Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 21 July 2016 [1]

Case C-156/15

Private Equity Insurance Group SIA
v
Swedbank AS
(Request for a preliminary ruling

from the Augstākā tiesa (Supreme Court, Latvia))

(Approximation of laws — Integration of financial markets — Financial collateral arrangements — Directive 2002/47/EC — Scope — Concepts of 'financial collateral arrangement' and 'relevant financial obligations' — Article 2(1)(a) and (f) — Provision of financial collateral — Concepts of 'possession' or 'control' of the financial collateral — Article 2(2) — Certain insolvency provisions disapplied — Articles 4 and 8 — Current bank account contract containing a financial collateral clause in favour of the bank)

Introduction

1. The present reference for a preliminary ruling gives the Court an opportunity to rule for the first time on the harmonised regime applicable to financial collateral arrangements established by Directive 2002/47/EC. [2]

2. The provision of financial collateral — in the form of cash or financial instruments — promotes the stability of financial markets by allowing risk in transactions to be limited. Directive 2002/47 is thus an important instrument in the integration of those markets, simplifying the conclusion of financial collateral arrangements, limiting the related formalities and protecting those arrangements from certain insolvency rules in the Member States' national law. [3]

3. The present dispute, which entails, among other things, a challenge to the validity of a contractual clause under which collateral is provided for monies deposited in a current account in favour of the bank, gives the Court an opportunity to clarify the scope of Directive 2002/47 and, more generally, to examine the balance established by that directive between considerations of market efficiency and considerations of the safety of the parties to the arrangement and third parties.

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ 2002 L 168, p. 43).

3 — See recitals 7 and 9 to 12 of Directive 2002/47.

Legislative framework

EU law

4. Article 1(4) and (5) of Directive 2002/47,[4] entitled 'Subject-matter and scope', provides:

'4.

(a) The financial collateral to be provided must consist of cash or financial instruments.…

5. This Directive applies to financial collateral once it has been provided and if that provision can be evidenced in writing.

The evidencing of the provision of financial collateral must 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.

…'

5. Article 2 of that directive, entitled 'Definitions', provides:

'1. For the purpose of this Directive:

(a) "financial collateral arrangement" means a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or general terms and conditions;

…

(c) "security financial collateral arrangement" means 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;

(d) "cash" means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits;

…

(f) "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 financial instruments.

…

4 — The provisions of Directive 2002/47 applicable at the material time predate the amendments introduced by 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 on financial collateral arrangements as regards linked systems and credit claims (OJ 2009 L 146, p. 37).

2. References in this Directive to financial collateral being "provided", or to the "provision" of financial collateral, are 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. Any right of substitution or to withdraw excess financial collateral in favour of the collateral provider shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in this Directive.'

6. Article 4 of Directive 2002/47, entitled 'Enforcement of financial collateral arrangements', provides:

'1. Member States shall ensure that on the occurrence of an enforcement event, the collateral taker shall be able to realise in the following manners, any financial collateral provided under, and subject to the terms agreed in, a security financial collateral arrangement:

…

(b) cash by setting off the amount against or applying it in discharge of the relevant financial obligations.

…

4. The manners of realising the financial collateral referred to in paragraph 1 shall, subject to the terms agreed in the security financial collateral arrangement, be without any requirement to the effect that:

(a) prior notice of the intention to realise must have been given;

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

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

(d) any additional time period must have elapsed.

5. Member States shall ensure that a financial collateral arrangement can take effect 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.

…'

7. Article 8 of Directive 2002/47 limits the application of certain insolvency provisions in the Member States' national law. [5]

Latvian law

8. Directive 2002/47 was transposed into Latvian law by the Finanšu nodrošinājuma likums (Law on financial collateral).

5 — I will not cite this article in full — or Article 1(2)(e) and Article 3 of that directive — as those provisions, although mentioned by the referring court, are not directly relevant to my proposed answers to the questions referred.

The dispute in the main proceedings

9. On 14 April 2007, Izdevniecība Stilus SIA, the legal successor to which is Private Equity Insurance Group SIA, entered into a standard current account contract with Swedbank AS.

