



STATUTORY INSTRUMENTS.

**S.I. No. 626 of 2010**



EUROPEAN COMMUNITIES (FINANCIAL COLLATERAL  
ARRANGEMENTS) REGULATIONS 2010

**(Prn. A10/1915)**

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ARRANGEMENTS) REGULATIONS 2010

ARRANGEMENT OF REGULATIONS

*Part 1*

PRELIMINARY PROVISIONS

1. Citation and commencement.
2. Definitions.
3. Application of these Regulations.
4. Formal requirements with respect to financial collateral arrangements and provision of financial collateral.
5. Parts 2, 3 and 4 not to limit certain other State laws.

*Part 2*

ENFORCEMENT OF FINANCIAL COLLATERAL ARRANGEMENTS

6. Right of collateral taker to enforce security financial collateral arrangement.
7. Financial collateral arrangement to have effect despite winding-up proceedings or reorganisation measures.

*Part 3*

SECURITY FINANCIAL COLLATERAL ARRANGEMENTS

8. Right of collateral taker to use financial collateral if arrangement so provides.
9. Use of financial collateral by collateral taker not to render rights of collateral taker invalid or unenforceable.
10. Non-compliance with certain obligations can be subject of close-out netting provision.

*Part 4*

TITLE TRANSFER FINANCIAL COLLATERAL ARRANGEMENTS

11. Recognition of title transfer financial collateral arrangements.
12. Recognition of close-out netting provisions.

*Part 5*

DISAPPLICATION OF CERTAIN INSOLVENCY PROVISIONS

13. Meaning of “commencement” in relation to winding-up proceedings, etc.
14. Financial collateral arrangements and financial collateral not to be invalidated or voided.
15. Certain financial collateral arrangements, etc., to be enforceable against third parties.
16. Provision of financial collateral not to be invalidated or declared void by certain events.
17. How these Regulations relate to general law of insolvency.

*Part 6*

SUPPLEMENTARY PROVISIONS

18. Conflict of laws.
19. Relationship with law giving effect to Consumer Credit Directive.

*Part 7*

REVOCATION

20. Revocation of European Communities (Financial Collateral Arrangements) Regulations 2004.

## EUROPEAN COMMUNITIES (FINANCIAL COLLATERAL ARRANGEMENTS) REGULATIONS 2010

I, BRIAN LENIHAN, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972, and for the purpose of giving effect to Directive 2002/47/EC<sup>1</sup> of the European Parliament and of the Council (as amended by Directive 2009/44/EC<sup>2</sup> of the European Parliament and of the Council), hereby make the following Regulations:

## Part 1

## PRELIMINARY PROVISIONS

*Citation and commencement*

1. (1) These Regulations may be cited as the European Communities (Financial Collateral Arrangements) Regulations 2010.

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

*Definitions*

2. (1) In these Regulations—

“book entry securities collateral” means financial collateral that consists of financial instruments title to which is evidenced by entries in a register or account kept by or on behalf of an intermediary;

“cash” means money credited to an account, or a claim for the repayment of money (for example, money market deposits);

“close-out netting provision” means—

(a) a provision of a financial collateral arrangement, or an arrangement of which a financial collateral arrangement forms part, or

(b) a rule of law,

as a result of which, on the occurrence (whether through the operation of netting or set-off or otherwise) of an enforcement event—

(i) either or both of the following apply:

(I) the obligations of the parties—

<sup>1</sup>O.J. L 168, 27.6.2002, p. 43.

<sup>2</sup>O.J. L 146, 10.6.2009, p. 37.

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

- (A) are accelerated so as to be immediately due and are expressed as an obligation to pay an amount representing the estimated current value of the obligations, or
  - (B) are terminated and replaced by an obligation to pay such an amount;
- (II) an account is taken of what is due from each party to the other in respect of those obligations and the party from which the larger amount is due is required to pay to the other party a net amount equal to the balance of the account;

“Consumer Credit Directive” means Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008<sup>3</sup>;

“credit claim” means a pecuniary claim arising out of an agreement under which a credit institution, as defined in Article 4(1) of the Recast Credit Institutions Directive, including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan;

