CONDITIONS FOR THE USE OF COLLATERAL BY A SECURED CREDITOR

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The idea that a pledgor could have the right to use its collateral[2] is in our legal system nothing new. Although the last significant reform of security interest provided also a collateral taker[3] with the right to use, with the pledgor's consent, a pledged moveable property handed over to it[4] (ius utendi), the idea that also a pledgor should have the possibility to dispose with collateral (ius disponendi) is unusual for the Slovak legal environment. Simply the first attempt to implement the Financial Collateral Directive in the amendment to the Securities Act and the Civil Code in 2004[5] laid down the right of certain collateral takers to dispose with a collateral. In June 2005 another amendment[6] to the Securities Act, governing among others this right of a collateral taker (hereinafter the amendment to the Securities Act, or the Amendment) was passed.

The amendment to the Securities Act provides the opportunity to think above the current Slovak law on the use of collateral by a secured creditor.

Given the extensive nature of the issue, we shall in this article deal only with the conditions that must be fulfilled in order that a secured creditor has the right to use (in the sense of ius utendi and ius disponendi) the collateral according to the Financial Collateral Directive and its implementation into Slovak law. Next year we shall focus on the legal aspect of the use itself of a collateral by a collateral taker and the subsequent settlement between such a creditor and the securing entity.

Collateral. The term collateral in several languages means an asset that serves as the object of

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[1] The author is a legal counsel of the European Investment Bank. The opinions expressed by the author in this article are only opinions of the author and may be different from the opinions of the European Investment Bank.

[2] The Civil Code § 151i para (1). References made in this article to certain regulations are in the following abbreviated form: SR Act of Parliament no. 566/2001 Coll. on securities and investment services and on the amendment to certain acts as later amended (the "Securities Act"); Directive of the European Parliament and Council No. 2002/47/EC of 6 June 2002 on financial collateral arrangements (the "Directive" or the "Financial Collateral Directive"); notification of the National Bank of Slovakia No. 36/2004 Coll. on the issuing of Measure No. 4/2004 on the capital adequacy of banks' financing of 16 January 2004 ("Capital Adequacy Measure"); SR Act of Parliament no. 7/2005 Coll. on bankruptcy and restructuring and on the amendment and supplementing of certain acts of 9 December 2004 (the "Bankruptcy and Restructuring Act"); Slovak Act of Parliament No. 40/1964 Coll. as later amended of 26 February 1964, effective as of 1 April 1964 (the "Civil Code"); SR Act of Parliament no. 483/2001 Coll. on banks and on the amendment and supplementing of certain acts as later amended of 5 October 2001 (the "Banks Act"); SR Act of Parliament no. 95/2003 Coll. on insurance and on the amendment and supplementing of certain acts as later amended (the "Insurance Act"); SR Act of Parliament no. 594/2003 Coll. on collective investment and on the amendment and supplementing of certain acts as later amended (the "Collective Investment Act"); SR Act of Parliament no. 429/2002 Coll. on the stock exchange as later amended (the "Stock Exchange Act"); Directive 2004/39/EC of the European Parliament and Council of 21 April 2004 on markets in financial instruments (the "Financial Instruments Markets Directive"); Directive 2003/71/EC of the European Parliament and Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (the "Prospectus Directive"); Directive 2000/12/EC of the European Parliament and Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (the "Bank Directive").

[3] In this article the following terms are differentiated: a "secured creditor" is a creditor whose receivable is secured a right of lien, a securitising transfer of a right or in another way; a "securing person" is an entity that secures its own obligation or the obligation of another entity; a "securing debtor" is an entity that secures, through collateral, its own obligation; a "lien creditor" is a creditor whose receivable is secured by a right of lien; a "collateral provider" is an entity that secures its own obligation or obligation of another entity by a right of lien; a "lien debtor" is an entity that secures its own obligation by a right of lien; a "financed person" is an entity that in the framework of a repo trade first sells an asset and then repurchases it; a "financing person" is an entity that in the framework of a repo trade first purchases an asset and then sells it.

[4] The Civil Code § 151i paras. (2) and (3).

[5] SR Act of Parliament no. 635/2004 Coll. amending SR Act of Parliament no. 566/2001 Coll. on securities and investment services and on the amendment and supplementing of certain acts (the Securities Act) as later amended and on the amendment and supplementing of certain acts.

