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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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NOTE

from :	Services of the Commission
to :	Working Party on Civil Law Matters (General Questions)
Subject :	UNIDROIT draft principles regarding the enforceability of close-out netting provisions - Non-paper by the Services of the Commission

This document presents UNIDROIT's draft principles regarding the enforceability of close-out netting provisions, in particular draft principle 9 on applicable law. It seeks the views of the Council Working Party on Civil Law Matters (General Affairs) on this draft principle in order to prepare the Union's position for the upcoming second session of the UNIDROIT Committee of Government Experts on March 4-8, 2013. Comments on the draft principles are expected by Unidroit by 2 February 2013.

1. The UNIDROIT draft principles on the enforceability of close-out netting provisions

UNIDROIT is currently elaborating a set of draft principles regarding the enforceability of close-out netting provisions. The principles will be contained in a non-binding, soft-law instrument, aiming to provide guidance to national legislators. While draft principles 1-8 address the substantive law on close-out netting, draft principle 9 addresses the issue of applicable law. The initial text has been elaborated by an informal study group composed of experts from the industry, international organisations and two Member States (FR, IT). It was first discussed by a Committee of Government Experts in October 2012. The second session of this Committee will take place from 4-8 March 2013. UNIDROIT intends to finalise the draft principles at this session and to submit them for approval to the Governing Council of UNIDROIT at its session on 8-10 May 2013.

The aim of this non-paper is to coordinate the Union's position, in particular regarding draft principle 9. The Commission is consulting, in parallel, the Expert Group of the European Securities Committee (EGESC), whose comments have been requested by 28 January. The Commission will combine all comments to be sent to Unidroit if possible by 2 February 2013 as requested by Unidroit.

2. Close-out netting in the EU *acquis*

Close-out netting[1] is an important risk mitigation tool for financial markets which is universally used through industry master agreements for financial products. Close-out netting is therefore protected in EU-legislation:

[1] Close-out netting is a contractual mechanism designed to protect a party vis-à-vis a counterparty's default, in particular, its insolvency. In financial transactions such as derivatives, both parties have multiple reciprocal outstanding obligations, some of which have a positive, others a negative value. Close-out netting contracts provide that if one of the two counterparties defaults, all outstanding contracts are accelerated and terminated, their replacement costs calculated and the resulting amounts set-off. The final sum that remains to be paid is only a fraction of the initial claims between the parties.

- Directive 2002/47/EC brings about a certain harmonisation of the substantive law on financial collateral arrangements and ensures, i.a. that a close-out netting provision can take effect according to its terms, notwithstanding the opening of insolvency proceedings. However, the scope of the Financial Collateral Directive is limited to public authorities and financial institutions (banks, investment funds, insurance undertakings).

- Directive 2001/24/EC on the reorganisation and winding-up of credit institutions provides that netting agreements are governed solely by the law of the contract which governs such agreements (Art 25); such agreements will therefore be upheld in insolvency if parties chose a "netting-friendly" law. Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) grants the party the freedom to choose the law applicable to their contract (Art. 3).

- In contrast, Regulation (EC) No 1346/2000 on insolvency proceedings does not contain a specific provision on netting. This entails a difference in the treatment of netting agreements depending on whether the creditor is a bank or entity covered by the Financial Collateral Directive (netting allowed) or an entity not covered (netting possibly not allowed, depending on the *lex fori concursus*). In order to remedy this situation, the Commission proposed on 12 December 2012 to amend Regulation (EC) No 1346/2000 (see COM(2012) 744 final), by including a specific netting rule corresponding to Article 25 of the Directive 2001/24/EC into the Regulation (proposed Art. 6a). As a result, parties can make their netting agreement insolvency proof by choosing an appropriate law; that choice of law will be respected also in the insolvency of the non-bank party to the agreement.

- Finally, the Commission proposal of 6 June 2012 for a directive on crisis resolution for banks (COM(2012) 280 final), gives regulators the power to impose a stay on close-out netting provisions in order to allow the orderly resolution of a bank in financial difficulties, e.g. by transferring the debtor's financial contracts to a bridge bank or similar entity, thereby preventing the negative effects which an automatic use of close-out netting provisions can have on the markets in times of financial crisis (proposed Art. 63).