“enforcement event”, in relation to a financial collateral arrangement, means a default or similar event agreed by the parties on the occurrence of which, under the arrangement or by operation of law—

- (a) the collateral taker is entitled to realise or appropriate financial collateral, or
- (b) a close-out netting provision takes effect;

“equivalent collateral” means—

- (a) in relation to collateral that is cash, a payment of the same amount and in the same currency, and
- (b) in relation to collateral that is a financial instrument—
  - (i) another financial instrument of the same issuer or debtor that is part of the same issue or class, and is of the same nominal amount, currency and description, as the first-mentioned instrument, or
  - (ii) if the relevant financial collateral arrangement provides for the transfer of other assets following the occurrence of an event relating to or affecting a financial instrument provided as financial collateral, those other assets;

“financial collateral” means cash, financial instruments or credit claims provided under a financial collateral arrangement, but does not include shares in a company whose exclusive purpose is—

<sup>3</sup>O.J. L 133, 22.5.2008, p. 66.

- (a) to own means of production that are essential for the collateral provider's business, or
- (b) to own real property;

“financial collateral arrangement” means a title transfer financial collateral arrangement or a security financial collateral arrangement (whether or not covered by a master agreement or by general terms and conditions);

“financial instruments” means any of the following:

- (a) shares in companies;
- (b) securities equivalent to shares in companies;
- (c) bonds and other forms of debt instruments if negotiable on the capital market;
- (d) any securities (other than instruments referred to in subparagraphs (a) to (c)) that are normally dealt in and give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange;
- (e) any securities (other than instruments referred to in subparagraphs (a) to (c) and instruments of payment) that give rise to a cash settlement;
- (f) units in collective investment undertakings;
- (g) money market instruments;
- (h) claims relating to, or rights in or in respect of, shares, securities, bonds, and instruments of a kind referred to in subparagraphs (a) to (d);

“member” includes shareholder;

“multilateral development bank” has the meaning given in Annex VI, Part 1, Section 4 of the Recast Credit Institutions Directive;

“public authority” means any person or body that performs a public function, and includes—

- (a) a local government body,
- (b) a public sector body of a Member State that is charged with responsibility for, or is involved in, the management of public debt, and
- (c) a public sector body of a Member State that is authorised to hold accounts for customers;

“provision of financial collateral” is to be construed in accordance with paragraph (2);

“Recast Credit Institutions Directive” means Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006<sup>4</sup>;

“relevant account”, in relation to book entry securities collateral, means the register or account (whether kept by the collateral taker or by a third party) in which the entries are made and by which that collateral is provided to the collateral taker;

“relevant financial obligation” means an obligation (whether present or future, and whether actual, contingent or prospective) secured by a financial collateral arrangement that gives a right to a cash settlement or the delivery of financial instruments, or both, and includes—

- (a) an obligation arising under a master agreement or similar arrangement,
- (b) an obligation owed to a collateral taker by a person other than the collateral provider, and
- (c) an obligation of any class or kind arising from time to time specified in the arrangement or, if the arrangement is varied, the arrangement as varied;

“reorganisation measure” means a measure in relation to a person involving an intervention by an administrative authority or a judicial authority that—

- (a) is intended to preserve or restore the financial situation of the person, and
- (b) affects pre-existing rights of third parties (including but not limited to a measure involving a suspension of payments, suspension of an enforcement measure or a reduction of claims);

“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;

“title transfer financial collateral arrangement” means an arrangement 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, and includes a repurchase agreement;

“winding-up proceedings” in relation to a person means collective proceedings (whether or not founded on insolvency and whether or not voluntary or compulsory) involving the intervention of an administrative or judicial authority, taken for the purpose of realising assets of the person and distributing the proceeds among creditors and members, as appropriate, of the person, and includes

<sup>4</sup>O.J. L 177, 30.6.2006, p. 1.

collective proceedings taken for that purpose where the proceedings are terminated by a composition or other similar arrangement.

(2) For the purposes of these Regulations, financial collateral is provided when financial collateral that is or is to be delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of a collateral taker or a person acting on a collateral taker's behalf is so delivered, transferred, held, registered or otherwise designated.