[6] SR Act of Parliament no. 336/2005 Coll. amending Act no. 566/2001 Coll. on securities and investment services and on the amendment and supplementing of certain acts (the Securities Act) as later amended and on the amendment and supplementing of certain acts.

securing rights[7]. In terms of the Slovak legal environment such rights may be said to include, besides pledge[8], the securing transfer of a right[9], the securing transfer of a receivable[10], or the securing transfer of securities[11] (hereinafter these transfers shall be jointly referred to as "securing transfers"), or a lien[12] (hereinafter, jointly referred to as "securing rights"). Since Slovak legal language has no common term for such a securing asset it is reasonable to appropriate the term collateral.

In financial market practice collateral represents as a rule receivables on accounts[13] or similar receivables or highly liquid and creditworthy financial instruments, most frequently bonds. The properties of the collateral, such as its liquidity or quality, should primarily ensure the increased possibility of satisfying the creditor's secured receivable, but the creditor's possibility to actually use the collateral can also be a significant factor.

Right to use a collateral. In the framework of European law, the use of collateral by a collateral taker is governed by the Financial Collateral Directive. This Directive lays down various rules to simplify and improve the effectiveness of collateralisation. These rules include also the right of the collateral taker to use the collateral. This is a sensitive right, as in the framework of it the collateral taker uses an asset not belonging to it. This right is also relatively revolutionary for a continental legal system significantly influenced by the French Napoleonic Code, where in principle the secured creditor was not allowed to use the collateral, sometimes even under the threat of losing the securing rights[14].

The competition of markets in the USA, where the re-use of collateral is possible, being termed "rehypothecation", had a significant influence on the introduction of this institute. The aim of introducing this possibility for the creditor to use a collateral provided was to increase liquidity on European financial markets. A requirement of the secured parties on financial markets may also often be the possibility to ensure the efficiency of their portfolio with a collateral and not the freezing of securing assets for a certain period[15]. Although secured creditors in international financial markets usually give preference to title transfer over security interests, this mobility of collateral is sometimes necessary also in the case of a security interest. It is used mainly in countries where security through a securing transfer is, for various reasons, problematic.

Basic preconditions for the right to use a collateral

Pursuant to the Financial Collateral Arrangements Directive and also the Securities Act in order for the right to use a collateral to arise several conditions must be fulfilled. These requirements concern: (i) collateral; (ii) securing rights; (iii) the secured receivable; (iv) the parties to the collateral relationship; and (v) contractual entitlement.

Nature of the collateral

Eligible collateral. Under the Financial Collateral Directive only financial collateral is usable as collateral, as defined in the Directive, i.e. receivables on an account or other similar payment receivables, or possibly financial instruments[16]. Under Slovak law these forms of collateral may be, besides receivables on accounts or other forms of deposits (hereinafter a "receivable on an account")[17], securities[18]. Cash in the form of banknotes and coins is not subject to any special regime. It is also necessary to draw attention to the fact that the term financial instrument under the Financial Collateral Arrangements Directive and the term "securities" overlap only partially.

Boundaries of Slovak law. The first group outside the conjunction in the meaning of these terms includes securities that are not financial instruments pursuant to the Financial Collateral Directive. This con-

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[7] The English word "collateral" has also found its place in French texts, in the form "collatéral", even if originally it had several other meanings. Sometimes "collateral" in these languages means the securing right itself. In this text however the term "collateral" is used in the meaning of a securing asset.

[8] The Civil Code § 151a et seq., the Securities Act § 45 et seq.

[9] The Civil Code § 553.

[10] The Civil Code § 554.

[11] The Securities Act § 53.

[12] The Civil Code § 151a et seq.

[13] The jargon for this case is often "cash", but since in Slovak law, and as a rule likewise in other jurisdictions, an entitled person to an account does not have right of property to the money on the account, but rather only a receivable for payment, it is necessary to understand the terms in relation to a right of lien to a receivable on accounts. In relation to securities held on a holder's account under Slovak law it is no longer possible to speak of a receivable towards this security, but rather of ownership. Conversely, we cannot speak of a direct property right in systems of indirect ownership of securities based on the trust institute (for example, England) or co-ownership (for example, Belgium).

[14] See Devos, D.: The Directive 2002/47/EC on Financial Collateral Arrangements of June 6, 2002. Editions de l'Université de Bruxelles: Brusel 2003, s. 266. ISBN 2-8004-1316-6.

[15] Reasoning (19) of the Financial Guarantees Directive.

[16] Financial Collateral Directive, Article 1(4)(a).

