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ORIENTAÇÃO DO BANCO CENTRAL EUROPEU

de 21 de Dezembro de 2006

**relativa à gestão dos activos de reserva do Banco Central Europeu pelos bancos centrais nacionais
e à documentação legal para as operações envolvendo os referidos activos**

(BCE/2006/28)(2007/C 17/02)

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Alterada por:

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Orientação do Banco Central Europeu de 20 de Julho de 2007

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▼B**ORIENTAÇÃO DO BANCO CENTRAL EUROPEU****de 21 de Dezembro de 2006****relativa à gestão dos activos de reserva do Banco Central Europeu pelos bancos centrais nacionais e à documentação legal para as operações envolvendo os referidos activos***(BCE/2006/28)**(2007/C 17/02)*

O CONSELHO DO BANCO CENTRAL EUROPEU,

Tendo em conta o Tratado que institui a Comunidade Europeia e, nomeadamente, o terceiro travessão do n.º 2 do seu artigo 105.º,

Tendo em conta o terceiro travessão do artigo 3.º-1 e os artigos 12.º-1 e 30.º-6 dos Estatutos do Sistema Europeu de Bancos Centrais e do Banco Central Europeu,

Considerando o seguinte:

- (1) Nos termos do artigo 30.º-1 dos Estatutos, o Banco Central Europeu (BCE) é dotado de activos de reserva pelos bancos centrais nacionais (BCN) dos Estados-Membros que tenham adoptado o euro, tendo o pleno direito de deter e gerir os activos de reserva que lhe tenham sido transferidos.
- (2) Nos termos dos artigos 9.º-2 e 12.º-1 dos estatutos, o BCE pode gerir determinadas actividades por intermédio dos BCN, aos quais recorre para a realização de algumas das suas operações. Consequentemente, o BCE considera que os activos de reserva que lhe tenham sido transferidos deveriam ser geridos pelos BCN na qualidade de mandatários.
- (3) A participação dos BCN na gestão dos activos de reserva transferidos para o BCE e as transacções relacionadas com a referida gestão requerem documentação específica para a realização de operações que envolvam os activos de reserva do BCE.
- (4) A Orientação BCE/2000/1, de 3 de Fevereiro de 2000, relativa à gestão dos activos de reserva do Banco Central Europeu pelos bancos centrais nacionais e à documentação legal para as operações envolvendo os activos de reserva do Banco Central Europeu ⁽¹⁾ já foi alterada por várias vezes desde a sua adopção, devendo ser refundida por razões de clareza e transparência,

ADOPTOU A PRESENTE ORIENTAÇÃO:

*Artigo 1.º***Definições****▼M1**

Para efeitos da presente orientação, entende-se por

— «Jurisdições europeias», os ordenamentos jurídicos de todos os Estados-Membros que tenham adoptado o euro em conformidade com o Tratado, e ainda a Dinamarca, Suécia, Suíça e Reino Unido (apenas Inglaterra e País de Gales);

⁽¹⁾ JO L 207 de 17.8.2000, p. 24. Orientação com a última redacção que lhe foi dada pela Orientação BCE/2005/15 (JO L 345 de 28.12.2005, p. 33).

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— «BCN participante», o BCN de um Estado-Membro que tenha adoptado o euro.

▼ B*Artigo 2.º***Gestão dos activos de reserva pelos BCN participantes na qualidade de mandatários do BCE**

1. Todos os BCN participantes têm o direito de colaborar na gestão operacional dos activos de reserva transferidos para o BCE. O BCN participante que assim o deseje poderá decidir abster-se dessa gestão ou levá-la a cabo em conjunto com outro ou outros BCN participante(s). Se um BCN não colaborar na gestão operacional dos activos de reserva do BCE, os restantes BCN gerirão os activos cuja gestão lhe competiria, se o mesmo não se tivesse abtido de o fazer.
2. Os BCN realizarão as operações que envolvam os activos de reserva do BCE na qualidade de mandatários deste. Presumir-se-á que, ao dar início a tais operações, o BCN participante reconhece a sua qualidade de mandatário do BCE. Cada um dos BCN participantes deve, relativamente a todas as operações por si efectuadas em nome do BCE e ao aceitar cada uma delas, revelar a todas as partes envolvidas a condição de mandante do BCE mediante menção ao nome e referência a um número ou identificador de conta deste.
3. Ao efectuar operações envolvendo os activos de reserva do BCE na qualidade de mandatários, os BCN individuais devem subordinar os seus próprios interesses, ou os interesses de qualquer entidade para a qual realizem operações, aos interesses do BCE.
4. Quando individualmente solicitados por uma contraparte do BCE a provar os respectivos poderes para a realização de operações envolvendo os activos de reserva do BCE na qualidade de seus mandatários, os BCN participantes devem fornecer-lhe prova do respectivo mandato e poderes de representação.

*Artigo 3.º***Documentação legal****▼ M1**

1. Todas as operações que envolvam os activos de reserva do BCE serão efectuadas mediante utilização da documentação legal modelo prevista no presente artigo. No entanto, aquando da adopção do euro por um Estado-Membro a Comissão Executiva poderá decidir utilizar os acordos quadros previstos na alínea c) do ponto 1 ou na alínea c) do ponto 2 do anexo I da presente orientação, em vez dos acordos previstos na alínea a) do ponto 1 ou na alínea a) do ponto 2 do referido anexo, se não estiver disponível uma apreciação jurídica, de forma e conteúdo aceitáveis para o BCE, relativa à utilização do referido acordo quadro no Estado-Membro em causa. A Comissão Executiva deve informar prontamente o Conselho do BCE de qualquer decisão tomada ao abrigo desta disposição.
2. As operações com garantia, incluindo reportes (venda com acordo de recompra ou compra com acordo de revenda) e reportes fraccionados (*buy/sell-back* ou *sell/buy-back agreements*), bem como todas as operações de derivados fora de bolsa que envolvam activos de reserva do BCE, devem ser documentadas nos termos dos acordos-quadro enumerados no anexo I, conforme adoptados ou alterados pelo BCE.

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3. O documento cujo modelo consta do anexo II deve ser apenso a, e fazer parte integrante de qualquer acordo-quadro (à excepção do Acordo-Quadro para Operações Financeiras da FBE — edição de 2004) ao abrigo do qual se efectuem operações com garantia (incluindo,

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nomeadamente, reportes (acordos de venda com acordo de recompra e acordos de compra com acordo de revenda), reportes fraccionados (*buy/sell-back* e *sell/buy-back agreements*), contratos de empréstimo de valores mobiliários e contratos de recompra tripartidos) ou operações de derivados fora de bolsa que envolvam os activos de reserva do BCE.

