Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 April 2018 [1]

Case C-107/17

UAB 'Aviabaltika'
v
BAB Ūkio bankas

(Request for a preliminary ruling
from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Reference for a preliminary ruling — Economic and monetary policy — Free movement of capital — Enforcement of financial collateral arrangements — Commencement of winding-up proceedings against the financial collateral taker — Occurrence of the enforcement event — Inclusion of the financial collateral in the assets remaining after the insolvency — Obligation to satisfy the claims primarily from the financial collateral)

I. Introduction

1. This is the second time that the Court of Justice has been called upon to give a preliminary ruling regarding the interpretation of the provisions of Directive 2002/47/EC. [2]

2. In the first case, which gave rise to the *Private Equity Insurance Group* judgment, [3] the Court had been asked to clarify the rights of the collateral taker ('the taker') in the event of the insolvency of the collateral provider ('the provider'). The present case seeks to resolve issues concerning how Directive 2002/47 should be interpreted where insolvency proceedings have been brought against the collateral taker.

3. Specifically, by its first two questions, the referring court seeks to ascertain whether Directive 2002/47 requires that the taker may or must realise the financial collateral notwithstanding the commencement of insolvency proceedings against it. By its third question, the referring court asks whether the provider can be given different treatment from that applicable to the other creditors involved in those insolvency proceedings so that that provider can effectively recover the financial collateral not realised by the taker.

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 judgment of 10 November 2016 (C-156/15, EU:C:2016:851).

II. Legal context

A. EU law

4. Article 2(1)(c) of Directive 2002/47 states that 'security financial collateral arrangement' means an arrangement under which the provider provides financial collateral by way of security to or in favour of the taker, and where the full or qualified ownership of, or full entitlement to, that financial collateral remains with the provider when the security right is established.

5. Paragraphs 1 and 5 of Article 4 of Directive 2002/47, entitled 'Enforcement of financial collateral arrangements', provide:

'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:

(a) financial instruments by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations;

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

…

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.'

B. Lithuanian law

6. It can be seen that, when transposing Article 2(1)(c) of Directive 2002/47, the Lithuanian legislature referred to a 'financial collateral arrangement with no transfer of title' rather than a 'security financial collateral arrangement'. Article 2(8) of the Lietuvos Respublikos finansinio užtikrinimo susitarimų įstatymas (Law of the Republic of Lithuania on Financial Collateral Arrangements) ('the FUSĮ') indicates that:

'"Financial collateral arrangement with no transfer of title" means an arrangement under which a collateral provider provides financial collateral guaranteeing fulfilment of the relevant financial obligations to, or in favour of, a collateral taker, but the full or qualified ownership of the financial collateral remains with the collateral provider.'

7. Paragraphs 3 and 8 of Article 9 of the FUSĮ provide:

'3. Following the occurrence of an enforcement event, the collateral taker shall be entitled to realise unilaterally the financial collateral provided under a financial collateral arrangement with no transfer of title in the following manners, subject to the terms agreed in that financial collateral arrangement with no transfer of title:

…

8. A financial collateral arrangement shall come into effect in accordance with the time limits specified therein, notwithstanding the commencement of winding-up proceedings or the application of reorganisation measures in respect of the collateral provider or collateral taker.'

III. Background to the dispute in the main proceedings

8. In 2011 and 2012, UAB aviacijos kompanija ('Aviabaltika') and the bank AB ('Ūkio bankas') entered into two guarantee issue agreements on the basis of which Aviabaltika's contracting partners were provided with guarantees ('the 2011 and 2012 agreements'). To secure its obligations, Aviabaltika granted security over the funds in the account opened in its name with Ūkio bankas.

9. Following the conclusion of those agreements, Ūkio bankas and Commerzbank AG entered into the counter guarantee agreements, under which Commerzbank provided guarantees to the State Bank of India. The State Bank of India provided guarantees to the beneficiaries of the guarantees, that is to say, Aviabaltika's contracting partners.

10. In May 2013, insolvency proceedings were commenced against Ūkio bankas.

11. Aviabaltika defaulted on its obligations to its contracting partners for whose benefit the guarantees had been issued under the 2011 and 2012 agreements.

12. In 2014, at the request of one of those contracting partners, Commerzbank fulfilled its obligations under the counter guarantee agreements. Commerzbank then debited certain amounts from the funds which Ūkio bankas had deposited in an account to cover the counter guarantees.

13. In the meantime, the Kauno apygardos teismas (Regional Court, Kaunas, Lithuania) upheld Aviabaltika's claim against Ūkio bankas resulting from the transfer of funds as collateral under the financial collateral arrangement as a liability in the insolvency proceedings.

14. After discharging its obligations to Commerzbank, Ūkio bankas deducted part of the amount debited by Commerzbank from funds in an account opened in Aviabaltika's name. Those funds consisted of the indemnity received under the Lithuanian legislation on deposit insurance. In the main proceedings, Ūkio bankas is seeking repayment from Aviabaltika of the remaining portion of the amount owed under the 2011 and 2012 agreements, plus interest.

