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*****II**

RECOMMENDATION FOR SECOND READING

on the Council common position for adopting a European Parliament and
Council directive on financial collateral arrangements
(5530/3/2002– C5-0116/2002 – 2001/0086(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Fernando Pérez Royo

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

At the sitting of 13 December 2001 Parliament adopted its position at first reading on the proposal for a European Parliament and Council directive on financial collateral arrangements (COM - 2001/0168 - 2001/0086(COD)).

At the sitting of 13 March 2002 the President of Parliament announced that the common position had been received and referred to the Committee on Economic and Monetary Affairs (5530/3/2002 - C5-01162002).

The committee had appointed Fernando Pérez Royo rapporteur at its meeting of 6 November 2000.

It considered the common position and draft recommendation for second reading at its meetings of 19 March 2002 and 23 April 2002.

At the latter it adopted the draft legislative resolution unanimously.

The following were present for the vote: Christa Randzio-Plath, chairman; José Manuel García-Margallo y Marfil, Philippe A.R. Herzog, and John Purvis, vice-chairmen; Fernando Pérez Royo, rapporteur; Generoso Andria, Hans Udo Bullmann, Harald Ettl (for Pervenche Berès), Robert Goebbels, Lutz Goepel (for Astrid Lulling), Lisbeth Grönfeldt Bergman, Mary Honeyball, Christopher Huhne, Othmar Karas, Giorgos Katiforis, Piia-Noora Kauppi, Christoph Werner Konrad, Wilfried Kuckelkorn (for Helena Torres Marques), Werner Langen (for Ingo Friedrich), Ioannis Marinos, Helmuth Markov (for Armonia Bordes), David W. Martin, Hans-Peter Mayer, Miquel Mayol i Raynal, Mikko Pesälä (for Carles-Alfred Gasòliba i Böhm), José Javier Pomés Ruiz (for Brice Hortefeux), Alexander Radwan, Bernhard Rapkay, Olle Schmidt, Peter William Skinner, Bruno Trentin, and Theresa Villiers.

The recommendation for second reading was tabled on 24 April 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council directive on financial collateral arrangements (5530/3/2002– C5-0116/2002 – 2001/0086(COD))

(Codecision procedure: second reading)

The European Parliament,

- having regard to the Council common position (5530/3/2002 – C5-116/2002),
 - having regard to its position at first reading¹ on the Commission proposal to Parliament and the Council (COM(2001) 168²),
 - having regard to Article 251(2) of the EC Treaty,
 - having regard to Rule 78 of its Rules of Procedure,
 - having regard to the recommendation for second reading of the Committee on Economic and Monetary Affairs (A5-0150/2002),
1. Approves the common position;
 2. Notes that the act is adopted in accordance with the common position;
 3. Instructs its President to sign the act with the President of the Council pursuant to Article 254(1) of the EC Treaty;
 4. Instructs its Secretary-General duly to sign the act and, in agreement with the Secretary-General of the Council, to have it published in the Official Journal of the European Communities;
 5. Instructs its President to forward its position to the Council and Commission.

¹Adopted texts, 13.12.2001, item 11

² OJ COJ C 180, 26.6.2001, p. 312

EXPLANATORY STATEMENT

The Directive Proposal on Financial Collateral Arrangements is an important step forward towards the creation of an integrated financial services market in Europe, in spite of its highly technical nature. It complements the Settlement Finality Directive, adopted in 1998, by extending legal certainty more generally to the use of collateral in order to reduce credit risk. For the time being, a collateral taker is faced with fifteen different legal regimes with respect to perfection requirements as well as to national bankruptcy laws.

The proposal therefore aims at providing a uniform minimum regime for the provision of securities and cash as collateral under both pledge and title transfer structures, including repurchase agreements. In order to achieve this objective, the directive requires Member States to ensure that certain provisions of insolvency law do not apply to such arrangements. This will enhance legal certainty for cross-border credit transactions and thus improve the functioning and the stability of financial markets in Europe.

In its first reading, the European Parliament gave its full support to the overall approach of the directive, suggesting however, to re-consider a number of issues. The Common Position, adopted by the Council on 5 March, differs considerably from the original Commission text. However, most of the modifications concern legal clarifications and do not substantially modify the basic approach of the directive. After careful examination of the Common Position, your rapporteur is happy to recognise that for the substance the Council has accepted most of the amendments, suggested by the European Parliament.

