

ANNEX 1 TO EVALUATION REPORT ON THE FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE (2002/47EC)

1. LOGICAL STRUCTURE OF THE FCD-EVALUATION

The following table summarizes the logic underlying the evaluation of the Financial Collateral Arrangements Directive.

	Description	Evaluation questions	Evidences	Indicators
Assumptions	The use of collateral is subject to divergent and complicated national provisions, thus creating uncertainty about its means to protect cross-border transactions.		Risk of chain reaction in case of failure by one participant Unfavourable legal opinions Examples	Low level of cross-border use of collateral Complaints by the industry about the costs and complexity of the cross-border use of collateral.
Actions	Financial Collateral Arrangements Directive (2002/47/EC)	How have the different Member States transposed the Directive? How has new legislation been enforced? Have there been important delays?	National implementation.	Transposition indicators. Transposition delays. Application of the Directive.
Results	Improvement of legal certainty of financial collateral arrangements. Simplification of the process to use collateral. Exemption of financial collateral arrangements from insolvency procedures Reduction of risk inherent in the provision of securities and cash as collateral.	Have legal certainty been improved? Has the process to use collateral been simplified? How? Has the risk in using collateral been reduced? Is there any implementation cost due to the Directive?	National laws and regulation. Responses to questionnaire Court decisions Changes in market practice More favourable legal opinions	Perception of legal certainty from market players. Administrative burden of using collateral. Risk management costs. Implementation costs.
Impacts	Contribute to the cost-efficiency of the financial markets. Increase in the use of collateral.	Have the use of collateral been increased in the EU? Are there any unexpected impacts?	Responses to questionnaire Financial market statistics	Figures on the use of collateral in the EU. Number of insolvency cases

2. PLANNING OF THE EVALUATION EXERCISE

The purpose of the current evaluation was first of all for the Commission to respond to its legal obligation to the European Parliament and the Council to present a report on the application of the Directive (in particular on the application of Article 1(3), Article 4(3) and Article 5) not later than 27 December 2006. Secondly, the Commission was interested to develop a thorough understanding whether the Directive is indeed still relevant and works effectively and efficiently. To this effect it had formulated some evaluation questions, which were directly or indirectly taken up in the two questionnaires which launched the evaluation exercise. The first questionnaire was addressed to the EU Member States, the ECB and the EEA States and the second one to the private sector. The questionnaires as well as the replies are published on the DG MARKT's website.

Whereas the answers to the questionnaire (as well as other publications) provided ample information on the implementation of the Directive and some key issues that merit further attention, the information on the functioning of the Directive was not enough or too recent for firm conclusions as to the impact of the Directive. As to the latter, many respondents also made a remark to that effect, e.g. on the question about the possible impact of the Directive. Despite the fact that it is thus too early to fully assess whether the Directive has led to greater integration and cost-efficiency of European financial markets, the evaluation has nonetheless delivered some interesting results.

3. ANSWERS TO THE EVALUATION QUESTIONS

This chapter aims - without trying to duplicate the report – to summarise the findings of the Commission based on the each evaluation question, as also found in the above table.

3.1. How have the different Member States transposed the Directive?

In general, Member States have followed closely the structure of the questionnaire and have given a detailed picture of how they have implemented the Directive, sometimes adding a correspondence table. The Commission considers that, overall Member States have adequately implemented the Directive.

3.2. How has new legislation been enforced?

The Commission has not seen evidence to suggest that there problems in the enforcement of the Directive, but it also considers that it is too early to make such an assessment. Illustrative is, for instance, the remark made by ISDA in relation to Poland: “There is no problem with netting of the collateral as long there is any bankruptcy”.

3.3. Have there been important delays?

The FCD was adopted on 6 June 2002 and implemented by most Member States in the course of 2004; only Austria and the UK have met the implementation deadline of 27 December 2003, while nine Member States did not implement the Directive until 2005. Sometimes the delay was caused by the debate on the personal scope of the Directives, e.g. whether or not to use the opt-out provisions of Article 1(3) and Article 1(4) (b).

3.4. Has legal certainty been improved?

Many Member States rightly observe that some of the measures introduced by the Directive already existed at the national level. Nonetheless, several respondents testified that the FCD has indeed improved the legal certainty in respect of certain techniques used in (cross-border) collateral transactions.

3.5. Has the process to use collateral been simplified? How?

The FCD has simplified the procedures for the creation, perfection, validity and enforceability of financial collateral by providing that the only formal requirement is that both the collateral arrangement and the provision of collateral under such arrangement must be evidenced in writing or in a legally equivalent manner.

3.6. Has the risk in using collateral been reduced?

The Commission considers this to be the case. According to the European Savings banks Group, the FCD has had a “favourable effect on the risk management of banks. In effect, greater legal certainty and simpler processing makes it possible to take advantage of the risk-reducing effects of collateral with more counterparties from more jurisdictions and as a consequence credit risk is covered more widely. Thus, collateral agreements have established themselves as an important and growing factor in risk management”.

3.7. Is there any implementation cost due to the Directive?

Answers vary from no implementation costs to some minor costs in changing their information systems or in familiarising themselves with the new law and its implications for them.

3.8. Has the use of collateral been increased in the EU?

The cross-border use of collateral within the EU has increased significantly, as evidenced by the report. The Commission believes that the FCD has facilitated and strengthened this trend, but concurs with the suspicion of the City of London Law Society Financial Law Committee, that the increase is “attributable less to the implementation of the Directive and more to an increase in activity in the global financial markets”.

3.9. Are there any unexpected impacts?

The general opinion is that it is too early to judge the possible negative impacts of the Directive. On some points further clarification may be desirable, notably the lack of any definition or guidance as to the meaning of “control” or “possession” being provided to the collateral taker has caused some concerns in the UK and Ireland in relation to their specific concept of floating securities.