TaylorWessing

LEGAL OPINION

for

EUROPEAN FEDERATION OF ENERGY TRADERS

regarding

MASTER NETTING

and

CROS-PRODUCT CREDIT SUPPORT

under

Austrian Law

March 2021

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I. INTRODUCTION

This legal opinion (The **"Opinion")** refers to specific questions raised in respect to the following documents:

- The Cross Product Master Agreement published in February 2000 by the Bond Market Association ("CPMA Form") as further modified by Version 1.0 of the European Commodities Schedule published on 23 June 2003 by EFET/ International Energy Credit Association ("IECA") ("Schedule") (collectively, the CPMA Form as modified by the Schedule is referred to as the Cross Product Master Agreement (**"CPMA"**);

- The Cross-Product Credit Support Annex **("CPMA CSA")** to the CPMA published by EFET on 23 June 2003;

- The Master Netting Agreement published by EFET in June 2010 (the **"MNA"**) (collectively the CPMA and the MNA are referred to as the "**Master Agreements"**)**;** and

- The Credit Support Annex to the MNA published by EFET in February 2011 (the "MNA CSA") (collectively, the CPMA CSA and the MNA CSA are referred to as the Credit Support Annexes [the "CSAs"]).

This legal opinion is strictly limited to the issues addressed herein and speaks only as of its date. We do not undertake to inform you of any changes which may hereafter come to our attention, unless expressly instructed to do so.

The competent courts of Austria shall have the exclusive jurisdiction over all disputes arising out of or in connection with the Opinion.

This opinion is addressed exclusively to EFET and its members who have subscribed to the EFET Legal Module, is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other persons without EFET's prior written approval.

Any rights of EFET and its members who have subscribed to its opinion service arising out of or as a result of the Opinion may not be assigned, encumbered or otherwise dealt with and neither EFET nor its members who have subscribed to its opinion service may attempt or purport to do so without our prior written consent.

A. <u>Limitations</u>

This Opinion is based on and limited to such officially issued and duly published laws, decrees, decisions, regulations and executive orders issued by any Austrian governmental authority and such officially issued and duly published applicable laws of the European Union having direct effect vis-a-vis the parties to the Master Agreement, as applied by Austrian courts as of the date of this Opinion, all of which are collectively referred to herein as "Austrian Law".

Our opinions expressed in this Opinion are limited to the above listed documents and are not to be construed to extend to any other document of a similar nature issued and endorsed by EFET. The scope of this Opinion is determined by EFET's instruction letter of 2 July 2020, a copy of which is attached hereto as Annex 1 and the issues specified therein and addressed in this Opinion.

Given the fact that the MNA and the CPMA have been drafted in a way to enable the parties to be as flexible as possible and given that the MNA and the CPMA may widely be amended and specified by selecting from the optional provisions and otherwise inserting specifically negotiated changes in the Election Sheet, it is impossible to render an exhaustive and final legal opinion that would cover all possible elections and all possible constellations of elections made in the election sheet. This Opinion must, therefore, be strictly limited to the issues addressed herein which we have reviewed in accordance with your instructions and which we have deemed important and necessary to fit the purpose of this Opinion regarding the standard form of the MNA and the CPMA. This Opinion does not substitute the independent review of any individually negotiated EFET documentation.

Taking into account the above considerations particular attention has been drawn to any public policy provisions under Austrian Law - in particular insolvency related matters - which apply irrespective of the choice of law, while other Austrian Law issues have been limited to the extent, we deemed appropriate and suitable for the purposes of this legal opinion.

Regulatory aspects and tax implications have not been included in our analysis for this Opinion.

B. Executive Summary

This section provides an overview of the main conclusions of the Opinion based on the assumptions set out in the instruction letter of 2 July 2020 (Annex 1) and is for your convenience only.

This summary should be read, interpreted and understood only in conjunction with the detailed analysis in point II of the Opinion.

As a matter of Austrian Law, the close-out netting provisions of the Master Agreements would be, in principle and subject to the restrictions described in this Opinion, valid and binding prior to, as well as subsequent to the opening of insolvency proceedings against an Austrian Party.

As a matter of Austrian Law, the termination of any of the Master Agreements upon the occurrence of a Close-Out Event is, in principle and subject to the restrictions described in this Opinion, valid and binding, irrespective of whether insolvency proceedings have been opened. Whether automatic early termination is recommendable depends on the type of insolvency proceedings and the type of Transactions to be terminated as described in more detail in point II.B.2 and II.B.3 of this Opinion.

The Opinion further describes in point II.A.10 and II.A.11 Austrian laws that govern the transfer of ownership. Based on such laws it is furthermore concluded, that the CSAs are an appropriate form to create the intended outright transfer of ownership in the collateral to a party.

There would be no change in the conclusions reached in this Opinion based upon the fact that a party has conducted business under the Master Agreements on a multibranch basis prior to its insolvency.

II. OPINION

A. Netting / Set-off Absent an Insolvency

Model CPMA / Model MNA

1. Your Question 1

"*Your opinion on whether a transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement would be validly included in each model Master Agreement, assuming either a choice of English or German law as governing such documents (save of the trading terms and conditions of the 2015 NBP Master which is governed by English law)? Please elaborate if your analysis depends on whether or not the relevant transaction: (i) was concluded before or after the execution of each Master Agreement; or (ii) makes explicit reference to a Master Agreement or the relevant Underlying Agreement."*

2. Scope of Netting / Set-off in Austria

The Master Agreements are netting agreements under private law; netting should therefore be based on a private autonomous agreement rather than on the basis of statutory netting/offsetting provisions. The legal effects of contractual netting depend on the specific agreement. The Austrian laws on netting are therefore not applicable (for the exceptions in the event of insolvency, see point II.B of this Opinion). In addition, the Master Agreements are not subject to Austrian law.

As civil law contracts, the Master Agreements are subject to the provisions of the Regulation Rome I[1]. As the fundamental general rule, Art 3 Rome I provides the freedom of parties to choose the governing law of their contracts. The contracts in question provide for a choice of law, so it is to be assumed that they are subject to either German or English law. Whether the Master Agreements are valid according to the respective governing law must therefore be checked according to the provisions of such governing law.

The parties define the scope of the Master Agreements in the accompanying Election Sheet[2]. The contracts, more specifically the transactions under the contracts subject to netting, are so defined in advance. If certain transactions should not be covered by the agreement, they must also be specified in advance[3]. Whether a transaction is covered by the Master Agreements therefore depends on the specific contractual arrangements.

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1 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
2 Section 2.1 MNA; Division 1, Part I.A of the Schedule.
3 Section 2.2 MNA;

The parties shall also specify in the Election Sheet the definition(s) of Close-Out Events which they wish to apply to the Master Agreements, and, if applicable, to the Netted Agreements[4].

Section 3.1(C)(III) and the related sections of the Election Sheet, permit the parties to hand select and customize a list of bespoken, harmonised Close-Out Events which they wish to apply to all of their netted agreements and upon the occurrence of which the MNA and all of its underlying Netted Agreements may be terminated. Therefore Section 3.1(C)(III) specifies – as so-called Harmonized Default Events – Winding-up, Insolvency and Attachments. But this is only one out of several other possible Close-Out Events for the Parties to elect. Section 3 of the MNA provides for example as further Harmonized Default Events as Non-Performance of a Party or its Credit Support Provider[5], Cross Default Acceleration[6], Prolonged or Repeated Failure to Deliver or Accept[7].

The same can be stated for the CPMA Form, also here, the Agreement provides for a wide spectrum of possible Close-Out Events that trigger Termination. The Schedule to the CPMA Form describes a variety of Close-Out Events which can be elected as such by the Parties[8].

Subject to the general qualifications set out in this Opinion we are of the understanding that the right of Termination for non-insolvency-related material reasons the related close-out netting provision constitute legal, valid and binding obligations of the parties and are enforceable in accordance with their terms.

3. Your Question 2

“Your opinion regarding the legality, validity and enforceability of each model Master Agreement (absent an insolvency of either party) to the netting and set-off of obligations due between the parties:

a. *under one or more physically settling transactions involving the same commodity or product,*

b. *under one or more physically settling energy transactions involving two or more different classes or types of commodity or product, and*

c. *under a combination of physically and financially settling transactions (transacted under two or more Underlying Agreements).”*

4 Section 3 MNA; Division 1, Part II of the Schedule
5 Section 3.1.(C)(I) MNA.
6 Section 3.1.(C)(II) MNA.
7 Section 3.1(C)(IV) MNA.
8 Division 1 Part II

4. No conflicting national provisions

The examination of the validity of the Master Agreements and the Underlying Agreements must be carried out in accordance with the provisions of the governing law, which is not national law. Leaving aside the prohibitions and restrictions on set-offs applicable in the context of insolvency proceedings, we are not aware of any Austrian provisions that would affect the validity of the Master Agreements, regardless of whether (i) a commodity is physically traded under several contracts or (ii) several different commodities are traded.

5. European Market Infrastructure Regulation – EMIR

The European Market Infrastructure Regulation[9] (EMIR) regulates trading in derivatives. The Regulation deals with clearing and bilateral risk management rules for over-the-counter ("OTC") derivative contracts, reporting requirements for derivative contracts and uniform rules for the exercise of activities of central counterparties ("CCPs") and trade repositories[10].

Due to the direct applicability of EMIR a separate transposition of EMIR into Austrian law has not been considered necessary. The regulatory aspects concerning the transfer of competences from national Financial Markets Authorities to European Supervisory Authorities the Austrian parliament introduced the Central Counterparty Implementation Act ("*Zentrale Gegenparteien-Vollzugsgesetz – ZGVG*") in order to support and permit the smooth transition of the affected supervisory competences. Generally speaking, the ZGVG stipulates the regulatory competences of FMA and the Austrian National Bank as regards (i) central counterparties, (ii) financial counterparties and (iii) non-financial counterparties.

Financial counterparties and non-financial counterparties

The scope of EMIR does not cover all market participants dealing in derivatives/OTC derivative contracts. The personal scope of EMIR distinguishes between central, financial and non-financial counterparties. CCP is the legal entity that acts between the parties to the traded contracts[11]. Financial counterparties ("FC") are investment firms, credit institutions, insurance companies and funds as defined in the relevant regulation or directive. Non-financial Counterparty ("NFC") is anyone who is not a financial or central counterparty[12]. The financial counterparties are in principle always covered by the EMIR's full catalogue of obligations.

By involving a CCP, the default risk of the trading partner is no longer borne, one only has to bear the default risk of the CCP. EMIR counters this risk by, among other things, increasing capital requirements and a strict authorisation procedure for the activity as CCP. The third

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9 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories.
10 Article 1 Paragraph 1 EMIR.
11 Article 2 Paragraph 1 EMIR.
12 Article 2 Number 3 EMIR.

pillar of EMIR consists of risk mitigation techniques, such as the timely confirmation of the terms of OTC derivative contracts.

From non-financial counterparty to clearing counterparty by exceeding thresholds

When NFCs trade OTC derivative contracts and exceed certain thresholds, they fall into the extended scope of the Regulation ("NFC+") under Article 10 EMIR. When calculating these thresholds, all OTC derivative contracts of the same class entered into by the non-financial counterparty or the group to which it belongs which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group (hedging) shall be taken into account[13]. The obligation to clear in accordance with Article 4 EMIR ends when the NFC provides evidence that the moving average position does not exceed the clearing threshold for 30 days.

Article 10 Delegated Regulation (EU) 149/2013[14] ("RTS 149/2013") specifies when the conclusion of an OTC derivative contract is to be regarded as serving hedging purposes.

The specific relevant threshold for the respective categories of derivatives traded by NFCs, the exceeding of which triggers the clearing obligation, was standardised in Article 11 RTS 149/2013. For OTC credit derivative contracts and OTC equity derivative contracts, this threshold is set at a gross notional value of one billion euros[15]. For OTC interest rate derivative contracts, OTC currency derivative contracts, OTC commodity derivative contracts and all other OTC derivative contracts, the relevant gross notional value is three billion euros[16].Furthermore, not only material exceptions must be taken into account here, but also calculation exceptions for the "C6 energy derivative contracts"[17], which were excluded from the calculation of the thresholds until 3 July 2020[18].

Obligations for non-financial counterparties subject to clearing

The consequences of exceeding the threshold are, on the one hand, qualification as NFC+ and the obligation to report to ESMA and the national supervisory authority[19]. More severe, however, is the obligation to clear all future derivative contracts if the moving average position exceeds the clearing threshold for a period of 30 days[20]. In fact, companies that do not carry any bank-specific risk are thus subjected to a regulatory regime that has been specifically

13 Article 10 Paragraph 3 EMIR.
14 Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP.
15 Article 11 Number a, b RTS 149/2013.
16 Article 11 Number c, d RTS 149/2013.
17 Article 4 Paragraph 1 Number 16 MiFID II.
18 Article 95 Paragraph 1 Number b MiFID II
19 Article 10 Paragraph 1 Number a EMIR; Article 11 RTS 149/2013.
20 Article 11 Number c, d RTS 149/2013.

tailored to the banking and financial industry (financial counterparties) and their specific risks and requirements.

These NFC subject to clearing obligations are thus subject to the obligation to calculate the value of outstanding contracts on a daily basis. According to Article 11 Paragraph 3 EMIR, there is also an obligation to have risk management procedures in place that enable "*the timely, accurate and appropriately segregated exchange of collateral*". This collateral must be "*appropriately*" segregated from the assets of the party. In terms of time, this includes transactions that were concluded on or after the day on which the clearing threshold was exceeded. This collateral must also be provided if, in the absence of an identification of the specific category of derivatives to be cleared a de facto clearing obligation does not yet exist through delegated regulation. Criteria for the quality of this collateral are set out in Article 46 EMIR, according to which it must be highly liquid and have a minimal credit and market risk.

With regard to non-financial counterparties, there is a derogation allowing bank guarantees to be accepted as collateral by the central counterparty[21]. In order to clarify these general concepts, ESMA was authorised to adopt regulatory technical standards after consulting the EBA, the ESRB and the ESCB[22]. This in turn was done by Delegated Regulation (EU) 153/2013[23].

<u>Energy traders as NFC+</u>

Companies that trade in energy commodities (such as electricity and gas) should in principle be considered as NFCs, as they are not financial services providers/banks.

Energy trading is usually carried out using master agreements, which allow many different concrete forms on a private law basis. Therefore, there is also a risk that products may qualify as OTC derivative contracts. A contract between two traders, where the price is fixed at the time of contract conclusion and the commodity is physically traded on different dates in the future is envisaged, could possibly be considered an OTC derivative contract (the material scope of the EMIR has to be assessed on the basis of the financial instruments traded[24]). This is also suggested by a reverse conclusion from the exemption/transitional provision in MiFID II created for derivatives that depict oil and coal, as the contracts are very similar except for the commodities depicted[25].

If a trader exceeds the relevant thresholds when trading in OTC commodity derivative contracts (3bn), he will be subject to the obligation to clear and, in doing so, to the requirements

21 Article 46 Paragraph 1 EMIR.
22 Article 46 Paragraph 3 EMIR.
23 Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties.
24 This legal opinion does not contain any examination of the material scope and therefore does not make any statement as to whether any product traded falls under the EMIR's definition of derivatives.
25 Article 4 Paragraph 1 Number 16 and Article 95 Paragraph 1 Number b MiFID II

to collateralise in accordance with the Regulation. At the moment, however, there is no regulation in the sense of Art 5 (2) EMIR that specifies which categories of OTC derivative contracts in commodities have to be cleared. Nevertheless, NFC+ will probably be obliged to provide collateral in accordance with Article 11 Paragraph 3 EMIR when trading OTC derivative contracts. Non-financial counterparties below the clearing threshold (NFC-) can be excluded from the scope, due to the fact that they are not considered to be of systemic relevance. Collateralisation of transactions by bank guarantees is therefore a common market practice, which is of great importance in many energy trading sectors (for the requirements for bank guarantees see below).

Scope of Margin

According to Article 11 Paragraph 3 EMIR, transactions in derivatives that are not subject to the clearing obligation must be collateralised in the EU. Delegated Regulation (EU) No. 2016/2251[26] ("RTS 2016/2251"), which came into force on 4 January 2017, specifies the requirements for risk management procedures to ensure the timely and appropriate exchange of collateral.

In case of an indirect clearing arrangement not only the transaction between the direct clearing member and the CCP, but also the corresponding transaction between the direct and indirect clearing member is considered and treated as a transaction cleared by a CCP[27].

The material scope of bilateral margin requirements is restricted by certain exclusions stipulated under EMIR and RTS 2016/2251. In order to maintain proportionality, the RTS 2016/2251 defines thresholds at group level below which certain requirements do not apply, as well as product exclusions for certain cases.

Initial Margin and Variation Margin

The RTS 2016/2251 defines the amount of securities to be lodged and the type of securities eligible for recognition. Variation margin and initial margin are provided as collateralization instruments.

According to the legal definition Initial margin ("IM") means "*the collateral collected by a counterparty to cover its current and potential future exposure in the interval between the last collection of margin and the liquidation of positions or hedging of market risk following a default of the other counterparty*." Variation margin ("VM") is defined as "*the collateral collected by a*

26 Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty.

27 European Securities and Markets Authority, Questions and Answers Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf (12), (Retrieved 02.03.2018).

counterparty to reflect the results of the daily marking-to-market or marking-to-model of outstanding contracts […]"[28].

