

Suppliment tal-Gazzetta tal-Gvern ta' Malta Nru. 18,725, 29 ta' Marzu, 2011

Taqsimha B

L.N. 118 of 2011

**SET-OFF AND NETTING ON INSOLVENCY 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:-

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

Citation,
commencement
and scope.
S.L. 459.01

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

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

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

Amends
regulation 1 of
the principal
regulations.

(a) for subregulation (2) thereof, there shall be substituted the following:

"(2) 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.";

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

"(3) In the event of a conflict between any of these regulations and the provisions of any of the Directives mentioned in subregulation (2), the provisions of the Directives shall prevail."; and

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

S.L. 378.12 "(4) 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.".

Amends
regulation 2 of
the principal
regulations.

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

(a) the present regulation shall be renumbered as subregulation (1) thereof;

(b) subregulation (1) thereof, 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 bank or credit institution within the meaning of regulation 4(1)(1) grants credit in the form of a loan;

"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:

"(b) 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 "instrument" there shall be substituted the following:

Cap. 370. " "instrument" has the same meaning as is assigned to it by article 2 of the Investment Services Act and includes shares in companies and other securities equivalent to shares in companies, partnerships or other entities and bonds and other forms of debt instrument, and any other securities 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), whether or not issued in Malta;"

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

(v) in the definition "relevant account", for the words "the register or account in which the entries are made", there shall be substituted the words "the register or account, which may be maintained by the collateral taker, in which the entries are made"; and

(c) immediately after subregulation (1) thereof, as renumbered, there shall be inserted the following new subregulations:

"(2) References in these regulations to financial collateral being "provided", or to the "provision" of financial collateral, are references 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:

Provided that any right of substitution, right to withdraw excess financial collateral, right to give instructions in relation to an account until an event of default occurs, any right to exercise rights or receive the fruits attaching to or in respect of the 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:

Provided further that in the case of financial collateral included under a collateral arrangement affecting all the property, present and future, of the debtor, including general hypothecs, the right of the collateral provider to freely dispose of or otherwise have possession or control of such financial collateral until the collateral taker exercises its enforcement rights against such financial collateral, shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in these regulations.

(3) References in these regulations to "writing" include recording by electronic means and any other durable medium."

Amends
regulation 3 of
the principal
regulations.

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

(a) the present regulation shall be renumbered as subregulation (1) thereof;

(b) in paragraph (a) of subregulation (1) thereof, as renumbered, for the words "or instruments" there shall be substituted the words "or instruments or credit claims";

(c) in the proviso to subregulation (1) thereof, as renumbered, for the words "a designated account.", there shall be substituted the words "a designated account;"; and

(d) immediately after the proviso to subregulation (1) thereof, as renumbered, there shall be added the following new proviso:

"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."; and

(e) immediately after subregulation (1) thereof, as renumbered, there shall be added the following new subregulation:

"(2) In addition and without prejudice to the foregoing, the inclusion of the claim in a list of claims submitted to the collateral taker in writing, is sufficient to identify that credit claim and to evidence the provision of the claim provided as financial collateral against the debtor or third parties.".

5. Immediately after regulation 3A of the principal regulations there shall be added the following new regulation:

Adds new regulation 3B to the principal regulations.

"Inapplicability of article 122(10) of the Companies Act. Cap. 386. 3B. The obligations arising out of article 122(10) of the Companies Act do not apply to pledges of shares provided in accordance with these regulations.".

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

Amends regulation 4 of the principal regulations.

(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;

Cap. 371. (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;

Cap. 370. (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 Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments;

Cap. 376. (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;

Cap. 403. (f) an insurance company with head office in Malta authorised in terms of article 7 of the Insurance Business Act to carry on business of insurance 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 insurance, an assurance undertaking as defined in Article 1(1)(a) of Council Directive 2002/83/EC of 5th November, 2002 concerning life assurance;

Cap. 370. (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."; and

(b) in paragraph (i) thereof, for the words, "any other collective investment scheme which is licensed or recognised", there shall be substituted the words "any other collective investment scheme and management company of such scheme which are licensed or recognised", and for the words "by a competent authority" there shall be substituted the words "by a foreign authority".

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

Amends
regulation 5 of
the principal
regulations.

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

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

"(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 is not 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 subregulation, insofar as validity and enforceability of the financial collateral arrangement against debtors or third parties is concerned, notice of the financial collateral arrangement shall be given to the debtor by the collateral taker or the collateral provider. The notice shall not be necessary if the debtor has acknowledged the financial collateral arrangement.

(4) Notice for the purposes of this regulation shall be made by:

(a) notification to the debtor in writing; and

(b) on the publication of a notice as follows:

(i) in a daily newspaper circulating wholly or mainly in Malta, and

(ii) where it appears that the majority of the debtors reside outside Malta, in a daily newspaper circulating wholly or mainly in such other jurisdiction outside Malta; and

(c) where there is doubt as to where the majority of the debtors reside, in a daily newspaper which has wide international circulation:

Provided that such notification shall be effective for all the purposes and effects of the Civil Code with regard to third parties, including the debtor, as follows:

Cap. 16.

Cap. 12.

(i) when notification is made in terms of article 187 of the Code of Organization and Civil Procedure, on the date of service and the provisions of the said Code of Organization and Civil Procedure shall determine such date of service;

(ii) when notification is made by mail, two days after dispatch by mail by the collateral provider or collateral taker of the notice in writing to the debtor's last known address;

(iii) when notification is made by publication in a newspaper, the time of the opening of business in the place of publication of the notice in the newspaper, and

(iv) when notification is made by any electronic means, one day after dispatch of the electronic notification,

as the case may be, unless the said notice expressly mentions a later date for the effects to commence."; and

(c) immediately after subregulation (5) thereof, as renumbered, there shall be inserted the following new subregulation (6):

Cap. 378. "(6) 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:

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

Cap. 371.
Cap. 377. (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.".

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Amends
regulation 6 of
the principal
regulations.

8. (1) Regulation 6 of the principal regulations shall be amended as follows:

(a) in subregulation (1) thereof -

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

(ii) 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."; and

(b) in subregulation (2) thereof, 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.

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

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

Amends
regulation 9 of
the principal
regulations.

10. Subregulation (1) of regulation 9 of the principal regulations shall be amended as follows:

(a) for the words "Notwithstanding the provisions of article 122(7) of the Companies Act, on the occurrence of a specified event," there shall be substituted the words "On the occurrence of a specified event,"; and

(b) for the words "so as to ensure fair treatment to the collateral provider." there shall be substituted the words "so as to ensure fair treatment to the collateral provider and the provisions of articles 122(6) to 122(9) of the Companies Act shall not apply.".