15. In those proceedings, Aviabaltika argues that Ūkio bankas should have satisfied its claims by debiting the funds in the guarantee cover account. Furthermore, Aviabaltika considers that it will be unable to recover the financial collateral not realised by Ūkio bankas in the insolvency proceedings commenced against that bank. Aviabaltika therefore argues that, if the national courts uphold Ūkio bankas' claim, they will, in practice, be obliging it to pay again to that bank an amount of money equal to the amount of those funds.

16. Ūkio bankas, by contrast, contends that, once the insolvency proceedings had commenced, it was prohibited from discharging a financial obligation which it had not discharged before those proceedings were commenced. Ūkio bankas also asserts that, once the insolvency proceedings had commenced, the funds in the guarantee cover account opened in Aviabaltika's name were included in the assets remaining after Ūkio bankas' insolvency and that, as a result, it could no longer use them to obtain satisfaction of its claims.

17. By judgment of 14 December 2015, the Kauno apygardos teismas (Regional Court, Kaunas) upheld Ūkio bankas' claims relating to the 2011 and 2012 agreements in their entirety.

18. By a ruling of 31 May 2016, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) upheld the judgment of 14 December 2015.

19. Aviabaltika brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

IV. Procedure and questions referred

20. In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 4(5) of Directive 2002/47 be interpreted as imposing an obligation on Member States to establish legal rules which provide that financial collateral is not included in the assets remaining after the insolvency of the collateral taker (a bank in the process of being wound up)? In other words, are Member States obliged to establish legal rules which require that a collateral taker (a bank) should be de facto able to obtain satisfaction of its claim, which is secured by financial collateral (money in an account of the bank and a right of claim to that money), despite the fact that the enforcement event occurred after the commencement of the proceedings for the winding-up of the collateral taker (the bank)?

(2) Should [Article 4(1) and (5)] of Directive 2002/47 be systematically interpreted as conferring on the collateral provider the right to demand that the collateral taker (the bank) should primarily obtain satisfaction of its claim, which is secured by financial collateral (money in an account of the bank and a right of claim to that money), by using the financial collateral, and accordingly as imposing an obligation on the financial collateral taker to give effect to such a demand despite the commencement of proceedings for its winding-up?

(3) If the answer to the second question is in the negative, and the collateral provider satisfies the claim of the collateral taker, which is secured by the financial collateral, by using other assets of the collateral provider, should the provisions of Directive 2002/47, in particular Articles 4 and 8 thereof, be interpreted as meaning that the collateral provider should also have applied to it an exemption from equal treatment of the collateral taker's (the bank's) creditors in winding-up proceedings and that the collateral provider should, in order to recover the financial collateral, be granted priority over other creditors in winding-up proceedings?'

21. Written observations were submitted by Aviabaltika, Ūkio bankas, the Lithuanian Government and the European Commission, who were also present at the hearing which took place on 18 January 2018.

V. Analysis

A. The first question referred

22. By its first question, the referring court seeks to ascertain whether Article 4(5) of Directive 2002/47 requires Member States to ensure that a collateral taker can enforce a security financial collateral arrangement in order to recover its claim against the provider, where the enforcement event occurs after insolvency proceedings have been commenced against that taker. If so, the referring court asks whether Directive 2002/47 determines the way in which the Member States are to ensure that the financial collateral arrangement can be enforced in the event of that taker's insolvency.

23. Although it is apparent from the wording of the first question referred that the referring court regards the two enquiries as identical, it should be observed that ascertaining whether or not there is an obligation to ensure that the taker can enforce the financial collateral arrangement in the event of insolvency is a prerequisite for determining the way in which the Member States are to ensure that it can be enforced.

24. Furthermore, it is true that the referring court is asking, in the context of its first question, whether Directive 2002/47 gives equal weight to protecting the rights of the provider and of the taker where another party to the contract is insolvent. However, it can be seen that, by the same question, the referring court is seeking to establish, in essence, whether the taker can realise the financial collateral when that taker is the subject of insolvency proceedings.

25. In order to answer that question, I will begin by examining whether Member States have an obligation to ensure that the taker can enforce the financial collateral if that taker is declared insolvent. I will then analyse Directive 2002/47 to establish whether it determines the way in which the Member States are to ensure that the financial collateral can be enforced.

1. Preliminary remarks

26. It is apparent from the request for a preliminary ruling that the referring court has not yet given a ruling in its case-law on the issue — which arises in the present case — of the enforcement of a financial collateral arrangement where the enforcement event occurs after insolvency proceedings have been commenced against the taker. However, that court has addressed a similar set of issues in cases concerning repayment of the financial collateral, claimed after winding-up proceedings had been commenced against a collateral taker, but where no enforcement event had occurred.