VM is used to regularly balance out fluctuations in the value of derivative contracts. IM, on the other hand, is intended to cover current and expected future fluctuations in value that may arise between the last exchange of margins and the re-covering of the risk or the sale of the position if one of the counterparties cannot meet its contractual obligations, i.e. defaults. Counterparties may use a standardised approach or an internal model to calculate IM.

The RTS 2016/2251 contains requirements for these models and for the timing of the provision of collateral. It also defines which assets are eligible as collateral and contains rules for their valuation. It also contains requirements for the segregation of initial margins from other assets of counterparties. Initial margins may not be repledged or otherwise reused. Furthermore, there are concentration limits for accepted initial margins.

In bilateral trades, the instrument of margining is utilized to reduce credit exposure and counterparty risk. Margin, either in the form of cash or securities, is transferred from one counterparty to the other as a security for a credit exposure with the purpose that in an event of default the surviving party is able to off-set potential losses with the margin received. VM represents the mark-to-market of the underlying trades. VM is generally calculated on a daily basis and can result in a positive or negative market value. Calculating VM is the easiest way to determine a benchmark of the actual loss if one of the counterparties defaults. Nevertheless, in case of a counterparty default, VM can be insufficient to cover the losses incurred due to market movements, suspension and delays of margin calls. Therefore, the bilateral margin requirement under EMIR also requires the exchange of IM to absorb potential losses not covered by VM. According to Article 11 RTS 2016/2251, IM can either be calculated utilizing the standardised approach or internal margin models. It is important to note that, in comparison to the IM requirements for centrally cleared OTC-derivatives, both methods stipulated under RTS 2016/2251 result in higher IM requirements for non-centrally cleared OTC-derivative contracts.

The range of assets that constitute eligible collateral are set forth in Article 4 of RTS 2016/2251. The list encompasses a fairly broad range of different assets to be utilized, notwithstanding being subject to the haircut provisions listed in Table 1 and Table 2 of RTS 2016/2251. In order to support the underlying objective of providing protection against losses in the case of a counterparty default, it is immanent that the value of the posted collateral remains fairly stable, even in times of financial turbulences. Therefore, the regulator imposed haircuts to adjust for the riskiness of the different asset classes and the requirements stated in Article 4 Paragraph 2 RTS 2016/2251 in order to prevent that the collateral value is correlated to the event of a counterparty default. This form of correlation is also referred to as "wrong-way risk". In order to avoid detrimental effects on financial stability due to the liquidation of collateral, the regulator also imposed certain concentration limits for initial margin. Those

[28] Article 1 Paragraph 1 and 2 RTS 2016/2251.

limits are applicable to systemically relevant counterparties and market participants with large OTC-derivative portfolios. The respective limits are laid down in Article 8 of RTS 2016/2251.[29]

Time scope of application

For market participants (financial counterparties and non-financial counterparties exceeding the clearing threshold as defined in Article 10 EMIR) with a notional amount of non-centrally cleared OTC derivatives exceeding EUR 3 trillion at group level, the obligation to exchange initial and variation margin started on 4 February 2017. This applies to those market participants that trade collateralised derivatives with other counterparties that also exceed this threshold. Lower volume counterparties have more time to prepare for their application thanks to a gradual introduction of the rules. The obligation to exchange variation margin will apply to them from 1 March 2017 and the obligation to exchange initial margin for smaller market participants will be phased in four steps[30]:

Date	Variation Margin	Initial Margin
4 February 2017	> 3 trillion euros	> 3 trillion euros
1 March 2017	all market participants	-
1 September 2017	-	> 2.25 trillion euros
1 September 2018	-	> 1.5 trillion euros
1 September 2019	-	> 0.75 trillion euros
1 September 2020	-	> 8 billion euros

Requirements for a bank guarantee used as collateral

The personal scope of bilateral margin requirements is provided by Article 11 Paragraph 3 EMIR and encompasses FC and NFC+. In practice, bank guarantees are often used as collateral. With regard to guarantees, ESMA has established extended requirements in Annex I, Section II RTS 153/2013. According to these requirements, a guarantee issued by a commercial bank must have the following characteristics in order to be accepted by the central counterparty:

- it is issued to guarantee a non-financial clearing member;
- the CCP demonstrates to its competent authority that the credit risk of the issuer is low, based on an appropriate internal assessment which is not entirely based on external opinions but on objective methodology;

29 *Kronberger*, OTC-Derivatives Clearing Obligation and Bilateral Margin Requirements, SPWR 2018, 167.
30 Article 36 Rts 2016/2251.

- it is denominated in a currency in which the CCP can demonstrate to the competent authority that it can adequately manage the risk in question or in a currency in which the CCP clears contracts to the extent necessary to cover the risk positions;
- the guarantee is irrevocable, unconditional and there is no exception, in particular for legal or contractual reasons, which could prevent payment;
- the utilisation of the guarantee during the liquidation period of the portfolio of the defaulting clearing member providing the guarantee is not affected by regulatory, legal or operational restrictions;
- the issuer is not part of the same group as the clearing member or provides services essential to the functioning of the CCP and there is no other significant correlation risk; and
- the adequacy of the guarantor has been approved by the management body of the CCP after a full assessment of the issuer and the legal, contractual and operational framework of the guarantee, based on criteria that ensure a high level of certainty as to the effectiveness of the guarantee.

Probably the most serious criterion is laid down in Annex I Section II Paragraph 1 Letter h RTS 153/2013, according to which the guarantee issued by a commercial bank must itself be fully covered by collateral. This collateralisation of the guarantee must not correlate with the creditworthiness of the guarantor or the non-financial counterparty and must be protected against insolvency in the event of simultaneous default of the clearing member and the guarantor.

In other words, the bank guarantee for the non-financial counterparty transaction must itself be fully collateralised.

<u>Additional requirements</u>

If the threshold value according to Article 10 Paragraph 1 EMIR has been exceeded by an NFC, Article 11 Paragraph 2 EMIR must also be complied with. This provision stipulates that a daily mark-to-market valuation must be carried out with regard to the portfolio. Articles 16 and 17 RTS 149/2013 specify when a mark-to-market valuation is not possible and which requirements must be met by a model price calculation.

<u>EMIR-REFIT</u>

On 28 May 2019, Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 was published. This is an amendment to EMIR, commonly referred to as "EMIR-REFIT", concerning the clearing obligation, the suspension of the clearing obligation, reporting obligations, risk mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and requirements for trade

repositories. EMIR-REFIT aims to simplify the European regulatory framework for the (OTC) derivatives market by addressing disproportionate compliance costs, transparency problems and insufficient access to clearing for certain counterparties.

The EMIR is now to apply (only) to those FCs which could pose a significant systemic risk to the financial system[31]. The definition of a FC in Article 2 Paragraph 8 EMIR is therefore amended accordingly, in that, for example, UCITS and AIF established solely for the purpose of implementing one or more employee share purchase plans are not considered FCs.

In addition, the category of small (non-)financial counterparties is created: In general, NFC are less networked than FC and are predominantly active in only one category of OTC derivatives. Therefore, in the view of the legislator, their activities pose a lower systemic risk to the financial system than the activities of FCs[32]. Therefore, the scope of the clearing obligation is limited for NFC that choose to calculate their position in relation to the clearing thresholds every 12 months. The clearing obligation for these non-financial counterparties will now only apply to those categories of OTC derivatives where the clearing threshold is exceeded. NFC will still be subject to the obligation to exchange collateral if any of the clearing thresholds are exceeded. In return, NFC who choose not to calculate their position in relation to the clearing thresholds will be required to clear all categories of OTC derivatives. However, NFC will have the possibility to demonstrate at any time that their positions no longer exceed the clearing threshold for any category of OTC derivatives, in which case the clearing obligation for that category of OTC derivatives will no longer apply.

Impact of MiFID II and MiFIR on energy traders

MiFID II and MiFIR form a set of rules that has the potential to change energy trading on a permanent basis. It is quite conceivable that several of the traded products could qualify as financial instruments as defined in Annex 1 Section C of Directive (EU) 2014/65. If this trader provides services,[33] such as the acceptance and transmission of orders relating to a financial instrument,[34] or if he trades on his own account,[35] he must in principle be regarded as an investment firm within the meaning of MiFID II. If none of the narrow exemptions in Articles 2 and 3 of the Directive, which are narrower than the previous provision, namely MiFID, apply, the trader is within the full scope of MiFID II and requires authorisation under Article 5 MiFID II as an investment firm.

Classification as an investment firm under MiFID II/MiFIR also has serious consequences with regard to EMIR, as the energy trader is thus immediately and directly subject to all obligations of EMIR as FC in the personal full scope of application.

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[31] Recital 5 EMIR-REFIT.
[32] Recital 8 EMIR-REFIT.
[33] Annex I Section A and B MiFID II.
[34] Annex I Section A Number 1 MiFID II.
[35] Annex I Section A Number 3 MiFID II.

Impact of EMIR on Master Agreements

As (i) the Master Agreements are integrated legal documents with numerous cross-references within each paragraph and given the fact (ii) that the Master Agreements have been drafted in a way to enable the Parties to be as flexible as possible and given the fact (iii) that the Master Agreements may widely be amended and specified by selecting from the optional provisions and otherwise inserting specifically negotiated changes in the Election Sheet, and given the fact (iv) that we have not been provided with Information on actual contractual relations between market participants and CCPs, and given the fact (v) that due to its novelty jurisdiction and commendation on aspects concerning EMIR and its practical implications on insolvency related, non-insolvency related, contractual and financial market related aspects, it is impossible to assess possible implications on, or changes to the Master Agreements which could either each on its own or together constitute a "material alteration" of the Master Agreements, which would affect the conclusions reached in the Opinion.

It is therefore impossible to render an exhaustive and final legal opinion that would cover possible implications and/or alterations of EMIR to the Master Agreements, respectively the legal interrelations between involved parties as regards insolvency-related or non-insolvency related aspects and its assessment under Austrian law.

We can therefore not exclude that EMIR, especially provisions on the factual interposition of a CCP might in case have mutual implications (i) on the contractual relations established under the Master Agreements, (ii) the termination of the Master Agreements, (iii) the avoidance of legal acts and (iv) on close-out netting under Master Agreements.

6. Your Question 3

"*An analysis and your opinion regarding the necessity or efficacy of performing any due diligence (i.e., lien searches, filings etc.) prior to a party entering into each model Master Agreement.*"

7. Due diligence

This question cannot be answered conclusively in the affirmative or negative. Carrying out a due diligence before entering into a business relationship can be advantageous, especially since knowledge of the economic, legal, tax and financial circumstances of the business partner can be gained. On the other hand, however, this could also involve (considerable) expenses. A cost-benefit analysis should therefore be carried out.

With due diligence, companies protect themselves by checking the assumptions and conditions of a cooperation or offer and identifying relevant risks. Which form of due diligence is applied depends on the respective situation and the extent of the risk. A due diligence can help companies to protect their interests, especially since a certain residual risk cannot be completely excluded despite the contractual safeguards in the Agreements in question.

8. Your Question 4

"A general discussion of, and your opinion regarding, your jurisdiction's laws relevant to the concepts of close-out netting and set-off of claims between parties, combinations of accounts or such other terminology as is employed in your jurisdiction to address such issues."

9. Legal situation regarding off-setting in Austria

Due to the choice of law in the Master Agreements and the Underlying Agreements, Austrian law on netting/off-setting is not applicable, but for the sake of completeness a brief description of the national civil law provisions is provided:

If not only the creditor is entitled to a claim against his debtor, but the debtor also has a claim against his creditor, these can be set off against each other. The claims will then expire to the extent that they cover each other. The off-setting (compensation) thus has the same effect as a payment, except that no payments actually have to be exchanged. Off-setting does not take place automatically; the person wishing to off-set must refer to it by submitting an explicit or conclusive off-setting declaration.

The conditions for off-setting are listed in Sections 1438 and 1439 General Civil Law Code ("*Allgemeines Bürgerliches Gesetzbuch – ABGB"*) and must be met at the time of off-setting. If they have been met, the party off-setting may off-set unilaterally (even against the will of the other party) by submitting an off-setting declaration that requires access. The off-setting declaration is hostile to conditions and time limits and, according to prevailing doctrine, contains a declarative acknowledgement of the principal claim.

The claims must be (i) correct[36] and due (ii) and similar[37] (iii) and reciprocal (iv) and there must be no legal or contractual prohibition of set-off.

Set-off shall be effective from the date on which the both claims first come into existence.

Netting can also be carried out by mutual agreement (netting agreement). The advantage of a netting agreement is that set-off is also effective if the aforementioned conditions for unilateral netting are not met. Contractual netting is therefore also possible if a (non-mandatory) statutory

[36] The counterclaim must be correct; this means that must have been validly created (no suspensive condition), still exists (has not expired due to preclusion or redemption), is free of objections (the objection of non-performance of the contract prevents off-setting in the case of concurrent settlement) and is actionable (whereby, according to the case law, off-setting against claims that have become statute-barred in the meantime is possible).

[37] Above all, money claims are similar.

netting prohibition exists. However, mandatory netting prohibitions (such as Section 20 Paragraph 1 Insolvency Act) also prevent contractual netting.

CPMA CSA / MNA CSA

10. Collateral in Austria

Austrian law generally recognizes the following types of security interests with respect to moveable assets and securities where a right in rem is established: (i) pledges, (ii) fiduciary transfers of ownership for security purposes as well as (iii) security assignments of claims.

As a general rule pledges (which include "regular" pledges where ownership is retained and "irregular" pledges where ownership is transferred), as well as fiduciary transfers of ownership and security assignments of rights are strictly accessory and thus dependant on the validity and existence of a secured obligation. Consequently, and as a general rule (with certain exceptions concerning real estate mortgages) pledges will automatically cease to exist upon discharge of the secured obligation.

Transferring ownership of movable goods in order to provide collateral, as well as pledging goods, is - in general - only valid if the goods themselves are handed over to the beneficiary.

Further - if the collateral consists of assets other than cash, the beneficiary has to liquidate the collateral upon foreclosure. Clauses pursuant to which he can simply keep the collateral are considered null and void.

The secured obligation, which can also be conditional or not yet due, has to be determined or at least determinable. For future obligations this means that the parties (i.e. the collateral provider and the collateral taker) and the legal basis (causa, Rechtsgrund) of the obligation (i.e. the obligation to be secured) need to be determined in a way that the secured obligation arising generally from "the parties" business relations (Geschäftsbeziehung) might be considered too vague.

Referring to obligations arising from contracts subject to a common master agreement is usually considered sufficiently determinable.

As regards the transfer of ownership or the creation of a security interest Austrian civil law requires both an obligation to transfer said ownership (the titulus) as well as an act with which the ownership is transferred (the modus, e.g. handing over the sold good). Transferring ownership or creating a security interest without an underlying obligation (i.e. an agreement to transfer the ownership, or create the security interest) is not possible according to Austrian civil law.

11. Your Question 5

"Your opinion on whether the laws of your jurisdiction characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that such transfer would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under each CSA. If so, please opine on whether there is any way to minimize such risk and the consequences of such a re-characterization to ensure the valid transfer of each type of Eligible Credit Support created by the providing party under each CSA."

Eligible Credit Support as defined in the CSAs is either a Letter of Credit (standby letter of credit, bank guarantee or similar document) or cash (to be transferred to an account of the Transferee). From an Austrian law perspective, a Letter of Credit would be understood as either a contract between the guaranteeing bank and the Transferee or at least a contract for the benefit of the Transferee. As such the question regarding a transfer of title is - from an Austrian law perspective - not applicable in the context of a Letter of Credit.

From an Austrian law perspective, the obligations of the transferor and the transferee under the CPMA CSA and the MNA CSA as regards the transfer of cash are in line with the Austrian understanding of an irregular cash pledge (*unregelmäßiges Geldpfand*), which in the strictest sense is a security interest.

That being said, in the course of an irregular cash pledge the ownership of the "pledged" cash is transferred to the transferee and the Transferee has full ownership rights and can dispose of the transferred cash however they wish.

The consequence of the characterization as an irregular pledge is that the Transferee is, at the end of the pledge period, obliged to (re-)pay the amount not needed to satisfy the secured claim(s).

For the sake of clarity - this is neither an automatic retransfer of ownership, nor an obligation to re-transfer ownership, but rather a contractual (re-)payment claim equivalent to the un-needed collateral which can be off-set against.

This is in our understanding the mechanism also provided for by Section 12 of the CPMA CSA and Section 11 of the MNA CSA as well.

12. Your Question 6

"Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, your opinion on whether it will need to take any subsequent action to ensure that its title in the

Eligible Credit Support continues. Your opinion should include whether there are any requirements in your jurisdiction necessary or advisable, including any filing registration, notification, stamping, notarization or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval together with any procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce or continue such ownership interest."

Once ownership is transferred there are no subsequent actions required to retain the title in the Eligible Credit Support.

13. Your Question 7

"Your opinion on the effect, if any, under the laws of your jurisdiction of the right to a providing party incorporated or otherwise organized under your jurisdiction to exchange Eligible Credit Support (for example, by swapping cash for a letter of credit) pursuant to Section 6 of each CSA. Does the presence of consent to substitution by the receiving party have any bearing on this question."

We understand that according to the CPMA CSA / MNA CSA Eligible Credit Support is provided by either transferring cash to an account determined by the other party or providing a Letter of Credit. Consequently, any exchange of Eligible Credit Support pursuant to Section 6 of each CSA will be a swap exclusively concerning cash and/or Letters of Credit. Furthermore, the Exchange of the Eligible Credit Support is subject to the approval of the Transferee.

