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The Netherlands

Date: 1 April 2021

Dear Sirs,

Legal opinion regarding Master Netting and related Cross-Product Credit Support Documentation

1 INTRODUCTION

1.1 You have asked us to give an opinion (this "**Opinion**") as to matters of French law in relation to a number of questions raised in your instruction letter dated 2 July 2020 (the "**Instruction Letter**"), in connection with:

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

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

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

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

The Master Agreements and the CSAs are together referred to as the "**Agreements**". A copy of the Instruction Letter is appended to Annex 8 to this Opinion.

1.5 For the purposes of giving this Opinion, we have only examined the standard form documents of the Agreements listed above in Annex 1 to this Opinion. We have not made any searches or enquiries concerning or affecting any person, or any corporate records of such persons.

1.6 This opinion is given only with respect to the laws of France in force and as applied by the *Cour de Cassation* (Supreme Court for private law matters), the *Conseil d'Etat* (Supreme Court for public law matters) and the *Conseil Constitutionnel* in their published decisions 15 days prior to the date of this letter. You should note that the case law on many of the matters opined on is scarce and that French courts are not bound by precedent. No opinion is expressed or implied as to the laws of any other jurisdiction. As to questions of fact material to the opinion expressed herein, we have, without independent investigation, relied upon the indications contained in the Agreements, and have assumed that all of the representations and warranties as to factual matters to be made or given by parties thereto are true and accurate (save to the extent specifically covered by this opinion). We have not undertaken any independent investigation to determine the existence or absence of any such facts and no inference as to our knowledge with respect thereto should be drawn from the fact that legal services have been rendered by us in connection with this opinion.

1.7 In providing this Opinion, we assume no obligation to update or supplement the Opinion to reflect any facts or circumstances which have come or may come to our attention after the date of this opinion or changes in law which have taken, may occur, or take effect, after such date.

1.8 This Opinion only purports to be an analysis of the issues raised by the Instruction Letter and does not purport to be an analysis of all issues which could arise in entering the Agreements. For example, it does not deal with matters related to power, authority, compliance with any constituent documents.

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

2 EXECUTIVE SUMMARY

Subject to the detailed explanations provided below, the position under French law can be summarised as follows:

2.1 The close-out netting provisions of the MNA and of the CPMA are effective and enforceable in accordance with their terms under the laws of the France. Upon the occurrence of Insolvency Proceedings the close-out netting provisions of the MNA and of the CPMA are effective and enforceable provided that the Financial Netting Regime Conditions are met.

2.2 The provisions of the CSA contemplating the transfer of Eligible Credit Support in favour of one Party are valid and enforceable under French law.

2.3 The close-out netting provisions of the MNA and the CPMA combined with the provisions of the relevant CSA related to it contemplating the transfer of Eligible Credit Support in favour of one Party are valid and enforceable under French law upon the occurrence of Insolvency Proceedings provided that the Financial Netting Regime Conditions are met.

2.4 It is not necessary for the Parties to the Agreements to agree to automatic, rather than optional, termination of Underlying Agreements.

2.5 Subject to the applicable rules under the EU Insolvency Regulation which (amongst other things) regulates jurisdictional issues on the commencement of Insolvency Proceedings, the conclusions of this Opinion are generally unchanged in respect of a Party conducting business on a multibranch basis prior to insolvency.

2.6 In the event of separate Insolvency Proceedings in relation to the French branch of a multibranch party, the responsible insolvency official would recognise the close-out netting provisions of the Agreements in accordance with their terms.

2.7 Each transfer of cash on an account located in France as Eligible Credit Support under the CSA would likely take effect as an unconditional transfer of ownership of the assets concerned in accordance with its terms and is unlikely to be recharacterised as the creation of a security interest. No further action is required to enforce or continue such ownership interest.

2.8 Unless otherwise agreed between the Parties, an orally agreed Underlying Agreement will be enforceable provided that the requirements for the formation of a binding contract are satisfied. The existence of an Underlying Agreement is not conditional on any subsequent written confirmation (with the exception of agreements on choice of jurisdiction, which for certain purposes may be required to be made in writing)

2.9 None of the elections contemplated by the Agreements would affect the substance of this Opinion relating to the enforceability of the close-out netting provisions of the Master Agreements.

2.10 In general: (i) the French courts will uphold the Parties' choice of governing law; and (ii) the French courts will respect the Parties' submission to jurisdiction under the relevant Agreements.

2.11 Please note that the executive summary does not form part of the opinion and that it is given for the purposes of convenience only.

3 SCOPE AND DEFINITIONS

3.1 You would like us to give our opinion in several related scenarios under the following categories: (i) each Master Agreement; (ii) each CSA; and (iii) each Master Agreement combined with the relevant CSA); with respect to the enforceability of each Master Agreement, each CSA and each Master Agreement combined with the relevant CSA against an entity organized and existing in, and subject to the bankruptcy courts of France. In particular, you are asking us to consider the enforceability of each Master Agreement and CSA against: (i) a corporation registered as a company under the laws of France; (ii) a bank/credit institution (as defined under Article 4(1) of the EU Regulation no. 575/2013 on prudential requirements for credit institutions and investment firms (the "**Capital Requirements Regulation**"); and (iii) an investment firm (as defined under Article 4(1) of EU Directive 2014/65 ("**MiFID II**").

3.2 You have provided us with a set of uniform Schedule / Election Sheet elections and specific Underlying Agreements which together form: (i) a 'model' CPMA; and (ii) a 'model' MNA, upon which we are requested to opine, (the "**Defaulted Elections**"), which are set out in Annex 5. We assume that any provisions of each Master Agreement (other than the Defaulted Election) (each such provision a "**Core Provision**") have not been altered in any material respect. You are asking us to state whether or not (a) any election contemplated in each Master Agreement that we have assumed in addition to the elections set forth 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, would be considered material alterations, as to which see paragraph 4.23 below.

We provide no opinion in the event where individual counterparties choose to move away from the model form of Schedule / Election Sheet with the Default Elections upon which the opinion is based, and it will be up to them to satisfy themselves (by obtaining their own supplemental opinions or otherwise) that their particular form of Master Agreement and/or relevant CSA is still valid and enforceable.

3.3 Unless defined herein (either immediately below or in this Opinion), capitalised terms used in this Opinion shall have the meaning given to them in a Master Agreement or a CSA, as applicable, have the same meaning in this Opinion, unless the context indicates otherwise.

"**Additional Netted Agreement**" has the meaning ascribed to such term in the MNA.

"**Bankruptcy Judgment**" means the judgment opening an Insolvency Proceeding.

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

"**BRRD 2**" means the Directive no. 2019/879 of 20 May 2019 amending BRRD as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms.

"**Civil Code**" means the French *Code civil.*

“**Commercial Code**” means the French *Code de commerce.*

“**EMIR**” means the Regulation (EU) no. 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

“**Financial Netting Regime**” means the specific regime relating to the netting and collateral in relation financial instruments.

“**Financial Netting Regime Conditions**” means the conditions referred to in Annex 7, which respect to the application of the Financial Netting Regime under the French Netting Law

“**FMC**” means the French *Code monétaire et financier* (the financial and monetary code).

“**France**” or “**French**” means refers to (i) the metropolitan territory of the French Republic and (ii) overseas departments (*départements d’outre-mer*) and territorial collectivities subject to article 73 of the French constitution of 4 October 1958 (as amended) and (iii) excluding other territories and collectivities such as French Polynesia, Wallis and Futuna and New Caledonia.

“**French Counterparty**” means a counterparty to any Agreement, which is a corporation (including a bank or other similar financial institution) duly incorporated or organized under the laws of France or an entity referred to in Annex 9.

“**French Insolvency Law**” means the French law relating to Insolvency Proceedings set out in Book VI of the Commercial Code.

“**French Netting Law**” means the French law relating to the Financial Netting Regime set out in articles L.211-36 to L. 211-40-1 of FMC

“**French Supreme Court**” means the *Cour de cassation*.

“**EU Insolvency Regulation**” means the European Union regulation no. 2015/848 of 20 May 2015 on Insolvency Proceedings (recast) as has been amended from time to time.

“**EU Judgment Regulation**” means the European Union regulation no. 1215/2012 of 12 December 2012 on recognition and enforcement of judgments in civil and commercial matters

“**EU Credit Institutions Reorganization and Winding up Directive**” means the directive 2001/24/EC of 4 April 2001 on the reorganization and winding up of credit institutions

“**EU Insurance Undertakings Insolvency Directive**” means the directive 2001/17/EC of 19 March 2001 on the reorganisation and winding up of insurance undertakings.

“**Insolvency Proceedings**” means the proceedings governed by the Book VI of the Commercial Code (both legislative and regulatory parts) relating to undertakings in difficulty and in particular (i) ad hoc proceedings (“*mandat ad hoc*”) (the “**Ad Hoc Proceedings**”) and conciliation proceedings (“*procédure de conciliation*”) (the “**Conciliation Proceedings**”) which are governed by Articles L. 611-1 to L. 611-16 of Title I of Book VI of the Commercial Code, (ii) safeguard (“*procédure de sauvegarde*”) **(“Safeguard Proceeding”)**; accelerated safeguard procedure (“*sauvegarde accélérée*”) **(“Accelerated Safeguard Proceeding”)**, accelerated financial safeguard procedure (“*sauvegarde financière accélérée*”) **(“Accelerated Financial Safeguard Proceeding”)**, judicial reorganization (“*redressement judiciaire*”) (“**Judicial Reorganization Proceeding**”) and winding-up (“*liquidation judiciaire*”).

“**Netted Agreement**” has the meaning ascribed to such term in the MNA and refers to the agreements designated as being a “Netted Agreement” in the Election Sheets of agreements falling in the scope of the MNA.

“**Opinion**” means this letter and /or its contents, as the context requires.

“Principal Agreement” means means ascribed to this term in the CPMA and refers to the agreements (each as from time to time amended or supplemented) between the parties thereto and designated as “Principal Agreement” in Parti I of the Schedule to the CPMA..

“**Rome I Regulation**” means of the Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations

“**Uncovered Transaction**” has the meaning ascribed to such term in the CPMA

“**Underlying Agreement**” means the designated Principal Agreement / Netted Agreement in the relevant Master Agreement.

3.4 In this Opinion:

(a) Headings are for ease of reference and shall not affect its interpretation.

(b) References to an “**Annex**” are to an appendix of this Opinion unless otherwise stated.

(c) References to a “**paragraph**” are to a paragraph of this Opinion, as the context requires.

(d) References to a “**section**” are to a section of this Opinion, as the context requires.

(e) Any references to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this Opinion

(f) An “**Insolvent Party**” is a Party which is or which becomes subject to an Insolvency Proceeding and a “**Solvent Party**” is the other Party.

(g) We refer to liquidation and winding up interchangeably. The terms are synonymous and mean “*liquidation judiciaire*” in French law.

3.5 We express no opinion:

(a) as to the validity and enforceability of any provisions of the Agreements other than those to which express reference is made in this Opinion;

(b) any matters of fact;

(c) on any laws, including insolvency laws, other than French law, even, where under French law, such foreign law falls to be applied;

(d) on the laws of any other jurisdiction;

(e) as to any competition law aspects raised by virtue of the publication of the Agreements;

(f) as to the existence of any property or assets transferred or to be transferred pursuant to the CSAs, whether any such property or assets is owned by the transferor thereof or whether the same is or may become subject to any rights, privileges (*privilèges*) or interests in favour of any other person ranking in priority to the transferee thereof[1];

(g) any proposal to introduce or change a law, or any pending change in law;

[1] Under French conflicts of law principles, generally the law of the country where property is situate (*lex rei situae*) will determine the manner and effectiveness of any purported transfer of title in that property which is otherwise valid under French law

(h) any law which has been enacted and has not commenced, or if it has commenced, has not started to apply;

(i) any pending judgment, or the possibility of an appeal from a judgment, of any court; or

(j) the implications of any of sub-paragraphs (g), (h), (i) above.