27. According to Lithuanian case-law, transferring funds to a bank account entails losing title to those funds and acquiring a right of claim against the bank for repayment of the amount transferred. Furthermore, according to that case-law, entering into a security financial collateral arrangement and transferring funds to a bank account as collateral have the effect of granting security over the rights of claim for repayment of those funds.

28. In addition, the national insolvency rules prohibit the enforcement of any obligation not yet enforced at the time of the opening of the insolvency proceedings.

29. Although the provisions of national legislation regarding financial collateral state that the commencement of insolvency proceedings is not to have the effect of limiting the rights of the taker, they nonetheless do not confer similar protection on the provider.

30. In fact, under the relevant national legislation the provider has no right to recover the financial collateral — at least outside the insolvency proceedings — once insolvency proceedings have been commenced against the taker.

31. That is the context in which the referring court states that its concerns stem from the fact that Directive 2002/47 does not clearly define the extent of the provider's rights in the event of winding-up proceedings being commenced against the taker. That court nevertheless considers that, in the *Private Equity Insurance Group* judgment,[4] the Court of Justice interpreted Directive 2002/47 as meaning that it, in essence, precludes insolvency proceedings from having any effect on financial collateral arrangements.

4 Judgment of 10 November 2016 (C-156/15, EU:C:2016:851).

32. The referring court therefore questions how the provisions governing security financial collateral arrangements fit with the national insolvency rules in circumstances such as those of the present case.

2. Does Directive 2002/47 establish an obligation for Member States to ensure that the taker can enforce the financial collateral arrangement in the event of its insolvency?

(a) Positions of the parties

33. Ūkio bankas contends that it is not necessary to answer the part of the first question referred which relates to the taker's right to obtain satisfaction of its claim from the financial collateral in circumstances such as those of the present case. In its view, that part of the first question relates to the specific situation in which the debtor — in the legal relationship arising from the existence of a bank account (the bank) — is the same person as the taker — in the legal relationship resulting from the provision of financial collateral. It argues that the legal relationships between banks and account holders are not covered by Directive 2002/47, but are a matter of national law only.

34. The Lithuanian Government considers that Article 4(5) of Directive 2002/47 does not oblige the Member States to ensure that the taker can recover its right of claim from the financial collateral after insolvency proceedings have been commenced against it. According to that government, Articles 4 and 8 of Directive 2002/47 afford protection for the taker where insolvency proceedings are commenced against the provider. This is a fortiori the case given that Directive 2002/47 barely regulates the rights of the provider.

35. By contrast, the Commission is of the view that Article 4(5) of Directive 2002/47 is intended to protect both parties to the financial collateral arrangement from the effects of insolvency proceedings.

36. Aviabaltika submits that Article 4(5) of Directive 2002/47 clearly and unambiguously entitles the taker to realise the financial collateral notwithstanding insolvency proceedings commenced against it, where the enforcement event occurs after the commencement of those proceedings.

(b) Interpretation of Article 4(5) of Directive 2002/47

37. Under Article 4(5) of Directive 2002/47, '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'.

38. To my mind, the wording of Article 4(5) of Directive 2002/47 leaves no room for doubt that that provision covers situations in which insolvency proceedings are commenced against a taker or against a provider.[5] Article 4(5) of that directive is therefore unambiguously worded as regards the fact that Member States are required to establish a legal framework ensuring that a financial collateral arrangement can be enforced in accordance with its terms notwithstanding the commencement of insolvency proceedings against the taker.

39. However, those findings do not necessarily mean that Member States are obliged to adopt rules according to which financial collateral is not included in the assets remaining after the taker's insolvency.

5 See, to that effect, Devos, D., 'The Directive 2002/47/EC on Financial Collateral Arrangements of June 6, 2002', De Walsche, A., Vandersanden, G., *Mélanges en hommage à Jean-Victor Louis*, Vol. II, Editions de l'Université de Bruxelles, Brussels, 2003, p. 269.

3. Does Directive 2002/47 determine the way in which Member States should ensure that the financial collateral arrangement can be enforced where the taker is the subject of insolvency proceedings?

(a) Positions of the parties

40. The Lithuanian Government considers that excluding financial collateral from the assets remaining after the taker's insolvency should not be regarded as indispensable to transposing Directive 2002/47 correctly. That government further asserts that financial collateral deposited in cash with a credit institution also falls within the scope of Directive 2014/49/EU.[6] That directive makes no mention of financial collateral as a mechanism which should be given special status. It is protected as a deposit and, like other deposits, forms part of the assets remaining after the insolvency of the credit institution.

41. In the same vein, Ūkio bankas observes that EU law contains no general principle requiring that an asset received from another person be kept separately from the receiving person's other assets. If the EU legislature had wanted that outcome, it would have adopted an explicit rule specifically on that point. Ūkio bankas invokes a number of measures of secondary EU law in support of its position.

42. In contrast to the positions of the Lithuanian Government and Ūkio bankas, Aviabaltika and the Commission consider that transferring funds under a security financial collateral arrangement cannot entail those funds being included in the taker's assets.

