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Ministarstvo financija Republike Hrvatske
mr.sc. Martina Dalić,
ministrica financija Republike Hrvatske
Katančićeva 5
HR – 10 000 Zagreb
Republika Hrvatska

Cc: Hrvatska narodna banka
dr. Željko Rohatinski,
guverner
Trg hrvatskih velikana 3
HR – 10 000 Zagreb
Republika Hrvatska

Hrvatska udruga banaka
dr. Zoran Bohaček,
predsjednik
Kaptol centar
Nova ves 17
HR – 10 000 Zagreb
Republika Hrvatska

e-mailom

Podrška pravnoj reformi regulative o "netiranju" i financijskom osiguranju u Hrvatskoj

Poštovana ministrice Dalić,

International Swaps and Derivatives Association, Inc. (ISDA) najveće je globalno udruženje financijske industrije prema broju članova. Članstvo u našem udruženju broji 830 najvećih svjetskih poslovnih, trgovačkih i investicijskih banaka, korporacija, državnih tijela i drugih institucija. ISDA je osnovana 1985. godine i danas predstavlja institucije iz 58 zemalja, na pet kontinenata. Naši članovi vodeći su sudionici u industriji privatno ugovorenih, odnosno *over-the-counter* (OTC), derivata. Više od polovice članova ima sjedište u Europskoj uniji i susjednim zemljama, a značajan broj ostalih članova aktivan je na europskim financijskim tržištima kao *dealeri*, pružatelji usluga ili krajnji korisnici derivata. Industrija OTC-derivata uključuje kamatne, valutne, robne, kreditne i dioničke (*equity*) *swapove*, opcije i *forwarde*,

International Swaps and Derivatives Association, Inc.
One Bishops Square
London E1 6AD, United Kingdom
P 44 (0) 20 3088 3550 **F** 44 (0) 20 3088 3555
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

kao i s njima srodne financijske proizvode kao što su to tzv. *caps, collars, floors* i *swaptions*. Najčešće korištene transakcije OTC-derivatima opisane su u Dodatku A ovoga dopisa.[1]

ISDA usko surađuje s regulatornim tijelima širom svijeta, budući da je jedna od glavnih misija ISDA-e promoviranje pravne sigurnosti i pružanje podrške pravnim reformama koje se tiču međunarodnih transakcija OTC-derivatima.

Budući da je ISDA posvećena promoviranju razvoja zdrave poslovne prakse upravljanja rizicima na međunarodnim financijskim tržištima, uz značajno oslanjanje na odgovarajući pravni i regulatorni tretman transakcija OTC-derivatima, ISDA je spremna Ministarstvu financija Republike Hrvatske, Hrvatskoj narodnoj banci i hrvatskim sudionicima tržišta kapitala ponuditi svu moguću pomoć s ciljem poboljšanja sadašnjeg pravnog okvira koji se općenito odnosi na derivate u Republici Hrvatskoj. Ova je inicijativa u skladu s misijom ISDA-e da olakša regulatornu podršku OTC-derivatima i pravnu provedivost standardizirane dokumentacije koja se odnosi na OTC-derivate, kao što su tzv. ISDA Master Agreement i Credit Support Document, čime se želi pridonijeti većoj usklađenosti međunarodnih i Europskih standarda s ciljem svladavanja teških situacija na tržištu.

Primarna svrha OTC-derivata jest zaštita (tzv. *hedging*) od različitih vrsta izloženosti i kvalitetno upravljanje rizicima. Pored gospodarskih subjekata, kao što su financijske institucije i trgovačka društva koji se ovim financijskim instrumentima služe u navedene svrhe, istima se služe i mnoge države koje preko državnih riznica upravljaju svojim javnim dugom koristeći kamatne i valutne *swapove* te ostale srodne financijske instrumente. Navedenim instrumentima redovito se služe i veliki energetski subjekti (primjerice, proizvođači električne energije, proizvođači naftnih derivata itd.), zatim različite državne agencije, tijela lokalne uprave i samouprave, a sve s ciljem upravljanja rizicima kojima su takvi subjekti izloženi (posebice rizici povezani s promjenom kamatnih stopa i promjenom tečaja).

Već nekoliko godina ISDA pažljivo prati razvoj regulative OTC-derivata u Republici Hrvatskoj. U posljednje vrijeme primjetno je stalno povećanje prekograničnih transakcija s hrvatskim subjektima. Osobito nam je drago što su Ministarstvo financija Republike Hrvatske i Hrvatska narodna banka učinili značajan napredak u poboljšanju hrvatskog pravnog sustava u pogledu OTC-derivata, netiranja (tzv. *netting*), financijskog osiguranja i regulative koja se odnosi na adekvatnost kapitala. ISDA je uočila i da većina zemalja koje su nekada bile zemlje pristupne članice EU-a, kao i zemlje kod kojih je trenutačno u tijeku proces pridruživanja EU-u, vrlo često nailaze na određene probleme prilikom implementiranja specijalizirane regulative koja se odnosi na financijska tržišta. Do toga, u pravilu, dolazi zbog postojanja velike količine direktiva EU-a koje je potrebno implementirati u vrlo kratkom vremenskom razdoblju. Takva situacija često uzrokuje proturječnosti u pravnom sustavu određene zemlje. U svezi s tim ISDA je uočila nekoliko mogućih problema koji se odnose na neusklađenost hrvatskog pravnog sustava, a koji se tiču netiranja u stečaju i regulative koja se odnosi na financijsko osiguranje. Spomenute proturječnosti imaju ozbiljan učinak na financijsko tržište, kao i na ukupnu pravnu sigurnost. Slijedom navedenoga i s dužnim poštovanjem, na ovaj

[1] Navedena lista redovito se ažurira i poboljšava od strane ISDA – e u skladu s razvojem financijskih instrumenata, te ista ne obuhvaća sve moguće varijacije OTC – derivata, zbog čega ista nije prevedena na hrvatski jezik, već je ista u hrvatskoj verziji ovog dopisa dostavljena u svom izvorniku.

način želimo sugerirati nadležnim regulatornim tijelima Republike Hrvatske da obrate pozornost na navedene probleme čim prije budu u mogućnosti.

Upoznati smo da Ministarstvo financija Republike Hrvatske namjerava u skorijoj budućnosti izraditi izmjene i dopune Zakona o financijskom osiguranju, Narodne novine br. 76/07. ISDA bi, stoga, rado započela dijalog s hrvatskim regulatornim tijelima vezan uz buduće implementiranje Direktive EU-a 2009/44/EC Europskog parlamenta i Vijeća Europe od 6. svibnja 2009. godine. Ova prilika otvara značajnu mogućnost ukazivanja na određene pravne probleme koji predstavljaju prepreke na putu priznavanja cjelovitog i neometanog priznavanja *close-out-nettinga* i ugovora o financijskom osiguranju u regulatorne svrhe sa svim vrstama hrvatskih subjekata kao ugovornih strana. Time bi došlo do značajnog unapređenja hrvatskog pravnog sustava, a sudionicima međunarodnog financijskog tržišta omogućio bi se značajan stupanj pravne sigurnosti, a jednako tako i Republici Hrvatskoj i hrvatskim subjektima kada posluju na međunarodnim financijskim tržištima.

Budući da smo do danas nebrojeno puta surađivali s regulatornim tijelima širom svijeta s ciljem promoviranja pravnog funkcioniranja *close-out netting* mehanizma, implementiranog u ISDA Master Agreement (radi se o vodećem standardiziranom ugovornom dokumentu koji se u cijelom svijetu koristi kao pravni standard za međunarodne transakcije OTC-derivatima[2]), nadamo se da biste i Vi našu pomoć držali korisnom.

Slijedom navedenoga, ovim dopisom željeli bismo Vam ukratko istaknuti ključne pravne probleme koje smo uočili u Hrvatskoj i dati nekoliko prijedloga za pravne promjene. Nadamo se da ćete naše sugestije prihvatiti kao odgovarajuće, budući da su iste usmjerene postizanju sigurnijeg pravnog okruženja, koje ne samo da doprinosi poslovanju domaćih i međunarodnih sudionika na financijskim tržištima, već i hrvatskom gospodarstvu u cjelini.

Što je *close-out netting*?

Većina ugovorne dokumentacije koja se u velikoj mjeri koristi na međunarodnim tržištima financijskih derivata izrađena je u obliku tzv. "okvirnih" ili *master* ugovora (kao što je to, primjerice, ISDA Master Agreement). Svaki od takvih okvirnih ugovora sastavljen je kao okvirni *netting*-ugovor na temelju kojega ugovorne strane mogu zaključiti veliki broj različitih transakcija i u trenutku "zatvaranja" (*close-out*), izračunati neto-izloženost koja postoji između ugovornih strana na temelju svih takvih trgovinskih transakcija. *Close-out netting* u pogledu transakcija OTC-derivatima predstavlja mogućnost da bilo koja od ugovornih strana jednog takvog okvirnog ugovora, u slučaju takvih transakcija OTC-derivatima koje još nisu dospjele, "poveže" (*to net*) sve njihove tržišne vrijednosti na dan njihova prijevremenog raskida, ukoliko dođe do kršenja ugovornih odredaba druge ugovorne strane (*default*) ili drugih ugovorom određenih događaja.

S problematikom *close-out nettinga* posebno je usko povezano i područje ugovora o financijskom osiguranju regulirano Direktivom o financijskom osiguranju (tzv. Financial Collateral Directive). Temeljem ugovora o financijskom osiguranju, obveza plaćanja neto-iznosa dobivenog *close-out nettingom*, dodatno je osigurana odredbama o financijskom

[2] ISDA je do danas objavila pet verzija ugovora ISDA Master Agreement: (i) 1987 ISDA Interest Rate Swap Agreement; (ii) 1987 ISDA Interest Rate and Currency Exchange Agreement; (iii) 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction); (iv) 1992 ISDA Master Agreement (Multicurrency – Cross Border); i (v) 2002 ISDA Master Agreement.

osiguranju (novac, vrijednosni papiri ili kreditna potraživanja). Ovakvim dodatnim financijskim osiguranjima sudionici financijskih tržišta smanjuju kreditni rizik transakcija OTC-derivatima, a time i ukupni sistemski rizik.