10. Clause 3.9 of that contract is worded as follows:

'The Customer's monies in the Account, present and future, shall be pledged to the Bank as financial collateral and shall cover all debts owed by the Customer to the Bank. In the event that the Customer fails to provide the monies necessary to make the payments in the current account, or in any other situation in which, pursuant to the present contract or any other contracts entered into with the Bank, or on any other legal basis, a debt owed by the Customer to the Bank arises, the Bank shall be entitled to settle that debt by enforcing the financial collateral arrangement, that is to say, the Bank shall be entitled, without giving prior notice to the Customer, to debit (transfer) from the Account the amount owed. …'

11. On 25 October 2010, Izdevniecība Stilus was declared insolvent. Subsequently, the insolvency administrator entered into a new current account contract which contained an identical financial collateral clause.

12. On 8 June 2011, Swedbank debited LVL 192.30 (around EUR 274) from the current account of Izdevniecība Stilus as a maintenance commission in respect of the period up to the declaration of insolvency.

13. The appellant in the main proceedings, represented by the insolvency administrator, brought an action against Swedbank for recovery of that amount, invoking the principles laid down in national law of equal treatment of creditors in insolvency proceedings and the prohibition on each creditor carrying out actions liable to prejudice other creditors.

14. The Latvian courts dismissed the application at first instance and on appeal on the basis of the national provisions transposing Article 8 of Directive 2002/47, which excluded financial collateral from the application of insolvency law.

15. The Augstākā tiesa (Supreme Court, Latvia), ruling in cassation, has doubts regarding the scope of those national provisions and their compatibility with the principle of equality enshrined in the Latvian Constitution. The referring court considers that, before any reference is made to the Satversmes tiesa (Constitutional Court, Latvia), it is necessary to dispel the doubts regarding the interpretation of Directive 2002/47.

16. The referring court observes in this regard that the national legislation on financial collateral grants an absolute priority to a financial collateral taker over other creditors, even in the case of secured claims, such as claims of the State or of workers. It asks whether such priority is justified by the purposes of Directive 2002/47.

17. The referring court is uncertain whether Directive 2002/47 applies to collateral provided in connection with a current account which is not used in securities settlement systems within the meaning of Directive 98/26/EC.[6] It also has doubts regarding the interpretation of Articles 3 and 8 of Directive 2002/47 and asks about the compatibility with the purpose of that directive of the priority granted to financial collateral over any other type of security, in particular over those made in a register, such as mortgages.

6 — Directive of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ 1998 L 166, p. 45).

The questions referred for a preliminary ruling and the procedure before the Court

18. Against this background, the Augstākā tiesa decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the provisions of Article 4 of Directive 2002/47 on financial collateral arrangements, having regard to recitals 1 and 4 in the preamble thereto, be interpreted as meaning that those provisions apply only to accounts which are used for settlement in securities settlement systems, or as meaning that they apply equally to any account open in a bank, including a current account which is not used for securities settlement?

(2) Must Article 3 and Article 8 of Directive 2002/47, having regard to recitals 3 and 5 in the preamble thereto, be interpreted as meaning that the purpose of that directive is to ensure especially favourable priority treatment for credit institutions in the event of the insolvency of their customers, in particular, over other creditors of those customers, such as workers, in respect of wages owing to them, the State, in respect of its tax claims, and secured creditors, whose claims are secured by securities protected by the presumption of authenticity resulting from registration in a public register?

(3) Must Article 1(2)(e) of Directive 2002/47 be understood as an instrument for minimum harmonisation or for full harmonisation, that is to say, must it be interpreted as meaning that it allows Member States to extend that provision to persons who are expressly excluded from the scope of the directive?

(4) Is Article 1(2)(e) of Directive 2002/47 a directly applicable provision?

(5) In the event that the purpose and scope of Directive 2002/47/EC are more limited than the actual purpose and scope of the national law, the adoption of which was formally justified on the basis of the obligation to transpose Directive 2002/47/EC, may the interpretation of that directive be used to invalidate a financial collateral clause based on national law, such as the clause at issue in the main proceedings?’