In detail:

- **Extending the scope of the directive**

The European Parliament had asked for the broadening of the scope of the directive in order to make sure that not only financial institutions will be able to benefit from the risk-mitigation mechanisms provided for by the directive. This is of particular relevance in view of Basel II, where the risk weighting of individual exposures will be decisive for the calculation of prudential capital requirements.

The Council has accepted the spirit of the amendments, referring to the broadening of the scope (amendments 4 to 9). As requested by the European Parliament, the thresholds for the inclusion of legal persons into the scope of the directive no longer exist, as long as the counterpart is a public authority, a central bank (including the BIS and multilateral development banks), a financial institution or a central counterparty, a settlement agent or a clearing house. For this reason, the comitology provisions, allowing for the adaptation of the thresholds to market developments are no longer needed and have been eliminated.

- **Definitions and Formal Requirements**

The Council has accepted the Parliaments request for clarification with respect to the definition of 'provision' of financial collateral. By taking into account amendments 10 and 11, it is now clear, that the directive will only cover collateral, if there is dispossession.

The requirement for financial collateral arrangements to be signed by the collateral provider (including electronic signature) has been dropped; as asked for in the Parliaments' report (amendment 12). Evidence can therefore be given in any legally equivalent manner, taking into account further technical innovation in this area.

- **Enforcement of financial collateral arrangements**

Following the request of the European Parliament (amendments 13 and 14), the Common position now allows for the realisation of financial instruments by appropriation.

The Council also accepted amendment 15, asking to clarify the pre-conditions for the right of use.

Other provisions

The Council also accepted the deletion of Article 10 paragraph 2 (amendment 17), concerning the conflict of laws for relevant accounts.

As for the implementing of the directive at national level, The Council did not take up the request of the European Parliament, to anticipate the deadline from end 2004 to end 2003. Member States will be given instead a delay of 18 months to comply with the directive, starting with its entering into force. However, the effect would be the same, if timely adoption can be ensured.

Critical Appraisal

Your rapporteur considers that the European Parliament should be satisfied with the outcome of the Council negotiations, given that most of its amendments have been accepted. However, there are two new elements, introduced by the Council, which in my view are not in line with the basic principles of the Single Market:

The common position has established two **opting out** provisions for Member States concerning the inclusion of non-financial entities into the scope of the directive as well as the right of appropriation for financial collateral.

- **Appropriation** was not envisaged in the Commissions' original proposal, as it is not recognised in the legal systems in all Member States. Now, that it has been introduced, following an amendment of the European Parliament, some Member State fear that this could create a precedent as well as major inconsistencies in their jurisdiction. The practical consequences of the opting out are rather limited, as it excludes just one of the enforcement alternatives, provided for by the directive. Although I object any opting-out facility in community legislation as a matter of principle, I would be reluctant to make it a case for conciliation, which would further delay the final adoption of the directive.
- The situation is different for the **opting out** clause related to the inclusion of non-financial entities into the scope of the directive on which some Member States insist for political reasons: They want to avoid the impression, that credits to industrial companies would be

privileged with respect to wage or fiscal claims. There is however a direct economic impact on market participants, as it would prevent companies, including SME's, to draw benefit from the directive, if Member States make use of the opting out. Nevertheless, the negative effects can easily be circumvented by the contractual counterparts, who will be free to choose a Member State for the collateral agreement where the opting out clause does not apply. For this reason, the practical relevance of the opting out is supposed to remain rather limited, as Member States would penalise their domestic financial markets.

Your rapporteurs' recommendation

Given that both opting out facilities are subject to a review clause, no later than four and a half years after the entry into force of the directive, your rapporteur considers, that the European Parliament should accept them for the time being. They are indeed disturbing elements from a Single Market point of view, however, their negative effects will be limited. Taking into account, that most of the Parliaments' concerns, expressed in first reading, have been met in the Common Position, your rapporteur would suggest not to present any amendments for the second reading, in order not to delay the definitive adoption of the directive. This would also allow for meeting the deadline of end 2003 for its implementation at Member State level.