The current EU-*acquis* on close-out netting is generally considered as satisfactory by Member States and there are currently no plans for further amendments than those brought by the proposed directive on bank resolution and the proposed revision of the Insolvency Regulation.

3. Suggested EU position on draft UNIDROIT principle 9 on applicable law

Given that the current EU rules are broadly satisfactory, it is suggested that the EU should aim in the UNIDROIT negotiations to arrive at internationally agreed principles which are compatible with the EU *acquis*, while allowing – if and where necessary - flexibility for those jurisdictions outside the EU that want to go beyond. A detailed comparison between the Unidroit draft principles and the EU *acquis* is provided in Annex 1. With one exception (cf. comment on para 5), draft principle 9 complies with the EU *acquis* and it is suggested to support it in principle. The following analysis examines the principle and sets out suggested comments paragraph-by-paragraph:

1. **Paragraph 1** provides that the law governing close-out netting provisions shall be determined by the private international law rules of the implementing States.[1] The UNIDROIT commentary explains that the drafters deliberately refrained from proposing a specific rule on the determination of the applicable law, i.e. the freedom to choose the applicable law or an objective connecting factor, because of a lack of global consensus on any such rule. This principle does not conflict with the EU-acquis; **it is suggested to support it**.

[1] In the EU, "the private international law rules of the implementing States" would cover the relevant private international law rules based on the Union legislation.

2. **Paragraph 2** clarifies that the governing law determines which parties and obligations (i.e. contracts) are eligible for being covered by a close-out netting provision. The clarification that the law applicable to the agreement prevails seems to be helpful, in particular in situations where the law chosen by the parties allows them to conclude a netting agreement for specific contracts whereas the *lex fori concursus* does not. **It is suggested to support the rule on substance. In drafting terms, however, it seems preferable to replace "further" by "in particular", because paragraph 1 does not contain any rule about the scope of the applicable law.** It might be considered to expand the paragraph to include other aspects of the scope of applicable law as does Article 12 Rome I Regulation (e.g. interpretation, performance, consequences of breach, extinction of obligations, consequences of nullity). However, the Commission is not aware of any particular problems other than the one which Paragraph 2 aims to address and which protects the parties' expectations concerning the applicable law so a further expansion of the rule may not really be needed in practice.

3. **Paragraph 3** addresses the case where a close-out netting agreement contains a different choice of law clause than one or several of the contracts covered by the netting agreement. The principle says that the choice in the netting agreement should prevail, thereby avoiding differences in interpretation in particular in situations where the underlying contracts were concluded after the conclusion of the netting agreement. This rule also seems helpful to improve legal certainty and does not seem to conflict with any rule of the EU *acquis*; **it is suggested to support it**. **As to drafting matters, it is suggested to retain the words in square brackets to clarify that this principle only concerns the law applicable to the netting agreement, not to the law applicable to the underlying contract**

4. **Paragraphs 4 and 5** address the interplay between the law applicable to the netting agreement and the law of the insolvency proceedings. Paragraph 4 – which is still in square brackets - states the principle that the opening of insolvency proceedings should not affect the determination of the law applicable to the netting contract and the obligations covered by this contract. This principle is in line with Union law, both insofar as credit institutions are concerned and, if the Commission proposal in the revision of the Insolvency Regulation is supported, insofar as commercial companies are concerned. **It is suggested to support this rule and to have the square brackets deleted.**

Paragraph 5 allows implementing states to impose restrictions on the exercise of rights arising from the netting agreement against the insolvency estate in two respects. First, national law can provide exceptions to paragraph 2 and limit the enforceability of close-out netting agreements with respect to certain parties or certain obligations. Second, national law can foresee the avoidability of close-out netting provisions as a fraudulent transaction or a preference detrimental to other creditors of the insolvent party.