Based on this understanding, neither the right to exchange the Eligible Credit Support nor the consent to substitution by the receiving party have any effect, other than providing the parties with the right to exchange the Eligible Credit Support.

14. Your Question 8

"Your opinion on whether the parties' agreement on the governing law of each CSA and their submission to jurisdiction would be upheld in your jurisdiction, and what would be the consequences if they were not."

In Austria conflicts of law are governed either by the Regulation (EC) No 593/2008 ("Rome I") or, where Rome I is not applicable, the Austrian Act on Private Law[38]. Both recognize, subject to certain limitations, a contractual choice of the law governing (among others) the obligations to transfer title or to provide security.

There are some mandatory standards Austrian courts would apply irrespective of a choice of law (among others the formal requirements for transferring a right in rem in real estate in Aus-

[38] Federal Law Gazette I, No. 77/2011 and Federal Law Gazette I, No. 184/2013.

tria or certain consumer protection provisions), however, there are no such mandatory standards that would negatively impact the performance of the obligations under either the CPMA CSA or the MNA CSA.

The submission to jurisdiction in the CPMA and the MNA, which also applies to the CSAs, is - from an Austrian law perspective - subject to either the Regulation (EU) No 1215/2012 (Brussels 1a) or, where Brussels 1a is not applicable, the Austrian Jurisdiction Standard Act (*Jurisdiktionsnorm*).

While both Brussels 1a as well as Austrian procedural law provide for mandatory places of jurisdiction, neither of the CSAs would fall under one of the exclusive jurisdictions provided for by either Brussels 1a or the Austrian Jurisdiction Standard Act.

Consequently both the choice of law as well as the submission to jurisdiction would be upheld in Austria.

15. Your Question 9

"Your opinion as to whether under local law of your jurisdiction, each CSA complies with any mandatory margining requirements applicable under the laws of your jurisdiction."

Whether or not each CSA complies with mandatory margining requirements depends mainly on the applicability of EMIR to the specific contractual relationship (please refer to Section II.A.5. for further information on the impact of EMIR and the margining requirements thereunder). Without knowing the specific contractual relationship, we cannot answer this question comprehensively.

For the sake of clarity - if (e.g.) EMIR were applicable to the contractual relationship and if a CCP were to be involved, the CSAs alone would not be enough to comply with the margining requirements under EMIR, since in that case the parties would be required to provide the CCP with collateral and not (only) each other.

16. Your Question 10

"Your opinion on whether there are any other local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a providing party incorporated or otherwise organized under your jurisdiction."

Both taking and realizing upon the Eligible Credit Support, which is limited to cash and Letters of Credit, is rather straight forward from an Austrian law perspective. However, if the Eligible Credit Support were to be provided by a subsidiary or an affiliated company of the Transferor, Austrian capital maintenance rules need to be taken into consideration.

Both limited liability companies (*Gessellschaft mit beschränkter Haftung*) as well as stock companies (*Aktiengesellschaft*) are subject to strict rules on raising and maintenance of capital, in particular to protect creditors.

Both the Austrian stock company act (*Aktiengesetz)* and the Austrian limited liability company act (*Gesetz über Gesellschaften mit beschränkter Haftung*) stipulate that the shareholders of a limited liability corporation or a stock company cannot reclaim their capital contribution. As long as the company exists, they are only entitled to the duly determined balance sheet profit (insofar as this is not excluded from distribution).

In order to comply with Austrian capital maintenance rules, a transaction between a company and its shareholders must stand up to arm's length comparison.

Consequently, providing services to shareholders without due consideration (which would include providing collateral for a shareholder's loan without adequate consideration) would be considered a breach of Austrian capital maintenance rules. Transactions that violate the capital maintenance rules are (in the worst case) absolutely void.

Consequently, when taking the Eligible Credit Support, the Transferee needs to take into consideration who actually provides the Eligible Credit Support. If the source of the Eligible Credit Support is either a subsidiary or an affiliated company of the contract party, special care needs to be taken to avoid the voidance of the provision of the Eligible Credit Support.

Model CPMA combined with the CPMA CSA / Model MNA combined with the Model CSA

17. Your Question 11

"The transferee's right in relation to the transferred Eligible Credit Support upon the occurrence of a Close-Out Event will be governed by: (i) in the case of the CPMA, Section 4 of the CPMA (see Section 11 of the CPMA CSA); and (ii) in the case of the MNA, Section 8 of the MNA (see Section 12 of the MNA CSA). Assuming that Section 4 of the CPMA / Section 8 of the MNA is valid and enforceable in your jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount by either party on the termination of Underlying l Agreements, your opinion on whether Section 11 of the CPMA CSA / Section 12 of the MNA CSA is also valid to the extent that it provides for the Base Currency Equivalent of all the Eligible Credit Support provided under each CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount. In other words whether, contractually, the right of a party to apply collateral to a Settlement Amount is enforceable."

Eligible Credit Support provided under each CSA is either cash or a Letter of Credit.

Section 11 of the CPMA CSA / Section 12 of the MNA CSA provide that upon the Early Termination Date, the Valuation Agent shall determine the Base Currency Equivalent of all Eligible

Credit Support and such amount determined by the Valuation Agent will be deemed to be an amount payable (but not yet paid) by the Transferee to the Transferor on the Determination Date and shall be included in the Final Net Settlement Amount. Further any Eligible Credit Support in the form of a Letter of Credit as of the Determination Date shall not be considered by the Valuation Agent in making such determination, while to the extent that the Transferee draws under any such Letter of Credit, the obligations of the Transferor shall be discharged in an amount equal to such drawings.

Consequently, as we understand, only cash provided as collateral under the CSAs is included in the calculation of the Final Net Settlement Amount. Given that the provision of cash under the CSAs is - from an Austrian law perspective - an irregular cash pledge, which, as previously mentioned, results in an off-setable re-payment claim at the end of the pledge period (in this case a Close-Out Event), the right to apply the collateral to the Settlement Amount is enforceable.

18. Your Question 12

"Your opinion on whether the opinions that you have expressed on: (i) the CPMA and the CPMA CSA; and (ii) the MNA and MNA CSA would change in the event that the parties agree to place the Eligible Credit Support with an independent third party collateral agent rather than a party to each Master Agreement and relevant CSA."

There are no particular issues under Austrian law with respect to third party collateral agents as this concept is recognized under Austrian law.

B. Netting / Set-off in the Context of an Insolvency

Model CPMA / Model MNA

1. Your Question 1

"*Assuming the parties* <u>have not</u> *selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule to the CPMA / Section 6.1 of the MNA Election Sheet) and/or none of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in your jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of your jurisdiction."*

2. Termination after opening of insolvency proceedings

a) The Effects of Insolvency Proceedings on Commodity Transactions in General

The Master Agreements are designed to facilitate and support, where permitted under applicable law, the early termination and close-out netting of unsettled trades of one or more commodities, derivatives and/or related products transacted under multiple bilateral trading agreements and, if applicable, other forms of transactional documentation. The Master Agreements have a clear focus on the commodities and derivative products traded in European energy markets, as well as related markets like emissions, pipeline, freight and wire capacity and weather derivatives (but is not structured to impose this scope as a limitation on users wishing a broader application of the document). § 1.2 of the Additional Netted Agreement Rider to the MNA's Election Sheet provides a set of standardized optional descriptions to define Commodities. These options are divided into a few general categories: traditional energy products, agricultural/soft commodities, metals and paper products, transportation, transmission, freight and storage capacity products, emissions credits and products, green energy products and tradable certificate, and weather derivatives. As with all similar provisions in the MNA, the parties are free to add their own customized additions to the standard list provided in the Rider.

In the context of Austrian insolvency laws, transactions entered into under Underlying Agreements, would be, in general, categorised as contracts providing for reciprocal obligations (“*zweiseitiger Vertrag*"). With respect to reciprocal obligations, Austrian insolvency laws provide for an important distinction between (i) contracts which have been fully performed by one party at the time of the institution of the insolvency proceeding ("*unilaterally unperformed contracts*") and (ii) those contracts that have not, or not fully, been performed by each of the parties at such time ("*mutually unperformed contracts*").

As an example: a contract regarding the purchase and sale of commodities that has not yet been performed by both of the parties, i.e. no delivery of the commodity has been made and payment has not been effected by the respective other party, is a mutually unperformed contract. To the contrary, if one party has fully performed its obligations under a contract regarding the purchase and sale of the commodities and has delivered the commodities in accordance with the provisions of such contract, whereby no payment has been made by the respective other party, the contract is a unilaterally unperformed contract. By the same means, an exercised option on the purchase and sale of commodities which has not been performed by each of the parties, is a mutually unperformed contract and an exercised option which has been fully performed by only one party at the time of the institution of the insolvency proceeding constitutes a unilaterally unperformed contract. The same principle applies with respect to forward sales or purchases.

The same principle applies also to "spot" contracts[39] if under such a spot contract either no delivery of a commodity has been made or no payment has been effected. In an insolvency situation Austrian law does, subject to the clarifications set forth in point II.B.2.b) of this Opinion, not distinguish between "Forward" and "spot" contracts but does only differentiate between (i) unilaterally unperformed contracts and (ii) mutually unperformed contracts, which could be either spot or forward contracts.

Section 21 Paragraph 4 Insolvency Act provides that, if the performance under a mutual contract is divisible, and the creditor has at the time of the institution of the insolvency proceedings already partially performed his obligations, the contract will be divided in (i) a unilaterally unperformed contract constituting a claim against the estate corresponding to the obligations performed and (ii) a mutually unperformed contract.

As a general rule, the existence of unilaterally unperformed contracts remains unaffected by the mere opening of insolvency proceedings. If the solvent party still owes performance under such a contract, the receiver has a claim for performance enforceable against the solvent party. If the insolvent party still owes performance, the solvent party has a claim against the insolvency estate, which takes part in any distribution of the estate as an unsecured ordinary claim.

This position is different from mutually unperformed contracts providing for reciprocal obligations. Sections 21 and 22 Insolvency Act set out provisions with respect to the effects of the opening of an insolvency proceeding on such mutually unperformed contracts:

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39 In practice, these are viewed as transactions where settlement occurs at the latest two banking days after the trade date; this also concurs with the definition of spot contract In Article 38 Paragraph 2 of Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial Instruments to trading, and defined terms for the purposes of that Directive (MIFID). The statutory definition reads "A spot contract for the purposes of paragraph 1 means a contract for the sale of a commodity, asset or right under the terms of which delivery is scheduled to be made within the longer of the following periods: (a) two trading days; (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period. However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period mentioned in the first subparagraph".

Section 21 Insolvency Act[40] sets out the general rule that the receiver is entitled to elect either to perform or to reject performance of any mutually unperformed and not otherwise terminated contract providing for reciprocal obligations. In determining whether to request or reject performance, the receiver must be guided by the interests of the insolvency estate and the creditors generally and shall act accordingly. Should the receiver reject performance, the creditor is entitled to claim damages resulting from non-performance. Such damage claims, however, constitute ordinary claims in the insolvency proceedings and entitle to a respective share in the distributions to other unsecured creditors.

In case the other party is required to perform first, it can refuse performance until performance by the insolvent counterparty is effected or secured, provided it was not required to be aware of the financial distress at the time of execution of the contract (Section 21 Paragraph 3 Insolvency Act).

Section 22 Insolvency Act[41] provides for an exemption to the receiver's right of election. Such right does not exist in respect of contracts regarding the supply of good which have a market or exchange price and which are to be performed at a fixed time or within a fixed period of time ("*Fixgeschäft*").

A contract falling under Section 22 Insolvency Act is automatically terminated upon the opening of insolvency proceedings. The receiver has no right to either request or reject performance. The mutual obligations under such contract are by operation of law replaced by a claim

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40 Section 21 Insolvency Act stipulates (English translation):

(1) If at the time of the opening of insolvency proceedings a mutual agreement has not been performed or not been fully performed by the insolvent party and the other contracting party, the receiver may either perform the agreement on behalf of the insolvent party and request that the other contracting party also perform the contract, or withdraw from the contract.

(2) The receiver must declare his intentions at the latest within a period to be determined by the insolvency court upon the other contracting party's request; otherwise it is assumed that the receiver withdraws from the transaction. The period to be determined by the insolvency court may not end earlier then 3 days from the report hearing. If the receiver witl1draws from the transaction, the other contracting party may demand reimbursement of the damage incurred by it as a creditor in insolvency. In case that the debtor is obliged to a performance not consisting in cash, and he is in delay with its performance, the receiver has to declare his intention without delay after receiving the request from the contracting party, at the latest within a period of 5 working days. Otherwise it is assumed that the receiver withdraws from the transaction.

(3) If the other contracting party is obliged to render an advance performance, such other party may refuse to perform until such time when the consideration or security therefore is provided, unless he should have been aware of the unsound financial situation of the insolvent party at the time the contract was concluded.

(4) If the performance due is divisible and the creditor has already rendered the performance to which he is obliged partially at the time of the opening of the bankruptcy proceedings, such creditor will be deemed as creditor in insolvency in terms of this claim, but only in respect of the amount corresponding to his partial performance.

41 Section 22 Insolvency Act stipulates (English translation):

(1) If the delivery of goods having a market or stock market price was required at a fixed date or within a fixed term and if such date or expiry of such term occurs after the institution of insolvency proceedings, it is not permitted to request performance, but only to request damages due to non-performance.

(2) The amount of damages equals the difference between the purchase price and the market or stock market price applicable at tile place of performance or the relevant market place for transactions which involve the required term of performance and are concluded on the second day after the institution of insolvency proceedings.

of the receiver or the solvent party for damages which, under the terms of Section 22 Paragraph 2 Insolvency Act, equals the amount of the difference between the original purchase price and the market price prevailing on the second business day after the opening of the insolvency proceedings for the goods bought for delivery on the originally agreed delivery date.

Due to the wide scope of Transactions, the applicability of Section 22 Insolvency Act cannot be completely excluded for individual Transactions. We deem, however, that Section 21 of the Insolvency Act would in most circumstances apply.

The Master Agreements contain no provision that a Transaction is terminated if not performed on the agreed date. In order to constitute a fixed date transaction, performance other than on the pre-agreed date must not be permissible. In addition, a termination of the Individual Contract upon the occurrence of such an event must be pre-agreed either explicitly or by an implied declaration of Intention ("*konkludente Willenserklärung*").[42]

The termination of a Transaction under the MNA is regulated in the MNA as a consequence of a Close-Out Event, which can be elected by the Parties. For Example, "Failure to Deliver" can be chosen by the parties in the Election Sheet as a Close Out Event and therefore the Agreement can be – again upon election of the Parties – terminated, either automatically or by Termination Notice. lt has to be noted that according to Section 3.1 of the MNA, the parties shall specify in the Election Sheet the definition of a Close Out Event, which they desire to apply to the MNA. Possible definitions which may be selected for this purpose include, without limitation, the MNA Default Events set forth in Section 3.1 (A) (Master Netting Agreement Default Events) and either: (i) the Netted Agreement Default Events according to Section 3.1 (B) or (ii) the Harmonized Default Events according to Section 3.1 (C), each if and as further revised, amended, restated, modified or supplemented by the Parties in the Election Sheet.

Further to the general provisions of the effect of the opening of insolvency proceedings on mutual obligations according to Sections 21 ff Insolvency Act, the Austrian Insolvency Act contains certain mandatory regulations regarding the "set-off" ("*Aufrechnung*") of claims during an insolvency proceeding. Section 20 Paragraph 4 Insolvency Act expressly provides that claims arising out of contracts involving special off-balance sheet financial transactions as set forth in Annex II to Regulation (EU) No 575/2013 and certain other transactions that have been rescinded because of the opening of insolvency proceedings may be set-off if the parties to a contract have agreed that these contracts are automatically rescinded or may be rescinded at the option of a party in case of opening of insolvency proceedings against a counterparty and

42 *Hödl* in *Schwimann/Neumayr*, ABGB Taschenkommentar[4] § 919 ABGB Rz 2.

that all mutual claims are to be set-off[43]. In addition to the exemptions in the banking sector, Section 20 Paragraph 4 Number 2a Insolvency Act sets out an exemption catalogue which covers the trade with goods which are listed on an exchange and commodities. This exemption is connected to Section 25b Paragraph 2 Insolvency Act regulating limitations to terminate contracts during insolvency proceedings applying to the counterparty of the insolvent person. For a detailed discussion and the problems of this provision please see point II.B.2.c) of this Opinion.

Further to be mentioned in terms of insolvency proceedings/regulations effecting transactions in general, is that in the event that insolvency proceedings are opened against the writer of an option prior to the exercise of such option, the writer's obligations – and consequently the holder's right to require each party to meet the obligations to perform – cease by virtue of law, whereas the opening of insolvency proceedings against the holder of an option – again prior to its exercise – does not affect the writer's obligations and the holder's right to require each party to meet the obligations to perform if not provided for the contrary (Section 26 Insolvency Act).

Section 25b Paragraph 1 Insolvency Act underlines the mandatory nature of the provisions mentioned above (Sections 21 to 25a Insolvency Act). This is in particular true with respect to the election rights of the receiver. Therefore, the termination of contracts shall only be possible by means of an important reason, i.e. in case that the termination could endanger the going concern of the enterprise. For a detailed discussion please see point II.B.2.c) of this opinion.

b) The Effects of Insolvency Proceedings on Transactions under the Master Agreements

The Master Agreements are designed in such a way, that unless parties actively opt-out of Global Close-Out in their Election Sheet, both automatic and voluntary termination rights contained in their Underlying Agreements will cease and termination will be possible only under the terms of the Master Agreements, and only in respect of all Underlying Agreements.

