L.N. 177 of 2004

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

Financial Collateral Arrangements Regulations, 2004

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

Citation and date of commencement.

1. (1) The title of these regulations is the Financial Collateral Arrangements Regulations, 2004.

(2) These regulations shall come into force on the 1st May, 2004.

(3) The purpose of these regulations is to implement the provisions of Directive 2002/47/EC on financial collateral arrangements as currently in force and as may be amended from time to time, and shall be interpreted and applied accordingly.

(4) In the event that there is a conflict between any of these regulations and the provisions of the Directive mentioned in subregulation (3) hereof, the provisions of the Directive shall prevail.

Interpretation.

2. In these regulations, unless the context otherwise requires –

"book entry securities collateral" means financial collateral provided under a financial collateral arrangement which consists of instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary;

"cash" means money credited to an account in any currency, or similar claims for the repayment of money, including money market deposits;

"central counterparty" means an entity which is interposed between institutions and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;

"clearing house" means an entity responsible for the calculation of the net positions of institutions, a possible central counterparty and, or a possible settlement agent;

"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 a specified event, whether through the operation of netting or set-off or otherwise:

(a) the benefit of time for the performance of relevant obligations by the collateral provider may no longer be claimed and, or the relevant obligations become 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

(b) 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;

"equivalent collateral" means:

(a) in relation to cash, a payment of the same amount and in the same currency; and

(b) in relation to instruments:

(i) 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

(ii) any other assets provided as financial collateral where a financial collateral arrangement provides for the transfer of other assets following the occurrence of any event relating to or affecting any instruments provided as financial collateral;

"European Union" means the European Union referred to in the Treaty;

"financial collateral arrangement" means:

(a) in the case of a title transfer financial collateral arrangement, an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations; and

(b) in the case of a security financial collateral arrangement, an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral remains with the collateral provider when the security right is established:

whether or not these arrangements are covered by a master agreement, standard form contract or general terms and conditions;

"instrument" has the same meaning as is assigned to it by article 2 of the Investment Services Act; Cap. 370.

"master agreement" means an agreement that provides the standard terms and conditions applicable to all or a defined subset of transactions that may be entered into from time to time, including the terms and conditions for close-out netting;

"Member State" means a State which is a member of the European Union;

"the Minister" means the Minister responsible for financial regulation;

"multilateral development bank" means the International Bank for Reconstruction and Development, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the Council of Europe Resettlement Fund, the Nordic Investment Bank, the Caribbean Development Bank, the European Bank for Reconstruction and Development, the European Investment Fund or the Inter-American Investment Corporation or any other bank as may be determined from time to time by the Minister by notice in the Gazette;

"provision" with reference to financial collateral means the delivery, transfer, holding, registration or designation in any other manner 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, and "to provide" and any of its conjugations shall be construed accordingly; and the right of substitution or withdrawal of excess financial collateral in favour of the collateral provider shall not prejudice the financial collateral provided to the collateral taker as referred to in these regulations;

"relevant account" in relation to book entry securities collateral means the register or account in which the entries are made whereby such securities collateral is provided to the collateral taker and made subject to a financial collateral arrangement;

"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 instruments, including:

(a) present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement);

(b) obligations owed to the collateral taker by a person other than the collateral provider; or

(c) obligations of a specified class or kind arising from time to time;

"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. Such measures shall be deemed to include the appointment of a Special Controller in terms of article 329B of the Companies Act or the appointment of an equivalent or similar officer or controller under any other law;

Cap. 386.

"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;

"settlement agent" means an entity providing to institutions and, or a central counterparty, settlement accounts through which transfer orders are settled and, as the case may be,

extending credit to those institutions and, or central counterparties for settlement purposes;

"specified 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;

"the Treaty" has the same meaning assigned to it by article 2 of the European Union Act, 2003; Cap. 460.

"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 ordered by the court.

Financial collateral.

3. The provisions of these regulations shall apply solely and exclusively to:

(a) financial collateral which consists of cash or instruments;

(b) financial collateral which has been provided and which can be evidenced in writing; and

(c) financial collateral arrangements which can be evidenced in writing or in a legally equivalent manner:

Provided that the evidencing of the provision of financial collateral shall 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.

Collateral taker and collateral provider.

4. For the purposes of these regulations, both the collateral taker and the collateral provider shall be:

(a) a public authority, including:

(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:

Provided that a public authority shall not include a public guaranteed undertaking unless this falls under paragraphs (b) to (i);

(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund and the European Investment Bank;

(c) a credit institution licensed in terms of the Banking Act, or an institution listed in the Schedule to these regulations;

Cap. 371.

(d) a licence holder in terms of the Investment Services Act;

Cap. 370.

(e) a financial institution licensed in terms of the Financial Institutions Act;

Cap. 376.

(f) a company authorised to carry on business of insurance other than business of reinsurance under the Insurance Business Act;

Cap. 403.

(g) an undertaking for collective investment in transferable securities (UCITS) in terms of the Investment Services (Undertaking for Collective Investment in Transferable Securities) Regulations;

(h) a management company in terms of the Investment Services (Undertaking for Collective Investment in Transferable Securities) Regulations; or

(i) a central counterparty, settlement agent or clearing house 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 paragraphs (a) to (i).

Formal requirements.

5. Without prejudice to the provisions of regulation 3, 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 shall not be dependent on the performance of any formal act.

Enforcement of financial collateral arrangements.

6. (1) On the occurrence of a specified event, the collateral taker may realise any financial collateral provided under, and subject to the terms agreed in, a security financial collateral arrangement as follows:

(a) in relation to cash, by setting off the amount against or applying it in discharge of the relevant financial obligations; or

(b) in relation to instruments, by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations.

