

| | Your position? | EMFLG/ISDA position | KBC draft position |
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| Scope of the Directive | | <p>The Directive should deal with:</p> <ul style="list-style-type: none"> - bilateral close-out netting arrangements - multilateral close-out netting arrangements which are not covered by the finality Directive <p>The Directive should include close-out netting arrangements where one or both parties are natural persons.</p> | <p>Material scope: The Directive should have a larger scope and deal with both set-off and all types of bilateral and multilateral netting.</p> <p>Furthermore, the netting directive should clarify through what type of legal mechanisms the different types of netting can take place (set-off, novation, ...).</p> <p>The personal scope of the directive should <u>not exclude natural persons</u> it being understood that we would not object to certain protective measures being introduced for consumers.</p> <p>The scope of the netting directive should not be limited to set-off and netting agreements that are accessory to a financial collateral arrangement but also encompasses <u>autonomous netting clauses and agreements</u>.</p> <p>The netting directive should deal with both the <u>validity and the perfection</u> of the set-off and netting arrangements, particularly in case of insolvency, reorganisation measures or any other type of concourse.</p> <p>As far as the set-off and netting of receivables is concerned, the netting directive should clarify <u>what characteristics the receivables should have</u> to benefit from the protection offered by the netting directive.</p> <p>Ideally, the Settlement Finality Directive should be incorporated in the netting directive.</p> |

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| <p>Definitions</p> | | <p>Some of the definitions used under the Netting Directive could be borrowed from the Directive 2002/47/EC on Financial Collateral arrangements (the 'FCD').</p> <p>Examples are the terms 'winding-up proceedings' and 'reorganisation measures', which for sake of consistency of the <i>acquis communautaire</i> should have the same meaning.</p> <p><u>New definitions are, however, necessary.</u></p> <p>Examples are the terms '<u>close-out event</u>' and '<u>close-out netting arrangement</u>', which in the context of netting have to be construed differently.</p> | <p>Instead of adapting the definitions of the netting directive to those used in the Collateral Directive, we feel that the definitions used in the netting directive, the Collateral Directive and the Settlement Finality Directive should be equated with those used in the Insolvency Regulation which in our opinion should work as the benchmark in view of its being directly applicable in each member state.</p> <p>The netting directive should provide for a definition of '<u>set-off</u>', '<u>netting</u>', '<u>close-out</u>', '<u>close-out event</u>' and '<u>close-out arrangement</u>'.</p> <p>The netting directive should also provide for a definition of '<u>concourse</u>'.</p> |
| <p>Formal Requirements</p> | | <p>The Netting Directive should ensure that the validity and enforceability or the admissibility in evidence of a close-out netting arrangement or transactions governed by it <u>are not dependent on the performance of any formal act.</u></p> <p>Formal acts include, amongst other requirements, registration, notarization or the provision of a 'certain date'.</p> <p>The Netting Directive should be applicable to all close-out netting arrangements and transactions, which can be <u>evidenced in writing or in a legally equivalent manner.</u> As far as transactions are concerned, 'legally equivalent' should also cover trades that have been concluded orally and that are evidenced by tape recordings or statement of a witness only or otherwise.</p> | |
| <p>Enforceability of netting or close out netting arrangements</p> | | <p>The Netting Directive should ensure that, on the occurrence of a close-out event, the close-out netting arrangement comes into effect and is enforceable as provided in the terms agreed therein.</p> <p><u>The Netting Directive should explicitly name those events or actions that should not constitute a requirement for the enforceability of the close-out</u></p> | <p>The netting directive should ensure that the set-off or netting can be operated <u>without the requirements of any prior actions such as a notice or a court approval.</u> The netting directive <u>should deal with the effect of an assignment</u> of one or more of the receivables that are the object of the set-off or netting arrangement. We are not in favour of the solution that set-off or netting can take effect even after an assignment since this is</p> |

