


# Procedure file

| Basic information  |                                       |
|--|---------------------------------------|
| COD - Ordinary legislative procedure (ex-codecision procedure)<br>Directive  | 2001/0086(COD)<br>Procedure completed |
| European financial markets: financial collateral arrangements and legal certainty, consequences on the SMEs<br><br>Amended by <a href="#">2008/0082(COD)</a><br>Amended by <a href="#">2012/0150(COD)</a><br>Amended by <a href="#">2016/0362(COD)</a> |                                       |
| Subject<br>2.50.03 Securities and financial markets, stock exchange, CIUTS, investments  |                                       |

| Key players                   |  |   |            |
|-------------------------------|--|---|------------|
| European Parliament           | Committee responsible  | Rapporteur                                | Appointed  |
|                               | <b>ECON</b> Economic and Monetary Affairs  |   | 06/11/2000 |
|                               |  | PSE <a href="#">PÉREZ ROYO Fernando</a>   |            |
|                               | Former committee responsible   |   | 06/11/2000 |
|                               | <b>ECON</b> Economic and Monetary Affairs  |   |            |
|                               |  | PSE <a href="#">PÉREZ ROYO Fernando</a>   |            |
|                               | Former committee for opinion   |   | 24/04/2001 |
|                               | <b>JURI</b> Legal Affairs and Internal Market  |   |            |
|                               |  | PPE-DE <a href="#">LEHNE Klaus-Heiner</a> |            |
| Council of the European Union | Council configuration  | Meeting                                   | Date       |
|                               | <a href="#">Economic and Financial Affairs ECOFIN</a>  | <a href="#">2414</a>                      | 05/03/2002 |
|                               | <a href="#">Economic and Financial Affairs ECOFIN</a>  | <a href="#">2401</a>                      | 13/12/2001 |
| European Commission           | Commission DG<br><a href="#">Financial Stability, Financial Services and Capital Markets Union</a> | Commissioner                              |            |

| Key events |   |                              |         |
|------------|---|------------------------------|---------|
| 27/03/2001 | Legislative proposal published                          | COM(2001)0168                | Summary |
| 05/04/2001 | Committee referral announced in Parliament, 1st reading |                              |         |
| 22/11/2001 | Vote in committee, 1st reading                          |                              | Summary |
| 22/11/2001 | Committee report tabled for plenary, 1st reading        | <a href="#">A5-0417/2001</a> |         |
|            |   |                              |         |

|            |  |   |         |
|------------|--|---|---------|
| 12/12/2001 | Debate in Parliament                                     |  |         |
| 13/12/2001 | Debate in Council  | <a href="#">2401</a>  |         |
| 13/12/2001 | Decision by Parliament, 1st reading                      | <a href="#">T5-0698/2001</a>  | Summary |
| 05/03/2002 | Council position published                               | <a href="#">05530/3/2002</a>  | Summary |
| 13/03/2002 | Committee referral announced in Parliament, 2nd reading  |   |         |
| 23/04/2002 | Vote in committee, 2nd reading                           |   | Summary |
| 23/04/2002 | Committee recommendation tabled for plenary, 2nd reading | <a href="#">A5-0150/2002</a>  |         |
| 15/05/2002 | Decision by Parliament, 2nd reading                      | <a href="#">T5-0228/2002</a>  | Summary |
| 06/06/2002 | Final act signed   |   |         |
| 06/06/2002 | End of procedure in Parliament                           |   |         |
| 27/06/2002 | Final act published in Official Journal                  |   |         |

### Technical information

|                            |   |
|----------------------------|---|
| Procedure reference        | 2001/0086(COD)  |
| Procedure type             | COD - Ordinary legislative procedure (ex-codecision procedure)  |
| Procedure subtype          | Legislation   |
| Legislative instrument     | Directive   |
|                            | Amended by <a href="#">2008/0082(COD)</a><br>Amended by <a href="#">2012/0150(COD)</a><br>Amended by <a href="#">2016/0362(COD)</a> |
| Legal basis                | EC Treaty (after Amsterdam) EC 095  |
| Stage reached in procedure | Procedure completed   |
| Committee dossier          | ECON/5/15704  |