Važnost *close-out nettinga* i ugovora o financijskom osiguranju

Najvažnije koristi *close-out nettinga* i ugovora o financijskom osiguranju jesu smanjenje rizika i smanjenje troškova. Smanjenje rizika očituje se u dva pravca: prvi je smanjenje kreditnog rizika, a drugi (posljedično) smanjenje sistemskog rizika. Naime, smanjenjem kreditnog rizika kod svake karike u lancu, odnosno između sudionika financijskog tržišta, *close-out netting* također ima pozitivan učinak i na sistemski rizik. Prepoznavši važnost *close-out nettinga*, centralne banke zemalja skupine G10, kao i centralne banke drugih zemalja (uključujući i Hrvatsku) mogu priznati *netting* prilikom izračunavanja adekvatnosti kapitala i velikih izloženosti (što dovodi do smanjenja troškova), pod pretpostavkom da su ispunjeni određeni uvjeti.

Close-out netting i ugovori o financijskom osiguranju pokazali su se kao izuzetno uspješni u izbjegavanju utjecaja globalnih ekonomskih kriza na sve sudionike tržišta (kreditni rizik u slučaju stečaja ugovorne strane koja je zaključila transakciju OTC-derivatima sveden je na dospjeli neto-iznos između ugovornih strana, a isti može čak iznositi i nulu, ukoliko je došlo do prijenosa osiguranja radi pokrića neto-izloženosti). Ovu činjenicu potvrđuje i Izvještaj Basel Committee/FSB Cross-Border Banking Resolution Group iz ožujka 2010. godine[3].

Naročite koristi koje bi donio učinkovit pravni okvir koji se odnosi na *close-out netting* i ugovore o financijskom osiguranju u Republici Hrvatskoj uključivale bi:

(i) smanjenje troškova određivanja cijene derivata, što bi osobito koristilo hrvatskim klijentima koji se koriste derivatima s ciljem zaštite od svojih poslovnih rizika;
(ii) komparativnu prednost koja se očituje u vidu nižih zahtjeva za adekvatnošću kapitala hrvatskih financijskih institucija;
(iii) povećanu predvidivost pravnog tretmana i veću sigurnost pravnog okruženja u cjelini;
(iv) poticaj široj primjeni derivatnih instrumenata, što bi omogućilo hrvatskim poslovnim subjektima (uključujući pritom i državnu riznicu) da se zaštite (*hedgiraju*) od rizika na najučinkovitiji i najsigurniji način, što je u interesu gospodarstva u cjelini;
(v) učinkovitost *close-out nettinga*, što bi znatno potaknulo širu primjenu okvirnih ugovora u Republici Hrvatskoj, čime bi se pored *nettinga* postiglo i stvaranje stabilne i predvidive ugovorne osnove za dugoročne poslovne odnose, kao i postizanje sigurnog pravnog okruženja koje potiče nastanak inovativnih proizvoda (što doprinosi smanjenju pravnog rizika primjenom standardizirane ugovorne dokumentacije za sve vrste financijskih proizvoda, uključujući i razvoj proizvoda poput trgovanja štetnim emisijama.

Kombinacija navedenih pozitivnih elemenata dovela bi do složenije pravne analize provedivosti *close-out nettinga* i ugovora o financijskom osiguranju u Hrvatskoj.

[3] http://www.bis.org/publ/bcbs169.htm

Potreba za pravnom sigurnošću

Na temelju informacija dobivenih od sudionika na tržištu, vidljivo je povećanje postojanja interesa za transakcijama derivatima, posebice OTC-derivatima, koje uključuju veći raspon vrsta imovine (uključujući i ugovore o financijskom osiguranju), i veću raznolikost ugovornih strana (koje se istima koriste). Ovakva situacija djelomično je vezana uz činjenicu da će, u bliskoj budućnosti, Republika Hrvatska postati članica EU-a. Pozdravljamo činjenicu da je Republika Hrvatska poduzela značajne napore s ciljem implementiranja svih relevantnih direktiva EU-a koje se odnose na područje tržišta kapitala, a posebice Direktive o financijskom osiguranju (Financial Collateral Arrangements Direcitve) (2002/47/EC), Direktive o konačnosti namire (Settlement Finality Directive) (98/26/EC) kao i Direktive o stečaju kreditnih institucija (Winding-up Directive for Credit Institutions) (2001/24/EC). Uočeno je da će određene odredbe hrvatskog Zakona o kreditnim institucijama, Narodne novine 117/08, 74/09, 153/09[4] kojim je implementirana Direktiva o stečaju kreditnih institucija (uključujući i odredbu o *nettingu* navedenu u članku 353. Zakona o kreditnim institucijama), stupiti na snagu tek kada Republika Hrvatska postane članicom EU-a. Nadalje, upoznati smo da je povijesno prva odredba o *close-out nettingu* u hrvatski pravni sustav ugrađena člankom 111. Stečajnog zakona[5], Narodne novine 44/96 (Zakon o bankama, Narodne novine 61/98), 29/99, 129/00, 123/03, Uredbe o izmjenama i dopunama Stečajnog zakona, Narodne novine 197/03 i 187/06, 82/06, 116/10[6], te da je navedena odredba u Republici Hrvatskoj još uvijek na snazi.[7]

Brojni navedeni pravni instrumenti EU-a na različite se načine pozivaju na *close-out netting*. U svom izvještaju o vrednovanju implementiranja Direktive o financijskom osiguranju, Europska komisija utvrđuje ključnu važnost pravnog koncepta *close-out nettinga* i prijeboja te navodi da definiranje *close-out nettinga* i prijeboja treba biti usklađeno u budućnosti (COM (2006) 833 final).

Što se tiče priznavanja pravnog instituta *close-out nettinga* u Republici Hrvatskoj, ISDA je utvrdila da u hrvatskim propisima postoje odredbe o provedivosti *close-out nettinga* u slučaju insolventnosti hrvatskih subjekata.

Iako hrvatsko pravo prepoznaje princip *close-out nettinga*, kao i međunarodno prihvaćenu terminologiju vezanu uz OTC-derivate, velik broj sudionika na financijskom tržištu i pravnih stručnjaka drže da hrvatsko pravo ne regulira dovoljno jasno provedivost *close-out nettinga* u slučaju stečaja hrvatskih subjekata.

Vezano uz navedeno, ISDA je uočila ključne probleme koji se odnose na proturječnu regulativu vezanu uz *close-out netting*, i to članak 111. hrvatskog Stečajnog zakona koji je suprotan članku 8. Zakona o financijskom osiguranju.

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[4] Hrv. Zakon o kreditnim institucijama, Narodne novine br. 117/08, 74/09, 153/09.

[5] Cjeloviti tekst članka 111. Stečajnog zakona naveden je u Dodatku B ovoga dopisa.

[6] Stečajni zakon, Narodne novine br. 44/96 (Zakon o bankama, Narodne novine br.161/98), 29/99, 129/00, 123/03, Uredba o izmjeni i dopuni Zakona o izmjenama i dopunama Stečajnog zakona Narodne novine br. 197/03, 187/06; 82/06 i 11610.

[7] Citirani članak 111. Stečajnog zakona nije u cijelosti u skladu s direktivama EU-a pa bi ga, prema našem mišljenju, trebalo revidirati u najskorijoj budućnosti.

Mnoge zemlje čiji pravni sustavi nisu ranije nedvosmisleno regulirali provedivost *close-out nettinga* i ugovora o financijskom osiguranju, donijeli su regulativu koja to omogućuje, ili još češće, koja učvršćuje pojedini relevantni pravni režim (vezano uz navedenu problematiku) kako bi postigle značajne kreditne i sustavne koristi koje pružaju *close-out netting* i ugovori o financijskom osiguranju. Takve primjere nalazimo u gotovo svim zemljama članicama EU-a (uključujući Belgiju, Češku, Dansku, Finsku, Francusku, Njemačku, Grčku, Mađarsku, Irsku, Italiju, Luksemburg, Maltu, Norvešku, Poljsku, Portugal, Rumunjsku, Sloveniju, Španjolsku, Švedsku, Veliku Britaniju), zatim u Švicarskoj i Turskoj. Drugdje u svijetu takvi su primjeri Australija, Brazil, Kanada, Izrael, Japan, Meksiko, Novi Zeland, Južnoafrička Republika, Južna Koreja i Sjedinjene Američke Države. Trenutačni izvještaj o provedivosti *close-out nettinga* diljem svijeta nalazi se na internetskoj stranici http://www.isda.org/docproj/stat_of_net_leg.html.

Pravna analiza važećih propisa Republike Hrvatske

O trenutačnom stanju u Republici Hrvatskoj koje se tiče navedenih pravnih pitanja imali smo prilike raspraviti s hrvatskim pravnim stručnjacima i sudionicima na tržištu.

(A) Regulativa derivata ("izvedenica") - definicije

Nakon 1991. godine u hrvatske je propise ugrađeno nekoliko osnovnih definicija derivata (primjerice u Zakon o deviznom poslovanju, raniji Zakon o trgovanju vrijednosnim papirima), ali i u regulativu koju je donijela Hrvatska narodna banka koja se odnosi na adekvatnost kapitala i upravljanje rizicima. Nedvojbeno je da je hrvatski pravni okvir kojim se reguliraju derivati prošao velik put do svojih posljednjih zakonskih definicija derivativnih transakcija ("izvedenica"), onako kako su iste definirane Zakonom o tržištu kapitala, Narodne novine 88/08, 136/08, 74/09[8] u članku 3. stavku 1. podstavku 2.d (definicija je navedena u Dodatku C ovoga dopisa).