[17] Civil Code, Article 151me.

[18] Act on Securities, Article 53a et seq.

cerns primarily cheques, travellers cheques that are payment instruments excluded from the scope of the Financial Collateral Directive. It also seems that this group covers deposit books, warehouse bonds and warehouse warrants, which apparently cannot be deemed money market instruments nor be deemed negotiable on capital markets[19]. In this field it may be simply said that the Slovak legislator has been more benevolent than European Community regulations.

Boundaries of European law. More problematic is the group of financial instruments that are not securities. Such instruments under the Financial Collateral Directive include rights to securities, in particular co-ownership rights. Also in relation to the rights to the respective securities in other jurisdictions[20], in the legal practice of Slovak collateral takers it will be important to realise to what governing law the given right to use securities is subject, because Slovak legislation in this field is probably at variance with European legislation and does not allow such use in the framework of a security interest.

Qualified types of securing rights

Security interest. The Financial Collateral Directive lays down expresis verbis the obligation of member states to allow collateral takers to use collateral that is the object of a security interest under the conditions determined therein[21]. Slovak law here has apparently taken its cue only from this part of the Directive, since it explicitly governs the use of collateral only in the framework of the security interest.

Securing transfers. In the case of securing transfers it is necessary to work from a general interpretation of the nature of the rights that have been assigned or transferred. If someone has acquired the right of property to a certain asset it is expected that a component of this right is also the ius disponendi element, i.e. the right to dispose with it. Likewise, the assignee has in principle the right to dispose with the acquired receivable, or right[22].

Sometimes in Slovak legal circles there arise, due to the stringent legislation, doubts as to the scope of the right of a secured creditor to dispose with a collateral that is the object of a securing transfer. There is a worry as to whether Slovak courts will not emphasise more the securing function of this institute, meaning the resulting obligation to return to the collateral provider the same collateral following fulfilment of the secured receivable, and not simply collateral of the same kind. Some commentators, even if with a certain degree of reserve, even state that while ownership acquired in the framework of a securing transfer of a right "entitles the creditor equally as does any other ownership, the creditor however as a rule does not use this right of property until the debtor fulfils its obligations from the secured liabilities"[23].

Under the Financial Collateral Directive the right to dispose with such collateral should not be denied to secured creditors. The Directive does, nevertheless, despite financial market lawyers' recommendations[24], not capture this issue explicitly, but rather charges member states to ensure that a securing transfer arrangement be effective in accordance with its provisions[25]. In other words, this means that a secured creditor should acquire the full right of property with all the rights this incorporates, including right of disposal, in accordance with the respective contract. The Directive also in relation to securing transfers governs the issue of the set-off and close-out netting of the obligation to return equivalent collateral. The obligation to return equivalent collateral also implies that this obligation to return equivalent collateral is based on the assumption that member states allow a secured creditor to use a collateral provided in the framework of a securing transfer of a right[26].

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[19] In relation to these instruments it is not clear whether they may be considered as negotiable on capital markets, as is required by the Financial Guarantees Directive in order that they may fall within its scope. Firstly, it is questionable whether negotiability of these instruments needs to be seen from the legal aspect as the legal possibility to trade such instruments, or from the aspect of liquidity, i.e. the practical possibility of their negotiating. The author inclines more to the legal interpretation. Secondly, if we incline to the legal interpretation, the meaning of this word may be only guessed at, since it is specified neither in the Directive nor the Securities Act. English doctrine, for example, deems a negotiable security to be a security which (i) may be transferred without any specific formalities, i.e. its handover or endorsement are sufficient; and (ii) in relation to which the acquirer in good faith acquires a security regardless the fact whether the selling entity is its owner or not [see Benjamin, J.: The Law of Global Custody. Butterworths: London 1996, p. 16. ISBN 0 406 04836 3]. It is clear that in this time of dematerialised securities even this definition is not sufficient.

[20] These rights were introduced into the Directive mainly in connection with indirect ownership systems of securities, where the holder has only the interest, loosely said he has the right to own and not the ownership right.

[21] Article 5 of the Financial Guarantees Directive relates to a security financial collateral agreement.

[22] This right is held provided that the given disposition is not prohibited by law.

[23] See Planka K. et al.: Občianske právo s vysvetlivkami. 1. zväzok. Iura Edition: Bratislava 2005, p. 468a. ISBN 80-88715-07-5.

[24] See the statement of the European group of lawyers of financial markets: www.efmlg.org/Docs/efmlg-statement.pdf, pg. 4.