3.6 Matters relating to tax law are outside the scope of this Opinion and we express no opinion on such matters herein.

4 OPINIONS

On the basis set out above, and subject to the assumptions in Annex 2 (*Assumptions*), the additional assumptions stated in respect of each section, and the qualifications in Annex 3 (*Qualifications*), we set out our opinions below.

4.1 Netting / Set-off Absent An Insolvency

Model CPMA / Model MNA

4.1.1 **Your opinion on whether a transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement would be validly included in each model Master Agreement, assuming either a choice of English or German law as governing such documents (save of the trading terms and conditions of the 2015 NBP Master which is governed by English law)?**

Please elaborate if your analysis depends on whether or not the relevant transaction: (i) was concluded before or after the execution of each Master Agreement; or (ii) makes explicit reference to a Master Agreement or the relevant Underlying Agreement.

Assuming that English law or German law by which each Master Agreement is expressed to be governed would validly include a transaction under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement in each Master Agreement, French law will recognize and admit such inclusion; provided that:

(a) if the relevant transaction was entered prior to the execution of a Master Agreement, such transaction would not be included pending on the execution of such Master Agreement and its inclusion thereunder;

(b) following the execution of a Master Agreement and provided that the Underlying Agreement is included in such Master Agreement, the transaction would then be included in the Master Agreement.

It is also not necessary for the Underlying Agreement or Uncovered Transaction / Additional Netted Agreement to explicitly refer to the Master Agreement, their inclusion in the Master Agreement is sufficient. Conversely, French law would recognize and admit the inclusion in either model Master Agreement if an Underlying Agreement or Uncovered Transaction / Additional Netted Agreement explicitly refers to such Master Agreement whereas such Master Agreement does not itself refer the Underlying Agreement or Uncovered Transaction / Additional Netted Agreement,

We are of this opinion because French law recognizes, in the absence of an insolvency proceeding (as to which see paragraph 4.10 with respect to conditions restricting contractual set-off) , that parties may freely contractually agree on the conditions of termination and set-off of their reciprocal obligations. Moreover, under the Financial Netting Regime, netting is recognized when the conditions for the Financial Netting Regime are met.

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

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

b) under one or more physically settling energy transactions involving two or more different classes or types of commodity or product[2], and

c) under a combination of physically and financially settling transactions (transacted under two or more Underlying Agreements)[3];

We are of the opinion that, absent of an insolvency of either party, the provisions of the Master Agreement providing for the netting and set-off of the obligations between the parties are legal, valid and enforceable under French law, in any cases a), b), or c). above under French law based on provisions of the Civil Code relating to <u>contractual</u> set-off or, if the Financial Netting Regime Conditions apply, based on the Financial Netting Regime.

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

No due diligence such as lien searches, filings are required prior to entering into each Master Agreement. Nonetheless, it is best practice and recommended to check (i) the legal status of each individual institution with whom transactions are under consideration in order to determine whether such counterparty is a Qualified Entity or a party to which a specific regimes applies or not and hence, whether the Financial Netting Regime Conditions are met or not.

Usual diligence with respect to the capacity of the counterparty and authority of the signatory is also recommended.

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

Under French law, set-off equivalent is "*compensation*", a French civil law mechanism which is a payment means designed to reduce the lower of (or extinguish) two reciprocal payment obligations.

There is no real equivalent terminology for close-out netting, the closest equivalent is *résiliation-compensation or solde unique compensé*. Close-out netting implies three stages: the first stage in the close-out process involves termination (*résiliation*) or acceleration (*déchéance du terme*) of the underlying contracts, which may be accomplished through explicit termination clauses; the second stage involves valuation (*évaluation*) of the termination amount (*montant de résiliation*) of each transaction in accordance with its terms and the third stage involves set-off (*compensation*).

Based on this analysis, the French concept of set-off may not be construed to cover the entire close-out netting concept.

General overview of set-off and netting in France under the civil law principles

<u>Set-off by operation of law (*compensation légale*)</u>

Under French law, set-off is a well-established concept enshrined by the Civil Code and case law. Debt may be set-off (i) by operation of law (*compensation légale*) if certain conditions are fulfilled pursuant to article 1347-1 of the Civil Code, (ii) by court order (*compensation judiciaire*) pursuant to

[2] In the absence of Master Agreements which provide for contractual set-off, transactions involving the same commodity or product when physically settled would qualify for set-off under the fungibility requirement. This would not apply when different classes or types of commodities or products need to be considered for set-off.

[3] This is intended for example to identify circumstances where a party is required under the laws of your jurisdiction to apply regulatory margining to derivative transactions, for example under the European Market Infrastructure Regulation (EMIR).

article 1348 of the Civil Code or (iii) contractually (*compensation contractuelle*), ie by agreement of the parties under article 1348-2 of the Civil Code.

With respect to set-off by operation of law, debts must fulfill five criteria set out in Article 1347-1 of the Civil Code:

(i) debts must be reciprocal, i.e. they exist between two parties;

(ii) the purpose of each debt must be a sum of money or a quantity of fungible things;

(iii) each debt must be liquid (i.e. the amount of each debt is determined); and

(iv) each debt must be due and payable

(v) the existence of each debt must be certain;

When these conditions are met, set-off takes place by operation of law and the two debts are reciprocally extinguished up to their respective amounts.

The requirement that the claims be certain, liquid and matured is no longer necessary to set-off so-called “connected” claims, as to which see below.

<u>Set-off by court order (*compensation judiciaire*)</u>

When the conditions above are not met, when the debts are not liquid and/or due, a party may request a judge to order set-off (*compensation judiciaire*) pursuant to Article 1348 of the Civil Code. Unless otherwise decided, set-off is then effective as at the date of the court decision.

<u>Set-off by agreement (*compensation contractuelle*)</u>

Debts not qualifying for the set-off by operation of law (*compensation légale)* or by court order *(compensation judiciaire)* may still be set-off if the parties have agreed to do so (*compensation conventionnelle*). Article 1348- 2 of the Civil Code provides « The parties are free to agree to extinguish all reciprocal obligations, present or future, by set-off. Such a set-off takes effect on the date of their agreement or, if it concerns future obligations, when they co-exist. » Such article of the Civil Code enshrines well-established case law on this matter. It should be noted that the principle of reciprocal obligations is a fundamental principle under French law.

The parties may freely choose the governing law of such contractual set-off under the autonomy principle (*loi d’autonomie*[4]). So, the parties may perfectly agree to have the set-off be governed by and subject to a law other than French law, such as English or German law.

The parties may thus agree to set-off debts which do not meet the criteria applicable to the set-off by operation of law. The parties may also further agree on the conditions of such set-off and how it has to be effectively exercised. They may agree how to apply the various amounts of reciprocal debt. As a consequence, any set-off clause will be upheld by French courts provided that they are reciprocal obligations.

In addition, debts which do not meet the conditions for legal set-off may still be offset if the parties have agreed to do so through contractual set-off. The parties may thus agree to set-off debts which do not meet the criteria applicable to the legal set-off (provided however that they are reciprocal). Article 1348-1 of the Civil Code provides that the judge cannot refuse the set-off of connected claims on the sole ground that that claims are not liquid or due. In that case, set-off is deemed to have occurred on the day where the first claim was falling due.

However, set-off by agreement may be subject to voidance if concluded during the Hardening Period. Should a Judicial Reorganisation Proceedings or Judicial Liquidation Proceedings be

[4] Rep Droit Civil, Dalloz, #41

opened, such *compensation conventionnelle* will be paralysed on the basis of the French Insolvency Law, except if the claims are connected claims.

Connexity - connected claims (*créances connexes*)

Connected claims (*créances connexes*) benefit from specific features, notably in the event of insolvency proceedings (see below). This is a concept which was first developed by case law. French Supreme Court held that obligations were connected (*connexes*) when resulting from one contract or when carried out pursuant to the same contract that has defined the framework of the business relationship of the parties such as a master agreement[5] or when the obligations are carried out pursuant to different contracts which constitute a single global contractual arrangement[6] or when the obligations arise from a master agreement and a specific contract (*contrat d'application*)[7]

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The validity and enforceability of the close out netting provisions of the Agreements under French law based on provisions of the French Civil Code relating to set-off would be upheld by French courts.

Financial Netting Regime

French law recognises a specific regime relating to close-out netting and provides for a robust statutory framework provided that certain conditions with respect to the parties and to transactions are met (the "**Financial Netting Regime**"). These provisions are set out under Articles L. 211-36 through L. 211-40 of the FMC and are set out in Annex 7. This regime provides specific protection, in particular in the context of Insolvency Proceedings, enabling the termination of contracts, the providing of collateral and setting out a statutory recognition of netting arrangements.

Article L. 211-36-1 I of the FMC provides that "a*greements relating to the financial obligations mentioned in Article L.211-36 above may be early terminated, and relating debts and receivables shall be netted between all the parties. The parties may provide for the calculation of a single net settlement amount irrespective of whether such financial obligations are governed by one or several agreements or master agreements*."

Article L. 211-36-1 II of the FMC further provides that "*the termination, valuation and netting procedures of the transactions and obligations referred to in article L.211-36 are effective vis-à-vis third parties. These procedures may be provided for in agreements or master agreements. Any termination, valuation or netting effected on grounds of civil execution proceedings or the exercise of a right of opposition shall be deemed to have taken place prior to said proceedings or to that action*". As a consequence, the conditions under which the termination may occur can be determined by the provisions of the agreement entered into between the parties.

The Financial Netting Regime allows the termination, without specifying whether such termination should occur automatically or by notice and the enforceability of the netting procedures set out in the Agreement. Therefore, the Parties to the CPMA or CMNA can choose to apply or not to apply Automatic Termination.

Please note that when the French Netting Law regime applies, termination by notice is recommended as such termination mode provides the flexibility which may be required in order to process an orderly Insolvency Proceeding as experience has shown. It avoids, in particular, situations where the Underlying Agreements would be terminated without the Parties having knowledge of it.

Consequently, assuming that the French Netting Law regime is applicable, we would not recommend to elect Automatic Termination and would consequently not suggest to amend the

[5] Cass Com.,9 May 1995, Bull Civ IV, n° 130 , Cass. Com., 12 December 1995, Bull. Civ. IV n°293.
[6] Cass. com., 1 March 2005, no 03-17.954.
[7] Cass. Com, 5 April 1994, Bull Civ IV, n°

scope of Automatic Termination or to specify or refrain from specifying a grace period to benefit of the favourable provisions of the French Netting law.

CPMA CSA / MNA CSA

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

By way of reminder, the Eligible Credit Support consists in a certain amount of cash being transferred to an account opened in the name of the beneficiary (most likely such account being opened in the books of credit institution); as a consequence, unless otherwise provided, any reference to Eligible Credit Support shall be deemed to a reference to cash. Cash will be deemed located where the account to which it is credited is located.

In the case where the cash is credited on an account outside France, the *lex rei sitae* (i.e. the law of the jurisdiction of location of the assets ("lex situs")) apply in accordance with French international private law and the transfer of title has to be perfected in compliance with the foreign law governing such account.