It should be noted that the authorisation to provide for a temporary stay of close-out netting provisions which was contained in the original draft is now contained in principle 8 of the draft Principles. This possibility is important for the EU in light of the proposal for a Directive on bank resolution which foresees such a stay.

The possibility given to implementing States by **lit a)** currently does not exist under EU law. Under Regulation Rome I, the question of eligibility would be determined by the chosen or otherwise applicable law subject only to internationally mandatory rules. It may be assumed that any restrictions on close-out netting stemming from insolvency law could be regarded as overriding mandatory rules under Art. 9 Rome I. It is proposed to support this principle because it allows Member States to maintain the level of close-out netting protection which currently exists in the EU and it does not force the EU to expand such protection (as the scope of the Unidroit principles seems to be broader than the Financial Collateral Directive (FCD), see the comparison in the Annex 1).

As to **lit b)**, the possibility to set aside a close-out netting agreement does currently not exist under EU law if the counterparties are covered by the scope of the Financial Collateral Directive and the insolvent debtor is captured by Directive 2001/24/EC (this is the combined effect of Art. 7 Financial Collateral Directive and Art. 25 and Art. 30 Directive 2001/24/EC). This means notably that if an EU bank has a claim resulting from a netting agreement against a non-EU entity, the netting agreement risks to be set aside in an insolvency opened outside the EU, whereas foreign creditors of EU banks could make their netting agreement "insolvency-proof" by choosing a netting-friendly EU law. The principle contained in lit b) also deviates from the philosophy contained in the proposed Art. 6a of the proposed revision of the Insolvency Regulation. **It is therefore suggested not to support the draft principle , even if in the end the Union could live with it**.

Annex 1 - Comparison UNIDROIT – EU *ACQUIS*

On the basis of Draft Principles regarding the enforceability of close-out netting provisions as developed for the second session of the UNIDROIT Committee of governmental experts on the enforceability of close-out netting provisions – December 2012 (C.G.E./Netting/2/W.P.2)

UNIDROIT	EU Provisions	Differences
DEFINITION		
Principle 1: Scope of the Principles These Principles deal with the effects and the enforceability of close-out netting provisions that are entered into by eligible parties in respect of eligible obligations.	(-)	*Unidroit-text serves only clarification.*
Principle 2: Definition of 'close-out netting provision' A "close-out netting provision" means a contractual provision on the basis of which, upon the occurrence of an event predefined in the provision in relation to a party to the contract, the due and undue obligations owed by the parties to each other that are covered by the provision are reduced to or replaced by a single net obligation, whether by way of novation, termination or otherwise, representing the value of the combined obligations, which is then payable by one party to the other.	**Financial Collateral Directive 2002/47/EC** **Article 2 (n) Definitions** (n) "close-out netting provision" means a provision **of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part**, or, in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise: (i) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or (ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.	*Unidroit-text is broader, because it is not limited to financial collateral arrangement*
PERSONAL SCOPE		
Principle 3: Definition of 'eligible party' 'Eligible party' means	**Financial Collateral Directive 2002/47/EC** **Article 1 (2) Subject matter and scope** The collateral taker and the collateral provider must each belong to one of the following categories: (a) a public authority (excluding publicly	*Unidroit-text is broader, leaving flexibility to the relevant state to*