4. Deve celebrar-se um acordo-quadro de compensação segundo um dos modelos constantes do anexo III com cada uma das contrapartes, à excepção das contrapartes: (i) com as quais o BCE tenha celebrado um Acordo-Quadro para Operações Financeiras da FBE (edição de 2004) e (ii) que operem ou tenham sido constituídas ao abrigo da legislação de qualquer uma das jurisdições europeias, com excepção da Irlanda.

5. A prestação de serviços financeiros envolvendo os activos de reserva do BCE por intermediários financeiros incluindo, nomeadamente, serviços bancários, de guarda de títulos e de investimento obtidos mediante correspondentes, entidades incumbidas da guarda e depositárias, organismos de liquidação e entidades de compensação centralizada de derivados transaccionados na bolsa, serão documentados mediante os contratos específicos que o BCE aprovar para o efeito.

*Artigo 4.º***Disposições finais**

1. A presente orientação entra em vigor em 1 de Janeiro de 2007.
2. Fica pela presente revogada a Orientação BCE/2000/1, com as alterações que lhe foram introduzidas.
3. As remissões para a orientação ora revogada devem entender-se como feitas para a presente orientação.
4. Os BCN participantes são os destinatários da presente orientação.

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ANEXO I

ACORDOS-QUADRO PARA OPERAÇÕES COM GARANTIA, OPERAÇÕES DE DERIVADOS FORA DE BOLSA E DEPÓSITOS

1. Todas as operações com garantia envolvendo activos de reserva do BCE [incluindo, nomeadamente, reportes (acordos de venda com acordo de recompra e acordos de compra com acordo de revenda) e reportes fraccionados (*buy/sell-back* e *sell/buy-back agreements*)] devem ser documentadas nos termos dos seguintes acordos-quadro, segundo modelos que o BCE pode aprovar ou alterar:
 - (a) O Acordo-Quadro para Operações Financeiras da FBE (edição de 2004), para operações realizadas com contrapartes organizadas ou constituídas ao abrigo dos ordenamentos jurídicos de qualquer uma das jurisdições europeias e ainda dos da Irlanda do Norte e Escócia;
 - (b) O *Bond Market Association Master Repurchase Agreement*, para operações realizadas com contrapartes organizadas ou constituídas ao abrigo da legislação federal ou estadual norte-americana; e
 - (c) O *TBMA/ISMA Global Master Repurchase Agreement (2000 version)*, para operações realizadas com contrapartes organizadas ou constituídas ao abrigo de outros ordenamentos jurídicos que não os enunciados nas alíneas a) e b).

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2. Todas as operações de derivados realizadas fora de bolsa envolvendo activos de reserva do BCE (incluindo os *swaps* de taxas de juro cujo risco de crédito tenha garantia financeira) devem ser documentadas nos termos dos seguintes acordos-quadro, segundo os modelos aprovados ou alterados pelo BCE:
 - a) O Acordo-Quadro para Transacções Financeiras da FBE (edição de 2004), para operações realizadas com contrapartes organizadas ou constituídas ao abrigo dos ordenamentos jurídicos de qualquer uma das jurisdições europeias;
 - b) O *1992 International Swaps and Derivatives Association Master Agreement (Multicurrency — cross-border, New York law version)*, para operações realizadas com contrapartes organizadas ou constituídas ao abrigo da legislação federal ou estadual norte-americana; e
 - c) O *1992 International Swaps and Derivatives Association Master Agreement (Multicurrency — cross-border, English law version)*, para operações realizadas com contrapartes organizadas ou constituídas ao abrigo de outros ordenamentos jurídicos que não os enunciados nas alíneas a) e b).

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3. Todos os depósitos envolvendo os activos de reserva do BCE em contrapartes que: (i) sejam elegíveis para a realização das operações com garantia descritas no n.º 1 e/ou das operações de derivados fora de bolsa descritas no n.º 2, e que (ii) tenham sido organizadas ou constituídas ao abrigo dos ordenamentos jurídicos de qualquer uma das jurisdições europeias, à excepção da Irlanda, devem ser documentados mediante o Acordo-Quadro para Operações Financeiras da FBE (edição de 2004), segundo modelos que o BCE pode aprovar ou alterar.



ANEXO II

ANEXO DO BCE ⁽¹⁾

O presente anexo deve ser apenso a, e fazer parte integrante de todo e qualquer acordo-quadro (à excepção do Acordo-quadro para Operações Financeiras da FBE — edição de 2004), ao abrigo do qual se efectuem operações com garantia [incluindo, nomeadamente, reportes (acordos de venda com acordo de recompra e acordos de compra com acordo de revenda), reportes fraccionados («buy/sell-back» e «sell/buy-back agreements»), contratos de empréstimo de valores mobiliários e contratos de recompra tripartidos] ou operações de derivados fora de bolsa envolvendo os activos de reserva do BCE nos termos do n.º 3 do artigo 3.º desta orientação .