Implementirajući ovu opsežnu definiciju derivata (kako OTC-derivata, tako i onih kojima se trguje na burzama), Hrvatska je učinila značajan korak naprijed u prepoznavanju širokog spektra derivativnih transakcija koje se koriste na međunarodnim financijskim tržištima.

(B) Regulativa o *nettingu* i financijskom osiguranju u Republici Hrvatskoj - pravna proturječnost

S obzirom na činjenicu da su transakcije OTC-derivatima usko povezane s regulativom o *nettingu*, uočili smo da je koncept *close-out nettinga* u Hrvatskoj izvorno uveden člankom 111. hrvatskog Stečajnog zakona (pod nazivom "Fiksni poslovi. Financijski poslovi s određenim rokom"). Iako je navedeni Stečajni zakon do danas imao nekoliko izmjena i dopuna, članak 111. ostao je nepromijenjen od dana donošenja 1996. godine.

Potrebno je napomenuti da članak 111. ipak ne daje suštinsku definiciju *close-out nettinga*. Štoviše, pojam *netting* uopće se ne pojavljuje u spomenutom Stečajnom zakonu. Zakon daje naznake o principu *close-out nettinga*, navodeći da ukoliko između ugovornih strana, od kojih

[8] Hrv.:"Zakon o tržištu kapitala", Narodne novine br. 88/08, 136/08, 74/09

je nad jednom ugovornom stranom pokrenut stečajni postupak (takva strana često se naziva i *defaulting party* - ugovorna strana koja ne ispunjava ugovorne obveze), postoji okvirni ugovor koji u sebi sadrži klauzulu o netiranju, druga ugovorna strana ima pravo jednostrano raskinuti sve transakcije nakon što je nad prvom ugovornom stranom pokrenut stečajni postupak i potraživati neto-iznos (naknadu zbog neispunjenja) dobiven izračunavanjem svih raskinutih transakcija nakon otvaranja stečajnog postupka. Ovo potraživanje (naknada zbog neispunjenja) bit će izračunato drugog radnog dana nakon otvaranja stečajnog postupka. Drugim riječima, vrijednost transakcija drugog radnog dana nakon otvaranja stečajnog postupka bit će uzeta kao relevantna vrijednost za izračunavanje neto-iznosa (naknade zbog neispunjenja). Zakon daje i prilično široku definiciju transakcija na koje se ova odredba primjenjuje. Isti propis prepoznaje raskid transakcija pokrivenih okvirnim ugovorom i izračunavanje samo jednog potraživanja po otvaranju stečajnog postupka na temelju takvog okvirnog ugovora.

Iako članak 111. ujedno regulira i druga relevantna pitanja koja se odnose na definiranje financijskih (derivativnih) transakcija na koje bi se trebao primijeniti navedeni članak[9], koliko nam je poznato, utvrdili smo da je u vremenskom razdoblju od 1996. do 2008. godine spomenuti članak bio jedini pravni izvor[10] u Republici Hrvatskoj koji je regulirao *close-out netting*. Potrebno je također istaknuti da sve do 2007. godine ni Stečajni zakon, niti bilo koji drugi propis nije sadržavao jasnu odredbu o financijskom osiguranju u smislu europske Direktive o financijskom osiguranju koje treba biti uračunato zajedno sa svim transakcijama u trenutku izračunavanja *close-out* neto-iznosa.

Ovakva situacija promijenila se 2007. godine kada je Hrvatski sabor donio Zakon o financijskom osiguranju (isti je na snazi od 1. siječnja 2008. godine), a kojim je implementirana Direktiva o financijskom osiguranju.

Zakon o financijskom osiguranju uveo je niz važnih odredbi ne samo u pogledu financijskog osiguranja, već i u pogledu OTC-derivata i *close-out nettinga*. Međunarodna financijska zajednica pozdravlja principe ugrađene u Zakon o financijskom osiguranju, budući da isti odražavaju standarde prihvaćene širom financijskih tržišta. Navedeni Zakon uveo je koncept "financijskog osiguranja" koji ranije nije bio poznat u lokalnom pravu, međutim, Zakon sadrži i odredbe koje kada se interpretiraju zajedno s važećim odredbama (drugih propisa), dovode do određenog stupnja proturječnosti.

U konzultacijama s hrvatskim pravnim stručnjacima, upućeni smo da temeljna diskrepancija postoji između članka 111. Stečajnog zakona i članka 8. Zakona o financijskom osiguranju. Ključni pravni problem leži u činjenici da oba propisa nastoje regulirati isto pravno pitanje (*close-out netting* u slučaju stečaja), no, kako se čini, svaki od navedenih propisa to čini na potpuno drugačiji način. Ovakvom proturječnošću otvara se mogućnost pojave nekoliko pravnih interpretacija. Budući da o navedenom pravnom pitanju ne postoji sudska praksa u Republici Hrvatskoj, ovakva situacija uzrokuje izvjestan stupanj pravne nesigurnosti, vezan uz provedivost *close-out nettinga* u slučaju stečaja hrvatskih subjekata.

[9] Budući da je članak 111. Stečajnog zakona izvorno donesen 1996. godine, isti, stoga, jasno ne upućuje da li se odnosi na definicije derivata prema članku 3. stavku 1. podstavku 2.d) Zakona o tržištu kapitala, koji je donesen 2008. godine.
[10] U ovom kontekstu ne razmatra se regulativa o adekvatnosti kapitala donesena od strane Hrvatske narodne banke.

Sažimajući opisanu problematiku, zabrinutost sudionika na financijskim tržištima koja se odnosi na članak 111. Stečajnog zakona i članak 8. Zakona o financijskom osiguranju očituje se na sljedeći način:

> Temeljni problem Stečajnog zakona nalazi se u odredbi članka 111. stavka 5.:
> "(5) Naknada zbog neispunjenja prema odredbama prethodnih stavaka ovoga članka sastoji se u razlici između ugovorene cijene i tržišne ili burzovne cijene, koja **drugoga radnoga dana** nakon otvaranja stečajnoga postupka u mjestu ispunjenja vrijedi za ugovore s ugovorenim vremenom ispunjenja. Druga strana svoju tražbinu na takvu naknadu može ostvarivati samo kao stečajni vjerovnik."

Dakle, ova bi odredba značila da bi, nakon što dođe do otvaranja stečajnog postupka nad hrvatskim subjektom na koji se primjenjuje Stečajni zakon, a pod pretpostavkom da između toga subjekta nad kojim je otvoren stečajni postupak i druge ugovorne strane postoji zaključen okvirni ugovor, došlo do izračunavanja neto-iznosa (*close-out net amount*) (svih transakcija) na temelju vrijednosti (tih transakcija) drugoga radnog dana nakon otvaranja stečajnog postupka. Budući da Stečajni zakon pripada skupini prisilnih pravnih propisa, to bi značilo da se isti obvezno primjenjuje i da se njegova primjena ne može mijenjati voljom ugovornih strana jednom kada je došlo do raskida transakcija, a nakon što je otvoren stečajni postupak.

Uspoređujući dalje članak 111. Stečajnog zakona i članak 8. Zakona o financijskom osiguranju, možemo uočiti sljedeće:

Prema članku 111. Stečajnog zakona, ugovorna strana nad kojom nije otvoren stečajni postupak ima pravo nad ugovornom stranom nad kojom je otvoren stečajni postupak zahtijevati naknadu zbog neispunjenja (umjesto ispunjenja transakcija), a koje transakcije se odnose na financijske usluge[11] koje imaju tržišnu ili burzovnu cijenu i koje su predmet okvirnog ugovora. Takva naknada zbog neispunjenja izračunat će se kao neto-iznos svih nedospjelih transakcija. Navedeni neto-iznos bit će obračunat "... u razlici između ugovorene cijene i tržišne ili burzovne cijene, koja drugoga radnoga dana nakon otvaranja stečajnoga postupka ..." i to koja "... u mjestu ispunjenja vrijedi za ugovore s ugovorenim vremenom ispunjenja …", (članak 111. stavak 5. Stečajnog zakona). Suprotno navedenom članku 111. Stečajnog zakona, članak 8. Zakona o financijskom osiguranju navodi da će se ispunjenje obveza iz ugovora o financijskom osiguranju, uključivši prijevremeni prestanak obveza, odnosno obračunavanje (*netting*), izvršiti sukladno tom ugovoru, bez obzira na to što je nad davateljem ili primateljem instrumenta osiguranja otvoren stečajni postupak, ili pokrenut likvidacijski postupak, ili su pokrenute mjere reorganizacije.

Zbog toga bismo Vas također uputili na činjenicu da je u pravnoj praksi razvijenoj kod transakcija na tržištu kapitala uobičajeno da takvi ugovori[12] sadrže odredbu prema kojoj u slučaju stečaja jedne ugovorne strane druga ugovorna strana ima pravo u roku od 20[13] dana

[11] Prema našem shvaćanju navedeni pojam "financijskih usluga" obuhvaćao bi i transakcije OTC-derivatima, međutim, sugerirali bismo da Stečajni zakon jasno upućuje ili na transakcije OTC-derivatima ili na definiciju derivata u Zakonu o tržištu kapitala (članak 3. stavak 1. podstavak 2.d., kako je navedeno u Dodatku C ovoga dopisa).
[12] ISDA Master Agreement sadrži ovu odredbu u svom članku 6 (a).
[13] Broj dana može varirati ovisno o uvjetima pojedinačnog ugovora koji je zaključen između ugovornih strana. U ovom dopisu koristimo broj od 20 dana isključivo iz praktičnih razloga, budući da se navedeni broj učestalo koristi kao pravni standard u ugovoru ISDA Master Agreement.

poslati obavijest o raskidu toj ugovornoj strani nad kojom je otvoren stečajni postupak, navodeći razlog takvog raskida, a u kojoj će (ta ugovorna strana) odrediti dan prijevremenog raskida svih nedospjelih transakcija pokrivenih okvirnim ugovorom, pri čemu taj dan ne može biti određen prije nego što takva obavijest postane važeća.

