MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Note for Consultation

Draft Financial Collateral Arrangements (Amendment) Regulations 2013

Reference is made to the *draft* Regulations entitled the Financial Collateral Arrangements (Amendment) Regulations, to be issued under the Set-off and Netting on Insolvency Act, as attached.

The current local Financial Collateral Arrangements Regulations (Legal Notice 177 of 2004) transpose Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, and also transpose Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 insofar as it amends Directive 2002/47/EC on financial collateral arrangements as regards credit claims. The Regulations encompass a legal framework for the cross-border use of financial collateral, which includes credit claims, in order to increase the pool of available collateral. In order to further facilitate collateral arrangements, the proposed draft Regulations extend beyond the minimum provisions of the Directives above-mentioned.

The MFSA has consulted the European Central Bank on the proposed amendments. The ECB issued its opinion on the 5 April 2013 (ref. CON/2013/24).

Hereunder is a brief overview of the most salient features of the proposed amendments:

1. Credit claims

The proposal seeks to widen the definition of "credit claims" as defined in Directive 2009/44/EC. The Directive defines "credit claims" as "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". In the proposed Regulations, pecuniary claims due to non-natural persons are also being included in the definition of what may be considered as a "credit claim", provided that the debtor of the claims granted as collateral is also a non-natural person. Therefore, credit claims due to or owed by individuals are not included in the proposed amendments.

2. Instrument

The definition of an "instrument" was also revised in order to achieve clarity. The current definition may generate doubts as to whether article 2 of the Investment Services Act includes certain financial instruments for which the Regulations are intended to cater. The proposed new definition aligns its wording more closely to the provisions of Directive 2002/47/EC.

3. Recognised jurisdiction

The definition of a 'recognised jurisdiction' is being enhanced to provide more certainty in interpretation.

4. Collateral taker and collateral provider

The list in regulation 4 of who may be a collateral taker and a collateral provider is also being widened. A corporation or other legal person established by statute, and securitisation vehicles, are proposed to be included.

5. Control

The new proposed proviso to regulation 2(2) states that a "collateral taker shall also be deemed to have control over financial collateral when this is held by a third party, non-natural person, who acts on the instructions of the collateral taker or of a person acting on his behalf, whether throughout the duration of the financial collateral arrangement or upon the occurrence of an event of default under the financial collateral arrangement". This provision is being introduced, mainly, in order to provide clarity in cases where financial collateral is held by a custodian on behalf of the collateral taker.

6. Enforcement of financial collateral arrangements

Regulation 6 adds that in relation to instruments consisting of securities of a SICAV, the financial collateral may also be realised in the manner and in accordance with the value as contemplated in regulation 14(6)(iii) of the Companies Act (Investment Companies with Variable Share Capital) Regulations." Therefore, insofar as concerns instruments consisting of securities of a SICAV, by adding this reference to a provision of the SICAV Regulations, the process of realisation of financial collateral in this context is being clarified. Furthermore, in various instances, the proposed regulations clarify that in certain circumstances the regulations shall prevail over the SICAV regulations.

Note

This communication is intended to bring this development to the attention of stakeholders for the purpose of consultation with relevant and interested parties. Interested parties are kindly requested to submit any comments and feedback which they may have in relation to this draft legislation, by e-mail, addressed to Dr. Vanessa Bonnici on vbonnici@mfsa.com.mt or to Dr. André Spiteri on aspiteri@mfsa.com.mt. Interested parties are kindly requested to submit any comments in writing by **not later than 19th July, 2013**.

Explanatory Note

The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received not only from licence-holders and other involved parties, but also following the necessary review and vetting by the relevant competent authorities and Minister to whom the MFSA is required by law to provide advice on financial services matters. It is important that persons involved in the consultation bear these considerations in mind. In the case of primary legislation, in particular Bills, these may and do undergo revisions during the Parliamentary stages.

This consultation is also being exercised at the request and on behalf of the Ministry of Finance.

Communications Unit
Malta Financial Services Authority
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