19. The order for reference, dated 11 March 2015, was received at the Court Registry on 1 April 2015. Written observations were submitted by the respondent in the main proceedings, the Latvian, Spanish and United Kingdom Governments, and the European Commission.

20. Those parties and interested persons and the appellant in the main proceedings also took part in the hearing, which was held on 11 May 2016.

Analysis

The first question

Preliminary remarks

21. By the first question, the referring court asks, in essence, whether Directive 2002/47 covers collateral which is provided by cash deposited in a current account and which covers all the bank’s claims vis-à-vis the account holder, where that account is not used in securities payment and settlement systems in accordance with Directive 98/26.

22. Although the national court refers to Article 4 of Directive 2002/47, it is clear from the wording of the question that it seeks to determine, in general, whether such collateral falls within the scope of that directive.

23. This question calls for an interpretation of Articles 1 and 2 of Directive 2002/47, which determine the scope of that directive and define the relevant concepts.

24. First, it should be examined whether Article 1(4)(a) and Article 2(1)(d) and (f) of Directive 2002/47 must be interpreted as applying to collateral such as that at issue in the main proceedings where it has no link with securities payment and settlement systems in accordance with Directive 98/26.

25. Second, it is necessary to clarify the conditions relating to the provision of financial collateral within the meaning of Article 2(2) of Directive 2002/47 in order to enable the referring court to determine whether the collateral at issue in this case was provided in accordance with those conditions and thus comes under the regime established by that directive.

26. I note that even though those provisions of Directive 2002/47 are not mentioned in the wording of the questions put by the national court, the Court expressly reserves the right to broaden the scope of the questions referred in order to give a helpful answer to the referring court, provided the substance of the question asked is preserved.[7]

27. In my view, that condition is met in this case, since it is necessary to interpret the relevant provisions of Articles 1 and 2 of Directive 2002/47 so as to enable the referring court to determine whether the clause at issue comes under the regime established by that directive. In addition, the interpretation of those provisions was the subject of a written question which the Court put to the parties in the main proceedings and the other interested persons, which were therefore able properly to express their views on this subject at the hearing.

The interpretation of Article 1(4)(a) and Article 2(1)(d) and (f) of Directive 2002/47

28. In order to answer the questions asked by the referring court, it is necessary to examine the scope of the regime established by Directive 2002/47 in connection with two aspects: the purpose of the collateral and the relevant obligations.

29. First, with regard to the purpose of the collateral, under Article 1(4)(a) of Directive 2002/47, the collateral to be provided for the purposes of the directive must consist of financial instruments or cash. 'Cash' is defined in Article 2(1)(d) of Directive 2002/47 as money credited to an account and similar claims for the repayment of money.[8] That definition is broad and covers cash deposited in a current account. Furthermore, no other provision of Directive 2002/47 limits its application solely to collateral provided in securities payment and settlement systems in accordance with Directive 98/26.

30. Although, according to recitals 1 and 4 of Directive 2002/47, the adoption of that directive forms part of the legal context established inter alia by Directive 98/26 and experience has demonstrated the benefits of common rules in relation to collateral constituted to systems under the latter directive, that consideration cannot in itself lead to the conclusion that the scope of Directive 2002/47 is limited to collateral provided in such systems. That conclusion does not follow from any provision of Directive 2002/47. In addition, according to recital 4, the regime under Directive 2002/47 complements the existing legislative instruments by dealing with further issues and going beyond them.

7 — See in particular judgment in *Phytheron International* (C-352/95, EU:C:1997:170, paragraph 14).

8 — It therefore excludes bank notes. See also recital 18 of Directive 2002/47.