43. Specifically, Aviabaltika disputes the underlying premiss of the first question referred. It argues that in the present case the funds transferred as financial collateral do not in fact form part of the taker's assets.

44. The Commission goes into more detail in this respect. It considers that, in the context of Directive 2002/47, it is necessary to distinguish between two types of financial collateral arrangement, namely security arrangements and arrangements with a transfer of title. According to the Commission, the financial collateral provided under a security financial collateral arrangement should not be included in the taker's assets in the event of the taker being wound up. The Commission states that, in the draft of the directive at issue, it included a recital 13, the second sentence of which provided, in relation to security financial collateral arrangements, that the provider could retain ownership of the pledged cash and be protected in cases where the taker becomes bankrupt.[7] Even though Directive 2002/47 did not reproduce the second sentence of recital 13 of the draft directive, it did not abolish the two separate categories of financial collateral arrangement. Indeed, according to the Commission, the interpretation to the effect that the provider would lose its title to the cash provided under a security financial collateral arrangement would negate the difference between those two categories of arrangement.

(b) The effects of transferring funds to a bank account and providing financial collateral

45. First of all, it should be noted that in their observations Aviabaltika and the Commission are referring not to the assets remaining after the taker's insolvency but to the taker's assets. Indeed, Aviabaltika and the Commission seem to consider that in the present case the issue of keeping the financial collateral outside the assets remaining after insolvency should not arise because we are dealing with security financial collateral.

6 Directive of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149).

7 See Proposal for a Directive of the European Parliament and of the Council on financial collateral arrangements (COM(2001) 168 final of 27 March 2001).

46. Admittedly, academic thinking has suggested that in the case of a security financial collateral arrangement within the meaning of Directive 2002/47, the taker's creditors have no rights over the funds transferred as financial collateral because, ultimately, those funds do not belong to the taker's assets. [8]

47. However, it can be seen that this is not the situation in the present case. It is apparent from the order for reference that, under the Lithuanian legislation, transferring money to a bank account entails losing title to those funds.

48. Moreover, in response to a question put by the Court at the hearing, the Lithuanian Government stated that, where collateral is provided in the form of cash paid into an account opened with the taker, a collateral arrangement with transfer of title is distinguished from a security financial collateral arrangement on the basis of who owns the account in question. Where the account is opened in the provider's name, the arrangement is a security financial collateral arrangement whereas, if the taker is the account holder, the arrangement is a collateral arrangement with transfer of title.

49. It therefore seems to me that, in the present case, the reason why the referring court is uncertain whether the financial collateral must be kept outside the assets remaining after the taker's insolvency is that — according to the Lithuanian legislation as interpreted by national case-law — transferring funds to a bank account (whoever is the holder) has the effect that the funds vest in the bank. [9]

50. Against this background, it is worth noting that the referring court's position is not clear in terms of identifying what is covered by the financial collateral.

51. On the one hand, when, in its first two questions, the referring court talks about the financial collateral, it mentions the funds in the bank account and the right of claim to those funds. On the other hand, in its request the referring court states that, in the present case, the financial collateral consists of the right of claim to the funds in Aviabaltika's bank account with Ūkio bankas.

52. In any event, it seems to me that, according to the referring court, the right to claim repayment of those funds is also included in the assets remaining after the taker's insolvency. That is why, in its first two questions, the referring court asks whether the funds and the right of claim are to be kept outside the assets remaining after the taker's insolvency.

(c) Protecting the ability to enforce financial collateral

53. Aviabaltika and the Commission consider that, in the case of a security financial collateral arrangement, Directive 2002/47 obliges Member States to ensure that the financial collateral is not included in the taker's assets. As a result, the financial collateral cannot be included in the assets remaining after that taker's insolvency.

54. Therefore, they submit that the only solution in keeping with Article 4(5) of Directive 2002/47 is that the assets covered by the financial collateral must be kept separate at the time the collateral is provided.

55. However, I do not find such a stark approach persuasive. It should be borne in mind that, according to Article 288 TFEU, a directive, including therefore Directive 2002/47, is binding on Member States as to the result to be achieved, but leaves it to the national authorities to decide the form and methods.

8 See T'Kint, F., Derjcke, W., *La Directive 2002/47/CE concernant les contrats de garantie financière au regard des principes généraux du droit des sûretés*, Euredia, 2003, Vol. 1, p. 55.

9 See, also, summary of the national case-law in points 27 to 30 of this Opinion.

56. Against this background, it should be noted that the legal systems of the Member States have profoundly different approaches to insolvency. The same is true of the provisions of national legislation regarding the effects of transferring the assets covered by the financial collateral to the taker.