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43 Section 20 Paragraph 4 of the Insolvency Act stipulates (English translation):
Claims under agreements which have been terminated by virtue of the opening of insolvency proceedings concerning
1. the special off-balance sheet financial transactions referred to in Annex II to Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, including derivative instruments for the transfer of credit risks,
2. sold interest rate, currency, precious metal, commodity, stock and other securities options as well as options on indices,

2a. commercial transactions with publicly traded goods and commodities within the meaning of Section 1 Number 3 Stock Exchange Act, BGBl. I Nr. 107/2017, as far as this transaction does not merely serve to cover own consumption, but constitutes a pure trading transaction,

3. repurchase transactions (Section 50 subpara 1 Banking Act and Article 4 (1) cf. 83 of Regulation (EU) 575/2013),
4. securities lending and securities borrowing transactions, may be off-set, provided that it has been agreed that these agreements are terminated or may be terminated by the other party upon opening of a insolvency proceeding against the assets of one contract party and that all mutual claims resulting from such agreement shall be off-set.

In case that a Close-Out Event like Winding-up, Insolvency or Attachment occurs, the Party can select in the Election Sheet, whether in such a case, the terminating Party shall initiate Close-Out under all of the Underlying Agreements by sending to the Defaulting Party a notice ("Termination Notice") which notice may be, but need not be, in the form provided in Annex 2 to the MNA, specifying the date on which all transactions under all Underlying Agreements are Closed-Out (the "Early Termination Date"); or whether the Close-Out shall be initiated automatically in accordance with the procedure set forth in Section 6 of the MNA. Section 6 of the MNA provides different options for the Parties to elect for Automatic Termination.

c) Termination of the Master Agreements

The provisions of Sections 25a and 25b Insolvency Act serve to facilitate the continuation or restructuring of the enterprise. According to these standards, contracts may only be terminated within the first six months after the opening of insolvency proceedings for good cause. Contrary to Sections 21 ff Insolvency Act as well as agreements on a right of withdrawal or automatic termination of the contract in the event of the opening of insolvency proceedings are not permitted.

According to Section 25a Paragraph 1 Insolvency Act[44], the termination of contracts during the period of 6 months from the opening of insolvency proceedings is only possible for an important reason and for the case, that the termination would not endanger the going concern of the insolvent enterprise.

As a supporting provision to Section 25a Paragraph 1 Insolvency Act, Section 25b Paragraph 2 Insolvency Act stipulates that agreements containing a right of withdrawal or termination of a contract in case of the opening of an insolvency proceeding, are disallowed, besides of contracts according to Section 20 Paragraph 4 Insolvency Act. Section 20 Paragraph 4 Insolvency Act refers to contracts involving special off-balance sheet financial transactions as set forth in Annex II to Regulation (EU) No 575/2013 and also contracts regarding the trade with goods, listed on the stock exchange, and raw materials. However, this exemption, set out in Number 2a is only valid as far as this transaction does not merely serve to cover one's own consumption (“*Eigenbedarf*”), but is to be considered as a pure trading transaction (“*Handelsgeschäft*”).

[44] Section 25a Insolvency Act (English translation):
(1) If the termination of a contract may endanger the continuation of the going concern of the enterprise, contractual parties of the debtor may terminate contracts concluded with the debtor only for important reasons.
The following reasons are not important reasons:
1. an adverse development of the commercial status of the debtor; or
2. delay by the debtor with the performance of claims having matured prior to the opening of the insolvency proceedings.

(2) The limitations of Paragraph 1 do not apply
1. if the termination of the contract is indispensable for avoiding material personal or commercial disadvantages to the contractual partner,
2. to entitlements for the disbursement of loans and
3. to employment contracts.

The explanatory remarks to the governmental bill for the IRÄG 2010[45] expressly refer to the trade with commodities and to standardised Master Agreements developed for such purpose that generally provides a right to withdrawal or a right to termination of a contract in the case of insolvency of a contracting party. The explanatory remarks recognise that the competitiveness of Austrian entrepreneurs would be gravely impaired in the international market.

The scope of the exemption in Section 20 Paragraph 4 Number 2a Insolvency Act has not yet been subject to published court decisions. Issues where a precise ruling by case law may be helpful concern the accurate distinction between a transaction covering own consumption and a pure trading transaction. It remains to be seen, whether a court considers these terms as objective criteria or whether the Intention of the party in question is relevant. Similarly, there is no case law, whether acquisition of an asset or its actual use for covering own consumption is relevant[46].

Finally, there is no case law how far the effect of a tainted portfolio will reach – will only claims related to the transaction involving the "tainted asset" be excluded from the termination and netting mechanism or is the entire portfolio effected? Austrian insolvency practitioners informally adopt the view that only transactions covering own consumption should be separated – but there is no authoritative statement to this effect.

In order to avoid a dispute about the classification as "own consumption" in the event of insolvency, it is advisable to include a clarification in the Master Agreement according to which no commodities are covered that serve own consumption:

"*In addition, the parties represent and warrant that they do not use or intend to use any of the commodities covered by this Agreement for own consumption ('Eigenbedarf') and that all transactions concerning those commodities shall constitute pure trading transactions ('reines Handelsgeschäft') in the meaning of Section 20 Paragraph 4 Number 2a Austrian Insolvency Act."*

In order to mitigate the above-mentioned residual risk, we further recommend to consider the following two ways to proceed:

- no reliance on Section 20 Paragraph 4 Number 2a is made and automatic termination triggered by an event preceding the opening of insolvency proceedings is agreed;
- in case of a portfolio where trades covering own consumption of the Austrian party can be excluded, one could also rely on the exemption and resort to termination by notice upon the occurrence of a Close-Out Event described in Section 3 (C)(III) of

45 612 der Beilagen XXIV. GP.

46 A similar concept can be found In the Austrian Renewable Energy Act ("*Ökostromgesetz*"). The explanatory remarks to the governmental bill for the IRÄG seem to indicate that the actual re-sale of the commodity is decisive.

the MNA

This regulation can therefore be brought in line with the rights of early termination/automatic early termination of the MNA and the CPMA and all Netted Agreements or Principal Agreements as provided in Section 3 of the MNA (Section 3 of the Election Sheet to the MNA) and Section 2 of the CPMA if applied and/or modified as described above and recommended in point II.B.4 of this Opinion. In our opinion the Austrian courts will uphold and enforce the concerned Sections of the MNA and the CPMA in the context of insolvency proceedings.[47]

3. Your Question 2

"*Assuming the parties <u>have</u> selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule / Section 6.1 of the MNA Election Sheet6) and/or all of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in your jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of your jurisdiction.*"

4. Recommendation to Opt for Automatic Termination

With respect to qualified privileged transactions as defined in Section 20 Paragraph 4 Insolvency Act, the close-out netting provisions as provided in the Master Agreements will be enforceable. In this respect, it is not necessary to opt for an automatic termination.

With respect to other transactions, reference is made to the conclusions in point II.B.2 of this Opinion. In order to preserve the full operation of the close-out netting provisions of the Master Agreement in the event of insolvency proceedings being opened in Austria over the assets of an Austrian party, it is necessary to ensure that the Master Agreements and all transactions concluded thereupon are terminated as soon as possible. We would therefore recommend that the parties opt for Automatic Termination to be applicable to parties incorporated in Austria,

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[47] Before Section 25a Insolvency Act was introduced by the IRÄG 2010, it had been generally accepted by courts and legal commentators in Austria that the parties may effectively provide that certain circumstances or facts which necessarily precede the formal opening of bankruptcy proceedings, such as the establishment of insolvency, over-indebtedness, failure to pay debts as they become due in general, etc., entitle the solvent party to terminate an agreement either by giving prior notice or by way of automatic termination. Such contractual termination right has been enforceable in subsequent bankruptcy proceedings, irrespective of whether notice is given prior or after the opening of bankruptcy proceedings.
Furthermore, according to courts and the prevailing legal scholars in Austria the parties have been allowed to effectively provide in a contract that upon the opening of bankruptcy proceedings the solvent party may terminate the contract by giving notice or by operation of automatic termination. This is in particular true as the parties may even validly provide that upon the opening of insolvency proceedings the solvent party may terminate a contract (argumentum a maiori ad minus). The Austrian Supreme Court ("*Oberster Gerichtshof*") recognised the validity of a contractual right to terminate a contract upon the opening of bankruptcy proceedings, and that such contractual termination rights are not affected by Section 21 (former) Bankruptcy Act, OGH 26.10.1960, HS 261, 1/94; 23.02.1966, HS 5394, V/32, *Mohr*, KO[10] (2006) § 21 KO E 71.

whereby the Early Termination Date in such event shall be the date on which the Close-Out Event triggering early termination occurs.

Only in cases where the concerns in connection with the criteria set out in Section 20 Paragraph 4 Number 2a Insolvency Act do not apply (i.e. the Austrian party maintains a "pure" trading portfolio without the risk of adverse effects of the use of assets in this portfolio for the coverage of own consumption), automatic termination does not have to be selected. Given the uncertainty of the details of the definition of this term "own consumption " addressed in point II.B.2.c) it is highly recommended to carefully analyse the circumstances of each individual counter-party or to include a clarifying clause as described in point II.B.2.c) above.

We can propose to amend Section 6.2 of the MNA[48] by agreeing the following additional paragraph as applying to the Austrian party (being "Party A"), whereby this proposal is based on the assumption that it is the intention of the parties to implement Automatic Termination only for the events stipulated in Section 3.1(C)(III)(d) of the MNA[49]. We further assume that the selection of Section 3.2(C) of the MNA results in the application of Section § 6.2. of the MNA:

> *"The Termination Effects shall take effect concerning Party A upon the occurrence of the Close-Out Event specified in Section 3.1(C)(III)(d):*
>
> a. *in case of the filing of a petition for the opening of any kind of insolvency proceedings or any other proceeding having an analogous effect by (a) Party A or its Credit Support Provider against itself ("Antrag auf Eröffnung des Insolvenzverfahrens" - "Schuldnerantrag" pursuant to Section 69 Austrian Insolvency Act) or (b) Party A's Credit Support Provider Against Party A at 11.59 pm, on the day before the filing of such petition.*
>
> b. *in case of the filing of the petition for the opening of any kind of insolvency proceedings or any other proceeding having an analogous effect against Party A or its Credit Support Provider by a third party (other than Party A or its Credit Support Provider; "Gläubigerantrag" pursuant to Section 70 Austrian Insolvency Act) as of 11.59 pm on the day before the filing of such petition, unless such filing (as referred to in Section 3.1(C)(III)(d)) is withdrawn, dismissed, discharged, stayed or restrained within a period of ten (10) Business Days from its filing*."

[48] A direct amendment of the CMPA In this manner is not feasible in the same way, since the definition of "Close-Out Event" In Section 1.1. of the CPMA simply refers to the "Principal Agreements" and the standard form of the CPMA does not set out genuine Close-Out Events.

[49] In our view it may make sense to consider the inclusion of Section 3.1(C)(III)(b) in the scope of the Automatic Termination mechanism.

5. Your Question 3

"Your opinion on whether the provisions of each model Master Agreement provide for the calculation of a single Final Net Settlement Amount (see Sections 3 and 4 of the CPMA / Section 7 and 8 of the MNA) upon the insolvency of a counterparty would be enforceable in an insolvency of a party that is organized under the laws of your jurisdiction."

6. Applicable Law with regard to set-off/netting

The following comments are based on the additional assumption that the Master Agreements will be legal, valid, binding and enforceable under the law specified as governing law (not being Austrian Law).

First of all, it must be clarified whether Austrian insolvency law is applicable for the legal assessment of this question.

The Provisions on International Insolvency Law provide for certain conflicts of law provisions in the event an insolvency would have a certain cross-border effect.

In this respect, Article 7 Section 2 Number (d) EIR[50] provides that the lex fori concursus is applicable to the conditions under which set-offs may be invoked. In addition, Art 9 EIR permits off-setting if it is permitted under the law applicable to the debtor's claim (principal claim) at the time of the opening of the insolvency proceedings. The purpose of the standard is to protect expectations in the security function guaranteed by the possibility of set-off. However, the party seeking set-off has no interest worthy of protection if the set-off situation was brought about to the disadvantage of the creditors[51].

Set-off shall mean any legal institution which, by off-setting, results in the extinction of the claims against each other. It is irrelevant whether the right of set-off exists ex lege or by agreement.

However, a (close-out) netting agreement is not fully covered by Article 9 EIR (the planned regulation in Art 6a has not become law): Rather, a distinction must be made between the insolvency-related due date and termination (covered by Article 7 Paragraph 2 Number (e) EIR) and the contractual netting agreement, to which Article 9 EIR applies; "*the law applicable to the insolvent debtor's claim*" is insofar the law applicable to the agreement. Priority must, however, always be given to Article 12 ("*Payment systems and financial markets*"). As leges speciales, the implementing provisions of several Directives[52] also take precedence.

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50 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("EIR").

51 Article 7 Section (2) Number (m) in conjunction with Article 16 EIR.

52 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, Article 25;

The prevailing opinion is that Article 9 EIR applies only to the extent that the lex fori concursus in any way "affects", i.e. limits the permissibility or effect of off-setting in comparison with the off-setting statute; it should be noted, however, that the insolvency statute under Article 7 Paragraph 2 Number (d) correctly regulates only the insolvency-specific off-setting conditions/limits.

Furthermore, set-off must be admissible at all under the lex causae, which is the law applicable to the debtor's claim (principal claim) by virtue of a reference to a substantive provision[53]. The standard here is the entire legal system of the lex causae. Which law is applicable has to be determined in accordance with the private international law of the competent court, i.e. usually the forum concursus, which requires not only an objective connecting factor but also a choice of law.

In addition, it has to be pointed out that pursuant to Article 12 EIR the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market. The legal consequence is therefore that only the lex causae – usually determined by choice of law – is decisive for the effects of the insolvency proceedings on the rights and obligations of the members (not third parties) arising from the system/financial market, also with regard to insolvency law. In this respect, Article 12 EIR remarkably allows a disposition of the applicable liability law.

Article 12 EIR intends to protect participants and organisers of a payment or settlement system or financial market in their reliance on the application of the agreed law, including in the event of insolvency. The practical significance is very low, firstly because the implementing provisions of Directive 98/26/EC[54], in particular Article 8, has priority, and secondly because participants in such systems are often banks and insurance companies in whose insolvency the EIR does not apply[55].

In addition, Section 233 Insolvency Act explicitly provides that netting agreements (“*Saldierungsvereinbarungen*”) shall be subject to the law applicable to the agreement. Under the assumption that under the law other than the laws of Austria governing the General Agreement, the contractual close-out netting provision is valid and enforceable, Austrian Courts will recog-

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, Articles 68 to 71;
Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, Article 8;
Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, Article 7.

53 Article 9 EIR.

54 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems

55 Article 1 Paragraph 2 EIR.

nize and enforce such contractual close-out netting provisions, subject to the general limitations established by the Insolvency Act on termination rights and for actions for avoidance of contracts.

Section 233 Insolvency Act complements Section 223 Insolvency Act, which mirrors Article 9 EIR. In effect, in addition and irrespective of the permissibility of set-offs under Article 9 EIR, Austrian Law gives deference to the choice of law regarding netting agreements by virtue of Section 233 Insolvency Act. This reference to the governing law refers to the contractual law only, e.g. the question of validity of the netting agreement, and not to the substantive insolvency laws of such other jurisdiction[56].

Should the provisions of the EIR no longer apply after the Brexit[57], Section 233 Insolvency Act nevertheless ensures that set-off is still permissible, provided that it is permitted under the law applicable to the debtor's claim.

Since the Austrian rules on netting apply in the event of insolvency, the conditions and restrictions for netting are examined in more detail below.

7. Set-Off of all Settlement Amounts under domestic Austrian Law

Section 19 and 20 Insolvency Act[58] set out the general rule regarding set-off (netting) in connection with insolvency proceedings. Section 19 and 20 Insolvency Act do not establish a distinction between contractual close-out netting provisions and set-offs in general. A contractual close-out netting provision is regarded as a mutually pre-agreed set-off triggered by the occurrence of certain events. This is partially due to the fact that for the time being, Austrian scholars and judicial opinion do not make a clear distinction between set-off and close-out netting[59] and

56 *Burgstaller/Katzmayer* in *Burgstaller*, Internationales Zivilverfahrensrecht, § 233 KO Rz 3.

57 At the time of writing the legal opinion, it is not yet clear how the Brexit will be implemented.

58 Section 19 of the Insolvency Act stipulates (English translation):

(1) Claims which could already have been set off at the time of the opening of insolvency proceedings need not be enforced in the Insolvency proceedings.

(2) The fact that a claim of a creditor or of the insolvent debtor is conditional or not due at the time of the opening of insolvency proceedings or that a creditor's claim does not refer to the payment of monies, does not preclude a set-off. For purposes of a set-off the creditor's claim is to be calculated pursuant to Section 14 and 15. If the creditor's claim is conditional, the court may hold the admissibility of a set-off to be subject to the provision of security.

