Minister of Finance, the Economy and Investment

L.N. of 2011

SET-OFF AND NETTING ON INSOLVENY ACT (CAP. 459)

Financial Collateral Arrangements (Amendment) Regulations, 2011

IN exercise of the powers conferred by article 7 of the Set-Off and Netting on Insolvency Act, the Minister of Finance, the Economy and Investment has made the following regulations:

Citation, commencement and scope. L.N. 177 of 2004.

1. (1) The title of these regulations is the Financial Collateral Arrangements (Amendment) Regulations, 2011 and they shall be read and construed as one with the Financial Collateral Arrangements Regulations, 2004 hereinafter referred to as "the principal regulations".

(2) These regulations shall enter into force on 30 June 2011.

(3) The objective of these regulations is, in part, to implement 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.

Amends regulation 1 of the principal regulations.

2. Regulation 1 of the principal regulations shall be amended as follows:

(a) for subregulation (3) thereof, there shall be substituted the following:

"(3) The purpose of these regulations is, in part, to implement the provisions of Directive 2002/47/EC on financial collateral arrangements and 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, as currently in force and as may be amended from time to time, including any implementing measures that have been issued or may be issued

thereunder and to provide for other matters relating to financial collateral arrangements and they shall be interpreted and applied accordingly."; and

(b) for subregulation (4) thereof, there shall be substituted the following:

"(4) In the event that there is a conflict between any of these regulations and the provisions of any of the Directives mentioned in subregulation (3) hereof, the provisions of the Directives shall prevail. In addition, the provisions of these regulations are without prejudice to Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and the Consumer Credit Regulations, 2010.".

Amends regulation 2 of the principal regulations.

3. Regulation 2 of the principal regulations shall be amended as follows:

(a) regulation 2 shall be renumbered as subregulation (1) of regulation 2;

(b) subregulation (1) of regulation 2 as renumbered, shall be amended as follows:

(i) immediately after the definition "close-out netting provision" there shall be inserted the following new definitions:

" "credit claims" means pecuniary claims arising out of an agreement whereby a credit institution, as defined in paragraph (c) of subregulation (1) of regulation 4, grants credit in the form of a loan. The term "credit claim" shall also include future claims against future debtors;

"EEA State" means any State which is a contracting party to the agreement on the European Economic Area signed at Oporto on the 2nd May, 1992, as adjusted by the Protocol signed in Brussels on 17th March, 1993 and as amended by any subsequent act;";

(ii) the definition "financial collateral arrangement" shall be amended as follows:

(a) in paragraph (a) thereof, for the words "full ownership of" there shall be substituted the words "full ownership of, or full entitlement to"; and

(b) for paragraph (b) thereof, there shall be substituted the following:

"in the case of a security financial collateral arrangement, an arrangement under which a collateral provider provides financial collateral by way of security for the purpose of securing or otherwise covering the performance of relevant financial obligations 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;";

(iii) for the definition of "instrument" there shall be substituted the following:

" "instrument" has the same meaning as is assigned to it by article 2 of the Investment Services Act, but shall also include all types of securities within the meaning of the Companies Act;";

(iv) the definitions "multilateral development bank" and "provision" shall be deleted; and

(c) immediately after subregulation (1) of regulation 2 as renumbered, there shall be inserted the following:

"(2) Reference in these regulations to financial collateral being 'provided' or to the 'provision' of financial collateral is a reference 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 collateral taker or of a person acting on the collateral taker's behalf. Any right of substitution, right to withdraw excess financial collateral in favour of the collateral provider or, in the case of credit claims, any 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 these regulations.".

Amends regulation 3 of the principal regulations.

4. Regulation 3 of the principal regulations shall be amended as follows:

(a) in paragraph (a) thereof, for the words "or instruments" there shall be substituted the words "or instruments or credit claims";

(b) in the proviso to paragraph (c) thereof, for the words "as

designated account.", there shall be substituted the words "a designated account;"; and

(c) immediately after the proviso to paragraph (c) thereof, as amended, there shall be inserted the following:

"Provided further, that for credit claims, the inclusion of the claim in a list of claims submitted to the collateral taker in writing, or in a legally equivalent manner, is sufficient to identify that credit claim and to evidence the provision of the claim provided as financial collateral between the parties or against the debtor or third parties when the provisions of sub-regulation (2) of regulation 5 of these regulations are followed.".

Amends regulation 4 of the principal regulations.