57. That is why the legislature chose not to adopt a measure on financial collateral as a unitary EU instrument. It sought instead to establish the regime for financial collateral with as little disturbance as possible to the legal framework currently in place in the Member States. [10]

58. That is also, to my mind, why Article 4(5) of Directive 2002/47 obliges the Member States to ensure that a financial collateral arrangement can take effect 'notwithstanding', in particular, the commencement of insolvency proceedings against the taker. To use the words of the second sentence of recital 12 of Directive 2002/47, which corresponds to Article 4(5) of that directive, this is a matter of giving financial collateral arrangements 'protection' from some rules of insolvency law. That approach is also confirmed by the explanatory memorandum to the draft directive, according to which that directive aims to provide limited protection of collateral arrangements from some rules of insolvency law, in particular those that might inhibit the effective realisation of collateral. [11]

59. In that context, I note that Directive 2002/47 does not determine the way in which the financial collateral is to be 'protected' against national insolvency rules. In any event, unlike the other EU secondary legislation to which Ūkio bankas refers, [12] Directive 2002/47 does not require the financial collateral to be kept separate at the time it is provided. Accordingly, it does not seem to me that keeping the financial collateral outside the taker's assets is the only solution imposed by Directive 2002/47.

60. I consider that, when transposing Directive 2002/47, the Member States are entitled to adopt different solutions to protect financial collateral from national insolvency rules, thereby ensuring that the commencement of insolvency proceedings against the taker cannot affect enforcement of the financial collateral arrangement.

61. The Member States could, in particular, qualify the provisions which determine the effects of placing the financial collateral at the taker's disposal, so that the collateral does not form part of the taker's assets at the time it is provided. They could also qualify the national insolvency rules which identify the assets forming part of the assets remaining after insolvency. Furthermore, a solution whereby the financial collateral falls within the assets remaining after insolvency, while the taker remains entitled to realise that collateral notwithstanding the ongoing insolvency proceedings, cannot be dismissed out of hand.

62. In the light of the arguments set out above, I propose that the Court's answer to the first question referred should be that Article 4(5) of Directive 2002/47 must be interpreted as meaning that the Member States are obliged to adopt rules which enable the collateral taker to recover its claim against the financial collateral provided under a security financial collateral arrangement, even if the enforcement event occurred after insolvency proceedings were commenced against that taker. It is for the Member States to establish the way in which they should ensure that the security financial collateral arrangement can be enforced where the taker is the subject of such proceedings.

10 See, to that effect, explanatory memorandum to the proposal for a Directive of the European Parliament and of the Council on financial collateral arrangements (COM(2001) 168 final of 27 March 2001) ('the explanatory memorandum to the draft'), point 2.3.

11 See explanatory memorandum to the draft, point 2.1.

12 See, inter alia, Article 39 and Article 48(7) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ 2012 L 201, p. 1). See, also, Article 10 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35). Article 10 of Directive 2015/2366 establishes two means of satisfying the safeguarding requirements. Member States may choose between keeping the funds separate (Article 10(1)(a)) and imposing an obligation to insure the funds in question (Article 10(1)(b)).

B. The second question referred

63. By its second question, the referring court seeks to establish whether Directive 2002/47 confers on the provider the right to demand that the taker primarily use the financial collateral to obtain satisfaction of the secured claim and accordingly imposes an obligation on that taker to recover its claim from that collateral.

1. Positions of the parties

64. Ūkio bankas states, in the first place, that in the event of insolvency, the bank cannot recover its claim from the financial collateral where that collateral consists of funds in an account opened by the provider with that bank.

65. In the second place, Ūkio bankas indicates that Directive 2002/47 gives the taker the right to choose how it enforces its claim against the provider. It contends that Article 4(1) and (5) and Article 2(1)(l) of that directive relate to the fact that it must be possible to realise the financial collateral. Article 4 of Directive 2002/47, in paragraphs 1 and 5 thereof respectively, uses the expressions 'that … the collateral taker *shall be able* to realise in the … manners [listed in this paragraph] any financial collateral' and 'that a financial collateral arrangement *can* take effect in accordance with its terms'.[13] Article 2(1)(l) of Directive 2002/47, for its part, provides that, on the occurrence of an enforcement event, 'the collateral taker *is entitled* to realise or appropriate financial collateral or a close-out netting provision comes into effect'.[14]

66. In the same vein, the Lithuanian Government considers in particular that, under Article 4(1) of Directive 2002/47, the Member States have a duty to ensure that the collateral taker can avail itself of the means of realising the collateral laid down in that provision.

67. By contrast, Aviabaltika maintained at the hearing that the expressions to which Ūkio bankas and the Lithuanian Government refer mean that the taker may decide, if it so wishes, whether or not to recover its claims against the provider.

68. Aviabaltika also submits that Article 4(1) and (5) of Directive 2002/47 does not expressly govern the issue of whether the taker is obliged to recover its claim primarily from the collateral provided. Whether or not such an obligation exists and the extent thereof must, according to Aviabaltika, be established by the arrangement entered into between the parties, having regard to the provisions of national legislation applicable to that arrangement and the objectives of Directive 2002/47. On the basis of that premiss, Aviabaltika considers that the presumption that the collateral should be realised first is an implied term of the arrangement.