Razlog ovakvog rješenja je činjenica što između ugovornih strana vrlo često može biti zaključeno i po nekoliko stotina nedospjelih transakcija derivatima u trenutku kada nad jednom ugovornom stranom bude otvoren stečajni postupak. U praksi, ona ugovorna strana nad kojom nije otvoren stečajni postupak, a ne zakonodavac, je ona strana koja ima pravo odlučiti o danu raskida, pa čak i u slučaju stečajnog postupka nad drugom ugovornom stranom, kako bi se mogla pripremiti za izračunavanje tržišnih vrijednosti svih nedospjelih transakcija i utvrditi njihovu ukupnu neto-vrijednost. Izuzetno je važno da bude izvjestan i točan dan kada dolazi do raskida svih transakcija, jer se na taj točno određeni dan trebaju utvrditi vrijednosti svake od transakcija, a koje zbog fluktuacija na financijskim tržištima mogu iz dana u dan (pa čak i tijekom samo jednog dana) biti dramatično različite. Jednom kada se točno odredi vrijednost svake od transakcija, moguće će biti utvrditi i konačni (dugovani) neto-iznos. Određivanje točnog dana prijevremenog raskida važno je i radi implementiranja istoga u procedure upravljanja rizicima i uvođenja izvjesnosti u izračunavanje točnog iznosa potencijalnih gubitaka.

Članak 111. Stečajnog zakona uvodi određenu dvojbu bi li se takva ugovorna klauzula o raskidu držala nevažećom prema hrvatskom pravu, posebno stoga što Stečajni zakon određuje da će do *close-out nettinga* (i izračunavanja *close-out* neto-iznosa) doći drugog radnog dana nakon otvaranja stečajnog postupka i budući da je stečajno pravo javno pravo, jasno je da ugovorne strane ne mogu zajednički (ugovorom) izmijeniti primjenu Stečajnog zakona. S druge pak strane, članak 8. Zakona o financijskom osiguranju podržava gore citiranu ugovornu odredbu o prijevremenom raskidu i "netiranju", međutim, navedeni članak time je, istovremeno, u suprotnosti sa Stečajnim zakonom.

Navedene proturječnosti mogu, stoga, dovesti do različitih pravnih interpretacija hrvatskih sudova u slučaju pokretanja pravnih postupaka vezanih uz navedenu problematiku, čime dolazi do daljnjeg povećanja stupnja pravne nesigurnosti.

(C) Zakon o kreditnim institucijama – članak 353. stupa na snagu tek u trenutku primanja Republike Hrvatske u Europsku uniju

Treći pravni izvor kojim se regulira *netting* nalazi se u članku 353. Zakona o kreditnim institucijama. Ovaj članak određuje da je u pogledu kreditnih institucija iz Republike Hrvatske, ili bilo koje druge države članice Europske unije, tijekom provođenja reorganizacijske mjere ili otvaranja likvidacijskog, odnosno stečajnog, postupka za ugovore o prijeboju i ugovore o netiranju mjerodavno pravo koje se primjenjuje na takve ugovore. Cjeloviti tekst ovoga članka nalazi se u Dodatku D ovoga dopisa.

Promatrajući iz perspektive pravnih praktičara ovu formulaciju, nije u cijelosti jasno koje je to pravo "koje se primjenjuje na takve ugovore". Interpretirajući navedenu odredbu, moguće je doći do dva zaključka. Prvi zaključak bio bi da je pravo koje se primjenjuje na ove ugovore (o *nettingu*) stečajno pravo (bilo koje stečajno pravo koje je mjerodavno za bilo koji pojedinačni subjekt nad kojim je otvoren stečajni postupak). Kao drugi zaključak nameće se rješenje da je

pravo koje se primjenjuje, zapravo, pravo koje su u ugovoru kao mjerodavno izabrale ugovorne strane (*lex contractus*). Stječe se dojam da i navedena odredba u sebi sadrži sličnu proturječnost, poput opisane proturječnosti između članka 111. Stečajnog zakona i članka 8. Zakona o financijskom osiguranju.

Koliko nam je poznato, navedeni članak 353. Zakona o kreditnim institucijama stupit će na snagu na dan prijema Republike Hrvatske u Europsku uniju (v. članak 376. Zakona o kreditnim institucijama, cjeloviti tekst navedenog članka nalazi se u Dodatku E ovoga dopisa).

Do toga trenutka isti problem proizlazit će iz proturječnosti članka 111. Stečajnog zakona i članka 8. Zakona o financijskom osiguranju koji se također primjenjuju i na kreditne institucije. U trenutku kada Republika Hrvatska postane članicom EU-a, sudionici financijskog tržišta koji redovito trguju s hrvatskim kreditnim institucijama bit će suočeni s dodatnim pravnim rizikom koji uzrokuje ranije opisana nejasna formulacija sadržana u članku 353. Zakona o kreditnim institucijama.

Što je potrebno učiniti?

Kao rezultat pravne nesigurnosti vezane uz OTC-derivate u Republici Hrvatskoj, Hrvatsko tržište derivata suočeno je, prema našem mišljenju, s bitnim kompetitivnim nedostatcima. Financijske institucije i institucionalni investitori u Republici Hrvatskoj i izvan nje ne mogu sa sigurnošću izračunavati svoje neto-izloženosti prema hrvatskim ugovornim stranama. Hrvatsko pravo, doduše, daje okvir za *netting*, ali mu nedostaje pravna izvjesnost u pogledu točnog određenja vremena kada nastupa dan prijevremenog raskida transakcija u slučaju pokretanja stečajnog postupka. Slijedom navedenoga, vidljivo je da se ne možemo u cijelosti osloniti na globalno prihvaćene standardizirane ugovore za derivate i s njima povezane transakcije. Istovremeno kao posljedicu takve pravne nesigurnosti hrvatski sudionici financijskog tržišta koji zaključuju transakcije derivatima, kako bi ograničili svoje rizike, suočeni su sa znatnim komparativnim nedostatkom koji se očituje u višoj cijeni derivativnih instrumenata i ograničenju pristupa tržištima financijskih derivata.

Na temelju svojeg iskustva, ISDA i njezini članovi drže da je iz perspektive (sprječavanja) sustavnog rizika iznimno važno osigurati sigurnost sudionicima financijskih tržišta u pogledu provedivosti *nettinga* i financijskog osiguranja u najvećoj mogućoj mjeri.

ISDA kontaktira s hrvatskom bankarskom zajednicom i sudionicima financijskog tržišta i ovim bismo putem željeli dati svoju podršku i pomoć u rješavanju svih opisanih proturječnosti. Razrješavanjem takvoga stanja, Republika Hrvatska bila bi u potpunosti u skladu sa svjetskim tržišnim standardima. Ovim putem rado bismo potaknuli Republiku Hrvatsku da razmotri mogućnost provođenja potrebnih izmjena i dopuna propisa u kontekstu nadolazeće Direktive EU-a kojom se mijenjaju Direktive o financijskom osiguranju i konačnosti namire (2009/44/EC) (EU Directive Amending the Financial Collateral and Settlement Finality Directives (2009/44/EC)). Implementacija navedene Direktive u državama članicama Europske unije predviđena je do kraja 2010.godine, , a njezino stupanje na snagu do lipnja 2011. godine. Vjerujemo da ovakva situacija otvara mogućnost razmatranja revidiranja inicijalne implementacije izvorne Direktive o financijskom osiguranju u Republici Hrvatskoj, kao i svih postojećih nedostataka vezanih uz regulativu o *nettingu*. Nekoliko

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država članica Europske unije iskoristilo je ovu novu Direktivu kao priliku za ispravljanje uočenih nedostataka u vlastitoj regulativi koja se odnosi na *netting*/financijsko osiguranje (primjerice Češka, Austrija, Velika Britanija, Slovenija).

Nadamo se da će Vam ove naše sugestije biti korisne i da ćete iste ujedno i razmotriti. Bilo bi nam posebno drago kada biste nam dopustili da Vam pružimo više informacija za sve diskusije koje se tiču navedene problematike. Također, vrlo bismo se rado upoznali s pogledima hrvatskih vlasti o svim pitanjima koja smo u ovom dopisu dotaknuli. Ukoliko držite da Vam ISDA može pomoći u ovom procesu, nadamo se da ćete nam se obratiti na ISDA European Office, One Bishops Square, London El 6AD, +44 20 3088 3550, pwerner@isda.org.

Poznato nam je da Ministarstvo financija Republike Hrvatske nije jedino tijelo u Republici Hrvatskoj u čiju bi nadležnost pripadala i implementacija Direktive kojom se mijenja Direktiva o financijskom osiguranju. Vjerujemo da bi i Hrvatska narodna banka trebala biti upućena u cjelokupnu problematiku. Slijedom toga, držali smo prikladnim poslati ovo pismo na znanje Hrvatskoj narodnoj banci, te dodatno Hrvatskoj udruzi banaka kao relevantnoj strukovnoj udruzi zainteresiranoj za ovu problematiku.

S poštovanjem,

Dr Peter M Werner
Senior Director
pwerner@isda.org

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DODATAK A

ODREĐENE TRANSAKCIJE TEMELJEM ISDA MASTER AGREEMENT UGOVORA

STUDENI 2009

(CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS, NOVEMBER 2009)

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example, Gold-COMEX on the COMEX Division of the New York Mercantile Exchange) or another method specified by the parties. Bullion swaps include cap, collar or floor transactions in respect of Bullion.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis or on a specified future date. A Bullion Trade may be settled by physical delivery of Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and

in the case of silver, platinum and palladium, a troy ounce (or in the case of reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security (or in some cases an equivalent security) to the other party (in consideration for the original cash payment plus a premium).

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate, floating index or floating commodity price payer on the cap and the other party is the floating rate, floating index or floating commodity price payer on the floor.

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

Credit Default Swap Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to enter into a Credit Default Swap.

Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may

also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or more) of Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Emissions Allowance Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity and shares to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for

payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of shares of an issuer or a basket of shares of several issuers at a specified strike price. The share option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed or floating rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a "Fund Interest"), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single

Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement occurs based on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

Fund Swap Transaction: A transaction a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency based on the redemption value of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

Longevity/Mortality Transaction. (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality- contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

Property Index Derivative Transaction. A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional or national area.

Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities (or in some cases equivalent securities) from such other party at a future date.

Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower's obligation to replace the securities at a defined date with identical securities.

Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

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DODATAK B

Članak 111. Stečajnog zakona (Narodne novine br. 44/96 (Zakon o bankama, Narodne novine br.161/98), 29/99, 129/00, 123/03, Uredbe o izmjeni i dopuni Zakona o o izmjenama i dopunama Stečajnog zakona Narodne novine br. 197/03, 187/06; 82/06 i 11610):

"(1) Ako je isporuka robe koja ima neku tržišnu ili burzovnu cijenu ugovorena za neko fiksno određeno vrijeme ili unutar nekog fiksnog roka, a to vrijeme ili istek roka nastupi tek nakon otvaranja stečajnoga postupka, druga strana ne može tražiti ispunjenje, već samo naknadu zbog neispunjenja fiksnih poslova.

(2) Ako je za financijske usluge koje imaju tržišnu i burzovnu vrijednost ugovoreno određeno vrijeme ili rok, a to vrijeme ili istek toga roka nastupi nakon otvaranja stečajnoga postupka, druga strana ne može tražiti ispunjenje, već samo naknadu zbog neispunjenja.

(3) Financijskim se uslugama iz stavka 2. ovoga članka osobito smatraju:
1. isporuka plemenitih kovina,
2. predaja vrijednosnih papira ili sličnih prava, ako stjecanje udjela u nekom trgovačkom društvu nije učinjeno s namjerom uspostavljanja trajne veze s tim društvom,
3. novčane činidbe koje se ispunjavaju u stranoj valuti ili u nekoj obračunskoj jedinici,
4. novčane činidbe čija visina je izravno ili neizravno određena tečajem strane valute ili obračunske jedinice, kamatnom stopom tražbine ili cijenom drugih dobara ili usluga,
5. opcije i druga prava na isporuke ili novčane činidbe u smislu odredaba točke 1. do 4. ovoga stavka.

(4) Ako su poslovi o financijskim uslugama obuhvaćeni jednim okvirnim ugovorom kojim je predviđeno, da u slučaju povrede ugovornih odredaba, može prestati samo sporazumno, svi će se ti poslovi smatrati jednim dvostrano obveznim ugovorom u smislu odredaba ovoga članka i članka 110. ovoga Zakona.

(5) Naknada zbog neispunjenja prema odredbama prethodnih stavaka ovoga članka sastoji se u razlici između ugovorene cijene i tržišne ili burzovne cijene, koja drugoga radnoga dana nakon otvaranja stečajnoga postupka u mjestu ispunjenja vrijedi za ugovore s ugovorenim vremenom ispunjenja. Druga strana svoju tražbinu na takvu naknadu može ostvarivati samo kao stečajni vjerovnik. "

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DODATAK C

Definicija derivata prema članku 3. stavku 1. podstavku 2.d. Zakona o tržištu kapitala (Narodne novine 88/08, ispr.136/08, 74/09)

„2.d. izvedenice u koje se ubrajaju:

– opcije (options), budućnosnice (futures), zamjene (swaps), kamatni unaprijedni ugovori (forward rate agreements) i bilo koji drugi izvedeni financijski instrumenti koji se odnose na vrijednosne papire, valute, kamatne stope ili prinose te drugi izvedeni financijski instrumenti, financijski indeksi ili financijske mjere koje se mogu namiriti fizički ili u novcu,

– opcije, budućnosnice, zamjene, kamatni unaprijedni ugovori i bilo koji drugi izvedeni financijski instrumenti koji se odnose na robu, a moraju se namiriti u novcu ili se mogu namiriti u novcu na zahtjev jedne od ugovornih strana (osim iz razloga neplaćanja ili drugih razloga za raskid ugovora),

– opcije, budućnosnice, zamjene i bilo koji drugi izvedeni financijski instrumenti koji se odnose na robu, a mogu se namiriti fizički pod uvjetom da se njima trguje na uređenom tržištu i/ili na multilateralnoj trgovinskoj platformi,

– opcije, budućnosnice, zamjene, unaprijedni ugovori i bilo koji drugi izvedeni financijski instrumenti koji se odnose na robu, a mogu se namiriti fizički, koji nisu navedeni u alineji 3. podtočke d. ove točke i nemaju komercijalnu namjenu, koji imaju karakteristike drugih izvedenih financijskih instrumenata, uzimajući u obzir između ostalog poravnavaju li se i namiruju putem priznatih klirinških organizacija ili podliježu redovitom maržnom pozivu (margin call),

– izvedeni instrumenti za prijenos kreditnog rizika,

– financijski ugovori za razlike (financial contract for differences),

– opcije, budućnosnice, zamjene, kamatni unaprijedni ugovori i bilo koji drugi izvedeni financijski instrumenti koji se odnose na klimatske varijable, vozarine, emisijske kvote ili stope inflacije ili druge službene ekonomske statističke podatke, a moraju se namiriti u novcu ili se mogu namiriti u novcu na zahtjev jedne od ugovornih strana (osim iz razloga neplaćanja ili drugih razloga za raskid ugovora), kao i bilo koji drugi izvedeni financijski instrumenti koji se odnose na imovinu, prava, obveze, indekse i mjere koje nisu navedene u ovoj točki, a koji imaju značajke drugih izvedenih financijskih instrumenata uzimajući u obzir, između ostalog, trguje li se njima na uređenom tržištu i/ili na multilateralnoj trgovinskoj platformi, i poravnavaju li se i namiruju putem priznatih klirinških organizacija ili podliježu redovitom maržnom pozivu.

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DODATAK D

Članak 353. Zakona o kreditnim institucijama (Narodne novine 117/08, 74/09, 153/09):

"Ugovor o prijeboju i ugovor o netiranju

Članak 353.

Tijekom provođenja reorganizacijske mjere ili otvaranja likvidacijskoga, odnosno stečajnog postupka nad kreditnom institucijom iz Republike Hrvatske ili druge države članice za ugovore o prijeboju i ugovore o netiranju mjerodavno je pravo koje se primjenjuje na takve ugovore."

DODATAK E

Članak 376. Zakona o kreditnim institutcijama (Narodne novine 117/08, 74/09, 153/09):

"Stupanje na snagu

Članak 376.

Ovaj Zakon objavit će se u »Narodnim novinama«, a stupa na snagu 1. siječnja 2009., **osim odredbi** članka 36. stavka 4., članka 56. točke 2., članka 72. do 78., članka 81. do 86., članka 92., članka 127. stavka 3. do 6., članka 158. stavka 2. točke 3., članka 160. stavka 3., članka 209. do 217., članka 219., članka 220., članka 222., članka 227., članka 228. stavka 1. točke 2., članka 282. stavka 4. i 5., članka 285., članka 286. stavka 6., članka 287. do 291., članka 293. do 294., članka 296. stavka 4., članka 298., članka 300., članka 301. stavka 2., članka 303. i **članka 331. do 359.** ovoga Zakona **koje stupanju na snagu na dan prijama Republike Hrvatske u Europsku uniju."**

ISDA Safe, Efficient Markets

Ministry of Finance of Republic of Croatia
mr.sc. Martina Dalić
Minister of Finance of the Republic of Croatia
Katančićeva 5
HR – 10 000 Zagreb
Republic of Croatia

Email: kabinet@mfin.hr

By e-mail and courier

June 24, 2011

Support for reform of netting and collateral legislation in Croatia

Dear Mrs Dalić,

The International Swaps and Derivatives Association, Inc. (**ISDA**) is the largest global financial trade association, by number of member firms. Our membership includes more than 830 of the world's major commercial, merchant and investment banks, corporations, government entities and other institutions. ISDA was chartered in 1985 and today represents institutions from 58 countries on five continents. Its members are the leading participants in privately negotiated, or over-the-counter (**OTC**), derivatives industry. More than half of the total membership is based in the European Union and neighbouring countries and a significant portion of the rest comprises participants active in the European financial markets as dealers, service providers or end users of derivatives. The OTC derivatives industry includes interest rate, currency, commodity, credit and equity swaps, options and forwards, and related products such as caps, collars, floors and swaptions. The most commonly entered into OTC derivatives transactions are described in Appendix A to this letter.[1]

ISDA cooperates closely with regulators around the world since one of ISDA's core missions is promoting legal certainty for cross-border OTC derivatives transactions through law reform.

ISDA is committed to promoting the development of sound risk management practices in the international financial markets. The markets are relying on the adequate legal and regulatory treatment of over-the-counter (**OTC**) derivatives transactions. ISDA is keen to offer all possible assistance to the Croatian Ministry of Finance, Croatian National Bank and Croatian market participants with regard to improving the current legal framework for derivatives in the Republic of Croatia. Such an initiative is in line with ISDA's mission to facilitate statutory support for OTC derivatives, the legal enforceability of standard market OTC derivatives documentation such as the ISDA Master Agreement and Credit Support Documents and thereby foster greater harmonization of international and European standards in order to cope with difficult market conditions.

The primary purpose of OTC derivatives is hedging of various exposures and sound risk management practices. Not only commercial entities like financial institutions and corporates

[1] The attached list is regulary updated and amended by ISDA according to the development of financial markets and it does not contain all possible types of OTC – derivatives. Therefore, the attached list has not been translated into Croatian lanuage but is rather atteched in its original version in English.

International Swaps and Derivatives Association, Inc.
One Bishops Square
London E1 6AD, United Kingdom
P 44 (0) 20 3088 3550 **F** 44 (0) 20 3088 3555
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

use those tools for such purposes, but also many governments around the world via their state treasuries manage their public debt by using interest rate swaps, currency swaps and various related instruments. It is also quite common for state owned entities like large energy providers (electricity utilities companies, oil producers etc.) and various state agencies and municipalities to use such instruments in order to manage the risks they are exposed to (particularly the risk related to the change of the market interest rates and the foreign exchange risk).