(3) Financial collateral has been provided to a collateral taker for the purposes of these Regulations if paragraph (2) has been complied with in relation to that collateral even if there exists a right of substitution of the financial collateral, a right to withdraw excess financial collateral in favour of the collateral provider or, in the case of a credit claim that is financial collateral, a right to collect the proceeds of the claim until further notice.

(4) A reference in these Regulations to writing includes a reference to any other method of recording information that is legally equivalent to writing, and in particular includes recording by electronic means (such as a computer) or in or by any other durable medium.

(5) A word or expression used in these Regulations and in Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002<sup>5</sup>, but not defined in paragraph (1), has, unless the contrary intention appears, the same meaning in these Regulations as it has in that Directive.

#### *Application of these Regulations*

3. (1) These Regulations apply to a financial collateral arrangement and to financial collateral only if the arrangement and collateral comply with this Regulation.

(2) The collateral taker and the collateral provider who are the parties to the financial collateral arrangement must each be one of the following:

- (a) a public authority (excluding a publicly guaranteed undertaking unless it is covered by one or more of paragraphs (b) to (l));
- (b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund or the European Investment Bank;
- (c) a credit institution (as defined in Article 4(1) of the Recast Credit Institutions Directive, but including the institutions listed in Article 2 of that Directive);
- (d) 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<sup>6</sup>);

<sup>5</sup>O.J. L 168, 27.6.2002, p. 43.

<sup>6</sup>O.J. L 145, 30.4.2004, p. 1



- (e) a financial institution (as defined in Article 4(5) of the Recast Credit Institutions Directive);
- (f) an insurance undertaking (as defined in Article 1(a) of Council Directive 92/49/EEC<sup>7</sup>);
- (g) 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<sup>8</sup>);
- (h) a management company (as defined in Article 1a(2) of Council Directive 85/611/EEC<sup>9</sup>);
- (i) 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);
- (j) a central counterparty, settlement agent or clearing house, or any similar entity that is operating in the futures, options or derivatives markets in a way not covered by the Settlement Finality Directive, provided the entity is regulated under the law of the State or of another country;
- (k) a person (other than a natural person) who acts as a trustee, or in a representative capacity, on behalf of—
  - (i) any one or more persons of whom at least one is a bondholder or the holder of any other form of securitised debt, or
  - (ii) an authority, bank, institution or other entity referred to in any of paragraphs (a) to (d);
- (l) any other person or group (other than a natural person), but only if the other party to the arrangement is an authority, bank, institution or other entity of a kind specified in any of paragraphs (a) to (k).

(3) In paragraph (2)(j) “central counterparty”, “clearing house” and “settlement agent” have the respective meanings given by Article 2 of the Settlement Finality Directive.

(4) For these Regulations to apply to a financial collateral arrangement, there must be evidence in writing of the arrangement.

(5) For these Regulations to apply to financial collateral, there must be evidence in writing of the provision of that collateral. The evidence must identify the financial collateral concerned. For that purpose, it is sufficient to prove—

<sup>7</sup>O.J. L 228, 11.8.1992, p. 1

<sup>8</sup>O.J. L 345, 19.12.2002, p. 1.

<sup>9</sup>O.J. L 375, 31.1.2.1985, p. 3.

- (a) in the case of book entry securities collateral, that that collateral has been credited to, or forms a credit in, the relevant account, and
  - (b) in the case of cash collateral, that that collateral has been credited to, or forms part of, a designated account.
- (6) The inclusion of a credit claim in a list of claims submitted in writing to a collateral taker—
- (a) is sufficient to identify the credit claim and to evidence the provision of the claim as financial collateral between the parties, and
  - (b) is also sufficient for those purposes against the debtor or third parties.
- (7) In this Regulation “Settlement Finality Directive” means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998<sup>10</sup>.

*Formal requirements with respect to financial collateral arrangements and provision of financial collateral*

4. (1) Subject to paragraphs (2) and (3), the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement, or the provision of financial collateral under such an arrangement, does not depend on the performance of a formal act such as registration or notice to the debtor.

(2) In the case of financial collateral that is or includes a credit claim, if, pursuant to the law of the State, the laws of another state would be applied to determine any of the matters referred to in paragraph (1) and, pursuant to the laws of that other state, that matter depends on the performance of a formal act such as registration or the giving of notice to the debtor, paragraph (1) does not affect the continued application of that requirement.