(2) Appropriation shall only be possible if in the security financial collateral arrangement the parties have specifically agreed that appropriation may take effect and have agreed on the valuation of the instruments.

(3) Unless the parties to a security financial collateral arrangement otherwise agree, the manner of realising the financial collateral in terms of subregulation (1) hereof shall not require that:

(a) prior notice of the intention to realise be given;

(b) the terms of the realisation be approved by any court, public officer or other person;

(c) the realisation be conducted by sale by auction or in any other prescribed manner; or

(d) any additional time period must have elapsed.

(4) Unless the parties otherwise agree, the operation of a close-out netting provision shall not be subject to the requirements listed in subregulation (3) hereof.

(5) The provisions of this regulation shall apply notwithstanding the provisions of the Civil Code, the Companies Act or any other law.

Cap. 16.
Cap. 386.

Right of use of financial collateral under security financial collateral arrangements.

7. (1) The collateral taker may exercise a right of use in relation to financial collateral provided under the security financial

collateral arrangement if and to the extent that the terms of such arrangement so provide.

(2) Where the collateral taker makes use of the financial collateral provided under a security financial collateral arrangement, he shall:

(a) by due date of performance of the relevant financial obligations, transfer equivalent collateral to replace the original financial collateral. Such equivalent collateral 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; or

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

(3) When, following the use of financial collateral, equivalent collateral is transferred in terms of paragraph (a) of subregulation (2) hereof, the rights of the collateral taker shall remain valid and enforceable in relation to such equivalent collateral.

(4) Upon the occurrence of a specified event at a time when the collateral taker has not as yet transferred equivalent collateral in terms of paragraph (a) of subregulation (2) hereof, the obligation to transfer such financial collateral may be the subject of a close-out netting provision.

Recognition of title transfer financial collateral arrangements.

8. Upon the occurrence of a specified event at a time when the collateral taker has not as yet, under a title transfer collateral arrangement, transferred equivalent collateral, the obligation to transfer such financial collateral may be the subject of a close-out netting provision.

Saving.

9. Regulations 6, 7 and 8 shall be without prejudice to any requirement to obtain the fair value of securities under article 122 of the Companies Act.

Cap. 386.

Certain insolvency provisions disapplied.

10. (1) A financial collateral arrangement shall be valid and enforceable 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.

(2) Such a financial collateral arrangement and the provision of financial collateral under such arrangement, shall 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 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 the taking of any other action or occurrence of any other event in the course of such proceedings or measures.

(3) Where on the day of, but after the moment of the commencement of winding-up proceedings or reorganisation measures:

(a) a financial collateral arrangement has come into existence;

(b) a relevant financial obligation has come into existence; or

(c) financial collateral has been provided,

it shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor ought to have been aware, of the commencement of such proceedings or measures.

(4) Where 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, or where such 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, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be declared invalid or void or be reversed on the sole basis that:

(a) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order 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 the taking of any other action or occurrence of any other event in the course of such proceedings or measures; and, or

(b) 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.

(5) Without prejudice to this regulation, the provisions of Title II of Part V of the Companies Act shall not render invalid or void the transactions entered into during the period referred to in paragraphs (2) (b) and (4) (a) hereof.

Cap. 386.

Conflict of Laws.

11. (1) Any issue arising in relation to book entry securities collateral with respect to:

(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 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; and

(d) the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event;

shall be governed by the law of the country in which the relevant account is maintained.

(2) For the purposes of this regulation, the law of a country is a reference to its domestic law, disregarding any rule under which, in deciding the relevant issue, reference should be made to the law of another country.

SCHEDULE

(Regulation 4 (c))

Entities which are considered as credit institution

(a) central banks of Member States;

(b) post office giro institutions;

(c) in Belgium, the "Institut de Réescompte et de Garantie/Herdisconterings- en Waarborginstituut";

(d) in Denmark, the "Dansk Eksportfinansieringsfond", the "Danmarks Skibskreditfond", and "Dansk Landbrugs Realkreditfond";

(e) in Germany, the "Kreditanstalt für Wiederaufbau", undertakings which are recognised under the "Wohnungsgemeinnützigkeitsgesetz" as bodies of State housing policy and are not mainly engaged in banking transactions, and undertakings recognised under that law as non-profit housing undertakings;

(f) in Greece, the "Elliniki Trapeza Viomichanikis Anaptyxeos", the "Tamio Parakatathikon kai Danion", and the "Tachidromiko Tamieftirio";

(g) in Spain, the "Instituto de Crédito Oficial";

(h) in France, the "Caisse des dépôts et consignations";

(i) in Ireland, credit unions and the friendly societies;

(j) in Italy, the "Cassa depositi e prestiti";

(k) in the Netherlands, the "Netherlandse Investeringsbank voor Ontwikkelingslanden NV", the "NV Noordelijke Ontwikkelingsmaatschappij", the "NV Industriebank Limburgs Instituut voor Ontwikkeling en Financiering" and the "Overijsselse Ontwikkelingsmaatschappij NV";

(l) in Austria, undertakings recognised as housing associations in the public interest and the "Österreichische Kontrollbank AG";

(m) in Portugal, "Caixas Económicas" existing on 1 January 1986 with the exception of those incorporated as limited companies and of the "Caixa Económica Montepio Geral";

(n) in Finland, the "Teollisen yhteistyön rahasto Oy/Fonden för industriellt samarbete AB", and the "Kera Oy/Kera Ab";

(o) in Sweden, the "Svenska Skeppshypotekskassan";

(p) in the United Kingdom, the National Savings Bank, the Commonwealth Development Finance Company Ltd, the Agricultural Mortgage Corporation Ltd, the Scottish Agricultural Securities Corporation Ltd, the Crown Agents for overseas governments and administrations, credit unions and municipal banks.

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