### Documentation gateway

|   |   |            |     |         |
|---|---|------------|-----|---------|
| Legislative proposal  | <a href="#">COM(2001)0168</a><br><a href="#">OJ C 180 26.06.2001, p. 0312 E</a>     | 27/03/2001 | EC  | Summary |
| Document attached to the procedure                              | <a href="#">CON/2001/0013</a><br><a href="#">OJ C 196 12.07.2001, p. 0010</a>       | 13/06/2001 | ECB | Summary |
| Committee report tabled for plenary, 1st reading/single reading | <a href="#">A5-0417/2001</a>  | 22/11/2001 | EP  |         |
| Economic and Social Committee: opinion, report                  | <a href="#">CES1468/2001</a><br><a href="#">OJ C 048 21.02.2002, p. 0001</a>        | 28/11/2001 | ESC |         |
| Text adopted by Parliament, 1st reading/single reading          | <a href="#">T5-0698/2001</a><br><a href="#">OJ C 177 25.07.2002, p. 0212-0287 E</a> | 13/12/2001 | EP  | Summary |
| Council position  | <a href="#">05530/3/2002</a><br><a href="#">OJ C 119 22.05.2002, p. 0012 E</a>      | 05/03/2002 | CSL | Summary |
| Commission communication on Council's position                  | <a href="#">SEC(2002)0278</a>   | 12/03/2002 | EC  | Summary |

|  |   |            |    |         |
|--|---|------------|----|---------|
| Committee recommendation tabled for plenary, 2nd reading | <a href="#">A5-0150/2002</a>  | 23/04/2002 | EP |         |
| Text adopted by Parliament, 2nd reading                  | <a href="#">T5-0228/2002</a><br><a href="#">OJ C 180 31.07.2003, p. 0158-0229 E</a> | 15/05/2002 | EP | Summary |
| Follow-up document                                       | <a href="#">COM(2016)0430</a>   | 29/06/2016 | EC | Summary |

#### Additional information

European Commission

[EUR-Lex](#)

#### Final act

[Directive 2002/47](#)  
[OJ L 168 27.06.2002, p. 0043](#) Summary

## European financial markets: financial collateral arrangements and legal certainty, consequences on the SMEs

**PURPOSE :** to protect the provision of financial collateral on a bi-lateral basis between two parties to a collateral agreement. **CONTENT :** since beginning of the 1990's a number of professional bodies have raised awareness about the legal uncertainty faced by payment and securities settlement systems, central banks and participants in the financial markets. This is reflected in the increasing flows in these systems and their significance for a well functioning modern society. The increased volumes also caused a higher degree of credit exposure for market participants, giving them strong incentives to reduce risk through netting or collateralization. The 1998 Directive on Settlement Finality constituted a milestone in establishing a sound legal framework for payment and securities settlement systems. This Directive is to date the only piece of European legislation regulating cross-border collateral in the context of financial transactions. Further measures are needed to facilitate the efficient use of cross-border collateral. In order to study this issue, the Commission constituted a Forum Group on Collateral in 1999. In light of this process it has reached the conclusion that the most appropriate way forward is the adoption of a EU Directive on the use of Collateral, by which the sound legal basis laid down by the Settlement Finality Directive for payment and securities settlement systems would be extended generally to transactions in financial markets. On the whole, this present proposal focuses on the provisions of collateral between two parties to a collateral arrangement. The principle objectives of the proposed Directive are: - ensuring that effective and reasonably simple regimes exist for the creation of collateral under either title transfer (including repo) or pledge structures, (i.e. providing that the only perfection requirement or procedure to follow to protect a collateral agreement should be that the interest be notified to, and recorded by, the relevant intermediary maintaining the securities account); - providing limited protection of collateral arrangement from some rules of insolvency law, in particular those that would inhibit the effective realization of collateral or cast doubt on the validity of techniques such as close-out netting, the provision of top-up collateral and substitution of collateral; - creating legal certainty regarding the conflict of laws treatment of book entry securities used as collateral in a cross-border context by extending the principle adopted in Article 9(2) of the Settlement Directive; - limiting the administrative burdens affecting the use of collateral in the financial markets by restricting the imposition of onerous formalities on either the creation or the enforcement of collateral arrangements; - ensuring that agreements permitting collateral taker to re-use the collateral for its own purposes under pledge structures are recognised as effective, as for repos. Lastly, a sound and efficient legal regime for limiting credit risk through the use of collateral will improve the functioning and stability of the European financial markets. ?

## European financial markets: financial collateral arrangements and legal certainty, consequences on the SMEs

The ECB appreciates that in order to meet the objectives of ensuring an integrated European financial market and supporting the smooth functioning of the single monetary policy in the economic and monetary union, the creation of a uniform minimum legal framework for arrangements set up to limit credit risk in financial transactions through the provision of securities and cash as collateral under both pledge and transfer of title arrangements (including repurchase agreements) is proposed. Moreover, the ECB highly welcomes this initiative as a significant and important effort to further promote the efficient and safe use, both at a domestic level and cross-border level, of financial collateral in order to establish a sound legal framework for payment and security settlement systems as well as for the operations of central banks.?