[25] Article 6(1) of the Financial Collateral Directive.

[26] Financial Collateral Directive, Article 6(2).

Where cash serves as collateral for a securing transfer, it is provided in practice through a transfer to the secured creditor's account. In the case of transfers from account to account, in the author's view, there does not occur any assignment of a receivable from an account to another entity, because the result of the transfer is, besides the change of creditor, also a change of debtor. In the author's opinion we are here speaking more of an assignment of payments in which the securing debtor's bank has, at the securing debtor's order, the obligation to pay out the respective sum owing in the framework of the receivable from the account to the secured creditor's bank to the secured creditor's account. As a consequence of the acceptance of this receivable by the secured creditor's bank towards the securing debtor's bank there arises to the secured creditor a receivable on the account. Therefore, in the case of this type of securing transfer of cash it is not precise, in the author's opinion, to speak of a securing transfer of a right. Such an interpretation would be possible only if both contracting parties were to have accounts at the same bank.

Neither does the Financial Collateral Directive shed much light on this field, since it speaks of cash as "money on accounts or similar rights to the return of money, such as money market deposits"[27]. It is however clear that the purpose of the Financial Collateral Directive is to encompass within its regime such a guarantee by means of a cash transfer. This understanding of collateral provided by means of a cash transfer is confirmed also by publications concerning the Financial Collateral Directive[28]. It seems then that money provided on the basis of a collateral arrangement to a secured creditor may in principle be used by this creditor and that this use should be recognised also in Slovakia.

Repo trades. Assets acquired in the framework of a repo trade are, according to the reasoning of the Financial Collateral Directive, subject to its regime[29]. A repo trade may simply be considered as a set of two purchase agreement, where in the framework of the first purchase agreement a certain asset is transferred to the other contracting party and where later in the framework of the second purchase agreement this second contracting party sells back to the first contracting party an equivalent asset for a repurchase price set in advance. This repurchase price as a rule corresponds to the purchase price in the first purchase contract increased by interest.

From such a definition it is clear that repo trades, from the pragmatic aspect have a collateral function, but in themselves do not formally constitute security. Although in Slovakia there is the risk that courts could attempt to reformulate such a trade as a securing transfer, this procedure does not seem correct[30]. Repo trades are recognised as a separate institute by several regulations[31]. Since in the framework of a repo trade the financing party acquires the right of property to the transferred asset[32], it results from the disposal component of this right that this party may use the given asset.

Retention Right. Retention right even though it is a collateral institute does not fall within the scope of the Financial Collateral Directive. This Directive relates to arrangements on the provision of collateral and not to security resulting directly from law. Therefore, neither does there relate to this right the possibility of its use under the Slovak implementation.

Nature of the receivable secured

Pledge. In Slovakia a pledge may be established for securing both financial as well as non-financial receivables, provided its value is definite, or may be determined at any time during the life of the security interest. It is irrespective here whether this concerns an existing, future or conditional receivable[33]. By analogy this applies also in the field of judging whether the collateral securing such a receivable may be used. Thus Slovak legislation not merely meets the minimum requirements of the Financial Collateral Directive, but indeed goes beyond them, since the Financial Collateral Directive relates only to obligations for financial ful-

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[27] Financial Collateral Directive, Article 2(1)(d).

[28] See for example Morton, The Collateral Directive. In: Raffan M.: A Practitioner's Guide to EU Financial Services Directives. City&Financial Publishing: London, First Edition p. 179. In this publication Guy Morton mentions that an equivalent collateral provided in the form of cash, i.e. receivables on an account, is provided by means of "the payment of the same amount in the same currency", i.e. not through assigning a receivable.

[29] See reasoning (3) of the Financial Collateral Directive.

[30] See Balaz: Právne aspekty derivátov, repo obchodov a pôžičiek cenných papierov. PrF TU: Trnava 2005, p. 42

[31] Act on Banks, Article 59(1)(e), measure on capital adequacy, Article 13(1), or Act on Bankruptcy and Restructuring, Article 180(1). It would certainly be of benefit to the legal certainty of financial markets were the risk of reformulation expressly removed by law as has happened, for example, in Holland in relation to dissimulation of repo trades as security interest. [see Rank W.: Dutch repo law ends risk of recharacterization. In: IFLR. Euromoney: London, November 2000 p. 14 – 17.].

[32] The issue is more complex in the case of repo trades with currencies, where money on accounts are trades.

