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1 March 2021

Dear Ladies and Gentlemen,

The Cross Product Master Agreement (as modified by the EFET/IECA European Commodities Schedule), the EFET Cross Product Credit Support Annex thereto, the EFET Master Netting Agreement and the EFET Credit Support Annex thereto – The Netherlands

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1. SCOPE OF ROLE/DOCUMENTS EXAMINED

1.1 We have been requested, as legal advisers to the European Federation of Energy Traders ("**EFET**"), in their instruction letter (the "**Instruction Letter**") sent to us by e-mail of 2 July 2020 to render an opinion letter in respect of the laws of The Netherlands as to the validity of:

1.1.1 the Cross Product Master Agreement ("**CPMA Form**") (version 1) published by the Bond Market Association in February 2000, as modified by version 1.0 of the European Commodities Schedule (the "**Schedule**") published on 23 June 2003 by EFET in conjunction with the International Energy Credit Association

("**IECA**") (the Cross Product Master Agreement as modified by the Schedule is referred to as the "**CPMA**")[1];

1.1.2 the Cross-Product Credit Support Annex to the CPMA published by EFET in June 2003 (the "**CPMA CSA**")[2];

1.1.3 the Master Netting Agreement (version 1.0, dated June 2010) as published by EFET (the "**MNA**" and, together with the CPMA, the "**Master Agreements**")[3]; and

1.1.4 the EFET Credit Support Annex to the MNA published in February 2011 (the "**MNA CSA**" and, together with the CPMA CSA, the "**CSA's**").

The Master Agreements and the CSA's are together also referred to herein as the "**Agreements**".

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1 The CPMA constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain master agreements (each an "**Underlying Agreement**") falling within the scope of the CPMA. If so selected by the Parties in Section 10.6 of the Schedule, the CPMA provides that it forms together with all Underlying Agreements and all transactions entered into thereunder a single agreement. Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all of its Underlying Agreements (Section 2.1 of the CPMA). Settlement Amounts are determined for the terminated Underlying Agreement (each a "**Closed-Out Agreement**") in accordance with their terms (Section 3.1 of the CPMA) and, to the extent necessary, converted into the Base Currency. If after termination both Parties owe one or more Settlement Amounts under two or more Closed-Out Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts (the "**Final Net Settlement Amount**") shall be owed by the Party with the larger aggregate obligation (Section 4 of the CPMA).

2 The CPMA CSA supplements the CPMA. It provides for the transfer of full ownership in the collateral to the Transferee who acquires the right of complete and unrestricted use of the collateral (§ 7 of the CPMA CSA). Upon termination of the CPMA, any collateral provided but not yet re-transferred by the Parties is to be valued and included in the Final Net Settlement Amount to be determined pursuant to Section 4 of the CPMA (§ 11 of the CPMA CSA). One special feature of the CPMA CSA is the inclusion of Letter of Credits.

3 The MNA constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain master agreements (each a "**Additional Netted Agreement**") falling within the scope of the MNA. The MNA provides that it, all Additional Netted Agreements and all transactions entered into thereunder form a single agreement (§ 2.3 of the MNA). Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all transactions under all of its Additional Netted Agreements (§ 4.1 of the MNA). Settlement Amounts are determined for the terminated Additional Netted Agreement (each a "**Closed-Out Agreement**") in accordance with their terms (§ 7.1 of the MNA) and, to the extent necessary, converted into the Base Currency. If on the Early Termination Date both Parties owe one or more Settlement Amounts under two or more Closed-Out Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts (the "**Final Net Settlement Amount**") shall be owed by the Party with the larger aggregate obligation (§ 8.1 of the MNA).

1.2 This opinion letter (the "**Opinion Letter**") is given only in respect of the Model MNA and the Model CPMA in the form described below. The Schedule contains certain elections set out below which have been chosen by EFET to reflect what are considered to be "default elections", together with selected Underlying Agreements. These elections are described below (the "**Model MNA"** and the **"Model CPMA"**). Where addressees of this Opinion Letter: choose to move away from the Model CPMA or the Model MNA (or amend / delete the Core Provisions) in any way, this Opinion Letter shall not apply and they must satisfy themselves (by obtaining supplemental opinions or otherwise) that their agreement is still valid and enforceable under the laws of this jurisdiction.

Underlying Agreements

1.2.1 **CPMA**: Division 1, Part I, Section A / **MNA**: Section 2.1, Part I of the Election Sheet – The Underlying Agreements selected shall be the GTMA, EFET Power Agreement (Version 2.1(a)/September 21, 2007), EFET Gas Agreement (Version 2.0(a), May 11, 2007), EECS Certificate Master Agreement (Version 1.0/14 December 2013), ISDA Master Agreement (either the 1992 or the 2002 versions). Each of the Underlying Agreements is governed by either English or German law save in respect of the ISDA Master Agreement which is governed by either English, New York, Irish or French law and the 2015 NBP Master Agreement which is governed by English law.

Excluded Agreements

1.2.2 CPMA: Division 1, Part I, Section B / MNA: Section 2.1, Part I of the Election Sheet - There shall be no Excluded Agreements.

Uncovered Transactions / Additional Netted Agreements

1.2.3 **CPMA: Division 1, Part I, Section C MNA: Part III of the Election Sheet** – Uncovered Transactions / Additional Netted Agreements should be included but all such transactions will be long form confirmations incorporating, in substantially their original form, the terms and conditions of one of the Underlying Agreements identified above, save that an Uncovered Transaction / Additional Netted Agreement shall also include confirmations incorporating the short term flat NBP 2015 trading terms and conditions which have not been amended and are therefore not subject to an NBP Master.

Close-Out Events

1.2.4 **CPMA: Division 1, Part II, Section A /MNA: Section 3.1, Part 1 of the Election Sheet** – 'Close-Out Event' means any events that entitle close-out under the Underlying Agreements. The parties may also agree to specify certain events as Close-Out Events, provided they use substantially the same wording as used in Section 5(a) ISDA Master Agreement or § 10.5 of the EFET Power Agreement.

Excluded Events

1.2.5 CPMA: Division 1, Part II, Section C / MNA: Section 3.2, Part 1 of the Election Sheet – 'Excluded Events' – the first three boxes will be checked.

Automatic Close-Out of Underlying Agreements

1.2.6 **CPMA: Division 1, Part II, Section C / MNA: Section 3.2, Part 1 of the Election Sheet** – In respect of the CPMA, assume the box is checked and that the rewrite of this provision contained in the Schedule is operative. In respect of the MNA, assume the box is unchecked.

1.2.7 CPMA: Division 1, Part III / MNA: Section 12.1, Part 1 of the Election Sheet – Additional Acknowledgements and Representations – none.

1.2.8 CPMA: Division 1, Part IV / MNA: Section 12.2, Part 1 of the Election Sheet: Governing Law – English and German law applies, in the alternative.

1.2.9 **CPMA: Division 1, Part VII / MNA: Section 12.2, Part 1 of the Election Sheet** – Assignment. In respect of the CPMA, no election, Section 7 applies but is amended as set out at (a) and (b) of the Election Sheet. In respect of the MNA, Section 12.5(A) shall be operative in respect of Party A and Party B.

1.2.10 **CPMA: Division 1, Part VIII** – Sections 10.1, 10.2, 10.4, 10.5, 10.7 and 10.8 shall apply.[4]

1.2.11 **MNA: Section 12.2, Part 1 of the Election Sheet –** Sections 10.1(A), 10.1(B), 6.4, 9.1 shall apply.

4 It is noted that the election of Sections 10.3, 10.6 and 10.10 are not required for the close/out netting and set/off clauses to be effective. It should be determined in accordance with the Governing Law of the CPMA whether such Sections should be applied.

1.2.12 CPMA: Division 1, Part X /MNA: Part II of the Election Sheet – no additional terms.

1.2.13 **CPMA only**: Division 2 applies as set out in the Schedule (unamended).

1.3 Where an opinion or analysis is provided in this Opinion Letter, such opinion or analysis is based on the elections set out above.

1.4 For purposes of this Opinion Letter, we have only considered the following counterparties under any of the Agreements, the Underlying Agreements or the Uncovered Transactions/Additional Netted Agreements:

1.4.1 a Dutch Company (including an SE);

1.4.2 a Dutch Credit Institution;

1.4.3 a Dutch Investment Firm;

such parties hereafter together referred to as the "**Counterparties**" and each a "**Counterparty**".

For the purpose solely of the multi-branch analysis in Part (C) and Appendix A below, we also consider:

1.4.4 a Foreign Company acting through one or more of its Dutch Branches;

1.4.5 EEA and Third Country Credit Institutions;

1.4.6 EEA and Third Country Investment Firms;

For the avoidance of doubt, this Opinion Letter does not extend to:

(a) any individuals, associations, partnerships or foundations (whether charitable or not);

(b) any Dutch Insurance Companies;

(c) any collective investment schemes, companies or funds (regardless of their location or their governing law);

(d) any public law entities (such as the Dutch State, provinces, DNB, etc), including associations of local governments with legal entity status pursuant the "*Wet gemeenschappelijke regelingen*";

(e) any entities (public or private law) under the laws or Curaçao, St. Maarten, Bonaire, Saba, St. Eustatius or Aruba;

(f) any pension funds (*pensioenfondsen*);

(g) any religious entities (*kerkgenootschappen*);

(h) any regulatory authorities or central counterparties;

(i) any international or supranational organisations; and

(j) any trusts.

1.5 In this Opinion Letter, unless otherwise specified:

1.5.1 "**Additional Netted Agreements**" shall have the meaning described in subparagraph 1.1.3 (footnote 3) below;

1.5.2 "**Automatic Close-out** " shall have the meaning ascribed to it in Section 6.3 of the MNA and Part II.B of the Schedule;

1.5.3 references to a "**Clause**" or a "**Section**" or "**§**" are to a clause in any of the Agreements;

1.5.4 references to "**BA**" are to the Dutch Bankruptcy Act (*Faillissementswet*);

1.5.5 "**BRRD**" means the EU Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms;

1.5.6 "**BRRD2**" means EU Directive 2019/879 of the European Parliament and the Council of 20 May 2019 amending BRRD;

1.5.7 "**BRRD Act**" means the provisions incorporated into the FMSA and the BA that implemented the BRRD (but not BRRD2 for which no implementing legislation has been submitted as at the date of this Opinion Letter) into Dutch law;

1.5.8 "**BRRD Entity**" means a type of entity that is within the scope of the resolution regime under the BRRD Act and/or the SRMR and includes (provided they qualify as a Counterparty under paragraph 2.1.1 above):

(i) a Dutch Credit Institution (not being an "opt-in" bank as referred to in article 3:4 FMSA; i.e. an undertaking that does not meet the requirements for a bank but has voluntarily applied for a licence as a Dutch Credit Institution);

(ii) a Dutch Investment Firm which is subject to the initial capital requirement of article 28(2) CRD IV (a "**BRRD Investment Firm**");

(iii) a financial institution (*financiële instelling*), as defined in Article 1:1 FMSA (cf. Article 4(1)(26) CRR), that is established in this jurisdiction, when such financial institution is a subsidiary of a Dutch Credit Institution (not being an opt-in bank) or a BRRD Investment Firm, or of a company referred to in (iv), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 CRR;

(iv) financial holding companies (*financiële holdings*), mixed financial holding companies (*gemengde financiële holdings*) and mixed-activity holding companies (*gemengde holdings*), each as defined in Article 1:1 FMSA (cf. Articles 4(1)(20), (21) and (22 CRR), respectively) that are established in this jurisdiction;

(v) a Third Country Credit Institution or Third Country Investment Firm where DNB has refused to recognise the actions of a third country resolution authority in accordance with article 95 BRRD or where the Third Country Credit Institution or Third Country Investment Firm is not subject to third country resolution proceedings in which case the Dutch branch of that Third Country Credit Institution or Third Country Investment Firm is subject to the exercise by DNB of Resolution Powers on the basis of article 96 BRRD (art. 3A:5 FMSA).

a "**BRRD Entity**" may include Dutch Companies if they qualify under (iii) or (iv) above, but we have excluded this possibility from this Opinion Letter (see the definition of "**Dutch Company**"below);

1.5.9 references to the "**Collateral Directive**" are to Directive nr. 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (as amended);

1.5.10 references to "**COMI**" are to the centre of main interests, as defined in article 3(1) of the Recast Insolvency Regulation;[5]

1.5.11 "**Commencement Time**" means in respect of Insolvency Proceedings, 00.00 hours of the day of the judgment of bankruptcy or moratorium;

1.5.12 "**Covid-19 Act**" means the Temporary Moratorium of Payments Bill (*Tijdelijke Betalingsuitstelwet 2020*) which is a component of the Temporary Covid-19 Justice and Social Security Act (*Tijdelijke wet COVID-19 SZW en JenV*) entered into effect on 17 December 2020;

1.5.13 references to a "**Credit Institution**" are to a bank (*bank*) as defined in article 1:1 FMSA;

1.5.14 "**CRD IV**" means EU Directive 2013/36/EU of the European Parliament and the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;

1.5.15 "**CRR**" means the EU Regulation 575/2013 of the European Parliament and the Council of 26 June 2013, on prudential requirements for credit institutions and investment firms and amending EMIR;

1.5.16 references to the "**DCC**" are to the Dutch Civil Code (*Burgerlijk Wetboek*);

1.5.17 references to "**Delivery Agreement**" shall have the meaning as set out in paragraph 4.10.1;

1.5.18 references to "**DNB**" are to the Dutch Central Bank (*De Nederlandsche Bank N.V.*);

1.5.19 references to a "**Dutch Company**" are to entities which are a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and which have their COMI in The Netherlands at all relevant times (not being a Dutch Credit Institution, a Dutch Insurance Company or an entity that is a parent company of or affiliated with a Dutch Insurance Company, a Dutch Investment

[5] In the case of a company or other legal person (in the absence of proof to the contrary), there is a rebuttable presumption that such centre is where the registered office of the company is located. This place must, of course, be within a Regulation State.

Firm, an entity that is part of a Dutch investment fund, or a BRRD Entity) and not otherwise subject to any type of regulation that might affect our Opinion Letter;

1.5.20 references to a "**Dutch Credit Institution**" are to a company that is (i) validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap),* a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) or a cooperative (*coöperatie)* and (ii) has a license to engage in the business of a Credit Institution pursuant to article 2:12 of the FMSA;

1.5.21 references to a "**Dutch Insurance Company**" are to a company that (i) is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) and (ii) has a license to engage in the business of an insurance company pursuant to article 2:31 of the FMSA (not being a BRRD Entity);

1.5.22 references to a "**Dutch Investment Firm**" are to a company that (i) is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and (ii) is licensed as an investment firm (*beleggingsonderneming*) under Article 2:99 FMSA; a Dutch Investment Firm may include a securities broker/dealer;

1.5.23 the "**EEA**" means the European Economic Area;

1.5.24 a reference to an "**EEA Credit Institution**" is to an EEA undertaking duly incorporated or organised under the laws of another EEA member state and which qualifies as a credit institution under the EU Banking Co-ordination Directive (2013/36/EU), but which is not a Dutch Credit Institution and which has obtained a banking license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) established or located in this jurisdiction that meets all the requirements of the FMSA for that branch to be lawfully engaged in business in this jurisdiction;

1.5.25 "**EEA Investment Firm**" means an undertaking duly incorporated or organised under the laws of another EEA member state, not being a Dutch Investment Firm and which qualifies as an investment firm under Directive 2014/65/EU on markets in financial instruments and which has obtained an investment firm license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) established or located in this jurisdiction that meets all the requirements of the FMSA for that branch to be lawfully engaged in business in this jurisdiction;

1.5.26 "**EMIR**" means Regulation (EU) 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories;

1.5.27 references to the "**FCA Rules**" are to the rules in Book 7 of the Dutch Civil Code and in the BA that implemented the Collateral Directive into Netherlands law;

1.5.28 "**financial collateral arrangement**" means an arrangement defined as such in the FCA Rules where the parties thereto are qualifying parties for the purposes of such rules and the charged or transferred assets are "financial collateral" as defined by such FCA Rules;

1.5.29 a reference to the "**FMSA**" is to the Dutch Financial Markets Supervision Act (*Wet op het financieel toezicht*), together with all its implementing and subordinate decrees and regulations;

1.5.30 references to a "**Foreign Company**" are to a company (not being an SE, an EEA Credit Institution, an EEA Investment Firm, a Third Country Credit Institution, or a Third Country Investment Firm) incorporated with legal entity status under the laws of another jurisdiction and having a branch or branches established or located in this jurisdiction and if such a company has its COMI in a Regulation State that such Dutch branch will qualify as an "establishment" within the meaning of article 2(10) of the Recast Insolvency Regulation (each, a "**Dutch Branch**");

1.5.31 "**Governing Law**" shall mean either English or German law save in respect of an Underlying Agreement which is an ISDA Master Agreement (which is governed by either English, New York, Irish or French law) or a 2015 NBP Master Agreement (which is governed solely by English law);

1.5.32 references to "**Insolvency**" and "**Insolvency Proceedings**" means the procedures listed in paragraph 4.1.1 (i)-(ii). A Party which is insolvent for the purposes of any insolvency law or otherwise subject to Insolvency Proceedings is referred to as the "**Insolvent Party**" and the other Party is referred to as the "**Solvent Party**";

1.5.33 references to "**Insolvency Representative**" are to a liquidator (*curator*) during a bankruptcy (*faillissement*) or an administrator (*bewindvoerder*) during a moratorium of payments (*surseance van betaling*) in the sense of the BA;

1.5.34 "**Nationalisation Measures**" means measures within the meaning of Chapter 6 of the FMSA (*bijzondere maatregelen*) in respect of a Dutch Credit Institution, a Dutch Investment Firm, and certain other regulated entities not covered by this Opinion Letter;

1.5.35 references to the "**Netting Clause**" are either to Sections 7 and 8 of the MNA or to Sections 3 and 4 of the CPMA or to all such sections as the context may require;

1.5.36 references to a "**Party**" are to a party to the relevant Agreement;

1.5.37 references to "**Purchase Agreements**" shall have the meaning as set out in paragraph 4.10.1;

1.5.38 "**Recast Insolvency Regulation**" means EU Council Regulation 2015/848 on insolvency proceedings (recast);

1.5.39 references to "**Regulation State**" are to The Netherlands and the other member states of the European Union (save for Denmark);

1.5.40 "**Resolution Measures**" has the meaning ascribed in paragraph 4.1.1 below;

1.5.41 "**Resolution Powers**" means in relation to BRRD Entities: (a) the sale of business powers (article 3A:28 FMSA/article 24 SRMR); (b) the bail-in powers (article 3A:44 FMSA/article 26 SRMR) by means of which liabilities owed by a BRRD Entity may be wholly or partially written down, cancelled or modified; (c) the bridge institution powers (article 3A:37 FMSA/article 25 SRMR): (d) the asset separation powers (article 3A:41 FMSA/article 25 SRMR); (e) the pre-resolution mandatory write-down or conversion powers (article 3A:17 FMSA/article 21(1) SRMR) pursuant to which DNB may write down or convert certain of the BRRD Entity's Tier 1 and Tier 2 capital instruments prior to or at the same time as exercising any other Resolution Power;

1.5.42 "**Retroactive Effect Rule**" means the rule that any dispositions of property made or agreements entered into by the Party subject to Insolvency Proceedings after the Commencement Time (if acting without the consent or cooperation of the Insolvency Representative or the court) are void;

1.5.43 "**Rome I**" means Regulation (EC) 593/2008 of the European Parliament and of the Council of 17th June 2008 on the law applicable to contractual obligations;

1.5.44 references to an "**SE**" are to a "*Societas Europaea*" established pursuant to EU Council Regulation No. 2157/2001 of 8 October 2001 on the European Company Statute and which has its statutory seat and its COMI in The Netherlands at all relevant times;

1.5.45 "**SFD**" has the meaning ascribed to it in paragraph 4.9.3 below;

1.5.46 "**SRB**" means the single resolution board established under the SRMR which will be responsible for determining whether an entity within the scope of the SRMR meets the conditions for it to be placed under resolution;

1.5.47 "**SRMR**" means Regulation (EU) 806/2014 of the European Parliament and of the Council of 15th July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010;

1.5.48 "**SSM Regulation**" means Regulation (EU) 1024/2013 of the European Parliament and of the Council of 15th October 2013;

1.5.49 references to the "**Termination Clause**" are to Section 4 of the MNA and to Section 2 of the CPMA;

1.5.50 "**Third Country Credit Institution**" means a Dutch branch of a Credit Institution incorporated with limited liability status in a country that is not a member state of the EEA which branch meets all the requirements of the FMSA in order for it to be lawfully engaged in such banking business in this jurisdiction;

1.5.51 "**Third Country Investment Firm**" means a Dutch branch of an investment firm incorporated with legal entity status in a country that is not a member state of the EEA which branch provides investment services and/or engages in investment activities and is licensed pursuant to Section 2:99 FMSA in order to be lawfully engaged in such investment business in this jurisdiction;

1.5.52 "**this jurisdiction**" and "**The Netherlands**" means the part of the Kingdom of The Netherlands located in Continental Europe (excluding, for the avoidance of doubt, any overseas nations forming part of the Kingdom of The Netherlands such as Aruba, Curacao, and St Maarten and any overseas special municipalities such as Saba, St. Eustatius and Bonaire;

1.5.53 "**Title Transfer Provisions**" shall have the meaning ascribed in paragraph 4.17.2 below;

1.5.54 "**Transactions**" shall have the meaning ascribed in paragraph 2.1.2 below;

1.5.55 "**Underlying Agreements**" shall have the meaning described in subparagraph 2.2.7 below; and

1.5.56 "**WHOA**" means the Act on Court Approved Pre-Insolvency Restructuring Schemes (*Wet Homologatie Onderhands Akkoord*) which has entered into effect on 1st January 2021 and "**WHOA Proceedings**" means composition proceedings as regulated under the WHOA;

1.5.57 references to the "**WUDCI**" are to EU Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions (as amended).

Capitalised terms used herein without definition shall, unless the context otherwise requires, have the same meanings ascribed to them in the Agreements or the Underlying Agreements (as defined herein). Headings are for ease of reference only and shall not affect the interpretation of this Opinion Letter.

1.6 Executive summary

On the basis of the terms of reference and the assumptions in paragraphs 1 and 2 respectively of this Opinion Letter, and subject to the excluded matters and the qualifications set out in paragraphs 3 and 5 below, this is an executive summary of the opinion expressed in paragraph 4 *with regard to close-out netting only*. This executive summary does not form part of this Opinion Letter and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having any interpretative effect on the opinion expressed in paragraph 4 below, which is the only opinion which can be relied upon.

1.6.1 Close out netting in a pre-insolvency situation is generally enforceable, see Part (B) below.

1.6.2 Both clauses with regard to early termination by notice and clauses with regard to automatic close-out, each in the event of Insolvency Proceedings, will generally be upheld by the Netherlands courts, see paragraphs 4.5 and 4.6 below; specific considerations apply to certain types of Transactions, as explained in paragraph 4.5, which are within the scope of Articles 38 and 237 BA as these would be terminated by operation of law; the imposition of Resolution Measures with respect to Dutch Credit Institutions and BRRD

Investment Firms may have a detrimental effect on the ability of the non-Defaulting Party to terminate and close-out Transactions (see paragraph 5.11) because either such termination is disallowed (paragraph 5.11.1) or because the resolution authorities terminated certain or all derivatives transactions with the Dutch Credit Institution or BRRD Investment Firm for purposes of bail-in (paragraph 5.11.7).

1.6.3 Under the laws of this jurisdiction it is not necessary that (i) the individual Transactions, the relevant Underlying Agreement or Additional Netted Agreement and the relevant Master Agreement are part of a single agreement in order for netting under the Netting Clause to be effective or (ii) the Parties to agree to an automatic, rather than an optional, termination of Transactions. If Automatic Close-out is selected to apply, such selection would be enforceable under the laws of this jurisdiction. Individual Transactions within the scope of articles 38/237 BA as referred to in the previous paragraph would still be terminated by operation of law. With respect to certain Counterparties Automatic Close-out cannot be validly agreed.

1.6.4 The determination of the Settlement Amounts and the Final Net Settlement Amount in accordance with the Agreements is generally enforceable in the event of Insolvency Proceedings, see paragraph 4.7 below, but subject to specific considerations with regard to currency, calculation date and interest as set out in subparagraphs 4.7.2, 4.7.3 and 4.7.4 below. These considerations do not all apply in case the Termination and Netting Clauses would be treated as netting arrangements under article 25 WUDCI (durng Insolvency Proceedings with respect to Dutch Credit Institutions and Dutch Investment Firms).

1.6.5 The CSA's are also valid to the extent that they provide for the Base Currency Value of all the Eligible Credit Support provided under the relevant CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee.

1.6.6 The analysis with regard to Insolvency set-off under the Recast Insolvency Regulation and the WUDCI is set out in paragraphs 4.8 and 4.9 below.