## European financial markets: financial collateral arrangements and legal certainty, consequences on the SMEs

The committee adopted the report by Fernando PÉREZ ROYO (PES, E) amending the proposal under the codecision procedure (1st reading). While it agreed with the aim of the proposal, the committee disagreed with the scope, as it felt that many small companies would be excluded. Whereas the proposal provided for both the collateral taker and provider to have a capital base of more than EUR 100 million or gross assets exceeding EUR 1000 million, the committee said that that this threshold was arbitrary and would leave out many companies that should also be able to benefit from the directive. It therefore deleted the threshold, thereby enabling any small company to be covered as long as the

counterpart was a public authority, a central bank or a financial institution. The elimination of this threshold would also mean that it would be unnecessary to delegate to the European Commission the power to revise the thresholds and thereby modify the scope of the directive. The committee said that modifying the scope should not be done through committee and adopted a number of other amendments linked to the committee issue. ?

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The European Parliament approved the report by Mr Fernando PEREZ ROYO (PES, E) subject to amendments. (Please refer to the previous text). In addition, the Parliament includes an amendment which stipulates that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 31 December 2003 at the latest. ?

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The common position follows the approach of the Commission proposal, with some amendments to the substance and to the presentation of the text. The main changes to the Commission proposal reflect the amendments proposed by the European Parliament and concern: - the persons and institutions covered by the scope of the Directive; - the requirements, which have to be fulfilled by the parties establishing a collateral arrangements in order to be safeguarded by the Directive, as for instance how the arrangement must be evidenced and signed by the Parties; - appropriation by the collateral taker of collateral on the occurrence of an enforcement event; - Article 9 (10 in the original proposal) on conflict of laws, which determines the location of book-entry securities and thereby the applicable law governing proprietary aspects of such securities, as in Article 9(2) in Directive 98/26/EC. ?

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The Commission considers that the common position preserves the key element of its proposal and of the Parliament's amendments that were incorporated into the common position during the negotiations in the Council. The Commission supports the text of the common position on this eagerly awaited Directive, being essential for the participants in the wholesale market for achieving an integrated securities market by the end of 2003. ?

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The committee adopted the report by Fernando PEREZ ROYO (PES, E) approving the common position without amendment under the second reading of the codecision procedure. ?

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The European Parliament adopted the report of Fernando PEREZ ROYO (PES, Spain) and approved the Council's common position. ?

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**PURPOSE :** to create a uniform minimum regime for the provision of securities and cash collateral. **COMMUNITY MEASURE :** Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements. **CONTENT :** this Directive creates a uniform EU legal framework to limit credit risk in financial transactions through the provision of securities and cash as collateral. Collateral is the property (such as securities) provided by a borrower to a lender to minimise the risk of financial loss to the lender in the event of the borrower failing to meet in full their financial obligations to the lender. Current rules applied to the use of collateral throughout the EU are complex and impractical resulting in uncertainty regarding the effectiveness of collateral as protection in cross-border transactions. Creation of a clear, uniform pan-EU legal framework for the use of collateral would contribute to the greater integration and cost-efficiency of European financial markets by encouraging cross-border business and creating a more competitive European financial market. The Directive creates a uniform minimum regime for the provision of securities and cash as collateral under both pledge and title transfer structures, including repurchase agreements, also called "repos" (where the securities are sold against cash, with a simultaneous agreement to repurchase equivalent securities at a specific price at a future date or on demand). This will contribute to the integration and cost-efficiency of the financial market as well as to the stability of the financial system in the Community, thereby supporting the freedom to provide services and the free movement of capital in the single market in financial services. This Directive focuses on bilateral financial collateral arrangements. In order to improve the legal certainty of financial collateral arrangements, Member States should ensure that certain provisions of insolvency law do not apply to such arrangements, 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 substitution of collateral. The Directive deals with the following aspects: - formal requirements; - enforcement of financial collateral arrangements; - right of use of financial collateral under security financial collateral arrangements; - recognition of title transfer financial collateral arrangements; - recognition of close-out netting provisions; - certain insolvency provisions disapplied; - conflict of laws. Not later than 27 December 2006, the Commission shall present a report to the European Parliament and the Council on the application of this Directive. ENTRY INTO FORCE : 27/06/2002. IMPLEMENTATION : 27/12/2003.?

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The Commission presented a report on the appropriateness of Article 3(1) of Directive 2002/47/EC on financial collateral arrangements.