a) a person other than a natural person; b) a partnership or unincorporated association (whether or not its membership includes natural persons); and **c) any other person or legal entity designated as an eligible party under the law of the relevant State.**	guaranteed undertakings unless they fall under points (b) to (e)) including: (i) public sector bodies of Member States charged with or intervening in the management of public debt, and (ii) public sector bodies of Member States authorised to hold accounts for customers; (b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as defined in (…), the International Monetary Fund and the European Investment Bank; (c) a financial institution subject to prudential supervision including: (i) a credit institution (…); (ii) an investment firm (…); (iii) a financial institution (…); (iv) an insurance undertaking as defined in (…) and a life assurance undertaking (…); (v) an undertaking for collective investment in transferable securities (UCITS) (…); (vi) a management company as defined in (…); (d) a central counterparty, settlement agent or clearing house, (…); (e) a person other than a natural person, including unincorporated firms and partnerships, provided that the other party is an institution as defined in points (a) to (d). 3. Member States may exclude from the scope of this Directive financial collateral arrangements where one of the parties is a person mentioned in paragraph 2(e). If they make use of this option Member States shall inform the Commission which shall inform the other Member States thereof.	*expand the scope*
MATERIAL SCOPE		
Principle 4: Definition of 'eligible obligation' 'Eligible obligation' means an obligation arising under one of the following contracts: a) derivative instruments, meaning an option, forward, future, swap, contract for differences or other transaction in respect of a reference	*In terms of the material scope, the Financial Collateral Directive protects a close-out netting provision only if it is included into a **financial collateral arrangement,** i.e. an agreement, under which a collateral provider provides financial collateral (**cash**, **financial instruments** or **credit claims**) to a collateral taker for the purpose of securing the performance of **relevant financial obligations**.* **Financial Collateral Directive 2002/47/EC** **Article 2 (1)** For the purpose of this Directive: (a) **'financial collateral arrangement'** means a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or	*UNIDROIT-text is much broader, it is based on an open list*

value that is [, or in the future becomes,] the subject of recurrent contracts in the derivatives markets; b) repurchase agreements, lending agreements and margin loans for the sale or purchase of securities, money market instruments and units in collective investment schemes; c) collateral arrangements securing another eligible obligation; d) contracts for the sale, purchase or delivery of (i) securities; (ii) money market instruments; (iii) units in a collective investment scheme; (iv) currency of any country, territory or monetary union; (v) gold, silver, platinum, palladium, or any other precious metal; or (vi) any other fungible commodity, meaning a commodity that is [,or in the future becomes,] the subject of recurrent contracts in the spot, forward or derivatives markets; e) **any other type of contract designated to that effect under the relevant law**; and f) agreements under which a party assumes a liability (whether by way of surety or as principal debtor) for the performance of obligations of another person under any agreement referred to in sub-paragraphs (a) to (e).	general terms and conditions; b) **'title transfer financial collateral arrangement'** means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations; (c) **'security financial collateral arrangement'** means an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral remains with the collateral provider when the security right is established; (d) '**cash'** means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits; (e) '**financial instruments'** means shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing; (o) '**credit claims**' means pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan". (f) **'relevant financial obligations'** may consist of or include: (i) present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement); (ii) obligations owed to the collateral taker by a person other than the collateral provider; or (iii) obligations of a specified class or kind arising from time to time". *Additionally, the following two situations are stipulated in the Financial collateral Directive:* **Article 5(5) Right of use of financial collateral under security financial collateral arrangements**	

	2. Where a collateral taker exercises a right of use, he thereby incurs **an obligation to transfer equivalent collateral to replace the original financial collateral** at the latest on the due date for the performance of the relevant financial obligations covered by the security financial collateral arrangement. (…) **5.** If an enforcement event occurs while an obligation as described in paragraph 2 first subparagraph remains outstanding, **the obligation may be subject of a close-out netting provision**. **Article 6(2) Recognition of title transfer financial collateral arrangements** 1. Member States shall ensure that a title transfer financial collateral arrangement can take effect in accordance with its terms. 2. If an enforcement event occurs while any **obligation of the collateral taker to transfer equivalent collateral under a title transfer financial collateral arrangement** remains outstanding, the obligation may be the subject of a close-out netting provision.	
FORMAL REQUIREMENTS		
Principle 5: Formal and Reporting requirements 5.(1) The law should not make the [operation] [creation, validity, enforceability, effectiveness against third parties or admissibility in evidence] of a close-out netting provision dependent on a) the performance of any formal act other than a requirement that a close-out netting provision be evidenced in writing or any legally equivalent form; and b) the use of standardised terms of specific trade associations. (2) The law should not make the [operation] [creation, validity, enforceability, effectiveness against third parties or admissibility in evidence] of a close-out netting provision and the obligations covered by the provision dependent on the compliance with any requirement to report data relating to those obligations to a trade repository or similar organisation for regulatory purposes.	**Financial Collateral Directive 2002/47/EC** **Article 3 Formal requirements** 1. Member States shall not require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement be dependent on the performance of any formal act Without prejudice to Article 1(5), when credit claims are provided as financial collateral, Member States shall not require that the creation, validity, perfection, priority, enforceability or admissibility in evidence of such financial collateral be dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claim provided as collateral. However, Member States may require the performance of a formal act, such as registration or notification, for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor or third parties. By 30 June 2014, the Commission shall report to the European Parliament and to the Council on whether this paragraph continues to be appropriate. 2. Paragraph 1 is without prejudice to the application of this Directive to financial collateral	*Unidroit text is broader*