1. As disposições do presente anexo constituem os termos e condições suplementares aplicáveis a [*designação do acordo-quadro a que o presente anexo se aplica*] com data de [*data do acordo*] (o «acordo») celebrado entre o Banco Central Europeu (o «BCE») e [*designação da contraparte*] (a «contraparte»). As disposições constantes do presente anexo são juntas ao, e incorporadas no acordo, dele fazendo parte integrante. Caso alguma das disposições do acordo (distinta das disposições do presente anexo) ou do acordo-quadro de compensação do BCE com data de [*data*] (o «acordo-quadro de compensação») celebrado entre o BCE e a contraparte, incluindo quaisquer termos e condições suplementares anexos ao acordo, seja contrária a ou produza efeitos iguais ou semelhantes às disposições do presente anexo, as disposições deste último prevalecem e são aplicáveis em vez das referidas disposições.
2. Excepto nos casos em que o contrário seja estipulado por lei ou regulamento, a contraparte aceita manter confidencial e, em circunstância alguma, não divulgar a terceiros quaisquer informações ou pareceres fornecidos pelo BCE, ou quaisquer informações referentes ao BCE obtidas pela contraparte pelo facto de esta ser parte do acordo, incluindo, nomeadamente, informações respeitantes à existência ou condições do acordo (incluindo o presente anexo) ou à relação por este meio criada entre a contraparte e o BCE. A contraparte não utilizará o nome do BCE em qualquer material de publicidade ou promoção.
3. A contraparte aceita notificar o BCE, por escrito e logo que possível, de: (i) qualquer operação de consolidação, absorção, fusão ou transferência de grande parte ou da totalidade dos seus activos para outra entidade, (ii) da eventual nomeação de um liquidatário, fiel depositário, administrador judicial ou entidade oficial análoga, bem como do início de qualquer procedimento de liquidação ou reorganização da contraparte ou de qualquer outro procedimento similar, ou iii) da alteração do nome da contraparte.
4. O BCE não renuncia pelo presente à imunidade que porventura lhe assista nos termos mais amplos da lei aplicável em relação à interposição de acções judiciais ou à sujeição à jurisdição de qualquer tribunal, nem em relação a despachos judiciais que tenham como consequência a adopção de providências cautelares não especificadas ou que envolvam o arrolamento ou o arresto dos seus bens (tanto antes como após sentença na acção principal).
5. Não serão oponíveis ao BCE quaisquer causas de incumprimento ou medidas de qualquer tipo em que se faça referência a falência, insolvência ou qualquer outra situação semelhante.
6. A contraparte declara que celebra o presente acordo (incluindo este anexo) em seu próprio nome e que efectuará todas as operações em seu próprio nome e não na qualidade de representante de qualquer outra entidade.

⁽¹⁾ O presente anexo foi redigido em inglês e faz parte integrante dos acordos-quadro redigidos em inglês regidos pela lei inglesa ou pela lei do Estado de Nova Iorque. A tradução do presente anexo para outras línguas foi realizada com fins meramente ilustrativos e as versões resultantes não são juridicamente vinculativas.

▼B*ANEXO III***ÍNDICE****Anexo IIIa**

Acordo-quadro de compensação regido pela lei inglesa e redigido em inglês, a utilizar em operações realizadas com todas as contrapartes, excepto as contrapartes que:

- (i) tenham sido constituídas nos Estados Unidos da América,
- (ii) tenham sido constituídas na França ou na Alemanha e que sejam elegíveis apenas para receber depósitos; ou
- (iii) com as quais o BCE tenha celebrado um Acordo-Quadro para Operações Financeiras da FBE (edição de 2004) e que tenham sido organizadas ou constituídas ao abrigo da legislação de qualquer uma das jurisdições europeias, com excepção da Irlanda.

Anexo IIIb

Acordo-quadro de compensação regido pela lei francesa: a ser utilizado com as contrapartes constituídas em França que sejam elegíveis para receber depósitos; redigido em francês.

Anexo IIIc

Acordo-quadro de compensação regido pela lei alemã: a ser utilizado com as contrapartes constituídas na Alemanha que sejam elegíveis para receber depósitos; redigido em alemão.

Anexo IIId

Acordo-quadro de compensação regido pela lei do Estado de Nova Iorque: a ser utilizado com as contrapartes constituídas nos Estados Unidos da América; redigido em inglês.



ANEXO IIIa

Acordo-quadro de compensação regido pela lei inglesa

MASTER NETTING AGREEMENT

Dated:

Between:

European Central Bank, Kaiserstrasse 29, D-60311 Frankfurt am Main, Germany (hereinafter referred to as the «ECB»), and

[Counterparty] whose [address] [registered place of business] is at [address] (hereinafter referred to as the «Counterparty»)

1. Scope of agreement

- 1.1 The purpose of this Agreement (hereinafter referred to as the «Agreement») is to ensure that the ECB is able to net all existing positions under all outstanding transactions made between the ECB and the Counterparty, regardless of any agent or agents authorised to act on behalf of the ECB through whom the transactions giving rise to those positions may have been effected, including the central bank of any Member State of the European Union which has adopted the euro as its currency, and regardless of which office (including the head office and all branches) of the Counterparty may be involved in such transactions, and after taking into account the effect of any existing netting provisions in master or other agreements between the ECB and the Counterparty and/or provisions of mandatory law that operate with similar effect that may apply to certain of such transactions.
- 1.2 In this Agreement, a «netting agreement» means any agreement for the time being in effect between the parties (and including, without limitation, this Agreement and agreements of the kind listed in Appendix 1 of this Agreement), including such modifications and additions thereto as may be agreed between the ECB and the Counterparty (hereinafter referred to as the «parties») from time to time, which contains provisions to the effect that, should any event of default as defined for the purposes of such agreement occur, there may be an early termination, liquidation, closing-out or acceleration of transactions or obligations under transactions or any analogous event (a «default termination») and the respective obligations of the parties under such agreement may be combined, aggregated or set-off against each other so as to produce a single net balance payable by one party to the other.

2. General

- 2.1 All transactions of whatever nature (hereinafter referred to as «transactions») entered into between the parties at any time after the date of this Agreement shall be governed by this Agreement, unless the parties specifically agree otherwise.
- 2.2 The parties acknowledge that the terms of this Agreement, all transactions governed by this Agreement, any amendments to the terms of such transactions, and the single net balance payable under any netting agreement constitute a single business and contractual relationship and arrangement.
- 2.3 The Counterparty has entered into this Agreement as principal and represents and warrants that it has entered and shall enter into all transactions as principal.
- 2.4 This Agreement is supplemental to the netting agreements entered into between the parties prior to the date of this Agreement, and all further netting agreements and transactions entered into between the parties after the date of this Agreement shall be supplemental to this Agreement.

3. Base currency

The base currency for the purposes of this Agreement shall be the US dollar or, at the ECB's option, any other currency. Wherever it is necessary in accordance with the terms of this Agreement to convert amounts into the base currency, such amounts shall be converted at the daily reference rate published by the ECB for the currency to be converted into the base currency or, in the absence of such reference rate, at the rate of exchange at which the ECB can buy or sell, as appropriate, such amounts with or against the base currency on such day, all as determined by the ECB.

▼ B**4. Cross acceleration**

Should any default termination occur under any netting agreement (including under Appendix 2 of this Agreement), then the ECB shall have the right to declare, by written notice to the Counterparty, that a default termination has occurred under each other netting agreement in respect of which default termination has not occurred in accordance with the provisions thereof.