(3) Paragraph (1) does not prejudice the application of these Regulations to financial collateral once that collateral has been provided if—

- (a) that provision is capable of being evidenced in writing, and
  - (b) the relevant financial collateral arrangement is also capable of being evidenced in writing.
- (4) Subject to paragraph (5), a debtor in relation to a credit claim that has been provided as financial collateral can waive, in writing—
- (a) the debtor’s rights of set-off against the creditor in relation to the credit claim and any person to whom the claim is assigned, pledged or otherwise mobilised as collateral; and
  - (b) the debtor’s rights arising from banking secrecy rules that would otherwise prevent or restrict the ability of the creditor to provide, for

<sup>10</sup>O.J. L 166, 11.6.1998, p. 45.

the purposes of using the credit claim as collateral, information on the credit claim or the debtor.

(5) Paragraph (4) does not apply to a debtor entitled to the benefit of any law of the State that gives effect to Council Directive 93/13/EEC of 5 April 1993<sup>11</sup> or any other law of the State concerning unfair contract terms.

*Parts 2, 3 and 4 not to limit certain other State laws*

5. Nothing in Parts 2, 3 and 4 limits any requirement imposed by any other law of the State requiring the realisation or valuation of financial collateral and the calculation of the relevant financial obligations to be carried out in a commercially reasonable manner.

Part 2

ENFORCEMENT OF FINANCIAL COLLATERAL ARRANGEMENTS

*Right of collateral taker to enforce security financial collateral arrangement*

6. (1) On the occurrence of an enforcement event relating to a security financial collateral arrangement, the collateral taker under the arrangement has a right to realise financial collateral provided under the arrangement—

- (a) in the case of financial collateral in the form of a financial instrument, by sale or (subject to paragraph (2)) by appropriation and by setting off the instrument's value against, or applying that value in discharge of, the relevant financial obligations,
- (b) in the case of financial collateral in the form of cash, by setting off the amount of cash against, or applying it, in discharge of the relevant financial obligations, and
- (c) in the case of financial collateral in the form of credit claims, by sale or (subject to paragraph (2)) by appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations.

(2) For the purpose of this Regulation, a collateral taker may appropriate a financial instrument or credit claim only if the relevant security financial collateral arrangement—

- (a) allows appropriation, and
- (b) provides for the valuation of the financial instrument or credit claim.

(3) Financial collateral may, subject to the terms of the relevant security financial collateral arrangement, be realised under this Regulation without—

- (a) giving notice of intention to realise the financial collateral,

<sup>11</sup>O.J. L 95, 21.4.1993, p. 29

- (b) the approval of the terms of realisation by a court, public authority or person, or
- (c) any additional period of time having elapsed.

(4) There is no rule of law requiring financial collateral to be realised by public auction or any other means by which an insolvent person's assets may be lawfully realised. However, a security financial collateral arrangement may provide for the realisation of the relevant financial collateral.

*Financial collateral arrangement to have effect despite winding-up proceedings or reorganisation measures*

7. A financial collateral arrangement has effect in accordance with its terms despite the commencement or continuation of winding-up proceedings or reorganisation measures in relation to the collateral provider or collateral taker concerned.

### Part 3

#### SECURITY FINANCIAL COLLATERAL ARRANGEMENTS

*Right of collateral taker to use financial collateral if arrangement so provides*

8. (1) If and to the extent that the terms of a security financial collateral arrangement so provide, the collateral taker under the arrangement has a right to use and dispose of financial collateral provided under the arrangement.

(2) Subject to paragraph (3), a collateral taker under a security financial collateral arrangement who exercises such a right is required to transfer equivalent collateral to replace the original financial collateral not later than the due date for the performance of the relevant financial obligations covered by the arrangement.

(3) Instead of complying with paragraph (2), the collateral taker may, on the due date for the performance of the relevant financial obligations, either—

- (a) transfer equivalent collateral, or
- (b) if and to the extent that the terms of the arrangement so provide, set off the value of the equivalent collateral against, or apply it in discharge of, the relevant financial obligations.