[(3) This Principle does not affect the application of any laws or regulations of the implementing State that provide for administrative, regulatory or penal sanctions for the noncompliance with formal requirements.]	only once it has been provided and if that provision can be evidenced in writing and where the financial collateral arrangement can be evidenced in writing or in a legally equivalent manner. 3. Without prejudice to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (1) and national provisions concerning unfair contract terms, Member States shall ensure that debtors of the credit claims may validly waive, in writing or in a legally equivalent manner: (i) their rights of set-off vis-à-vis the creditors of the credit claim and vis-à-vis persons to whom the creditor assigned, pledged or otherwise mobilised the credit claim as collateral; and (ii) their rights arising from banking secrecy rules that would otherwise prevent or restrict the ability of the creditor of the credit claim to provide information on the credit claim or the debtor for the purposes of using the credit claim as collateral.	
EFFECT OF CLOSE-OUT NETTING PROVISIONS		
Principle 6: Operation of Close-out Netting Provisions in General 6.(1) The law should ensure that a close-out netting provision is enforceable in accordance with its terms. In particular, the law a) should not impose enforcement requirements beyond those specified in the close-out netting provision itself; and b) should ensure that, where one or more of the obligations covered by the closeout netting provision are, and remain, invalid, unenforceable or ineligible, the operation of the close-out netting provision is not affected in relation to the other covered obligations [, which are valid, enforceable and eligible]. [(2) Nothing in these Principles affects the application of any laws and regulations restricting the operation of close-out netting provisions in whole or in part on the basis that the close-out netting provision conflicts with laws and regulations concerning fraud or the conditions for validity of contracts.]	**Financial Collateral Directive 2002/47/EC** **Article 7 Recognition of close-out netting provisions** 1. Member States shall ensure that a close-out netting provision can take effect in accordance with its terms: (a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider and/or the collateral taker; and/or (b) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights. 2. Member States shall ensure that the operation of a close-out netting provision may not be subject to any of the requirements that are mentioned in Article 4(4), unless otherwise agreed by the parties. **Article 4(4) Enforcement of financial collateral arrangements** 4. The manners of realising the financial collateral referred to in paragraph 1 shall, subject to the terms agreed in the security financial collateral arrangement, be without	*The FCD text is more specific*

	any requirement to the effect that: (a) prior notice of the intention to realise must have been given; (b) the terms of the realisation be approved by any court, public officer or other person; (c) the realisation be conducted by public auction or in any other prescribed manner; or (d) any additional time period must have elapsed.	
Principle 7: Additional Rules on the Operation of Close-out Netting Provisions in Insolvency 7.(1) The law should ensure that upon the commencement of insolvency proceedings in relation to a party to the close-out netting provision a) the operation of the close-out netting provision is not stayed; b) the [relevant] insolvency administrator or [relevant] court should not be allowed to demand from the other party performance of any of the obligations covered by the close-out netting provision, even if these obligations are otherwise enforceable, while rejecting the performance of any obligation owed to the other party that is covered by the close-out netting provision and otherwise enforceable; c) the mere entering into and operation of a close-out netting provision as such should not constitute grounds for the avoidance of a close-out netting provision on the basis that it is deemed inconsistent with the principle of equal treatment of creditors; and d) the operation of a close-out netting provision should not be restricted merely because the close-out netting provision or one or more of the obligations covered by this provision were entered into during a prescribed period before, or on the day of but before, the commencement of the proceedings.	**Financial Collateral Directive 2002/47/EC** **Article 8 Certain insolvency provisions disapplied** 1. Member States shall ensure that a financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided: (a) on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement; or (b) in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures. 2. Member States shall ensure that where a financial collateral arrangement or a relevant financial obligation has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of, winding-up proceedings or reorganisation measures, it shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor should have been aware, of the commencement of such proceedings or measures. (…) 4. Without prejudice to paragraphs 1, 2 and 3, this Directive leaves unaffected the general rules of national insolvency law in	*Unidroit text is more specific*