In the case where the cash is credited on an account opened in France, we consider that the transfer of ownership of cash will be upheld by French courts, without being characterised as purporting to create a mortgage, charge, lien, pledge, encumbrance or other security interest:

<u>Assuming the Financial Netting Regime does not apply</u>, the civil law regime would apply including in respect of effecting the perfection. French courts have traditionally upheld that a transfer of cash to the counterparty in the form of a *gage-espèces* is effected by transfer to the pledgee who has title to the cash transferred. Such principle is now in the Civil Code under article 2341, 2nd paragraph which states with respect to the pledge of fungible assets (such as cash), that the pledgee acquires ownership of the pledged assets, provided the pledgee can transfer back the same quantity of assets. No particular formalities are required in order to perfect a cash pledge.

<u>Assuming the Financial Netting Regime applies</u>, article L. 211-38 of the FMC provides that “As a guarantee for current or future financial obligations referred to Article L.211-36, parties may <u>provide for transfers of title, effective vis-a-vis third parties without further formalities</u>, of commodities represented by a warehousing receipt, financial instruments, <u>bills</u>, receivables, agreements, <u>or cash</u>, or the creation of security interests over such assets or rights,” The transfer of ownership of cash is therefore recognised by statute law.

With respect to Letter of Credit, we understand that such Letter of Credit is issued directly to the benefit of the Transferee since the Letter of Credit "*obliges the bank to pay the amount guaranteed therein upon the first demand of the Transferee*". As a consequence, the Letter of Credit cannot be viewed, strictly speaking, as "transferred"; since the Letter of Credit is not owned by the Transferor and is issued directly to the Transferee there is transfer of ownership.

4.3 **Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, your opinion on whether it will need to take any subsequent action to ensure that its title in the Eligible Credit Support continues. Your opinion should include whether there are any requirements in your jurisdiction necessary or advisable, including any filing registration, notification, stamping, notarization or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval together with any procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce or continue such ownership interest.**

With respect to Eligible Credit Support located in France, the transfer of title should be perfected in compliance with French law: except for having a written agreement (which condition is met by entering into the CPMA CSA or MNA CSA), the transfer of ownership should be perfected upon delivery of the cash provided as collateral to an account opened in the Transferee's name. From a French law perspective, no other requirements would have to be complied with to perfect such transfer of title in France and ensure that the title therein perfected continues. No filing registration, notification, stamping, notarization or any other action or governmental judicial, regulatory or other order, consent or approval is required in to continue such ownership interest.

In the event of default of the Transferor, the Transferee will be entitled to retain the cash held in the account at the time and have such cash to be offset with the relevant sums owed to it by the Transferor.

With respect to Eligible Credit Support located outside France, according to French private international law rules, French law will not be competent to govern the perfection and the enforcement of the transfer of title of the collateral. However, to the extent that a transfer of title has been validly perfected under the law of the jurisdiction where the Eligible Credit Support is located, French law would recognize its validity and its effectiveness toward the Transferee and no particular action or procedural step would have to be taken in France by the Transferor to establish, perfect, continue or enforce such ownership interest.

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

Two situations are to be distinguished, depending on the location of Eligible Credit Support:

With respect to Eligible Credit Support located in France, French law does not expressly provide for such possibility, nor does it prevent the Transferee and the Transferor from consenting in advance to such exchange of Eligible Credit Support pursuant to Section 6 of each CSA. Such substitution should be considered on a case by case basis, since one may not exclude the possibility that each substitution could be characterized as a new collateral arrangement and as such, require compliance with the rules governing the establishment of such collateral arrangement at the time of substitution.

However, this should not affect or limit the Transferee's absolute right of ownership of the relevant assets. Such agreement is only a personal obligation of the Transferee.

Thus, if the Transferee notifies the Transferor that it does not consent to the proposed exchange, the Transferor should have no right in rem over the original Eligible Credit Support.

If the Transferee notifies its consent, the Transferor will only recover a right in rem over equivalent Eligible Credit Support upon completion of the relevant transfer.

With respect to Eligible Credit Support located outside France, the *lex rei sitae*, i.e. the law of the jurisdiction where the relevant Eligible Credit Support is located, must be complied with since French law would not govern neither the Transferor nor Transferee's rights.

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

With respect to the parties' agreement on the governing law, from a French conflict of law rules perspective and for the purposes of this opinion, we consider that a distinction shall be generally drawn between two key concepts:

(i) the "creation" of the security, which relates to the conventional or contractual aspects whereby the parties agree on the principle of the creation of the security interest and its operating procedures, and

(ii) the "perfection" of the security, which relates to the formalities to perform in the jurisdiction where the assets are located in order to ensure the enforceability of the rights in rem, whether ancillary or principal, vis-a-vis third parties and other creditors.

The "creation" of the security shall be governed by the law governing the agreement, i.e. the law of the contract (*lex contractus*). The "perfection" of the security shall be governed by the *lex rei sitae*, i.e. the law of the jurisdiction where the assets subject to the security are located.

The express choice of English law or German law as the governing law of the CSAs will be recognised by the French courts, pursuant to Article 3.1 of Rome I Regulation, subject to the provisions of the Rome I Regulation setting out circumstances where the chosen law may not apply or may be overridden. In particular

(a) where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, such choice of law will not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (Article 3.3 of Rome I Regulation);

(b) nothing in the Rome I Regulation restricts the application of overriding mandatory or of the law of the forum (*lois de police*) (Article 9.2 of Rome I Regulation);

(c) effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful (Article 9.3 of Rome I Regulation); and

(d) the application of a provision of the chosen law may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum (Article 21 of Rome I Regulation).

Regarding the CSA, to the extent, for instance, that any of the counterparty would not be a French entity, or some of the Eligible Credit Support would not be located in France, there would exist in our view sufficient grounds to uphold that such agreement is entered into in a situation involving a conflict of laws and may accordingly be governed by non-French law.

<u>With respect to the choice of jurisdiction</u>, the submission to the English or to the German courts under the Agreements is valid.A judgment obtained the German courts against the French Counterparty with regard to the performance of its obligations under the Agreements would be enforceable in the French Republic in conformity with the provisions of the EU Judgment Regulation. A judgment obtained the English courts against the French Counterparty with regard to the performance of its obligations under the Agreements would be enforceable in the French Republic provided that it has obtained exequatur.

Subject to the rules governing international *lis pendens*, under French private international law, a final judgment for a fixed and definite sum of money obtained against the French Counterparty and rendered by English (the “**English Judgment**”) courts would be capable of recognition and enforcement in France without review of the substantive matters thereby adjudicated, through an action for *exequatur* brought before the competent French court, provided that such French court is furnished with the original and a translation into French (by a sworn translator) of the underlying agreement and the English Judgment (as the case may be) determines that the requirements developed by jurisprudence for the enforcement of foreign judgments are satisfied, in particular that:

- the English Judgment is not subject to appeal, its enforcement has not been stayed and it is enforceable in English courts;

- the dispute is clearly connected to the country in which the judgment was rendered (England) and the French courts did not have exclusive jurisdiction to hear the matter;

- the English Judgment is not contrary to French international policy, both pertaining to the merits and procedure of the case;

- -the English Judgment is not tainted with fraud; and

- the English Judgment does not conflict with a judgment of a French court or a foreign judgment which has been recognized in France and there is no risk of conflict with proceedings pending before the French courts at the time enforcement of the judgment is sought and having the same or similar subject matter as such judgment.

In this respect, it should be noted that bankruptcy matters are excluded from the scope of the EU Judgment Regulation.

Article 25 of the EU Judgment Regulation provides that if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction unless the agreement is nil and void as to substantive validity under the law of that Member State. Such jurisdiction shall he exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either (a) in writing or evidenced in writing or (b) in form which accords with practices which the parties have established between themselves or (c) in international trade or commerce, in a form which accords with usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In the unlikely event where the conditions of Article 25 of the EU Judgment Regulation are not met, the submission to jurisdiction would still be upheld to the extent it meets the conditions of French rules of private international law, when the agreement to the jurisdiction clause is in writing or evidenced in writing[8].

To the extent that each CSA does not constitute a purely domestic contractual relationship, French courts should uphold the parties' agreement on submission to jurisdiction

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

EMIR sets out requirements for the clearing of OTC (over-the-counter) derivatives through authorized central counterparties (CCPs), collateral exchange and risk mitigation requirements for non-cleared derivatives, as well as post-trade reporting. Under EMIR and implementing regulations, certain Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) may need to be centrally cleared by financial or non-financial counterparties; furthermore, derivative contracts will need to be reported to a trade repository and risk mitigation techniques will need to be applied to those derivative contracts which are not subject to the clearing obligation.

Article 11(3) of EMIR provides that non-financial counterparties referred to in Article 10 shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after the clearing threshold is exceeded ; Article 11(5) of EMIR provides that European Supervisory Authorities ("**ESAs**") shall develop regulatory technical standards ("**RTS**") on the risk mitigation techniques, including the risk-management procedures, including the levels and type of collateral and segregation arrangements

As a consequence, certain counterparties may be required in relation to certain Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable)[9] to comply with margin obligation.

[8] See in this respect Héléne Gaudemet-Tallon: *Les conventions de Bruxelles et de Lugano*, Edition LGDJ 1996, n° 112. Under recent decisions the French Supreme court (*Cour de cassation*) tend to require from the French judge to verify that the clause relating to the prorogation of jurisdiction is contractually accepted by the other party to give it full effect (Cass, corn, 13 November 2013, no 13-13.586,. Cass, Civ 1, 17 February 201008-12.749).

[9] The margin obligation under EMIR will only apply to physically settled commodity contracts if additional conditions are met e.g. that it is traded on an MTF or non-EU trading venue, or has the "characteristics of other derivative financial instruments" (as defined in Commission Regulation 1287/2006/EC, including that it is expressly stated to be equivalent to a contract traded on a regulated market, MTF or non-EU trading venue). As of 3 January 2018, MiFID2, (1) carves out contracts on wholesale energy products (e.g., gas and power) that are traded on an OTF and must be physically-settled and (2) provides

The RTS are set out in the Commission Delegated Regulation 2016/2251 of 4 October 2016 and Article 2 of the RTS provides for the general requirements. In particular, Article 2 (2) (g) provides that the risk management procedure shall include procedures specifying the following “the terms of all necessary agreements to be entered into by counter-parties, at the latest, at the moment in which a non-centrally cleared OTC derivative contract is concluded, including the terms of the netting agreement and the terms of the exchange of collateral agreement in accordance with Article 3”.

Article 2 provides further that “For the purposes of point (g) of the first subparagraph, the terms of the agreements shall comprise all aspects concerning the obligations arising from any non-centrally cleared OTC derivative contract to be concluded, and at least the following:

(a) any payment obligations arising between counterparties;

(b) the conditions for netting payment obligations;

(c) events of default or other termination events of the non-centrally cleared OTC derivative contracts;

(d) all calculation methods used in relation to payment obligations;

(e) the conditions for netting payment obligations upon termination;

(f) the transfer of rights and obligations upon termination;

(g) the governing law of the transactions of the non-centrally cleared OTC derivative contracts.”

In our view, each CSA comply with the above criteria. We have not checked the compliance with the other requirements set out in the RTS.

For the avoidance of doubt, in this Opinion, we are not addressing the issue as to whether the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and the parties fall within the scope of the EMIR and, hence the margin requirements. It requires a case by case analysis of the situation and qualification of the counterparty and the Underlying Agreements.