Section 20 Paragraph 1 of the Insolvency Act stipulates (English translation):

(1) A set-off is not permitted if a creditor in Insolvency became a debtor of the bankrupt assets only after the opening of insolvency proceedings or if the claim against the bankrupt has been acquired only after the opening of bankruptcy proceedings. The same applies if the debtor acquired the counterclaim before the opening of bankruptcy proceedings but at the time, he acquired such claim was or should have been aware of the bankrupt's insolvency […].

59 In view of the tendencies to harmonise the Acquis Communautaire with respect to close-out netting as reported by ISDA, this situation may change; see also the report prepared by the European Financial Markets Lawyers Group, Protection for bilateral Insolvency Set-off and netting agreements under EC Law (October 2004), which provides a comprehensive comparative law analysis on the differences in the implementation of the close-out netting EU legislation by the EU Member States.

consider them basically as similar rights, the latter being often viewed merely as a contractually pre-agreed set-off upon the occurrence of certain events.

Accordingly, set-off is not permitted if claims could not have been set off at the time of the formal opening of insolvency proceedings or the solvent party became a debtor of the insolvent party only thereafter due to a contractual arrangement after the opening of insolvency proceedings or in the event the claim against the insolvent party has been assigned after such opening. The same applies in the event of an assignment/a creation of claims before the formal opening of insolvency proceedings and the solvent party has known or should have known of the insolvency of the insolvent party.

Consequently, should the MNA or the CPMA and all Underlying Agreements be terminated before the opening of insolvency proceedings, it is generally accepted among courts and legal commentators in Austria that the netting of all termination values is valid and remains unaffected by the insolvency proceedings.

Should the Master Agreements and the Underlying Agreements be terminated upon the formal opening of insolvency proceedings, the interpretation of this case is controversial in the jurisdiction of the Austrian Supreme Court ("*Oberster Gerichtshof*")[60] The relevant question is whether reciprocal claims and obligations arising as a result of such early termination of each Underlying Agreements may be considered as such which have already been in existence, although conditional or not due, at the time of opening of insolvency proceedings (Section 19 Insolvency Act) or as such which have been established upon the opening of insolvency proceedings (Section 20 Insolvency Act).

According to the prevailing number of legal commentators contractually agreed close-out netting provisions are valid and enforceable[61]. This position is, in general, supported by the decisions of the Austrian Supreme Court ("*Oberster Gerichtshof*")[62]. In our opinion, the view of the Austrian Supreme Court in connection with individual cases where set-off has been denied may not be extended and applied to the termination of other contracts. Consequently, we are of the opinion that the close-out netting provisions pursuant to Section 3 of the MNA and Section 2 of the CPMA are valid and enforceable in the context of insolvency proceedings; always provided that termination of the Master Agreements and the Underlying Agreements has occurred in compliance with the relevant restrictions in case of insolvency of one of the parties (see point II.B.2.c). In such a case Austrian Law will recognise and give effect to the provisions of the Master Agreements providing for the determination and netting of the Settlement

[60] For a discussion of the different decisions, see *Koch*, Netting-Vereinbarungen und das österreichische Konkursrecht. Am Beispiel von Swap-Rahmenverträgen. ÖBA 1995, 495.

[61] *Schubert* in *Konecny/Schubert*, Insolvenzgesetze § 20 KO Rz 83; *Koch*, Netting-Vereinbarungen und das österreichische Konkursrecht. Am Beispiel von Swap-Rahmenverträgen. ÖBA 1995, 495.

[62] Inter alla EvBI 1977/153 and EvBI 1978/4; JBI 1960, 230; HS 14.933/24; for a detailed discussion of the doctrine of the Austrian Supreme Court also see WBl 1987, 52.

Amounts in determining a single lump-sum amount (Final Net Settlement Amount) upon the insolvency of an Austrian Party.

Even if the Austrian Supreme Court recognises the validity of a Close-Out Netting provision upon the opening of insolvency proceeding, please note that set-off is prohibited (Section 20 Paragraph 1 and 2 Insolvency Act) with a claim that has been acquired (assigned) within six months prior to the opening of insolvency proceedings, in the event that the assignee acquired such claim although he was aware or should have been aware of the debtor's insolvency. The Austrian Supreme Court held that this principle shall also apply with respect to any such agreements pursuant to which claims are created as a "covering fund"[63].

Accordingly, a contractual close-out netting provision will be valid and enforceable in the context of insolvency proceedings with respect to all amounts payable encompassed by the close-out netting provision. Only insofar as other claims against the insolvent Austrian counter party not encompassed by the contractual close-out netting provision are concerned, a set-off against such amounts will be subject to the limitations outlined above for set-off in general (Section 20 Paragraphs 1 and 2 Insolvency Act). Consequently, Austrian courts would apply and enforce the close-out netting provision pursuant to Section 3 of the MNA and Section 2 of the CPMA Form.

These restrictions do, however, not apply in the context of Section 20 Paragraph 4 of the Insolvency Act. Section 20 Paragraph 4 Insolvency Act expressly provides that claims arising out of contracts involving special off-balance sheet financial transactions as set forth in Annex II to Regulation (EU) No 575/2013 and certain other transactions that have been rescinded because of the opening of insolvency proceedings may be set-off if the parties to a contract have agreed that these contracts are automatically rescinded or may be rescinded at the option of a party in case of opening of insolvency proceedings against a counterparty and that all mutual claims are to be set-off.

Section 20 Paragraph 4 of the Insolvency Act is clearly a provision recognizing Close-Out Netting as it covers the termination and aggregation of all mutual claims upon the opening of insolvency proceedings. According to Section 20 Paragraph 4 Insolvency Act the underlying contract has to be terminated as a consequence of a contractually stipulated right of the solvent party or a contractually stipulated automatic termination upon the opening of insolvency proceedings. Section 20 Paragraph 4 Insolvency Act is limited to the transactions specifically referred therein, the major part forming the transactions covered by Annex II to Regulation (EU) No 575/2013.

63 ÖBA 1993, 659, the "covering fund" in this case was a savings book that has been posted as collateral by the insolvent debtor with the creditor after the debtor had already been insolvent. After the debtor successfully appealed this collateral according to Section 30 Paragraph 1 Number 1 Insolvency Act, the Bank tried to set-off the debtor's claim with a counter claim. The Austrian Supreme Court regarded this set-off as not permissible, not only because of the successful appeal but also, because the bank had knowledge about the insolvency of the debtor at the time of obtaining counterclaim.

If the contracting parties have agreed on automatic termination, it may still happen that a service (commodity delivery) is provided between the occurrence of the Close Out Event and the calculation of the Settlement Amount. In such a case, off-setting is nevertheless permitted if the contracting parties have agreed to this in Section 10.5 of the CPMA or Section 6.4 of the MNA. However, this shall only apply to claims which were provided after the occurrence of the Close Out Event but before the opening of insolvency proceedings. Due to mandatory statutory provisions (Section 19 Insolvency Act), off-setting against claims that arose after the opening of insolvency proceedings is not permitted.

To sum up:

- Claims which could already be (entirely) set off at the time of the opening of insolvency proceedings need not be enforced in an insolvency proceeding. Therefore, should the Master Agreements and all Underlying Agreements be terminated before the opening of insolvency proceedings, it is generally accepted among courts and legal commentators in Austria that the netting of all termination values is valid and remains unaffected by the insolvency proceedings.

- Set-off is not permitted if claims could not have been set off at the time of the formal opening of insolvency proceedings or the solvent party became a debtor of the insolvent party only thereafter due to a contractual arrangement after the opening of insolvency proceedings or in the event the claim against the insolvent party has been assigned after such opening. The same applies in the event of an assignment/a creation of claims before the formal opening of insolvency proceedings and the solvent party has known or should have known of the insolvency of the insolvent party.

- Set-off is further prohibited with a claim that has been acquired (assigned) within six months prior to the opening of insolvency proceedings, in the event that the assignee acquired such claim although he was aware or should have been aware of the debtor's insolvency.

- A contractual close-out netting provision will be valid and enforceable in the context of insolvency proceedings with respect to all amounts payable encompassed by the close-out netting provision.

- Contractual close-out netting is recognised within the scope of Section 20 Paragraph 4 of the Insolvency Act.

8. Your Question 4

“Your opinion on whether or not early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are voidable, challengeable or in any way vulnerable to deletion by a liquidator or any third

party if insolvency procedures are later opened against a party that is organized under the laws of your jurisdiction."

9. Brief General Outline of the Rules on the Avoidance of Contracts

In the event of insolvency proceedings over the assets of an Austrian counter-party any legal act ("*Rechtshandlung*") and hence also the execution of the Agreements or the Principal Agreements or the carrying-out of Uncovered Transactions, any payments thereunder or the granting of a security ("Performance Assurance") is avoidable according to the rules of the Insolvency Act[64]. As a general rule, legal acts may be avoided if (i) performed within a certain "suspect period" (ranging from 10 years to 6 months) prior to opening of insolvency proceedings; (ii) being disadvantageous of the other creditors of the Austrian counterparty ("*Gläubigerbenachteiligung"*); (iii) the avoidance of the legal act is suitable to increase the other creditors satisfaction ("*Befriedigungstauglichkeit*"), i.e. will lead to a re-payment or re-delivery to the insolvency estate; and, (iv) the intention of the insolvent Austrian counterparty to cause disadvantage to any of its other creditors ("*Benachteiligungsabsicht*") by such legal act has been known or should have been known by the respective other party.

Outside of insolvency proceedings any legal acts are avoidable according to the rules of the Act on Avoidance of Contracts in the events described below.

10. Avoidance under the Insolvency Act

First of all, the question must be answered whether the Austrian provisions on avoidance also apply to legal acts when they are subject to foreign law. According to the Austrian Supreme Court, the rules of the Insolvency Act concerning avoidance of contracts, in particular its preconditions, are mandatory rules of law ("*Eingriffsnormen*") in relation to an Austrian counterparty and therefore the laws of the (Austrian) lex fori concursus (the laws applicable at the place the insolvency proceedings are commenced) will also apply in case of connection with another jurisdiction[65].

According to the Insolvency Act such legal acts may be avoided upon a motion by the receiver, if

i. effected in the last <u>ten years</u> preceding the opening of insolvency proceedings and the intention of the insolvent Austrian counterparty to disadvantage its other creditors was known by the respective other party, as the case may be;

ii. effected in the last <u>two years</u> preceding the opening of insolvency proceedings, if the other creditors of the insolvent Austrian party were effectively disadvantaged, and the

64 Sections 27 through 43 Insolvency Act.

65 OGH 11.12.1989, 6 Ob 540/88 = ecolex 1990, 85 = ÖBA 1990, 836; *Keppelmüller*, Österreichisches Internationales Konkursrecht (1997) Rz 100 ff.

intention of insolvent Austrian counterparty to disadvantage its other creditors should have been known by the respective other party;

iii. effected with a close relative[66] (or in case of corporations: a shareholder or previous shareholder – "*familia suspecta*") in the last two years preceding the opening of insolvency proceedings, and the other creditors of the insolvent Austrian counterparty were effectively disadvantaged unless such close relative or shareholder, as the case may be, can establish that the intention of the insolvent Austrian counterparty to disadvantage its other creditors was not known to it;

iv. a sales, swap, or delivery agreement at an undervalue was effected within one year preceding the opening of insolvency proceedings and the dissipation of the insolvent Austrian counterparty's assets to the detriment of its other creditors was known or should have been known by the respective other party[67];

v. effected without consideration in the last two years preceding the opening of insolvency proceedings, unless (a) effected in discharging a legal duty, (b) constituting a customary donation, or (c) being of adequate amount for charitable purposes or to honor a moral obligation;

vi. constituting the acquisition of assets of an insolvent Austrian counterparty in compliance with an authoritative order (mainly in execution proceedings) within the last two years preceding the opening of insolvency proceedings if the money payable as consideration originated from the insolvent Austrian counterparty (with respect to close relatives and shareholders (see above point .iii) it is a rebuttable presumption that the money originates from insolvent Austrian counterparty);

vii. in relation to certain other assets (dowry, etc.)[68];

viii. the discharge of obligations ("*Befriedigung*") or the granting of security("*Sicherstellung*") was made within a period of one year prior to the opening of insolvency proceedings and within 60 days prior to or after the insolvency ("*Zahlungsunfähigkeit*") or over-indebtedness ("*Überschuldung*") or the filing of a petition for the opening of insolvency proceedings in relation to insolvent Austrian counterparty and a discharge or security of such kind or at such time was not due to the respective other party, unless the respective other party was not preferred ("*inkongruente Deckung*") or a discharge or security of such kind or at such time was due to the respective other party ("*kongruente Deckung*") but the intention of insolvent Austrian counterparty to prefer the

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66 The scope of the close relative/familia suspecta has been extended since 1 March 2006 (amended Section 32 Paragraph 2 of the Insolvency Act) and applies to all entities subject to insolvency proceedings, in the case of a legal entity, this would include members of the management and supervisory board, shareholders with unlimited liability or persons having a participation of at least 25 per cent.

67 Point (i) to (iv) are regulated by section 28 Insolvency Act.

68 We have refrained from elaborating on this particular item as it has no relevance to this legal opinion; point (v) to (vii) are regulated by section 29 Insolvency Act.

respective other party was known or should have been known to the respective other party[69];

ix. the discharge of obligations ("*Befriedigung*") or granting of security ("*Sicherstellung*") was made within a period of six months prior to opening of insolvency proceedings and after the insolvency ("*Zahlungsunfähigkeit*") or over-indebtedness ("*Überschuldung*") or the filing of a petition for the opening of insolvency proceedings in relation to insolvent Austrian counterparty, the discharge of obligations ("Befriedigung") or granting of security ("Sicherstellung") was disadvantageous to the creditors of insolvent Austrian counterparty, and the respective other party had knowledge or should have had knowledge of the insolvency ("*Zahlungsunfähigkeit"*) or over-indebtedness ("Überschuldung") or of the filing of a petition for the opening of insolvency proceedings in relation to insolvent Austrian counterparty.

11. Avoidance under the Act on Avoidance of Contracts

According to the Austrian Supreme Court[70] the law governing avoidance of contracts outside of insolvency proceedings is the law applicable at the place in which the assets, the re-transfer of which to the debtor is the subject matter of the suit for avoidance, are located. The Supreme Court has also ruled that a choice of law with respect to avoidance of contracts is inadmissible and will not be honoured[71].

Outside of insolvency proceedings certain legal acts (as detailed under (i) through (vii) above, whereby the "suspect periods" are calculated from the moment the claim for avoidance is raised) may be avoided by any other creditor having an enforceable claim who has not been satisfied in enforcement proceedings or who most likely will not be satisfied if enforcement proceedings were initiated.

12. Avoidance of Early termination, Close-Out Netting or the Calculation and Payment of the Termination Amount

The execution of the Master Agreements and all Netted Agreements or Principal Agreements or the carrying-out of Uncovered Transactions, any payments thereunder, including payment of the Termination Amount prior to insolvency, or the granting of a Performance Assurance is potentially avoidable by the liquidator during insolvency proceedings according to the rules set out above.

This does not apply to transactions (including payments, netting as well as Performance Assurances) within a payment or settlement system in the meaning of the Austrian Settlement Finality Act (*Finalitätsgesetz)*, which is the Austrian transposition act of Directive 98/26/EC.

[69] (viii) regulated by section 30 Insolvency Act.
[70] OGH 23.5.1984, 3 Ob 507/84 = JBl 1985, 299.
[71] OGH 27.02.1984, 3 Ob 584/84 = SZ 58/34; RIS-Justiz RS0076601.

Such payment and transfer orders and their settlement (including any kind of netting) as well as the provision of securities in this regard are not subject to avoidance.

Consequently, and depending on the specific set-up of the underlying contracts early termination, close-out netting as well as the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are potentially avoidable during an insolvency.

13. Your Question 5

"'Cross Category Netting' – since the model Master Agreements contemplates the inclusion of various types of master agreements and other trading documentation covering both physical and financial trading, your opinion on any applicable issues that need to be considered as to the enforceability of netting between physical and financial transactions or various categories of physical products (see Annex A for potential categories).

Your opinion should include a discussion of your jurisdiction's insolvency laws as they would apply to the close-out and netting via each model Master Agreement of obligations under different categories or types of traded products, and

a. *if any distinctions are applicable based on whether these products are traded under one or more Underlying Agreements,*

b. *if any distinctions are applicable when attempting to use a model Master Agreement to net / set-off physically settled transactions when these involve the purchase, sale and/or optioning of different commodity types or categories (e.g. the netting obligations related to gas, power and coal trading) ("Cross Product Netting"), and*

c. *if any distinctions are applicable based on whether both financially settled swaps, swaptions and derivative transactions and physically settled forwards and options are traded under one or more Underlying Agreements with respect to each Master Agreement."*

14. Cross-Category-Netting

In the absence of special provisions, in the case of commodity or financial transactions involving individual contracts based on a master agreement, there would be a risk that the receiver under Section 21 Insolvency Act would enter into the favourable contracts and release from the unfavourable ones. It is therefore in the interest of the parties to the Master Agreement to provide for automatic termination of the master agreement in the event of insolvency of one of the parties to the agreement while at the same time off-setting the mutual claims and to reflect the correspondingly lower risk in the balance sheet. The Insolvency Act permits close-out netting agreements for certain commodity and financial transactions (enumeration in Section 20 paragraph 4 Insolvency Act), by allowing to agree on the automatic termination of such agreements in the event of insolvency (Section 25b Paragraph 2 Insolvency Act). Section 20 Paragraph 4 Insolvency Act declares the contractually agreed netting effective in this case. The latter rule avoids difficulties of delimitation as to whether the claims arose before or only after the opening of the insolvency proceedings.