5. Regulation 4 of the principal regulations shall be amended as follows:

(a) for paragraphs (b) to (g) of subregulation 1 thereof there shall be substituted the following:

"(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 on the taking up and pursuit of the business of credit institutions (recast), the International Monetary Fund and the European Investment Bank;

(c) a bank or credit institution licensed under the Banking Act, or otherwise licensed or authorised by a foreign authority in a recognised jurisdiction or a credit institution within the meaning of article 4(1) of Directive 2006/48/EC including the institutions listed in article 2(1) of that Directive;

(d) an investment services licence holder under the Investment Services Act, or otherwise licensed or authorised by a foreign authority in a recognised jurisdiction or an investment firm within the meaning of subparagraph 1 of paragraph 1 of article 4of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;

(e) a financial institution licensed in terms of the Financial Institutions Act or a financial institution within the meaning of article 4 of Directive 2006/48/EC;

(f) a company authorised in terms of article 7 of the Insurance Business Act to carry on business of insurance or reinsurance or both insurance business and reinsurance or an insurance undertaking as defined in article 1(a) of Council Directive 92/49/EEC of the 18 June, 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance, an assurance undertaking as defined in article 1(1)(a) of Council Directive 2002/83/EC of 5th November, 2002 concerning life assurance, a reinsurance undertaking or a special purpose vehicle each as defined in article 2(1)(c) of Council Directive 2005/68/EC of 16th November, 2005 on reinsurance;

(g) an undertaking for collective investment in transferable securities (UCITS) as defined in article 1(2) of Council Directive 85/611/EEC of the 20th December, 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) whether licensed in terms of the Investment Services Act or authorised in a Member State or EEA State.";

(b) paragraphs (j) and (k) thereof shall be renumbered (k) and (l) respectively;

(c) immediately after paragraph (i) thereof there shall be added the following new paragraph:

"(j) any retirement fund or scheme as defined in article 2 of the Special Funds (Regulation) Act;";

(d) in paragraph (k) thereof as renumbered, for the words "as defined in paragraphs (a) to (i)" there shall be substituted the words "as defined in paragraphs (a) to (j)"; and

(e) in paragraph (l) thereof as renumbered, for the words "as defined in paragraphs (a) to (j)" there shall be substituted the words "as defined in paragraphs (a) to (k)".

Amends regulation 5 of the principal regulations.

6. Regulation 5 of the principal regulations shall be amended as follows:

(a) subregulation (2) thereof shall be renumbered as subregulation (5);

(b) immediately after subregulation (1) thereof, there shall be inserted the following:

"(2) Without prejudice to the provisions of regulation 3, when credit claims are provided as financial collateral the creation,

validity, perfection, priority, enforceability or admissibility in evidence of such financial collateral between the parties shall not be dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claims provided as collateral.

(3) When credit claims are provided as financial collateral, and without prejudice to the foregoing paragraph, insofar as validity and enforceability of the financial collateral arrangement against debtors or third parties is concerned, notice of the financial collateral arrangement must be given to the debtor by the collateral taker or the collateral provider. The notice is not necessary if the debtor has acknowledged the financial collateral arrangement. Notice for the purposes of these regulations shall take any form as set out in article 13 of the Securitisation Act, paying regard to the fact that in lieu of a transfer for the purposes of a securitisation, notice is being given of a financial collateral arrangement.

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(4) When the financial collateral arrangement refers to a future class or classes of credit claims, the provisions of article 12 and 13 of the Securitisation Act shall apply *mutatis mutandis* with such amendments as are required paying regard to the fact that in lieu of a transfer for the purposes of a securitisation, the parties are agreeing on a financial collateral arrangement."; and

(c) immediately after subregulation (3) thereof, as renumbered, there shall be inserted the following new subregulation:

"(4) Without prejudice to the provisions on unfair terms in consumer contracts in the Consumer Affairs Act, debtors of credit claims may validly waive, in writing or in a legally equivalent manner:

(a) 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

(b) their rights arising from article 34 of the Banking Act and article 3 of the Professional Secrecy Act in relation to confidentiality and professional secrecy 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.".

Amends regulation 6 of the principal regulations.

7. (1) Subregulation (1) of regulation 6 of the principal regulations shall be amended as follows:

(a) in paragraph (b) thereof, for the word "obligations." there shall be substituted the word "obligations;"; and

(b) immediately after paragraph (b) thereof, there shall be added the following new paragraph:

"(c) in relation to 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) In subregulation (2) of regulation 6 of the principal regulations, for the words "of the instruments." there shall be substituted the words "of the instruments and the credit claims.".

Amends regulation 7 of the principal regulations.

8. Immediately after subregulation (4) of regulation 7 of the principal regulations, there shall be inserted the following new subregulation:

"(5) The provisions of this regulation shall not apply to credit claims.".