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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 :	the Spanish delegation
to :	Working Party on Civil Law Matters (General Questions)
Subject :	Spanish position on the non-paper by the Commission referred to principle 9 of UNIDROIT draft principles regarding the enforceability of close-out netting provisions

The Spanish delegation shares with the Commission its positive approach on the existence of a provision on the application of private international law rules on this matter.

It also considers that, due to the EU substantive provisions on netting agreements, the coherence of EU law and its future development, especially within the current situation of restructuring and resolution of European banking entities, shall be ensured. In Spain the scope of netting agreements is limited to highly regulated entities.

Being UNIDROIT draft principles a soft-law instrument, it is possible to be flexible in the negotiation but some elements already integrated in principle 9 should be taken into consideration:

- A restrictive criterion should prevail when establishing the scope of the law governing the netting agreement in its relation with the law applicable to the insolvency proceedings.
- We should refer to private international law provisions of the country in which the principles are to be applied in case of conflict between netting agreements and the law governing the insolvency proceeding.
- Some limitations should be streamlined for the enforceability of netting agreements with regards to its own validity and effectiveness and to its concurrence with actions for the reintegration of the bankruptcy assets. In this area other issues such as the treatment of the subordinate debt can be considered.

Finally, we should not forget that contrary to the homogeneity of EU law applicable in EU Member States and the trust inspired by other EU business partners with regards to their national provisions on netting agreements and insolvency, these draft principles have a worldwide dimension and therefore the remit to the national law of a given jurisdiction could imply a diversion from the criteria in force in the EU.

Because of the reasons set above, the negotiation should be carried out in a coordinated manner and the suggested flexible position should be compatible with a higher level of legal certainty and regulation.