

Commission's Evaluation Report on the Financial Collateral Directive of 20th December 2006 – Proposal for a revision of the Financial Collateral Directive or for the adoption of a Netting Directive

We welcome the Commission's Evaluation Report on the Financial Collateral Directive and the conclusions reached therein. However, we encourage the Commission to reconsider at least the following points.

1. Personal Scope of Application:

The question of which entities may benefit from the Financial Collateral Directive is of crucial relevance. From a financial institutions perspective, carrying out business cross-border and vis-à-vis all types of counterparts including non-financial institutions and individuals, the personal scope of the Financial Collateral Directive should be as widely defined as possible. Whilst it is positive that only two Member States have used a full opt-out under Article 1(3) of the Financial Collateral Directive, it has to be noted that other Member States have chosen a personal scope which either provides for more nuanced limitations or for a wider application than foreseen by the Financial Collateral Directive. This state of diversity results in a continuous need for further due diligence to determine if, or under which conditions, a collateral transaction would profit from the new regime. We strongly encourage the Commission to contemplate removing any opt-out possibilities and to expand the personal scope of application to a wider range of entities (including, at least, entities other than consumers).

2. Material Scope of Application

We welcome the Commission's conclusion to consider the broadening of eligible collateral in order to cover 'credit claims'. However, the Commission should extend the scope beyond credit claims and include all receivables whether arising under a loan agreement or under any other contract (e.g., a purchase or service agreement). This would be in line with Basel II and the Banking Directive which, if certain requirements are met, recognise the assignment of receivables as eligible credit risk mitigation. The Commission should also aim at enhancing the existing scope of eligible collateral described by the terms 'financial instruments'. The Commission should especially address some of the legal issues that have been identified when implementing the Financial Collateral Directive, e.g., the inclusion of debt obligations and shares 'not tradable in the capital market'. We suggest that in the light of these experiences, the Commission should assess whether the beneficial effect of the Financial Collateral Directive could be generally extended to other types of assets commonly used in the financial markets.

3. Rating Related Top-up Collateral

Although the Financial Collateral Directive permits and offers legal certainty to mark-to-market and substitution mechanisms, it fails to deal with the common scenario in which top-up is required due to a deterioration of the credit rating of the collateral provider. We realise that this omission was based on the reluctance to propose measures conflicting with insolvency laws of some Member States which discourage

provisions under which a creditor's position is improved as a result of an insolvency-related event or a context of deteriorating credit-worthiness. We believe, however, that it is preferable to address this situation and offer legal certainty to all situations where top-up is linked to an objective trigger which cannot lead to a discretionary misuse by the parties.

4. Protection of Close-out netting arrangements

The protection of close-out netting arrangements is of paramount importance to financial market participants. It reduces credit risk, and hence allows an increase in the credit exposures that institutions are able to accept. In conjunction with this, the amount of capital legally required for credit institutions to cover their credit exposures could be reduced. Netting can also contribute to reducing settlement and liquidity risk and, as a consequence, systemic risk. We therefore appreciate that the Commission is willing to further explore the possibility of improving the existing framework for netting. However, we would appreciate if the Commission would not hesitate to swiftly start this exercise and involve the financial industry at the earliest stage possible. We attach in Annex 2 a first outline of what could be the content of a draft proposal for a directive on close-out netting arrangements (the "Netting Directive"), which, however, is to be understood as a feasibility study only.