[(2) These Principles do not affect a partial or total restriction of the operation of close-out netting provisions under the relevant insolvency law as a fraudulent transaction or as a preference that is detrimental to other creditors, where factors other than or additional to those covered by paragraph (1) of this Principle are present].	relation to the voidance of transactions entered into during the prescribed period referred to in paragraph 1(b) and in paragraph 3(i).	
EXCEPTIONS FOR RESOLUTION		
Principle 8: Resolution of Financial Institutions 8. These Principles are without prejudice to a stay of the operation of a close-out netting provision which the law of the implementing State, subject to appropriate safeguards, may provide for in the course of resolution proceedings for financial institutions.	**Commission proposal of 6 June 2012 for directive establishing a framework for the recovery and resolution of credit institutions and investment firms,** COM(2012) 280 final **Article 63 Power to temporarily suspend termination rights** 1. Subject to Article 77, Member States shall ensure that resolution authorities have the power to suspend the termination rights of any party under a financial contract with a failing institution that arise solely by reason of an action by the resolution authority, from the notification of the notice pursuant to Article 74 (5) and (6) until no later than 5 pm on the business day following that notification. For the purposes this paragraph, the relevant time is that in the home Member State of the institution under resolution. 2. Where a resolution authority exercises the power set out in paragraph 1 to suspend termination rights, it shall make all reasonable efforts to ensure that all margin, collateral and settlement obligations of the failing institution that arise under financial contracts during the period of suspension are met. 3. A person may exercise a termination right under a financial contract before the end of the period referred to in paragraph 1 if that person receives notice from the resolution authority that the rights and liabilities covered by the **netting arrangement** shall not be transferred to another entity. 4. Where a resolution authority exercises the power specified in paragraph 1 to suspend termination rights, those rights may be exercised on the expiry of the period of suspension as follows: (a) if the rights and liabilities covered by the financial contract have been transferred to another entity, or the bail-in tool has been	*Compatible with DRAFT EU rules*

	applied to the institution under resolution for the purpose referred to in point (b) of Article 37(2): (i) A person may not exercise termination rights as a result of the resolution action in any case covered by Article 77(1); (ii) A person may exercise termination rights in accordance with the terms of that contract on the occurrence of any subsequent default by the recipient where the contract has been transferred to another entity, or by the institution where the bail-in tool has been applied; (b) if the rights and liabilities covered by the financial contract remain with the institution under resolution, and the resolution authority is not applying the bail in tool in accordance with Article 37(2) (a) with regards to that institution, a person may immediately exercise termination rights in accordance with the terms of that contract. (…) 6. For the purposes of paragraph 1, financial contracts shall include the following contracts and agreements: (a) securities contracts, including: (i) contracts for the purchase, sale or loan of a security, a group or index of securities, (ii) an option on a security or group or index of securities, (iii) a repurchase or reverse repurchase transaction on any such security, group or index; (b) commodities contracts, including: (i) contracts for the purchase or sale of a commodity for future delivery, (ii) an option on a commodity; (c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date, (d) repurchase agreements relating to securities; (e) swap agreements, including: (i) swaps, options, futures or forward agreements relating to interest rates; spot or other foreign exchange, precious metals or commodity agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation, (ii) total return, credit spread or credit swaps, (iii) any agreement or transaction that is similar to an agreement referred to in points (i) or (ii) of this point which is the subject of recurrent dealing in the swaps or derivatives markets;	