2. ASSUMPTIONS

In examining the Agreements and in giving this Opinion Letter, we have, with your permission, made the following assumptions.

2.1 **Assumptions set out in the Instruction Letter**

We have been requested to make the following assumptions for our Opinion Letter:

2.1.1 On the basis of the terms and conditions of the relevant Master Agreement, the relevant Additional Netted Agreement or Underlying Agreement (if applicable) and other relevant factors, and acting in a manner consistent with the intentions stated in the relevant Master Agreement and the relevant Additional Netted Agreement or Underlying Agreement (if applicable), the Parties over time may enter into a number of transactions that are intended to be governed by the relevant Master Agreement either as transactions entered into under the relevant Additional Netted Agreement or Underlying Agreement or as Uncovered Transactions/Additional Netted Agreements (where such Uncovered Transactions/Additional Netted Agreements will only include long form confirmations incorporating, in substantially their original form, the terms and conditions of the Underlying Agreements or Additional Netted Agreement identified below in either Division 1, Part 1, Sections A of the Template Defaults Elections of the CPMA or in the Additional Netted Agreement Rider as Part III of the MNA Election Sheet). The transactions entered into will include any or all of the transactions described in Annex B attached to this Opinion Letter (the "**Transactions**").[6]

2.1.2 Each Underlying Agreement and Uncovered Transaction/Additional Netted Agreement is valid, legally binding and enforceable in accordance with its respective terms and conditions (save as discussed in paragraph 4.8.3(b) below).

2.1.3 Each Close-Out Event specified as applicable pursuant to: (i) in respect of the CPMA, the Election for Division 1, Part II, Section A of the Schedule; or (ii) in respect of the MNA, the Election for Section 3.1, Part I of the Election Sheet is an effective and valid Event of Default under the applicable Underlying Agreement or Additional Netted Agreement.

2.1.4 The relevant Agreements, Underlying Agreements and/or Uncovered Transactions/Additional Netted Agreements are entered into by two Parties, one of which is a Counterparty as mentioned in paragraph 1.4 above.

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6 Some of the Transactions provide for an exchange of cash by both counterparties and others provide for the physical delivery of shares, bonds or commodities (including emission rights) in exchange for cash.

2.1.5 *Insolvency Assumption*. For the purposes of addressing the insolvency related issues under Part (A) below, it is assumed that (i) the Master Agreements are governed by a Governing Law and (ii) after entering into Transactions and prior to the maturity thereof, the Counterparty becomes the subject of Insolvency Proceedings under the insolvency laws of The Netherlands and, subsequent to the commencement of the Insolvency, either the Counterparty or the Insolvency Representative seeks to assume the confirmations representing profitable ("in the money") Transactions for the insolvent Counterparty.

2.1.6 *CSA Assumptions*. For the purposes of addressing the issues under Part (D) below, it is assumed that Eligible Credit Support provided under the CSA's will only take the form of either "cash" as defined in Article 2(d) of the Collateral Directive (hereafter referred to as "**Cash**" or **"Cash Collateral**"; which we assume to be denominated in freely convertible currency and to mean a bank transfer between the account of Party A as Transferor and the account of Party B as Transferee, which latter account is either with Party B itself or under Party B's control) or Letters of Credit. It is furthermore assumed that (i) Party A is at all times the Transferor under the CSA's and (ii) the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral and (iii) Party A is a Counterparty established or incorporated under the laws of this jurisdiction. Party B as Transferee is holding the collateral and applying and using that collateral in a close-out netting event and is an entity incorporated or organized under the laws of a jurisdiction other than The Netherlands.

2.1.7 *Multi-branch assumptions.* For the purposes of addressing the multi-branch issues in Part (C) 4.16 below, it is assumed that a Counterparty is established or incorporated in this jurisdiction, but may have entered into one or more Underlying Agreements, Additional Netted Agreements or Uncovered Transactions through branches or other duly registered offices in other jurisdictions. After entering into these Transactions and prior to the maturity thereof, that Counterparty becomes the subject of Insolvency Proceedings under the laws of this jurisdiction. For the purposes of addressing the multi-branch issues in Part (C) 4.17, it is assumed that a counterparty is a Foreign Company, a EEA Credit Institution or Third Country Credit Institution, an EEA Investment Firm or a Third Country Investment Firm or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than The Netherlands and that it has entered into individual Transactions under some or all Additional Netted Agreements or Underlying Agreements both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of The Netherlands (the "**Dutch Branch**"). After entering into these Transactions and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

2.2 General Assumptions Necessary for Opinion

Furthermore, we have, with your permission, assumed:

2.2.1 that each Party has the capacity, power (corporate, regulatory and otherwise) and authority under all applicable laws to enter into the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction and to perform its obligations thereunder and that each Party has taken all necessary steps validly and lawfully to enter into, execute, deliver and perform the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction and has duly executed the same;

2.2.2 that each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required under all laws of any applicable jurisdiction (including The Netherlands) to enable it lawfully to enter into and perform its obligations under the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction and to ensure the legality, validity, admissibility in evidence or enforceability thereof;

2.2.3 that each Party is duly incorporated as a legal entity and validly existing and in good standing (where such concept is legally relevant to its capacity) under the laws of its jurisdiction of incorporation and of the jurisdiction of its place of business;

2.2.4 the due compliance with all matters (including, without limitation, the obtaining of the necessary consents, licenses, approvals and authorisations, the making of the necessary filings, lodgments, registrations and notifications and the payment of stamp duties and other taxes) under any law other than that of this jurisdiction as may relate to or be required in respect of: (i) the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction, (ii) their lawful execution, (iii) the Parties thereto or other persons affected thereby, (iv) the performance or enforcement by or against the Parties or such other persons, or (v) the creation of valid and legally binding obligations of all Parties to the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction, enforceable against such Parties in accordance with their respective terms;

2.2.5 that execution and performance of the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction are in each Party's corporate interest, and that they have been entered into *bona fide* commercial reasons and on arms' length terms;

2.2.6 that, save as expressly stated otherwise in this Opinion Letter, the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction are governed by the laws of England or Germany (hereinafter (the "**Governing Law**");

2.2.7 that the Agreements provide for the inclusion of some of all of the master agreements described as in Annex A (each such master agreement being an "**Underlying Agreement**") and that each Additional Netted Agreement and each Underlying Agreement is capable of being amended in the manner envisaged by the Agreements;

2.2.8 that, for the purpose of any opinions regarding the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction thereunder, under the Governing Law and all other relevant laws (other than those of this jurisdiction):

(a) the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction create valid and legally binding obligations for both Parties enforceable in accordance with their terms; and

(b) the choice of the Governing Law is a valid and binding selection; and

(c) that each Underlying Agreement, each Uncovered Transaction/ Additional Netted Agreement and each individual Transaction is, as a matter of their governing laws and the Governing Law, validly and effectively amended by, and made subject to, the relevant Master Agreement and are, as amended by such Master Agreement, valid and legally binding between the Parties thereto under all relevant laws; and

(d) each Underlying Agreement and each Uncovered Transaction/ Additional Netted Agreement is capable of being terminated, closed out and liquidated in the manner envisaged by the Agreements and capable of having a Settlement Amount determined; and

(e) the submission by the Parties to the jurisdiction of the London Court of International Arbitration, the German Institute of Arbitration or any other arbitration institute or court, as the case may be with regard to the Agreements, the Underlying Agreements or the Uncovered Transaction/Additional Netted Agreements is legal, valid and binding upon the Parties; and

(f) the Title Transfer Provisions as set out in the CSA's constitute a financial collateral arrangement in the form of a title transfer financial collateral arrangement, or an arrangement of which such a financial collateral arrangement forms part;

and, without prejudice to our opinion under paragraph 4.31 and elsewhere below, that the courts of this jurisdiction will, in giving effect to the choice of law provisions in the Agreements, the Underlying Agreements or the Uncovered Transaction/Additional Netted Agreements apply the Governing Law correctly;

2.2.9 that the Agreements, the Underlying Agreements, the Uncovered Transaction/Additional Netted Agreements and the Transactions are not capable of being voided or otherwise held invalid, null, void, unenforceable or ineffective (in whole or in part) by reason of fraud, error, misrepresentation, coercion, undue influence, illegality, financial assistance, voidable preference or transaction at an undervalue or otherwise whether or not on the insolvency of either of the Parties (except as specifically dealt with in this Opinion Letter);

2.2.10 that each Settlement Amount falling to be determined under an Underlying Agreement or an Uncovered Transaction/Additional Netted Agreement is duly determined in accordance with the provisions thereof;

2.2.11 that under all relevant laws (excluding those of this jurisdiction) the close-out netting procedures incorporated in the Underlying Agreements or the Uncovered Transactions/Additional Netted Agreements are valid and enforceable in Insolvency Proceedings and that the obligation to pay the Settlement Amount calculated under each Underlying Agreement or each Additional Netted Agreement is legally binding and enforceable against the Parties under its governing law(s) and must be deemed to have originated prior to the Insolvency of the Parties under its governing law(s);

2.2.12 that the obligations to pay the Settlement Amount pursuant to each Closed-Out Agreement are legally binding and enforceable and – under all relevant laws other than those of this jurisdiction - capable of being set-off under Section 4 of the CPMA or Section 8 of the MNA and mutual between the Parties in the sense that (a) they are the only two parties involved, (b) claim and counterclaim arise between the Parties acting in the same capacity and as principals and not as agents and each is personally liable as regards obligations owing by it and is personally entitled to the rights corresponding with the other Party's obligations, (c) are not assigned to one of the Parties by a third party and (c) are not assigned, pledged or otherwise encumbered by one of the Parties to a third party or otherwise transferred to a third party;

2.2.13 that the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction are entered into prior to the commencement of any Insolvency Proceedings in respect of either Party and, at the time at which the Agreements, each Underlying Agreement, each Uncovered Transaction/Additional Netted Agreement and each Transaction are entered into, neither Party was aware that an Insolvency petition in respect of the other Party had been filed;

2.2.14 that no further Transactions will be entered into and no further transfers of Eligible Credit Support will be made between the Parties on or after (i) the Commencement Time of the Insolvency Proceedings of the Counterparty or (ii) the moment one Party was aware that an Insolvency petition in respect of the other Party had been filed;

2.2.15 that, without prejudice to paragraph 1.2 above or Part (F) below, none of the terms of the Agreements, the Uncovered Transactions/Additional Netted Agreements, the Underlying Agreements or the Transactions have been or will be altered, varied, waived, discharged or superseded by virtue of any agreement between the Parties and that no supplemental terms and conditions are or will be agreed between the Parties that could affect or qualify our opinion as set out herein;

2.2.16 that (save in relation to any non-performance by one Party which leads to the taking of action by the other Party under the termination and close out provisions of the Agreements) each Party duly performs its obligations undertaken under the Agreements, each Underlying Agreement and each Uncovered Transaction/Additional Netted Agreement in accordance with their respective terms;

2.2.17 that where a Counterparty:

(a) is a Foreign Company: each Dutch Branch will constitute an "establishment" within the meaning of article 2.10 of the Recast Insolvency Regulation;

(b) is an EEA Credit Institution or a Third Country Credit Institution: each branch in this jurisdiction will meet all the requirements of the FMSA in order for that branch to be lawfully engaged in business in this jurisdiction;

(c) is an EEA Investment Firm or a Third Country Investment: each branch in this jurisdiction will meet all the requirements of the FMSA in order for that branch to be lawfully engaged in business in this jurisdiction;

2.2.18 that all Counterparties (except for those referred to in subparagraph 2.2.17 above) have their COMI in The Netherlands at all relevant times so as to permit main Insolvency Proceedings in respect of them to be opened by a Dutch court.

3. SCOPE OF REVIEW / MATTERS EXCLUDED

3.1 Scope of Review

As Dutch lawyers we are not qualified to assess the meaning and consequences of the terms of any of the Agreements under any law other than Netherlands law, in particular, we have made no investigation into any Governing Law as a basis for the opinion expressed hereinafter and do not express or imply an opinion thereon. Accordingly, our review thereof has been limited to the terms of such documents as they appear on the face thereof without reference to the general body of law incorporated into or made applicable to such document by the choice of law clause contained therein.

3.2 No Investigation of Assumptions

Where an assumption is stated to be made in this Opinion Letter, we have not made any investigation or enquiry with respect to the matters that are the subject of such assumption and we express no views as to such matters.

3.3 No Opinion on Individual Transactions

For this Opinion Letter, we have not reviewed the terms of the Underlying Agreements or the Uncovered Transactions/Additional Netted Agreements or any individual Transaction and consequently no opinion is expressed in relation thereto. We also emphasise that a wide variety of Transactions can be entered into, to which special considerations may apply. For this opinion we have not reviewed the terms of any Transaction that may be concluded under any Underlying Agreement or any Uncovered Transactions/Additional Netted Agreement and consequently no opinion is expressed in relation to the binding nature and enforceability of any specific Transaction.

Furthermore, it should be considered in relation to particular Transactions, such as *inter alia* weather transactions and weather options (as described in Annex B), whether these Transactions would qualify as prohibited gaming or wagering.

3.4 **Scope of Opinion**

We opine only as to the validity and effectiveness of the specific provisions of the Agreements as stated in the opinion below. We express no opinion as to the validity or enforceability of any document other than the Agreements. With regard to the CSA's our Opinion Letter is limited to the issues discussed in Part (D) below.

We express no opinion and no opinion is given (or may be inferred or implied):

3.4.1 as to any law other than to the laws of The Netherlands in force as at the date hereof as applied and interpreted according to present published case-law of the Netherlands courts, administrative rulings, and authoritative literature;

3.4.2 that the future or continued performance of any of the obligations of the parties contemplated by the Agreements will not contravene such laws application or interpretation, if such laws, application or interpretation are altered in the future;

3.4.3 with regard to the effect of any systems of law (other than the laws of The Netherlands) even in cases where, under Netherlands law, any foreign law falls to be applied and we assume that no such foreign law would affect or qualify our opinion as set out below;

3.4.4 on the tax laws of The Netherlands or, except as stated otherwise, on international law, including (without limitation) the rules of or promulgated under or by any bi- or multilateral treaty or treaty organisation (unless implemented into the laws of The Netherlands) or on any anti-trust, public procurement, state aid, data protection, privacy, cybersecurity, market abuse or competition laws; or

3.4.5 on any commercial, accounting, regulatory capital, capital adequacy or other non-legal matter or on the ability of any Party to meet its financial or other obligations under the Agreements;

3.4.6 as to any matters of fact;

3.4.7 as to any person or entity other than the Counterparties;

3.4.8 on the effects of any recognition of third country resolution measures in this jurisdiction based upon articles 93/94 BRRD;

3.4.9 as to any Transactions that are accepted, directly or indirectly, for clearing through a central counterparty;

3.4.10 because a letter of credit is issued by a third party issuer in favour of the Party seeking credit support, we shall not address the "transfer" of Letters of Credit. Generally speaking, the characterisation of the provision of Letter of Credit shall be subject to the laws applicable to such Letter of Credit.

3.5 Further Limitations of Scope

3.5.1 Once an amount has been determined under the Netting Clause, the party to whom such amount is payable must seek to enforce that debt, whether by lodgement of a claim against the other Party or otherwise; the ability to actually enforce payment of the amount due will be dependent on the facts of the case. Our opinion in paragraph 4 below is confined to the enforceability of the Netting Clause and accordingly we do not opine on the enforceability of any net amount payable under the Agreements *after giving effect to* the Netting Clause or any right of set-off.

3.5.2 We express no opinion as to whether any party needs to comply with or as to the consequences of non-compliance with any applicable provisions of EMIR and any technical standards made thereunder in respect of anything done by it in relation to or in connection with the Agreements.[7]

3.5.3 There is no case law dealing with the close-out provisions of the Termination Clause or the netting provisions of the Netting Clause, but there is case law on these types of clauses and confirming that these can be validly invoked against an Insolvency Representative in Insolvency Proceedings. We understand, however, that your fundamental requirement is for the validity of those

[7] However, Article 12(3) of EMIR provides that any infringement of the rules under Title II of EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract", consequently any failure by a party to so comply should not make the Master Agreements invalid or unenforceable.

provisions of the Agreements to be substantiated by a written and reasoned opinion.

4. OPINION

Based upon and subject to the foregoing and to the further qualifications set out below and subject to any factual matters, documents or events not disclosed to us, having regard to such legal considerations as we deem relevant, we are on the date hereof of the following opinion.

(A) TERMINATION AND CLOSE-OUT IN THE CONTEXT OF INSOLVENCY

4.1 Dutch Insolvency Proceedings & Resolution Measures

4.1.1 *Bankruptcy, moratorium and resolution measures*

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency procedures to which a Counterparty could become subject in The Netherlands are the following:

(i) bankruptcy (*faillissement*), as referred to in and governed by title I of the BA;

(ii) (except for Dutch Credit Institutions): moratorium of payments (*surseance van betaling*) as referred to in and governed by title II of the BA ;

(iii) in respect of Dutch Companies and Dutch Investment Firms: WHOA Proceedings.

In addition, BRRD Entities can be subject to the following resolution and reorganisation measures:

(iv) the exercise of any Resolution Power by DNB as the national resolution authority for The Netherlands acting either (i) independently or (ii) upon the instructions of the SRB in respect of those BRRD Entities which fall within the scope of the SRMR.[8]

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[8] The SRMR applies to:

Together the procedures referred to under paragraphs (i) and (ii) shall be referred to as "**Insolvency Proceedings**" and those under paragraph (iv) shall be referred to as "**Resolution Measures**". A short overview of the proceedings and measures under (i) to (iv) and the Counterparties to which they can be applied is provided in Appendix A. Appendix A also describes the new temporary Covid-19 Act, under which a Dutch Cpmany can obtain protection from pending bankruptcy petitions for up to 2 months (with two possible extensions by a further 2 months) if it can show that in the absence of government measures to combat Covid-19 it would have had a viable business.

4.1.2 *Retroactive Effect Rule*

In Insolvency Proceedings, a judgment of bankruptcy or moratorium has retroactive effect as from the Commencement Time and the Retro-active Effect Rule applies to any dispositions of property made or agreements entered into by the Party subject to such proceedings after the Commencement Time (if acting without the consent or cooperation of the Insolvency Representative or the court).

4.1.3 *Foreign Companies*

(a) In relation to a Foreign Company, both of the Insolvency procedures described above can apply in respect of its Dutch Branches, subject to the provisions of the Recast Insolvency Regulation. More specific information on the insolvency of Foreign Companies can be found in Appendix A and on Multi-Branch Parties can be found in Part (C) below.

(b) In the absence of a Dutch Branch, the mere fact that certain assets and liabilities of a Foreign Company are located in this jurisdiction, does not give the courts of The Netherlands jurisdiction to declare Insolvency

a. Credit institutions (i.e. banks and certain other deposit-takers), as defined in CRR, in participating member states of the European Union;

b. Parent undertakings, including financial holding companies and mixed financial holding companies, established in one of the participating member states of the European Union, when subject to consolidated supervision carried out by the European Central Bank in accordance with the SSM Regulation establishing the single supervisory mechanism; and

c. Investment firms and financial institutions (each as defined in the CRR) established in participating member states when they are covered by the consolidated supervision of the parent undertaking carried out by the European Central Bank in accordance with the SSM Regulation.

Proceedings with regard to that Foreign Company, whether or not initiated by local creditors. Netherlands courts only have jurisdiction to open Insolvency Proceedings against legal entities having their COMI in The Netherlands and against any legal entity (other than an EEA Credit Institution) that carries on business or professional activities *through a branch office in The Netherlands*.

4.1.4 *EEA Credit Institutions*

In relation to an EEA Credit Institution, no Insolvency Proceedings can be imposed by the courts of this jurisdiction. Reorganisation or liquidation measures with regard to such institutions can only be taken by the authorities of their home member state. Such measures shall include all assets and EU branches of that EEA Credit Institution and must be recognised in The Netherlands and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Credit Institution. Where an EEA Credit Institution is subject to insolvency proceedings in another Regulation State in accordance with (the rules implementing) the WUDCI, the issue of enforceability of the Netting Clauses in insolvency situations must in our view be determined in accordance with the paragraph 4.9 below (replacing all references to Dutch Insolvency law by references to the local insolvency law of the relevant Member State).

4.2 **Cross-category Netting/Split Netting Pools**

There are no rules under Dutch Insolvency law that would lead to a splitting-up or segregation of the portfolio of Transactions under the relevant Underlying Agreement or Additional Netted Agreement into two or more "netting pools". It is possible, however, that:

(i) certain individual Transactions are subject to automatic termination by force of law (see paragraph 4.5 below), while others can still be terminated by notice after the judgment declaring the commencement of Insolvency Proceedings;

(ii) in the special situation outlined in paragraph 4.10, termination of certain individual Transactions may not be possible, while other individual Transactions can be terminated (automatically or by notice); and

(iii) in order to exercise the "bail-in" Resolution Power in respect of Counterparties that are BRRD Entities, DNB/SRB will be empowered to terminate certain derivatives contracts leaving others intact.[9]

4.3 Due Diligence on Insolvency Proceedings

Other than published court judgements and the abbreviated publication thereof in the Official State Gazette (*Staatscourant*), there is no easily accessible and conclusive evidence available in this jurisdiction with respect to Insolvency of Counterparties. In addition, an application for bankruptcy or moratorium of payments is generally not known to the public. Despite not determining this conclusively, the following searches and enquiries evidence to a large extent whether a Counterparty is declared bankrupt or has been granted a moratorium of payments:

4.3.1 an online search can be performed with the Central Insolvency Register (*Centraal Insolventieregister*) referred to in articles 19a and 222b of the BA[10] which can show that a Counterparty has been declared bankrupt or granted a moratorium of payments. There is normally no delay between the bankruptcy or moratorium judgment and its registration in the online register.

4.3.2 the competent Chamber of Commerce[11] (the "**Chamber**") can confirm by telephone that:

(a) a Counterparty has registered a voluntary winding-up resolution;

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9 Under the BRRD, a "*derivative*" is defined by cross-reference to Article 2(5) of EMIR ("a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC [MiFID1] as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006"). This includes most Commodity Transactions (other than spot transactions).

10 www.insolventies.rechtspraak.nl

11 The various chambers of commerce (*kamers van koophandel*) in this jurisdiction maintain a trade register from which information can be derived with regard to *inter alia* incorporation of a Party, its branches, authorised representatives, etc. It is advised to retrieve such information by requesting an extract from the trade register with regard to such Party.

The relevant chamber of commerce also registers (i) a voluntary winding-up resolution of a Party registered with that chamber, (ii) whether that chamber has itself taken any steps to dissolve such Party, (iii) any order placing any assets of such Party under administration (*onder bewindstelling*); and (iv) any order by the relevant court of first instance (*Rechtbank*) for the dissolution (*ontbinding en vereffening*) of such Party. It is advisable to enquire after such registrations, however, any such enquiries do not determine conclusively whether or not the matters or events enquired after have occurred or not. There is no formal register of orders as referred to in (ii), (iii) and (iv) above and therefore any searches made may not be conclusive.

(b) such Chamber is itself taking any steps to have a Counterparty dissolved;

(c) it has registered an order placing any assets of a Counterparty under administration (*onderbewindstelling*); and

(d) there is a registration of any order by the Court of first instance for the dissolution (*ontbinding en vereffening*) of a Counterparty.

For the avoidance of doubt, here is no formal register of judgments, declarations or orders as referred to in (b), (c) or (d) above.

4.3.3 an online search can be performed with the EU Insolvency Register[12] (*EU Insolventieregister*) to verify that in respect of a Counterparty which is subject to the Recast Insolvency Regulation none of the EU Insolvency Procedures have been registered in other EU Member States (other than Denmark).

4.4 Safe harbour for derivatives?

Dutch Insolvency law does not provide for "safe harbour" provisions for certain types of derivatives from which Transactions could benefit, but if a BRRD Entity becomes subject to Resolution Measures, the BRRD and the BRRD Act do have such provisions (also more generic provisions helpful for derivatives such as those safeguarding close-out netting, set-off etc), which we discuss in paragraph 5.11 below.

However, Dutch insolvency law does create two pitfalls that could affect the early termination of certain Transactions:

4.4.1 for those Transactions that are subject to articles 38/237 BA (see our analysis in paragraph 4.5 below), the effect could be that with effect from the Commencement Time, all such outstanding Transactions with a delivery and settlement date after the date of Insolvency are terminated by operation of law;

4.4.2 it is generally held that an option qualifies under the laws of this jurisdiction as an irrevocable offer to enter into an agreement, i.e. in the case of an option the irrevocable offer to buy a certain quantity of underlying against a certain pre-agreed price, the strike price. The acceptance of such offer is considered to occur

12 https://www.rechtspraak.nl/Registers/Paginas/EU-Registraties.aspx

upon the exercise of the option. As a result of the fixation principle (as referred to in subparagraph 4.7.3 below), the rights of creditors are unalterably fixed as of the Commencement Time. This implies, *inter alia,* that in the event of the bankruptcy of a Counterparty that is an option seller, the acceptance of the offer to enter into an agreement is not binding the Insolvent Party's estate after the Commencement Time.[13] For such binding effect of the exercise of an option after the Commencement Time of the Insolvency Proceedings, the cooperation of the Insolvency Representative is required.

