

# ISDA

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ENGLISH VERSION

Monsieur J.-L.Girodolle  
Chef du bureau "Epargne et marchés financiers"

Monsieur Hubert Gasztowtt  
Conseiller Juridique du Trésor

Direction du Trésor  
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Dear Sirs,

## **Implementation in France of the Directive on financial collateral arrangements**

We understand that you are leading the working group within the French Ministry of Finance that is preparing legislation for the implementation in France of the Directive 2002/47/EC of the European Parliament and Council on financial collateral arrangements (the "**Collateral Directive**").

The International Swaps and Derivatives Association, Inc. ("**ISDA**") is the global trade association representing leading participants in the privately negotiated derivatives industry, a business that includes interest rate, currency, commodity, credit, and equity swaps, options, and forwards, as well as related products such as caps, collars, floors, and swaptions. ISDA was chartered in 1985 and today numbers over 600 member institutions from 46 countries on six continents. These members include most of the world's major institutions who deal in, and leading end-users of, privately negotiated derivatives as well as associated service providers and consultants.<sup>1</sup>

Nearly half of ISDA's members are European institutions, with the next largest group being North American (Canada, the USA, and Mexico), followed by members from the Asia-Pacific region and South America. Of the 20 primary members represented on ISDA's current Board of Directors, 11 are European institutions, including BNP Paribas (other French banks, including Société Générale and Crédit Lyonnais, have previously been represented on the Board of Directors). ISDA's French members are an active and influential group within our total membership and form an important part of the international market for privately negotiated derivative transactions. ISDA's members therefore have a deep and longstanding interest in the legal and regulatory framework for financial transactions in Europe and specifically in France.

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<sup>1</sup> For further information on ISDA, please consult our website at <http://www.isda.org>.

ISDA has actively supported collateral law reform in Europe for many years and participated, along with other leading financial market associations, including the French Banking Federation and the European Banking Federation, in the various public consultations leading to the adoption of the Collateral Directive. ISDA has been actively monitoring the progress of implementation of the Collateral Directive in each Member State of the European Union.<sup>2</sup> ISDA also participated actively in the public consultations leading to the adoption by the Hague Conference on Private International Law of the Hague Convention on the law applicable to securities held by an intermediary, signed in December 2002.

The Collateral Directive is an essential measure necessary to enhance legal certainty for cross-border financial collateral arrangements in the European single market. We understand that the French Ministry of Finance is currently considering recommending that France exercise the opt-out provided for in Article 1(3) of the Directive to exclude corporate end-users from the scope of the Directive.

We understand that current French legislation confirms the effectiveness against a corporate end-user, including in the event of its insolvency, of (a) close-out netting under a market master agreement such as the Master Agreement published by the FBF or the 1992 or 2002 Master Agreement published by ISDA and (b) of a title transfer collateral arrangement under, for example, the Collateral Addendum to the FBF Master Agreement or the 1995 Credit Support Annex to the ISDA Master Agreement.

To this extent, we appreciate that the current legal environment in France for trading privately negotiated derivative transactions on a collateralised basis is favourable for both financial institutions and corporate end-users. We also understand that the exercise by France of the opt-out in Article 1(3) of the Directive would not alter this current favourable regime with respect to derivatives, repos and securities loans.

In the light, however, of the increasing interrelationship between derivatives transactions and other types of financial arrangements in the wholesale financial markets (for example, securitisations, repackagings and other structured financings, which are increasingly structured using derivatives and/or are hedged with derivatives), we respectfully suggest that you reconsider exercising the opt-out in Article 1(3). Often the same economic result may be achieved in different ways, via different financial structures, sometimes involving derivatives, repos and securities loans (which benefit from the current regime) and sometimes involving combinations of loans, deposits, securities issues and the like (which would not benefit from the current favourable regime). To have different legal treatments apply to different parts of a single structured financing involving a corporate end-user would lead to unpredictable results and therefore to legal uncertainty.

The additional certainty, simplicity, efficiency and uniformity across the broad range of financial obligations that the Directive is intended to achieve is clearly beneficial for both collateral providers and collateral takers. Increasingly corporate end-users are not only providers but also takers of collateral. Ideally, therefore, they should, when taking collateral from a financial institution, benefit from the same certainty, simplicity and efficiency that financial institutions will enjoy when taking collateral under the new regime, irrespective of the exact legal nature of the relevant transactions.

We hope that our comments are helpful to you during your considerations. We are fully supportive of the principles and purposes of the Collateral Directive, and we stand ready to provide any information or assistance, for example, regarding international market practice, that may aid in the process of implementation in France of this crucial European internal market measure.

Yours sincerely,

(Peter M Werner, [pwerner@isda-eur.org](mailto:pwerner@isda-eur.org))

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<sup>2</sup> A summary of publicly available information on implementation of the Collateral Directive in each Member State is regularly posted and updated on ISDA's website at <http://www.isda.org> (see "Committees", then "Collateral Law Reform Group", where there is a hyperlink to the summary at the end of the second paragraph).