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

As mentioned above, the quality of the counterparty should be checked in order to determine whether such counterparty is a Qualifying Counterparty or not and if the other conditions relating to the Financial Netting Regime apply in order to benefit from the favorable Financial Netting Regime.

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

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

In other words whether, contractually, the right of a party to apply collateral to a Settlement Amount is enforceable.

a temporary exemption (until 3 July 2020) on contracts on coal and oil that are traded on an OTF and must be physically settled.

We are of the view that the right of a party to apply collateral to a Final Net Settlement Amount is enforceable under French law. This validation refers not only to netting but also expressly to valuation methodology and procedures agreed upon between the parties. This covers in our view their ability to incorporate within the lump-sum termination amount, termination values of different types of transactions, taken either separately or as a portfolio, whether cash or physically settled, and different currencies related or denominated products, which, if performed in good faith, using pre-agreed determinable means and commercially reasonable procedures and rules to produce a commercially reasonable result, should be enforced by a French court.

Note that, if relevant when analysing enforceability of the Agreement with certain French entities against which set-off would not be enforceable (e.g. public law governed entities such as territorial authorities or public utility services, as to which see Annex 10), this distinction is of no adverse effect on the enforceability of netting against French Counterparty, netting being expressly covered by the Financial Netting Regime.

The Transferee will be entitled, in a case of default of the Transferor to set-off the relevant sums owed to it by the Transferor with the cash held in the account at the time.

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

We assume that the independent third party collateral agent would hold the Eligible Credit Support acting for the account of, for the benefit or to the order of the beneficiary.

As stated above, the concept of set-off strictly speaking entails reciprocal claims. Nevertheless, the close-out netting implies that the parties agree on the procedures of computations of claims and the determination of a single closed-out amount. We are of the view that nothing prevents the fact that the parties may agree that Eligible Credit Support is placed with an independent third party collateral agent and such Eligible Credit Support be factored and taken into account when the computation is carried out.

Moreover, with respect to the Financial Netting Regime, article. 211-38 II of the FMC provides that :

“When the guarantees referred to in I above are relating to the financial obligations referred to in 2°, 3° and 4° of I of Article L.211-36:-1 °) The creation and perfection of such guarantees shall not be conditional upon any formality. They arise from the transfer of the relevant assets and rights, of the collateral giver's dispossession or of their control by the beneficiary <u>or a person acting on its behalf</u>;”

As a consequence, the ability to place the Eligible Credit Support with a third person is specifically contemplated (assuming that the Financial Netting Regime applies and in particular the financial obligations referred to in 2°, 3° and 4° of I of Article L.211-36).

Therefore, the opinions we have expressed on the Master Agreements and the CSAs would not change in the event the Eligible Credit Support is placed with an independent third party collateral agent provided that such Eligible Credit Support is acting on behalf of the beneficiary.

4.10 **<u>Netting / Set-off in the context of an Insolvency</u>**

This section 4.10 is subject to the following additional assumptions:

After entering into a transaction and prior to its maturity, an entity incorporated in your jurisdiction becomes the subject of voluntary or involuntary insolvency proceedings in your jurisdiction and, subsequent to the commencement of the insolvency proceedings, either that entity or an insolvency official seeks to assume the confirmations representing profitable transactions for the insolvent party and reject the confirmations representing unprofitable transactions for the insolvent party.

Model CPMA / Model MNA

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

If the Financial Netting Regime Conditions are not met, the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would not be upheld under French law in the event of Conciliation Proceedings, Safeguard Proceeding or Judicial Reorganization Proceedings as Articles L. 622-13 and L. 631-14 of the French Commercial Code further provides that notwithstanding any legal or contractual provision to the contrary, no indivisibility, termination or rescission of a contract may result solely from the introduction of a Safeguard Proceeding or a Judicial Reorganisation Proceeding. Articles L. 622-29 and L. 631-14 of the French Commercial Code provides that the Bankruptcy Judgment opening Safeguard Proceeding or Judicial Reorganisation Proceeding does not have the effect of accelerating claims which are unmatured as of the date of the Bankruptcy Judgment.

On the other hand, under Article L. 643-1 of the French Commercial Code, a Judicial Liquidation Proceeding has the effect of accelerating pre-Bankruptcy Judgment claims (either at the date of the Bankruptcy Judgment or, as the case may be, at the date of the judgment approving a sale plan[10]).

Furthermore, pursuant to Article L. 622-7 of the French Commercial Code, where a Bankruptcy Judgment is rendered, a payment on account of pre-bankruptcy debts is prohibited except in respect of set-off on account of connected claims.

Nonetheless, whereas the Bankruptcy Judgment has the effect to stay payment of debts (including pre-existing debts), it should not prevent payment by way of set-off of connected debts[11] (*créances connexes*) pursuant to Article L. 622-7 of the French Commercial Code. French Supreme Court held that obligations were connected (*connexes*) when resulting from one contract or when carried out pursuant to the same contract that has defined the framework of the business relationship of the parties such as a master agreement[12], or when the obligations are carried out pursuant to different contracts which constitute a single global contractual arrangement[13].

The parties may also contractually agree that certain debt are connected. In the context of insolvency proceedings, case law seems to retain as a criteria whether the parties wished to intentionally create and provoke the connexity in order to circumvent the rule preventing the payment of the prior dates and, by doing so, wilfully breaking the equal treatment amongst the creditors. In that case, the contractually agreed connexity agreement had not been upheld by the court. One ruling admitted such connexity and therefore the set-off as the set-clause had been agreed prior to the Hardening Period (ie the suspect period which can start up to 18 months prior to the Bankruptcy Judgment opening the insolvency proceeding)[14]. However, the case law is uncertain and another ruling stated that a clause did not characterized enough the connexity link and the set-off was then rejected. In any event, the creditor has filed its claim (*déclaration de créances*)[15]

[10] Note that if the Court orders a temporary continuation of business activities in liquidation in order to sell all or part of the business, pre-bankruptcy claims are accelerated on the date of the judgement ordering the sale.
[11] Article L. 622-7 of the French Commercial Code
[12] Cass. Corn., 12 December 1995, Bull. Civ. IV n°293.
[13] Cass. com., 1 March 2005, no 03-17.954.
[14] Cass. Com. 9 December 1997, Bull Civ IV, n° 327
[15] , Cass Com 18 January 2005, n°02-12.324, Bull. Civ. IV, n° 11 ; Cass. Com. 3 May 2011, n°10-16.758

Connexity by law may also be considered in relation to transactions with respect to the same underlying asset; when the transactions meet the fungiblity test.

Nevertheless, the application of the connexity in a case where the Financial Netting Regime Conditions are not met is also limited on the ability to terminate the other contract. As stated in the description of French Insolvency Law (see Annex 4), French insolvency law prevents a party to terminate a contract on the sole ground of the opening of the insolvency proceeding. The other party may still require the administrator to take position as to whether the underlying agreement should be continued (and in such case the ongoing amounts shall be paid) or not (and in such case, the termination amount may be offset with other amounts under the Master Agreement).

If the Financial Netting Regime Conditions apply, on the basis of the provisions of paragraph II of Article L. 211-36-1 and of Article L. 211-40 of the FMC, we are of the opinion that the provisions of the MNA and of the CPMA entered into between the French Counterparty and the other party entitling the other party to early terminate all Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) upon the occurrence and continuance of an Insolvency Proceeding in respect of the French Counterparty are valid and enforceable under French law.

If an Agreement documents both Qualifying and non Qualifying Transactions, we believe that in that case that the presence of non Qualifying Transactions should not impact the application of the French Netting Law to the Qualifying Transactions leaving non Qualifying Transactions subject to the provisions of Articles L. 622-13, L. 631-14 and L. 622-7 of the French Commercial Code. However, please note that there is no French case law on such a question. In the absence of case law precedents, that matter remains subject to uncertainty in an area such as insolvency law where exemptions of mandatory rules should be interpreted narrowly. Therefore, we recommend segregating in independent portfolios Qualifying Transactions and non Qualifying Transactions.

How such segregation may be organized is a practical matter which needs to be addressed by a counterparty in the context of its accounting regime. Consideration needs to be given to the desirability to identify in a special segregation ledger those transactions which may not meet the qualifying transaction test so that, in the context of close-out, those transactions may be contractually carved-out from the close-out netting process. Appropriate provisions may need to be considered from that perspective for introduction in the relevant schedule.

In this situation, it would also be advisable to avoid provisions contemplating automatic termination so that room for discretion should remain available with respect to close-out netting.

Consequently, it may be preferable to avoid resorting to those arrangements and segregate the non Qualifying Transactions under a separate master agreement.

4.10.2 **Assuming the parties have selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule / Section 6.1 of the MNA Election Sheet[16]) and/or all of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in your jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of your jurisdiction.**

Assuming that the Financial Netting Regime Conditions are not met, the automatic early termination provisions will not be enforceable under French law. In that circumstances, the non-insolvent counterparty's may notify the insolvent French Counterparty's administrator, summoning them to take a view on the continuation (and hence the performance) of the agreements. Failing which the agreements will be terminated.

Assuming that the Financial Netting Regime Conditions are met, the provisions of the MNA and CPMA contemplating that all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all transactions done under them shall close out automatically

[16] In the case of the MNA, Automatic Close-Out applies if the parties leave Section 6.1 blank.

immediately upon the automatic Close-Out of any one of the Netting Agreements and Principal Agreements, respectively, pursuant to its terms are valid and enforceable under the laws of France

Article L. 211-36-1 of the FMC provides indeed that the conditions under which the termination may occur are determined by the provisions of the agreement entered into between the parties. Therefore, to the extent Automatic Termination provisions are contemplated under the MNA, those provisions should be upheld before a French court.

Article L. 211-40 of the FMC further provides that the provisions of the French Insolvency Law do not prevent the application of Articles L. 211-36 and following of the FMC.

Accordingly, we believe that the French Netting Law permits the Automatic Termination of all Transactions upon occurrence of an Insolvency Proceedings with respect to the French Counterparty when the Agreement so provides.

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

Assuming that the Financial Netting Regime Conditions are not met, the calculation of a single Final Net Settlement Amount upon the insolvency might be possible only in relation to connected claims (*créances connexes*). The parties may contractually agree that various claims are connected.. It is therefore important that the election to make Section 10.6 apply in the Schedule with respect to transactions which are not Qualified Transactions in order to be able to rely on the connexity exemption. Such connexity should not have been designed as a way to circumvent other creditors' rights and it is subject to voidance and nullity during the Hardening Period. Moreover, this assumes that the Underlying Agreement (including Uncovered Transactions / Additional Netted Agreements, if applicable) could have been terminated in order to determine a termination amount (as to which see above) and that the pre-insolvency termination amount has been filled (*déclaration de créances*).

Assuming that the Financial Netting Regime Conditions are met, we are of the opinion that the provisions of the MNA and of the CPMA entered into between a French Counterparty and the other party contemplating the calculation of a Final Net Settlement Amount in accordance with Article 8 of the MNA and 4.4 of the CPMA are valid and enforceable under French law, notwithstanding the opening of a Proceeding against the French Counterparty, provided that at least one Party is a Qualifying Party and that the Transactions contemplated thereunder qualify as financial instruments.

This opinion is based on the provisions of Article L. 211-36-1 and of Article L. 211-40 of the FMC which contemplate that:

i. the parties may provide for the calculation of a single netted settlement amount, **irrespective of whether the financial obligations resulting from transactions on financial instruments are governed by one or several agreements or master agreements**;

ii. the netting procedure is binding on third parties;

iii. the provisions of the French Insolvency Law do not prevent the application of Articles L. 211-36 and following of the FMC.