4.5 Early termination by notice

*In this paragraph we discuss the issue whether, assuming the Parties have **not** specified that Automatic Close-Out to each Underlying Agreement, the Termination Clauses of the MNA or the CPMA permitting the other Party (the "**Terminating Party**" or "**Closing-Out Party**") to terminate by notice (as described in Section 5.1 of the MNA or Section 2.2 of the CPMA) all the Underlying Agreements (including all Uncovered Transactions / Additional Netted Agreements, if applicable) and all the Transactions done under them upon the occurrence of a Close-Out Event are enforceable under the laws of this jurisdiction.*

4.5.1 *Recognition of Termination by notice*

(a) Dutch contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. Under Dutch law the main principle is that, unless provided otherwise, the commencement of Insolvency Proceedings does not in itself affect existing contracts, in the sense that such proceedings do not change the terms thereof. Dutch Insolvency rules in principle do not affect these termination clauses.

(b) Subject to the considerations with regard to article 38/237 BA (set out in the next paragraph) and - assuming that none of the Transactions qualify as Delivery Agreements as referred to in articles 37b/237b BA (as also explained below) - we are of the opinion that the Termination Clause permitting the Terminating Party to terminate the Underlying Agreements (including all Uncovered Transactions / Additional Netted Agreements, if applicable) and all the Transactions entered into

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[13] Confirmed by the Supreme Court on 5 January 1923, NJ 1923, 359.

thereunder upon the Insolvency of a Counterparty is enforceable under the laws of this jurisdiction.

4.5.2 *Mandatory Automatic Close-out ex lege for forward, physically settled Transactions in Insolvency Proceedings*

(a) However, there are two provisions in the BA, articles 38 and 237 BA, which may cause the mandatory *automatic* close-out of all outstanding Transactions as of the Commencement Time of the Insolvency Proceedings in respect of a Counterparty. Articles 38/237 deal with forward contracts for the future delivery of commodities or securities, which commodities or securities are traded on a public exchange (i.e. the forward contract itself could be OTC) and which contracts have a settlement date falling after the Commencement Time of the Insolvency Proceedings. With effect from the Commencement Time, (i) *all* outstanding forward Transactions falling within articles 38/237 BA are terminated by operation of law and (ii) the Parties' mutual and unperformed settlement and delivery obligations are extinguished automatically. Articles 38/237 BA state that if the Solvent Party suffers any loss as a result, it will have a non-preferred claim for damages against the estate, and *vice versa*. The rationale of these articles is to create certainty with respect to executory contracts containing speculative elements, but relating to commodities having a readily ascertainable market price. Therefore, it may not be required that the commodities having such a market price are actually traded on an exchange.

(b) If a Netherlands court would apply articles 38/237 BA to Transactions (with maturity dates after the Commencement Time), the only practical consequence would be that the non-defaulting party would have no freedom to terminate such Transactions *after* the Insolvency judgment, because the Transactions will have already been automatically terminated with effect from such judgment by operation of Netherlands Insolvency law. The main risk constituted by articles 38/237 BA is that the date of the Insolvency judgment will be imposed by the court for Transactions for which under the terms of the relevant Master Agreement, Underlying Agreement or Additional Netted Agreement a valuation date would apply which is *after* the date of the Insolvency judgment.

(c) Otherwise, the legal consequences when applying either articles 38/237 BA or the Termination and the Netting Clauses of the Master Agreements are essentially the same: the relevant Transactions will be terminated and the mutual obligations converted into an obligation for one of the parties to pay damages. Articles 38 and 237 BA do not provide for the manner in which such damages should be calculated, but, on the basis of the legislative history of these articles, it seems likely that the parties can validly agree on a method of calculating damages when entering into the Master Agreements, the Underlying Agreements, the Uncovered Transactions or the Additional Netted Agreements.

(d) It should be borne in mind that:

(i) only those Transactions which are actually outstanding as of the day of the Insolvency judgment could be affected by articles 38/237 BA; and

(ii) Articles 38/237 BA do not apply to Transactions carried out on an EU financial market (art. 12 Recast Insolvency Regulation) or through an EU payment or settlement system (which includes an EU central counterparty); this Opinion does not deal with such exchange traded derivatives or cleared otc-derivatives.

4.5.3 *Single Agreement?*

It is not required for the enforceability in this jurisdiction of the Termination Clause of the Master Agreements, or to ensure that Close-Out applies to all Transactions, or to safeguard the ability to calculate a net amount that the "single agreement" principle (as provided for in § 12.17 of the MNA and, if so selected in Section 10.6 of the Schedule, in the CPMA) is included in such Master Agreements.

4.6 Automatic Close-Out

In this paragraph we discuss whether, assuming the Parties **have elected** *Automatic Close-Out of each Underlying Agreement (§ 6.1 of the MNA Election Sheet or Division 1, Part II.B of the Schedule) to apply, and/or* ***all*** *of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the Counterparty, the Termination Clauses of the relevant Master Agreement terminating all the Underlying Agreements (including Uncovered Transactions / Additional Netted*

Agreements, if applicable) and all Transactions entered into thereunder upon the occurrence of a Close-Out would be enforceable under the laws of this jurisdiction.

4.6.1 *Recognition of Automatic Close-out*

(a) Under Netherlands law the main principle is that, unless provided otherwise, the commencement of Insolvency Proceedings does not in itself affect existing contracts, in the sense that such proceedings do not change the terms thereof. Automatic close out clauses therefore remain intact.

(b) There is case-law confirming the effectiveness of automatic close out clauses, which operate immediately prior to or upon the Commencement Time of Insolvency Proceedings of one of the Parties. We are also not aware of any basis upon which such automatic close out clauses could violate any mandatory statutory provisions of Dutch law (except in the case of very specific Delivery Agreements, see paragraph 4.10 below). Furthermore, Netherlands contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. In addition thereto, with respect to certain forward contracts, Netherlands Insolvency law itself provides for automatic termination in the event of bankruptcy (article 38/237 BA) of one of the Parties (see subparagraph 4.5.1 above).

(c) On the basis of the arguments set out above, we believe that the Termination Clauses as referred in § 6.1 of the MNA Election Sheet or Division 1, Part II.B of the Schedule automatically terminating all the Underlying Agreements, all Additional Netted Agreements (if any) and all Uncovered Transactions entered into thereunder, upon the occurrence of a Close-Out Event in respect of a Counterparty are enforceable under the laws of this jurisdiction and should be upheld by the Dutch courts and that the Insolvency Representative will not have the opportunity to disclaim or accept individual Transactions depending on their profitability, since no individual Transactions will be outstanding at the time he is appointed. Please refer to paragraph 4.11 below for a particular risk in electing Automatic Close-out when dealing with regulated Counterparties and to paragraph 4.10 below for a particular prohibition of termination in case of Delivery Agreements and Purchase Agreements.

4.6.2 *Single Agreement?*

It is not required for the enforceability in this jurisdiction of the Automatic Close-Out clauses in the Master Agreements, or to ensure that such Close-Out applies to all Transactions, or to safeguard the ability to calculate a net amount that the "single agreement" principle (as provided for in § 12.17 of the MNA and, if so selected in Section 10.6 of the Schedule, in the CPMA) is included in such Master Agreements.

4.7 Determination of Settlement Amounts, Net Set-Off Amount and Final Net Settlement Amount

In this paragraph we discuss whether the Netting Clauses in the Master Agreements providing for the aggregation, netting or offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount are enforceable under the laws of this jurisdiction.

4.7.1 *Determination of the Final Net Settlement Amount*

(a) The determination of the amount due for all Closed-Out Agreements in accordance with the Netting Clauses could, depending on the characterisation under the Governing Law, be treated by the Netherlands courts either:

(i) as an agreed procedure – not involving the legal device of set-off – for arriving at a single net amount representing a Party's damages on Close Out of the relevant Underlying Agreements, Uncovered Transactions, Additional Netted Agreements and the Transaction entered into thereunder; or

(ii) as a contractual set-off of the mutual claims (representing losses and gains) resulting for both Parties from the Settlement Amounts due between them[14] pursuant to the Close Out of the various Underlying Agreements, Uncovered Transactions,

[14] Under Section 3 of the CPMA and Section 7 of the MNA, the Settlement Amount for each Underlying Agreement and each Additional Netted Agreement shall be determined in accordance with the terms of the Closed Out Agreement. Since we have assumed that the close-out netting procedures incorporated in each of the Underlying Agreements and each of the Additional Netted Agreements are valid and enforceable in Insolvency Proceedings and the obligation to pay the Settlement Amount under each Underlying Agreement is legally binding and enforceable against the Parties under its Governing Law, we will not deal with issues related thereto in this Opinion Letter.

Additional Netted Agreements and the Transaction entered into thereunder.

(b) As to (a)(i) above:

Under the laws of this jurisdiction there is no rule of law that, as a matter of principle, invalidates a calculation of damages that is valid under the Governing Law. Dutch law allows parties to stipulate in advance how damages will be calculated in case of early termination of certain or all Transactions, due to breach or otherwise. In Insolvency Proceedings, such agreements are effective. However, it is conceivable that the Dutch courts would test whether mandatory Insolvency set-off provisions are compatible with (i.e. achieve a result similar to) the determination of the Final Net Settlement Amount as set out in the Netting Clauses (see below).

(c) As to (a)(ii) above:

The netting and set-off as envisaged in the Netting Clauses does not appear to lead to a result contrary to mandatory Netherlands Insolvency set-off provisions. In the event that a creditor of an insolvent debtor is also the latter's debtor, the BA (article 53 for bankruptcy and article 234 for moratorium) allows this creditor/debtor to plead a set-off **provided that** his claim(s) and his obligations (expressed in the same currency or "generic consideration"):

(i) have come into existence before the date of the Insolvency; *or*

(ii) resulted directly from (one or more) transactions with the bankrupt entered into prior to the date of the judgement opening Insolvency Proceedings.

Insolvency set-off is therefore allowed and contractual set-off arrangements can be enforced in Insolvency Proceedings, **provided that** (a) claim and counterclaim have "pre-insolvency origins" and (b) there is "mutuality", i.e. debtor and creditor under the cross-claims must be the same persons or entities and (c) the claim and counterclaim are expressed in the same currency or "generic consideration".[15] To the extent that either the claim or the counterclaim does not originate from pre-insolvency transactions or there is no such mutuality or single currency, a contractual set-off will not be effective in Insolvency. For the purpose of this Opinion Letter, we have assumed that there will be mutuality between the Parties.[16] Equally, we have assumed that none of the transactions subject to the Close-Out will have been entered into between the Parties, and none of the counterclaims shall have arisen under legal relationships originated, after the Commencement Time in relation to the Insolvent Party. We also understand that the Master Agreements and the Underlying Agreements provide for conversion by the Terminating Party of all amounts due and payable into a single currency in accordance with a pre-agreed conversion rate of exchange which will satisfy requirement (c).

(d) The general principles outlined above lead to the conclusion that (subject to our observations in subparagraphs 4.7.2, 4.7.3 and 4.7.4 below) the Netting Clauses will be recognised and are enforceable in Insolvency Proceedings, **provided that** all Settlement Amounts used for calculating the Final Net Settlement Amount have "pre-insolvency origins".

(e) Furthermore, for set-off to be effective, it is not necessary under the laws of the Netherlands to file, register or otherwise record in any public office or elsewhere the claim and counterclaim or to comply with any other formality in the Netherlands in relation thereto.

4.7.2 *Currency*

In this subparagraph we discuss whether the provisions of each Master Agreement providing for the calculation of a single Final Net Settlement Amount (Sections 3 and 4 of the CPMA / Sections 7 and 8 of the MNA) upon the

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15 The mandatory mutuality requirement has been slightly relaxed in recent Supreme Court caselaw that upheld multi-party insolvency contractual set-off (*HR 15 November 2019, JOR 2020/22, RI 2020/3*).

16 We note that as a result of assignment under Section 7 of the CPMA the mutuality required for set off could be jeopardised if not all (rights arising under all) Underlying Agreements and the CPMA are assigned to the same person. Thus, an election prohibiting assignment would have a beneficial effect in safeguarding mutuality.

insolvency of a Counterparty would be enforceable in Insolvency Proceedings under the laws of this jurisdiction.

(a) In the event of Insolvency of a Party in this jurisdiction, any amount payable by the Insolvent Party should be filed with the Insolvency Representative in its equivalent in Euro (converted at the exchange rate prevailing on the date of the Insolvency judgment). This is a result of the application of article 133 and/or 260 BA. It is not possible to obtain a payment from the Insolvency Representative in a currency other than the lawful currency of the Netherlands. The BA is unclear as to whether an official exchange rate is to be used, or a rate determined by the Closing-Out Party in accordance with Section 3.2 of the CPMA or Section 7.2 of the MNA. Therefore, the provisions in the Agreement for the time and rate of conversion of the Settlement Amount into the Base Currency may, in Insolvency Proceedings in this jurisdiction, be superseded by a conversion, or conversions, at the time and rate specified by the Insolvency Representative.

(b) On the basis of articles 53/234 BA in combination with articles 133/260 BA, it *might* be argued that in case of Insolvency Proceedings in this jurisdiction, the calculation to be effected pursuant to the Netting Clauses should be made in Euro instead of any other Base Currency. On the basis of this argument, any claims of the Non-Defaulting Party on the Insolvent Party would by operation of law be converted in Euro whereas any claims of the latter on the former would remain in the Base Currency[17]. If the Base Currency is not the Euro, this could theoretically have the result that such claims cannot be set off, since the requirement that such claims should correspond to each other is not met.

(c) The better and more commonly held view, however, is that insolvency set-off under articles 53/234 BA operates, in effect, outside the Insolvent estate and therefore would not cause the monetary claims which are the subject of such set-off to be "admitted" in the Insolvency Proceedings, thereby causing section 133/260 BA to be applicable.

17 It should be noted that articles 133 and/or 260 BA only refers to claims to be "verified" by the Insolvency Representative, i.e. claims of the creditors of the Insolvent Party. With regard to claims of the Insolvent Party itself it is therefore not entirely clear whether the mechanism of articles 133 and/or 260 BA applies.

(d) Furthermore, in our view:

(i) the contractual arrangements providing for conversion of other currencies into the Base Currency would be binding upon the Insolvency Representative, that representative in this respect being in the same contractual position as the Insolvent Party; and

(ii) the only consequence of articles 133/260 BA is that the amount resulting from the Section 4 of the CPMA, if any such amount is owed by the Insolvent Party, must be converted in Euro at the market rate of exchange prevailing on the Commencement Time, in order to be admitted in the Insolvency Proceedings.

In other words, we think that it is, as a matter of Netherlands insolvency law, unlikely that the application of a Base Currency other than Euro (*e.g.*, USD) would frustrate the operation of the Netting Clauses during Insolvency Proceedings.

4.7.3 *Date of Calculation under Netting Clauses*

All calculations under the Netting Clauses may have to be made by reference to a date not later than the date on which the Insolvency Proceedings were opened.[18] Although there is no express provision in the BA stating this, it is held that as a general rule an Insolvency judgment fixes the rights of the creditors unalterably as of the Commencement Time. Any amount by which any Settlement Amount, any Net Set-Off Amounts and/or any Final Net Settlement Amount increased between the Commencement Time and the later date by reference to which the Solvent Party made its calculation, may not be recoverable (or indeed included in the netting, aggregation and set-off process contemplated under the Master Agreements). Accordingly, all amounts included in the calculations or the set-off under the Netting Clauses may have to be calculated by reference to a date not later than the insolvency judgment date which may occur prior to the date of close out and/or the valuation date for the purpose of netting. This risk does not arise in case the Insolvent Party is a

18 This is a result of the so-called *fixation principle*. Although there is no express provision in the BA stating this (see however e.g. Supreme Court 18 December 1987 NJ 1988, 340), it is held that as a general rule the insolvency judgment fixes the rights of the creditors unalterably as of the Commencement Time. Please note that in our opinion this fixation principle does *not* prevent a Party to give a notice of termination after the bankruptcy date.

Dutch Credit Institution or a Dutch Investment Firm and the Netting Clause is treated as a 'netting arrangement' under the WUDCI (see paragraph 4.9 below). The risk is furthermore somewhat mitigated, regardless of what type of Counterparty is insolvent, where the CSA qualifies as a financial collateral arrangement.[19]

4.7.4 *Accrual of interest*

(a) Interest accruing after the Commencement Time cannot be admitted on a claim against the Insolvency Party, unless the claim is secured by a right of pledge or mortgage (article 128/260 BA). If a moratorium is converted into a bankruptcy proceeding, the interest that accrued during the former can be admitted in the latter.

(b) Although article 53 BA does not provide for the applicability of this provision *per analogiam* on set-off, there is a remote risk that the claim for interest accruing after the date of the Insolvency judgment may not be capable of being taken into account for set-off purposes. This could mean that there is a risk that if interest, accrued after the date on which Insolvency is declared, is included in the netting, aggregation or set-off as referred to in the Netting Clauses, the claim for such post Insolvency interest may not be capable of being taken into account for set-off purposes.

(c) The better view, however, is that (a) insolvency set-off governed by articles 53/234 BA operates, in effect, outside the Insolvent estate and therefore would not cause the monetary claims which are the subject of such set-off to be "admitted" in the Insolvency Proceedings, thereby causing section 128/260 BA to be applicable and (b) the only consequence of articles 128/260 BA is that the net amount resulting from the set-off, if any such amount is owed by the Insolvent Counterparty, will not be capable of accruing interest after the Commencement Time of the bankruptcy judgment, unless the Solvent Party has a security interest in respect of that amount. Therefore, Section

19 The Retroactive Effect Rule is partially disapplied for financial collateral arrangements and for acts performed pursuant to such arrangements (e.g. transfer of additional Collateral) in that: (i) the actual time of the judgment applies, instead of the Commencement Time, to such financial collateral arrangements and acts; and (ii) if such financial collateral arrangements or acts were entered into, or took place, on the same day as the judgment opening the Insolvency Proceedings, they are valid provided the other party is able to show that it was not aware, nor should have been aware, of such judgment.

4.5 of the CPMA and Section 8.4 of the MNA with regard to interest accruing on the Settlement Amounts, Net Set-off Amounts and Final Net Settlement Amount may not be enforceable in respect of interest accruing after the Commencement Time of the bankruptcy judgment.

4.8 Effect of the Recast Insolvency Regulation

4.8.1 *Scope*

Where a Party is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking ("**Excluded Entities**"), and its COMI is in a Regulation State, the Recast Insolvency Regulation will apply. Therefore, the Recast Insolvency Regulation is applicable to:

(a) a Counterparty which is a Dutch Company whose COMI is situated in The Netherlands; and

(b) a Counterparty which is a Foreign Company whose COMI is situated in another Regulation State in the event that "territorial" or "secondary proceedings" are opened in respect of its branches in this jurisdiction;

but not to:

(i) Insolvency Proceedings in this jurisdiction involving Dutch Credit Institutions, Dutch Insurance Companies, Dutch Investment Firms (or any other Dutch entity, institution or undertaking covered by the WUDCI)[20], Third Country Credit Institutions or Third Country Insurance Companies; or

(ii) Insolvency proceedings or reorganisation measures (as referred to in the WUDCI) taken by the home Member State of an EEA Credit Institution or EEA Investment Firm in respect of that EEA Credit Institution or EEA Investment Firm.

20 The WUDCI was amended by article 117 BRRD to cover investment firms as defined in article 4(1) of CRR (which refers to entities as defined in article 4(1) of MiFID1, therefore the same as Dutch Investment Firms and EEA Investment Firms.

4.8.2 *Treatment as Set-Off*

(a) In the event that the Recast Insolvency Regulation applies to Insolvency Proceedings in this jurisdiction ***and*** the Netting Clauses would be treated as contractual set-off arrangements by the courts in this jurisdiction, a set-off is permitted in each of the two following situations:

(i) if it is permitted under Dutch insolvency law (article 7.2(d) Recast Insolvency Regulation); or

(ii) if it is permitted by the insolvency rules of the Governing Law that is applicable to the insolvent debtor's claim (article 9(1) Recast Insolvency Regulation) even if not permitted under Dutch law.

(b) Consequently, in principle the Insolvency laws of this jurisdiction would determine whether a set-off is permitted, and if not, such a set-off may still be valid if permitted under the insolvency rules of the Governing Law even if Netherlands insolvency law would not allow a set-off as may be agreed between the Parties to the Agreements. Thus, a set-off which is not possible due the Dutch law restrictions mentioned in paragraph 4.7.1 – 4.7.4 above (but probably not if the restrictions arise under 4.7.3[21]), may still be accepted by the courts of this jurisdiction if it is permitted under the insolvency rules of the Governing Law.[22]/[23]

[21] There are some limitations of Dutch insolvency law which may adversely affect the enforceability of netting or set-off pursuant to the Netting Provisions, even when a set-off would be permitted as a matter of the insolvency rules of German law. Dutch courts could give effect to these limitations, in particular when they can be regarded as an expression of overriding principles (e.g. the 'fixation principle'; paragraph 4.7.3 above) prevailing in Dutch insolvency law, or because the results reached by the Governing Law's insolvency rules would be manifestly incompatible with Dutch public policy (Article 27 Recast Insolvency Regulation).

[22] This is sustained by analogy by the interpretation of article 16 Recast Insolvency Regulation given in Dutch (Supreme Court and lower) case law and by the Virgós/Schmit Report. Article 16 Recast Insolvency Regulation protects the rights of counterparties to transactions that could be challenged on the basis of "voidable preference" in the same manner as article 9(1) Recast Insolvency Regulation does, i.e. by giving the *lex contractus* overriding effect if the *lex concursus* would permit such a challenge. Pursuant to unwritten Dutch international private law, article 16 Recast Insolvency Regulation also applies if the Governing Law is non-EU law.

[23] This analysis also applies where the Insolvent Party's claims are not governed by an EU system of law. In our view, the right to demand set-off is not limited to situations where the Counterparty's claim is governed by the law of a Member State, but should also be allowed when this claim is governed by the law of a non-member state. Article 9 Recast Insolvency Regulation does not require that this *lex causae* must be the law of a Member State. It does not

4.8.3 *Treatment as Set-Off Uncertain*

(a) However, the courts of this jurisdiction may not apply articles 7.2(d) and 9(1) Recast Insolvency Regulation to the Netting Clauses, particularly if they take the view that such Netting Clauses include features other than set-off[24], *i.e.* a method of valuation of transactions as well as the termination of transactions (see subparagraph 4.7.1(a)(i) above). If this interpretation is followed, articles 7.2(d) and 9(1) Recast Insolvency Regulation will not be applicable to the Netting Clauses and the general rule of article 7 Recast Insolvency Regulation will apply, which means that Dutch Insolvency law shall apply to the effectiveness of these provisions. Please refer to paragraph 4.7.1 above and the restrictions mentioned under paragraphs 4.7.2, 4.7.3 and 4.7.4 above.

(b) We express no opinion on whether or not the courts of this jurisdiction would make any distinction between the concepts of set-off and close-out netting for the purposes of the Recast Insolvency Regulation. We also express no view as to whether the Recast Insolvency Regulation would "validate" invalid netting or set-off under one of the Underlying Agreements or Additional Netted Agreements should such agreements be invalid under their own terms.

(c) Furthermore, for set-off to be effective, it is not necessary under the laws of The Netherlands to file, register or otherwise record in any public office or elsewhere the claim and counterclaim or to comply with any other formality in The Netherlands in relation thereto. It is required, however, to notify the Insolvency Representative that the right to set-off has been exercised.

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explicitly refer to the laws of another Member State while other provisions of the Recast Insolvency Regulation do expressly confine the applicability of a law other than the *lex concursus* to laws of a Member State. Moreover, the case law of the European Court of Justice of 16 January 2014 (*C-328/12 [Ralph Schmid v Lilly Hertel*]) provides an argument that article 9 also applies if the *lex causae* is the law of a third country. This is, in our opinion, the better view.

24 This interpretation is supported by the fact that other EU legislation contains specific rules with respect to netting arrangements while also providing rules for set-off arrangements (*e.g.*, Article 25 WUDCI and the Resolution Safeguards provided pursuant to the BRRD).

4.9 Effect of the WUDCI

4.9.1 *Scope*

In accordance with the WUDCI, the insolvency laws of The Netherlands determine the effects of Insolvency Proceedings on the Agreements and the Netting Clauses with Counterparties that are Dutch Credit Institutions, Dutch Investment Firms[25] or Third Country Credit Institutions.