To recall, Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements as amended by Directive 2009/44/EC (FCD) creates a harmonised EU legal framework for the creation and enforcement of collateral, i.e. title transfer financial collateral arrangements where the full title to the collateral is transferred to the collateral taker or security financial collateral arrangements where the collateral taker receives a security right, e.g. a pledge or a charge. Since the financial crisis, collateral has become increasingly important, driven by a market need for more secured funding and regulatory requirements. In 2009, the FCD was amended to introduce credit claims as collateral. A credit claim is defined in the FCD as a pecuniary claim arising from an agreement where a credit institution grants credit in the form of a loan.

The 2009 revision of the FCD (Article 3(1)) prevents Member States from requiring that the creation or validity of financial collateral arrangements relating to credit claims be dependent on the performance of a formal act, e.g. registration or the notification of the debtor. This revision aims to ensure that Member States have an option to require formal acts, e.g. registration or notification, relating to credit claims used as collateral for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor or third parties.

Under the 2009 revision, the Commission was asked to report on the continuing appropriateness of the Member State option.

The report focuses on the implementation of Article 3(1) of the revised FCD. Its scope is whether the Directive works effectively and efficiently as regards formal acts required to provide credit claims as collateral.

Implementation of the Directive: Directive 2009/44/EC revising the FCD was adopted on 6 May 2009. It was implemented in most Member States in 2011 and all had transposed it by 2012.

Any quantitative assessment of the impact of Directive 2009/44/EC on the mobilisation of credit claims is challenging (the use of credit claims as collateral rose from 23% to 26% of total collateral used. However, it declined between 2012-2013 from 26% to 19%).

Overall, the objective of the FCD to facilitate the use of credit claims has been achieved. There is evidence that the inclusion of credit claims within the harmonised framework for collateral has facilitated their use in certain jurisdictions.

The FCD also removed formal requirements for the creation or validity of collateral arrangements. In effect, the risk of invalidation of such arrangements has been eliminated, aiding the mobilisation of credit claims.

Differences in the formalities and techniques available to collateralise credit claims still persist between Member States. Nevertheless, even when credit claim collateral remains subjected to national formal requirements, once they are complied with, the collateral benefits from the ease of enforcement introduced by the FCD.

The cross-border use of credit claims collateral is still subject to legal uncertainty due to the effect of different national requirements and the incomplete harmonisation of conflict of laws rules at EU level.

Appropriateness of Article 3(1) of the FCD: the report noted that several policy choices could be considered as regards Article 3(1) of the FCD.

1) The status quo could be kept: this is explicitly favoured by twelve Member States that argue the opt-out provision allows for a reasonable balance of the interests.

2) Article 3(1) option could be removed: this would oblige Member States to remove all national provisions for credit claims used as collateral that require the performance of formal acts, e.g. registration or notification of the debtor. This is advocated by four Member States arguing that a deletion of the option would create an EU level playing field and enhance legal certainty, fostering the cross-border use of credit claims.

3) A review of the FCD could be considered: this could reflect on the harmonisation of substantive law issues, e.g. formal acts required for the perfection, priority, enforceability or admissibility in evidence against the debtor or third parties, when credit claims are used as collateral as well as on the appropriateness of ensuring that set-off is fully excluded with respect to credit claims mobilised as collateral with central banks.

Commissions position: stressing that action at the EU level must respect the principle of proportionality, the Commission considered that formal requirements can fulfil a useful purpose and requiring their complete removal would therefore not be appropriate. Leaving the choice of such requirements to Member States creates difficulties in cross-border situations, but harmonising them may interfere with other interrelated provisions of national law.

Moreover, the costs and benefits of any harmonisation would need to be balanced very carefully and should only be considered as part of a broader reform after a thorough evaluation of the FCD. In this context, the Commission stated that Article 3(1) of the FCD seems to continue to be appropriate.

As announced in the [Action Plan on Building a Capital Markets Union?](#), the Commission has launched a broad review on the progress in removing barriers to cross border clearing and settlement with a view, amongst other things, to improving legal certainty in the cross-border exchange of collateral. To this end, the Commission has established an expert group, the European Post-Trade Forum, to identify the remaining barriers.

By 2017, the Commission will take forward early targeted work with view to reducing the uncertainty surrounding securities ownership as well as propose uniform rules to determine with legal certainty which national law shall apply to third party effects of the assignment of claims. This will contribute to achieving greater legal certainty also in cases of cross-border mobilisation of credit claims as collateral and correct the

drawbacks of the existing situation.