31. This interpretation is corroborated by the *travaux préparatoires*, according to which the proposal which led to the adoption of Directive 2002/47 was based on the idea that, although Directive 98/26 regulated collateral provided in the context of financial transactions, further measures were needed to facilitate the efficient use of financial collateral, going beyond the advances permitted by Directive 98/26.[9] Similarly, it is stated in the Evaluation Report produced by the Commission in the context of the transposition of Directive 2002/47 that although Directive 98/26 had already granted some protection to collateral provided in connection with participation in a system envisaged by that directive, the adoption of Directive 2002/47 was underpinned by the need for a more comprehensive approach in order to ensure the effectiveness of financial collateral, in particular in cross-border transactions.[10]

32. Second, with regard to the concept of 'relevant financial obligations', according to the definition in Article 2(1)(f) of Directive 2002/47, the financial obligations concerned are those which give a right to cash settlement and/or delivery of financial instruments and may consist of or include present or future, actual or contingent or prospective obligations, obligations of third parties or obligations of a specified class or kind arising from time to time.

33. That definition encompasses the situation at issue in the main proceedings where the collateral covers all the collateral taker's claims vis-à-vis the collateral provider. It is clear from the *travaux préparatoires* for Directive 2002/47 that the concept of 'relevant financial obligations' had to include the use of 'all monies' arrangements, where the collateral is provided for any present or future liability of the issuer to the taker.[11] The United Kingdom Government noted at the hearing, moreover, that such arrangements are widely used in practice.

34. I note that according to the Evaluation Report on Directive 2002/47, some Member States have restricted the scope of collateral with regard to certain financial obligations in the specific case where the collateral provider is not a person mentioned in Article 1(2)(a) and (d) of Directive 2002/47.[12] In this regard, Article 1(3) of that directive gives Member States the option to transpose the directive by limiting the application of the harmonised regime solely to public bodies and financial institutions mentioned in Article 1(2)(a) and (d) of Directive 2002/47. However, the fact that Member States availed themselves of this option is not relevant in determining the scope of the directive in this case, as the Republic of Latvia did not invoke Article 1(3) of Directive 2002/47 when it transposed the directive.

35. For all these reasons, I consider that Directive 2002/47 cannot be interpreted as applying exclusively to collateral provided in securities payment and settlement systems. In addition, as is clear from Article 2(1)(f) of Directive 2002/47, relevant obligations are not limited to those relating to securities payment and settlement systems but may include any obligation giving a right to cash settlement. Charges linked to management of a current account clearly fall in this category of obligations.

9 — See Proposal for a Directive of the European Parliament and of the Council on financial collateral arrangements (COM(2001) 168 of 27 March 2001, p. 1). See also, in the context of the transposition of Directive 2002/47 in Polish law, Pisuliński, J., 'Zabezpieczenia finansowe w systemie prawa cywilnego', Przegląd Prawa Handlowego 6/2005, p. 27.

10 — See Evaluation Report on the Financial Collateral Arrangements Directive (2002/47/EC) (COM(2006) 833 final of 20 December 2006, p. 3). I note that the scope of Directive 2002/47 is not limited to cross-border transactions.

11 — See COM(2001) 168 of 27 March 2001, explanatory memorandum relating to Article 2. In its first legislative proposal, the Commission examined what types of exposure had to be covered, concluding that it would be both difficult and unnecessary to try to distinguish between different transactions in this regard. See European Commission document: 'Working Document on Collateral: First preliminary draft proposal for a Directive', 15 June 2000, p. 6, and Yeowart, G., 'Purpose of the Financial Collateral Directive', in Yeowart, G., and Parsons, R., Yeowart and Parsons on the Law of Financial Collateral, Edward Elgar Publishing, 2016, p. 19.

12 — According to that Evaluation Report produced by the Commission, for cases where the collateral provider is not a financial institution, the German legislature inter alia limited the collateral covered to collateral used to secure certain specifically defined financial obligations, thus excluding in particular long-term cash loans involving undertakings (see COM(2006) 833 final of 20 December 2006, p. 9).

36. Lastly, all the parties which submitted observations in the present case agree on such a broad interpretation of the scope *ratione materiae* of Directive 2002/47. The Commission stated in particular at the hearing that the interpretation that any obligation giving a right to cash settlement is covered is necessary to ensure the effectiveness of the directive, having regard to the wide diversity of the obligations relevant to the operation of the financial markets.