4.9.2 *Treatment as Set-Off*

If the Netting Clauses would qualify as a set-off arrangement within the meaning of article 23 WUDCI, then in the event Insolvency Proceedings are commenced in this jurisdiction in respect of a Dutch Credit Institution, a Dutch Investment Firm or a Third Country Credit Institution, a set-off is permitted - solely as a matter of the rules implementing the WUDCI - in each of the two following situations:

(a) if it is permitted under Dutch Insolvency law (article 10.2(c) WUDCI); or

(b) if it is permitted by the law applicable to the entity's claim (article 23 WUDCI and article 212(w) BA).[26]

This means that a set-off, as contemplated by the Netting Clauses, will be allowed if and to the extent that it is permitted under the law which governs such entity's claim under the relevant Master Agreement, Underlying

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[25] The WUDCI was amended by article 117 BRRD to cover investment firms as defined in article 4(1) of CRR (which refers to entities as defined in article 4(1) of MiFID1, therefore the same as Dutch Investment Firms and EEA Investment Firms).

[26] In our view, the right to demand set-off is not limited to situations where the Counterparty's Dutch claim is governed by the law of an EU member state (other than Denmark), but should also be allowed when this claim is governed by the law of a non-member state (such as England after Brexit). Neither article 23 WUDCI, nor article 9 Recast Insolvency Regulation nor article 212w BA require that this right of set-off is restricted to the law of an EU member state. However, it has been argued in legal writing that the restriction to the law of an EU member state must be implied in these provisions, because other provisions of the WUDCI and the Recast Insolvency Regulation do expressly confine the applicability of a law other than the lex concursus (article 4) to situations where that other law is the law of an EU member state. Even if this interpretation is correct (which we dispute), the Dutch courts may still apply article 23 WUDCI by way of analogy (i.e. to the situation where the governing law is that of a non-member state), so that set-off may still be possible if permitted under the law of a non-member state.

Agreement or Additional Netted Agreement, even if Dutch Insolvency law would not allow a set-off as contemplated by the Netting Clause.

4.9.3 *Treatment as Netting*

(a) However, if the Netting Clause would be regarded as a "netting agreement" within the meaning of article 25 WUDCI, then in the event Insolvency Proceedings are commenced in respect of a Dutch Credit Institution, a Dutch Investment Firm or a Third Country Credit Institution the effectiveness of the Netting Clause shall be determined *solely* by the Governing Law[27], but without prejudice to the Resolution Measures under articles 3A:51 and 3A:54 FMSA (see paragraph 5.11 below).

(b) Article 25 WUDCI refers to the *lex contractus* as "solely" governing a netting agreement, which implies that the insolvency rules of the Governing Law of the relevant Master Agreement, Underlying Agreement or Uncovered Transaction/Additional Netted Agreement exclusively determines the validity and effectiveness of a netting agreement in the relevant Insolvency Proceedings. Therefore, the restrictions outlined in paragraph 4.7.2, 4.7.3, and 4.7.4 above would then not apply.

(c) We express no view as to whether or not the courts of this jurisdiction would make any distinction between the concepts of set-off and close out netting for the purposes of the WUDCI.

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27 Article 25 WUDCI has been implemented in Article 212ff BA (for bankruptcy). Unfortunately, in both Articles a "netting agreement" is defined by reference to netting of payment or transfer orders in the context of payment or clearing systems designated in accordance with the EU Directive 98/26/EC of the European Parliament and the Council of 19th May 1998 on the Limitations of Systems Risk in Payment and Securities Settlement Systems (the "**SFD**") and it can therefore be argued that The Netherlands has incorrectly implemented the WUDCI in this respect. Only if the Dutch courts would interpret Article 212ff BA in accordance with the WUDCI, would the effectiveness of the Netting Clauses be determined solely by the Governing Law of the relevant Master Agreement, Underlying Agreement or Additional Netted Agreement.

4.10 Termination and Close-Out Rights in respect of Physical Energy Transactions, Cross-Affiliate Situations and Uncovered Transactions

4.10.1 *Special Rules for Physical Energy Transactions*

Special regimes exist in the physical energy market in respect of customers taking physical delivery on a continuous basis and in respect of licensed electricity companies:

(a) There is a risk that certain Transactions that qualify as Delivery Agreements may not be capable of being terminated. Article 37b (for bankruptcy) and article 237b (for moratorium of payments) BA stipulate that in agreements for the continuous physical delivery of gas, water, electricity or heating needed for a customer's primary living needs or for the continuity of his/her business (each a "**Delivery Agreement**") early termination clauses triggered by (a request petitioning) Insolvency Proceedings or the levying of an attachment may only be invoked against customers who or which are subject to Insolvency Proceedings with the consent of the Insolvency Representative. Therefore, insofar as any Transactions under a Underlying Agreement or an Uncovered Transaction/Additional Netted Agreement could be treated as Delivery Agreements where the Insolvent Party is the party taking delivery of gas, water, electricity or heating, early termination clauses triggered by (a request petitioning) Insolvency Proceedings (or an attachment) may only be invoked with the consent of the Insolvency Representative. Consequently, for such physically settled energy Transactions, both automatic and optional termination clauses may not be enforceable in Insolvency Proceedings.[28]

(b) Dutch companies that are licensed under the Electricity Act ("**Electricity Companies**") are subject to certain restrictions in relation to purchase agreements (*inkoopcontracten*) with their suppliers <u>*insofar as*</u> these purchase agreements relate to their delivery of electricity to low-volume end-users (i.e.: households) (such agreements: "**Purchase Agreements**"). Such Electricity Companies are under a statutory

[28] There is no guidance from case law or otherwise as to what constitutes a Delivery Agreement. Although it appears to be unlikely that such Delivery Agreements would be documented between a German energy or heating supplier and its Dutch customer(s) in the form of an Underlying Agreement such as the EFET Gas Contract, it cannot be ruled out and EFET member firms are advised to seek separate advice when in doubt.

obligation to deliver electricity to their end-user clients as long as their license is in effect. They are not permitted to include in such Purchase Agreements any clauses providing for automatic or optional termination or for the deferral of the supplier's obligations if their Insolvency is petitioned or Insolvency Proceedings are opened against them. Therefore, with regard to such Electricity Companies and insofar as a Transaction regarding the *physical delivery of electricity* would qualify as a Purchase Agreement, the Termination Clauses will not be enforceable. The risk this poses is not significant - in our view - because if an Electricity Company becomes subject to Insolvency Proceedings, its license will typically be withdrawn within a period of approximately 10 days (the "**freeze period**") after which the early Termination Clauses under the Agreements will be permitted and in any event all unpaid amounts owing by the Electricity Company in respect of electricity deliveries during the freeze period are automatically guaranteed by the transmission system operator (presently 'TenneT N.V.') as programme responsible party (*programma verant-woordelijkheid*) under the relevant legislation. After early termination becomes effective, the netting may also include amounts due during the freeze period.

4.10.2 *Cross-Affiliate Netting*

As there is now Supreme Court caselaw confirming the validity of multi-party contractual set-off clauses in Insolvency Proceedings (*HR 15 November 2019, JOR 2020/22, RI 2020/3*), the requirement of mutuality for a valid insolvency set-off has been relaxed in cases where there is a contractual arrangement governing multi-party set-off. Before this case-law, it would have been necessary to rely on article 9(1) Recast Insolvency Regulation, article 23 WUDCI or article 25 WUDCI if the insolvency rules of the Governing Law allowed multi-party set-off. In our opinion, merely adding multiple (affiliated) parties to each Master Agreement is not sufficient to achieve the benefit of the new case law; there should be an actual multilateral set-off or netting clause in the relevant Master Agreement.

4.10.3 *Close-Out Netting of Uncovered Transactions*

In respect of the CPMA only, we confirm that as a matter of Dutch law it would appear prudent to elect that close-out netting applies to Uncovered Transactions unless this is not necessary under the Governing Law.

4.11 **Advisability of Automatic Close-Out and Imposing Uniform Default Events**

In this paragraph we discuss whether it is recommended to elect Automatic Close-out to apply upon a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(iii) of the MNA) or similar event.

4.11.1 Whether or not to elect Automatic Close-out to apply upon a Winding-up, Insolvency or Attachment and to modify the scope of this clause depends on a number of factors.

4.11.2 There are two main risks involved in not using Automatic Close-out:

(a) *Firstly*, individual Transactions which are outstanding as of the Commencement Time and which are within the scope of article 38/237 BA (see paragraph 4.5 above) would be terminated by operation of law regardless of whether Automatic Close-out applied or not. In our view, parties who do not apply Automatic Close-out are more likely to overlook the fact that they need to take prompt action to cope with the potentially harmful effects of these articles from the BA.

(b) *Secondly*, for all outstanding individual Transactions at the Commencement – irrespective of whether they are within the scope of article 38/237 BA – the 'fixation principle' enshrined in case law on the BA (see subparagraph 4.7.3 above) could entail that the enforceability of the Netting Clauses may be subject to the limitation that all calculations must be made by reference to a date not later than the date of the insolvency judgment. This means, *inter alia*, that the computation of the Settlement Amounts and the Final Net Settlement Amount calculated in accordance with the Netting Clauses will have to be made on the basis of the rates prevailing on the date of the insolvency judgment. The result would be that the amount by which the net amount owing to the Non-Defaulting Party increased between the judgment date and the later date by reference to which the calculation was made becomes irrecoverable. When Automatic Close-out is applied, all calculations in respect of the Settlement Amounts and the Final Net Settlement Amount will by virtue of the relevant Master Agreement have to be made by reference to the day of the occurrence of the Close-Out Event, while not electing Automatic Close-out: (a) would give the Non-Defaulting Party the freedom to terminate by notice on or after the date of the insolvency judgment, but (b) could also give rise to the mistaken belief that by having the option of giving notice against a later date, the Non-Defaulting Party would be entitled to calculate the Settlement Amounts and the Final Net Settlement Amount by reference to rates and values applicable at such later date (e.g. at the time it concludes a replacement transaction).

4.11.3 There are two main risks involved in using Automatic Close-out:

(a) *Firstly*, the Non-Defaulting Party would not necessarily be apprised immediately of any petition seeking an insolvency judgment or indeed any such judgment regarding the Counterparty, which entails the risk that individual Transactions, Underlying Agreements, Additional Netted Agreements or Master Agreements will have terminated without the its knowledge.

(b) *Secondly*, the defaults triggering Automatic Close-out are so widely drafted that they might (depending on the interpretation under the Governing Law) include "silent administration" (*stille curatele*), which is a form of emergency administration applicable to certain regulated Counterparties in The Netherlands, and of which the other Party would not normally be aware (see paragraph 5.5 below). This would creat the risk that the Non-Defaulting Party might be approached by the administrator with the claim that all Transactions had terminated long ago, without having had an opportunity to mitigate its damages or to unwind related transactions such as hedges. See Appendix B for suggested language.

4.11.4 Whether or not one selects Automatic Close-out is therefore not driven by the need to preserve close-out netting rights in relation to Counterparties, but more by the assessment of the relative weight given to the risks outlined above.

4.11.5 There is no legal necessity under the laws of this jurisdiction of using each Master Agreement to impose uniform default events across all types and categories of trades (effectively superseding the default terms of Underlying 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. Nevertheless, it may be preferred by certain EFET member firms to amend the insolvency events in each Master Agreement so as to exclude and/or capture specific Dutch procedures. See appendix B for suggested language.

(B) TERMINATION AND CLOSE-OUT BASED ON NON-INSOLVENCY RELATED MATERIAL REASONS

4.12 *This Part (B) deals with the following issues:*

4.12.1 *Whether the provisions in § 8 of the MNA and Section 4 of the CPMA providing for the offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount are enforceable under the laws of this jurisdiction.*

4.12.2 *Whether the laws of this jurisdiction would recognize that the Close-Out applies to all Transactions entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement and whether the single agreement concept (as provided for in § 2.3 of the MNA and, if so selected in Section 10.6 of the Schedule, in the CPMA) is necessary in order to preserve the enforceability of the termination right and the ability to calculate a net amount.*

4.12.3 *Whether the Counterparty's obligation to pay the Final Net Settlement Amount in Euro, USD or GBP (as agreed between the Parties in the Election Sheet or the Schedule) is enforceable under the laws of this jurisdiction.*

4.12.4 *Whether the rights of the Terminating Party or Closing-Out Party to terminate and Close-Out Transactions entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement are enforceable in accordance with the terms of the MNA or the CPMA?*

4.13 Pre-Insolvency Termination and Close-Out under the Master Agreements

4.13.1 *Recognition of Choice Of Law*

Regarding the general position on the validity and effectiveness of a contractual choice for a foreign governing law for the Master Agreements, see paragraph 4.31 below.

(a) *Law Applicable to Termination and Close-Out Provisions.*

Pursuant to article 12 of Rome I, the law determined to be applicable to a contract on the basis of Rome I will govern the interpretation and performance of the contract as well as the consequences of nullity or a breach of contract (including the assessment of damages and termination) and the statutory limitations on bringing suit for a breach.

With respect to the Master Agreements this entails that in principle the Governing Law governs the remedies provided to the Parties pursuant thereto[29]. Therefore, if these remedies (including the early termination and close-out netting provisions) are enforceable in accordance with the terms of the Master Agreements under their Governing Law, this will in principle be recognised as valid and enforceable by the courts of The Netherlands.

(b) *Law applicable to set-off*

(i) Prior to Insolvency Proceedings, the provisions on set-off and netting are enforceable under the laws of this jurisdiction on the assumption that they enforceable under the Governing Law of the Master Agreements. We are of this opinion because where the relevant claims subject to set-off arise from the same agreement (or the same framework agreement and a set of Transactions concluded thereunder) and are subject to a contractual set-off arrangement also contained in such agreement, the law governing the agreement governs the set-off between these claims.[30] In this case the set-off and netting provisions are contained in the Master Agreements which are expressed to be subject to the Governing Law, and therefore such law should be applied by the Dutch courts to determine whether the Parties are entitled to a set-off in respect of payments due to each other thereunder.

(ii) In our view (although there is no treaty or statutory provision or case law confirming this), it would likewise follow in the event that the Underlying Agreements or the Uncovered Transactions / Additional Netted Agreements happen to be governed by different laws, that the law by which the relevant Master

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29 Subject to certain mandatory rules or rules of international public policy. The relevant provisions of the Master Agreements do not conflict with any such mandatory rules or rules of international public policy.

30 This follows indirectly from article 17 Rome I, which provides that, where the right to set-off is not agreed between the Parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted. As the text indicates, this conflict rule does not apply where the set-off is agreed between the Parties, as is the case in the Master Agreements. The reasoning behind this presumably is that where set-off has been agreed, the law governing the contract (Articles 3 and 4 Rome I) in which it has been agreed applies to the requirements for a valid set-off. Further support is provided by Article 12(1)(d) Rome I, which provides that the proper law of an agreement governs "the various ways of extinguishing obligations".

Agreement is expressed to be governed should properly determine whether the Settlement Amounts determined under the separate Underlying Agreements may be offset according to the provisions of the relevant Master Agreement.

(iii) Therefore, outside the context of Insolvency Proceedings, the question whether the Parties are entitled to exercise the contractual rights of set-off provided by the relevant Master Agreement (other than by reason of Insolvency) in respect of claims arising between them pursuant to such Master Agreement would be determined exclusively by the Governing Law as the proper law of such Master Agreement.

(iv) The analysis under (i) – (iii) above applies regardless of whether a Transaction is cash or physically settled and regardless of the underlying commodity or product.

(v) As regards the enforceability of the Counterparty's obligation to pay the Final Net Settlement Amount in Euro, USD or GBP (as agreed between the Parties in the Election Sheet or the Schedule), the Dutch courts have powers, if so requested, to make an award in a foreign currency; however, please note that enforcement of a judgment for a sum of money expressed in foreign currency against the Dutch Counterparty's assets located in The Netherlands would be executed in terms of Euro and the applicable rate of exchange would be that prevailing on the date of payment.

4.14 Pre-Insolvency Termination and Close-Out if Master Agreements were governed by the laws of The Netherlands

4.14.1 *Pre-Insolvency Close-Out*

(a) There is no published case-law of the Dutch courts directly dealing with the effectiveness of the Master Agreements' Termination and Netting Clauses, but there is case law upholding the effectiveness of these types of clauses and confirming that these can be validly invoked against an Insolvency Representative in Insolvency Proceedings. These clauses qualify as dissolving conditions in respect of the Parties' scheduled future obligations, i.e. the occurrence of certain events will constitute a condition ("trigger") for the contract's dissolution. Under Netherlands contract law any future contingency can be made a dissolving condition, unless it violates a statutory provision or public policy. We are not aware of any basis upon which the Termination Clause could violate such provision or public policy. Furthermore, Netherlands contract law recognises termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. In addition thereto, with respect to certain futures contracts the BA itself provides for automatic termination in the event of bankruptcy (Article 38 BA) or moratorium (Article 237 BA) of one of the Parties (see paragraph 4.5.2).

(b) The determination of the Settlement Amount due for each Closed-Out Agreement in accordance with the relevant Master Agreement could be treated by the Netherlands courts either (i) as an agreed procedure – not involving the legal device of set-off – for arriving at an amount representing a party’s damages on Close Out of certain or all Transactions under the relevant Underlying Agreement or Additional Netted Agreement, or (ii) as a contractual set-off of the mutual claims (representing losses and gains) resulting for both parties from individual terminated Transactions pursuant to the relevant Underlying Agreement or Additional Netted Agreement.

(c) *As regards (i):* Netherlands law allows parties to stipulate in advance how damages will be calculated in case of early termination of certain or all transactions, due to breach or otherwise.

(d) *As regards (ii):* see paragraph 4.11.2(b) above.

4.14.2 *Pre-Insolvency set off*

(a) The statutory provisions in this jurisdiction concerning set-off are of a non-mandatory nature. Article 6:127 DCC provides that where two parties are each others' mutual creditor and debtor, each of these parties can, *by means of a declaration to the other*, in principle set off the mutual claims up to the amount which they have in common. Outside Insolvency Proceedings (in addition to the requirement that there should be a declaration by the party invoking set-off, there being no requirement as to the form of such declaration, **provided that** the message has reached the other party) the following requirements apply to set-off:

(i) the parties have to be each others' mutual creditor and debtor and are acting in the same capacities;

(ii) the mutual claims should correspond to each other (i.e. in case of monetary claims, the claims should as a general rule be expressed in the same currency);

(iii) the party invoking set-off is entitled to pay his debt (e.g. the debt has matured or may be prepaid); and

(iv) the counter-claim of the party invoking set-off is enforceable.

(b) Since the provisions of article 6:127 DCC are of a non-mandatory nature, the Parties may agree on a set-off arrangement which is broader than as set out therein, e.g. the set-off of obligations of multiple parties even if between such multiple parties the mutuality of claim and counterclaim is lacking.

(c) Despite the requirement set out in paragraph (a) above, set-off by a debtor is allowed of (i) claims that are transferred under Section 7 CPMA by the debtor´s creditor to a third party with (ii) counterclaims such debtor may have on the original creditor, provided such counterclaims arise under the same contractual relationship as the transferred claim or such counterclaims were already due and payable before the transfer. Therefore, if a Party would transfer its rights under a Underlying Agreement to another party, the other Party could still invoke set-off of counterclaims that have risen under that Underlying Agreement, regardless of the transfer.[31]

(d) *Single Agreement Concept?* It is not required for the enforceability in this jurisdiction of the Termination Clause of the Master Agreements, or to ensure that Close-Out applies to all Transactions, or to safeguard the ability to calculate a net amount to include the "single agreement" principle (as provided for in § 2.3 of the MNA and, if so selected in Section 10.6 of the Schedule, in the CPMA) into such Master Agreements. Also, all or some individual Transactions may be terminated if a Material Reason occurs.

(e) *Transactions Covered by Master Agreement?* The question whether a Transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement is validly included in each Master Agreement is entirely dependent on the outcome under either the Governing Law of such documents including the question whether there is any difference in case 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.

(C) MULTI-BRANCH PARTIES

4.15 Netherlands Multibranch Party

4.15.1 *In this paragraph we will discuss whether there would be any change in our conclusions expressed in Part (A) above concerning the enforceability of the Termination and Netting Clauses under the Master Agreements (given the assumption in subparagraph 2.1.7 above) based upon the fact that Party A is a Counterparty incorporated and having its COMI in this jurisdiction and has conducted business under some or all of the Underlying Agreements or Additional Netted Agreements on a multibranch basis (i.e. through its offices in The Netherlands as well as through one or more branches located abroad) prior to its insolvency? Also, would the MNA and, if so selected in Section 10.6 of the Schedule, the CPMA be treated as a single unified agreement by the Insolvency Representative under the laws of The Netherlands, regardless of the treatment*

[31] This follows from article 6:130 DCC, which does not apply in the event of Insolvency.

of the MNA or the CPMA or Transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?

4.15.2 We do not consider that the use of a Master Agreement with offices of a Counterparty incorporated under the laws of this jurisdiction but with branch offices in a number of different jurisdictions, including some where netting may not be effective (e.g. where an insolvency official in those jurisdictions may be entitled to "cherry-pick" obligations), would jeopardise the effectiveness of the Termination Clause or the Netting Clauses (as explained in Part (A) above) in the event that such a Counterparty became subject to Insolvency Proceedings in this jurisdiction. In particular, there is no danger that an Insolvency Representative of such an Insolvent Party could treat the obligations in respect of individual Transactions entered into in this jurisdiction separately from other obligations arising under the Master Agreements or the Underlying Agreements or other individual Transactions entered into through branch offices outside this jurisdiction.

4.15.3 Where a Party is incorporated under the laws of - and has its COMI in - this jurisdiction and has offices in a number of other jurisdictions, an Insolvency Representative is required in Insolvency Proceedings conducted under the laws of this jurisdiction to include obligations arising from all transactions (regardless of the office from which they were entered into) in the calculation of amounts owed to and from the Insolvent Party and would (subject to our observations in paragraphs 4.5, 4.6 and 4.7 above) be bound by the provisions of the CPMA and the MNA in accordance with their respective terms.

4.15.4 For Counterparties that are:

(a) subject to the Recast Insolvency Regulation, this rule follows from article 3 Recast Insolvency Regulation; insolvency proceedings may be opened by the courts of the Regulation State where a debtor has its COMI and such proceedings shall have universal effect throughout the other Regulation States, i.e. (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be located, unless a "secondary insolvency proceeding" is opened in another Regulation State (except as otherwise provided in the Recast Insolvency Regulation);

(b) Dutch Credit Institution or Dutch Investment Firms: this rule follows from the WUDCI.

4.15.5 We believe that in Insolvency Proceedings before the Dutch courts, the insolvency law applicable in the jurisdiction of the non-netting branches is irrelevant in this respect and that the conclusions reached in this Opinion concerning the enforceability of the Netting Clauses should remain the same.

4.15.6 The "single agreement" concept is also not relevant for this paragraph of our Opinion Letter (see paragraphs 4.5.2, 4.6.2 and 4.14.2(d)).

4.16 **Foreign Multibranch Party**

4.16.1 *In this subparagraph we discuss whether separate proceedings could be brought in this jurisdiction with respect to assets and liabilities of the branch located in this jurisdiction of a Foreign Company upon the commencement of insolvency proceedings against such Foreign Company in that Foreign Company's own jurisdiction. Our discussion will include (i) how the relevant authorities in this 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 Foreign Company and (ii) whether or not in our opinion local creditors of the branch would be able to initiate separate proceedings in this jurisdiction even if the relevant authorities did not do so.*

(a) As mentioned in paragraph 4.1.2(b) above, Netherlands courts only have jurisdiction to open Insolvency Proceedings against any foreign legal entity (other than an EEA Credit Institution and an EEA Investment Firm in certain scenarios) that carries on business or professional activities *through a branch office in The Netherlands*. Therefore one must distinguish between the following situations:

(b) ***COMI in a Regulation State/establishment in The Netherlands:*** If a Foreign Company's COMI is located in a Regulation State, then, pursuant to Article 3 Recast Insolvency Regulation, insolvency proceedings may only be opened by the courts of that Regulation State and such proceedings have universal effect throughout the other Regulation States, i.e. (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be located (except as otherwise provided in the Recast Insolvency Regulation). Consequently, the courts of another Regulation State:

(i) must recognize any insolvency proceedings opened by such courts as having effect also in their jurisdiction (i.e. such insolvency proceedings must be given effect by such courts) and the applicable law of such main insolvency proceedings will be the law of the Regulation State where the COMI is situated;

(ii) may open "territorial proceedings" or, after the commencement of main proceedings "secondary proceedings" in the event that such a Foreign Company possesses an "establishment" in the territory of such other Regulation State. The applicable law of such territorial or secondary insolvency proceedings will be the law of that other Regulation State .