[33] Civil Code, Article 151c(1) and (2).

[34] Financial Guarantees Directive, Article 1(1)(b), (c) and (f).

[35] Civil Code, Article 553(1); for collateral transfer of securities see Article 53(1).

filment or the handing over of financial instruments and not to other financial receivables[34].

Securing transfer. Through the securing transfer of a right, or securities the fulfilment of an obligation may be secured[35] and through the securing transfer of a receivable any receivable[36] may be secured, both without further specification. It is clear that such an obligation does not need to be a payment obligation. It is questionable though whether courts would interpret receivables as meaning also future obligations and receivables or conditional obligations and receivables. If it is at all possible that such obligations and receivables could be secured by a pledge, there is no reason to exclude them in relation to other forms of security.

Repo trades. In the case of repo trades we cannot speak of a secured receivable, since formally one trade comprises two purchase contracts. Payment of the purchase price nevertheless predicates a payment receivable.

Nature of the contracting party

Secured creditor. Under the regime provided for by the Financial Collateral Directive a secured creditor is entitled to use a collateral. This particular regime is not subject to the right of the securing debtor to use the collateral, which could have come into consideration mainly in the case of pledge. The right of a pledgor to use a collateral is governed by general regulations of the Slovak Republic outside the Financial Collateral Directive[37].

Qualified institutions. The nature of the parties to a collateral contractual relationship is also important for the possibility to use a collateral in the regime of the Financial Collateral Directive. At least one of the parties must be an eligible, as a rule financial, institution[38]. This part of the Financial Collateral Directive has apparently been the subject of most debate, since some member states' ministers of justice have requested that non-financial institutions be exempted from its effect[39]. In the end non-financial institutions are subject to its regime only if the member state decides so. Through the amendment to the Securities Act non-financial institutions have, in contrast to the Act's original wording, been excluded from the special regime[40].

According to the reasoned statement to the Amendment[41], the aim of this measure is to prevent the scope of the general regulation's application towards entities not having the specific features similar to those of a financial institution from being lessened, since it was only relatively recently that Slovakia undertook comprehensive reform of security interest[42]. It is nevertheless a pity to exclude large non-financial companies from the sphere of parties whose collateral may be used, since these companies, too, often have their own treasury department, with the staff having the necessary education and experience, and thus they could apply the advantages of the special regime in order to optimise their financing[43]. It would thus also be to the benefit of the Slovak financial market's liquidity were the law to allow Slovak banks to use, under certain conditions, collateral provided to them by such companies.

Where the collateral is formed by securities, the Act fictitiously divides qualified institutions into two groups. The first, which we shall term fully qualified institutions, includes central banks of member states, certain multilateral development banks, banks, insurance companies, fund management companies, etc. The second group contains partially qualified institutions, comprising mainly other regulated entities whose main line of business is the acquisition of shares in an asset, and certain entities involved in clearing and payments systems. This means that not all financial institutions operating in Slovakia fall within the sphere of qualified enti-

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36 Civil Code, Article 554.

37 See Article 151i(1) of the Civil Code.

38 Financial Guarantees Directive, Article 1(2), the Securities Act, Article 53a(1), and Civil Code, Article 151me(8).

39 Devos, D.: The Directive 2002/47/EC on Financial Collateral Arrangements of June 6, 2002. Editions de l'Université de Bruxelles: Brusel 2003, pg. 263. ISBN 2-8004-1316-6.

40 Financial Guarantees Directive, Article 1(3).

41 See SR Government Resolution No 283 of 20 April 2005 concerning draft act amending Act No 566/2001 Coll. on securities and investment services and on the amendment to certain acts (the Securities Act) as later amended and on the amendment to certain acts.

42 See commentary to point 4 of the SR Government Resolution No 283 of 20 April 2005 concerning draft act amending Act No 566/2001 Coll. on securities and investment services and on the amendment to certain acts (the Securities Act) as later amended and on the amendment to certain acts.

43 Also the original draft Directive submitted by the Commission foresaw sufficient sophistication of large non-financial companies in its original draft compulsorily subordinated companies with assets exceeding EUR 100 million of equity or EUR 1 billion of gross assets to the Financial Guarantees Directive [COM(2001) 168 final, 2001/0086(COD), pg. 18].