For several years ISDA has been closely observing the development of OTC derivatives regulation in the Republic of Croatia. Cross-border transactions with Croatian counterparties have been growing steadily recently. We are delighted to see that the Croatian Ministry of Finance and the Croatian National Bank have made significant progress and valuable improvements in the Croatian legal system in respect of OTC derivatives, netting, financial collateral and capital adequacy regulation. However, ISDA has noticed that it has been quite common to the majority of former and current EU accession countries come across certain issues when implementing specialized regulation regarding financial markets. This is due to the fact that myriad EU directives have to be implemented in a very short period of time. This often causes inconsistencies in the respective country's legal system. In this context ISDA has made several observations on possible inconsistencies in the Croatian legal system in terms of netting in bankruptcy and around the regulation of financial collateral. These inconsistencies have a serious effect on the financial markets as well as legal certainty. We would therefore respectfully suggest that these issues be looked at by the Croatian authorities as soon as possible.

We understand that the Croatian Ministry of Finance intends to amend the Financial Collateral Law, Official Gazette No. 76/07 (Croat.: *"Zakon o financijskom osiguranju",* Narodne novine br.76/07) in the near future. ISDA is keen on entering into a dialogue with the Croatian authorities in view of the forthcoming implementation of the amending Directive 2009/44/EC of the European Parliament and Council of 6 May 2009. This occasion provides a great opportunity to address some legal issues which are currently standing in the way of full and unfettered recognition of close-out netting and financial collateral arrangements with all types of Croatian counterparties for regulatory purposes. This would result in a significant improvement of the Croatian legal regime and would allow international market participants as well as the Republic of Croatia and Croatian counterparties that participate in the international financial market to benefit from a higher degree of legal certainty.

Having worked with regulators in jurisdictions around the world to promote legal enforceability of the close-out netting mechanism in the ISDA Master Agreement, (the leading standard form documentation for international OTC derivatives transactions worldwide[2]), we hope ISDA's assistance could prove useful to you.

Please allow us to briefly outline the main legal issues we have identified with regard to Croatia and provide a few suggestions for legal reform. We hope that you find these appropriate in the interest of achieving a safer and more certain legal environment which benefits local and international market participants and the Croatian economy as a whole.

What is close-out netting?

Most contractual documents that are widely used in international financial derivative markets are drafted as a type of master or framework agreement (such as the ISDA Master Agreement). Each of these master agreements is designed as a master netting agreement

[2] ISDA has published five forms of the ISDA Master Agreement: (i) the 1987 ISDA Interest Rate Swap Agreement; (ii) the 1987 ISDA Interest Rate and Currency Exchange Agreement; (iii) the 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction); (iv) the 1992 ISDA Master Agreement (Multicurrency – Cross Border); and (v) the 2002 ISDA Master Agreement.

under which the parties can enter into a number of different trades and, on close-out, calculate the net exposure between the parties under all of these trades. Close-out netting in relation to OTC derivative transactions refers to the ability of a party under a master agreement for such OTC derivative transactions (such as an ISDA Master Agreement) to net the mark-to-market values of all existing transactions under the master agreement upon their early termination following the default of its counterparty or other specified events.

Closely related to the issue of close-out netting are financial collateral arrangements under the Financial Collateral Directive. Under a financial collateral arrangement, the obligation to pay a net close-out amount is further secured by provision of financial collateral (cash, securities or credit claims). This is an additional means by which market participants minimize their credit risks on derivative transactions, and thus systemic risk.

The benefits of close-out netting and financial collateral arrangements

The benefits of close-out netting and financial collateral arrangements are risk reduction and cost reduction. The risk reduction is twofold: reduction of credit risk and the consequent reduction of systemic risk. By reducing credit risk at each node in the network of relationships between market participants, close-out netting also has an important positive effect on systemic risk. Recognizing the value of close-out netting, the G10 central banks and central banks of other jurisdictions (including Croatia) may permit, subject to prudential conditions, the recognition of netting for capital adequacy and large exposure purposes (leading to cost reduction).

Close-out netting and financial collateral arrangements have proved to be extremely helpful in mitigating the impact of the current global economic crisis on all market participants (the credit risk upon insolvency of a derivative counterparty being reduced to a net amount due between the parties, or even to zero where collateral has been transferred to cover the net exposure). The March 2010 report of the Basel Committee/FSB Cross-Border Banking Resolution Group makes reference to this fact[3].

The particular benefits of an efficient legal framework for close-out netting and financial collateral arrangements in the Republic of Croatia would include:

(i) A cost cutting effect on derivatives pricing, benefiting Croatian clients using derivatives to hedge their business risks;

(ii) Competitive advantage of lower capital adequacy requirements for Croatian financial institutions;

(iii) Increased predictability of legal treatment and a safer legal environment in general (which is a valuable asset for attracting foreign investments);

(iv) The incentive for a wider use of derivative instruments allowing Croatian businesses (also including the state treasury) to hedge their risks in the most efficient and secure way, in the interest of the economy as a whole; and also

(v) Close-out netting effectiveness is likely to encourage a wider use of master agreements in the Republic of Croatia which would, close-out netting aside, allow the establishment of a more stable and foreseeable contractual basis for long term business relationships and set up a safe legal environment fostering product innovation (which then leads to the reduction of legal risk by using standardized documentation templates for all kinds of financial products, including developing products such as trading in emissions allowances).

[3] http://www.bis.org/publ/bcbs169.htm

The combination of the above beneficial factors would lead to a more robust legal analysis of the enforceability of close-out netting and collateral arrangements in Croatia.

The need for legal certainty

Feedback from market participants indicates that interest in derivatives transactions with Croatian entities continues to increase. This is particularly the case in OTC derivatives, involving a wider range of asset classes, including financial collateral arrangements, as well as with a greater diversity in counterparty types. This is partly related to the fact that the Republic of Croatia shall become an EU member state in the very near future. We welcome the fact that the Republic of Croatia has undertaken major efforts in implementing all relevant EU directives in the capital markets area, especially the Financial Collateral Arrangements Directive (2002/47/EC), the Settlement Finality Directive (98/26/EC) as well as the Winding-up Directive for Credit Institutions (2001/24/EC). We note that some of the provisions of the Croatian Credit Institutions Act, Official Gazette No. 117/08, 74/09, 153/09[4] implementing the Winding-up Directive for Credit Institutions (including the netting provision stated under Article 353 of the Credit Institutions Act) will enter into force upon the moment the Republic of Croatia joins the EU. Furthermore, we understand that historically the first close-out netting provision in the Croatian legal system was given in Article 111 of the Croatian Bankruptcy Act[5], Official Gazette No. 44/96 (Banking Act, Official Gazette No. 161/98), 29/99, 129/00, 123/03, Decisions on the Amendments to the Bankruptcy Act Official Gazette No. 197/03 and 187/06, 82/06, 116/10[6] and that this provision is still in force in the Republic of Croatia[7].

The various aforementioned EU legal instruments make reference to close-out netting in one way or another. The European Commission, in its report on the evaluation of the implementation of the Financial Collateral Directive, acknowledged the crucial significance of the legal concepts of close-out netting and set-off and stated that the *"acquis communautaire"* as to the definition of close-out netting and set-off needs to be further harmonized going forward (COM (2006) 833 final).

As far as the current legal recognition of close-out netting in the Republic of Croatia is concerned, ISDA has observed that the enforceability of close-out netting is included in Croatian provisions on the insolvency of Croatian entities.
However, although Croatian law may recognize close-out netting principles and internationally accepted OTC derivatives terminology, many market participants and legal experts believe that Croatian law does not set out a clear position with respect to enforceability of close-out netting in the event of the bankruptcy of Croatian entities.

In addition, ISDA has major concerns relating to the contradictory regulation dealing with close-out netting under Article 111 of the Croatian Bankruptcy Act which appears to be contrary to both Article 8 of the Financial Collateral Law.

In recognition of the substantial credit and systemic benefits of close-out netting and financial collateral arrangements, many jurisdictions that were previously subject to doubts about the enforceability of netting and collateral arrangements, have introduced legislation to enable it or, more often, to strengthen the relevant legal regime. Examples in Europe include the vast majority of EU member states (including Belgium, Czech Republic, Denmark, Finland,

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[4] Croat.:"Zakon o kreditnim institucijama", Narodne novine br. 117/08, 74/09, 153/09

[5] The full text of Article 111 of the Bankruptcy Act is reproduced in Appendix B of this letter.

[6] Croat."Stečajni Zakon", Narodne novine 44/96 (Zakon o bankama, Narodne novine 61/98), 29/99, 129/00, 123/03, Uredbe o izmjenama i dopunama Stečajnog zakona, Narodne novine 197/03 i 187/06, 82/06, 116/10

[7] However, the stated provision of Article 111 of the Bankruptcy Act is not fully in accordance wdith EU Directives and from our perspective it needs to be revised in the nearest future.

France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, United Kingdom), Switzerland and Turkey. Examples elsewhere include Australia, Brazil, Canada, Israel, Japan, Mexico, New Zealand, South Africa, South Korea and the United States. A current status report on the enforceability of close-out netting worldwide can be obtained from http://www.isda.org/docproj/stat_of_net_leg.html.

The Current Legal Analysis under Croatian Law

We have discussed the current legal analysis with legal experts and market participants in the Republic of Croatia.

(A) Derivatives legislation - definitions

In the period after 1991 a number of basic definitions relating to derivatives have been included in Croatian law (i.e. Foreign Exchange Act, former Securities Market Act) as well as the capital adequacy and risk management regulations published by the Croatian National Bank. It is fair to say that the Croatian legal framework for derivatives has come a long way until the latest statutory definition of derivative transactions (Croat.:*"izvedenice")* as defined by the Capital Markets Act, Official Gazette No. 88/08, 136/08, 74/09[8], in Article 3 (1)sub - paragraph 2d (cf. Appendix C to this letter).