Thus, if a Foreign Company:

(iii) is declared insolvent in accordance with the Recast Insolvency Regulation in a Regulation State where its COMI is situated, the enforceability of the Netting Clauses must in our view be determined in accordance with the law of such Regulation State;

(iv) has a Dutch Branch, the Dutch courts would be competent to open territorial or secondary Insolvency Proceedings pursuant to the Recast Insolvency Regulation in respect of the assets of that Dutch Branch. The applicable law with respect to such Insolvency Proceedings will be Dutch law and such Insolvency Proceedings will be territorial in scope, meaning that the effect of such proceedings will be restricted to the Foreign Company's assets situated in this jurisdiction; it should be noted that the determination of the "location" of a contract is not free from doubt[32].

(c) If no territorial insolvency proceedings are opened in this jurisdiction, the courts of this jurisdiction will recognise the effects of the insolvency proceedings opened in the Foreign Company's home jurisdiction, also in relation to the assets and liabilities of the Dutch branch. These effects will also be recognised, when territorial insolvency proceedings have been opened in this jurisdiction, in relation to any assets located outside this jurisdiction (the location of assets does not depend for these

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32 Art. 3.2 and 27 of the Recast Insolvency Regulation.

purposes on whether they are allocable to the business of the Dutch branch, but on certain objective tests such as the physical location of tangible property or the place of principal establishment of the debtor of a claim).

(d) ***EEA Credit Institution:*** In relation to an EEA Credit Institution, neither bankruptcy nor moratorium can be imposed in this jurisdiction with respect to their Dutch branch office(s). Reorganisation or liquidation measures with regard to such institutions should be taken by the authorities of their home member state. Such measures shall include all assets and EU branches of that EEA Credit Institution and must be recognised in The Netherlands and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Credit Institution. Where any EEA Credit Institution is subject to insolvency proceedings in another Member State in accordance with (the rules implementing) the WUDCI the enforceability of the Netting Clauses in insolvency situations must in our view be determined in accordance with paragraph 4.9 above.

(e) ***EEA Investment Firm:*** In relation to an EEA Investment Firm, Insolvency Proceedings can be imposed by the courts of this jurisdiction upon DNB's request. Reorganisation or liquidation measures with regard to such institutions can also be taken by the authorities of their home member state and will in that case include all assets and EU branches of that EEA Investment Firm and must be recognised in The Netherlands[33] and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Investment Firm. Where any EEA Investment Firm is subject to insolvency proceedings in another Member State, the issue of enforceability of the Netting Clauses in insolvency situations must in our view be determined in accordance with paragraph 4.9 above.

(f) ***Foreign Company with COMI outside a Regulation State:*** The Recast Insolvency Regulation is not applicable to insolvency proceedings where the Foreign Company's COMI is situated outside the jurisdiction

[33] Articles 212s, 212t and 212oo BA.

of the Regulation States (recital 14 of the Recast Insolvency Regulation), so that it does not govern:

(i) the consequences of the opening of an insolvency proceeding in a Regulation State concerning a Party whose COMI is situated outside the Regulation States, and

(ii) the consequences of the opening of an insolvency proceeding in third party states (*i.e.* Denmark and any other States).

(g) To what extent foreign insolvency proceedings of foreign companies whose COMI is situated outside the Regulation States are recognised in The Netherlands, is unclear. It appears from Supreme Court case law that, absent international treaty provisions to the contrary, such foreign insolvency proceedings in principle have no extra-territorial effect in this jurisdiction.

(h) This means that:

(i) the foreign general attachment of the insolvent Foreign Company's estate (or similar effects, such as the transfer of the estate to a receiver in bankruptcy) does not include the assets of the debtor that are situated in The Netherlands;

(ii) in principle, the legal effects of insolvency proceedings under foreign insolvency laws cannot be invoked in The Netherlands;

(iii) creditors of the Foreign Company can petition the Dutch courts to open Insolvency Proceedings in respect of that Foreign Company's Dutch branch office (article 2(4) BA).

Although Netherlands international insolvency law is based on the territorial effect of foreign insolvency proceedings, this does not mean that these proceedings receive no recognition at all. The foreign receiver generally has *locus standi* in The Netherlands. The powers granted to a liquidator by the foreign *lex concursus* should therefore in principle be recognised in The Netherlands. Also in other respects foreign insolvencies can have legal consequences in The Netherlands. It could be argued that the legal consequences created by the foreign insolvency law can be recognised in The Netherlands, as long as (i) they are not closely connected with the fact that the foreign insolvency must be regarded as a general attachment on the insolvent company's assets for the benefit of all his creditors, and (ii) this does not lead to unsatisfied creditors no longer having recourse in respect of assets of the insolvent company that are situated in The Netherlands.

4.16.2 *In this subparagraph we discuss the question whether, if separate proceedings are brought in this jurisdiction with respect to the assets and liabilities of the Dutch Branch, the Insolvency Representative or the Dutch courts would include Party F's position under the Underlying Agreements or the Additional Netted Agreements, in whole or in part, among the assets of the Dutch Branch and, if so, whether the Insolvency Representative or the Dutch courts would recognize the close-out netting provisions of the relevant Master Agreement in accordance with their terms? In particular, could the situation arise that an Insolvency Representative or court (considering a single Master Agreement) would require a counterparty of the Dutch Branch of Party F to pay the mark-to-market value of Transactions entered into with the Dutch Branch to the Insolvency Representative of the Dutch Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Transactions with Party F under the same Master Agreement (assuming that close-out netting under the Master Agreement would be enforced in accordance with its terms in the insolvency proceedings for Party F in Country H)?*

(a) Under Dutch law, a branch is not considered to have legal personality. Hence, the Foreign Company and **not** its Dutch Branch will at all times remain the counterparty under the relevant Master Agreement. Because the "mutuality requirement" is fulfilled in this scenario, set off can take place, however, in respect of the claims between the Solvent Party and the Foreign Company only. This remains true even in case the Dutch Branch qualifies as an "establishment" under the Recast Insolvency Regulation and on the basis thereof territorial insolvency proceedings have been initiated in The Netherlands. The latter is only relevant because at first instance the *lex concursus* (*i.e.* Dutch set-off provisions) determines whether set-off is allowed or not. As explained in paragraph 4.7 above, Dutch set-off provisions, are in general however creditor-friendly and should thus in such situations not give rise to any problems, in particular if mutuality is assured.

(b) One of the main principles of Netherlands international Insolvency law is that, as far as Insolvency Proceedings commenced in The Netherlands are concerned, the Netherlands proceedings aim to have "universal effect", which (*inter alia*) means that they aspire to comprise all assets of the Insolvent Foreign Company, including those situated abroad (without prejudice to the sovereignty of another state). To the extent that the Recast Insolvency Regulation applies, the Insolvency Proceedings in this jurisdiction will have:

(i) *universal effect* in all other Regulation States (subject to secondary proceedings being opened elsewhere) if the Foreign Company's Dutch branch qualifies as its COMI; and

(ii) *territorial effect* if that COMI is located in another Regulation State, meaning that the effects of a secondary insolvency proceeding in this jurisdiction will be confined to the assets of the Dutch Branch located in The Netherlands.

In the latter case it is uncertain whether all Master Agreements, Underlying Agreements, Uncovered Transactions / Additional Netted Agreements and all Transactions thereunder will be comprised in Dutch Insolvency Proceedings, save that the analysis of set-off under the Recast Insolvency Regulation (Part (A), paragraph 4.8 above) does not appear to be any different. In our view this means that:

(A) the Insolvency Representative in charge of territorial proceedings in respect of the Dutch Branch, and the Dutch courts, will need to give effect to the Termination and Close-Out Provisions of the Master Agreements in the manner indicated in Part (A) above, without distinguishing between those Uncovered Transactions / Additional Netted Agreements or Underlying Agreements that are allocable to the Dutch branch and those that are not;

(B) if the Final Net Settlement Amount resulting from that process is payable by Party F, the other Party can file proof of such claim both in the main insolvency proceedings and in the secondary Dutch proceedings;

(C) if the Final Net Settlement Amount resulting from that process is payable to Party F, that claim will be part of the assets to be collected by the Dutch Insolvency Representative if the other Party (which owes this Final

Net Settlement Amount) has its COMI in this jurisdiction.

(D) COLLATERAL

4.17 Governing Law Aspects

In this paragraph we discuss which law, according to Dutch private international law, governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the CSA's.

4.17.1 With regard to Letters of Credit, there is no "transfer of ownership" properly speaking and therefore the question does not arise. The Letter of Credit will be governed by the chosen law applicable to it. On the basis that a Letter of Credit is issued in favour of a Party and cannot be transferred, any questions relating to a "transfer" of a Letter of Credit are not relevant. Therefore, in this Opinion Letter, we shall not address the "transfer" of Letters of Credit and where applicable Eligible Credit Support shall be read as "Cash".

4.17.2 The proprietary effects, creation and perfection requirements, requirements for rendering §3 of the CPMA CSA and §3 of the MNA CSA (the "**Title Transfer Provisions**") effective against third parties, and the steps required for the realisation of the Title Transfer Provisions, will, as a matter of Dutch private international law, be governed by the following laws.

4.17.3 Where the cash collateral is simply transferred pursuant to a contractual arrangement to the effect that the Counterparty transfers cash from its own account to that of the Transferee and that in case of the Counterparty's default the Counterparty's claim for repayment of the transferred cash is set-off against the Transferee's claims under the relevant Master Agreement, as appears to be the case under the Title Transfer Provisions, the law applicable to this contractual arrangement applies. In respect of cash collateral transferred under the CSA's this leads to the conclusion that the Governing Law is applicable to the question of characterisation, validity and effectiveness of this arrangement, including the question whether the Title Transfer Provisions qualify as a financial collateral arrangement.

4.17.4 Assuming that under the Governing Law, the Title Transfer Provisions qualify as a financial collateral arrangement[34], the requirements for a valid set-off in insolvency (as stated in paragraph 4.7 above) are partly disapplied. Netting and set-off will be allowed in respect of claims that have arisen *after* the Commencement Time **provided that** the Non-Defaulting Party was not aware of the insolvency judgment at the relevant time. Equally, Cash Collateral may be transferred in respect of a debt that has arisen on the date of the Insolvency judgment, **provided that** the Transferee was not aware of such judgment at the relevant time.

4.18 Recharacterisation Risk

Here we discuss whether the laws of this jurisdiction would characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that any such transfer would be re-characterized as creating a security interest.

4.18.1 *Insolvency and pre-insolvency: recharacterisation of transfers of cash as Eligible Credit Support.*

(a) With reference to paragraph 4.17 above, assuming that the Governing Law of the applicable Master Agreements and CSA's (if not Dutch law) characterises a transfer of Cash as Eligible Credit Support as effecting an unconditional transfer of "ownership", such characterisation will be recognised by the courts of this jurisdiction.

(b) The laws of this jurisdiction would not interfere with the outcome as reflected under (a) above if the CSA were governed by Dutch law, or if the Transferee's bank account is located in this jurisdiction, because the transfer of Cash as Eligible Credit Support would be regarded under

34 Pursuant to article 7:52 DCC, financial collateral arrangements are only subject to the FCA Rules if at least one of the parties falls within one of several specified categories. It is not entirely clear when – in an international transaction – article 7:52 DCC is applicable. The purpose of article 7:52 DCC is to prevent certain parties from granting rights of use or appropriation rights in relation to financial collateral. This is clearly a matter of property law. In our opinion, article 7:52 DCC should be treated in the same manner. For this reason it is our opinion that where the transfer of Collateral under a financial collateral arrangement is governed by the law of another jurisdiction, that law should determine which parties can enter into financial collateral arrangements in the sense of the Collateral Directive. Therefore, in our view, where the transfer of the Cash Collateral is governed by the law of another jurisdiction, the limitations as to the qualifying parties imposed by article 7:52 DCC are not applicable

Dutch law as the payment of a bail sum (*waarborgsom*)[35] and therefore valid.

(c) Therefore, in relation to Cash as Eligible Credit Support located, or deemed to be located, in this jurisdiction, the courts of this jurisdiction would not recharacterise transfers of such Cash under the Title Transfer Provisions as creating a security interest, provided this is also the case under the Governing Law;

(d) Therefore, on the assumption stated in (a) above, a transfer of Cash as Eligible Credit Support under a CSA (where the cash is paid to the Transferee or into an account with a third party held under the Transferee's control) constitutes an unconditional transfer of ownership of such Cash, which will not be recharacterised as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in such Cash.

4.18.2 *Recharacterisation of transfer of Eligible Credit Support in Insolvency: Dutch Insolvent Transferor*

The same analysis as set out in subparagraph 4.18.1 above with regard to recharacterisation of an outright transfer of Eligible Credit Support consisting of Cash applies in the event of the Counterparty (acting as Transferor) becoming subject to Insolvency Proceedings. The latter's Insolvency Representative will have a claim for repayment of such Cash against the Transferee, subject to the limitations arising from Dutch insolvency law (as outlined in Part (A) above and in our qualifications below).

35 Although there is no express basis for this in statutory law or case law there is ample reason to assume that the payment of a bail sum by a debtor to its creditor for its present or future claims would be permitted under Netherlands law. We base our view, *inter alia*, on the legislative history of the DCC, dealing with the possibility of depositing (other than by way of a pledge) a sum of money with one's creditor, against which recourse can be taken by the creditor in case of default. In the DCC’s legislative history the question is discussed whether "the payment of a bail sum constitutes a pledge consisting of money". According to the legislator this will depend on the intention of the parties. It is conceivable - according to the legislator - that the party having asked and obtained a sum of money to serve as collateral simply becomes the debtor for repayment thereof. In particular where the recipient is obliged to pay interest (see § 9 of the CPMA CSA and § 9 of the MNA CSA), indicating that he is entitled to use the money and is therefore not under a duty to segregate the money from his other assets, this would suggest (according to the legislative history) that the parties must have intended a "bail sum". Thus, in the legislative history the possibility of the "bail sum", as an alternative means of obtaining security over money, albeit with the debtor taking credit risk on the creditor, has been recognised. Since the recipient of the bail sum will become the debtor for repayment thereof, it may set-off its repayment obligation against any obligation the transferor of such bail sum owes to it.

4.18.3 *Recharacterisation of transfer of Eligible Credit Support in Insolvency: Insolvent Dutch Transferee*

The same analysis as set out in subparagraph 4.18.1 above with regard to recharacterisation of an outright transfer of Eligible Credit Support consisting of Cash applies in the event of Insolvency of a Dutch Transferee. In case either the Transferee's Insolvency Representative or the Transferor is entitled to close-out the relevant Agreements and/or Transactions, the CSA will be effective to the extent that it provides that the value of the Collateral provided and not yet transferred is to be included as an "other amounts payable" (owing to the Transferor) in the calculation of the net amount payable under the Netting Clause, subject to the limitations arising from Netherlands insolvency law (as outlined in Part (A) above and in our qualifications below).

4.19 **Perfection Requirements / Local Margining Rules / Other Local Law Considerations**

In this paragraph we discuss (i) whether, assuming that the Transferee receives absolute ownership in the collateral, it will need to take any action (e.g. any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) thereafter as a matter of Dutch law to enforce or continue such ownership interest, (ii) whether under the laws of this jurisdiction, each CSA complies with any mandatory margining requirements and (iii) 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 Counterparty.

Assuming the Transferee receives absolute "ownership" of the Eligible Credit Support consisting of Cash and subject to the observations in paragraphs 4.17 and 4.18 above, there will be no need as a matter of Dutch law to take any subsequent action (e.g. any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval or any procedures) to ensure that the Transferee's rights in the Cash so transferred are safeguarded.

As regards the question whether under the laws of this jurisdiction, each CSA complies with any mandatory margining requirements, other than those arising from EMIR, there are only margin requirements applicable to derivative transactions with non-professional Dutch clients and these require licensed counterparties to obtain margin, monitor its mark-to-market adequacy, require additional margin when necessary and to liquidate such margin within fixed terms if the client provides insufficient margin.

Finally, we confirm that there no other Dutch law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a Counterparty.

4.20 **Substitution Rights**

In this paragraph we deal with the question whether there is any effect, under the laws of this jurisdiction, of the right to substitute collateral pursuant to § 6 of each CSA and whether the presence or absence of consent to substitution by the Transferee has any bearing on this point.

The right of a Transferor incorporated or otherwise organized under this jurisdiction to exchange Eligible Credit Support pursuant to Section 6 of each CSA is valid and legally binding and enforceable in accordance with its terms (assuming this is also the case under the Governing Law). As Section 6 of each CSA presupposes that the Transferee approves such exchange, such exchange shall only be valid if such approval is given by the Transferee. See our recommendation in 4.29.2 below.

Any obligation on the Counterparty to accept substitution of Eligible Collateral by the Transferor under the CSA should follow from the contractual obligations in the CSA. If on the basis of the analysis in paragraph 4.24, the CSA cannot be nullified based upon voidable preference, then the substitution of Eligible Collateral should not be subject to such voidable preference risk either. However, some degree of risk is constituted by the additional claw back powers outlined in 4.24.5 below, unless avoidance would not be possible under the Governing Law.

4.21 **Transfer of additional Eligible Credit Support and voidable preference risk**

In case of transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the CSA, the same analysis as set out in relation to the substitution of Eligible Collateral in paragraph 4.20 above will apply.

Under Clause 3 of the CSA, the Counterparty will be obliged to transfer additional Eligible Credit Support upon demand of the Transferee. This constitutes a prior legal and contractual obligation to effect such a transfer and, therefore, the transfer of additional Eligible Credit Support will not be voluntary as described in paragraph 4.24.1.

4.22 **Final Net Settlement Amount / Insolvency Analysis**

We will deal with the issue whether, assuming that Section 4 of the CPMA and § 8 of the MNA which govern the Transferee's right in relation to the transferred Eligible

Credit Support upon the occurrence of a Close-Out Event (together with § 11 of the CPMA CSA and § 12 of the MNA CSA, respectively) are valid and enforceable under the Governing Law and the laws of this jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of Transactions, § 11 of the CPMA CSA and § 12 of the MNA CSA are also valid to the extent that they provide for the value of the collateral provided and not yet (re)transferred to be included in the calculation of the Final Net Settlement Amount under Section 4 of the CPMA or § 8 of the MNA, as the case may be.

4.22.1 Yes, based on the assumption that Section 4 of the CPMA and § 8 of the MNA are valid and enforceable under the Governing Law insofar as they relate to the determination of a Final Net Settlement Amount payable by either Party on the termination of Transactions, § 11 of the CPMA CSA and § 12 of the MNA CSA are also valid to the extent that they provide for the Base Currency Value of all the Eligible Credit Support provided under the relevant CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee.

4.22.2 Nevertheless, as mentioned in paragraph 4.7.3 above, all calculations under the relevant provisions may have to be made by reference to a date not later than the Commencement Time of the Insolvency Proceedings in respect of the Counterparty.

4.22.3 In relation to a CPMA or an MNA, as the case may be, which includes the Title Transfer Provisions, following the occurrence of a Close-Out Event relating to Insolvency Proceedings in respect of a Counterparty which is the transferee of Cash Collateral, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under Section 4 of the CPMA and § 8 of the MNA, so that the Base Currency Value of all the Eligible Credit Support provided under the relevant CSA on the Determination Date will be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee.

4.23 **CSA Specific Permutations.**

Would any of the answers to paragraphs 4.17 – 4.22 be different assuming 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;

(d) the Parties agree to place the Eligible Credit Support with an independent third party collateral agent rather than in an account in the name of the Transferee?

As regards (a): in case of an EEA Credit Institution the answers would be different (more positive) if § 11 of the CPMA CSA and § 12 of the MNA CSA qualify as "netting arrangements" in which case paragraph 4.9.3 above applies. In case of Third Country Credit Institutions, the answers would be the same.

As regards (b): for these entities the answers to 4.17 – 4.22 would not be different.

As regards (c): this is irrelevant to our answers to 4.17 – 4.22.

As regards (d): provided it is stipulated that such a payment to a third party collateral agent will create a debt for the Transferee that can be set-off in a Close-Out Event, we see no reason why our answers to 4.17 – 4.22 would be different.

4.24 **Validity challenges by creditors pre- and post-Insolvency: Suspect periods and Voidable Preference**

Will Party A (or its Insolvency Representative) be able to recover any transfer of Eligible Credit Support provided to Party B during a certain "suspect period" preceding the date of the insolvency? If such a period exists, does the substitution of Eligible Credit Support by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the relevant CSA during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

4.24.1 *General Voidable Preference Regime*

(a) Under Dutch law every creditor, but in bankruptcy (*faillissement*) only the liquidator (*curator*), has the right (the so-called *Actio Pauliana*) to nullify (by simple declaration) a transaction entered into by the debtor (in this case Party A) with a third party (in this case Party B) **provided that**:

(i) the transaction was entered into by the Party A *voluntarily* (i.e. in the absence of a legal or contractual obligation); **and**

(ii) the transaction was *prejudicial* to the recourse possibilities some or all of Party A's creditors (i.e. if the transaction leads to a reduction in the assets available for recourse by its creditors); **and**

(iii) *at the time of the transaction* both Parties knew or ought to have known of the fact that the transaction would have such prejudicial effect; **or**

(iv) in the event that the transaction is for nil consideration (i.e. gifts and other gratuitous dispositions), *at the time of the transaction*, Party A knew (or ought to have known) of the prejudicial effect, regardless of whether Party B shared such knowledge; as presumably the CSA's, the Master Agreements and any Transactions are entered into on commercially acceptable terms, this should not be relevant.

(b) As regards subparagraph 4.24.1(a)(iii) above: the mere fact that the parties knew that there was a *possibility* that the transaction could be prejudicial to the recourse possibilities of the company's other creditors, is not sufficient.

(c) Therefore, there is a risk of voidable preference only if both Parties knew or ought to have known on the moment that the CSA, the Master Agreement, the Underlying Agreements, the Additional Netted Agreements or any Transaction were entered into, that this would have a prejudicial effect on the recourse possibilities of other creditors of Party A.

4.24.2 *Burden of proof*

The burden of proof of all of the above elements rests upon the creditor who wishes to nullify the transaction, although a reversal of this burden in respect of the "knowledge requirement" (under subparagraphs 4.24.1(a)(iii) and (iv) above) is provided in law if the voluntary transaction took place less than one year before the creditor invokes the *Actio Pauliana* or - as the case may be - one year prior to the Commencement Time of Party A's Insolvency Proceedings, **and** falls within one or more of the statutory categories of "suspect" transactions. Such suspect transactions include:

(a) payments of or providing collateral for debts that are not yet due and payable;

(b) transactions by the debtor (if a company) with or for the benefit of a group company; and

(c) transactions at an undervalue.

There are no specific rules with regard to the proof to be provided. Proof can be provided in various forms, e.g. written documents such as notes or memoranda, oral evidence such as testimonies or taped conversations, or even circumstantial evidence; it is up to the courts to decide whether the proof is acceptable.

Apart from the reversal of the burden of proof for suspect transactions entered into one year prior to invoking the *Actio Pauliana* or - as the case may be - one year prior to the Commencement Time of Party A's Insolvency Proceedings, there are no "suspect periods" in relation to the *Actio Pauliana* or otherwise under Dutch law.

4.24.3 *Limitation period*

Voidable preference has a limitation period of three years from the date on which a prejudiced creditor or – as the case may be – the liquidator *discovered* the detrimental effect of the transaction.

4.24.4 *Analysis*

(a) Eligible Credit Support that consists of Letters of Credit issued by a third-party credit institution cannot be recovered by an insolvency official of Party A and is therefore not taken into account in this section of our Opinion Letter.

(b) In order to assess the potential impact of the *Actio Pauliana*, one must carefully distinguish between (i) the creation of a contractual obligation for Party A to post Eligible Credit Support and (ii) the actual transfers thereof. The reason for this (as outlined in subparagraph 4.24.1(a)(i) above) is that only voluntary transactions can be nullified. This means that where Party A’s assumption of a contractual obligation to transfer Eligible Credit Support cannot be challenged, then *any subsequent transfers of collateral* by Party A will also be "safe" (subject to subparagraph 4.24.5 below), because they can then be characterised as involuntary transactions (i.e. transactions for which a contractual obligation exists). Therefore, in this Opinion Letter we will focus on Party A's assumption of a contractual obligation to post Eligible Credit Support.

(c) It is likely that the creation under the relevant CSA of the obligation to transfer Eligible Credit Support by Party A could be considered as a *voluntary act* (unless the Governing Law analysis is different). If the relevant CSA was entered into within one year before the relevant creditor invokes the Actio Pauliana, the CSA may be considered a "suspect" transaction under subparagraph 4.24.2(a) or (b) above, depending on how much over collateralization is achieved. It is unlikely that entering into the CSA would be considered as a ‘transaction for a nil consideration’ (see subparagraph 4.24.1(a)(iv) above), and therefore only issues in subparagraphs 4.24.1(a)(ii) and (iii) above should be considered.

(d) As to the issue in subparagraph 4.24.1(a)(ii) above: clearly if Party A remains solvent (i.e. able to pay its debts and does not provide insufficient recourse to its creditors as a result of entering into the CSA), then a creditor would not be able to nullify the collateral posted because the requirement under subparagraph 4.24.1(a)(ii) above will not be satisfied.

