satisfy the requirements set out in paragraphs 2 and 5 and to financial collateral in accordance with the conditions set out in paragraphs 4 and 5.

2 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)) including:

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- (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;
 - [^{F1}b a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as referred to in Annex VI, Part 1, Section 4 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)⁽⁹⁾, the International Monetary Fund and the European Investment Bank;]
 - c a financial institution subject to prudential supervision including:
 - (i) [^{F1}a credit institution as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that Directive;
 - (ii) an investment firm as defined in Article 4(1)(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments⁽¹⁰⁾;
 - (iii) a financial institution as defined in Article 4(5) of Directive 2006/48/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 insurance (third non-life insurance Directive)⁽¹¹⁾ and an assurance undertaking as defined in Article 1(1)(a) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance⁽¹²⁾;
 - (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)⁽¹³⁾;
 - (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).
- 3 Member States may exclude from the scope of this Directive financial collateral arrangements where one of the parties is a person mentioned in paragraph 2(e).

If they make use of this option Member States shall inform the Commission which shall inform the other Member States thereof.

4

- [^{F1}a The financial collateral to be provided shall consist of cash, financial instruments or credit claims;]

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b Member States may exclude from the scope of this Directive financial collateral consisting of the collateral provider's own shares, shares in affiliated undertakings within the meaning of seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts⁽¹⁴⁾, 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.

[^{F2}c Member States may exclude from the scope of this Directive credit claims where the debtor is a consumer as defined in Article 3(a) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers⁽¹⁵⁾ or a micro or small enterprise as defined in Article 1 and Article 2(2) and (3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises⁽¹⁶⁾, save where the collateral taker or the collateral provider of such credit claims is one of the institutions referred under Article 1(2)(b) of this Directive.]

5 This Directive applies to financial collateral once it has been provided and if that provision can be evidenced in writing.

The evidencing of the provision of financial collateral must allow for the identification of the financial collateral to which it applies. For this purpose, it is sufficient to prove that the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account. [^{F2}For credit claims, the inclusion in a list of claims submitted in writing, or in a legally equivalent manner, to the collateral taker is sufficient to identify the credit claim and to evidence the provision of the claim provided as financial collateral between the parties.]

[^{F2}Without prejudice to the second subparagraph, Member States may provide that the inclusion in a list of claims submitted in writing, or in a legally equivalent manner, to the collateral taker is also sufficient to identify the credit claim and to evidence the provision of the claim provided as financial collateral against the debtor or third parties.]

This Directive applies to financial collateral arrangements if that arrangement can be evidenced in writing or in a legally equivalent manner.

[^{F3}6 Articles 4 to 7 of this Directive shall not apply to any restriction on the enforcement of financial collateral arrangements or any restriction on the effect of a security financial collateral arrangement, any close out netting or set-off provision that is imposed by virtue of Title IV, Chapter V or VI of Directive 2014/59/EU of the European Parliament and of the Council⁽¹⁷⁾, or to any such restriction that is imposed by virtue of similar powers in the law of a Member State to facilitate the orderly resolution of any entity referred to in points (c)(iv) and (d) of paragraph 2 which is subject to safeguards at least equivalent to those set out in Title IV, Chapter VII of Directive 2014/59/EU.]

Textual Amendments

- F1** Substituted by [Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims \(Text with EEA relevance\)](#).
- F2** Inserted by [Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims \(Text with EEA relevance\)](#).

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F3 Inserted by Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (Text with EEA relevance).

Article 2

Definitions

- 1 For the purpose of this Directive:
- a ‘financial collateral arrangement’ means a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or general terms and conditions;
 - ^[F1]b ‘title transfer financial collateral arrangement’ means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of, or full entitlement to, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations;
 - c ‘security financial collateral arrangement’ means an arrangement under which a collateral provider provides financial collateral by way of security to or in favour of a collateral taker, and where the full or qualified ownership of, or full entitlement to, the financial collateral remains with the collateral provider when the security right is established;]
 - d ‘cash’ means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits;
 - e ‘financial instruments’ means 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;
 - f ‘relevant financial obligations’ means the obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and/or delivery of financial instruments.