By implementing this extensive definition of derivatives (both OTC derivatives as well as the exchange traded form) Croatia has made a significant step forward in recognizing the huge variety of derivatives transactions that are used in international financial markets.

(B) Netting and collateral legislation in Republic of Croatia – legal inconsistency

Since OTC derivatives transactions are closely linked to netting legislation, we understand that the concept of close-out netting in Croatian legislation was originally introduced by Article 111 of the Croatian Bankruptcy Act (under the title "Fixed Transactions. Financial Transactions with Fixed Term." (Croat.:*"Fiksni poslovi. Financijski poslovi s određenim rokom").* Although the Bankruptcy Act has been amended several times, Article 111 has remained unchanged since its adoption in 1996.

Article 111, however, does not provide a substantive definition of close-out netting is. The term "netting" does not appear to be mentioned in the Bankruptcy Act at all. The law provides a reference to principle of close-out netting by stating that provided there is a master agreement with a netting clause in place between the bankrupt entity (also referred to as "the defaulting party") and the non-defaulting party, the non-defaulting party may terminate all transactions and claim the net amount of all terminated transactions upon the bankruptcy of the defaulting party. This claim is to be calculated on the second business day after the day the bankruptcy proceedings have officially commenced. This means that the value of the transactions on the second business day should be taken as the value relevant for the calculation of the net amount. The law also provides a fairly wide definition of the eligible transactions. It acknowledges the termination of the transactions under the master agreement and the calculation of a single claim upon bankruptcy under such master agreement.

Although Article 111 also addresses other relevant issues regarding the definition of financial (derivative) transactions to which this Article is meant to apply to[9], we understand that for the

[8] Croat.:"Zakon o tržištu kapitala", Narodne novine br. 88/08, 136/08, 74/09

[9] Since Article 111 of the Bankruptcy Act was orginally passed in 1996 and it does not clearly refer to the definitions of derivatives as given under Article 3 Sub - paragraph 1. Sub sub - paragraph 2 d of the Capital Markets Act that was passed in 2008.

period from 1996 to 2008 this was the only legal source[10] in the Republic of Croatia dealing with close-out netting. Furthermore, it has to be noticed that until 2007 neither the Bankruptcy Act nor any other law contained any clear provision regarding financial collateral in the sense of the EU Financial Collateral Directive that should be calculated together with all outstanding transactions when calculating the close-out net amount.

However, this situation changed in 2007 when the Croatian Parliament passed the Financial Collateral Law (in force as of January 1st, 2008) adopting the EU Financial Collateral Directive.

The Financial Collateral Law introduced a set of important provisions not only in respect of financial collateral, but also in respect of the OTC derivatives and close-out netting. The concepts implemented in the Financial Collateral Law have been welcomed by the international financial community since they reflect standards across all financial markets. This law has introduced the concept of financial collateral that previously was not recognized by local law. The law also contains certain provisions that, when interpreted together with certain previously existing provisions, result in a certain degree of inconsistency.

We understand from experts in Croatian law that the most relevant discrepancy exists between the Article 111 of the Bankruptcy Act and Article 8 of the Financial Collateral Law. The basic legal problem lies within the fact that both laws aim at regulating the same legal issue (close-out netting in bankruptcy), but appear to do so in different ways. Such an inconsistency opens a window for several possible interpretations. Since there is no existing court practice in the Republic of Croatia to address this matter, the described situation causes certain level of legal uncertainty about the clear enforceability of close-out netting in bankruptcy of Croatian entities.
In summary, the concerns of the market participants arising in connection with Article 111 of the Croatian Bankruptcy Act and Article 8 of the Financial Collateral Law are as follows:

The main issue regarding the Bankruptcy Act is described under Article 111 (5):

> *"(5) The claim for non-performance as stated under previous sub - paragraphs of this Article shall be determined by the difference between the agreed price and that market or exchange price which* ***on the second business day*** *after the institution of the bankruptcy proceedings prevails at the place of performance for contracts entered into with the stipulated time. The other party may assert such claim only as a creditor in bankruptcy proceedings."*

This provision has the meaning that after the institution of the bankruptcy proceeding against any Croatian counterparty which is subject to the Bankruptcy Act, and provided a master agreement is in place between the bankrupt entity and the non-defaulting party, it can be argued that the value for the calculation of the close-out/net amount is to be calculated based on their value on the second business day after the institution of the bankruptcy proceedings. Since the Bankruptcy Act is part of the mandatory provisions under local law/*"ordre public",* this means that the application of this provision is compulsory by it and cannot be amended by the parties to a contract, at least not as long as the termination happens upon bankruptcy.

Furthermore, a comparison between Article 111 of the Bankruptcy Act and Article 8 of the Financial Collateral Law shows the following:

According to Article 111 of the Bankruptcy Act the non-defaulting party has the right to claim for non-performance (and not the right to request for the fulfillment of such transactions) from the defaulting party (the bankrupt entity) in respect of the financial

[10] In this context we do not take into consideration capital adquacy regulation passed by the Croatian National Bank.

services[11] that have a market or an exchange price and are covered by the master agreement. Such a claim (Croat.:*"naknada zbog neispunjenja")* shall be calculated as a net amount of all outstanding transactions. This net amount shall be calculated based on "*...a market price or an exchange price that is valid on **the second business day** after the day a bankruptcy proceeding has commenced..."* and that *"...such price is valid for the contract with the stipulated ("agreed") time of fulfillment at the place of (their) fulfillment."* (Article 111 (5) of the Bankruptcy Act[12]). Contrary to Article 11 of the Bankruptcy Act, Article 8 of the Financial Collateral Law states that if a bankruptcy proceeding has commenced, the fulfillment of obligations arising out of the financial collateral agreement, including the premature (early) termination of obligations (acceleration) with regard to netting ("calculation") **shall take effect in accordance with the terms provided in such agreement**, **notwithstanding the commencement of bankruptcy proceeding, liquidation proceedings or reorganisation measures in respect of the collateral provider or collateral taker.**

Also, we would like to draw your attention to the fact that it is quite common in legal practice, developed in capital markets transactions, that such agreements[13] contain a provision that in case of the bankruptcy proceeding, the non-defaulting party shall send a termination notice stating that if at any time a bankruptcy proceeding with respect to the defaulting (bankrupt) party has occurred and is then continuing, the other party (the non-defaulting party) may, by not more than 20 days[14] give notice to the defaulting (bankrupt) party specifying that the relevant event of default (bankruptcy), **designate a day** not earlier that the day such notice is effective as early termination date in respect of all outstanding transactions covered by the master agreement.

The reason for this approach is that there are usually many hundreds of derivative transactions outstanding at the moment bankruptcy occurs. In practice, the non-defaulting party may decide on the early termination date, and not the legislator, even in case of the bankruptcy of the defaulting party in order to be prepared to calculate the market value of all outstanding transactions and their net value. The determination of the precise early termination date of all transactions is of utmost importance, because on such date the value of each of such transactions has to be determined, whereas due to the volatility of financial markets such values can dramatically differ from one day to the next day (and often even within one day). Once the value of each transaction is determined, only then it is possible to determine the final (owned) net – amount. The precise determination of the early termination date is also important for the implementation of the risk management procedures and in respect of the more certain calculation of the potential losses.

Article 111 of the Bankruptcy Act raises concerns that such a termination clause might not be enforceable under Croatian law, because the Bankruptcy Act provides that the close-out netting (and calculation of a close-out net sum) shall take effect on the second dealing day after the day the bankruptcy proceeding has commenced, and since this is the public law, it is clear that the parties may not mutually change the enforcement of the Bankruptcy Act. On the other hand, Article 8 of the Financial Collateral Law supports the stated provision of the agreement related to the early termination and netting, but at the same time it is contrary to the Bankruptcy Act.

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[11] We understand that such 'financial services' cover the OTC derivatives transactions, however, we would recommend that Bankruptcy Act clearly refers either to the OTC derivatives transactions or to the definition derivatives given Capital Markes Act (Article 3 (1)sub-paragraph 2 d., as stated under A) above).

[12] We understand that this provision contains a full range of legal questions and unclear concepts, however the intention of this letter is to pay your attention just to core problems currently existing in Croatian legal system.

[13] ISDA Master Agreement contains such provision in its Section 6 (a).

[14] The number of days may vary according to the terms of the agreement entered between the parties. We are using the number of 20 days as a matter of convenience, since it is used as a legal standard in the ISDA Master Agreement.

The discrepancies outlined above may lead to different interpretation by Croatian courts, in case litigation around these issues was to be initiated. This concern further increases the degree of legal uncertainty.

(C) *Credit Institutions Act – Article 353 to enter into force the moment the Republic of Croatia joins the European Union*

The third legal source dealing with netting is given in Article 353 of the Credit Institutions Act. It states that during the enforcement of reorganization measures or commencement of liquidation respectively bankruptcy proceedings in respect of a credit institution from Republic of Croatia or any other member state, the governing law applicable to the compensation and netting agreements shall be the "*law that applies to these agreements (the law to which these agreements are subject"*). The complete text of this Article is provided in Appendix D to this letter.

From the perspective of the legal practitioners it is still not clear which law is *"the law that applies to such agreements" (or "the law to which these agreements are subject").* When interpreting this provision it is possible to reach two conclusions – the first conclusion would be that the law that applies to these (netting) agreements is (any) bankruptcy law (any bankruptcy law that is relevant in respect of an individual bankruptcy entity) and the second conclusion would be that the law that applies to netting agreements shall be the contractual law as agreed between the parties *("lex contractus").* It seems that even in respect of credit institutions this provision contains similar interpretation ambiguity as the one described between Article 111 of the Bankruptcy Act and Article 8 of the Financial Collateral Law.

We understand that Article 353 shall enter into force upon accession to the EU by the Republic of Croatia (cf. Article 376 of the Credit Institutions Act; contained in Appendix E to this letter).