(e) Although an *Actio Pauliana* can be brought if the debtor is still solvent, according to authoritative literature, it is a *conditio sine qua non* for any successful *Actio Pauliana* that the debtor has become unable to pay its debts as they fall due. Only then it will become apparent that there is insufficient recourse available to the debtor’s creditors. If Party A continues to be able to pay its debts, the risk of a preference challenge being made on the basis of the mere fact that it has reduced the recourse available to its other creditors by posting collateral, should be regarded as remote.

(f) As to the issue in subparagraph 4.24.1(a)(iii): unless the assumption of the obligation to transfer collateral took place within one year before the creditor challenges it, the creditor will need to show that Party A was aware or ought to have been aware of the fact that assuming the obligation to provide collateral would have the effect that such prejudicial effect would arise (the real or constructive knowledge of the mere possibility that such detrimental effects might arise being insufficient). If an objective financial analysis of Party A's position can only lead to the conclusion that no prejudice to Party A’s other creditors should occur, then this will be Party A’s best defence.

4.24.5 *Additional claw back risk*

(a) In addition to the *Actio Pauliana* described above, in bankruptcy (*faillissement*) the liquidator (*curator)* has the power (under article 47 BA) to invoke the nullity of and claw back any contractually required collateral transfers effected by Party A before the Commencement Time in the event that:

(i) Party B knew, at the time of such transfer that a petition for Party A's bankruptcy had been filed with the court; or

(ii) such transfer resulted from concerted action of Party A and Party B aimed at preferring the latter to the detriment of Party A's other creditors.

(b) Accordingly, to the extent that it can be demonstrated that an obligatory legal act performed by Party A prior to becoming subject to bankruptcy in order to satisfy or extinguish an obligation under the Agreements (including but not limited to the obligations to make a transfer of Eligible Credit Support; each such legal act and extinguishment of debt hereinafter referred to as "**Obligation Performance**"):

(i) occurred at the moment that Party B knew that a request for Insolvency of Party A had been filed; or

(ii) was the result of collusion between the two Parties as referred to under subparagraph 4.24.5(a)(ii) above, such Obligation Performance could be nullified.

4.24.6 *Impact of Governing Law*

(a) Under the Recast Insolvency Regulation and the WUDCI (implemented in articles 212t and 212x BA), the law applicable to Insolvency Proceedings shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors. Accordingly, the Dutch rules with regard to voidable preference shall apply in the event of Insolvency Proceedings in this jurisdiction including the Insolvency Representative's authority to nullify legal acts entered into prior to Insolvency on the basis of *Actio Pauliana*.

(b) However, under the Recast Insolvency Regulation,[36] and the WUDCI[37] in order to protect the Insolvent Party’s counterparty, a claim by the liquidator in bankruptcy for nullification on the basis of voidable preference will only be successful if it would *also* be possible under the insolvency rules of the law of another Regulation State governing the preferential transaction itself. In this case that would meanthe Governing Law assuming that is the law of a Regulation State. The relevant legal provisions provide the Solvent Party the opportunity to prove that under the insolvency rules of the Governing Law (applicable to the relevant transaction) no such nullification is allowed or that the conditions for nullification are not met.[38] Article 16 Recast Insolvency Regulation has been adopted in Dutch (Supreme Court and lower) case law as a general rule of Dutch private international law, and the protection it affords therefore also applies if the Governing Law is non-EU law (such as English law post-Brexit).

(c) This means that the requirements for nullification of both the BA and of the Governing Law (as the governing law of the CSA) should be satisfied. If it is not possible under such Governing Law for a local insolvency representative to set aside the CSA, then the liquidator

36 Article 13.

37 Article 30(1), implemented as article 212ee BA (as regards bankruptcy of a regulated entity).

38 See: ECJ 16 April 2015, JOR 2016/169 [*Lutz/Bauerle*]; ECJ 15 October 2015, JOR 2016/170 [*Nike/Sportland*]; ECJ 8 June 2017, JOR 2017/250 [*Vinyls*].

(*curator*) could not do so either and all transfers of Eligible Credit Support would be treated as involuntary transactions.

(d) This is subject to the additional clawback risk set out in subparagraph 4.24.5 above, however, only if those transfers of collateral would also be subject to such risk under the Governing Law.

4.24.7 *Substitution of Collateral*

(a) Here it is assumed that Party A has an obligation to accept substitution of Eligible Collateral by Party B under the CSA under the contractual provisions set out therein. If on the basis of the analysis in this paragraph 4.23 the CSA cannot be nullified using the Actio Pauliana, then the obligatory exchange of Eligible Collateral should not be subject to such voidable preference risk either except under the additional clawback powers outlined in subparagraph 4.24.5 above, but these powers will be ineffective if such avoidance would not be possible under the insolvency rules of the Governing Law (subparagraph 4.24.6 above).

(b) Please note that where under the applicable Governing Law such a substitution would be treated as the creation of *new security interests,* this could have an impact on general bankruptcy issues, in particular the voidness of post-Insolvency dispositions by Party A and the voidability of preferential transactions.

4.24.8 *Transfer of additional Eligible Credit Support*

In case of transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the CSA, the same analysis as set out in relation to the substitution of Eligible Collateral in paragraph 4.24.7 above will apply. If under the relevant CSA, Party A is obliged to transfer additional Eligible Credit Support to Party B, this will constitute a prior legal and contractual obligation to transfer and, therefore, the transfer of additional Eligible Credit Support will not be voluntary as described in subparagraph 4.24.1(a)(i) above.

4.25 Other requirements for the effectiveness of the CSA's in this jurisdiction

In this paragraph we will answer the query whether the CSA's are in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to Party B and whether there are other requirements to be observed in jurisdiction in order to ensure validity of such transfer of Eligible Credit Support by Party A.

4.25.1 The CSA's are in an appropriate form to be effective in the manner set out in this Opinion Letter. There are no other relevant requirements necessitated by the laws of this jurisdiction.

4.25.2 The CSA's supplement, amend, form part of and are subject to the relevant Master Agreement. Therefore, the same analysis as set out in Part (A) above applies to the enforceability of the CSA's in the event of Insolvency.

4.26 **Other recommendations**

Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?

There are no other material issues relevant to the questions on the subject of collateral set out above which we wish to draw to your attention.

(E) **GENERAL ENFORCEABILITY**

Is this Part (E) we deal with the questions (i) whether the Agreements are legal, valid and binding under the laws of The Netherlands and (ii) whether we have any recommendations for revising any provisions of either Master Agreement or either CSA, assuming these are governed by Netherlands law in order to make such agreements enforceable under such laws or to materially improve their legal efficacy (given such provision's apparent intent)?

4.27 **Validity and Enforceability under Governing Law**

Subject to the assumptions set out in this Opinion Letter, to our analysis and observations set out in paragraphs 4.1 through 4.26 above, and to the qualifications in paragraphs 4.31 and 5 below, if an Agreement is governed by a Governing Law (and assuming its validity and enforceability under that Governing Law), that Agreement will be recognised as valid and enforceable by the courts of The Netherlands and the choice of the Governing Law will be recognised, which means that:

(a) in any proceedings for the enforcement of the Counterparty's *contractual obligations* under any such Agreement, the courts of The Netherlands would give effect to the choice of the Governing Law; and

(b) such Governing Law would accordingly be applied by the Dutch courts upon proper proof of the relevant substantive rules thereof.

As regards choice of jurisdiction, please refer to paragraph 4.32 below.

4.28 Amendments

4.28.1 EFET members may consider the following change to the MNA: the MNA provides in §11 for payment netting (*ie*, on an on-going basis, the payment on a net basis of amounts that fall due on the same date and in the same currency between the parties) "if this §11.1 is made operative by the Parties in the Election Sheet". Under Dutch law payment netting applies by default unless the parties expressly provide otherwise. In order to give effect to the apparent intent of §11, the following sentence could be added at the end of the paragraph: "If not so specified, payments shall be made on a gross basis and without set-off, without prejudice to §7 (*Determination and Settlement of Settlement Amounts*) and §8 (*Netting-Off of Settlement Amounts; Accrual of Interest*)".

4.28.2 EFET members may also consider the following change to the MNA when dealing with Counterparties incorporated in The Netherlands or with an establishment in The Netherlands, irrespective of the governing law of the MNA:

> Dutch law allows third-party creditors to launch proceedings seeking the bankruptcy or liquidation of a debtor. These proceedings may ultimately be dismissed, and may occasionally be frivolous; some considerable time may also elapse until the courts make a final decision on the claim. It is therefore advisable in our view to include in the Election Sheet, as allowed under §3.1(C)(III)(d) of the MNA, that the mere petition or institution against a party of proceedings seeking a judgment of insolvency only constitutes a Default Event if not withdrawn, dismissed, etc. after a period as specified in the Election Sheet.

4.28.3 On a point of detail, we note that the definitions of "Credit Support Document" in Division 1, Part VIII of the Schedule to the CPMA exclude "any guarantee by a third party of a Party's obligations". Under the laws of this jurisdiction third parties can provide asset security without necessarily also providing a guarantee; the apparent intent of the clause would be better served by saying "any guarantee or security by a third party of a Party's obligations".

4.28.4 In respect of substitution of Eligible Credit Support, please see our recommendation in subparagraph 4.29.2 below.

4.28.5 Further suggested amendments are contained in Appendix B.

(F) CORE PROVISIONS

This Part (F) is based on the same additional assumptions as Parts (A) and (B) above and discusses whether any of the elections contemplated by the Master Agreements or the CSA's (other than those elections and provisions set out in paragraph 1.2 above) change the substance of our conclusions reached under Part (A) or Part (B) above. As far as the CSA's are concerned, we will discuss the effect of electing to allow substitution with or without consent.

4.29 Elections contemplated by the Agreements

4.29.1 *Elections contemplated by the Agreements*

In paragraph 1.2 above we have indicated which elections in the CPMA we have based our opinion on. The standard elections contemplated in the Election Sheet pertaining to the Schedule (the "**Election Sheet**") will not change the substance of our opinions with respect to Enforceability of Close-out Netting (under Part (A) above). For the avoidance of doubt, any additional provisions that are inserted in Part II of the Election Sheet can, however, change the substance of those opinions and are therefore outside the scope of this Opinion Letter. Please also refer to subparagraph 4.31.2(b) below, in which amendments to the core provisions are addressed. As to the "Automatic Close-out" election, please refer to paragraph 4.11 above. For the rest, the elections contemplated by the Agreements are not of such a nature as to modify our conclusions reached under Part (A) or (B) above.

4.29.2 *CSA's*

(a) The standard specifications contemplated in § 14 of the CPMA CSA or § 15 of the MNA CSA (except for election 14 (*Additional provisions*) which falls outside the scope of this Opinion Letter) will not change the substance of our opinions with respect to Enforceability of Close-out Netting (under Part (A) above).

(b) You requested us to elaborate specifically on the effects of electing to allow substitution with or without consent. In this respect, we note that any obligation on the Counterparty to accept substitution of Eligible Credit Support or Eligible Collateral by the other Party under the relevant CSA should follow from the contractual obligations in such document in order to minimize the risk of voidable preference outlined in subparagraph 4.24.7 above. Hence, we advise to insert an additional provision to this effect in § 14 of the CPMA CSA and § 15 of the MNA CSA which provides that, contrary to what is stated in § 6, the substitution or exchange of Eligible Credit Support and/or Eligible Collateral is not subject to the Transferee's approval. Please refer also to paragraph 4.23 above.

4.30 **Core Provisions**

4.30.1 *Core provisions*

The following Clauses are considered to be "**Core Provisions**", meaning that such core provisions may not be amended without affecting the conclusions reached in Part (A) (*Termination)and Close-Out in the Context of Insolvency*) of this Opinion Letter:

(a) Section 1 of the CPMA;

(b) §§3 to 8 of the MNA, and Sections 2 to 4 of the CPMA,

including any definitions used in these Core Provisions. Please note that this does not imply that any other amendment would not affect our opinion as set out herein. Any amendment to the Agreements should be carefully considered and appropriate legal advice should be taken to assess the consequences of such impact. This includes (a) any election contemplated in each Master Agreement that we have assumed in addition to the elections set forth in Part (A) above and made pursuant to: (i) in the case of the CPMA, Division 1 of the Schedule; and (ii) in the case of the MNA, the Part I of the Election Sheet and (b) any specification made pursuant to Section 14 of the CPMA CSA and Section 15 of the MNA CSA.

(G) GOVERNING LAW, ARBITRATION AND JURISDICTION

In this Section (G) we discuss the issue whether – assuming the Agreements, the Underlying Agreement and the Additional Netted Agreements are subject to a Governing Law - the Parties' agreement on the governing law, submission to arbitration or jurisdiction (Section 12 of the MNA and Section 6 of the CPMA) would be upheld in The Netherlands.

4.31 **Choice of law**

This paragraph and the next consider whether there are any applicable limitations on the courts in this jurisdiction with regard to upholding a choice of a Governing Law and submission to the jurisdiction of local courts.

4.31.1 As regards the contractual obligations arising under or pursuant to the Agreements, the choice of law provisions will be recognised in this jurisdiction and the Governing Law would accordingly be applied by the Dutch courts if the

Agreement or any claim thereunder comes under their jurisdiction upon proper proof of the substantive rules of the Governing Law.

4.31.2 When applying the Governing Law as the laws governing the Agreements, the competent courts of the Netherlands may or shall act as follows as a result of Rome I:

(a) they may give effect to the overriding mandatory provisions (i.e. provisions the respect for which is regarded as crucial for a country for safeguarding its public interests, such as its political, social or economic organisation), to such an extent that they are applicable to any situation falling within their scope, irrespective of the Governing Law, of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful (article 9(3) Rome I)[39];

(b) they will apply the overriding mandatory provisions of the law of The Netherlands (article 9(2) Rome I)[40];

(c) they may refuse to apply the Governing Law if such application is manifestly incompatible with the public policy of the Netherlands (article 21 Rome I)[41]; and

(d) they shall regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (article 12 (2) Rome I).

4.31.3 With the express reservation that as Netherlands lawyers we are not qualified to assess the meaning and consequences of the terms of the Agreements under the

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39 Where the dispute is solely over the contractual aspects of a transaction of a commercial or financial nature, Dutch courts have so far refused to give such overriding effect to certain mandatory rules, even in cases where there seemed to be every opportunity to do so. For this reason we consider the risk of mandatory rules of foreign jurisdictions be applied by Dutch courts to be remote.

40 The prevailing attitude in Dutch case law is that only Dutch rules which are of a "public law nature" (e.g. exchange control regulations, banking regulations, competition rules) are mandatory rules which are capable of overriding the chosen law.

41 From case law it appears that the test for manifest incompatibility with public policy will only be met in extraordinary circumstances, such as where the application of foreign law would violate fundamental principles of Dutch law or contravene international law.

Governing Law, on the face of such documents we are not aware of any provision that is likely to:

(i) be manifestly incompatible with Netherlands public policy (see 4.31.2(c) above); or

(ii) give rise to situations where overriding mandatory rules of Netherlands law will prevail over the chosen law of such documents (see 4.31.2(b) above).

It should also be noted that we are not aware of any published order, ruling or decision of a Netherlands court, in which such a court has used article 9(3) Rome I (or its predecessor, article 7(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations) to give overriding effect to foreign mandatory rules pertaining to a law other than the chosen (or applicable) law in commercial or financial litigation brought before such courts. (see 4.31.2(a) above).

4.32 Submission to Jurisdiction

4.32.1 The submission by the Parties under any of the Agreements to the exclusive jurisdiction of (i) the English courts in case the laws of England apply to the relevant Agreement or (ii) the courts of Frankfurt/Main in case the laws of Germany apply to the relevant Agreement, or (iii) of the London Court of International Arbitration, the German Institute of Arbitration or any other arbitration institute or court, as the case may be with regard to the Agreements, the Underlying Agreements or the Additional Netted Agreements, if any, each with regard to any proceedings arising out of or in relation to the relevant Agreement(s) is legal, valid and binding upon the Counterparty.

4.32.2 A Dutch court would declare itself not competent (*onbevoegd*) in the event that a Party to the relevant Agreement containing an exclusive choice of forum clause or choice of arbitration clause attempted to sue the other Party before the courts of The Netherlands. As to arbitration, The Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and arbitration clauses are upheld, and arbitral awards are enforced, in accordance with that Convention.

4.32.3 Notwithstanding the submission to the exclusive jurisdiction of the courts referred to in subparagraph 4.32.1 above, however, a Netherlands court would assume jurisdiction:

(a) if the defendant enters an appearance and does not contest the jurisdiction prior to defences relating to the merits and, in the event that Section 1 of Title 1 of Book 1 Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) applies, there is a reasonable ground for jurisdiction of such Netherlands court;

(b) pursuant to Article 254 Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) in urgent matters, when, in view of the interests of the parties, provisional measures are required;

(c) in the context of an attachment against a Party or any of its assets located in the Netherlands.

(H) PENDING DEVELOPMENTS

Here we discuss any anticipated future developments in the laws, rules and/or regulations of this jurisdiction or those of the European Union that may affect the opinions stated in this Opinion Letter.

4.33 As at the date of this Opinion Letter, we are not aware of any pending developments in relevant legislation in this jurisdiction, which could have the result that the wording of the opinions would require amendment.

5. QUALIFICATIONS

This Opinion Letter is subject to the following observations:

Meaning of "Enforceable"

5.1 the terms "*enforceable*", "*enforceability*", "*valid*", "*binding*" and "*effective*", where used in this Opinion Letter, mean that the obligations assumed by the Parties under, and the relevant provisions of, the Agreements are of a type which Netherlands law generally enforces or recognises; it being understood that enforcement before the courts of the Netherlands will in any event be subject to the degree to which the relevant obligations are enforceable under their governing law (if other than the laws of this jurisdiction), the nature of the remedies available in such courts (the power to order specific performance or to grant injunctive relief being at the court's discretion), the acceptance by such courts of jurisdiction, the effect of provisions imposing prescription or limitation periods (within which suits, actions or proceedings must be brought), the availability of defences such as fraud, duress, misrepresentation, undue influence, error, set-off (unless validly waived), abatement (i.e. the discretion to decrease the amount of agreed damages, indemnities or penalties) and counter-claim and to the effect of any sanctions or emergency management legislation (such as the Dutch Financial Relations Emergency Act (*Noodwet Financieel Verkeer*) and articles 1:28/1:29 FMSA);

5.2 no part of this Opinion is to be read as a statement that judgments rendered by foreign courts or arbitral awards granted by foreign arbitral tribunals would be enforceable in The Netherlands or that all the procedures of such courts (such as discovery of documents or the compulsion of witnesses by subpoena) will be available against a Counterparty; generally speaking:

5.2.1 an enforceable judgment obtained in a foreign court against a Counterparty in an action instituted in the manner contemplated by the relevant Master Agreement will be recognised and enforced by the courts of The Netherlands without re-trial or re-examination of the merits, on the basis of and subject to the limitations imposed by the applicable enforcement treaty or European regulation (such as for example Council Regulation (EC) No. 1215/2012 on Jurisdiction and the Enforcement and Judgments in Civil and Commercial matters of 12 December 2012 (the "**Judgments Regulation**")) and in the absence of such an internationally binding arrangement no such recognition or enforcement will be afforded to the foreign judgment;

5.2.2 an arbitral award rendered pursuant to the arbitration clause as set forth in the relevant Master Agreement shall be enforceable in The Netherlands in accordance with and subject to the limitations of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Trb. 1959, nr. 58) and the relevant provisions of Book 4 of The Netherlands Code of Civil Procedure;

5.3 any enforcement of the Agreements and of any foreign judgments in The Netherlands will be subject to the rules of civil procedure as applied by the courts of The Netherlands; such courts have powers to mitigate the amount of damages, indemnities or penalties provided for in the Agreements (including any agreed costs payable in respect of litigation or collection), to the extent it regards them as manifestly excessive and, if so requested, to make an award in a foreign currency; such courts may also refuse to give effect to any provision in an agreement which would involve the enforcement of foreign revenue or penal laws; service of process for any proceedings before the courts of The Netherlands must be performed in accordance with Dutch laws of civil procedure; the taking of concurrent proceedings in more than one jurisdiction in which the Judgments Regulation is applicable may - notwithstanding the terms of the Agreements - be precluded by one of the provisions of Section 9 (*Related Actions*) of that Regulation and the Dutch courts may be obliged to decline jurisdiction as a result thereof; as regards jurisdiction generally, the courts of The Netherlands have powers to stay proceedings if concurrent proceedings are brought elsewhere; finally, the ability of any party to assume control over another party's proceedings before the courts of The Netherlands may be limited by Dutch rules of civil procedure;

5.4 enforcement of a judgment for a sum of money expressed in foreign currency against the Counterparty's assets located in The Netherlands would be executed in terms of Euro and the applicable rate of exchange would be that prevailing on the date of payment;

Regulatory Interventions/Court approved Stays

5.5 if the DNB or the AFM finds that a Dutch Credit Institution or a Dutch Investment Firm does not comply with the solvency, liquidity and administrative directives ("*richtlijnen*") issued by it, or if there are other indications of a development which in the judgment of the DNB or the AFM endangers or could endanger the solvency or liquidity of such an entity, then the DNB or the AFM can determine that, as of a certain moment in time, all or certain bodies of the Dutch Credit Institution or Dutch Investment Firm can only exercise their powers with the approval of one or more persons (known as silent administrators, "*stille curatoren*") designated by the DNB or AFM. Pursuant to the FMSA, the Dutch Credit Institution or Dutch Investment Firm can challenge the validity of any act performed without such approval, if the other party to that act knew that no such approval was given, or could not have been ignorant thereof. The appointment of a silent administrator and accordingly the necessity of the approval referred to is not normally published. It is likely that without a publication or without it being otherwise obvious to the other party that the person or persons was/were designated as referred to, the other party will not know, nor ought to have known, that the approval referred to was required;

5.6 at the start of and during bankruptcy proceedings in respect of a Dutch Credit Institution, the bankruptcy court can authorise the liquidator to transfer all or part of the funding liabilities of such a Dutch Credit Institution to a third party (without the counterparty's consent) and to amend the relevant contracts prior to such a transfer (without the counterparty's consent), save that the following liabilities can not be amended: (i) liabilities secured on the Dutch Credit Institution's assets by way of pledge or mortgage, (ii) liabilities arising from hire-purchase agreements; (iii) liabilities arising from a financial collateral agreement (which includes repo agreements); (iv) liabilities owing to clients under derivatives positions which the Dutch Credit Institution has entered into for these clients' account and which are protected under the segregated pool rules of articles 49f-h of the Dutch Securities Giro Transfer Act (*Wet giraal effectenverkeer*);

5.7 in Insolvency Proceedings under the laws of this jurisdiction, any dispositions of the Insolvent Party's property made after the Commencement Time of Insolvency Proceedings of such Party are void under article 23 BA unless the court otherwise orders or the FCA Rules prevent its application (see paragraph 5.8 below);

5.8 in Insolvency Proceedings a judgment of bankruptcy or moratorium has retroactive effect as from the Commencement Time and any dispositions by the Counterparty of property made after such Commencement Time are void, but this does not apply to financial collateral arrangements nor to acts performed pursuant to such arrangements (e.g. a transfer of additional or substitute Eligible Credit Support). The actual time of the judgment applies to such financial collateral arrangements or acts. In addition, financial collateral arrangements or acts pursuant thereto are enforceable against third parties even if such arrangements or acts were entered into or took place after the judgment opening the Insolvency Proceedings was made, but on the same day, provided the counterparty is able to show that it was not aware nor should have been aware of such judgment;

5.9 Article 212b BA creates two further exceptions to the Retro-active Effect Rule mentioned above:

5.9.1 for any transfer order, or any disposition of property in pursuance of such an order, given by a Dutch Credit Institution or a Dutch Investment Firm after the Commencement Time but prior to the moment of the opening of Insolvency Proceedings in respect of such a Counterparty irrespective of when the order was carried out; the same applies to any payment, delivery, margin transfer, set-off, close-out, liquidation of margin or other disposition necessary to give effect to or carry out such a transfer order;

5.9.2 for any transfer orders given by (or on behalf of) a Dutch Credit Institution or an Investment Firm against the effect of Insolvency Proceedings in cases where the relevant order was entered onto a qualifying system (for SFD purposes) *after* the moment of opening of the relevant Insolvency Proceedings if carried out on the same day and the "relevant parties" neither knew nor ought to have known about the judgment opening the Insolvency Proceedings at the time of settlement; the same applies to any set-off instructions and any payment, delivery, margin transfer, set-off, close-out, liquidation of margin or other disposition necessary to give effect to or carry out such a transfer order or set-off instruction;

5.10 the BA contains stay of execution provisions (Article 63a BA regarding bankruptcy and Article 241a BA regarding moratorium) allowing the supervisory judge (*rechter-commissaris*) in case of bankruptcy and the court in case of moratorium to render an order/judgment to the effect that the rights of recourse of all or specifically designated third parties in respect of assets belonging to the insolvent estate (or in the possession of the insolvent debtor) are suspended for a period of no more than two months (with a possibility of extension by - at most - two more months), save with prior permission of the supervisory judge/court. Although there is no case law on this matter, we endorse the view that has been expressed in authoritative legal writing that termination rights and set-off are not within the scope of Article 63a and Article 241a BA and that therefore a "freeze-order" should have no impact on the exercise of such rights; furthermore, such a freeze order does not apply to Eligible Credit Support that is subject to a financial collateral arrangement;

Effect of Resolution Measures

5.11 The FMSA and the SRMR contain various provisions which might affect the effectiveness of the Netting Provisions. In particular they provide for various remedies for a failing BRRD Entity, which include the Resolution Powers.