4.10.4 **Your opinion on whether or not early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are voidable, challengeable or in any way vulnerable to deletion by a liquidator or any third party if Insolvency Proceedings are later opened against a party that is organized under the laws of your jurisdiction.**

Provided that the Financial Netting Regime Conditions are met, we are of the opinion that the close-out netting provisions or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are valid and enforceable under French law even in the case where such close-out netting occurs after the Bankruptcy Judgment.

Such opinion is based on the provisions of Article L. 211-40 of the FMC, which contemplate that the provisions of the French Insolvency Law do not prevent the application of the French Netting Law.

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

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

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

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

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

We are of the opinion that the provisions of the MNA and CPMA providing for a cross-category netting mechanism between all physically settled Transactions and all financially settled Transactions governed by one or more Netted Agreements and Principal Agreements (including Uncovered Transactions) are valid and enforceable under the laws of France, irrespective of whether the French Counterparty is subject to an Insolvency Proceedings, provided that the Financial Netting Regime Conditions are met.

This opinion is based on article L. 211-36-1 of the FMC which:

- contemplates that agreements relating to the financial obligations resulting from transactions on financial instruments may be terminated and the debts and claims relating thereto may be netted among themselves;
- provides that the parties may provide for the calculation of a single netted settlement amount, such financial obligations being governed either by **one or several agreements or master agreements**; and
- does not make any distinction between physically settled transactions and financially settled transactions.

Assuming that the Financial Netting Regime Conditions are **not** met, we refer you to the above 4.10.1 on the termination and set-off of the Transactions: except for connected claims[17], in relation to which set-off is possible, netting would not possible.

4.10.6 **Assuming that the parties have selected a Base Currency (Division 1, Part VI of the CPMA Schedule and section 8.3(C) of the MNA Election Sheet) other than the legal currency of your jurisdiction in which the insolvent party is organized, your opinion on whether payment of the**

[17] Transactions involving the same commodity or product when physically settled would qualify for set-off under the fungibility requirement. This would not apply when different classes or types of commodities or products need to be considered for set-off, unless there is a contractual connexity, which may be challenged during the Hardening Period.

Final Net Settlement Amount in that currency would be enforceable under the laws of your jurisdiction.

Assuming that the Financial Netting Regime Conditions are **not** met, claims denominated in foreign currencies are to be converted into Euros at the rate prevailing on the date of the Bankruptcy Judgment in the case of a Safeguard Proceeding or a Judicial Reorganization Proceeding and on the date of the judgment ordering the liquidation in the case of a Judicial Liquidation Proceeding.

Assuming that the Financial Netting Regime Conditions are met, we are of the opinion that the provisions of the MNA and CPMA contemplating, for the purpose of calculating the Final Net Settlement Amount, the conversion in the Base Currency of any amount denominated in a currency other than the Base Currency are valid and enforceable under French law on the basis of the provisions of Article L. 211-36-1 of the FMC,

Conversion in the Base Currency of any amount to be calculated upon termination of Transactions is indeed part of the valuation methods in a close-out netting mode which is supported by paragraph II of Article L. 211-36-1 of the FMC.

We believe, however, that the provisions of Article L. 211-36 and following of the FMC should prevail in respect of valuation in so far as Article L. 211-40 of the FMC provides that the close-out netting provisions apply notwithstanding the provisions of Book VI of the French Commercial Code relating to Proceedings.

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

Subject to the assumptions and qualifications herein set forth, we are of the opinion that the MNA and CPMA will constitute valid and legally binding obligations of a French Counterparty in accordance with its terms, irrespective of whether such French Counterparty is subject to an Insolvency Proceedings, provided that the Financial Netting Regime Conditions are met.

In the case where the Financial Netting Regime Conditions are **not** met, the rights of a party in accordance with each Master agreement, and in particular the ability to early terminate or accelerate the Underlying Agreements as well would not be enforceable, we refer you to paragraph 4.10.2 and to Annex 4 in relation to French Insolvency Law.

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

Choice of law

The express choice of English law or German law as the governing law of the Agreements will be recognised by the French courts, pursuant to Article 3.1 of the Rome I Regulation, which provides that a contract shall be governed by the law chosen by the parties. Although the express choice of English law or German law as the governing law of the Agreements is a choice of law within the terms of Article 3.1, the Rome I Regulation does provide for circumstances where the chosen law may not apply or may be overridden. In particular:

(a) where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, such choice of law will not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (Article 3.3 of Rome I Regulation);

(b) nothing in the Rome I Regulation restricts the application of overriding mandatory or of the law of the forum (*lois de police*) (Article 9.2 of Rome I Regulation);

(c) effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful (Article 9.3 of Rome I Regulation); and

(d) the application of a provision of the chosen law may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum (Article 21 of Rome I Regulation).

From the above, it appears that subject to the above, the choice of law under each Master Agreement is a valid choice of law and that outside the scope of an Insolvency Proceeding where French law will be relevant in relation to the French Counterparty, the exercise of contractual rights of set-off provided thereunder will be determined by the laws of England and Wales or Germany, as the case may be as the proper law governing the Master Agreement, subject to the regulations

Jurisdiction

The submission to the English or to the German courts under each Master Agreement is valid and a judgment obtained in the German courts against the French Counterparty with regard to the performance of its obligations under the Agreements would be enforceable in the French Republic in conformity with the provisions of the EU Judgment Regulation. With respect to judgment obtained in the English courts, such judgment will have be subject to exequatur, as to which see section 4.5 above.

Article 25 of the EU Judgment Regulation provides that if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction unless the agreement is nil and void as to its substantive validity under the law of the Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either (a) in writing or evidenced in writing or (b) in form which accords with practices which the parties have established between themselves or (c) in international trade or commerce, in a form which accords with usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In this respect, it should be noted that bankruptcy matters are excluded from the scope of the EU Judgment Regulation but are included in the EU Insolvency Regulation (as to which see below).

4.10.9 **Your opinion on whether, pursuant to the EU Parliament and Council Regulation No. 2015/848 of 20 May 2015 (the "EU Insolvency Regulation") most provisions of which became directly applicable in all Member States as from 26 June 2017, a bankruptcy court in your jurisdiction would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement if they differ from the analogous insolvency laws of your jurisdiction.**

Under the EU Insolvency Regulation, set-off is permitted in each of the two following situations:

a) if it is permitted under the law of the jurisdiction in which insolvency proceedings have been opened in relation to the insolvent debtor (Article 7(2)(d) of the EU Insolvency Regulation); or

b) if it is permitted by the law applicable to the insolvent debtor's claim (Article 9(1) of the EU Insolvency Regulation

With respect to a bankruptcy opened in France, assuming that the Financial Netting Regime Conditions are met, we are of the view that a bankruptcy court in France would apply the close-out netting and/or set-off provisions under each Master Agreement. We are because Article 7 (Applicable law) of the EU Insolvency Regulation provides that "the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: (…) (d) the conditions under which set-offs may be invoked. " So, under such provisions, the laws of France where the procedure is opened shall determine the conditions under which set-off may be invoked.

Article 9 (Set-off) of the EU Insolvency Regulation further provides that "1.The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim", however this shall not preclude actions for voidness, voidability or unenforceability.

Finally, Article L. 211-40 of the FMC provides that the provisions of Book VI of the Commercial Code, or those governing any equivalent judicial or amicable proceedings initiated on the basis of foreign laws, shall not interfere with the application of the provisions of the Financial Netting Regime.

Since French law permits set-off and netting, a French court will apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement.

<u>If the Financial Netting Regime Conditions are not met</u>, we refer you to paragraph 4.10.1 but the set-off of connected claims could be possible subject to the actions for voidness, voidability or unenforceability during the Hardening Period.

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

For the purpose of this paragraph, we assume that each Master Agreement is valid, binding and enforceable in accordance with its own respective terms and conditions in accordance with its governing law notwithstanding that one or more Underlying Agreements are not valid, binding or enforceable in accordance with its governing terms.

If the EU Insolvency Regulation applies, set-off will be allowed if <u>it is permitted under the laws governing the Master Agreement</u>. Assuming the Financial Netting Regime Conditions apply, a French court will not be able to undermine the "global" netting provisions of each Master Agreement notwithstanding that one or more Underlying Agreements is not valid, binding and enforceable .

Moreover, with respect to credit institution, Article 25 of the EU Credit Institutions Reorganization and Winding up Directive provides that, in relation to the reorganisation and netting agreement shall be governed solely by the law of the contract which governs such agreement.

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

<u>Assuming that the Financial Netting Regime Conditions are met,</u> it results from the combination of Articles L. 211-38 and L. 211-40 of the FMC described above that those rights benefit from a general exemption of French Insolvency Law and should be enforceable irrespective of the insolvency of the French Counterparty.

<u>Assuming that the Financial Netting Regime Conditions are **not** met</u>, the agreement would still be valid but the remedy of close-out netting and termination following commencement of an Insolvency Proceeding as provided by the French Netting Law would not be available where termination occurs on the grounds of the opening of Insolvency Proceedings (as further described in Annex 4 to this Opinion) towards the French Counterparty.

Limitations applicable to set-off of claims arising under the Master Agreement when the French Counterparty is a credit institution, an investment firm, an insurance company or a public entity are addressed in Annex 10 to this Opinion.

We are of the view that the enforceability or operation of the model Master Agreement would be enforceable and withstand the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings as Pursuant to article L. 211-40 of the FMC relating to the French Netting Law, the provisions of Book VI of the French Commercial Code (relating to insolvency proceedings) and provisions governing all equivalent judicial or amicable proceedings initiated on the ground of foreign law cannot constitute an obstacle to the above mentioned French Netting Law rules of the FMC.

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

The Underlying Agreements may be subject to various governing law. Moreover, some transaction may qualify as Qualifying Transactions for the purpose of the French Netting Law, whereas others may not qualify as Qualifying Transactions. Upon the occurrence of an event of default, some transactions may also be out-of-the money (i.e. there is a termination amount payable by the non-defaulting party). Other transactions may require a physical settlement as opposed to an obligation to pay. In the context of French Insolvency Law, the continuation of a contract could be in the interest of the counterparty.

Although article L. 211-36-1 of the MFC provides that the conditions under which the termination may occur can be determined by the provisions of the agreement entered into between the parties, this would apply only to the Transactions where the Financial Netting Regime Conditions are met.

As a consequence, we believe that it is preferable to assess on case-by-case each transaction prior to terminate it, in order to determine whether this is in the best interest of the counterparty to process an orderly Insolvency Proceeding as experience has shown. Hence, we believe that it is not necessarily in the best interest of the parties to have uniform default event and we would not recommend it.

CPMA CSA / MNA CSA

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

As a general matter, French insolvency regulations provide for a "suspect period" (for general information about such suspect period under French law, please refer to Annex 4 hereto) during which certain security interests granted by the insolvent party over its assets may be or are automatically deemed, retroactively, null and void. Moreover, pursuant to Article L. 632-2 of the French Commercial Code, any act for consideration (*actes à titre onéreux*) performed during the Hardening Period are voidable if the person dealing with the debtor had knowledge of the debtor's insolvency.

In the event that the Financial Netting Regime Conditions are not met, rights of the Transferee on the Eligible Credit Support would be affected as French courts would have the right to consider that it has not been transferred or substituted lawfully.