5. Global netting

- 5.1 Should a default termination occur, the ECB shall, as soon as is reasonably practicable, take an account of what is due from each party to the other under each netting agreement (including under Appendix 2 of this Agreement) in respect of which default termination has occurred and aggregate the sums due from each party to the other under such netting agreements (including under Appendix 2 of this Agreement), in every case in or converted into the base currency, and only the net balance of the account shall be payable by the party owing the larger aggregate sum.
- 5.2 Clause 5.1 shall continue to operate to the extent possible notwithstanding the unenforceability under applicable law of any provisions contained in any netting agreement (including under Appendix 2 of this Agreement).

6. Notices and other communications

All notices, instructions and other communications to be given under this Agreement shall be effective only upon receipt and shall be made in writing (including by electronic means).

7. Severability

Each provision contained herein (including, without limitation, Appendix 2 of this Agreement) shall be treated as separate from any other provision herein and shall be enforceable notwithstanding the unenforceability of any such other provision.

8. Non-assignability

The rights and obligations of the Counterparty under this Agreement may not be assigned, charged, pledged or otherwise transferred or dealt with by the Counterparty.

9. Governing law and jurisdiction

- 9.1 This Agreement shall be governed by and construed in accordance with English law.
- 9.2 For the benefit of the ECB, the Counterparty hereby irrevocably submits for all purposes of or in connection with this Agreement to the jurisdiction of the District Court (*Landgericht*) of Frankfurt am Main, Germany. Nothing in this clause 9 shall limit the right of the ECB to take proceedings before the courts of any other country of competent jurisdiction.

European Central Bank**Name of Counterparty**

By _____

By _____

Title _____

Title _____

(Address for the service of notices under this Agreement)

Date _____

Date _____

(In case of Luxembourg counterparties:)

In addition to clause 9 of this Agreement the parties agree that for purpose of Article 1 of the Protocol annexed to the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, signed in Brussels on 27 September 1998 and without prejudice to the foregoing execution of this Agreement by the parties hereto, [Luxembourg Counterparty] expressly and specifically confirms its agreement to the provisions of clause 9 of this Agreement, stipulating that the District Court (*Landgericht*) of Frankfurt am Main shall have jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with this Agreement and, for such purposes, irrevocably submits to the jurisdiction of such courts.

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Luxembourg Counterparty

By _____

Title _____

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Appendix 1

Netting agreements (*)

1. FBE Master Agreement for Financial Transactions (Edition 2004)
2. ISDA Master Agreement (Multi-currency — Cross border 1992)
3. TBMA/ISMA Global Master Repurchase Agreement (2000 version)
4. The Bond Market Association Master Repurchase Agreement.

(*) This documentation is maintained by the ECB Legal Services and the legal departments of the national central banks.

▼B*Appendix 2***Transactions not subject to any netting agreement**

1. The provisions of this Appendix apply to transactions entered into between the parties that are not effectively subject to any other netting agreement.
2. Should:
 - (a) a default termination occur under any netting agreement, or
 - (b) an event that is defined as an event of default or other analogous event under any netting agreement occur, which event would, assuming there were outstanding transactions under any such netting agreement, result in, or entitle the ECB to take steps which would result in, a default termination under such netting agreement,

(any such event under (a) or (b) above is referred to in this Appendix as an «event of default»),

then all transactions to which this Appendix applies (but not less than all, unless any such transaction may not be so closed out under applicable law) under which obligations have or would otherwise have fallen due by or after the date of such event of default (the «close out date») shall be liquidated and closed-out as described under paragraphs 3 and 4 of this Appendix, and the ECB shall, without prejudice to paragraphs 3 and 4 of this Appendix, not be obliged to make any further payments or deliveries under any such transactions.
3. Should liquidation and close-out under paragraph 2 of this Appendix occur, the ECB shall, as soon as is reasonably practicable, take an account of what is due from each party to the other, including, as necessary, determining in respect of each transaction the ECB's total gain or loss, as the case may be, resulting from the liquidation and close-out of such transaction as at the date of such liquidation and close-out, in every case in or converted into the base currency. The ECB shall then aggregate such gains and losses and only the balance of the account shall be payable by the Counterparty, if the aggregate losses exceed the aggregate gains, or by the ECB, if the aggregate gains exceed the aggregate losses.
4. In determining in respect of each transaction the ECB's total gain or loss, the ECB shall, subject to applicable law, use a commercially reasonable method of calculation which (a) is based on, to the extent practicable and available, quotations from at least four leading dealers in the relevant market operating in the same financial centre, and (b) takes into account, where applicable, the liquidation and close-out of such transaction earlier than its scheduled value date or delivery date.
5. The parties agree that the calculation of the net sum under paragraphs 3 and 4 of this Appendix is a reasonable pre-estimate of losses suffered.

*ANEXO IIIb***Acordo-quadro de compensação regido pela lei francesa****CONVENTION-CADRE DE COMPENSATION**

Date:

Entre:

La Banque centrale européenne, Kaiserstrasse 29, D-60311 Francfort-sur-le-Main, Allemagne (ci-après dénommée la «BCE») et

(ci-après dénommée la «Contrepartie»)

1. Champ d'application de la convention

1.1. La présente Convention (ci-après dénommée la «Convention») a pour objet de permettre à la BCE de compenser l'ensemble des positions existantes dans le cadre de l'ensemble des transactions en cours effectuées entre la BCE et la Contrepartie, sans distinction de l'agent ou des agents autorisés à agir pour le compte de la BCE par l'intermédiaire duquel ou desquels les transactions génératrices de ces positions ont pu être effectuées, y compris la banque centrale de tout Etat membre de l'Union européenne ayant adopté l'euro comme monnaie nationale, et sans distinction de l'établissement (y compris le siège social et l'ensemble des succursales) de la Contrepartie impliqué dans ces transactions, et après prise en considération de l'incidence de toutes les dispositions existantes relatives à la compensation qui figurent dans la convention-cadre ou dans les autres conventions conclues entre la BCE et la Contrepartie et/ou des dispositions de la législation applicable ayant un effet similaire et susceptibles de s'appliquer à certaines de ces transactions.

1.2. Dans la présente Convention, on entend par «convention de compensation» toute convention en vigueur entre les parties (y compris, sans restriction, la présente Convention et les conventions de l'espèce énumérées dans l'additif 1 de la présente Convention), y compris les modifications et avenants aux textes susceptibles d'être convenus, s'il y a lieu, entre la BCE et la Contrepartie (ci-après dénommées les «parties»), qui comporte des dispositions prévoyant, lors de la survenance d'un cas de défaillance tel que défini dans le cadre de cette convention, une possibilité de résiliation, d'exigibilité anticipées ou de «close out» des transactions ou des obligations afférentes aux transactions ou de tout événement analogue (une «résiliation pour défaillance»), les obligations respectives des parties dans le cadre de cette convention pouvant dès lors être regroupées, globalisées ou compensées réciproquement de manière à donner lieu à un solde net unique payable par l'une des parties à l'autre.