Mandatory Default Override

5.11.1 Under Articles 1:76b and 3A:57 FMSA, provided that the BRRD Entity's substantive obligations under the contract, including payment and delivery obligations and provision of collateral, continue to be performed, the taking of a crisis prevention measure (as defined in the BRRD) or a crisis management measure (as defined in the BRRD; this includes a Resolution Power) in relation to a BRRD Entity, or the occurrence of any event directly linked to such a measure, cannot constitute an enforcement event (within the meaning of the FCA Rules), and shall not make it possible to exercise against the BRRD Entity any termination, suspension, modification, netting or set-off rights, to obtain possession, exercise control or enforce or create any security over any asset of the BRRD Entity, or to enforce security interests. However, rights to terminate based on the existence or occurrence of other circumstances and the operation of the Netting Provisions in relation to them, should not be affected (article 68(4) BRRD).[42]

5.11.2 The above applies *mutatis mutandis* to any Nationalisation Measures in respect of any financial undertaking (*financiele onderneming*) established in this jurisdiction (or its parent undertaking if established in this jurisdiction).

Suspension Powers

5.11.3 DNB or the SRB (as applicable) has the power:

(i) under Article 3A:52 FMSA, to suspend the payment and delivery obligations of a BRRD Entity subject to resolution, but in those circumstances the payment and delivery obligations of the counterparty are also suspended;

(ii) under Article 3A:53 FMSA, to restrict the enforcement by secured creditors of security interests over the assets of a BRRD Entity; and

(iii) under Article 3A:54 FMSA, to suspend the contractual termination, acceleration or close-out rights[43] of a party to a contract with a BRRD Entity provided that such BRRD Entity's substantive obligations under the contract continue to be performed.

Any period of suspension as referred to above must end no later than midnight at the end of the first business day following the day on which the order providing for the suspension is published. Thereafter the suspension or restriction is automatically lifted.

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42 This default override also applies to contracts entered into by the subsidiary of an BRRD Entity in resolution whose obligations have been guaranteed by a parent or other member of the group and it thereby operates to exclude the effect of cross-default provisions.

43 Article 2(1)(82) BRRD/article 1:1 FMSA defines a termination right as a right to terminate a contract, a right to accelerate, close-out, set-off or net obligations or any similar provision that suspends, modifies or extinguishes an obligation of a party to the contract or a provision that prevents an obligation under the contract from arising that would otherwise arise.

Partial Property Transfers

5.11.4 A property transfer may apply to only part of the assets and liabilities of a BRRD Entity (such a transfer being referred to as a "*partial property transfer*").[44] A partial property transfer could cause the transfer of some, but not all, of the Transactions (or obligations arising under Transactions), with the result that the ability to net the amounts due in respect of different Transactions against the amounts due in respect of others is impaired. The same could also result from the use of the power to cancel or modify contractual terms or to replace the BRRD Entity by another entity as party to an agreement.

Safeguards in case of Partial Property Transfers, Substitutions and termination/Modification of Contracts

5.11.5 Article 76 BRRD (article 3A:60 FMSA) provides that in the case of a partial property transfer to a transferee (or the use of the power to cancel or modify contractual terms or to replace the BRRD Entity by another entity as party to an agreement), the Member States must ensure the protection of certain arrangements. This includes, in particular, security arrangements, set-off arrangements[45] and netting arrangements[46] or title transfer financial collateral arrangements. Pursuant to Article 3A:60 FMSA, rights and liabilities between a person and a BRRD Entity are protected if they are rights and liabilities which either the person or the BRRD Entity is entitled to set-off or net under any such arrangement existing between them.

5.11.6 Articles 77-80 BRRD provide that if a partial property transfer has been made in contravention of Article 76, the partial property transfer does not affect the exercise of the right to set-off or net (i.e. these rights can be exercised irrespective of the partial property transfer). There are RTS (Commission

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44 This may be the case because the property transfer instrument concerned expressly applies to only part of the business of the BRRD Entity or because it is ineffective in relation to foreign property, which may include Transactions, or obligations arising under Transactions, which are governed by the laws of a different jurisdiction.

45 Defined as an arrangement under which two or more claims or obligations owed between the BRRD Entity and a counterparty can be set off against each other (article 3A:1 FMSA).

46 As defined in article 2(1)(98) BRRD: "*an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC*".

Delegated Regulation (EU) 2017/867, OJ. 2017, L.131/15) which further specify the classes of arrangements to be protected under Article 76 BRRD and thereby affect the scope of protected arrangements also under Dutch law.

Bail-In Powers

5.11.7 Bail-in (article 26 SRMR/article 3A:44 FMSA) may be applied to liabilities owed by a BRRD Entity under or in connection with the Agreements or one or more Transactions, and would then reduce or eliminate the amount owed with the effect that the ability of the non-defaulting Party to net amounts due in respect of that liability against liabilities owed by the non-defaulting Party to the BRRD Entity is commensurately reduced or eliminated. However, in this regard articles 3A:44(3), 60 and 61 FMSA prohibit bail-in from being applied in relation to a liability which is:

(i) a liability which is a secured liability (as defined in article 2(1)(67) BRRD which includes liabilities secured by a charge, pledge, lien, or collateral arrangement), but only to the extent secured, the unsecured portion of the liability being eligible for bail-in;

(ii) a liability which has an original maturity of less than 7 days; or

(iii) a liability that relates to a derivative[47] which has not been converted into a net debt, claim or obligation in accordance with the relevant arrangement.

Bail-in may therefore only be applied in respect of derivatives liabilities after close-out of the relevant derivatives contract (article 49(2) BRRD), and for that purpose article 63(1)(k) BRRD (article 3A:51 FMSA) grants the resolution authority the ability to terminate and close out any derivatives (whether collateralised or not). Any resulting net close-out amount payable by a BRRD Entity, to the extent that it is not a secured liability, is consequently subject bail-in, even though the actual contract (prior to close-out) was a secured liability.

[47] Under the BRRD a "*derivative*" means a derivative as defined in Article 2(5) of EMIR *("a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC [MiFID1] as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006*"). This includes most Commodity Transactions (other than spot transactions).

Effect of WHOA Proceedings and the Covid-19 Act

Mandatory Default Override

5.12 Under the new Article 373 BA (introduced under the WHOA), the preparation or proposal of a restructuring plan covered by the WHOA, the appointment by the court of a restructuring expert or any the occurrence of any other event or act directly related or reasonably required for the plan's implementation (e.g. a court ordered stay; see (c) below), shall not in themselves allow the debtor's counterparty to invoke contractual or other powers (i) to terminate or dissolve a contract (whether automatic or by notice), (ii) to amend obligations owing to the debtor or (iii) to suspend the performance of its own obligations towards the debtor. Events of default clauses that could be triggered by such events cannot be validly invoked against the debtor (the WHOA overrides such contractual provisions). It is doubtful whether a court outside the EU would give effect to this override.

5.13 Under the Covid-19 Act, in case *the Non-Defaulting Party filed for the Counterparty's bankruptcy in The Netherlands* and the Counterparty (not being a Dutch Credit Institution or a Dutch Investment Firm) is granted protection by the court, the Non-Defaulting Party will not be allowed to terminate or dissolve the Agreements based on a default that occurred prior to the court order, but if it has received Cash Collateral under the Title Transfer Provisions (assuming these qualify as a financial collateral arrangement).[48] it can do so and also set-off against Cash Collateral (i.e. so that the Base Currency Value of all the Eligible Credit Support provided under the relevant CSA on the Determination Date will be included in the calculation of the Final Net Settlement Amount).

Moratorium

5.14 If an event of default has occurred allowing the Non-Defaulting Party to suspend, amend or terminate the Agreements, this and the enforcement of security interests over assets owned by the Counterparty can be blocked by a court-ordered stay period (4 months with possible extensions for up to no more than a further 4 months) except with prior court approval, but any such stay order does not affect: (i) creditors who are unaware of the fact that a restructuring plan was being prepared (i.e. had no knowledge

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[48] See paragraph 4.17.4.

of the filing of a so-called "scheme declaration"[49] and had not otherwise been informed by the debtor) or that a stay order had been issued, (ii) security interests in respect of collateral located outside this jurisdiction (i.e. in other EU Member States or in non-EU countries; this is not relevant for this Opinion Letter), (iii) Cash Collateral received under a title transfer collateral arrangement (as such Cash Collateral is not owned by the Counterparty[50] and therefore not caught by the stay order), (iv) any call made by the Non-Defaulting Party under a Letter of Credit or (v) normal set-off of mutual obligations between creditor and debtor (as that does not constitute enforcement against the debtor's assets; the close-out netting process under the Agreements can be regarded as a set-off under certain circumstances – see paragraphs 4.7 – 4.9 above).

5.15 Even if the Non-Defaulting Party's termination, suspension, and close-out rights arising from a pre-stay default would be frozen, it can only be required to continue the performance of its obligations if the Counterparty provides the Non-Defaulting Party with collateral security for such continued performance during the stay period. In the event that (a) the Counterparty fails to offer or provide such collateral security, this shall allow the Non-Defaulting Party to exercise its termination, suspension, close-out netting rights, or (b) the collateral security available to the Non-Defaulting Party becomes (or threatens to become) insufficient during the stay period, the Non-Defaulting Party can petition the court to allow it to exercise its termination/close-out rights and enforce its security interests forthwith and the court will have no option but to grant a permission in such circumstances.

Contract Termination by the Court

5.16 If the Non-Defaulting Party does not agree to a proposal by a Counterparty, which has entered into WHOA Proceedings, to amend or terminate an Agreement, the court can allow the unilateral termination of the Agreement (and all transactions thereunder) if such termination is part of the restructuring plan submitted to and approved by it provided a reasonable notice period is observed by the Counterparty.[51] In the event of

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[49] Before offering a WHOA restructuring plan, the debtor must file a confidential scheme declaration with the competent Dutch court in which it commits to offer a restructuring plan within 2 months and it may then simultaneously request the court to order a general or specific stay against creditor action for a period of 4 months.

[50] See paragraphs 4.17 and 4.18 above.

[51] When it approves the restructuring plan, the court can extend the notice period to a maximum of three months after the approval order, if it deems the period chosen by the debtor to be unreasonable.

such a termination, the Non-Defaulting Party will be legally entitled to damages, which will be calculated on the basis of the agreed close-out netting arrangements (including the application of any collateral held by it or by the Counterparty)[52]; the damages will therefore consist of the amount of the Non-Defaulting Party's net claim against the Counterparty after giving effect to the Agreement's close-out netting procedures upon the date the termination becomes effective;[53] this net claim can be marked down if it is integrated into the restructuring plan[54] as the Non-Defaulting Party would also not have received 100% payment of its net claim in the Counterparty's bankruptcy.

5.17 Under the Covid-19 Act, *in case the Non-Defaulting Party would initiate enforcement action in respect of security interests over the Counterparty's assets in The Netherlands*, a Counterparty (not being a Dutch Credit Institution or a Dutch Investment Firm) can request the Dutch court in summary proceedings to order a deferral such enforcement actions, for a maximum period of up to 2 months (with two possible extensions by a further 2 months each). Such a moratorium order should not apply to (i) Cash Collateral received by the Non-Defaulting Party under the Title Transfer Provisions (as the 'assets' are <u>not owned</u> by the debtor), (ii) any call made by the Non-Defaulting Party under a Letter of Credit.

General Qualifications

5.18 where any Party is vested with a discretion or may determine a matter, Netherlands law may require that such a discretion is exercised or such determination is made reasonably. Any provision in the Agreements providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto. A Netherlands court may regard any calculation, termination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified;

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52 This is because of the 'no creditor worse off' principle enshrined in the WHOA; no creditor can be forced to accept a restructuring plan which means it receives less value (whether in cash or in non-cash awards) than it would have received in case of regular insolvency proceeding (Article 384 BA (new)).

53 As this will be difficult to quantify up front given that market value of the positions and the collateral will vary over time, the parliamentary notes indicate that a restructuring plan would normally contain a bandwith.

54 The debtor has a choice to either include the damages in the restructuring plan or not to do so. In the latter case, the damages will need to be paid in full. In the former case it can offer a partial payment, but the counterparty then has the right to contest the restructuring plan as an affected creditor.

5.19 each power of attorney (*volmacht*) and mandate (*lastgeving*) (including, but not limited to, powers of attorney and mandates expressed to be irrevocable) granted and all appointments of agents made by a Counterparty, explicitly or by implication, will terminate by law and without notice upon the Commencement Time with respect to bankruptcy (*faillissement*) and will become ineffective in case a Counterparty becomes subject to moratorium of payments (*surseance van betaling*), the exercise of any Resolution Powers. Notwithstanding the above, where the relevant power of attorney or mandate forms part of a financial collateral arrangement, and is necessary to realise the financial collateral, these rules will be disapplied;

5.20 with reference to our opinion in paragraph 4.32 above, it should be noted that with respect to disputes regarding verification of claims against a Party that is subject to Insolvency Proceedings in this jurisdiction, the court of The Netherlands which has declared the Insolvency Proceedings has exclusive jurisdiction;

5.21 if the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the courts of this jurisdiction may recognise the extinction of those claims or liabilities.

6. RELIANCE

This Opinion Letter:

(a) expresses and describes Netherlands legal concepts in English and not in their original Netherlands terms; consequently, this Opinion Letter is issued and may only be relied upon on the express condition that it shall be governed by and that all words and expressions used herein shall be construed and interpreted in accordance with the laws of the Netherlands;

(b) speaks only as of its date hereof and is strictly limited to the matters set forth herein and no opinion may be inferred or implied beyond that expressly stated herein;

(c) is addressed exclusively to EFET the members of the EFET Legal Committee and any other entity which has subscribed to EFET for one or more of the country opinions, is for their sole benefit and may not be relied upon by, or disclosed to, any other person, entity or corporation whatsoever without EFET's and our joint prior written approval, save for disclosure by EFET members to the appropriate regulatory and/or supervisory authorities, having jurisdiction over such members, on the basis that:

(i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms, but not for the purposes of reliance,

(ii) we do not assume any duty or liability to any person to whom such disclosure is made; and

(iii) such person agrees not to further disclose this opinion or its contents to any other person, other than as permitted above, without our prior written consent;

(d) may not be used for any purpose other than in connection with the Agreements; and

(e) does not result in any obligation on our part to notify or to inform the addressees of any developments subsequent to its date that might render its contents untrue or inaccurate in whole or in part at such time.

Yours faithfully,

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F.G.B. Graaf
(*advocaat*)
Clifford Chance LLP

ANNEX A
MASTER AGREEMENTS COVERED BY THE EFET MASTER NETTING AGREEMENT OR THE TBMA CROSS PRODUCT MASTER AGREEMENT

Energy Trading Master Agreements

- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2000), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2003), sponsored by the European Federation of Energy Traders (EFET)
- UK Grid Trade Master Agreement (version June 2004), sponsored by the Futures and Options Association (FOA)
- NBP Amendment Agreement for natural gas settled through the National Balancing Point (NBP) based on the Short Term Flat NBP Trading Terms and Conditions 1997
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2004
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2001
- International Emissions Trading Master Agreement (version 2010/2011), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2008), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2005), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2002), sponsored by the International Emissions Trading Association (IETA)
- US Master Power Purchase & Sale Agreement (version 2000), sponsored by the Edison Electric Institute

- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2002), sponsored by the North American Energy Standards Board, Inc (NAESB)

- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2006), sponsored by the North American Energy Standards Board, Inc (NAESB)

- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2005), sponsored by GasEDI

- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2000), sponsored by GasEDI

Derivatives Master Agreements

- Financial Energy Master Agreement (version 2000), sponsored by the Nordic Association of Energy Traders (NAET)

- ISDA 2002 Master Agreement, sponsored by the International Swaps and Derivatives Association, Inc.

- 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the International Swaps and Derivatives Association, Inc.

- 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), sponsored by the International Swaps and Derivatives Association, Inc.

- 1987 Interest Rate and Currency Exchange Agreement, sponsored by the International Swaps and Derivatives Association, Inc.

- Australian version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the Australian Financial Markets Association (AFMA)

- New Zealand version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border)

- German Rahmenvertrag für Finanztermingeschäfte (version 2001), sponsored by the German Banker's Association

- German Rahmenvertrag für Finanztermingeschäfte (version 1994), sponsored by the German Banker's Association

- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 2003), sponsored by the Schweizerische Bankiervereinigung

- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 1994), sponsored by the Schweizerische Bankiervereinigung

- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version July 2007), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version August 2001), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre AFB Relative Aux Operations Sur Instruments Financiers à Terme (version), sponsored by the Association Française des Banques (AFB)
- Spanish Contrato Marco De Operaciones Financieras (versión 1997), sponsored by the Asociación Española de Banca Privada (AEB)
- Dutch Raamovereenkomst voor Financiële Derivaten (RFD), sponsored by the Nederlandse Vereniging van Banken (NVB)
- Japanese Bond Option Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Mexican Contrato Marco para Operaciones Financieras Derividas
- Mexican Contrato Normativo para la realización de las operaciones de Intercambio
- Mexican Master Agreement for Entering into Dollar against Mexican Peso Forward Transactions
- US Master Securities Forward Agreement (version 1996), sponsored by The Bond Market Association (TBMA)
- US Master OTC Options Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US OTC Option Transactions – U.S. Treasury Securities Master Dealer Agreement (version August 1989), sponsored by the Public Securities Association (PSA)
- UK International Currency Options Market Agreement (ICOM) sponsored by the British Bankers' Association (BBA)
- UK Foreign Exchange and Options Master Agreement (FEOMA), sponsored by the British Bankers' Association (BBA)
- UK International Foreign Exchange Master Agreement (IFEMA), sponsored by the British Bankers' Association (BBA)
- The 1994 International Bullion Master Agreement (IBMA) (version June 1994), sponsored by the London Bullion Market Association and the Foreign Exchange Committee

- European Master Agreement for Financial Transactions (EMA) (edition January 2004), sponsored by the Banking Federation of the European Union (FBE)
- European Master Agreement for Financial Transactions (EMA) (edition January 2001), sponsored by the Banking Federation of the European Union (FBE)

Securities Lending Master Agreements

- Global Master Securities Lending Agreement (GMSLA) (version 2010), sponsored by the International Securities Lending Association (ISLA)
- Global Master Securities Lending Agreement (GMSLA) (version 2000), sponsored by the International Securities Lending Association (ISLA)
- Master Equity & Fixed Interest Stock Lending Agreement (MEFISLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Master Gilt Edged Stock Lending Agreement (GESLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version 1995), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version October 1994), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version February 1994), sponsored by the International Securities Lending Association (ISLA)
- US Master Securities Loan Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US Master Securities Loan Agreement (version May 1993), sponsored by the Public Securities Association (PSA)
- Canadian Securities Loan Agreement, sponsored by the Investment Dealers Association of Canada (IDAC)
- German Rahmenvertrag für Wertpapierleihgeschäfte
- German Rahmenvertrag für Wertpapierdarlehen (version 1999)
- French Contract Cadre de Prêts des Titres (version 2007), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- French Contract Cadre de Prêts des Titres (version), sponsored by the Association Francaise des Professionnels des Titres (AFTI)

- Australian Master Securities Lending Agreement (version November 2003), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version December 2002), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version April 1997), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- New Zealand Master Repurchase Securities Lending Agreement
- Japanese Basis Agreement Concerning Stock Lending Transactions, sponsored by the Japan Securities Dealers Association (JSDA)

Repurchase Master Agreements

- Global Master Repurchase Agreement (GMRA) (version October 2000), sponsored by The Bond Market Association (TBMA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA) (version November 1992)
- US Master Repurchase Agreement (MRA) (version September 1996), sponsored by The Bond Market Association (TBMA)
- US Master Repurchase Agreement (MRA) (version 1987)
- Canadian Repurchase/Reverse Repurchase Transaction Agreement
- Australian version of the Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of Global Master Repurchase Agreement (GMRA) (version 1995)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2005)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2002)
- German Rahmenvertrag für echte Pensionsgeschäfte (version 1997)

- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2007), sponsored by the Fédération bancaire française (FBF) [FBF07 REPO]
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2003), sponsored by the Fédération bancaire française (FBF)
- French Convention-cadre Relative Aux Opérations de Pensions Livriée, sponsored by the Association du Forex et des Trésoriers de Banque (AFTB)
- Japanese Bond Lending Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Japanese Basic Agreement Concerning Gensaki Transactions of Bonds, Japan Securities Dealers Association (JSDA)

ANNEX B
TRANSACTIONS UNDER UNDERLYING AGREEMENTS OR ADDITIONAL NETTED AGREEMENTS[55]

A. Energy Transactions

Commodity Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of commodity (e.g., base metals, gas, oil, electricity, emission rights or freight) in exchange for payment of a specified price, which becomes due on the same day, two days later or on another agreed future date. The transaction may be settled by physical delivery of the quantity of commodity in exchange for the specified price or may be cash settled based on the difference between the market price of the commodities on the settlement date and the specified price.

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

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as base metals, gas, oil, electricity, emission rights or freight, or a futures contract on a commodity (e.g., Brent Crude Futures on the ICE Futures Europe Exchange); all calculations are based on a notional quantity of the commodity.

B. Energy Related Transactions

Emissions Allowance Transaction. A transaction, structured in the form of a swap, cap, collar, floor or some combination thereof, in which one party agrees to buy from or sell to the other party a specified quantity of a right to emit one tonne of carbon dioxide (CO2) or other emissions product such as Nitrogen Oxide ("**NOx**") or sulfur dioxide ("**SOx**") during a specified period valid only for the purposes of meeting the requirements of applicable law and

[55] Some of the Transactions provide for an exchange of cash by both parties and others for the physical delivery of commodities, shares or bonds in exchange for cash.

which is capable of being transferred from the seller to the buyer under a trading system established pursuant to applicable law.

Renewable Energy Certificates ("RECs") Transaction. A transaction in which one party agrees to buy from or sell to the other party one or more fungible renewable energy certificates, each evidencing the production of 1MWhr of renewable energy and which is capable of being issued, evidenced, traded and redeemed in accordance with international standard practices such as the European Energy Certificate System. .

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

Weather Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation to receive a payment determined by reference to the amount by which a particular release of statistical data on weather conditions, which may include heating, cooling, precipitation and wind either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike level.

C. Other Transactions

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

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

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

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

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

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

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

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

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

9. **Commodity Forward.** A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the commodity and is settled based,

among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

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

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

12. **Contingent Credit Default Swap**. A Credit Default Swap Transaction in which the credit protection seller pays an amount determined by reference to the value of a hypothetical swap transaction.

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

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

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

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

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

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

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

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

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

21. **Emissions Allowance Transaction**. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40. **Weather Index Transaction**. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather

conditions, which may include measurements of heating, cooling, precipitation and wind.

APPENDIX A

OVERVIEW OF INSOLVENCY PROCEEDINGS AND RESOLUTION MEASURES

1. ***Bankruptcy: general overview***

Bankruptcy (*faillissement*) is a general attachment on (practically) all of the assets of a debtor, imposed by a judgment of the appropriate Dutch court (*Rechtbank*) for the benefit of the insolvent debtor's collective creditors. The objective of the bankruptcy is to provide for an equitable liquidation and distribution of (the proceeds of) the debtor's assets among its creditors. In practice, however, bankruptcy proceedings serve as an important instrument for the reorganisation and continuation of businesses in financial distress.

According to the BA, bankruptcy proceedings can be opened in respect of any debtor, natural or legal person, regardless of whether he carries on a business, practises an independent profession or not.

The court appoints a liquidator (*curator*) who is charged with the management and realisation of the debtor's assets (including by means of a transfer of (part of) the business as a going concern). The liquidator acts under the general supervision of a supervisory judge (*rechter-commissaris*). For certain acts of the receiver the law requires the (prior) authorisation of the supervisory judge, e.g. for conducting legal proceedings and for terminating employment and rental contracts. Under Dutch law a bankruptcy judgment takes effect retroactively from the Commencement Time on the date such judgment is rendered.