37. Accordingly, I consider that Article 1(4)(a) and Article 2(1)(d) and (f) of Directive 2002/47 must be interpreted as applying to collateral such as that at issue in the dispute in the main proceedings which is provided by cash deposited in a bank account and which covers all the bank's claims vis-à-vis the account holder. The question whether that account is used in securities payment and settlement systems in accordance with Directive 98/26 is not relevant.

The interpretation of Article 2(2) of Directive 2002/47

38. Under Article 1(5) of Directive 2002/47, the directive applies to financial collateral once it has been provided and if that provision can be evidenced in writing.

39. That provision is to be read in the light of recital 10 of Directive 2002/47, according to which, whilst exempting the conclusion of a financial collateral arrangement from certain formal requirements under national law,[13] that directive must provide a balance between efficiency and the safety of the parties to the arrangement and third parties. According to that same recital, Directive 2002/47 achieves that balance through its scope covering only those financial collateral arrangements which provide for 'some form of dispossession', in other words the provision of the financial collateral, and where the provision of the financial collateral can be evidenced in writing.

40. The requirement of the provision of collateral thus constitutes a *quid pro quo* for dispensing in the interests of market efficiency with the formal requirements under national law.[14]

41. Under Article 2(2) of Directive 2002/47, the concept of 'provision' of collateral refers to 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.

42. That condition of being 'in the possession' or 'under the control' is a key element in determining whether a certain collateral arrangement falls within the scope of Directive 2002/47. A collateral arrangement may be classified as a 'financial collateral arrangement' within the meaning of Directive 2002/47 only if the collateral has been provided so as to be in the possession or under the control of the collateral taker.

43. Aside from title transfer financial collateral arrangements, meaning that, subject to repurchase agreements, full ownership of financial collateral is transferred to a collateral taker for the purpose of securing the performance of relevant financial obligations,[15] the interpretation of the concepts of being 'in the possession' or 'under the control' in the context of cash or financial instruments is problematic. According to some writers, it is probably the most controversial aspect of the financial collateral regime established by Directive 2002/47.[16]

13 — See Article 3 of Directive 2002/47.

14 — See Parsons, R., '"Possession" or "Control" test to be satisfied when creating a security financial collateral arrangement' in Yeowart, G., and Parsons, R., *Yeowart and Parsons on the Law of Financial Collateral*, Edward Elgar Publishing 2016, p. 168.

15 — See Article 2(1)(b) of Directive 2002/47.

16 — See Parsons, R., op. cit., p. 167.

44. It is stated in the observations submitted by the United Kingdom Government and by the Commission that the application of the requirements in question has caused difficulties in practice, as is reflected in particular in two rulings by United Kingdom courts which interpret inter alia the term 'control' within the meaning of Article 2(2) of Directive 2002/47.

45. In *Gray*,[17] which concerned collateral in the form of cash deposited in a bank account, the discussion focused on the question whether the control requirement is satisfied where the account, although managed by the collateral taker, is not blocked. The British court ruled that the provision of collateral presupposes that the collateral taker is able to prevent the collateral provider from disposing of it. In addition, the collateral taker must have 'legal' control over the object of the collateral, mere administrative or practical control being insufficient. Those requirements were not satisfied in that case, as the collateral provider could request the withdrawal of monies deposited in the account without restriction.

46. The problem of the interpretation of Article 2(2) of Directive 2002/47 arose again in *Lehman Brothers International (Europe)*.[18] The British court noted that *Gray* had been the subject of commentaries criticising the fact that the strict application of the 'legal' control requirement could exclude from the regime of Directive 2002/47 certain arrangements used in practice and drawn up with the intention of their being included. Whilst noting these criticisms, that judgment essentially confirmed the approach adopted in *Gray* in respect of the 'legal control' criterion and held that mere administrative control of the object of the collateral would be insufficient to satisfy the criterion set out in Article 2(2) of Directive 2002/47, in particular where the collateral provider has the right to dispose of the monies concerned without restriction.