2. Dispositions d'ordre général

2.1. L'ensemble des transactions de toute nature (ci-après dénommées «transactions») conclues entre les parties à tout moment après la date de la présente Convention sera régi par la présente Convention, sauf si les parties en décident spécifiquement autrement.

2.2. Les parties reconnaissent que les termes de la présente Convention, l'ensemble des transactions régies par elle, toutes les modifications apportées aux termes de ces transactions et le solde net unique payable dans le cadre de toute convention de compensation constituent une relation et un accord professionnels et contractuels uniques.

2.3. La Contrepartie a conclu cette Convention en son nom propre; elle déclare et atteste qu'elle a conclu et conclura toutes les transactions en son nom propre.

2.4. La présente Convention complète les conventions antérieures de compensation conclues antérieurement entre les parties; toutes les autres conventions de l'espèce et transactions qui seront conclues ultérieurement entre les parties compléteront la présente Convention.

3. Devise de référence

La devise de référence utilisée dans le cadre de cette Convention sera le dollar des Etats-Unis ou, au choix de la BCE, une autre devise. Dans les cas où il sera nécessaire, conformément aux termes de la présente Convention, de convertir les montants dans la devise de référence, la conversion s'effectuera au taux de référence quotidien publié par la BCE pour la devise à convertir dans la devise de référence ou, à défaut de ce taux de référence, au taux de change auquel la BCE peut acheter ou vendre, selon le cas, ces

▼B

montants avec ou contre la devise de référence ce même jour, selon les conditions définies par la BCE.

4. Clause de défaillance croisée

Lors de la survenance d'une résiliation pour défaillance dans le cadre d'une convention de compensation (y compris dans le cadre de l'additif 2 de la présente Convention), la BCE sera habilitée à prononcer, par notification écrite à la Contrepartie, la résiliation pour défaillance de chacune des autres conventions de compensation pour lesquelles il n'y a pas eu résiliation pour défaillance dans les conditions prévues par les dispositions précitées.

5. Compensation globale

5.1. Lors de la survenance d'une résiliation pour défaillance, la BCE comptabilisera dans les meilleurs délais les montants dus par chacune des parties à l'autre au titre de chaque convention de compensation (y compris dans le cadre de l'additif 2 de la présente Convention) pour laquelle est intervenue une résiliation pour défaillance et globalisera les sommes dues par chaque partie à l'autre au titre de ces conventions de compensation (y compris dans le cadre de l'additif 2 de la présente Convention) libellées ou converties dans tous les cas dans la devise de référence, seul le solde net étant payable par la partie débitrice du montant brut le plus élevé.

5.2. La clause 5.1 restera en vigueur dans la mesure du possible nonobstant le caractère inapplicable, en vertu de la loi en vigueur, de toute disposition pouvant être contenues dans une convention de compensation (y compris dans le cadre de l'additif 2 de la présente Convention).

6. Notifications et autres communications

L'ensemble des notifications, instructions et autres communications à donner dans le cadre de la présente Convention ne prendront effet qu'à la date de leur réception et seront adressées par écrit (y compris par les moyens électroniques).

7. Gestion séparée

Chacune des dispositions de la présente Convention (y compris, sans restriction, l'additif 2 de ladite Convention) sera traitée isolément des autres dispositions et sera applicable nonobstant le caractère inapplicable de ces autres dispositions.

8. Incessibilité

Les droits et obligations de la Contrepartie dans le cadre de la présente Convention ne peuvent être cédés, transférés ou autrement négociés par la Contrepartie.

9. Loi applicable, attribution de compétences

9.1. La présente Convention sera soumise au droit français et interprétée selon ledit droit.

9.2. Dans l'intérêt de la BCE, la Contrepartie soumet irrévocablement par la présente Convention tous les cas afférents à celle-ci ou s'y rapportant à la compétence de la juridiction du tribunal (*Landgericht*) de Francfort-sur-le-Main, Allemagne. Aucune disposition de cette clause 9 ne limitera le droit de la BCE d'entamer une procédure judiciaire devant les tribunaux compétents d'un autre pays.

Banque centrale européenne**Contrepartie**

Par _____

Par _____

En qualité de _____

En qualité de _____

Date _____

Date _____

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Appendice 1

Conventions de compensation

1. FBE Master Agreement for Financial Transactions (Edition 2004)
2. ISDA Master Agreement (Multi-currency — Cross border 1992)
3. TBMA/ISMA Global Master Repurchase Agreement (2000 version)
4. The Bond Market Association Master Repurchase Agreement.

▼B*Appendice 2***Transactions non soumises à une convention de compensation**

1. Les dispositions du présent Additif s'appliquent aux transactions conclues entre les parties qui ne sont pas effectivement soumises à une autre convention de compensation.
2. Lors de la survenance:
 - (a) d'une résiliation pour défaillance dans le cadre d'une convention de compensation ou
 - (b) d'un événement défini comme étant un cas de défaillance ou un événement analogue dans le cadre d'une quelconque convention de compensation, lequel événement, dans l'hypothèse où des transactions seraient en cours au titre de cette convention de compensation, amènerait ou habiliterait la BCE à prendre des mesures qui entraîneraient une résiliation pour défaillance dans le cadre de ladite convention,(les événements prévus en (a) ou en (b) étant dénommés dans le présent Additif «cas de défaillance»),