As a result of bankruptcy, the Insolvent Party loses with immediate effect all rights to administer and dispose of his assets. The liquidator manages the bankrupt estate, which consists of all of the Insolvent Party's assets and liabilities existing on the date of the bankruptcy judgment and extends to all after-acquired assets as well. The estate is not liable for obligations incurred by the Insolvent Party after the Commencement Time, except to the extent that such obligations arise from transactions that are beneficial to the estate.

The BA does not provide for the consolidation of bankruptcy proceedings opened in respect of companies belonging to the same group. However, there are some examples of cases in which courts have allowed such consolidation.

2. ***Moratorium of payments: general overview***

Moratorium of payments is a court ordered general suspension of a debtor's payment obligations; its objective is to provide an instrument for the reorganisation and continuation of viable businesses in financial distress. It is available only at the request of the debtor and only has effect in respect of ordinary (non-secured and non-preferred) creditors. During the period for which the moratorium of payments has been granted, creditors with non-preferential claims cannot take recourse in respect of the debtor's assets.

Moratorium of payments proceedings can be opened in respect of natural persons carrying on a business or practising an independent profession and juristic persons. The moratorium of payments may be granted by the court for a maximum period of one and a half years and may be prolonged at the request of the debtor (if necessary more than once) with a maximum of one and a half years.

As a result of the granting of a moratorium of payments, the debtor can no longer manage and dispose of its assets without the co-operation or authorisation of a court appointed administrator (*bewindvoerder*). Likewise, the administrator cannot act without the co-operation or authorisation of the debtor. In a moratorium of payments proceeding, the court may appoint a supervisory judge, whose role is limited to regulating certain procedural matters and advising the administrator upon his request.

The administrator in a moratorium has fewer powers than a liquidator in bankruptcy. The former can only act with the cooperation of the Insolvent Party, *i.e.* the management in the case of a company (and the debtor/the management can only act with the cooperation of the Insolvency Representative). It should be noted that moratorium of payments is also deemed to take effect retroactively from the Commencement Time on the date the order is rendered.

3. ***Act on Court Approved Pre-Insolvency Restructuring Schemes***

3.1 As of 1st January 2021, a new Dutch law has introduced the possibility of pre-insolvency debt restructuring schemes; this new tool is available to all Dutch Companies and Dutch Investment Firms. It doesn't apply to Dutch Credit Institutions. This new law is known as the Act on Court Approved Pre-Insolvency Restructuring Schemes ("**WHOA**" following the Dutch abbreviation). The WHOA's goal is to introduce a restructuring procedure enabling debtors in financial difficulties to restructure at an early stage and avoid insolvency while remaining in control of their business. To use this new procedure, debtors must foresee that they will not be able to continue paying their due and payable debts.[56] Under such circumstances, the debtor or a court appointed restructuring specialist may offer a restructuring plan to the debtor's creditors and shareholders. Before offering a WHOA restructuring plan, the debtor must file a confidential scheme declaration with the competent Dutch court in which it commits to offer a restructuring plan within 2 months (the "**Scheme Declaration**") and it may then simultaneously request the court to order a general or specific stay against creditor action for a period of 4 months (see below). A restructuring plan could propose amendments to debt instruments, payment deferrals, debt-for-equity swaps, haircuts / write-downs of all or certain creditors and termination of executory contracts (where the counterparty did not voluntarily cooperate with a proposal to amend or terminate the contract; see below). Not all of the debtor's creditors need to be covered by the restructuring plan. Creditors are grouped in separate classes (depending on their ranking in an insolvency) that vote separately on the proposed plan. Subject to certain safeguards, creditors who voted against the restructuring plan could be (cross-) crammed down and bound by the restructuring plan if a majority (of 2/3 of the value) of creditors within a class (or a more senior class) vote in favor of such a plan and the court subsequently approves the plan. It is generally held that creditors that have security interests over assets located in other EU Member States or outside the EU are not affected by such a court approved plan (unless they voluntarily cooperate and agree to the plan).

3.2 The WHOA provides the following (insofar as relevant to the Agreement):

(a) the preparation or proposal of a restructuring plan covered by the WHOA, the appointment by the court of a restructuring expert or any the occurrence of any other event or act directly related or reasonably required for the plan's implementation (e.g. a court ordered stay; see (c) below), shall not *in themselves* allow the counterparty to invoke contractual or other powers (i) to terminate or dissolve a contract (whether automatic or by notice), (ii) to amend obligations owing to the debtor or (iii) to suspend the performance of its own obligations towards the debtor; events of default clauses that could be triggered by such events cannot be validly invoked against the debtor (the WHOA overrides such contractual provisions); it is doubtful whether a court outside the EU would give effect to this override;

[56] This means that the debtor must be able to pay its currently due and payable debts, but not those arising in the foreseeable future (looking as much as a year in the future). I.e. there must be no realistic prospect of avoiding future insolvency if the debtor's liabilities are not restructured.

(b) if a debtor, who is in the course of preparing a restructuring plan, proposes to a counterparty to amend or terminate its contractual arrangements[57] and the counterparty does not agree, the court can allow the unilateral termination of the contract if this termination is part of the restructuring plan that is eventually submitted to and approved by the court and then only subject to a reasonable notice period.[58] However, in that case, the counterparty will have a legal right for damages, which will have to be calculated on the basis of the agreed close-out netting arrangements (including the application of any collateral held by the counterparty). This is because of the 'no creditor worse off' principle enshrined in the WHOA; no creditor can be forced to accept a restructuring plan which means it receives less value (whether in cash or in non-cash awards) than it would have received in case of regular insolvency proceedings[59]; the damages will therefore consist of the amount of the counterparty's net claim against the debtor after going through the close-out netting procedures upon the date the termination becomes effective;[60] this claim can be marked down if it is part of the approved restructuring plan[61] as the counterparty would also not have received 100% payment of the claim in the debtor's insolvency;

(c) if an event of default has occurred allowing the counterparty to suspend, amend or terminate a contract (e.g. close-out a master agreement or other executory contract), it will be entitled to do so, unless the court grants a stay period before the close-out is declared.[62] During such a stay period (4 months with possible extensions with no more than a further 4 months) the debtor will be protected against the filing of bankruptcy petitions, the enforcement of security interests

57 Clearly, the debtor would only do this for contracts that it deems financially onerous.

58 When it approves the restructuring plan, the court can extend the notice period to a maximum of three months after the approval order, if it deems the period chosen by the debtor to be unreasonable.

59 Article 384 BA (new).

60 As this will be difficult to quantify up front given that market value of the positions and the collateral will vary over time, the parliamentary notes indicate that a restructuring plan would normally contain a bandwidth.

61 The debtor has a choice to either include the damages in the restructuring plan or not to do so. In the latter case, the damages will need to be paid in full. In the former case it can offer a partial payment, but the counterparty then has the right to contest the restructuring plan as an affected creditor.

62 A stay is not granted automatically, but needs to be requested by the debtor after it has filed a so-called Scheme Declaration and has confirmed that it has already offered a restructuring plan to its creditors or will do so within 2 months. A stay can cover all of the debtor's assets or be confined to specific creditors and specific assets.

over assets owned by the debtor[63] and the levying of attachments for contract/payment enforcement (except, in each case, with prior court approval). The stay order does not affect: (i) creditors who are unaware of the fact that a restructuring plan was being prepared (i.e. had no knowledge of the filing of the Scheme Declaration and had not otherwise been informed by the debtor) or that a stay order had been issued, (ii) security interests in respect of collateral located in other EU Member States or in non-EU countries, (iii) security interests in the form of title transfers or (iv) normal set-off of mutual obligations between creditor and debtor (as that does not constitute enforcement against the debtor's assets). In all other situations, the counterparty's termination, suspension, and close-out rights arising from a pre-stay default are frozen and it can be required to continue the performance of its obligations BUT ONLY IF the debtor provides the counterparty with collateral security for such continued performance during the stay period. In the event the debtor fails to offer or provide such collateral security, this shall allow the counterparty to exercise its termination, suspension, close-out netting rights.[64] If the collateral security available to the counterparty becomes (or threatens to become) insufficient during the stay period, the counterparty can petition the court to allow it to exercise its termination/close-out rights and enforce its security interests forthwith. The WHOA's parliamentary notes are clear that the court will have no option but to grant a permission in those circumstances.

4. *Covid-19 Act*

4.1 On 4th June 2020, the Dutch government introduced draft legislation for the Temporary Moratorium of Payments Bill (*Tijdelijke Betalingsuitstelwet 2020*; the "**Covid-19 Act**") for Dutch companies (other than Dutch Credit Institutions, Dutch Insurance Companies and Dutch Investment Firms) that are in financial distress as a consequence of the official measures related to Covid-19. The Covid-19 Act entered into force on 17 December 2020. For purposes of this Opinion Letter, it is only relevant for Counterparties that are Dutch Companies.

4.2 Under the Covid-19 Act, a qualifying debtor can obtain protection from pending bankruptcy petitions for up to 2 months (with two possible extensions by a further 2 months) if he can show that in the absence of government measures to combat Covid-19 he would have had a viable business. During this period the following applies **to the creditor(s) who filed for bankruptcy**: (i) the case will not be heard by the Dutch court;

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63 Assets transferred to the creditor under title transfer arrangements are therefore not affected by the stay order.

64 The same applies in case the stay period expires without an approved restructuring plan binding upon the counterparty.

for the period of the moratorium; (ii) they cannot force payment of debts which have become due prior to the court order granting the moratorium or suspend any services under the defaulted contract; (iii) they will not be allowed to terminate / dissolve the contract based on a default that occurred prior to the court order; and (iv) if so ordered by the court upon the debtor's request, they cannot take recourse against the debtor's assets without prior court approval (this does not apply to title transfer arrangements (as the assets are not owned by the debtor) or to security interests that qualify as a financial collateral arrangement).

4.3 **As regards creditors who have initiated security enforcement actions in respect of (or made attachments on) the debtor's assets in The Netherlands**, the debtor can request the Dutch court in summary proceedings to order the deferral of such enforcement actions or to lift attachments against its assets, if he can demonstrate that this is necessary for the continuation of its business. During this moratorium the affected creditors: (i) cannot force payment of debts which have become due prior to the court order granting the moratorium or suspend any services under the defaulted contract; (ii) will not be allowed to terminate / dissolve the contract based on a default that occurred prior to the court order. This means that a debtor can use this law to postpone enforcement actions by its counterparties in relation to assets owned by it and located in The Netherlands security rights for a maximum period of up to 2 months (with two possible extensions by a further 2 months). This should not apply to title transfer arrangements (as the assets are not owned by the debtor) nor to security interests that qualify as a financial collateral arrangements.

5. Insolvent Foreign Companies

In relation to a Foreign Company both of the Insolvency procedures described in 1 and 2 above can apply in respect of its Dutch Branches, subject to the provisions of the Recast Insolvency Regulation. A more detailed discussion of Multi-Branch Parties can be found in Part (C) of the Opinion Letter.

If a Foreign Company's COMI is located in one Regulation State[65], then, pursuant to article 3 Recast Insolvency Regulation, insolvency proceedings may only be opened by the courts of that Regulation State and such proceedings will have universal effect throughout the other Regulation States, i.e. (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they

65 The Recast Insolvency Regulation is not applicable to insolvency proceedings where the Foreign Company's COMI is situated outside a Regulation State and therefore it does not govern (i) the consequences of the opening of an insolvency proceeding concerning such a debtor in such a Regulation State, and (ii) the consequences of the opening of an insolvency proceeding in non Regulation States.

possibly affect all creditors, wherever they may be located (except as otherwise provided in the Recast Insolvency Regulation). Consequently, the courts of another Regulation State:

(a) must recognize any insolvency proceedings opened by such courts as having effect also in their jurisdiction (i.e. such insolvency proceedings must be given effect by such courts) and the applicable law of such main insolvency proceedings will be the law of the Regulation State where the COMI is situated;

(b) may open "territorial proceedings" or, after the commencement of main proceedings "secondary proceedings" in the event that such a Foreign Company possesses an "establishment" in the territory of such other Regulation State. The applicable law of such territorial or secondary insolvency proceedings will be the law of that other Regulation State[66].

Thus, if a Foreign Company:

(c) is declared insolvent in accordance with the Recast Insolvency Regulation in a Regulation State where its COMI is situated, the enforceability of the Netting Clause must in our view be determined in accordance with the law of such Regulation State;

(d) has a Dutch Branch, the Dutch courts would be competent to open territorial or secondary Insolvency Proceedings pursuant to the Recast Insolvency Regulation in respect of the assets of that Dutch Branch.

6. Application to Specific Counterparties

In addition to the general statements made in opinion paragraphs 4.1 and 4.16, please note the following:

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[66] However, territorial or secondary insolvency proceedings are limited in scope to the Foreign Company's assets in that Regulation State and so will not extend beyond the Regulation State where they are opened. Furthermore, under article 3(3) Recast Insolvency Regulation, secondary proceedings are limited to winding-up proceedings. Generally, secondary insolvency proceedings will be opened following the opening of main insolvency proceedings, but there are exceptions to this principle as set out in article 3(4) Recast Insolvency Regulation. Although the Recast Insolvency Regulation does allow the process of liquidation in the secondary proceedings to be stayed at the request of the liquidator in the main proceedings, this remains subject to such liquidator taking any suitable measure to guarantee the interests of the creditors in the secondary proceedings. In this regard we would refer you to article 33 Recast Insolvency Regulation.

6.1 Bankruptcy (*faillissement*) can be applied to Dutch Credit Institutions and Dutch Investment Firms (as well as to Dutch branches of Third Country Credit Institutions and Third Country Investment Firms).[67]

6.2 Moratorium (*surséance*) cannot be applied to Dutch Credit Institutions, but can be applied to Dutch Investment Firms.[68]

6.3 WHOA Proceedings can be applied to Dutch Companies and Dutch Investment Firms.

6.4 Resolution Measures can be applied to Dutch Credit Institutions and BRRD Investment Firms as well as to Third Country Credit Institutions and Third Country Investment Firms (that are type (v) BRRD Entities.

6.5 Both bankruptcy and moratorium can be applied to the Dutch branches of EEA Investment Firms (unless their home member state applies liquidation or reorganisation measures first; see paragraph 4.16.1 of this Opinion Letter) and of Third Country Investment Firms.

6.6 In relation to an EEA Credit Institution (also see opinion paragraph 4.1.3): (i) neither bankruptcy nor moratorium can be imposed in this jurisdiction with respect to its Dutch branch office(s) and (ii) recovery and resolution measures can only be taken by the competent authorities of its home member state.

6.7 In relation to EEA Investment Firms, Insolvency Proceedings can be imposed by the courts of this jurisdiction upon DNB's request. Reorganisation or liquidation measures with regard to such institutions can also be taken by the authorities of their home member state and will in that case include all assets and EU branches of that EEA Investment Firm. Such measures must be recognised in The Netherlands[69] and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Investment Firm. Consequently, the Dutch authorities appear only to be able to apply liquidation or reorganisation measures to an EEA Investment Firm if the firm's home member state does not apply such measures prior to the Dutch courts or authorities.

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67 In relation to such entities: the BA provides that no third party (but only DNB or AFM) can file a petition for their bankruptcy.

68 The set-off and netting analysis under the WUDCI (see paragraph 4.3.3(g) above) applies to Dutch Investment Firms.

69 Articles 212s, 212t and 212oo BA.

Where an EEA Investment Firm is subject to insolvency proceedings in another Member State, the issue of enforceability of the Netting Clauses in insolvency situations must in our view be determined by the Dutch courts in accordance with opinion paragraph 4.9.

7. Nationalisation Measures

If the creditworthiness of a Dutch Credit Institution, a Dutch Investment Firm or any other regulated entity qualifying as a financial undertaking (*financiële onderneming*) within the meaning of the FMSA threatens the stability of the Dutch financial sector, the Dutch Minister of Finance can take Nationalisation Measures, which could include public ownership (nationalisation) of or any other measures in relation to such an entity. Nationalisation Measures do not qualify as insolvency proceedings as a matter of Dutch law.

8. Effect of Resolution Measures

8.1 The BRRD has created a new framework for the resolution of failing credit institutions and investment firms across the European Union. As this was introduced in the form of a European Union directive, it was necessary for the BRRD to be implemented into national law; in The Netherlands this was achieved pursuant to the BRRD Act. The rules that were introduced by the BRRD Act apply to a Party that is a Dutch Credit Institution, a BRRD Investment Firm or any other BRRD Entity.

8.2 In addition to the BRRD, the SRMR establishes uniform rules and procedures for the resolution of those credit institutions and certain investment firms which are established in member states of the European Union participating in the "single supervisory mechanism" established under the SSM Regulation (the "**SSM**") (that is, member states within the Eurozone) and groups of companies containing such a credit institution or investment firm.

8.3 The effect of SRMR and BRRD is that a distinction will have to be made between:

(i) Dutch Credit Institutions and BRRD Investment Firms for which the SRMR entrusts the SRB with the power to determine a resolution scheme; and

(ii) less significant Dutch Credit Institutions and BRRD Investment Firms, for which such decision-making shall in principle be the responsibility of DNB as the national resolution authority, using the powers under the BRRD Act.

In the scenario that a group in resolution, containing in scope Dutch Credit Institutions and BRRD Investment Firms, includes credit institutions and investment firms established in both SSM and non-SSM member states of the European Union, the resolution process under the BRRD will apply with the SRB representing the national resolution authorities of participating member states of the European Union.

8.4 DNB is required to implement the resolution scheme, whether or not this has been devised by the SRB or DNB. In cases where this has been devised by the SRB, the SRB will monitor the relevant institution's resolution and may give instructions to DNB on any aspects of the resolution. In the event that DNB does not comply with the resolution scheme, the SRB will have the power to directly instruct the relevant institution in resolution.

8.5 Instead of or prior to any Insolvency Proceedings, a BRRD Entity may be subject to one or more of the Resolution Powers. In relation to termination rights, netting and set-off, the effects of any of the aforementioned Resolution Powers (and other ancillary powers exercisable under the FMSA) are considered in paragraph 5.11 above.

9. Foreign Insolvencies and Resolution Measures

9.1 A foreign defaulting Party ("**Foreign Defaulting Party**") can be subject to Insolvency Proceedings in this jurisdiction if it is a Foreign Company and the requirements for secondary proceedings in respect of the Dutch Branch under the Recast Insolvency Regulation are satisfied (see paragraph 5. above),[70] or if it is a Third Country Credit Institution or Third Country Investment Firm.

9.2 For Foreign Companies having their COMI in a Regulation State (not having a Dutch Branch) and EEA Credit Institutions[71], the courts and authorities in The Netherlands would be required to defer to the proceedings in the Foreign Defaulting Party's home jurisdiction.

9.3 Both bankruptcy and moratorium can be applied to the Dutch branches of EEA Investment Firms (unless their home member state applies liquidation or reorganisation measures first[72]).

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70 Please refer to Chapter III of the Recast Insolvency Regulation.

71 In relation to an EEA Credit Institution, no Insolvency Proceedings can be imposed by the courts of this jurisdiction. Where any EEA Credit Institution is subject to insolvency proceedings in another Member State in accordance with (the rules implementing) the WUDCI, the issue of enforceability of the Netting Clause in insolvency situations must in our view be determined in accordance with the paragraphs 4.3.3 (g) and (h).

72 For Netting Opinion only: see paragraph 3.14.3 below.

9.4 In all other cases, there can be no separate Insolvency Proceedings in this jurisdiction in relation to a Foreign Defaulting Party and the authorities in this jurisdiction would not be required to defer to the proceedings in the Foreign Defaulting Party's home jurisdiction (unless this is Curaçao, Aruba or St. Maarten).

9.5 Resolution Measures can be applied to Dutch Credit Institutions and Third Country Credit Institutions or Third Country Investment Firms (provided they are type (v) BRRD Entities).

9.6 Resolution Measures with regard to EEA Credit Institutions can only be taken by the authorities of their home member state. Such measures shall include all assets and EU branches of that EEA Credit Institution and must be recognised in The Netherlands and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Credit Institution.

APPENDIX B

NECESSARY OR DESIRABLE AMENDMENTS

Although this is ultimately a matter to be determined under the Governing Law, we believe that the events specified in the Winding Up/Insolvency/Attachment clause (§3.1(C)(III) of the MNA adequately refers to Insolvency Proceedings as defined in this Opinion. There may be some uncertainty as to whether this clause as drafted under the Governing Law covers Resolution Measures and Nationalisation Measures. These, as well as WHOA Proceedings, do not qualify as insolvency or winding-up proceedings under Dutch law. WHOA Proceedings are modelled on US Chapter 11 proceedings and UK Scheme of Arrangement proceedings; to the extent such proceedings qualify under the Winding Up/Insolvency/Attachment clause (§3.1(C)(III) of the MNA, WHOA Proceedings are also are likely to qualify. Certain Resolution Powers may result in the BRRD Entity being left with no assets, being run-off or being liquidated. If Resolution Measures are indeed excluded from the Termination Clauses, then termination would only be possible if those measures resulted in a default under any of the other sub-clauses of the Termination Clauses. If Parties wish to have the ability to terminate on the occurrence of Resolution Measures, WHOA Proceedings and Nationalisation Measures, without making these insolvency related matters under the Termination Clauses, language is suggested to that effect under (B) below. *Note that none of the proposed language has been approved by foreign counsel.*[73]

(A) The risk in the case of an Agreement with a Dutch Credit Institution or a Dutch Investment Firm, where parties **have selected automatic close out** is that the appointment of a silent administrator (as mentioned in paragraphs 4.11.3(b) and 5.5 above) qualifies as an insolvency related event covered by the Termination Clause, resulting in an immediate close out of all outstanding individual Transactions without the Non-defaulting Party knowing it. To address this risk and also to make sure that the Non-defaulting Party is able to terminate the Agreement if and when it becomes aware of the appointment of a silent administrator, we would recommend inserting an additional "Material Adverse Change" category in the Termination Clause:

> *"if a non-disclosed silent administrator ("stille curator") pursuant to the Dutch Financial Markets Supervision Act ("Wet op het financieel toezicht") as amended, restated or re-enacted from time to time) is appointed over or in respect of a Party established in The Netherlands (for the avoidance of doubt,*

[73] We emphasize that these additional clauses have not been reviewed or approved by legal counsel expert in the relevant Governing Law (which we consider important as they are to be included in the EFET Gas Contract which may be subject to any Governing Law).

the appointment of a silent administrator ("stille curator") shall not constitute an insolvency or winding-up event for the purposes of Clause [ ] of this Agreement)."

The effect of this language would be that the appointment of a silent administrator would be a "Material Reason", but would not be considered to be able to cause a "silent" termination of individual Transactions in case automatic close-out is selected. If there is reason to believe under the Governing Law that WHOA Proceedings qualify as an insolvency related event under the Winding Up/Insolvency/Attachment clause (§3.1(C)(III) of the MNA, there is an identical risk arising from such proceedings being mostly undisclosed until late in the process. In that case, afurther clause may be appropriate:

"*if any filing, restructuring proposal, appointment of a restructuring expert or other court order or judgment is made or rendered in accordance with the Act on Court Approved Pre-Insolvency Restructuring Schemes ("Wet Homologatie Onderhands Akkoord") in respect of a Party established in The Netherlands (for the avoidance of doubt, any such filing, proposal, appointment, order or judgment shall not constitute an insolvency or winding-up event for the purposes of Clause [ ] of this Agreement)*."

(B) As there may be some uncertainty as to whether (i) the taking of Nationalisation Measures in respect of a Counterparty or (ii) the application of Resolution Measures in respect of BRRD Entities or (iii) WHOA Proceedings are covered by the Events of Default (see our introductory comments above), it may be appropriate to expand these so that there is no doubt that the relevant Party is in a position to terminate and close-out the Master Agreements, the Underlying Agreements and the Transactions concluded thereunder. This can be achieved by inserting an additional default event in the relevant Termination Clause:

*"if a Party becomes subject to any form of crisis prevention or crisis management measure, any resolution measure or any special measure (*bijzondere maatregel*) within the meaning of Parts 1, 3A or 6 of the Netherlands Financial Markets Supervision Act (*Wet op het financieel toezicht*) as amended, restated, or re-enacted from time to time, if any filing, restructuring proposal, appointment of a restructuring expert or other court order or judgment is made or rendered in accordance with the Act on Court Approved Pre-Insolvency Restructuring Schemes (*Wet Homologatie Onderhands Akkoord*) in respect of a Party established in The Netherlands, or any proceedings or steps are commenced to apply any such measures or proceedings to a Party (for the*

avoidance of doubt, such measures, proceedings or steps shall not constitute an insolvency or winding-up event for the purposes of Clause 10.5(c) of this Agreement);"

Note, however, that invoking such events can be affected by the Mandatory Default Override (see paragraphs 5.11.1, 5.12 and 5.13 above) or become subject to a two day suspension, inter alia, in case the BRRD Entity continues to perform its substantive obligations under the contract (see paragraph 5.11.3 above), although non-Dutch courts may not give effect to the overriding effect of these mandatory Dutch law provisions.