Assuming that the Financial Netting Regime Conditions are met, it results from the autonomous regime contemplated under the French Netting Law that no obligation arising out of the Agreements, including posting of Eligible Credit Support by way of transfer of title to Cash, the performance thereof or compliance therewith, prior to the institution of any Insolvency Proceedings in respect of the French Counterparty, could be set aside in any such Insolvency Proceedings as a preference, voidable transaction or otherwise under the French Insolvency Law. Therefore, transfer or substitution of Eligible Credit Support should not be subject to voidance during the Hardening Period.

Such Financial Netting Regime protections would also benefit to substitutions or additions of collateral where not fraudulent.

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

If the Financial Netting Regime Conditions are **not** met, the provisions of the French Insolvency Law, such as L. 632-2 of the French Commercial Code would apply pursuant to which any act for consideration ("*actes à titre onéreux*") performed during the Hardening Period are voidable if the person dealing with the debtor had knowledge of the debtor's insolvency.

In respect of transfer and substitution of collateral, as a general rule, a French court could analyse the substitution as a new collateral arrangement which would therefore fall within the scope of the prohibitions of the Hardening Period.

If the Financial Netting Regime Conditions are met, the rights of the Transferee shall not be affected by the opening of an Insolvency Proceeding against the Transferor, nor by any provisions of the French Insolvency Law, including those relating to the Hardening Period, since the insolvency provisions are disapplied generally by the Financial Netting Regime.

The transfer of additional Eligible credit Support pursuant to the mark-to-market provisions of each CSA would not be subject to voidance. Article L. 211-38 of the FMC provides that as a guarantee for current or future financial obligations referred to Article L. 211-36, parties may provide for transfer of title, effective vis-à-vis third parties without formalities of financial instruments, bills, receivables, agreement or cash (…) enforceable even when one of the parties is subject to a proceeding provided for the Book VI of the Commercial Code, or any equivalent judiciary or amicable proceeding under foreign law.

In relation to posting of Eligible Credit Support by way of providing Letters of Credit should not be subject to voidance. Indeed, Letters of Credit are beyond the scope of application of Article L. 632-1 of the French Commercial Code which provides that certain categories of transactions performed during the Hardening Period are subject to automatic voidance. It is assumed, however, that such a letter of credit would be issued on arm's length commercial terms.

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

As stated above in paragraph 4.10.1, the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings does not in our view have any impact on the enforceability or operation of each CSA since with respect to Financial Netting Regime, the provisions of Livre VI of the French Commercial Code (which include rules relating to the Hardening Period) shall not interfere with the application of the provisions of the French Netting Law.

If the Financial Netting Regime does not apply, see above in paragraph 4.10.1 and Annex 4.

4.14 **An analysis of local law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in your jurisdiction, with the provider of the Eligible Credit Support being an entity based outside your jurisdiction.**

If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can bolster or re- characterize the nature of the providing party's rights to that Eligible Credit Support.

If the recipient party is insolvent in France,

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

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

The recipient has effectively a title over such Eligible Credit Support as further developed above in 4.8 on the outright transfer of ownership of cash to the account of the transferee. The collateral provider has a claim against the recipient of the Eligible Credit Support which can be netted against the obligations of the recipient to the collateral provider, notwithstanding the opening of an insolvency proceeding against the recipient. If, nonetheless, following the close-out netting, the recipient still owes an amount to the transferor (as a result of over-colleralisation), the transferor has to file a claim for the remaining amount.

Transfer of ownership in respect of cash occurs by credit of an account in the name of the transferee, such cash being as a result commingled with the treasury of the transferee. If, following close-out netting and enforcement, there is an overcollateralization and the transferee has to transfer back an amount to the transferor, the transferor holds merely a claim against the transferee for such amount which it has to file (*déclaration de créances*).

There are two ways to minimize the above risks:

- Monitoring and managing the collateral with daily adjustment to ensure that there is no over-collateralisation; and
- Transferring the cash to an independent third party collateral agent rather than the counterparty, so that the transferred collateral would not fall within the insolvency estate of the recipient

4.15 **An analysis of the rights and obligations of an insolvent party organized in your jurisdiction with respect to Eligible Credit Support held by a recipient party organized outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can undermine or re-characterize the nature of the recipient's rights to that Eligible Credit Support?**

If the Eligible Credit Support is located in France, and assuming that the Eligible Credit Support is in the form of cash credited to the account of the recipient party (*gage-espèces*), we refer you to paragraph 4.2 above. When the Financial Netting Regime does not apply, the administrator or liquidator of the insolvent party may seek to challenge the transfer of cash if such transfer occurred during the Hardening Period and provided that the conditions set out in L. 632-2 of the French Commercial Code are met (ie for a security set up after the debt) or if the recipient party had knowledge of the debtor's insolvency.

If the Eligible Credit Support is not located in France, French law would defer to the *lex rei sitae*, in determining the proprietary rights of the recipients of the Eligible Credit Support and therefore, the transfer of title should be perfected in compliance with the *lex rei sitae*. Please refer to the legal opinion for the jurisdiction where the Eligible Credit Support is located. To the extent that a transfer of title has been validly perfected under the law of the jurisdiction where the Eligible Credit Support is Located, French law would recognize its validity and its effectiveness toward the Transferee.

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

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

Assuming the Financial Netting Regime applies, we are of the view that the rights of the transferee of Eligible Credit Support would be enforceable in accordance with the terms of: (i) the model CPMA and the CPMA CSA; and (ii) the model MNA and the MNA CSA, irrespective of the insolvency of the providing party incorporated or otherwise organized in France.

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

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

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

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

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

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

As mentioned in paragraph 4.1.2, the concepts of close-out netting and set-off of claims are different in France.

Provided that the Financial Netting Regime Conditions are met, French law recognizes specific regime relating to close-out netting. Pursuant to article L.211-40 of the FMC, such rules and procedures are enforceable, irrespective of any French insolvency rules or those governing any equivalent judicial or amicable proceedings initiated on the basis of foreign laws. Termination, valuation and netting procedures and rules, as determined by the parties, would be enforceable vis-à-vis third parties.

Article L. 211-40 of the FMC provides that the provisions of Book VI of the Commercial Code, <u>or those governing any equivalent judicial or amicable proceedings initiated on the basis of foreign laws,</u> shall not interfere with the application of the provisions of the Financial Netting Regime. In the case, that an insolvency proceeding is opened against a collateral provider located outside France, French courts would disregard the opening of the insolvency against the transferor.

We refer you to paragraph 4.10.9 above.

One of the most important benefit provided by the Financial Netting Regime is immunity against the effects of insolvency proceedings, as well as civil execution proceedings, at any stage of constitution, perfection or enforcement of collateral arrangements, under the exception of bad faith and fraud (notably, their creation and perfection cannot, save for fraud, be challenged on the grounds that they would have been operated during the Hardening Period).

If the Financial Netting Regime Conditions are not met, see paragraph 4.10.1 above.

4.18 <u>**Cross Affiliate Netting and Set-off**</u>

Since the versions of the model CPMA and model MNA do not address this topic and are not intended for these purposes, but because this issue may be of use to some EFET members, only to the extent that there is established law in your jurisdiction on the subject, a summary

of such law and a review of the different risk considerations involved in choosing to add multiple parties to each model Master Agreement.

As opposed to branches, subsidiaries or affiliates have a legal separate entity to the other affiliate entities. The principle of mutuality is fundamental under French law for contractual set-off and would not be met if claims does not exist between the same parties to the agreement.

French Netting Law nonetheless seems to admit that entities belonging to the same group may be considered for the purpose of close-out netting, such recognition is limited to financial obligations resulting from agreements between clearing house and their clients. Article L.211-36 I 4° provides that:

“Financial obligations resulting from agreements entered into between one or several clearing houses and one of their clearing members, between this clearing member and a client to whom it provides, directly or indirectly, a clearing service, and between the client and the clearing houses mentioned in 4° herein.

For the purposes of this 4° of I, the word "client" refers to, should all the parties agree upon, all legal entities pertaining to the same consolidation perimeter.”

However, in our view, such exception should be read restrictively and is limited to the above case. Therefore, it could not apply *mutatis mutandis* to other transactions, such as those for the other type of transactions such as those contemplated by the Master Agreements and the CSAs.

4.19 Multi-branch Parties

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

1. **whether there would be any change in your conclusions concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA (given the assumption 8 (i) in Annex 2 above);**

   There would be no change to our conclusions stated under or above if a French Counterparty has conducted business under a Master Agreement on a multibranch basis prior the opening of Insolvency Proceeding.

   If a French Counterparty becomes insolvent, (i) the judicial administrator or the liquidator, as the case may be, will be bound by the terms of the Agreements, even as regards Underlying Agreements entered into by French Counterparty through branches located outside France and (ii) a court in France would require the judicial administrator or the liquidator, as the case may be, to give effect to the provisions of the Agreements, in accordance with their terms, not only as between the head office of the French Counterparty incorporated in France and the other party but also between the various branches of the French Counterparty incorporated in France and the other party.

   Under French law, the head office of a corporation organised under the laws of the French Republic and its unincorporated branches (whether domestic or foreign) are treated as one and the same legal entity. Obligations incurred by an unincorporated branch office (whether domestic or foreign) of a corporation organised under the laws of the French Republic are obligations of such corporation, as one and the same legal entity.

   Furthermore, French Insolvency Law recognises the principle of the unity-universality theory where debtor can only be subject to one single Insolvency Proceeding which extends to and has effects in any jurisdictions where the debtor owns assets.

Court having jurisdiction in bankruptcy matters would have jurisdiction over all assets of the debtor, whether in France or abroad. This principle would extend to both domestic and foreign branches of a corporation.

In respect of a debtor whose centre of main interest is situated within the territory of the French Republic and which is subject to the provisions of the EU Insolvency Regulation, the EU Insolvency Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Therefore, secondary proceedings may be opened in the EU Member States where the French insolvent debtor has an establishment. See, in this respect, Annex 4 to this Opinion.

However, as far as credit institutions and insurance companies are concerned, French authorities are the sole authorities empowered to decide on the implementation of reorganisation and winding-up measures in a credit institution or an insurance company licensed in France, including branches established in other EU Member States or in Member States of the European Economic Area. Therefore, the opening of secondary proceedings in any other Member State is not permitted.

2. **whether separate proceedings could be brought in your jurisdiction with respect to assets and liabilities of the overseas branch located in your jurisdiction of a counterparty organized or incorporated outside your jurisdiction upon the commencement of insolvency proceedings against the counterparty in that outside jurisdiction. Your opinion should include how the relevant authorities in your jurisdiction would treat the proceedings in an outside jurisdiction by, for example, deferring to them so that the assets and liabilities of the branch would be treated as part of the proceedings against the counterparty. Please also include whether or not in your opinion local creditors of the branch would be able to initiate separate proceedings in your jurisdiction even if the relevant authorities did not do so; and**

For the purpose of this paragraph 4.19 to this Opinion, we have assumed that:

a. A corporation, a credit institution, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("Party F") incorporated, organized or having its centre of main interest in a country ("Country H") other than France has entered under the Master Agreement into 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 French law (the "French Branch"); and

b. After entering into these Underlying Agreements and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

The answer to this question depends upon the location of Party F:

a. If Party F is registered in another Member State of the European Economic Area[18] ("EEA") and is subject to the Winding-Up Directive (applicable to credit institution and investment firm, as further described in Annex 10) or the Solvency II Directive (applicable to insurance company, as further described in Annex 10), the principles set forth by the Winding-Up Directive (applicable to credit institution, as further described in Annex 10) and the Solvency II Directive (applicable to insurance company, as further described in Annex 10) are universality and unity of insolvency proceedings. French authorities would not be competent to open separate proceedings with respect to the assets and liabilities of the French Branch.

b. If Party F is registered in another EEA Member State and is subject to the EU Insolvency Regulation, EU Insolvency Regulation contemplates the possibility to open secondary proceedings.