	(f) master agreements for any of the contracts or agreements referred to in points (a) to (e). 7. (…) **Article 77** **Exclusion of termination and set-off rights in resolution** 1. Member States shall ensure that counterparties under a financial contract as defined in Article 63 entered into originally with the institution under resolution cannot exercise termination rights under that contract or rights under a walk-away clause unless the resolution action is the sale of business tool or the bridge institution tool and the rights and liabilities covered by the financial contract are not transferred to a third party or bridge institution, as the case may be. For the purposes of this paragraph, a walk-away clause includes a provision in a financial contract that suspends, modifies or extinguishes an obligation of the non-defaulting party to make a payment, or prevents such an obligation from arising that would otherwise arise. 2. Member States shall ensure that creditors of the institution under resolution are not entitled to exercise statutory rights to set-off unless the resolution action is the sale of business tool or the bridge institution tool and the rights and liabilities covered by the financial contract are not transferred to a third party or bridge institution, as the case may be. *See also proposed Article 68(2)(d), Art. 69 and Art. 72 that provide for safeguards in terms of netting arrangements after the resolution tools have been applied.*	
PRIVATE INTERNATIONAL LAW		
Principle 9: Governing Law of Close-Out Netting Provisions 9.(1) The private international law rules of the implementing State should determine the law that governs the operation of the close-out netting provision, taking into account, to the extent permitted by the laws of the implementing State, any choice of the governing law by the parties. (2) The governing law in accordance with paragraph (1) further determines which parties and	**Directive 2001/24/EC on reorganisation and winding up of credit institutions** **Article 25 Netting agreements** Netting agreements shall be governed solely by the law of the contract which governs such agreements. *(Special rule to Article 10 which provides that a credit institution shall be wound up in accordance with the laws of its **home Member State**, i.e. the Member State in which this credit institution has been authorised.)*	*Unidroit text is more limited, because Principle 9(5) protection of close-out netting against insolvency:* • *does not mandatorily cover netting agreements protected by the EU acquis,* • *does not extend to avoidance rules.*

obligations are eligible for being covered by the close-out netting provision. (3) The law should ensure that a choice of law made in a close-out netting provision prevails [in relation to this provision] over any other choice of law made in or in relation to the obligations covered by the close-out netting provision except as otherwise provided by the parties. [(4) The law should ensure that the commencement of insolvency proceedings does not affect the determination of the governing law or laws for the operation of the close-out netting provision and the obligations covered by this provision.] (5) Notwithstanding the above, if insolvency proceedings have been commenced in respect of a party to the close-out netting provision [or a branch of that party] and under a law other than the law determined in accordance with paragraph (1), the implementing State **may provide** that the **law governing the insolvency proceedings** governs also **a) the determination of the scope of parties and obligations that are eligible for close-out netting for the purposes of the enforcement of the close-out netting provision in the context of insolvency proceedings before the courts of the relevant implementing State**; and **b) the avoidance of a close-out netting provision as a fraudulent transaction or as a preference that is detrimental to other creditors of the insolvent party.**	**Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings**, COM(2012) 744 final Article 1 Council Regulation (EC) No 1346/2000 is amended as follows: (…) (25) The following Article 6a is inserted: "Article 6a Netting agreements Netting agreements shall be governed by the law of the contract governing such agreements". -- **Directive 2001/24/EC on reorganisation and winding up of credit institutions** **Article 30 Detrimental acts** 1. Article 10 shall not apply as regards the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors as a whole, where the beneficiary of these acts provides proof that: - the act detrimental to the creditors as a whole is subject to the law of a Member State other than the home Member State, and - that law does not allow any means of challenging that act in the case in point. 2. Where a reorganisation measure decided on by a judicial authority provides for rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors as a whole performed before adoption of the measure, Article 3(2) shall not apply in the cases provided for in paragraph 1 of this Article. **Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings** **Article 13 Detrimental acts** Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: - the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and - that law does not allow any means of challenging that act in the relevant case.	

	Article 4(2)(m) Law applicable 2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular: … (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.	