l'ensemble des transactions concernées par le présent Additif (sans exception, sauf dans le cas où une transaction ne peut faire l'objet d'une résiliation dans ces conditions aux termes de la loi applicable) dans le cadre desquelles les obligations sont ou seraient arrivées à échéance à la date ou après la date de survenance de ce cas de défaillance (la «date de résiliation») pourront être résiliées par notification écrite de la BCE à la Contrepartie dans les conditions prévues aux paragraphes 3 et 4 du présent Additif et la BCE ne sera pas tenue d'effectuer, sans préjudice des paragraphes 3 et 4 du présent Additif, d'effectuer d'autres paiements ou livraisons au titre de ces transactions.
3. En cas de résiliation selon les termes du paragraphe 2 du présent Additif, la BCE comptabilisera dans les meilleurs délais les sommes dues par chacune des parties à l'autre, notamment, le cas échéant, en déterminant pour chaque transaction la perte ou le gain total de la BCE résultant de la résiliation de ladite transaction à la date de résiliation, le montant étant dans tous les cas libellé ou converti dans la devise de référence. La BCE globalisera ensuite ces gains et pertes et seul le solde net sera payable par la Contrepartie si le total des pertes excède celui des gains, ou par la BCE si le total des gains excède celui des pertes.
4. Pour déterminer, dans le cadre de chaque transaction, le montant total du gain ou de la perte de la BCE, celle-ci utilisera, sous réserve de la législation applicable, une méthode de calcul commercialement raisonnable (a) fondée, dans la toute la mesure du possible, sur les cotations fournies par au moins quatre intervenants de premier rang du marché considéré et opérant dans le même centre financier et (b) prenant en compte, le cas échéant, la résiliation de la transaction intervenues antérieurement à la date de valeur ou de livraison prévus.
5. Les parties conviennent que le calcul de la somme nette aux termes des paragraphes 3 et 4 du présent Additif constituent une estimation raisonnable des pertes encourues.



ANEXO IIIc

Acordo-quadro de compensação regido pela lei alemã

Europäische Zentralbank

EZB-Aufrechnungsvertrag

(«Master Netting Agreement»)

vom:

zwischen

der Europäische Zentralbank, Kaiserstraße 29, D-60311 Frankfurt am Main, Deutschland (im nachfolgenden «EZB») und

.....

(Im nachfolgenden «Vertragspartner»)

1. Anwendungsbereich dieses Vertrages

1.1 Der Zweck dieses Vertrages (im folgenden: «Vertrag») besteht darin, die Verrechnung aller bestehenden Positionen aus allen offenen Geschäften zwischen der EZB und dem Vertragspartner zu ermöglichen. Der Vertrag schließt Geschäfte ein, die die EZB über Stellvertreter (z. B. Teilnehmerzentralbanken) abschließt. Er umfaßt auch ferner alle diejenigen Geschäfte, die über die Hauptverwaltung oder eine unselbständige Zweigniederlassung des Vertragspartners mit der EZB abgeschlossen werden. Der Vertrag berücksichtigt ferner alle sonst zwischen den Parteien bestehenden Rahmenverträge oder sonstigen Vereinbarungen, die Aufrechnungsklauseln enthalten, sowie zwingende gesetzliche Vorschriften mit ähnlichen Wirkungen.

1.2 Unter einem Aufrechnungsvertrag (Netting Agreement) im Sinne dieses Vertrages (im folgenden: «Aufrechnungsvertrag») sind alle die zwischen den Parteien getroffenen (einschließlich dieses Vertrags sowie der im Anhang 1 zum Vertrag aufgeführten) Vereinbarungen in ihrer jeweiligen Fassung zu verstehen, die Klauseln enthalten, wonach im Fall eines wichtigen Grundes (event of default) insbesondere eine vorzeitige Beendigung eintritt oder eine Kündigung ausgesprochen werden kann (im folgenden: «Beendigung oder Kündigung aus wichtigem Grund»); ferner muß dort vereinbart sein, daß infolge einer Beendigung oder Kündigung Geschäfte oder Verpflichtungen fällig bzw. in verrechenbare, fällige Forderungen umgewandelt werden, die anschließend zusammengefaßt, ver- oder aufgerechnet werden mit der Folge, daß lediglich ein einziger Nettosaldo durch eine der beiden Parteien geschuldet wird.

2. Allgemeines

2.1 Für alle Geschäfte, die die Parteien nach Unterzeichnung dieses Vertrages tätigen (in folgenden «Einzelabschlüsse»), gelten die nachfolgenden Bestimmungen, sofern die Parteien im Einzelabschluß nichts abweichendes vereinbaren.

2.2 Die Parteien sind sich darüber einig, daß dieser Vertrag in seiner jeweiligen Fassung, alle Einzelabschlüsse, die von diesem Vertrag erfaßt werden, und die aus Aufrechnungsverträgen resultierenden Nettosalden ein einheitliches Vertragsverhältnis bilden.

2.3 Die Vertragsparteien sichern zu, daß sie den Vertrag in eigenem Namen abgeschlossen haben und alle Einzelabschlüsse ebenfalls in eigenem Namen tätigen werden.

3. Vertragswährung («base currency»)

Vertragswährung ist der US-Dollar oder jede andere Währung, die die Parteien vereinbaren. Die Umrechnung von auf andere Währungen lautenden Beträgen in die Vertragswährung erfolgt jeweils zum täglichen Referenzkurs, den die EZB für die umzurechnende Währung veröffentlicht oder, hilfsweise, zum jeweiligen Marktkurs, zu dem die EZB an diesem Geschäftstag den umzurechnenden Währungsbetrag gegen die Vertragswährung kaufen oder verkaufen kann.

4. Vertragsübergreifendes Kündigungs- oder Beendigungsrecht aus wichtigem Grund

Sofern die EZB ein Kündigungs- oder Beendigungsrecht aus wichtigem Grund im Rahmen eines Aufrechnungsvertrages (sowie auch gemäß Anhang 2 zu diesem Vertrag) hat, erstreckt sich dieses Recht auch auf jeden anderen

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Aufrechnungsvertrag, auch wenn nach den dortigen Vereinbarungen ein vergleichbarer Kündigungs- oder Beendigungsgrund noch nicht gegeben ist.

5. Allumfassende Aufrechnungsvereinbarung («global netting»)

- 5.1 Sollte eine Beendigung oder Kündigung aus wichtigem Grund stattfinden, wird die EZB unverzüglich die aus den jeweiligen Aufrechnungsverträgen (sowie auch aus Anhang 2 zu diesem Vertrag) resultierenden Nettosalde errechnen und diese, nach Umrechnung in die Vertragswährung, zu einer einzigen Forderung oder Verbindlichkeit zusammenfassen mit der Folge, daß nurmehr dieser Betrag zwischen den Parteien geschuldet wird.
- 5.2 Z. 5.1 gilt ungeachtet dessen, daß Klauseln in Aufrechnungsverträgen (einschl. Anhang 2 zu diesem Vertrag) nach dem jeweils anwendbaren Recht nicht wirksam bzw. nichtig sind.

6. Erklärungen und andere Mitteilungen

Alle Erklärungen, Weisungen und andere Mitteilungen im Rahmen dieses Vertrages sind nur dann wirksam, wenn sie in Schriftform oder in elektronischer Form übermittelt werden und der Gegenseite auch zugegangen sind.