(4) Equivalent collateral transferred in accordance with paragraph (2) or (3) is subject to the same security financial collateral agreement as that to which the original financial collateral was subject and is to be taken to have been provided under the security financial collateral arrangement at the same time as the original financial collateral was first provided.

(5) This Regulation does not apply to credit claims.

*Use of financial collateral by collateral taker not to render rights of collateral taker invalid or unenforceable*

9. The use of financial collateral by a collateral taker in accordance with Regulation 8 does not render invalid or unenforceable the rights of the collateral taker under the security financial collateral arrangement concerned in relation to financial collateral transferred in discharge of an obligation referred to in paragraph (2) of that Regulation.

*Non-compliance with certain obligations can be subject of close-out netting provision*

10. If an enforcement event occurs when an obligation referred to in Regulation 8(2) has not been complied with, the obligation can be the subject of a close-out netting provision.

Part 4

TITLE TRANSFER FINANCIAL COLLATERAL ARRANGEMENTS

*Recognition of title transfer financial collateral arrangements*

11. (1) A title transfer financial collateral arrangement has effect in accordance with its terms.

(2) If an enforcement event occurs when an obligation of the collateral taker to transfer equivalent collateral under a title transfer financial collateral arrangement remains outstanding, the obligation can be the subject of a close-out netting provision.

*Recognition of close-out netting provisions*

12. (1) A close-out netting provision has effect in accordance with its terms irrespective of whether—

- (a) winding-up proceedings or reorganisation measures have been commenced, or are continuing, in relation to the collateral provider or collateral taker concerned, or
- (b) rights arising in respect of the relevant financial collateral purport to have been assigned or attached as a result of judicial or other process or any other disposition.

(2) The operation of a close-out netting provision is subject to a requirement to do any of the things referred to in paragraphs (a) to (c) of Regulation 6(3), or to realise any collateral in any particular way, only if the relevant financial collateral arrangement so provides. Without limiting the generality of the foregoing, Regulation 6(4) applies to the operation of a close-out netting provision.

## Part 5

## DISAPPLICATION OF CERTAIN INSOLVENCY PROVISIONS

*Meaning of “commencement” in relation to winding-up proceedings, etc*

13. For the purposes of this Part—

- (a) winding-up proceedings commence on the making of a winding-up order by the court; and
- (b) reorganisation measures commence on the appointment of an administrator, whether by a court or otherwise.

*Financial collateral arrangements and financial collateral not to be invalidated or voided*

14. Neither a financial collateral arrangement, nor financial collateral provided under such an arrangement, may be invalidated or declared void or reversed only because the arrangement was created, or the financial collateral was provided—

- (a) on the day on which relevant winding-up proceedings or reorganisation measures commenced, but before the commencement of those proceedings or measures, or
- (b) during a period before, and defined by reference to, the commencement of those proceedings or measures, or by reference to the making of any court order or the taking of any other action, or the occurrence of any other event, during those proceedings or measures.

*Certain financial collateral arrangements, etc., to be enforceable against third parties*

15. Any financial collateral arrangement or relevant financial obligation created, or any financial collateral provided, on the day on which, but after the moment at which, winding-up proceedings or reorganisation measures were commenced, is binding on third parties if the collateral taker concerned is able to prove that that collateral taker was not aware, and had no reason to believe, that the proceedings or measures had commenced.

*Provision of financial collateral not to be invalidated or declared void by certain events*

16. (1) If a financial collateral arrangement contains an obligation to provide financial collateral, or additional financial collateral, in order to take account of changes in the value of the financial collateral, or in the amount of the relevant financial obligations, the provision of financial collateral or additional, substituted or replacement financial collateral under such an obligation may not be invalidated or declared void or reversed only because—

- (a) the provision was made on the day on which winding-up proceedings or reorganisation measures commenced, but before the commencement of those proceedings or measures, or during a period before, and defined by reference to—

- (i) the commencement of winding-up proceedings or reorganisation measures, or
  - (ii) the making of a court order, or the taking of any other action, or the occurrence of any other event, during the course of those proceedings or measures, or
- (b) the relevant financial obligations were incurred before the date on which the financial collateral, or the additional, substituted or replacement financial collateral, was provided.