[18] As of today, EEA includes all European Union Member States, Iceland, Norway and Lichtenstein.

Pursuant to Article 37 paragraph 1 of the EU Insolvency Regulation, the opening of secondary proceedings may be requested by (i) the insolvency practitioner in the main proceedings or (ii) any other person or authority empowered to request the opening of insolvency proceedings under the law of the EEA Member State within the territory of which the opening of secondary proceedings is requested.

c. If Party F is not registered in another EEA Member State and neither exequatur of the Bankruptcy Judgment opening the insolvency proceedings against Party F in its home country has been granted by a French court nor an insolvency international treaty has been signed between France and Party F's jurisdiction, R. 600-1 of the French Commercial Code provides that French courts have jurisdiction to rule on reorganisation and winding-up proceedings concerning any debtor having the main centre of its interests (centre principal de ses intérêts) in France (subject to any international treaty between France and Party F's jurisdiction).

In practice, Party F in such scenario may be declared bankrupt in France and be subject to the French Insolvency Law, irrespective of the fact as to whether it is insolvent in its home jurisdiction.

Under the French Insolvency Law, a Judicial Reorganization Proceedings or a Judicial Liquidation Proceedings may be opened, inter alia, at the request of any creditor, whatever the nature of its claim may be.

d. If Party F is not registered in another EEA Member State and (i) a French court has granted an exequatur in respect of the judgment opening the insolvency proceedings against Party F in its home country or (ii) such judgment has been recognised through an insolvency international treaty, then (a) no separate insolvency proceedings may be started in France as regards the assets and liabilities of the French Branch, and (b) said judgment would be enforceable in France by the relevant bankruptcy official of such country. The bankruptcy proceedings would then remain subject solely to the laws of such country.

Where an exequatur judgment of the judgment opening the insolvency proceedings has been rendered in France, French courts are bound to recognise the authority of a foreign judicial administrator and French authorities would not be empowered to open separate proceedings.

3. in the event that proceedings are brought in your jurisdiction with respect to the assets and liabilities of the branch located in your jurisdiction,

Under the principle of the universality of the assets and liabilities detailed above, our view is that the Master Agreement should be treated as one single unified agreement by the French receiver if the French Counterparty is subject to Insolvency Proceeding.

Within the context of a separate Insolvency Proceeding opened in France with respect to the French Branch, we believe that a French insolvency official and courts would include Party F's position under the Master Agreement in whole among the assets of the French Branch.

4.20 **<u>CSA Specific Permutations</u>**

In relation to each of the questions in paragraph 4.19 above, the assumption is that the providing party is a counterparty incorporated or otherwise organised in your jurisdiction. Please consider your answer to each question and indicate how your answer would be different, if at all, assuming instead that:

1. The providing party is a branch located in your jurisdiction of a bank organised outside your jurisdiction;

We refer you to our answer above. As far as credit institutions and insurance companies are concerned and are registered and organised by the law in another EEA Member State and assuming that BRRD (as amended by BRRD 2) applies, such bank’s supervisory authorities are the sole authorities empowered to decide on the implementation of reorganisation and winding-up measures in a credit institution, including branches established in France. Therefore, the opening of secondary proceedings in France is not permitted.

If such bank has its head office is situated outside the EEA, (i) if no exequatur judgment has been issued in France in respect of foreign insolvency proceedings and assuming that the legal effect of foreign insolvency proceedings is not recognised by treaty, the opening of a separate proceeding would be possible in respect of a French branch or (ii) should an exequatur judgment be issued, the foreign insolvency proceedings would be recognised in France.

2. **The providing party is neither incorporated nor otherwise organised in nor a branch located in your jurisdiction, but has assets in your jurisdiction;**

   Where the providing party is neither incorporated nor has a branch in France we do not believe that a French court would have jurisdiction to open an Insolvency Proceeding against a foreign debtor under circumstances where that foreign debtor is holding assets in France without operating a branch in France. In that scenario, attachment procedures against assets located in France would be more appropriate.

3. **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.**

   Where the providing party has no connection in France or no assets in France, we do not believe that a French court would have jurisdiction to open an Insolvency Proceeding against a foreign debtor under circumstances where that foreign debtor is holding assets in France without operating a branch in France. In that scenario, attachment procedures against assets located in France would be more appropriate.

4.21 **General Validity of each CPMA and each CSA and the Choice of Law and Jurisdiction**

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

   On the basis of the assumptions and the qualifications set out in this opinion, we are of the opinion that (i) the CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA are legal, valid and binding under French law.

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

   As set out above in paragraph 4.10.8, the express choice of English law or German law as the governing law of the Agreements will be recognised by the French courts, pursuant to Article 3.1 of Rome I Regulation, subject to the other provisions of the Rome I Regulation.

4.22 **Other Provisions**

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

a. **need to be revised in order to be enforceable in your jurisdiction; or**

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

Please provide suggested revisions.

With respect to either Master Agreement or CSA which is governed by English law with a credit institution or investment firm as a French counterparty, we recommend to insert a bail-in recognition clause whereby the non French counterparty recognises that the financial contract may be subject to exercise of stay of power by the ACPR as resolution entity. We do not have other additional recommendations to make with respect to the general enforceability of any of the Master Agreement or its CSA. There is no other recommendation that we would like EFET members to consider.

4.23 **<u>Defaulted Elections and Core Provision</u>**

We are of the view that the Defaulted Elections 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, would not be considered as material alterations and would not alter our opinion.

We are of the opinion that an election prohibiting assignment would not have any material effect on the CPMA or the MNA.

Provided that the Financial Netting Regime Conditions are met, we are of the opinion that the Election in the chart set out in Annex 5 are valid, binding and enforceable subject to the qualifications made in this Opinion. We think that it is necessary and advantageous to elect Sections 10.3 (rights of third parties), 10.6 (single agreement) (in particular for non Qualifying Transactions) and/or 10.10 (partial invalidity) apply in the CPMA.

It is crucial that no amendment are made so that the Financial Netting Regime Conditions are no longer met and nor to amend the provisions relating to the the close-out mechanism (i.e. the close-out of Principal Agreement, the determination and Settlement of Settlement Amounts and the Set-off of Settled Amounts).

For those Underlying Agreements which are not Qualifying Transactions, it is recommended to elect clause 10.6 (single agreement) of the CPMA in order to benefit from contractual connexity.

We confirm that it is necessary to elect that close-out netting applies to Uncovered Transactions. However, to the extent that some transactions would not qualify as Qualifying Transactions, it is not necessary to check all boxes for the definition of Uncovered or all boxes save for ‘Uncovered Transaction Default’ for these transactions, as to which see our opinion in paragraph 4.10.1 when an agreement documents both Qualifying and non Qualifying Transactions.

Valuation rules are objective, and predetermined (or determinable) and reflect the economic value of transactions at the time of termination.

4.24 **<u>Recent & Pending Developments</u>**

Please highlight any recent or anticipated future developments in the laws, rules and/or regulations of your jurisdiction or those of the European Union that may affect the laws of your jurisdiction and any of the opinions that you have provided in respect of each Master Agreement and each CSA.

Unless otherwise mentioned below, we believe that there are no pending developments, as a result of which a material adverse change in the current legal environment in France concerning the enforceability of close-out netting referred to in the opinion, may be expected in a foreseeable future.

4.24.1 ***Directive on restructuring and insolvency.*** Directive no. 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive no. 2017/1132 (the “***Insolvency*** & ***Restructuring Directive”)*** has entered into force on 17 July 2019.

Insolvency & Restructuring Directive provides for an harmonised legal framework of the preventive restructuring and frameworks within the Union. Article 6 of the Insolvency & Restructuring Directive notably provides for a stay of individual enforcement actions for a duration of 4 months (which may be extended or renewed up to 12 months), and such stay shall, in principle, apply to all types of claims and cannot exclude certain types of claims (such as secured or preferential claims). However, Member States may provide that the stay applies to all creditors, or that it applies to only one or more individual creditors or categories of creditors.

Article 7(6) of the Insolvency & Restructuring Directive authorizes an exception to such rule with respect to netting arrangements: *"Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets, even in circumstances where Article 31(1) does not apply, if such arrangements are enforceable under national insolvency Law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement. The first subparagraph shall not apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value."*

The Insolvency & Restructuring Directive does not provide for a definition of "netting arrangement".

Insolvency & Restructuring Directive will have to be implemented under French law not later than 17July 2021.

4.24.2 On 12 February 2021, the European Commission launched two consultations on the reviews of the Settlement Finality Directive (Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems ,"**SFD**") and Financial Collateral Directive (Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, "**FCD**"). The consultation documents discuss, inter alia, the following considerations in relation to the FCD: clarification of awareness of insolvency proceedings, extension of protection of netting to cover avoidance of pre-insolvency actions, extension of covered collateral (e.g. stablecoins, emission allowances. Following such consultation, the European Commission may amend the FCD and the netting regime.

We are French lawyers registered with the Paris Bar and this opinion is limited to French law. The opinions expressed herein are as of the date hereof only. We assume no responsibility to update, revise or complete this opinion, or to communicate with or advise the addressee of, in relation to subject referred to in this opinion or any change, development or occurrence of any circumstances, events or conditions relating to any subject referred to in this opinion.

This opinion is governed by and will be interpreted by French law and French courts shall have exclusive jurisdiction with respect to this opinion.

Yours faithfully,

Reed Smith LLP

Reed Smith LLP

Annex 1
List of Documents

1. EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005)

2. EFET Master Netting Agreement (Version 1.0, published June 2010)

3. CPMA Cross-Product Master Agreement (Version February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003)

4. EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003)

5. EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011)

Annex 2
Assumptions

In the Instruction Letter, we were requested to make the following assumptions to our opinion:

1 only those designated Principal Agreements/Netted Agreements and the commodities/financial instruments commonly traded thereunder will be covered by the model Master Agreement.

2 On the basis of the terms and conditions of the relevant Master Agreement, the relevant 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 Underlying Agreement (if applicable) the Parties over time may enter into a number of transactions that are intended to be governed by the Master Agreement either as transactions entered into under the relevant 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 identified below in either Division 1, Part 1, Section A of the Template Default Elections of the CPMA or in the Additional Netted Agreement Rider at Part III of the MNA Election Sheet). The transactions entered into will include any or all of the transactions described in Annex 6 hereto.

3 Each of those Underlying Agreements and each Uncovered Transaction/Additional Netted Agreement is valid, binding and enforceable in accordance with its own respective terms and conditions save in respect of paragraphs 4.10.9 and 4.17 where such Underlying Agreements are assumed as not being valid.

4 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 model 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.

5 The Eligible Credit Support provided under the each CSA will only take the form of either cash or letters of credit.

6 With respect to the rights of a transferor to retrieve collateral from an insolvent entity, we assume that the transferor is incorporated or organized under the laws of France. With respect to the rights of a transferee to hold collateral and apply and use that collateral in a close-out netting event, we assume that the transferee is incorporated or organized under the laws of a jurisdiction other than France. We further assume that cash collateral is denominated in a freely convertible currency and is held under the control of the Transferee.

7 Each CSA and Master Agreement are entered into by two entities, one of which is a corporation (including a bank or other similar financial institution) duly incorporated or organized under the laws of France. However, our opinion is also be applicable to other French entities set out in Annex 9.