7. Teilbarkeit

Sollte eine Bestimmung dieses Vertrages (einschließlich des Anhangs 2) ganz oder teilweise unwirksam sein oder werden, bleiben die übrigen Bestimmungen wirksam. An Stelle der unwirksamen Bestimmungen tritt eine wirksame Regelung, die dem wirtschaftlichen Zweck mit der unwirksamen Bestimmung soweit wie möglich Rechnung trägt.

8. Die Rechte und Pflichten aus dem Vertrag darf der Vertragspartner weder abtreten noch in sonstiger Weise hierüber verfügen.
9. 9.1. Dieser Vertrag unterliegt dem Recht der Bundesrepublik Deutschland.
9.2 Nicht ausschließlicher Gerichtsstand ist Frankfurt am Main.

Europäische Zentralbank

Vertragspartner

Name _____

Name _____

Titel _____

Titel _____

Ort, Datum _____

Ort, Datum _____

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Anhang 1

Liste der Aufrechnungsverträge

1. FBE Master Agreement for Financial Transactions (Edition 2004)
2. ISDA Master Agreement (Multi-currency — Cross border 1992)
3. TBMA/ISMA Global Master Repurchase Agreement (2000 version)
4. The Bond Market Association Master Repurchase Agreement.

*Anhang 2***Geschäfte, die keinem Aufrechnungsvertrag unterliegen**

1. Vorschriften dieses Anhangs finden Anwendung auf solche Einzelabschlüsse zwischen den Parteien, die von keinem anderen Aufrechnungsvertrag erfaßt werden.
2. Sofern
 - a) eine Beendigung oder Kündigung aus wichtigem Grund nach Maßgabe eines Aufrechnungsvertrages eintritt oder
 - b) ein Beendigungs- oder Kündigungsgrund nach Maßgabe eines Aufrechnungsvertrages vorliegt, der zur Beendigung führen oder zur Kündigung durch die EZB berechtigen würde, sofern Einzelabschlüsse im Rahmen dieses Aufrechnungsvertrags getätigt worden wären,

(im folgenden: «beendigendes Ereignis im Sinne dieses Anhangs»)

und die EZB eine Kündigung im Hinblick auf diesen Anhang ausgesprochen hat, dann werden alle unter diesen Anhang fallenden Einzelabschlüsse gemäß den Ziffern 3 und 4 dieses Anhangs beendet und abgerechnet, sofern diese Einzelabschlüsse Verpflichtungen enthalten, die im Zeitpunkt des Wirksamwerdens der Beendigung oder Kündigung noch nicht fällig sind. Die Hauptpflichten aus diesen Einzelgeschäften erlöschen, vorbehaltlich der nachfolgenden Ziffern 3 und 4 dieses Anhangs.
3. Sollte eine Beendigung oder Kündigung gemäß Ziffer 2 dieses Anhangs eintreten, wird die EZB unverzüglich die beiderseitigen Ansprüche ermitteln und hierbei, sofern erforderlich, den aus jedem Einzelabschluß für die EZB resultierenden Gewinn oder Verlust ermitteln, der sich aus der vorzeitigen Kündigung oder Beendigung an dem Tag ergibt, an dem die Kündigung oder Beendigung wirksam wird; sie wird ferner diese Positionen ggf. in die Vertragswährung umrechnen. Die EZB faßt dann diese Forderungen und Verbindlichkeiten zu einer einzigen Forderung oder Verbindlichkeit zusammen mit der Folge, daß nurmehr dieser Betrag zwischen den Parteien geschuldet wird.
4. Zur Ermittlung der Gewinne und Verluste der EZB aus den jeweiligen Einzelabschlüssen wird die EZB, vorbehaltlich des anwendbaren Rechtes, eine für beide Seiten angemessene Berechnungsmethode verwenden, die a), soweit möglich und vorhanden, auf den von mindestens vier bedeutenden Marktteilnehmern an dem maßgeblichen Finanzplatz gestellten Kursen oder Preisen beruht und b) hierbei in Rechnung stellt, daß die Beendigung oder Kündigung des jeweiligen Einzelabschlusses vorzeitig stattgefunden hat.

*ANEXO IIIa***Acordo-quadro de compensação regido pela lei do Estado de Nova Iorque****MASTER NETTING AGREEMENT**

Dated as of:

Between:

European Central Bank, Kaiserstrasse 29, D-60311 Frankfurt am Main, Germany (hereinafter referred to as the «ECB»), and

[Counterparty] whose [address] [registered place of business] is at [address] (hereinafter referred to as the «Counterparty»)

1. Scope of agreement

1.1 The purpose of this Agreement (hereinafter referred to as the «Agreement») is to ensure that the ECB is able to net all existing positions under all outstanding transactions made between the ECB and the Counterparty, regardless of any agent or agents authorised to act on behalf of the ECB through whom the transactions giving rise to those positions may have been effected, including the central bank of any Member State of the European Union which has adopted the euro as its currency, and regardless of which office (including the head office and all branches) of the Counterparty may be involved in such transactions, and after taking into account the effect of any existing netting provisions in master or other agreements between the ECB and the Counterparty and/or provisions of mandatory law that operate with similar effect that may apply to certain of such transactions.

1.2 In this Agreement, a «netting agreement» means any agreement for the time being in effect between the parties (and including, without limitation, this Agreement and agreements of the kind listed in Appendix 1 of this Agreement), including such modifications and additions thereto as may be agreed between the ECB and the Counterparty (hereinafter referred to as the «parties») from time to time, which contains provisions to the effect that, should any event of default as defined for the purposes of such agreement occur, there may be an early termination, liquidation, closing-out or acceleration of transactions or obligations under transactions or any analogous event (a «default termination») and the respective obligations of the parties under such agreement may be combined, aggregated or netted against each other so as to produce a single net balance payable by one party to the other.

2. General

2.1 All transactions of whatever nature (hereinafter referred to as «transactions») entered into between the ECB and the parties at any time after the date of this Agreement shall be governed by this Agreement, unless the parties specifically agree otherwise.

2.2 The parties acknowledge that the terms of this Agreement, all transactions governed by this Agreement, any amendments to the terms of such transactions, and the single net balance payable under any netting agreement constitute a single business and contractual relationship and arrangement.