69. In the same vein, the Commission considers that Article 4(1) and (5) of Directive 2002/47 must be interpreted as conferring a right on the provider to demand that the taker obtains satisfaction of its claim primarily using the collateral under the arrangement, unless that arrangement provides otherwise.

2. The methods of realising the financial collateral

70. It is clear that, in linguistic terms, Article 2(1)(l) and Article 4(1) and (5) of Directive 2002/47 imply an option rather than an obligation to realise the financial collateral.

13 Emphasis added.

14 Emphasis added.

71. However, account should be taken of the fact that the taker is entitled to realise the financial collateral on occurrence of 'the enforcement event' within the meaning of Article 2(1)(l) of that directive. This therefore concerns an eventuality rather than a definite event. Consequently, the fact that the enforcement event is not definite may explain why Article 4(5) of Directive 2002/47 concerns the possibility that a financial collateral arrangement might be capable of taking effect notwithstanding the commencement of insolvency proceedings.

72. As regards the use of the expressions 'the collateral taker *shall be able* to realise [the financial collateral]' in Article 4(1) of Directive 2002/47 and 'the collateral taker *is entitled* to realise … financial collateral' in Article 2(1)(l) of that directive, I note that those provisions establish several methods of realising the financial collateral. This could explain why there is an option rather than an obligation to use one of those methods.

73. It can be seen that interpreting the expressions set out in the provisions at issue which refer to an option to realise the financial collateral — in Article 4(1) and (5) in particular — does not afford an unequivocal answer to the second question referred.

74. However, it should be noted that Article 4(1) and (5) of Directive 2002/47 refers to the terms of the arrangement in order to determine the way in which the financial collateral is to be realised. Furthermore, several provisions of Directive 2002/47, like Article 4(5) of that directive, also give a degree of weight to the 'terms'[15][16] of the financial collateral arrangement. Those provisions are intended to ensure that the financial collateral arrangement is enforced in accordance with the parties' original arrangements, notwithstanding any external circumstance, including the commencement of insolvency proceedings.

75. It follows that, in the context of Directive 2002/47, the arrangements made by the parties to a financial collateral arrangement enjoy special status. It can therefore be argued that that directive aims above all to uphold the intentions of the parties as expressed at the time the financial collateral arrangement was entered into. As a result, the answer to the second question referred depends on how the financial collateral arrangement entered into between the parties to the dispute in the main proceedings is interpreted.

76. Contrary to the assertions of Aviabaltika and the Commission, I do not think that Directive 2002/47 establishes a presumption that the taker must recover its claim from the financial collateral unless the financial collateral arrangement provides otherwise. That issue depends, inter alia, on the solutions adopted by the national legislature as regards interpreting arrangements entered into between individuals.

77. Accordingly, Article 4(1) and (5) of Directive 2002/47 must be interpreted as not obliging the collateral taker to obtain satisfaction of its claim primarily using the collateral provided under the security financial collateral arrangement.

3. The implications of the proposed solution for recovery of the unused collateral by the provider

78. I appreciate the argument put forward by Aviabaltika and the Commission that the fact that the taker is not obliged to obtain satisfaction for its claim primarily using the financial collateral could prevent the provider from effectively recovering that collateral in the event of the taker's insolvency, with the result that, in practice, that provider would have to pay the amount of the financial collateral twice.

15 See Article 5(1) of Directive 2002/47.

16 See Article 6(1) and Article 7(1) of Directive 2002/47.

79. However, bearing in mind the first two solutions envisaged in point 61 of this Opinion, namely (i) that the financial collateral is kept outside the taker's assets and (ii) that it is kept outside the assets remaining after that taker's insolvency, the provider should be entitled to recover the collateral and to receive full reimbursement thereof notwithstanding the commencement of insolvency proceedings. It can be seen that both those solutions have lasting effects, with the result that the fact that the taker has obtained satisfaction through other assets of the provider does not entail a risk of the provider not being able to recover the unused collateral.

80. Such a risk does arise however with regard to the third of the solutions envisaged in point 61 of this Opinion, namely the situation in which the financial collateral falls within the assets remaining after the insolvency. In this case, the taker might recover its claim from other assets of the provider, who would then be forced to seek to recover the unused collateral in the insolvency proceedings in accordance with the ranking of creditors laid down by the relevant provisions of national legislation. Consequently, in some cases, the provider might be unable effectively to recover the financial collateral, even though the taker has recovered its claim from other assets of that provider.

81. I am not convinced that this solution is in line with the objectives pursued by the EU legislature.

82. In general terms, the regime established by Directive 2002/47 is to contribute — according to recital 3 of that directive — to the integration and cost-efficiency of the financial market and to the stability of the financial system in the European Union.

83. As regards how the regime governing financial collateral arrangements established by Directive 2002/47 fits with the national insolvency rules, recital 5 of that directive states that the directive aims to improve the legal certainty of financial collateral arrangements.