47. In the main proceedings the Commission notes that the provision of financial collateral means that the collateral taker exercises 'legal control' over the object of the collateral, which is understood as the power to prevent the collateral provider disposing of it. The collateral provider's right freely to withdraw cash from the account to which the collateral relates would run counter to that requirement. At the hearing the Commission stated that it held essentially the same position as was adopted by the United Kingdom courts in the abovementioned cases.

48. In my view, the considerations which led the United Kingdom courts to reject the argument that mere administrative control exercised over the object of the collateral is sufficient are also relevant to the interpretation of Article 2(2) of Directive 2002/47 in this case.

49. As is rightly stated by the United Kingdom Government and the Commission, the requirement of the collateral being 'in the possession' or 'under the control' of the collateral taker for the purposes of Article 2(2) of Directive 2002/47[19] would become entirely ineffective if it were interpreted as covering a situation where the collateral provider is able to continue to dispose of it freely.

50. I would note that the second sentence of Article 2(2) of Directive 2002/47 validates collateral techniques permitting the collateral provider to substitute or to withdraw excess. It can be inferred *a contrario* that granting broader rights to the provider would mean that the requirement of the provision of the collateral is not met.

17 — *Gray and others v G-T-P Group Limited: Re F2G Realisations Limited (in liquidation)* [2010] EWHC 1772 (Ch), paragraphs 60 to 62.

18 — *Lehman Brothers International (Europe) (In Administration)* [2012] EWHC 2997 (Ch), paragraphs 119 to 126 and 131 to 137.

19 — I note that although this question is not relevant in the context of the present case, the United Kingdom Government and the Commission adopted different positions on the link between these two notions. The Commission suggests that 'possession' or 'control' constitutes a single requirement, whereas, from the point of view of the case-law invoked by the United Kingdom Government and English legal literature, they are two alternative criteria. See also Parsons, R., op. cit., p. 185.

51. Thus, in my view, in the case of collateral provided in the form of cash deposited in an account, being in the possession or under the control of the collateral taker must mean that the collateral taker not only has practical control over the account to which the collateral relates, but also has the right to prevent the withdrawal of cash by the collateral provider in so far as is necessary to guarantee the relevant obligations.

52. In the present case the referring court should thus examine whether the current account contract concluded between the parties in the main proceedings contains a clause conferring on Swedbank such a right to limit withdrawals of monies deposited in the account concerned. Without prejudice to that examination, which falls within the autonomous responsibility of the referring court, I observe that at the hearing the parties in the main proceedings agreed that the contract at issue did not contain a clause permitting the bank to limit withdrawals or requiring that a certain amount must remain blocked in the account. If this were established, it would lead to the conclusion that the collateral in question cannot be considered to be provided in accordance with the requirements laid down by Directive 2002/47 and that it is not therefore covered by those provisions.

53. Accordingly, I consider that Article 2(2) of Directive 2002/47 must be interpreted to the effect that the provision of financial collateral in the form of cash deposited in a bank account requires the existence of a contractual clause conferring on the collateral taker the right to limit the use of monies deposited in that account in so far as is necessary to guarantee the relevant obligations.

The second question

54. The referring court asks, in essence, whether Directive 2002/47, in particular Articles 3 and 8 thereof, must be interpreted as guaranteeing the collateral taker the right to realise any financial collateral, notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider. It states that such priority granted to the financial collateral taker might seem contrary to the principle of equal treatment of creditors in insolvency proceedings (*paritas creditorum*).

55. I would point out that although the national court refers to Articles 3 and 8 of Directive 2002/47, the question asked relates more to Article 4 of that directive, which concerns inter alia the conditions for enforcement of financial collateral. The referring court asks about the possibility of introducing possible restrictions on the right of the collateral taker to obtain satisfaction of his claims in the event of the insolvency of the provider. According to that court, in the absence of such implicit restrictions, the system established by Directive 2002/47 may seem questionable from the perspective of the principle of equal treatment of creditors.