2.3 Each party represents and warrants to the other that it is a financial institution for purposes of the U.S. Federal Deposit Insurance Corporation Improvement Act of 1991 (hereinafter referred to as «FDICIA»), and the parties agree that this Agreement shall be a netting contract, as defined in FDICIA, and that each receipt or payment obligation under the Agreement shall be a covered contractual payment entitlement or covered contractual payment obligation respectively, as defined in and subject to FDICIA.

2.4 The Counterparty has entered into this Agreement as principal and represents and warrants that it has entered and shall enter into all transactions as principal.

[2.5 The Counterparty represents and warrants to, and covenants and agrees with the ECB, that:

- (a) it has the power to execute and deliver this Agreement and any other documentation relating to this Agreement to which it is a party and that it is required to deliver; it has the power to perform its obligations under this Agreement and any obligations under

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any netting agreement to which it is a party; it has taken all necessary action to authorise such execution, delivery and performance, including authorisations required under the U.S. Federal Deposit Insurance Act, as amended, including amendments effected by the U.S. Federal Institutions Reform, Recovery and Enforcement Act of 1989, and under any agreement, writ, decree or order entered into with a party's supervisory authorities; and

- (b) at all times during the term of this Agreement, it will continuously include and maintain as part of its official written books and records this Agreement, the netting agreements and evidence of all necessary authorisations.]⁽¹⁾

[2.5][2.6] This Agreement is supplemental to the netting agreements entered into between the parties prior to the date of this Agreement, and all further netting agreements and transactions entered into between the parties after the date of this Agreement shall be supplemental to this Agreement.

3. Base currency

The base currency for the purposes of this Agreement shall be the US dollar or, at the ECB's option, any other currency. Wherever it is necessary in accordance with the terms of this Agreement to convert amounts into the base currency, such amounts shall be converted at the daily reference rate published by the ECB for the currency to be converted into the base currency or, in the absence of such reference rate, at the rate of exchange at which the ECB can buy or sell, as appropriate, such amounts with or against the base currency on such day, all as determined by the ECB.

4. Cross acceleration

Should any default termination occur under any netting agreement (including under Appendix 2 of this Agreement), then the ECB shall have the right to declare, by written notice to the Counterparty, that a default termination has occurred under each other netting agreement in respect of which default termination has not occurred in accordance with the provisions thereof.

5. Global netting

5.1 Should a default termination occur, the ECB shall, as soon as is reasonably practicable, take an account of what is due from each party to the other under each netting agreement (including under Appendix 2 of this Agreement) in respect of which default termination has occurred and aggregate the sums due from each party to the other under such netting agreements (including under Appendix 2 of this Agreement), in every case in or converted into the base currency, and only the net balance of the account shall be payable by the party owing the larger aggregate sum.

5.2 Clause 5.1 shall continue to operate to the extent possible notwithstanding the unenforceability under applicable law of any provisions contained in any netting agreement (including under Appendix 2 of this Agreement).

6. Notices and other communications

All notices, instructions and other communications to be given under this Agreement shall be effective only upon receipt and shall be made in writing (including by electronic means).

7. Severability

Each provision contained herein (including, without limitation, Appendix 2 of this Agreement) shall be treated as separate from any other provision herein and shall be enforceable notwithstanding the unenforceability of any such other provision.

8. Non-assignability

The rights and obligations of the Counterparty under this Agreement may not be assigned, charged, pledged or otherwise transferred or dealt with by the Counterparty.

⁽¹⁾ Representation to be used where the Counterparty is a US depository institution.

▼ B**9. Governing law and jurisdiction**

9.1 This Agreement shall be governed by and construed in accordance with the laws of the State of New York, United States of America.

9.2 For the benefit of the ECB, the Counterparty hereby irrevocably submits for all purposes of or in connection with this Agreement to the jurisdiction of the District Court (*Landgericht*) of Frankfurt am Main, Germany. Nothing in this clause 9 shall limit the right of the ECB to take proceedings before the courts of any other country of competent jurisdiction.

European Central Bank**[Name of Counterparty] ⁽¹⁾**

By _____

By _____

Title _____

Title _____

(Address for the service of notices under this Agreement)

Date _____

Date _____

⁽¹⁾ In the case of US depository institution counterparties, to be executed by a bank officer at the level of Vice President or higher.

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Appendix 1

Netting agreements

1. FBE Master Agreement for Financial Transactions (Edition 2004)
2. ISDA Master Agreement (Multi-currency — Cross border 1992)
3. TBMA/ISMA Global Master Repurchase Agreement (2000 version)
4. The Bond Market Association Master Repurchase Agreement.

▼B*Appendix 2***Transactions not subject to any netting agreement**

1. The provisions of this Appendix apply to transactions entered into between the parties that are not effectively subject to any other netting agreement.

2. Should:

(a) a default termination occur under any netting agreement, or

(b) an event that is defined as an event of default or other analogous event under any netting agreement occur, which event would, assuming there were outstanding transactions under any such netting agreement, result in, or entitle the ECB to take steps which would result in, a default termination under such netting agreement,

(any such event under (a) or (b) above is referred to in this Appendix as an «event of default»),

then all transactions to which this Appendix applies (but not less than all, unless any such transaction may not be so closed out under applicable law) under which obligations have or would otherwise have fallen due by or after the date of such event of default (the «close out date») shall be liquidated and closed-out as described under paragraphs 3 and 4 of this Appendix, and the ECB shall, without prejudice to paragraphs 3 and 4 of this Appendix, not be obliged to make any further payments or deliveries under any such transactions.

3. Should liquidation and close-out under paragraph 2 of this Appendix occur, the ECB shall, as soon as is reasonably practicable, take an account of what is due from each party to the other, including, as necessary, determining in respect of each transaction the ECB's total gain or loss, as the case may be, resulting from the liquidation and close-out of such transaction as at the date of such liquidation and close-out, in every case in or converted into the base currency. The ECB shall then aggregate such gains and losses and only the balance of the account shall be payable by the Counterparty, if the aggregate losses exceed the aggregate gains, or by the ECB, if the aggregate gains exceed the aggregate losses.

4. In determining in respect of each transaction the ECB's total gain or loss, the ECB shall, subject to applicable law, use a commercially reasonable method of calculation which (a) is based on, to the extent practicable and available, quotations from at least four leading dealers in the relevant market operating in the same financial centre, and (b) takes into account, where applicable, the liquidation and close-out of such transaction earlier than its scheduled value date or delivery date.

5. The parties agree that the calculation of the net sum under paragraphs 3 and 4 of this Appendix is a reasonable pre-estimate of losses suffered.