According to the Austrian legal situation, it is essential that the transactions in question are covered by Section 20 Paragraph 4 Insolvency Act. Whether it is a physical or financial transaction is of no consequence in this context. We assume that the majority of the potential categories listed in Annex A are covered, but cannot conclusively assess if some of them are not included. For this purpose, as follows:

a) <u>Special insolvency law provisions for transactions for delivery by a fixed date not covered by Section 20 Paragraph 4 Insolvency Act</u>

We presume that for those financially traded products that may not be covered, they are to be classified as futures ("*Termingeschäft*") or fixed date transaction ("*Fixgeschäft*").

The general rule of Section 21 of the Insolvency Act was considered by the legislator to be inappropriate for transactions for delivery by a fixed date, since one of the most important characteristics of a transaction for delivery by a fixed date is the security of performance at a certain point in time and this security no longer exists from the time of the opening of the insolvency proceedings.

An option of the insolvency administrator, as provided in Section 21 Insolvency Act, would also be inequitable because transactions for delivery by a fixed date are often at the same time risk transactions in which the parties to the contract have speculated on the future market situation or the future price of goods bought or sold for a certain amount. If the insolvency administrator were to have a right of choice which he could in principle assert throughout the entire duration of the insolvency proceedings, he could first wait for the market development and then decide on the variant (withdrawal or fulfilment) which is favourable for the insolvency estate.

If the requirements of Section 22 Insolvency Act[72] are met, the insolvency administrator shall not have the right to choose, unlike under Section 21 Insolvency Act, and may not

[72] <u>Section 21 Insolvency Act stipulates (English translation):</u>
(1) If the delivery of goods having a market or stock exchange price was conditional on the delivery of the goods at exactly a fixed time or within a fixed period of time and if the time or expiry of the period of time occurs only after the opening of the insolvency proceedings, performance may not be claimed but only damages for non-performance.
(2) The claim for damages shall be the difference between the purchase price and the market or stock exchange price prevailing at the place of performance or at the relevant trading venue for the transactions concluded on the second working day after the opening of the insolvency proceedings with the stipulated time of performance.

demand fulfilment. This is to be understood as immediate termination of the contract. The following requirements must be met:

- Both sides have not yet completely fulfilled a synallagmatic contract.
- The contract must relate to the delivery of goods.
- The goods to be delivered must also have a market or stock exchange price
- The agreed maturity of the fixed date transaction is after the opening of insolvency proceedings.

If such a fixed date transaction is involved, the claim for damages for non-performance shall immediately supersede the claim for performance. The right to performance of the contract is transformed into a claim for damages for non-performance as soon as the insolvency proceedings are opened. No declaration by the insolvency administrator is required, who is also not entitled to vote in this respect.

Section 22 Insolvency Act does not make any statement who is entitled to claim damages. It can therefore also be claimed by the insolvency administrator in favour of the insolvency estate. If the contractual partner is entitled to the claim, it is, however, by virtue of an express statutory provision, a mere insolvency claim.

Since such a claim for damages only becomes existent after the opening of insolvency proceedings, it is also not subject to the netting and set-off provisions of the Master Agreements.

The amount of compensation is determined by the price difference between the agreed price and the price for the typical covering transaction ("*Deckungsgeschäft*"). The buyer shall thus be entitled to the amount by which the market or stock exchange price of the place of performance or the relevant trading venue for transactions concluded on the second working day after the opening of insolvency proceedings for the goods in question and with the same time of performance exceeds the purchase price.

The provision of Section 22 Insolvency Act is mandatory law and cannot be excluded by agreement. A contractual agreement according to which the contract is not to expire ex lege in the event of insolvency also argues against the fixed transaction character. Therefore, Section 21 Insolvency Act would have to be applied to such a contract if the other requirements were met[73].

Section 22 Insolvency Act is applicable to contracts with an international connection, i.e. also to contracts which are to be assessed according to the rules of private international

[73] *Widhalm-Budak* in *Konecny*, Insolvenzgesetze § 22 IO Rz 25 (Stand 1.10.2017, rdb.at).

law under foreign law, because according to Art 7 (2) lit e EIR, Section 22 Insolvency Act as a provision of domestic insolvency law is applicable in every domestic insolvency just like Section 21 Insolvency Act.

b) Special provisions for payment or settlement systems and financial markets

There are special provisions regarding the effects of insolvency proceedings on the rights and obligations of members of a payment or settlement system or a financial market. Therefore, it is not the product being traded that is relevant, but who is trading it. The intention is to meet the need for protection, in particular with regard to the close-out and netting agreements to be found within these systems as well as with regard to the sale of securities and the collateral provided to secure these transactions. The provisions aim to prevent the possibility of altering the payment and settlement mechanisms provided for in payment or netting systems and on the regulated financial markets of the Member States in the event of the insolvency of a counterparty.

Article 12 EIR provides that, the effects of insolvency proceedings on the rights and obligations of members of a payment or settlement system or a financial market shall be governed solely by the law of the Member State applicable to the system or market in question.

The relevant statute under Article 12 IER (= the insolvency law of a (single) Member State) is decisive for “the rights and obligations of the members”. The purpose of this uniform connection is to make the consequences of the insolvency of a member of the system or market calculable, in particular with regard to the consequences of netting or closing out provided for under the system. In this connection, the "rights and obligations" of the members are likely to be influenced by the provisions on set-off (Article 7 Paragraph 2 Number d EIR) and the effects of the opening of proceedings on ongoing contracts (Article 7 Paragraph 2 Number e EIR)[74].

Following to Article 12 EIR, further legal acts were issued, in particular Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems and Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. The Member States have had to implement these Union acts and their recent amendments. In Austria, the main implementing legislation are the Federal Act on Settlement Finality in Payment and Securities Settlement Systems (Finality Law - “*Finalitätsgesetz*”) and the Federal Act on Collateral in the Financial Markets (“*Finanzsicherheiten-Gesetz – FinSG*”).

The scope of application of the Settlement Finality Law is determined by the term "system", which, however, does not mean anything other than an agreement between at least

74 *Maderbacher* in *Konecny*, Insolvenzgesetze Art 12 EuInsVO 2015 Rz 20 (Stand 1.9.2018, rdb.at).

three participants for the execution of payment and transfer orders according to common rules and standardised specifications (Section 2 Finality Law).

The clear purpose of the Finality Law is to ensure the effectiveness of settlements (netting) in the system. Pursuant to Section 15 Finality Law, payment and transfer orders which are entered into a system before a decision is issued on the opening of insolvency proceedings concerning the assets of a participant shall not expire on the opening of insolvency proceedings. Settlements based on such orders shall not be affected by the opening of insolvency proceedings. A payment or transfer order may not be revoked by a participant in a system or by a third party with effect for the system from the time specified in the rules of the system. This shall also apply in the event of insolvency proceedings against a participant (of the system concerned or of an interoperable system) or against the operator of an interoperable system which is not itself a participant in the system.

The FinSG applies if both the collateral taker and the collateral provider belong to one of the following categories:

- public-law corporations;
- central banks, ECB, European Investment Bank, International Monetary Fund, multilateral development banks, Bank for International Settlements;
- Regulated financial institutions;
- Central counterparties, clearing houses and clearing houses, etc.

However, the provisions of the FinSG on the provision and realisation of collateral apply not only if both the collateral provider and the collateral taker belong to one of the categories of professional financial market participants as defined in Section 2 FinSG, but also if the agreement involves a legal entity, a sole proprietor or a partnership on the one hand and a professional financial market participant as defined in Section 2 Paragraph 1 FinSG on the other hand (Section 2 Parapraph 2 FinSG as amended by Federal Law Gazette I 2010/90). This amendment has considerably increased the practical relevance of the special provisions of the FinSG, which can be described as the "third layer" of the lien in addition to the provisions under civil law and company law. Accordingly, only transactions in which (i) a natural person who is not a sole trader is involved and (ii) in which neither on the side of the collateral provider nor on the side of the collateral taker a professional financial market participant is involved are now excluded from the personal scope of application of the FinSG.

Section 9 FinSG stipulates that the set-off as a result of termination under a corresponding agreement[75] (close-out-netting) also becomes effective if (i) bankruptcy or liquidation proceedings, reorganisation proceedings or a reorganisation measure have been opened or initiated against the assets of the collateral provider or the collateral taker or are still ongoing and (ii) the rights subject to the set-off as a result of termination have been assigned or judicially or otherwise seized or otherwise disposed of. By Section 9 FinSG the provisions on close-out netting laid down in the Insolvency Act are supplemented in connection with the provision of financial collateral. The amounts obtained from the realisation of financial collateral may also be included in the close-out netting. Like the provisions in the Insolvency Act, the FinSG also requires that the parties have previously and legally agreed on the close-out netting.

c) Trading one product under several Underlying Agreements

As far as foreseeable, it is of no importance for the consequences under insolvency law whether a product is traded in one or more Underlying Agreements.

d) Cross product netting in physical trading of different commodities

As far as foreseeable, it is of no importance for the consequences under insolvency law whether different commodity types are traded.

15. Your Question 6

"Assuming that the parties have selected a Base Currency (Division 1, Part VI of the CPMA Schedule and section 8.3(C) of the MNA Election Sheet) other than the legal currency of your jurisdiction in which the insolvent party is organized, your opinion on whether payment of the Final Net Settlement Amount in that currency would be enforceable under the laws of your jurisdiction."

16. Claims in a foreign currency

The Austrian Insolvency Act has expressly regulated the case where a claim is not denominated in the national currency (EUR). According to Section 14 Paragraph 1 Insolvency Act, claims which are not in the national currency must be asserted according to their estimated value in the national currency at the time of the opening of the insolvency proceedings. The decisive date for calculating the value of the claim is the opening of insolvency proceedings. The determination of the value of foreign currency receivables is purely a calculation process.

[75] Section 3 Paragraph 1 Number 14 lit a FinSG.

17. Your Question 7

"Your opinion on whether the rights of a party are enforceable in accordance with the terms of each model Master Agreement, irrespective of the insolvency of the entity incorporated in your jurisdiction."

On the question of enforceability in the absence of insolvency, see point II.A.

18. Your Question 8

"Your opinion on whether the parties' agreement on governing law of each model Master Agreement and submission to jurisdiction will be upheld in your jurisdiction, and the consequences if it were not."

19. Agreement on governing law

As an expression of the principle of private autonomy which characterises private law in principle, both Section 11 Austrian Private International Law Act[76] and Article 3 Rome I allow the parties to choose a legal system. Accordingly, the parties' choice of law takes precedence over the determination of the applicable law according to objective criteria. The Rome I Regulation also follows this system: Under Article 3 Paragraph 1 Rome I, the contract is governed by the law chosen by the parties; the objective connection under Article 4 Rome I presupposes the absence of a choice of law. Restrictions of the freedom of choice of law result from the protection of weaker parties (Article 5 to 8 Rome I), the primacy of internationally mandatory rules (Article 9 Rome I) and public policy (Article 21 Rome I).

Articles 10f and 13 Rome I shall apply when examining the establishment and validity of the choice of law. These questions are therefore generally subject to the governing law. Any formal requirement must be assessed independently of the main contract; a particular form must therefore only be complied with if it is provided for in the governing law and in the legal systems alternatively chosen pursuant to Article 11 Paragraph 1 to 3 Rome I for the governing of law.

The Austrian Private International Law Act only applies if the Rome I Regulation is not applicable. This Act also limits the choice of law in the case of typical requirements for the protection of the weaker party (consumer contracts, rental and employment contracts). The choice of law under the Austrian Private International Law Act is inadmissible where – as in property law – there is a standardization requirement ("*Typenzwang*") and with regard to the substantive requirements for contesting the creditor's claim.

In contrast to the scope of application of the Rome I Regulation, the substantive validity of a choice of law agreement must be assessed according to the lex fori[77].

[76] Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz).
[77] RIS-Justiz RS0077085.

20. Lex fori concursus

Article 7 EIR stipulates the principle of the applicability of the insolvency law of the Member State of the opening of proceedings (“lex fori concursus”). The EIR has direct effect throughout the territory of the Union (with the exception of Denmark). Within the scope of application of the Insolvency Regulation 2015, this law determines all procedural and material effects of the opening, liquidation and termination of insolvency proceedings[78].

According to the prevailing opinion, Article 7 EIR is a reference to a material norm (“*Sachnormverweis*”), the autonomous insolvency conflict law of the state in which the proceedings are opened and in particular possible referrals back and onward are therefore irrelevant.

The lex fori concursus should include all those legal norms which determine the specific insolvency law effects of the proceedings and whose application is necessary to enable the insolvency proceedings to fulfil the tasks and objectives defined by the lex fori concursus itself.

Regarding the question of which substantive law is applicable to set-off/netting, see point II.B.6 of this Opinion).

At present (date of preparation of this opinion) it cannot yet be estimated whether the EIR will continue to apply after the Brexit. The relevant provisions of the Insolvency Act will therefore be briefly discussed:

In general, the national provisions on international insolvency law shall only apply unless international law or legal acts of the European Union, in particular the EIR, provide otherwise (Section 217 Insolvency Act). The conflict-of-law rules therefore apply in particular if (i) the insolvency proceedings were opened in a third state (non-EU Member States and Denmark), (ii) the proceedings are not listed in Annex A EIR and thus do not fall within its material scope of application, but are nevertheless insolvency proceedings within the meaning of Section 221 Insolvency Act, (iii) the debtor is not covered by the personal scope of application (see Article 1 Paragraph 2 EIR) or (iv) there is no international connection with more than one Member State of the EIR that is occasionally required.

Sections 221 to 235 Insolvency Act shall apply both to insolvency proceedings opened in Austria and to foreign insolvency proceedings.

According to Section 221 Paragraph 1 of the Insolvency Act, insolvency proceedings, the conditions for their opening and their effects are governed by the law of the opening state; insolvency proceedings opened in Austria are therefore generally subject to the Insolvency Act. The wording of Section 221 Paragraph 1 Insolvency Act largely corresponds to Article 7 Par-

[78] Recital 66 EIR.

agraph 1 and Paragraph 2, first sentence, of the EIR. Following the regulatory model of Article 7, Section 221 Paragraph 2 then lists a catalogue of examples, which provides a basis for interpretation, particularly when it comes to specifying the limits of the Insolvency Statute.

21. Your Question 9

"*Your opinion on whether, pursuant to the EU Parliament and Council Regulation No. 2015/848 of 20 May 2017 (the "EU Insolvency Regulation") most provisions of which became directly applicable in all Member States as from 26 June 2017, a bankruptcy court in your jurisdiction would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement if they differ from the analogous insolvency laws of your jurisdiction (please see paragraph III.B.18.c below where this topic is to be discussed at greater length). In addition, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, your opinion on whether the close-out netting and/or set-off provisions under each Master Agreement would nevertheless become valid by operation of the EU Insolvency Regulation*."

22. Application of the European Insolvency Regulation

In the main, we refer to our comments in point II.B, in particular point II.B.6, of this Opinion.

Should, for whatever reason, one or more Underlying Agreements be ineffective or not binding, we assume that the validity of the Master Agreements remains unaffected. Should an Underlying Agreement be invalid, but the claim from the invalid agreement nevertheless be legally established (to be assessed under the governing law, which is not Austrian law), we assume that the provisions of the Master Agreement will lead to a set-off/netting of the claim against any counterclaims. The general limitations described in point II.B.2 to II.B.7 of this Opinion must be borne in mind. Therefore, for example, the claim arising from the invalid Underlying Agreement must have existed prior to the opening of insolvency proceedings.

23. Your Question 10

"A general discussion of, and your opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of the model Master Agreement."

24. No disadvantages for a creditor filing for insolvency

The mere filing of a petition for the opening of insolvency proceedings does not have any effects on the enforceability of early termination/automatic termination, close-out netting and the calculation and payment of the Termination Amount in accordance with the provisions of the General Agreement. However, according to Sections 30 and 31 Insolvency Act the applicable suspect periods for the avoidance of transactions of the Austrian debtor are triggered by/calculated upon the filing of a petition for the opening of insolvency proceedings (see point II.B.9 of this Opinion).

25. Your Question 11

"*An analysis and your opinion regarding the advisability in your jurisdiction of using each model Master Agreement to impose uniform default events across all types and categories of trades (effectively superseding the default terms of underlying master agreements or deal documentation) as opposed to allowing such underlying default provisions to operate for their respective categories of trades even if to do so might permit close-out and set-off of some trades governed by the relevant Master Agreement, but not others.*"

26. Uniform default events

In light of the fact that the second variant (no uniform default events) may lead to inconsistencies and/or difficulties in enforceability in the event of insolvency, we would therefore recommend uniform default events. A more detailed analysis would go beyond the scope of this general legal opinion.

CPMA CSA / MNA CSA

27. Your Question 12

"Your opinion on whether an entity duly organized or incorporated under the laws of your jurisdiction (or its administrator, provisional liquidator, receiver, trustee or other similar official) will be able to recover any transfer of Eligible Credit Support made to the transferee during a certain "suspect period" preceding the date of the insolvency that makes the recovery vulnerable to being treated as preferential or otherwise suspect (or other similar treatment) by such official and therefore subject to avoidance. If such a "suspect period" exists, please give your opinion on whether the substitution of Eligible Credit Support by a counterparty during this period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing. Please also include an analysis of the relevant time-period(s) surrounding the insolvency."