56. I note that it is clear from Article 4 of Directive 2002/47, read in the light of recitals 3, 5 and 10 of that directive, that one of the objectives of the regime established by that directive is to protect financial collateral from the application of some rules of national insolvency law.[20] In this regard, Article 4(1) of Directive 2002/47 confers on the collateral taker the right to realise any financial collateral provided under a security financial collateral arrangement. Paragraphs 4 and 5 of that article protect that right from the effects of national insolvency rules. Paragraph 4 permits the rapid realisation of collateral in the case of default by the provider, disapplying the requirements set out in subparagraphs (a) to (d) of that paragraph. In addition, paragraph 5 requires Member States to ensure that a financial collateral arrangement can take effect notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker.

20 — See also COM(2001) 168 of 27 March 2001, explanatory memorandum relating to Article 5.

57. In my view, those provisions cannot be construed to the effect that the collateral taker could not realise the collateral in the event of the insolvency of the provider so as not to jeopardise the rights of other creditors. On the contrary, they seek to exempt financial collateral from the application of the restrictions provided for by national insolvency law.

58. In my view, this consideration cannot be called into question by the argument, raised by the appellant in the main proceedings and the Latvian Government, relating to the situation of secured creditors, such as the State, workers or registered security holders.

59. As the Commission notes, from the point of view of the system established by Directive 2002/47, the question of the status of the creditor in insolvency proceedings does not arise, as that directive simply seeks to guarantee the right to realise collateral on the occurrence of all enforcement events. That solution is justified by the need to improve the legal certainty of financial collateral arrangements and to ensure their efficiency. [21]

60. Having said that, Directive 2002/47 contains provisions enabling the balance to be maintained between considerations of market efficiency and considerations of legal certainty.

61. First, with regard to the scope *ratione personae*, Article 1(3) of Directive 2002/47 accords Member States the possibility to exclude arrangements where one of the parties is not an authority, a public body, a supervised financial institution or a central counterparty, settlement agent or clearing house within the meaning of Directive 98/26. [22]

62. Second, the regime under Directive 2002/47 applies only to collateral 'provided' within the meaning of Article 2(2), which implies some form of 'dispossession' of the collateral provider. The regime under Directive 2002/47 is therefore applicable only if the collateral taker has 'possession' or 'control' for the purposes of that directive. [23]

63. Third, Article 8 of Directive 2002/47 lays down certain limitations on the application of national insolvency rules for collateral provided before the commencement of insolvency proceedings but subject to the 'zero-hour' rule, which gives retroactive effect to such proceedings (paragraphs 1 and 3), and exceptionally for collateral provided after the commencement of insolvency proceedings, where the collateral taker proves his good faith (paragraph 2). [24]

64. Subject to the situations referred to in Article 8, the regime under Directive 2002/47 does not cover collateral provided after the commencement of insolvency proceedings.

65. In my view, this observation answers the concerns expressed by the referring court and the Latvian Government concerning the fact that the special treatment of financial collateral could jeopardise the protection of mortgagees. The referring court states that where monies obtained from the sale of property belonging to the insolvent party are paid into the bank account to which the financial collateral relates, the collateral taker could use them to obtain satisfaction of his claims. In my view, that concern is unfounded because collateral provided after the commencement of insolvency proceedings is not covered by the regime established by Directive 2002/47.

21 — In this respect, Directive 2002/47 is part of the broader system of EU insolvency law, which includes the legislative instruments mentioned in recital 4.

22 — In practice, as is clear from the Evaluation Report on Directive 2002/47, only the Republic of Austria has decided to apply that opt-out in full and five other Member States have applied it partially (the Czech Republic, the Federal Republic of Germany, the French Republic, the Republic of Slovenia, the Kingdom of Sweden). See COM(2006) 833 final of 20 December 2006, p. 9.

23 — See points 40 and 41 of this Opinion.

24 — See also COM(2001) 168 of 27 March 2001, explanatory memorandum relating to Article 9.

66. As far as the main proceedings are concerned, as was observed by the United Kingdom Government, which raised this aspect at the hearing, Directive 2002/47 would not apply if the cash providing the collateral was paid into the bank account concerned after the commencement of insolvency proceedings.