Until that moment in time the same problem that stems from inconsistencies between Article 111 of the Bankruptcy Act and Article 8 of the Financial Collateral Law also apply to credit institutions When Republic of Croatia joins the EU, market participants trading with Croatian credit institutions shall face another legal risk caused by the unclear wording contained in Article 353 of the Credit Institutions Act as described above.

What to do next?

As a result of legal uncertainties around the treatment of derivatives in the Republic of Croatia, the Croatian derivative markets are in our view at a competitive disadvantage. Financial institutions and institutional investors inside and outside the Republic of Croatia who deal with Croatian counterparties cannot be certain to calculate their exposure against Croatian counterparties on a net basis. The Croatian regulation provides a netting framework, but lacks the legal certainty in respect of the precise timing on the designation or an early termination date for transaction in case of a bankruptcy proceedings. Therefore, netting terms set forth in global standard contracts for derivatives and related transactions cannot be fully relied upon. At the same time, Croatian market participants who seek to enter into derivative transactions to hedge their risks are at a disadvantage as they face higher cost for derivative instruments and may have restricted access to them as a consequence.

Based on the experience of ISDA and its members, it is extremely important, especially from a systemic risk perspective, to ensure certainty to market participants as to the enforceability of netting and collateral agreements to a large extent.

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ISDA is in contact with Croatian banking and market participants and would like to convey its support for addressing the inconsistencies described above. This would bring the Republic of Croatia in line with global market standards. We would like to encourage the Republic of Croatia to consider the relevant amendments in the context of the forthcoming implementation of the EU Directive Amending the Financial Collateral and Settlement Finality Directives (2009/44/EC). The Amending Directive is meant to be implemented by the end of 2010 with its provision entering into effect by June 2011 (in EU member states). This occasion may provide an opportunity to look into the initial implementation of the Financial Collateral Directive and any shortcomings in related netting legislation. Several EU member states have taken this opportunity to address certain shortcomings in their existing netting/collateral legislation (eg, Czech Republic, Austria, United Kingdom, Slovenia).

We hope that our comments provide helpful input to your considerations. We would be delighted to provide more input to your discussions. We would also be very interested in the views of the Croatian authorities on the issues outlined in this. If ISDA can be of any help in this process, we hope that you will not hesitate to contact the undersigned at ISDA's European Office, One Bishops Square, London El 6AD, +44 20 3088 3550, pwerner@isda.org.

We understand that the Ministry of Finance is the lead authority in Croatia in implementing the Amending Directive. We also understand that the Croatian National Bank is involved in this matter. Hence we thought it appropriate to send this letter to the Croatian National Bank as well as the Croatian Banking Association as a relevant association of business professionals interested in this matter.

Yours sincerely,

Dr Peter M Werner
Senior Director
pwerner@isda.org

cc Croatian National Bank
Dr. Željko Rohatinski

cc Croatian Banking Association
Dr. Zoran Bohaček

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APPENDIX A

NOVEMBER 2009

CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example, Gold-COMEX on the COMEX Division of the New York Mercantile Exchange) or another method specified by the parties. Bullion swaps include cap, collar or floor transactions in respect of Bullion.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis or on a specified future date. A Bullion Trade may be settled by physical delivery of Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and in the case of silver, platinum and palladium, a troy ounce (or in the case of reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security (or in some cases an equivalent security) to the other party (in consideration for the original cash payment plus a premium).

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate, floating index or floating commodity price payer on the cap and the other party is the floating rate, floating index or floating commodity price payer on the floor.

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

Credit Default Swap Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to enter into a Credit Default Swap.

Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or

more) of Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Emissions Allowance Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity and shares to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for

payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of shares of an issuer or a basket of shares of several issuers at a specified strike price. The share option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed or floating rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a "Fund Interest"), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

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Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement occurs based on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

Fund Swap Transaction: A transaction a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency based on the redemption value of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

Longevity/Mortality Transaction. (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality- contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

Property Index Derivative Transaction. A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional or national area.

Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities (or in some cases equivalent securities) from such other party at a future date.

Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower's obligation to replace the securities at a defined date with identical securities.

Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

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APPENDIX B

Article 111 of the Bankruptcy Act (Official Gazette No. 44/96 (Banking Act, Official Gazette No. 161/98), 29/99, 129/00, 123/03, Decisions on the Amendments to the Bankruptcy Act Official Gazette No. 197/03 and 187/06, 82/06):

"Fixed Transactions. Financial Transactions with Fixed Term.

(1) If it was stipulated that the supply of goods that have a market or an exchange price is to be performed at a fixed time or within a fixed period of time, and if such time or the expiration of such period occurs after the institution of bankruptcy proceeding, then in lieu of performance only a claim for non-performance of fixed transactions may be asserted by the other counterparty.

(2) If a term or a deadline was stipulated for financial services that have a market or an exchange price, and such term or deadline occurs after the institution of bankruptcy proceeding, then in lieu of performance only a claim for non-performance may be asserted by the other counterparty.

(3) The term "financial services" in respect of sub-paragarph 2 of this Article shall particularly mean:

1. the delivery of precious metals,
2. the delivery of securities or similar rights, unless it is intended to acquire an interest in another company for purposes of creating a permanent connection to such company;
3. monetary payments performed in a foreign currency or any currency unit;
4. monetary payments the amount of which is determined directly or indirectly, by the currency rate of a foreign currency or a currency unit or the interest rate applied to a claim or the price of other goods or services;
5. options and other rights for delivery or monetary payments pursuant to 1 to 4 of this sub - paragraph.

(4) If financial services are combined in a master agreement for which it has been agreed that it may be terminated for breach of contract only by consent[15], then all such individual transactions shall constitute a single agreement providing for reciprocal obligations within the meaning of this Article and Article 110 of this Act.

(5) The claim for non-performance stated under previous sub - paragraphs of this Article shall be determined by the difference between the agreed price and that market or exchange price which on the second business day after the institution of the bankruptcy proceedings prevails at the place of performance for contract entered into with the stipulated time. The other party may assert such claim only as a creditor in bankruptcy proceedings."

[15] Here we need to point out that it is highly likely that one grammatical error occured at the time Bankruptcy Act was published in Official Gazette. The Bankrutpcy Act has been mostly „copied" from German Inslovency Code as of October 6th, 1994. The provision of the German original text that was literally copied/enacted was: *"If individiual contracts regarding financial transaction are combined in a master agreement for which it has been agreed it may be terminated for breach of contract* ***in its entirety****, then all such individual contracts shall constitute a single contract providing for reciprocal obligation with the meaning of §§ 103, 104."* The Croatian „translation" (actually, enactment of the same text) contains an error – the words „in its entirety" were translated into „by consent", what does not make any sense in practice. We believe the intention of the Croatian Parliament was to follow the original German text.

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APPENDIX C

Definition of derivatives pursuant to Article 3 (1) sub-paragraph 2 d. of the Capital Markets Act, Official Gazette No. 88/08, 136/08, 74/09:

"2.d. derivatives, that include:

- options, futures, swaps, forward rate agreements and all other financial derivate instruments that are related to securities, currencies, interest rates or incomes, and other financial derivative instruments, financial indexes or financial measures that can be settled either physically or in cash,
- options, futures, swaps, forward rate agreements and all other financial derivative instruments that are related to commodities, whereby such agreements have to be settled in cash or can be settled in cash upon the request of the one of the (contracting) parties (except from the reason of the non – payment or other default reasons for the termination of the contract);
- options, futures, swaps, forward rate agreements and all other financial derivate instruments that are related to commodities, whereby such agreements can be settled physically, under the condition that such derivatives are traded either on the regulated market and/or on the multilateral trading platform,
- options, futures, swaps, forward rate agreements and all other financial derivate instruments that are related to commodities, whereby such agreements can be settled physically, whereby such instruments are not listed under the line 3 of the sub - paragraph d. of this paragraph and they do not have any commercial purpose, that they have characteristics of other financial derivative instruments, taking into consideration the fact either that they are being cleared and settled by the recognized clearing houses or they are related to the regular margin call,
- derivative instruments with the purpose of transferring the credit risk;
- financial contracts for differences,
- options, futures, swaps, forward rate agreements and all other financial derivative transactions that are related to climatic variables, transfer fees, emission quotes of inflation rates or other official economic statistical data, and have to be settled in cash or can be settled in cash upon the request of the one of the (contracting) parties (except from the reason of the non – payment or other default reasons for the termination of the contract), together with all other financial derivative instruments that are related to property, rights, obligations, indexes and measures that are not stated hereunder and also contain characteristic of other financial derivatives instruments, specifically taking into consideration whether such instruments are traded on an organized market and/or on a multilateral trading platform or are cleared and settled by the recognized clearing houses or they are related to the regular margin call."

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APPENDIX D

Article 353 of the Credit Institutions Act, Official Gazette No. 117/08, 74/09, 153/09:

"Compensation Agreement and Netting Agreement

Article 353

During the enforcement of reorganisation measures or commencement of liquidation respectively bankruptcy proceedings in respect of a credit institution from Republic of Croatia or any other member state, the governing law applicable to the compensation and netting agreements shall be the law that applies to such agreements (the law to which these agreements are subject)."

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APPENDIX E

Article 376 of the Credit Institutions Act, Official Gazette No. 117/08, 74/09, 153/09:

"Coming Into Force
Article 376

This Act shall be published in the Official Gazette, but it shall come into force on January 1st, 2009, **except the following provisions** – Article 36 (4), Article 56 (2), Articles 72 to 78, Articles 81 to 86, Article 92, Article 127 (3) to (6), Article 158 (2) to (3), Article 160 (3), Articles 209 to 217, Article 219, Article 220, Article 222, Article 227, Article 228 (1)sub - paragraph 2, Article 282 (4) and (5), Article 285, Article 286 (6), Articles 287 to 291, Article 293 to 294, Article 296 (4), Article 298, Article 300, Article 301 (2), Article 303 and **Articles 331 to 359** of this Act, that **shall come into force on the day Republic of Croatia is accepted to the European Union."**