

[ISDA]

[EFMLG]

**DRAFT 19.03.08**

Deleted: 4

Mr. David Wright  
Deputy Director General  
European Commission  
Internal Market and Services DG  
Financial Services Policy and Financial Markets  
Rue de Spa, 2  
1000 - Bruxelles  
BELGIUM

[ ] March 2008

### **Directive 2002/47/EC on Financial Collateral Arrangements – Proposal for a European Netting Directive**

Dear Mr Wright,

We are writing on behalf of the European Financial Markets Lawyers Group (EFMLG)<sup>1</sup> and the International Swaps and Derivatives Association, Inc (ISDA)<sup>2</sup> to express our concern over the Commission's tentative decision not to take on to its agenda the industry's proposals for a substantial overhaul of the Directive 2002/47/EC on Financial Collateral Arrangements (the "Financial Collateral Directive").

In January 2006, the Commission invited the industry to contribute to the evaluation of the Financial Collateral Directive and to render proposals for its further development. At that time, the EFMLG and ISDA welcomed this initiative and contributed to the industry survey by sharing their views on the questions raised by the Commission<sup>3</sup>. Members of the EFMLG and ISDA had also the opportunity to further discuss the industry's position and potential proposals of the Commission's Evaluation Report, which was finally published in December 2006. We have now learned that the Commission is preparing a proposal for a new Directive amending jointly the Financial Collateral Directive and the Directive 98/26/EC on settlement

Deleted: its

Deleted: upcoming

Deleted: to

<sup>1</sup> The European Financial Market Lawyers Group (EFMLG) is a group of senior legal experts from the EU banking sector dedicated to analysing and undertaking initiatives intended to foster the harmonisation of laws and market practices and facilitate the integration of financial markets in Europe following the introduction of the euro. The members of the Group are selected, on the basis of their personal experience, amongst lawyers of those credit institutions based in the EU which are most active in the European financial markets, namely the banks of the Euribor and Eonia panels. More information about the EFMLG and its activities is available on its website at [www.efmlg.org](http://www.efmlg.org).

<sup>2</sup> The International Swaps and Derivatives Association, Inc (ISDA) is the largest global financial trade association, by number of member firms representing leading participants in the privately negotiated derivatives industry. ISDA was chartered in 1985, and today has over 800 member institutions from 55 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the credit and market risks inherent in their core economic activities. More information about ISDA and its activities is available on its website at [www.isda.org](http://www.isda.org).

<sup>3</sup> EFMLG letter entitled 'Response to the Commission Questionnaire regarding the Transposition of Directive 2002/47/EC on Financial Collateral Arrangements' of 7 April 2006, ISDA letter entitled 'Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements' of 3 April 2006, see also ISDA's report entitled 'Collateral Arrangements in the European Financial Market – The Need for National Law Reform' of November 1999 (revised version March 2000).

finality (the “Finality Directive”), but revising only some of the provisions identified in the Evaluation Report.

We fully support the work that the Commission is undertaking, especially as far as the extension of eligible collateral to certain bank receivables and the further harmonisation of the *acquis communautaire* on conflict of laws is concerned. We also understand that the Commission is driven by the concern that further amendments might be premature and require more comprehensive and thorough analysis. However, as summarised in the Appendix to this letter, it is our view that there is certainly room for further progress, in particular where the personal and material scope of the Financial Collateral Directive and the protection of close-out netting are concerned.

As outlined in previous surveys and reports<sup>4</sup>, both the industry and its regulators consider it essential to have a high degree of legal certainty on the enforceability of contractual close-out netting arrangements. Furthermore, the Banking Directive explicitly requires that credit institutions when using contractual netting arrangements – as well as competent authorities – must be satisfied that netting is legally valid and enforceable under the laws of each relevant jurisdiction<sup>5</sup>. This provision highlights the Community’s concern for legal certainty in view of its implications for the prudential supervision of credit institutions and the stability of the financial system and at the same time the need for the Community to take action to enable its banks to comply with such requirements.

We do believe that it is feasible to provide legal certainty by enacting a new Netting Directive. The main content of such instrument is outlined in the Annex to this letter. It could recast and harmonise the *acquis communautaire* on netting especially as far as the conflict of law rules are concerned. However, if after considering this letter, the Commission still decides not to initiate a specific Netting Directive as proposed, we believe that the Financial Collateral Directive should be revised and improved to ensure at least a sufficient and appropriate minimum level of legal certainty.

We would be pleased to discuss our proposal further with you or your staff and to answer any question you may have.

Best regards,

Antonia Sáinz de Vicuña

Robert Pickel

Chairman  
European Financial Market  
Lawyers Group

Executive Director and CEO  
International Swaps and Derivatives  
Association, Inc.

## Annex

---

<sup>4</sup> EFMLG report entitled ‘Protection for Bilateral Insolvency Set-off and Netting Agreements under EC Law’ of October 2004, ISDA memorandum entitled ‘Memorandum on the Implementation of Netting Legislation – A Guide for Legislators and Other Policy-Maker’ of March 2006, ISDA 2006 Model Netting Act, published on 10 October 2007 (revision of the 1996 Model Netting Act).

<sup>5</sup> Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1), Annex III, Part 7.