(2) If a financial collateral arrangement contains a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, the provision of financial collateral or additional, substituted or replacement financial collateral under such a right may not be invalidated or declared void or reversed only because—

- (a) the provision was made on the day on which winding-up proceedings or reorganisation measures commenced, but before the commencement of those proceedings or measures, or during a period before, and defined by reference to—
  - (i) the commencement of the winding-up proceedings or reorganisation measures, or
  - (ii) the making of a court order, or the taking of any other action, or the occurrence of any other event, during the course of those proceedings or measures, or
- (b) the relevant financial obligations were incurred before the date on which the financial collateral or additional, substituted or replacement financial collateral was provided.

*How these Regulations relate to general law of insolvency*

17. Except as provided by this Part, nothing in these Regulations affects the operation of the laws of the State relating to insolvency with respect to the voiding of transactions during the period referred to in Regulation 14(b) or paragraph (1)(a) or (2)(a) of Regulation 16.

Part 6

SUPPLEMENTARY PROVISIONS

*Conflict of laws*

18. (1) Any question with respect to any of the matters specified in paragraph (2) arising in relation to book entry securities collateral is to be governed by the domestic law of the country in which the relevant account is maintained, irrespective of any law of that country that provides for the law of another country to be referred to in deciding the question.

- (2) The matters referred to in paragraph (1) are the following:

- (a) the legal nature and proprietary effects of the book entry securities collateral concerned;
- (b) the requirements for perfecting a financial collateral arrangement relating to that collateral and the provision of that collateral under such an arrangement and, more generally, the completion of steps necessary to render such an arrangement and provision effective against third parties;
- (c) whether a person's title to, or interest in, that collateral is overridden by, or subordinated to, a competing title or interest;
- (d) whether a person has in good faith acquired title to, or an interest in, that collateral;
- (e) the steps required for the realisation of that collateral following the occurrence of an enforcement event.

*Relationship with law giving effect to Consumer Credit Directive*

19. Nothing in these Regulations affects the operation of any law of the State that gives effect to the Consumer Credit Directive.

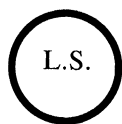
Part 7

REVOCATION

*Revocation of European Communities (Financial Collateral Arrangements) Regulations 2004*

20. The following statutory instruments are revoked:

- (a) the European Communities (Financial Collateral Arrangements) Regulations 2004 (S.I. No. 1 of 2004);
- (b) the European Communities (Financial Collateral Arrangements) (Amendment) Regulations 2004 (S.I. No. 89 of 2004).



GIVEN under my Official Seal,  
21 December 2010.

BRIAN LENIHAN,  
Minister for Finance.



## EXPLANATORY NOTE

*(This note is not part of the instrument and does not purport to be a legal interpretation.)*

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

The aim of the Directive is to create a Community-wide regime for the provision of financial instruments (mainly securities) and cash (not banknotes, but rather money credited to an account) as collateral and where possession or control of the collateral passes to the collateral taker. The regime applies to both title transfer financial collateral arrangements (including repurchase agreements or “repos”) and security financial collateral arrangements. It does not apply to non-financial forms of collateral, such as real estate, plant and machinery, book debts etc.

These arrangements should allow financial collateral to be used more freely and effectively across the Union and contribute to the cost efficiency of the financial market and to the stability of the financial system. To achieve these objectives, the Directive requires Member States to ensure that certain provisions of insolvency law do not apply to the types of financial collateral arrangement that are covered by the Directive; 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 the substitution of collateral.

BAILE ÁTHA CLIATH  
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR  
Le ceannach díreach ón  
OIFIG DHÍOLTA FOILSEACHÁN RIALTAIS,  
TEACH SUN ALLIANCE, SRÁID THEACH LAIGHEAN, BAILE ÁTHA CLIATH 2,  
nó tríd an bpost ó  
FOILSEACHÁIN RIALTAIS, AN RANNÓG POST-TRÁCHTA,  
AONAD 20 PÁIRC MIONDÍOLA COIS LOCHA, CLÁR CHLAINNE MHUIRIS,  
CONTAE MHAIGH EO,  
(Teil: 01 - 6476834 nó 1890 213434; Fax: 094 - 9378964 nó 01 - 6476843)  
nó trí aon díoltóir leabhar.

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