84. Furthermore, the second sentence of recital 12 of Directive 2002/47 refers not to the taker or provider being 'protected' but to the 'protection' of financial collateral arrangements from national insolvency rules. Moreover, it should be noted that recital 11 of Directive 2002/47, although it concerns the scope of that directive, also states that the directive seeks to protect financial collateral arrangements which satisfy the formal requirements established by that directive. In that vein, the Court observed, in paragraph 50 of the *Private Equity Insurance Group* judgment,[17] that the regime established by Directive 2002/47 confers an inherent advantage on financial collateral.

85. The considerations set out above show that Directive 2002/47 is intended not only to safeguard the option to realise the financial collateral in the event of the insolvency of one of the parties, but also to establish a specific regime governing financial collateral arrangements as a mechanism characterised by legal certainty, thereby contributing — as recitals 3 and 17 of that directive indicate — to the stability of the EU financial system.

86. I do not think that that aim can be reconciled with the solution arising from the national legislation whereby, in circumstances such as those at issue in the main proceedings, the collateral provider has to pay the taker a second time an amount of money equal to the amount of the financial collateral.

87. This is a fortiori the case given that, in some situations, such a solution could lead to the provider in question becoming insolvent. It is apparent from recital 17 of Directive 2002/47 that the financial collateral regime established by that directive is intended to limit contagion effects in case of a default of a party to a financial collateral arrangement.

17 See judgment of 10 November 2016 (C-156/15, EU:C:2016:851).

88. Accordingly, the option of recovering the claim from the provider's other assets cannot prevent that provider from effectively recovering the financial collateral, notwithstanding the commencement of insolvency proceedings against the taker. Otherwise, a taker would be systematically encouraged to recover its claims from the provider's other assets in order to obtain, in practice, twice the amount of the financial collateral.

89. In the light of the reasoning set out above, I propose that the Court's answer to the second question referred should be that Article 4(1) and (5) of Directive 2002/47 must be interpreted as not obliging the collateral taker to obtain satisfaction of its claim primarily using the collateral provided under the security financial collateral arrangement. Such an obligation may however arise from the terms of the financial collateral arrangement as interpreted in the light of the provisions of the law applicable to that arrangement. In any event, the option of recovering the claim from other assets of the provider once an enforcement event has occurred cannot prevent that provider from effectively recovering that unused collateral in the event of the commencement of insolvency proceedings against the taker.

C. The third question referred

1. Admissibility

90. By its third question, raised in the event that the Court answers the second question in the negative, the referring court requests the Court of Justice to clarify whether the provider should be ranked above the other creditors of the insolvent taker so that it can recover the financial collateral where the taker has recovered its claim from other assets of that provider.

91. It should be noted that, in my view, the third question referred is completely unrelated to the subject matter of the dispute in the main proceedings, and its admissibility is therefore questionable.

92. That question concerns the conduct of the insolvency proceedings commenced against Ūkio bankas. In that regard, I would point out that, according to the request for a preliminary ruling, the court which commenced the insolvency proceedings against Ūkio bankas upheld Aviabaltika's claim against Ūkio bankas as a liability of that bank. [18]

93. However, the main proceedings are between Ūkio bankas and Aviabaltika and concern the enforcement of the 2011 and 2012 agreements. Moreover, it is not apparent from the request for a preliminary ruling that Aviabaltika made any counterclaim against Ūkio bankas. Thus, in the dispute in the main proceedings, the referring court is not called upon to resolve the matters relating to the recovery of Aviabaltika's claim against Ūkio bankas in the insolvency proceedings.

94. Therefore, I do not believe that an answer to the third question referred will be of use in resolving the dispute in the main proceedings.

95. I also note that the referring court does not invoke any rule of Lithuanian law which could affect the ranking of the taker's creditors and favour the collateral provider. Accordingly, it seems to me that, when transposing Directive 2002/47, the Lithuanian legislature did not decide to protect the provider's rights by means of the national insolvency rules which determine the order in which the creditors of the insolvent undertaking must be satisfied.

18 See point 13 of this Opinion.

96. In any event, the third question referred would be relevant only if the financial collateral were to be included in the assets remaining after the taker's insolvency. According to my analysis of the first question referred, such a solution is, in principle, permissible under Directive 2002/47.[19] Moreover, it is apparent from the request for a preliminary ruling that this is the solution envisaged by the Lithuanian case-law.

97. Furthermore, as regards whether the provider should be ranked above the other creditors of the insolvent taker so that it can recover the financial collateral once the taker has recovered its claim from other assets of the provider, it is apparent from my answer to the second question referred that the option to recover the claim from the provider's other assets cannot prevent that provider from effectively recovering the unused collateral.

98. However, in relation to the third question referred, the referring court harbours doubts as to whether the unused collateral can be recovered where the taker is the subject of insolvency proceedings. Specifically, the referring court seeks to ascertain whether Directive 2002/47 is capable of affecting the national insolvency rules which determine the order in which the taker's creditors should be satisfied. That matter has not been resolved in my analysis of the second question referred.