67. Although this aspect is not clear from the order for reference, both the parties in the main proceedings nevertheless stated at the hearing that the monies debited by Swedbank from the current account of Izdevniecība Stilus had been deposited in that account only after the commencement of the insolvency proceedings. If this chronology were established by the referring court, it would have to be concluded that the collateral at issue was not provided before the commencement of such proceedings and is not therefore covered by the provisions of Directive 2002/47.

68. I therefore take the view that Article 4(1), (4) and (5) of Directive 2002/47 must be interpreted to the effect that the collateral taker has the right to realise any financial collateral provided under a security financial collateral arrangement, notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider. Subject to the provisions of Article 8 of that directive, that right applies to collateral provided before the commencement of such proceedings.

The third and fourth questions

69. The referring court states that the Latvian Law on financial collateral applies to natural persons, whilst such persons are expressly excluded from the scope *ratione personae* of Directive 2002/47 under Article 1(2)(e) thereof. By the third and fourth questions, it therefore asks whether such an extension of the scope *ratione personae* is consistent with that provision of Directive 2002/47 and, if so, whether that provision has direct effect. Whilst acknowledging that these questions are hypothetical in the context of the dispute in the main proceedings, the referring court considers them important in view of a possible review of constitutionality of the Law on financial collateral.

70. I would observe that it is common ground that the dispute in the main proceedings does not involve natural persons and that the questions relating to the possibility of extending the regime under Directive 2002/47 to such persons are therefore hypothetical.

71. In these circumstances, the fact that the same questions might arise again in future in connection with a possible review of the constitutionality of the Law on financial collateral by the Satversmes tiesa (Constitutional Court) cannot remove the hypothetical character of these questions in the present case. The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute.[25] If the national court were to refer a question of constitutionality to the Satversmes tiesa (Constitutional Court), there is nothing to prevent the latter court making a reference for a preliminary ruling to the Court of Justice, if it considers it necessary.

72. Accordingly, the third and fourth questions must be considered inadmissible.

The fifth question

73. By its fifth question, the referring court is seeking to determine the consequences which it could draw, in terms of the validity of the clause at issue, in the event that the scope of Directive 2002/47 is more limited than that of the national legislation.

25 — See, in particular, judgment in *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 29).

74. I would note that the relevance of this question and its link to the other questions are not explained in detail by the referring court. It can nevertheless be inferred from the wording of the question that it is intended to determine the effect of Directive 2002/47 on the dispute in the main proceedings if the Court were to rule, in answer to the first question, that the scope of that directive is limited to collateral relating to securities payment and settlement systems.

75. If, according to the answer given by the Court to the first question, the contractual clause at issue is not covered by Directive 2002/47, the referring court would thus be required to determine the consequences of that difference between the scope of the directive and the scope of the national law as far as the validity of that clause is concerned.

76. However, it follows from my answer to the first question that the scope of Directive 2002/47 cannot be considered to be limited to collateral relating to securities payment and settlement systems. In these circumstances, I consider that there is no need to answer this question.

Conclusion

77. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Augstākā tiesa (Supreme Court, Latvia) as follows:

(1) Article 1(4)(a) and Article 2(1)(d) and (f) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements must be interpreted as applying to collateral such as that at issue in the dispute in the main proceedings which is provided by cash deposited in a bank account and which covers all the bank's claims vis-à-vis the account holder. The question whether that account is used in securities payment and settlement systems in accordance with Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems is not relevant.

Article 2(2) of Directive 2002/47 must be interpreted to the effect that the provision of financial collateral in the form of cash deposited in a bank account requires the existence of a contractual clause conferring on the collateral taker the right to limit the use of monies deposited in that account in so far as is necessary to guarantee the relevant obligations.

(2) Article 4(1), (4) and (5) of Directive 2002/47 must be interpreted to the effect that the collateral taker has the right to realise any financial collateral provided under a security financial collateral arrangement, notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider. Subject to the provisions of Article 8 of that directive, that right applies to collateral provided before the commencement of such proceedings.