28. Avoidance of Eligible Credit Support

Austrian insolvency law is characterised by the principle of equal treatment of creditors. This means that all unsecured creditors should be equally satisfied. Legal acts performed by the debtor prior to the opening of insolvency proceedings are generally not covered by the insolvency law provisions on the equal treatment of creditors. However, the insolvency avoidance law is intended to prevent circumvention of the equal treatment of creditors by enabling the avoidance of creditor-damaging legal acts performed prior to the opening of insolvency proceedings ("suspect period", ranging from 10 years to 6 months).

The object of the challenge within the meaning of Sections 27 ff Insolvency Act are basically

- legal acts,
- which were carried out before the opening of insolvency proceedings, and
- which concern the debtor's assets.

A legal act in the sense of Sections 27 ff Insolvency Act is any act that produces a legal effect. On the one hand, legal acts are legal transactions, namely both disposition and executory agreements ("*Verpflichtungs- und Verfügungsgeschäft*") as well as acts of volition ("*Willenserklärung*"). Furthermore, mere real acts are also covered by the concept of legal act insofar as they produce legal effects (e.g. the provision of a service). Due to this broad definition, Eligible Credit Supports may also be subject to Austrian law of avoidance. For the additional requirements, see point II.B.10 to II.B.12 of this Opinion. The relevant time periods for the avoidance are also listed under these headings.

As the substitution of a collateral is also a legal transaction, it is subject to the general rules on avoidance. Therefore, if an exchange of Eligible Credit Support takes place within the periods relevant for the avoidance and the other conditions for avoidance are met, the exchange can be avoided even if the original collateral arrangement was not subject to avoidance.

Assuming that the value of the exchanged asset does not exceed the original value, the question arises whether the exchange was made to the detriment of the debtor's estate. The answer depends over the assets of which contracting party insolvency proceedings are opened. Since the transferor transfers an asset which reduces his estate, but at the same time gets back an already transferred asset, the legal transaction is probably not to the disadvantage of his creditors and therefore not avoidable. In the opposite case, if the transferor releases an asset but in return receives only an asset of a lower value, an avoidance would be conceivable. Since in this case the assets of the transferor may be reduced, it would be possible that such an exchange could be avoidable in the insolvency of the transferor. However, the other requirements for an avoidance – as described above - must also be met here.

According to the Austrian Supreme Court[79] the law governing avoidance of contracts outside of insolvency proceedings is the law applicable at the place in which the assets, the re-transfer of which to the debtor is the subject matter of the suit for avoidance, are located. The Supreme Court has also ruled that a choice of law with respect to avoidance of contracts is inadmissible and will not be honoured[80]

79 OGH 23.05.1984, JBL 1985, 299 = IPRE 2/106.
80 OGH 27.02.1984, SZ 58/34 = IPRE 2/107.

Outside of insolvency proceedings certain legal acts may be avoided by any other creditor having an enforceable claim who has not been satisfied in enforcement proceedings or who most likely will not be satisfied if enforcement proceedings were initiated.

29. Financial Collateral Act – FinSG

In addition, the FinSG (Financial Collateral Act) could be relevant, provided it is applicable (see point II.B.14.b). FinSG implements the Financial Collateral Directive and regulates the creation and liquidation of collaterals between certain financial market participants.

The FinSG does not result in any significant changes/additions to the insolvency law provisions on set-off/netting. The opening of insolvency proceedings does not affect the possibility of off-setting, which in principle already exists in advance. If the claims are already set off against each other when the insolvency proceedings are opened, they need not be asserted in the insolvency proceedings (Section 19 Paragraph 1 Insolvency Act). The insolvency creditor entitled to set-off has a similar position to a segregation creditor, because for him the counter-claim is a cover equal to a pledge. The set-off is not excluded by the fact that the claim of the creditor or the bankrupt is still conditional or not due at the time of the opening of the insolvency proceedings or that the creditor's claim was not directed towards a monetary payment (Section 19 Paragraph 2 Insolvency Act).

According to Section 20 Insolvency Act, however, set-off is inadmissible if a creditor of the insolvency proceedings only became a debtor of the insolvency estate after the opening of the insolvency proceedings or if the claim against the joint debtor was only acquired after the opening of the insolvency proceedings. In order to avoid the problem of delimitation as to whether a claim arose at or only after the opening of the insolvency proceedings, the regulations on contractual netting have been introduced for certain - in Section 20 Paragraph – 4 Insolvency Act – financial transactions. Claims arising from contracts relating to these financial transactions which have been terminated due to the opening of insolvency proceedings may be set-off if it has been agreed that these contracts will be terminated upon the opening of insolvency proceedings relating to the assets of one contracting party or may be terminated by the other party and that all mutual claims arising therefrom are to be set off (close-out netting). The provisions on close-out netting set out in the Insolvency Act are supplemented by Section 9 FinSG in connection with the provision of financial collateral. The amounts obtained from the realisation of financial collateral may also be included in the netting. Like the provisions in the Insolvency Act, the FinSG also requires that the parties have previously and legally agreed on the close-out netting.

See also recitals 14 and 15 of the Financial Collateral Arrangements Directive[81] with respect to Section 9 FinSG. A definition of close-out netting can be found in Section 3 Paragraph 1 Number 14 FinSG.

The provision of Section 8 Paragraph 1 FinSG protects the validity of the provision of financial collateral in the form of a transfer of full rights, such as the transfer of ownership by way of security or in the context of a repurchase agreement. The recharacterization of such a security financial collateral arrangement into a right in rem is excluded (see recital 13 of the Financial Collateral Directive). In the event of insolvency, the collateral taker - as the owner - therefore has a right of segregation against the insolvency estate within the scope of the FinSG.

Section 8 Paragraph 2 FinSG recognises the principle of close-out netting even if a financial collateral arrangement is created in the form of a transfer of full rights (transfer of title). The creditor must, of course, pay any surplus resulting from the realisation or set-off to the debtor or the insolvency estate (cf. the last sentence of Section 10 FinSG[82]).

Section 11 Paragraph 1 declares the FinSG to be *a lex specialis* with regard to the creation and realisation of liens and security interests. For reasons of better comparability with the Directive, the legislator has given preference to the regulation of financial collateral in a special law over the adaptation of the corresponding provisions in other laws, in particular in the Austrian Civil Code (“ABGB”) and Insolvency Act.

In particular, the FinSG is more specific when applying Sections 447 ff. of the Austrian Civil Code on liens and the special provisions in this regard in Sections 356 f and 367 ff of the Austrian Commercial Code (“UGB”). The provisions of Sections 19 f Insolvency Act on offsetting must take into account the FinSG's provisions on close-out netting described above.

Pursuant to Section 11 Paragraph 2 FinSG, legal provisions on avoidance or nullity of legal transactions remain unaffected by the FinSG. This applies not only to the provisions of bankruptcy law on avoidance (see Sections 27 ff Insolvency Act as described in point II.B.9 to II.B.11 of this Opinion) mentioned in the materials, but also to general civil law provisions, such as the avoidance of contracts due to error or fraud (Sections 871 ff ABGB), default in performance or contractual liability (if Austrian civil law applies).

30. Your Question 13

“Your opinion on whether the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each CSA during any applicable ‘suspect period’ described above is subject to avoidance, either because it will be considered to relate to an antecedent or pre-existing obligation or for some other reason.”

81 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

82 Section 10 FinSG obliges the collateral taker to surrender any surplus to the collateral provider.

31. Transfer of Eligible Credit Support during a "suspect period"

For the avoidance under Austrian law, the point in time at which the avoidable legal act was performed is decisive. In this specific case, this is the point in time when the Eligible Credit Support was transferred. The time at which the underlying claim was established is irrelevant for the avoidance of the transfer of the Eligible Credit Support. Consequently, a challenge cannot be avoided by establishing the underlying claim before the suspect period.

32. Your Question 14

"A general discussion of, and your opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of each CSA."

33. No disadvantages for a creditor filing for insolvency

The mere fact that a creditor files for insolvency does not have a negative impact on the creditor's legal position in the insolvency proceedings.

34. Your Question 15

"An analysis of local law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in your jurisdiction, with the provider of the Eligible Credit Support being an entity based outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can bolster or re-characterize the nature of the providing party's rights to that Eligible Credit Support.

a. What rights does the providing party have against such an asset located in your local jurisdiction upon the insolvency of the recipient party?

b. Are there other steps that the providing party should be taking to minimize its risk and best protect such an asset?

35. Legal fate of an Eligible Credit Support in insolvency proceedings

For the general civil law requirements for an enforceable transfer of Eligible Credit Support, see point II.A.10 of this Opinion.

The EIR contains rules on the treatment of rights of segregation and rights to separate satisfaction in insolvency proceedings with a foreign element. As rights in rem are of particular importance in practice, the EIR provides special reference for rights in rem diverging from the law of the opening State. The basis, validity and extent of rights in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of a right in rem should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights in rem should be paid to the insolvency practitioner in the main insolvency proceedings[83].

Article 8 EIR stipulates that the opening of insolvency proceedings not affects the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. This means that rights of segregation and separation also apply in the event of the insolvency of an Austrian contractual partner.

Section 11 of the CPMA CSA and the MNA CSA provides that on the Denomination Date the Valuation Agent shall determine all Eligible Credit Support provided. In the following, the amount determined by the Valuation Agent shall be included in the Final Net Settlement Amount to be determined pursuant to the Master Agreements. If, when determining the Final Net Settlement Amount, it should result that the non-insolvent counterparty has a claim against the insolvent counterparty, this claim would qualify as an insolvency claim ("*Insolvenzforderung*"). Creditors in the possession of a "plain" insolvency claim participate in the insolvency proceedings by filing their claims in the insolvency proceedings and, if the insolvency administrator recognizes the filed claim, they receive a quota-based satisfaction.

In order to minimize the risk for the transferor, the transferor should demand for a transfer of the Return Amount in time, as provided for in Section 4 of the CPMA CSA and the MNA CSA.

However, should a Final Net Settlement Amount be calculated in favour of the insolvent debtor, the insolvency administrator may demand full satisfaction of this claim from the contracting party.

36. Your Question 16

"An analysis of local law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in your jurisdiction, with the provider of the Eligible Credit Support being an entity based outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there

[83] Recital 68 EIR.

any way that a bankruptcy court in your jurisdiction can bolster or re-characterize the nature of the providing party's rights to that Eligible Credit Support.

If insolvency proceedings are opened against the assets of the recipient of an Eligible Credit Support under Austrian law, the contractual provisions regarding the collateral granted to the insolvent company prior to the opening of insolvency proceedings shall continue to apply. National Austrian law does not provide for any strengthening of the rights of the insolvent collateral receiver.

Model CPMA combined with the CPMA CSA / Model MNA combined with MNA CSA

37. Your Question 17

"Your opinion on whether the rights of the transferee of Eligible Credit Support would be enforceable in accordance with the terms of: (i) the model CPMA and the CPMA CSA; and (ii) the model MNA and the MNA CSA, irrespective of the insolvency of the providing party incorporated or otherwise organized under your jurisdiction."

38. Enforceability of the rights of the transferee

Subject to our analysis and recommendations regarding limitation relating to termination and close-out netting provisions (Sections II.A and II.B of this Opinion) we are of the opinion that the rights of the transferee are enforceable under the laws of Austria in accordance with their respective terms.

39. Your Question 18

"A general discussion of, and your opinion regarding, your jurisdiction's insolvency laws, and any relevant terminology with an emphasis on law and precedent applicable to the concepts of close-out netting and set-off of claims between parties, and:

a. *how generally applicable statutory or common law set-off (or similar) rights could interact with the contractual netting and set-off rights contained in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA;*

b. *applicable law which might have an impact on the respective priorities assigned to such rights by a court in your jurisdiction; and*

c. *specifically, whether the EU Insolvency Regulation affects local jurisdiction conflict of law rules such as overruling local jurisdiction insolvency laws if the parties to the Master Agreement have opted for a jurisdiction other than the jurisdiction relevant to the insolvent party. In particular, your opinion on whether or not a bankruptcy court in your jurisdiction would apply the EU Insolvency Regulation to close-out netting and/or set-off such that it would* *apply the governing law of the Master Agreement or CSA as the law applicable to close-out netting and/or set-off or whether it would seek to apply local law in its stead;*

d. *whether, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, the close-out netting and/or set-off provisions under each Master Agreement when combined with the relevant CSA would nevertheless become valid by operation of the EU Insolvency Regulation; and*

e. *whether the laws of your jurisdiction consider set-off and close-out netting as separate or similar rights."*

40. General discussion on close-out netting and set-off

In this respect, we refer to the comments and notes in the points II.B of the opinion. The combination of Model CPMA and CPMA CSA as well as Model MNA and MNA CSA does not result in any material differences in the legal assessment.

With regard to questions on applicable law and the EIR, we also refer to the statements above, which have been included at appropriate points throughout the opinion.

The mere fact that one of the Underlying Agreements should be invalid does not automatically result in the invalidity of the Master Agreements or the CSA. There are no provisions in the Austrian Insolvency Act (or the EIR) that would make the close-out netting and/or set-off provisions under each Master Agreement ineffective in such a case.

C. Cross Affiliate Netting and Set-off

1. Your Question

"Since the versions of the model CPMA and model MNA you are reviewing do not address this topic and are not intended for these purposes, but because this issue may be of use to some EFET members, only to the extent that there is established law in your jurisdiction on the subject, a summary of such law and a review of the different risk considerations involved in choosing to add multiple parties to each model Master Agreement."

2. Legal issues relating to cross affiliate netting and set-off

The following explanations are only an exemplary list of the possible legal issues that may arise in connection with cross affiliate netting and set-off and are not a final legal assessment. If an EFET member intends to introduce such a system within a group, a case-by-case assessment is necessary, taking into account the specific circumstances.

- Equity replacement: Clearing and netting in this context means the periodic settlement of intra-group claims and liabilities between group companies. The Austrian netting provisions as well as the provisions of the Austrian Equity Replacement Act (Eigenkapitalersatzgesetz - EKEG) are applicable to them. The core idea of the EKEG is that a loan granted by the shareholder of the company in a crisis is treated as equity capital for the protection of creditors and therefore cannot be repaid during the crisis. So-called commodity loans (= the shareholder sells the shareholder a commodity and credits the company with the purchase price) may also be covered by the repayment moratorium under certain circumstances. In order to prevent circumvention, the law expressly stipulates that off-setting against "blocked" claims is also not permitted.

- Maintenance of equity: In accordance with the Austrian capital maintenance provisions, it must be ensured that both (i) the claims and liabilities to be off-set and (ii) the netting agreement comply with a third-party comparison, so that the performance relationship between the group companies does not lead to an enrichment of a company. Both the claims to be netted and the netting agreement should therefore be third party comparable with regard to notice periods, interest rates and the creditworthiness of the other clearing or netting participants. In particular, the framework agreement for clearing or netting should ensure that participating group entities have sufficient possibilities to obtain information on the creditworthiness of the other participating group entities. If the netting agreement contains unusual agreements or agreements that favour one party (e.g. with regard to interest or notice periods), the netting agreement and thus also the cash management system based on it could violate the prohibition of the replacement of equity.

- Intra-group collateral: A breach of capital maintenance regulations can also lie in the provision of collateral or other assumption of liability (guarantee or surety) for liabilities of a shareholder or sister company. According to case law, the provision of collateral by a subsidiary taken out by a direct or indirect shareholder constitutes an illegal return of equity, unless the collateral is justified by special reasons. This also applies to contributions made by a corporation to a third party related to the shareholder at the instigation of a shareholder, e.g. to a company in which the shareholder himself holds a stake (sister company). The provision of collateral is permissible if it can be operationally justified from the point of view of the company providing the collateral. The decisive factor is whether the provision of collateral is also in the interest of the company providing the collateral, taking into account all circumstances of the specific case. From the management's point of view, the provision of collateral must be judged to be prudent, so that under these circumstances such a provision of collateral would have been granted to outside third parties as well.

- Group off-setting clause (“*Konzernverrechnungsklausel*”): A group off-setting clause grants a group-affiliated company the right to off-set not only its own claims but also those of affiliated companies (parent, subsidiary or sister companies) against claims of the contracting party. The contracting party also has the right to set off against claims which the contractual partner is entitled to against another of the group affiliated companies. Outside of the insolvency law, reciprocity can be effectively waived by contract and thus third-party off-setting (also implied) can be agreed upon; the off-setting provisions of Sections 19, 20 Insolvency Act are mandatory and group off-setting clauses which violate them are invalid. In contrast to a netting agreement, the intercompany set-off clause does not have a redemption effect ("*Tilgungswirkung*"), but allows later redemption by unilateral structuring act.

- Margin Exemptions for Intragroup Transactions: In general terms, an intragroup transaction can simply be described as an OTC-derivative contract concluded between members of the same group. The detailed definition of what constitutes an intragroup transaction is stipulated in Article 3 Paragraph 1 EMIR for NFCs and Article 3 Paragraph 2 EMIR for FCs. Pursuant to Article 11 Paragraph 5 to 10 EMIR and subject to certain preconditions, intragroup transactions can be exempted from the bilateral margin requirement. The applicable preconditions are similar but not identical in respect to intragroup transactions between group members established in the same member state (Article 11 Paragraph 5 EMIR), between members of the same group established in different member states (Article 11 Paragraphs 6, 7 and 10 EMIR) and between members with one counterparty established in a third-country (Article 11 Paragraphs 8, 9 EMIR).