Relevant financial obligations may consist of or include:

- (i) present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement);
 - (ii) obligations owed to the collateral taker by a person other than the collateral provider; or
 - (iii) obligations of a specified class or kind arising from time to time;
- g ‘book entry securities collateral’ means 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;

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- h ‘relevant account’ means in relation to book entry securities collateral which is subject to a financial collateral arrangement, 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;
- i ‘equivalent collateral’:
 - (i) in relation to cash, means a payment of the same amount and in the same currency;
 - (ii) in relation to financial instruments, means 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;
- j ‘winding-up proceedings’ means 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;
- k ‘reorganisation measures’ means 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;
- l ‘enforcement event’ means 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;
- m ‘right of use’ means 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;
- n ‘close-out netting provision’ means 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^[F1];
- ^[F2]o ‘credit claims’ means pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan.]

2 References in this Directive to financial collateral being ‘provided’, or to the ‘provision’ of financial collateral, are to the financial collateral being delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the

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collateral taker or of a person acting on the collateral taker's behalf. [F1 Any right of substitution, right to withdraw excess financial collateral in favour of the collateral provider or, in the case of credit claims, right to collect the proceeds thereof until further notice, shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in this Directive.]

3 References in this Directive to ‘writing’ include recording by electronic means and any other durable medium.

Textual Amendments

- F1** Substituted by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance).
- F2** Inserted by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance).

Article 3

Formal requirements

1 Member States shall not 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.

[F2 Without prejudice to Article 1(5), when credit claims are provided as financial collateral, Member States shall not require that the creation, validity, perfection, priority, enforceability or admissibility in evidence of such financial collateral be dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claim provided as collateral. However, Member States may require the performance of a formal act, such as registration or notification, for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor or third parties.

By 30 June 2014, the Commission shall report to the European Parliament and to the Council on whether this paragraph continues to be appropriate.]

2 Paragraph 1 is without prejudice to the application of this Directive to financial collateral only once it has been provided and if that provision can be evidenced in writing and where the financial collateral arrangement can be evidenced in writing or in a legally equivalent manner.

[F23 Without prejudice to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁽¹⁸⁾ and national provisions concerning unfair contract terms, Member States shall ensure that debtors of the credit claims may validly waive, in writing or in a legally equivalent manner:

- (i) their rights of set-off vis-à-vis the creditors of the credit claim and vis-à-vis persons to whom the creditor assigned, pledged or otherwise mobilised the credit claim as collateral; and

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- (ii) their rights arising from banking secrecy rules that would otherwise prevent or restrict the ability of the creditor of the credit claim to provide information on the credit claim or the debtor for the purposes of using the credit claim as collateral.]

Textual Amendments

- F2** Inserted by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance).

Article 4

Enforcement of financial collateral arrangements

1 Member States shall ensure that on the occurrence of an enforcement event, the collateral taker shall be able to realise in 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^[F1];

^[F2]c credit claims, by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations.]

2 Appropriation is possible only if:

- a this has been agreed by the parties in the security financial collateral arrangement; and
- ^[F1]b the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments and the credit claims.]

^{F4}3

4 The manners of realising the financial collateral referred to in paragraph 1 shall, subject to the terms agreed in the security financial collateral arrangement, be without any requirement to the effect that:

- a prior notice of the intention to realise must have been given;
- b the terms of the realisation be approved by any court, public officer or other person;
- c the realisation be conducted by public auction or in any other prescribed manner; or
- d any additional time period must have elapsed.

5 Member States shall 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.

6 This Article and Articles 5, 6 and 7 shall be without prejudice to any requirements under national law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner.

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- F2** Inserted by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance).
- F4** Deleted by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance).

Article 5

Right of use of financial collateral under security financial collateral arrangements

1 If and to the extent that the terms of a security financial collateral arrangement so provide, Member States shall 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.

2 Where a collateral taker exercises a right of use, he thereby incurs an obligation to transfer equivalent collateral to replace the original financial collateral at the latest on the due date for the performance of the relevant financial obligations covered by the security financial collateral arrangement.

Alternatively, the collateral taker shall, on the due date for the performance of the relevant financial obligations, either transfer equivalent collateral, or, if and to the extent that the terms of a security financial collateral arrangement so provide, set off the value of the equivalent collateral against or apply it in discharge of the relevant financial obligations.