99. While I accept that my observations on the third question referred are hypothetical, I consider that analysing this issue is useful for setting out all the legal aspects of the case at issue in the main proceedings, in so far as it concerns the Member States' obligation to grant the provider priority so that it can recover the unused collateral where that collateral is included in the assets remaining after the taker's insolvency.

2. The effect of Directive 2002/47 on the national insolvency rules

100. Ūkio bankas considers that Directive 2002/47 does not grant the provider any priority over the taker's other creditors in the insolvency proceedings in order to recover the financial collateral, and that the principle of equal treatment of the creditors of the insolvent bank should apply. Aviabaltika, the Lithuanian Government and the Commission are of the view that the provisions of Directive 2002/47 do not govern the order in which the creditors of the insolvent undertaking must be satisfied.

101. I am, however, not convinced that the fact that Directive 2002/47 contains no provisions fixing the ranking of creditors means that that directive is not capable, when transposed, of affecting the provisions of national legislation governing the order in which the creditors of the insolvent undertaking must be satisfied.

102. In the event that the national legislature sees fit to include the financial collateral provided under the security financial collateral arrangement in the assets remaining after the taker's insolvency, that legislature should accept the consequences of its decision and reflect them in the national insolvency rules, including the rules determining the order in which the creditors of the insolvent undertaking must be satisfied.

103. First, in point 59 of my Opinion in *Private Equity Insurance Group*,[20] referring to the arguments of certain interested persons who considered that the protection granted by the financial collateral at the time it was realised was capable of affecting the ranking of creditors as determined by national insolvency rules, I observed that, 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. I consider that the Court shared that view in its judgment. In the *Private Equity Insurance*

19 See point 61 of this Opinion.
20 C-156/15, EU:C:2016:586.

Group judgment,[21] the Court held that '[the] different treatment [of creditors as a result of the specific nature of financial collateral] is based on an objective criterion that relates to the legitimate aim of Directive 2002/47, which is to improve the legal certainty and effectiveness of financial collateral in order to provide stability in the financial system.'

104. Second, in terms of the effects on the ranking of creditors, I see no meaningful difference between keeping the financial collateral provided under a security financial collateral arrangement outside the assets remaining after the taker's insolvency, and changing the ranking of creditors. In both cases, that collateral would be repaid to the provider, notwithstanding the claims of the taker's other creditors.

105. Third, it is true that Directive 2002/47 — according to Article 8(4) thereof — does not affect the general rules of national legislation regarding insolvency in relation to the voidance of transactions entered into, in particular, during the period preceding the commencement of winding-up proceedings.

106. However, it does not seem to me that that provision can be interpreted as meaning that, when transposed, Directive 2002/47 is not capable, in principle, of affecting the national insolvency rules.

107. Article 8(4) of Directive 2002/47 would be redundant if Directive 2002/47 were not capable of affecting such rules. I am therefore more inclined to regard that provision as an exception to the general rule that the Member States are entitled to modify the national insolvency rules in order to safeguard the objectives pursued by that directive.

108. Consequently, I consider that, in the event that the national legislature sees fit to include the financial collateral provided under the security financial collateral arrangement in the assets remaining after the taker's insolvency, that legislature must grant the provider priority over the other creditors involved in the insolvency proceedings so that that provider can effectively recover the collateral where the taker has not realised that collateral after the occurrence of an enforcement event.

109. In the light of the arguments set out above, and assuming that the Court decides to answer the third question referred, I propose that it should answer that, in the event that the national legislature sees fit to include the financial collateral provided under the security financial collateral arrangement in the assets remaining after the taker's insolvency, Directive 2002/47 requires that the provider be granted priority over the other creditors of the insolvent taker, so that that provider can recover the unused collateral where the taker has recovered its claim from other assets belonging to that provider.

VI. Conclusion

110. In the light of the foregoing, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) as follows:

(1) Article 4(5) 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 meaning that the Member States are obliged to adopt rules which enable the collateral taker to recover its claim against the financial collateral provided under a security financial collateral arrangement, even if the enforcement event occurred after insolvency proceedings were commenced against that taker. It is for the Member States to establish the way in which they are to ensure that the security financial collateral arrangement can be enforced where the taker is the subject of such proceedings.

21 See judgment of 10 November 2016 (C-156/15, EU:C:2016:851, paragraph 51).

(2) Article 4(1) and (5) of Directive 2002/47 must be interpreted as not obliging the collateral taker to obtain satisfaction of its claim primarily using the collateral provided under the security financial collateral arrangement. Such an obligation may however arise from the terms of the financial collateral arrangement as interpreted in the light of the provisions of the law applicable to that arrangement. In any event, the option of recovering the claim from other assets of the collateral provider once an enforcement event has occurred cannot prevent that provider from effectively recovering that unused collateral in the event of the commencement of insolvency proceedings against the taker.