44 Apparently the aim of the legislator was not to include under the expression “entities other than that under point (c) subject to prudent supervision, the main line of business of which is the acquisition of shares in assets pursuant to a specific regulation, as well as an entity seated abroad with a similar line of business” pension fund management companies, but rather foreign investment companies [Article 4(6) of Act No 594/2003 Coll. on collective investment and on the amendment to certain acts as later amended], which do not have their equivalent in Slovakia.

ties. In all likelihood the legislator has not included among the qualified institutions above the compulsory framework, pension fund management companies unregulated at the European level, in the case of which the interest to protect pensioners against financial market liquidity probably took precedence[44].

Multiple entities on the one side of a collateral relationship. An interesting feature of the amendment to the Financial Collateral Act is also the exclusion of the possibility to use collateral in the form of securities where at least one of the parties on the side of the collateral taker or on the side of the pledgor is not a fully qualified financial institution. This provision is also probably at variance with the Financial Collateral Directive. It is not possible to exclude from the special regime of this Directive cases where on one side only partially qualified institutions act, and which fall within the scope of the Directive.

At this stage in the law's development it is not possible to give a definitive answer as to whether under the Financial Collateral Directive the right to use a collateral should relate, for example, to a security interest established jointly in favour of two collateral takers, one of which is a qualified financial institution and the other is not. The judiciary must choose whether to incline towards the argument of the development of financial markets in Europe, which was one of the aims of the Directive, or towards the argument of protecting unqualified institutions, which emerged during the process of passing the Directive.

Agreement on the use of collateral

Security interest. A further requirement for the use of a collateral is an agreement between the participants of a collateral relationship that the collateral taker may use the collateral. Such an agreement was not required before the last amendment to the Securities Act, which was at variance with European legislation and at the limits of the constitutional and international protection of property rights. The conditioning of the use of collateral by a collateral taker through such an agreement is required by the market itself[45].

In the case of a security interest such an agreement is necessary[46]. While under Slovak legislation it is not essential, in order for the contracting parties to set in the agreement the scope in which the collateral taker may use the collateral, it is possible only to recommend this specification in the interest of legal certainty. Under the Financial Collateral Directive the use of collateral by a collateral taker should be allowed only in the scope in which the contracting parties to the collateral relationship have agreed.

On the other hand an interesting rule of the amendment is that anonymous trades in pledged securities may be concluded only if the pledgor has agreed so in the securities pledge agreement. From the aspect of European law it is not correct to require from contracting parties that they explicitly agree the possibility of anonymous trades in deposited securities, but rather it is enough if such a use of securities falls within a more generally formulated agreement on the use of pledged securities. Despite this, it is perhaps pragmatic to meet this requirement of Slovak law in order that the respective contracting parties avoid any unpleasantnesses.

A collateral taker may, provided the manner of the collateral's use entitles him to do so under the agreement with the pledgor, use a collateral also for various investments and thus also profit from the collateral, which originally belonged to the pledgor. It is mainly lien debtors that should realise this fact and either duly request for the provision of this right to the collateral taker an appropriately advantageous interest on the secured receivable, or to provide for the remuneration for the provision of this right in agreement itself on the use of the collateral.

Securing transfers. In the case of securing transfers an agreement on use of the collateral should in principle not be necessary, because this right should ensue from the acquired right of property. Nevertheless, as has already been mentioned, the law in the field of the use of securing transferred in the framework of a securing transfer is not the most explicit, therefore it is safer, even if it may not be mandatory, that the contracting parties in a contract on a securing transfer explicitly provide for the possibility and scope of any possible use of the collateral by the secured creditor.

Repo trades. In the framework of repo trades an agreement on the possibility to use the asset transferred is not necessary. The financing party becomes the owner of the transferred asset, where formally this ownership is not provided as security.

Conclusion

Even though there are several differences between the Financial Collateral Directive and its implementation, in principle it is possible to fulfil the preconditions for the use of collateral so that a secured creditor may subsequently dispose with it. It is a pity that the legislator proceeded restrictively in the case of some

[45] See the statement of the European group of lawyers of financial markets: www.efmlg.org/Docs/efmlg-statement.pdf, pg. 4.
[46] Act on Securities, Article 53b(1), and Civil Code, Article 151me(5).

of them. As however will be shown in the following part of this article, in the case of the insufficient maturity of this law, the issue of expanding the scope of the special regime of the use of a collateral by a collateral taker to other entities is not currently the greatest problem. In the near future it will be necessary to concentrate mainly on removing the barriers the financial market encounters in the use itself of a collateral by a secured creditor and its settlement with the securing entity.