D. Multi-branch Parties

1. Your Question

"In the case of a counterparty that has entered into transactions under a Master Agreement as a multi-branch party, it is clearly necessary to obtain enforceability opinions from each country where a branch of that counterparty is located that has entered into one or more transactions under that Master Agreement. In this regard, please provide your opinion on the following:"

1. *whether there would be any change in your conclusions expressed in paragraph III.B above concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA (given the assumption in paragraph II.F.(i) above);*

2. *whether separate proceedings could be brought in your jurisdiction with respect to assets and liabilities of the overseas branch located in your jurisdiction of a counterparty organized or incorporated outside your jurisdiction upon the commencement of insolvency proceedings against the counterparty in that outside jurisdiction. Your opinion should include how the relevant authorities in your jurisdiction would treat the proceedings in an outside jurisdiction by, for example, deferring to them so that the assets and liabilities of the branch would be treated as part of the proceedings against the counterparty. Please also include*

whether or not in your opinion local creditors of the branch would be able to initiate separate proceedings in your jurisdiction even if the relevant authorities did not do so; and

3. *in the event that proceedings are brought in your jurisdiction with respect to the assets and liabilities of the branch located in your jurisdiction, whether or not the administrator, provisional liquidator, receiver, trustee or other similar official and/or the courts in your jurisdiction would include the counterparty's position under its Underlying Agreements or underlying transactions among the assets of its branch and, if so, recognize their respective close-out and netting provisions in accordance with their terms (you may assume that the close-out netting provisions under the relevant Underlying Agreements or underlying transactions would be enforceable in the proceedings against the counterparty brought outside your jurisdiction)."*

2. Austrian Multi-branch Parties

According to the Austrian Trade Act (Gewerbeordnung 1994 - GewO) companies may have, outside of their place of the seat, branches where business activities are conducted. A branch shall be opened by a decision of a competent authority of a company in accordance with the incorporation statement or the articles of association. The competent trade authority is the administrative district authority ("*Bezirksverwaltungsbehörde*)[84].

A branch is not a legal entity. The company shall acquire rights and obligations through the business activity of its branch. The branch is organizationally and economically connected to the company and conducts its own business pursuant to the instructions by the company. A branch shall conduct business under its own firm name and indicating its seat as well as the seat of its founder. According to Section 33 of the Austrian Companies Act ("*Unternehmensgesetz*"), the director of a company has to apply for the registration of the branch in the Austrian Commercial Register.

Based on the above stated, the obligations of the branch, that were taken over by execution of the respective Master Agreements are actually obligations of the company itself. There would be no change in the conclusions reached under points II.A and II.B of this Opinion based upon the fact that Party A has conducted business under the Master Agreements on a multi-branch basis prior to its insolvency.

3. Foreign Multi-branch Parties

A branch is understood to be a part of a company that is physically separated from the registered office, has a large degree of organizational independence, operates under its own management and is set up for more than just a temporary period. Foreign legal entities may conduct permanent business activities in Austria either through a legally independent subsidiary

[84] Section 46 of the Austrian Trade Act.

or a branch office. According to Section 12 Commercial Register Act ("*Firmenbuchgesetz*" – FBG), branches of foreign legal entities located in Austria must be entered in the commercial register.

Whether an Austrian branch office must be registered in the commercial register depends on Austrian law. The registration has a purely declaratory effect and is therefore not a prerequisite for the foreign legal entity to be granted legal personality in Austria. The question of the independent legal personality of branches is to be judged according to their own seat law, i.e. according to the law of the place of the branch and not according to the founding law/seat law of the foreign legal entity. If they do not have their own legal personality according to this, they are subject in all organizational (corporate) matters, including the power of representation, to the law of the actual head office of the legal entity or other entity under foreign law. According to Austrian law, the domestic branch of a foreign legal entity does not have independent legal personality; the legal subject is rather the foreign company, which is why the domestic branch also lacks the capacity to be a party to legal proceedings. In insolvency proceedings, including the opening of insolvency proceedings prior to these proceedings to examine the preconditions for insolvency, nothing else applies. The contrary doctrinal opinions on the justification of the independent insolvency capacity of a domestic branch go back to the time when the territoriality principle, which has since been replaced by the principle of universality, was still predominant in doctrine and practice.

Branches within the scope of the EIR

Within the scope of application of the EIR, Article 3 stipulates that the debtor's center of main interests ("COMI") is decisive for determining international jurisdiction for the opening of main insolvency proceedings.

This means that the courts of the Member State in which the center of the debtor's main interests is situated have jurisdiction to open main insolvency proceedings even if the registered office is situated in another Member State. If the center of the debtor's main interests is located in a member state of the European Union, only the courts of this Member State have international jurisdiction to open the main proceedings pursuant to Article 3 EIR. In principle, these main insolvency proceedings comprise the debtor's entire worldwide assets, unless these are excluded due to secondary insolvency proceedings running in parallel, or, with regard to assets located in third countries, according to the respective national legal systems.

In principle, the courts do not have the option of opening territorially limited individual insolvency proceedings instead of the universalistic main proceedings. However, if the debtor's main interests lie in another Member State, territorially restricted proceedings may only be opened in that Member State if there is a branch as defined by the EIR[85]. Although the opening of a mere individual insolvency instead of a main insolvency is fundamentally contrary to the

[85] RIS-Justiz RS0121443; Article 2 Letter h EIR.

principles of procedural unity and universality pursued by the EIR, it was permitted for reasons of practicality.

Branches from third countries

Outside the scope of the EIR, there is no legal basis for opening insolvency proceedings limited to domestic assets. In any event, the opening of insolvency proceedings limited to the assets of a branch is not permitted.

The insolvency petition against a foreign legal entity operating in Austria through a branch is not to be directed against its branch, but directly against the foreign legal entity. Only in order to establish the international Austrian and local jurisdiction of the court appealed to, reference is to be made to the existence of the branch, which may also be registered in the commercial register. The request together with the summons to a court hearing must be served on the legal entity at its head office. Only insolvency petitions directed against the branch are to be rejected as inadmissible due to lack of independent insolvency capacity, if necessary, after a prior order for improvement. Finally, in addition to the other requirements for insolvency, the inability to pay debts or over-indebtedness of the company, and not only of the branch office, must be examined.

E. CSA Specific Permutations

1. Your Question

In relation to each of the questions in paragraph III.B above, the assumption is that the providing party is a counterparty incorporated or otherwise organised in your jurisdiction. Please consider your answer to each question and indicate how your answer would be different, if at all, assuming instead that:

(a) The providing party is a branch located in your jurisdiction of a bank organised outside your jurisdiction;

(b) The providing party is neither incorporated nor otherwise organised in nor a branch located in your jurisdiction, but has assets in your jurisdiction;

(c) None of the above applies to the providing party (that is, it has no connection with your jurisdiction), but the margin was issued by the government of your jurisdiction or comprises cash in the lawful currency of your jurisdiction.

2. Credit Institutions

Certain special rules apply, in addition to the general insolvency proceedings described herein, in the case of corporations which are credit institutions. Credit institutions are not subject to the provisions of the Insolvency Act on restructuring plans (Section 82 Paragraph 1 Banking Act). A credit Institution may be subjected to a specific bank supervision proceeding ("*Geschäftsaufsichtsverfahren*"), which qualifies as a reorganization measure within the meaning of Article 2 of Directive 2001/24/EC. Directive 2001/24/EC has been transposed into Austrian law by virtue of an amendment to the Banking Act (see Section 81 ff Banking Act).

The Financial Markets Authority ("FMA") in Austria is a party to insolvency proceedings and bank supervision proceedings of credit institutions.

An application for the opening of insolvency proceedings regarding credit institutions can only be filed by the Financial Markets Authority in its capacity as banking supervisory authority and during a bank supervision proceeding also by the supervisor.

However, with regard to branches of credit institutions, it should also be noted that they do not have legal personality in Austria and that Austrian courts therefore have no jurisdiction over insolvency proceedings of the branch (see point II.D.3 of this Opinion).

The conclusions in this Opinion with respect to the CSA regarding insolvency-related termination and close-out netting are also valid if the providing party is organised outside Austria and has a branch in Austria. In this context, it must also be taken into account that, according to the Austrian understanding, a branch is not a contracting party due to its lack of legal personality.

3. Assets in Austria as the only connecting factor

The mere fact that a foreign contractual partner (providing party) has assets in Austria has no influence on the contractual relationship (unless the applicability of Austrian law to the relevant contract has been expressly agreed).

4. Margin issued by Austrian government

The mere fact that the margin was issued by the Austrian government does not have any changed legal effects in the event of insolvency.

F. <u>General Validity of each CPMA and each CSA and the Choice of Law and Jurisdiction</u>

1. Your Question 1

"Given your above stated assumptions, are the: (i) CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA legal, valid and binding under the laws of your jurisdiction?"

2. Choice of Law

Since basically every type of contract can be concluded across borders and the collisions of different legal systems (which are also subject to constant change) are conceivable, it is not possible to provide solutions to all legal problems. In order to regulate certain fundamental questions in advance, it is advisable to include clauses on the choice of law, jurisdiction, dispute settlement, interpretation, written form and residual validity.

It is advisable to specify in the contract the law applicable to contractual rights and obligations. Within the scope of application of the Rome I, a choice of law may be made explicitly or conclusively (on the basis of the circumstances of the case), even retroactively (until the conclusion of negotiations at first instance) with retroactive effect on the conclusion of the contract (Article 3 Paragraphs 1, 2 and 5 Rome I). If a place of jurisdiction has been agreed or a specific language of the contract has been chosen, this is an indication of a coherent choice of law (law of the place where the court has its seat; Recital 12 Rome I).

The Master Agreements contain a choice of law clause; the law to be applied is to be defined by the parties in the Election Sheet.

Restrictions on the free choice of law result from the following European provisions:

- Limits to the free choice of law are imposed on contractual rights and obligations, especially under Article 3 Paragraph 3 Rome I (where all other elements of the situation lead to the law of another country) and Article 3 Paragraph 4 Rome I (where the law of a non-EEA country is chosen: Switzerland, Iceland, Norway). Not relevant in this specific case are the restrictions on consumer contracts, on insurance contracts under private law, individual employment contracts.

- In the non-contractual obligations, restrictions on the choice of law result, for example, from Article 6 Paragraph 4 of Rome II[86] (for claims under competition and antitrust law) and Article 8 P3) of Rome II (for claims arising from infringements of intellectual property rights) and generally from Article 14 Rome II.

- Despite a valid choice of law, so-called mandatory rules of the court seised remain in force (Article 9 Paragraph 2 Rome I). These are norms under public or private law which pursue public interests and are of a higher value than unilaterally mandatory law; e.g. foreign exchange law, import and export bans, protective provisions for commercial agents, real estate law, employee protection law, insolvency law etc. The court hearing the case may also consider foreign mandatory rules to be considerable. The essential mandatory rules, in particular those relating to insolvency law, were referred to at the relevant section of this opinion.

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86 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

- It is possible that the ordre public clause in Article 21 Rome I will apply, namely where the application of a provision of foreign law would lead to a result incompatible with fundamental principles of public policy in the State of the court seised.

The Austrian Federal Law on Private International Law ("IPRG") also contains rules on the choice of law. However, the scope of application of the IPRG has been considerably reduced by EU legislation. The choice of law depends mainly on the legal relationship concerned. For legal relationships under the law of obligations (which, however, are now largely covered by the Rome I and Rome II), the choice of law is primarily provided for as a connecting factor (Section 35 Paragraph 1 and Section 11 IPRG), and this also applies to legal obligations (Section 48 Paragraph 1 IPRG[87]).

The substantive validity of the choice of law agreement is to be assessed according to the lex fori[88], in the scope of application of the Rome I Regulation according to the chosen law.

We are not aware of any indications that would lead to the ineffectiveness of the choice of law clause.

3. Arbitration and Jurisdiction

Regarding the validity of the prorogation of the Austrian jurisdiction it needs to be established whether the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") or the (at least in this context) identical Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters ("Lugano Convention") apply or not.

According to Article 23 Brussels I/Article 17 Lugano Convention the Parties may agree that a court or the courts of a Member State/Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship if at least one of the parties is domiciled in a Member State/Contracting State and if so agreed in writing or by on oral agreement evidenced in writing[89]. Based upon our assumptions the agreement on the jurisdiction of a Contracting State is legally valid and binding.

An agreement on the jurisdiction of a Non-Contracting State is subject to the provisions of the respective foreign /lex fori. An agreement on arbitration is generally valid[90] if made in writing[91].

87 RIS-Justiz RS0076955.

88 OGH 8 Ob 533/85, RIS-Justiz RS0077085.

89 Alternatively such agreement on the prorogation of jurisdiction can be also reached in a form which accords with practices which the parties have established between themselves; or (II) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce ls widely known to, and regularly observed by, parties to contracts of the type !involved in the particular trade or commerce concerned.

90 If signed on the basis of a power of attorney a special power of attorney in respect of the agreement an arbitration is required.

91 The Arbitration Amendment Act 2006 (Schiedsrechts-Änderungsgesetz - SchiedsRÄG 2006, Federal Law Gazette, 1, No. 2006/7) entered into Force on July 1, 2006. In essence, it provides for certain clarifications to the

Pursuant to the Arbitration Amendment Act 2006[92], the receipt of written communication is deemed to have been received if the addressee has knowledge of the arbitral proceedings and the residence remains unknown despite reasonable inquiry. If, however, the Parties seek enforcement of an international arbitration award in Austria, the enforceability of such award is subject to the condition that the arbitration award has been issued in the country being a party to a bilateral or multilateral agreement. Austria recognises arbitration awards of basically all developed countries and is a party to the New York Convention of Recognition of International Arbitration Awards of 1958.

4. Your Question 2

"Are there any applicable limitations on the courts in your country with regard to upholding a choice of local law and submission to the jurisdiction of local courts?"

5. Potential disputes relating the choice of law clause

Specific problems traditionally arise in relation to set-off, compensation for creditor satisfaction and creditor challenge:

- If the statutes of the claims involved differ in the set-off, the unilateral set-off pursuant to Article 17 Rome I is subject to the law of the claim against which the set-off is made, i.e., the statute of the claim of the set-off opponent (principal claim). The existence of the counterclaim and - if required by the statute of the principal claim - its due date must of course be assessed according to the law applicable to the counterclaim. An analogy for the set-off against non-contractual claims is obvious due to the absence of a corresponding provision in the Rome II Regulation.

- The compensation for a creditor's satisfaction by a third party (guarantor, insurer, employer) obliged to do so in the form of legal assignment, assignment obligation or right of recourse is governed by the material law of the legal system which pronounced the third party's obligation to perform (Article 15 Rome I and Article 19 Rome II[93]). The statutory compensation for voluntary payment by a third party, on the other hand, is based on the substantive law of the claim paid (Article 15 Rome I).

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rules of arbitration applicable, in case the place of arbitration is in Austria, irrespectively whether the contractual arrangement is governed by Austrian substantive law. In such an event we would recommend to analyse whether the arbitration clause and the nomination procedures for arbitrators are in compliance with the conditions established by the relevant provisions of Austrian procedural laws. Pursuant to Section 583 Paragraph 1 Civil Procedure Act the arbitration agreement can be concluded in written form as a signed document or as a Fax, e-mail or other forms of telecommunications. However, we do advise to make use of signed documents.

92 Please note that the Austrian Civil Procedure Act has been amended by the Arbitration Amendment Act 2013 (Schiedsrechts - Änderungsgesetz 2013 - SchiedsRÄG 2013, Federal Law Gazette I, No. 2013/118, which entered into force 1Jannuary 2014) by which the appeal procedure to the Austrian Supreme Court for challenging arbitral awards has been significantly shortened. Therefore, the Austrian Supreme Court shall have jurisdiction as the only instance.

93 OGH 8 Ob 291/81; 7 Ob 626/95; RIS-Justiz RS0026788.

- Creditors' avoidance in insolvency proceedings is subject to lex concursus, i.e. the law of the place of the insolvency court (Article 7 Section 2 Letter m EIR; but also, Article 16 EIR). The avoidance outside the insolvency must be based on the strongest relationship[94]). Opinions on this are divided: According to the case law, and excluding the possibility of a choice of law[95], it is primarily the substantive law of the place where the debtor's assets are situated which is decisive.

G. Other Provision

1. Your Question

"Are there any other provisions of either Master Agreement or either CSA that, given a choice of your local law, either:

(a) need to be revised in order to be enforceable in your jurisdiction; or

(b) the legal efficacy of which could be materially improved upon or optimized with different wording (given such provision's apparent intent)?

2. Legal risks

Since the Agreements (i) offer the contracting parties the greatest possible flexibility, (ii) can be adapted to individual requirements, (iii) a wide variety of products are traded and (iv) can be based on the most various Underlying Agreements, it cannot be finally ruled out that due to the circumstances of the particular case individual provisions conflict with mandatory national regulations. Where legal risks were anticipated, these were pointed out in this Opinion.

It is not possible to make a general assessment of the effects of the choice of law in favour of Austrian law; in principle, we recommend concluding the relevant agreements under the proposed law. In particular due to the fact that a practical guidance has been developed under the proposed governing laws (which is absent in comparable detail in Austria) our recommendation not to deviate from this standard selection is reinforced.

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94 OGH 2 Ob 196/04v; RIS-Justiz RS0076601.

95 OGH 3 Ob 584/84.