3 The equivalent collateral transferred in discharge of an obligation as described in paragraph 2, first subparagraph, shall be subject to the same security financial collateral agreement to which the original financial collateral was subject and shall be treated as having been provided under the security financial collateral arrangement at the same time as the original financial collateral was first provided.

4 Member States shall ensure that the use of financial collateral by the collateral taker according to this Article does not render invalid or unenforceable the rights of the collateral taker under the security financial collateral arrangement in relation to the financial collateral transferred by the collateral taker in discharge of an obligation as described in paragraph 2, first subparagraph.

5 If an enforcement event occurs while an obligation as described in paragraph 2 first subparagraph remains outstanding, the obligation may be the subject of a close-out netting provision.

[^{F26} This Article shall not apply to credit claims.]

Textual Amendments

- F2** Inserted by [Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims \(Text with EEA relevance\)](#).

Article 6

Recognition of title transfer financial collateral arrangements

- 1 Member States shall ensure that a title transfer financial collateral arrangement can take effect in accordance with its terms.
- 2 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

- 1 Member States shall 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.
- 2 Member States shall 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.

Article 8

Certain insolvency provisions disapplied

- 1 Member States shall ensure 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.

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2 Member States shall ensure 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.

3 Where a financial collateral arrangement contains:

- (a) 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
- (b) a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value,

Member States shall ensure 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.

4 Without prejudice to paragraphs 1, 2 and 3, this Directive leaves unaffected the general rules of national insolvency law in relation to the voidance of transactions entered into during the prescribed period referred to in paragraph 1(b) and in paragraph 3(i).

Article 9

Conflict of laws

1 Any question with respect to any of the matters specified in paragraph 2 arising in relation to book entry securities collateral shall be governed by the law of the country in which the relevant account is maintained. The reference to the law of a country is a reference to its domestic law, disregarding any rule under which, in deciding the relevant question, reference should be made to the law of another country.

2 The matters referred to in paragraph 1 are:

- a the legal nature and proprietary effects of book entry securities collateral;
- b the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral and the provision of book entry securities collateral under such an arrangement, and more generally the completion of the steps necessary to render such an arrangement and provision effective against third parties;
- c whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred;

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- d the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event.

[^{F5}Article 9a

Directives 2008/48/EC and 2014/59/EU

This Directive shall be without prejudice to Directives 2008/48/EC and 2014/59/EU.]

Textual Amendments

- F5** Substituted by [Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations \(EU\) No 1093/2010 and \(EU\) No 648/2012, of the European Parliament and of the Council \(Text with EEA relevance\).](#)

Article 10

Report by the Commission

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.

Article 11

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2003 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 12

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

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Article 13

Addressees

This Directive is addressed to the Member States.

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- (1) OJ C 180 E, 26.6.2001, p. 312.
- (2) OJ C 196, 12.7.2001, p. 10.
- (3) OJ C 48, 21.2.2002, p. 1.
- (4) Opinion of the European Parliament of 13 December 2001 (not yet published in the Official Journal), Council Common Position of 5 March 2002 (not yet published in the Official Journal) and Decision of the European Parliament of 15 May 2002.
- (5) OJ L 166, 11.6.1998, p. 45.
- (6) OJ L 125, 5.5.2001, p. 15.
- (7) OJ L 110, 20.4.2001, p. 28.
- (8) OJ L 160, 30.6.2000, p. 1.
- (9) [^{F1}OJ L 177, 30.6.2006, p. 1.]
- (10) [^{F1}OJ L 145, 30.4.2004, p. 1.]
- (11) [^{F1}OJ L 228, 11.8.1992, p. 1.]
- (12) [^{F1}OJ L 345, 19.12.2002, p. 1.]
- (13) OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2001/108/EC of the European Parliament and of the Council. (OJ L 41, 13.2.2002, p. 35).
- (14) OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).
- (15) [^{F2}OJ L 133, 22.5.2008, p. 66.]
- (16) [^{F2}OJ L 124, 20.5.2003, p. 36.]
- (17) [^{F3}Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).]
- (18) [^{F2}OJ L 95, 21.4.1993, p. 29.]

Textual Amendments

- F1** Substituted by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance).
- F2** Inserted by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance).
- F3** Inserted by Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (Text with EEA relevance).