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| | | <p><u>netting arrangement.</u></p> <p>Examples are (i) prior notices of the intention to terminate and close-out (ii) approvals of a court, public officer or other person (iii) the determination of current values, costs or losses as of a prescribed date or point in time or in a prescribed manner.</p> <p>It should also be ensured that close-out netting arrangements can take effect notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures or any purported assignment, attachment or other disposition of or in respect of the close-out netting arrangement.</p> <p>The Netting Directive should also ensure that covered transactions are not void or voidable or otherwise unenforceable just by reason of a law relating to gaming or gambling</p> | <p>very detrimental to factoring, forfaiting, discounting operations, etc.</p> <p>It should be ensured that <u>set-off and netting can be operated notwithstanding any attachment (beslag/saisie) on any of the receivables that are to be netted.</u> It should be clarified here that the set-off and netting can take effect without any additional requirement (such as connexity).</p> <p>It should be ensured that the set-off or netting can take effect notwithstanding the commencement or continuation of <u>insolvency proceedings</u> (such as bankruptcy, winding up,...) or <u>reorganisation proceedings</u> (such as administration, collective redress, voluntary liquidation,...) without any additional requirement (such as connexity).</p> <p>It should be ensured that neither the set-off or netting arrangement nor the set-off or netting executed on the basis thereof, can be void or voidable on the basis that they took place during a certain '<u>supect period</u>' prior to the commencement of a insolvency proceeding.</p> <p>There is still a lot of uncertainty with regard to the enforceability of set-off or netting when one or more of the transactions or receivables that are to be netted only came into existence after the commencement of a insolvency proceeding or concourse. Preferably this issue should also be addressed in the netting directive.</p> |
| Insolvency provisions | | <p>The Netting Directive should ensure that any transfer of cash or financial instruments under the close-out netting arrangement or any transaction should not be declared invalid or void on the sole basis that the transfer was made on the day of the commencement of <u>winding-up proceedings or reorganisation measures</u> in a prescribed period prior to the commencement of such proceedings.</p> <p>It should also be provided that the operation of a close-out netting arrangement shall not be affected by any <u>moratorium, stay, freeze or any decree or order</u> with a similar effect made by any administrative or judicial authority or liquidator or similar official.</p> | |
| Conflict of laws rules | | The Netting Directive should ensure that all | The netting directive should introduce a <u>European conflict of laws rule</u> with respect to the <u>validity of set-</u> |

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| | | <p>questions arising in relation to the enforceability of a close-out netting arrangement shall be governed solely by the <u>substantive civil law chosen by the parties</u> of the close-out netting arrangement.</p> <p>The <u>relevant matters governed by such laws should be explicitly named, including</u> (i) the legal nature of a close-out netting arrangement, (ii) the requirements and legal steps necessary to render a close-out netting arrangement and the transactions there under effective and enforceable and (iii) the rules relating to whether a transaction detrimental to other creditors is void, voidable or unenforceable.</p> <p>Once the Netting Directive provides for appropriate conflict of law rules applicable to all close-out netting arrangements, Article 25 of the Directive 2001/24/EC on the reorganisation and winding up of credit institutions (the '<u>Winding-up Directive</u>') could be deleted. If the Commission decides to maintain Article 25 of the Winding-up Directive, it should at least further clarify the term "netting" as well as the aspects outlined above preferably by, to the extent possible, applying the same terminology and formulations as those intended for the Netting Directive.</p> | <p>off and netting. Currently, such a conflict of laws rule is only provided for in article 25 of the Winding Up Directive but it needs to be considered whether the conflict of laws rule provided there is the most appropriate.</p> <p>The netting directive <u>should provide for a clear conflict of laws rule</u> regarding the enforceability in case of concurrence of set-off and netting operated by way or law or on the basis of a netting agreement. This conflict of law rule should be consistent with the Insolvency Regulation.</p> <p>Since the 'close-out' is a separate legal mechanism, the netting directive should also provide for a specific conflict of law rule regarding the validity and the enforceability of 'close-out' clauses.</p> |
| <p>Other comments?</p> | | | |