8 **Multi-branch assumptions**: (i) For the purposes of addressing the multi-branch issues in paragraph 4.19 1. above, we have assumed that a counterparty is incorporated or organized in France but more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered overseas offices in other than France (ii) for the purposes of addressing the multi-branch issues at paragraph 4.19 2. and 3., we assume that an overseas counterparty is incorporated or organized outside France may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered offices in France.

9 **Elections**: there are no variation or amendment to the Schedule / Election Sheet template;

10 **Scope of counterparty types**. The counterparty in France is either a (i) a corporation registered as a company under the laws of your jurisdiction; (ii) a bank/credit institution (as defined under Article 4(1) of the Capital Requirements Regulation; and (iii) an investment firm (as defined under Article 4(1)

of EU Directive 2014/65 ("MiFID II"). Please see Annex 10 for further considerations relating to credit institution and investment firms.

Furthermore, with your consent, we made the following assumptions:

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

12 each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreements, each Principal Agreement and each Transaction, to exercise its rights 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 Principal Agreement or Netted Agreement and each Transaction and has duly authorized, executed and delivered the same;

13 each Party has obtained, complied with the terms of, and maintained, all authorizations, approvals, licenses and consents required to enable it lawfully to enter into and perform its obligations under the Agreements, each Principal Agreement or Netted Agreement and each Transaction and to ensure the legality, validity, admissibility in evidence or enforceability thereof;

14 the choice of English or German law or such other jurisdiction for which an election has been made to govern the Agreements is a valid choice of law under the laws of England or Germany, or such other law as has been elected, as the case may be;

15 no law of a jurisdiction other than France adversely affects the conclusions in this Opinion, and in this regard we note that you are obtaining, or have obtained, opinions from other counsel on matters of the laws of jurisdictions other than France;

16 each Underlying Agreement, when duly and validly created, will not modify, avoid, vary, rescind, render unenforceable or be contrary to public policy, any provision of the Agreements;

17 the Agreements, the Netted Agreements, the Principal Agreements and the Transactions are not or will not result in a breach of any applicable law (other than the laws of the French Republic) or is intended to avoid the applicability or the consequences of any law in a manner that is not permitted thereunder;

18 the provisions of the Agreements, each Netted Agreement, each Principal Agreement and each Transaction create valid, legal, binding and enforceable obligations for both Parties under all relevant laws (other than those of this jurisdiction) and that they are, as a matter of their governing laws and that of the MNA or CPMA, validly and effectively amended by, and made subject to, the MNA or CPMA, respectively, and are, valid and legally binding between the Parties thereto under all relevant laws (other than those of this jurisdiction) and each Netted Agreement, each Principal Agreement and each Transaction is capable of being terminated, closed out and liquidated in the manner envisaged by the MNA or CPMA, as the case may be and capable of having a Final Net Settlement Amount determined;

19 the Agreements, each Netted Agreement, each Principal Agreement have been properly executed have been properly filled out by both Parties and no provisions of the Agreements and CSAs, that are necessary for the giving of this Opinion, has been varied, altered or waived other than the Defaulted Elections;

20 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 Netted Agreement, each Principal Agreement and Transactions in accordance with its terms;

21 save as otherwise stated in this Opinion, all Transactions entered into between the Parties qualify as financial contracts or forward financial instruments (*instruments financiers à terme*) within the meaning of Article L. 211-1-III, D. 211-1 A and L 211-36 II of the FMC (see in this respect Annex 7 on the "**Qualifying Transactions**")

22 at least one of the Parties to the Agreements is a Qualifying Party under the French Netting Law (as further described in Annex 7 to this Opinion);

23 Transactions are capable of being terminated under English law or German law or any other law governing such Agreement, as the case may be, in accordance with the provisions of the relevant Netted Agreement or Principal Agreement;

24 after entering into the Transaction and prior to the maturity thereof, an Insolvency Proceeding has occurred in respect of the French Counterparty and, subsequent to the commencement of the related Proceeding, either the other party or an insolvency administrator, receiver and/or liquidator attempts to recognize only the confirmations which represent profitable transactions for the French Counterparty. Unless otherwise mentioned in the Opinion, when the French Insolvency Law applies, French law is designated as being the *lex concursus*, i.e. the law applicable to the French Counterparty's insolvency situation

25 each Agreement and each Underlying Agreement is entered into prior to (i) the commencement of any Insolvency Proceedings and (ii) any date of cessation of payments in respect of the French Counterparty;

26 if the French Counterparty may be subject to a Judicial Reorganisation Proceedings or a Judicial Liquidation Proceedings, at the time where the Agreement, each Netted Agreement or Principal Agreement are entered into, the other party shall not have knowledge of the French Counterparty's insolvency[19]

27 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 date of the bankruptcy judgment of either Party (it being noted that under the laws of this jurisdiction a judgment by which an insolvency is declared has retro-active effect until 00.00 hours of the day of such judgment), or (ii) the date one Party was aware that an insolvency petition in respect of the other Party had been filed;

28 the Agreements, each Netted Agreement or Principal Agreement and each Transaction have been entered into for *bona fide* commercial reasons and on arms' length terms by each of the Parties;

29 each Final Net Settlement Amount falling to be determined under a Netted Agreement or Principal Agreement is duly determined in accordance with the provisions thereof;

30 under all relevant laws (excluding those of this jurisdiction) the close-out netting procedures incorporated in the Netted Agreement or Principal Agreements are valid and enforceable in insolvency proceedings and that the obligation to pay the Final Net Settlement Amount calculated under each Netted Agreement or Principal 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 relevant Party under its governing law(s);

31 the obligations to pay the Final Net 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 and following of the MNA or the Netted Agreement or Principal Agreements and mutual between the Parties in the sense that they (a) arise between the Parties acting in the same capacity and as principals and not as agents, (b) are not assigned to one of the

[19] An Ad Hoc Proceeding, a Conciliation Proceeding, an Accelerated Financial Safeguard Proceeding, an Accelerated Safeguard Proceeding or a Safeguard Proceeding may be opened against a French Counterparty without such Counterparty being insolvent within the meaning of the French Insolvency Law.

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;

32 neither the Agreements, the Netted Agreement or Principal Agreements nor the Transactions are capable of being avoided or otherwise held ineffective (in whole or in part) by reason of fraud, error, misrepresentation, undue influence, illegality or otherwise;

33 the French Counterparty, when entering into any Transaction with another counterparty, shall comply with applicable French laws and regulations, if any, providing for specific conditions to be complied with by such French Counterparty regarding the conclusion of Transactions. This is in particular the case (but without limitation) if the French Counterparty is:

(a) a French collective investment undertaking ("*organisme de placement collectif*").

(b) a housing financing company ("société de financement de l'habitat")[20]

(c) a public establishment ("établissement public"),

(d) the French State,

(e) a local government ("collectivité locale"),

(f) the Caisse de la dette publique and the Caisse d'amortissement de le dette sociale,

(g) the Banque de France,

(h) the Institut d'émission des départements d'outre-mer and the Institut d'émission d'outre-mer,

(i) an insurance company ("entreprise d'assurance"), reinsurance company or a mutual insurance company ("sociétes d'assurance mutuelles")[21].

(j) a French mutual or cooperative bank ("banque mutualiste ou coopérative")[22]

34 each Letter of Credit is valid, binding and enforceable in accordance with its own respective terms and conditions;

35 there is nothing in the laws of another jurisdiction that affects the opinions herein expressed,

36 each Party complies with (i) its contractual obligations under or in connection with the Agreement and each Underlying Agreements and (ii) all regulatory matters, including without limitation the obtaining of the necessary authorizations, permissions, consents, licenses, consents and exemptions by or from any governmental, judicial, administrative, supervisory or public bodies or authorities of any country or supra-national organization, the making of the necessary filings, registration, notifications (including

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[20] Housing financing companies are credit institutions licensed as "*établissement de crédit specialisé*" (specialised credit institution). The regime applicable to housing financing companies is contemplated in Articles L. 513-28 et seq. of the FMC and in Articles R. 515-15 et seq. of the FMC which have been introduced in the FMC by the French law n°2010-1249 on banking and financial regulation. While a "*société de financement de l'habitat*" may enter into Transactions the effectiveness of close out netting provisions contemplated in the Agreements is subject to limitations upon occurrence of insolvency of the "*société de financement de l'habitat*" as further described in Annex 10 paragraph 7.

[21] Insurance companies and mutual insurance companies are governed by the French Insurance Code.

[22] Mutual and co-operative banks are subject to Articles L. 512-1 et seq. of the FMC and to Articles R. 512-1 et seq. of the FMC. Whereas banks may carry out any banking transactions, mutual or cooperative banks may carry out any banking transactions within the limits of the rules which govern mutual or cooperative banks. It should also be noted that central bodies of mutual or cooperative banks may or may not have the status of a credit institution and may therefore qualify or not qualify as a Qualifying Party. Therefore, the question as to whether an entity which is a member of a network of a category of mutual or cooperative banks or the central body of such a network qualifies as a Qualifying Party must be analysed on a case by case basis.

without limitation notification of major shareholding, or disclosure under Regulation (EU) no. 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("EMIR") or Regulation (EU) no. 2015/2365 of 25 November 2015 on transparency of securities financing transactions and of reuse), all applicable requirements including under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("MIFID II"), the European Regulation (EU) no. 600/2014 of the European Parliament and of the Council dated 15 May 2014, on markets in financial instruments and the European Regulation (EU) no. 2016/1011 of the European Parliament and of the Council dated 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and the payment of stamp duties and other documentary taxes and charges;

37 Underlying Agreements are capable of being terminated under the law governing such Agreement in accordance with the provisions of the relevant Agreement;

38 where the French Counterparty is a corporation referred to in Annex 9 to this Opinion, the centre of main interests of such French Counterparty is located in France (as that term is defined in the EU Insolvency Regulation)) and the courts of France would have jurisdiction to open insolvency proceedings in relation to such French Counterparty and subject to the exceptions provided in this regulation, would apply the French Insolvency Law to such proceedings;

39 all obligations under each of the Agreements are mutual between the Parties in the sense that there are only two Parties and each is personally liable as regards obligations owing by it and beneficial owner of obligations owed to it

40 Apart from the Agreements, there is no other agreement, instrument or arrangement between or affecting the Parties which conflicts with, overrides, amends, affects, modifies or supersedes the Agreements (save for any such agreement or arrangement in relation to the Underlying Agreement which is effected under the terms of the Agreements)

41 The Agreements, and each Underlying Agreement, are entered into by each Party prior to the commencement of any Insolvency Proceedings in respect of either Party.

42 With the exception of 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 will duly perform its obligations under and in accordance with the respective Agreements.

43 In the case of any Party which is a foreign company (i.e. incorporated outside France), all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreements have been duly fulfilled, performed and effected.

44 In the case of any Party which is a foreign company that (i) is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking, and (ii) its centre of main interests is in an EU member state other than the United Kingdom or Denmark, each branch will constitute an "establishment" within the meaning in the EU Insolvency Regulation.

Annex 3
Qualifications

The terms “enforceable”, “enforceability” and “effective” (or any combination thereof) when used in this Opinion mean that the obligations assumed by the relevant party under the Agreement are of a type which French law generally recognizes and enforces; it does not mean that these obligations will necessarily be enforced in all circumstances in accordance with their terms. This Opinion is also subject to the qualifications detailed in this Annex 3.

1 Certain entities are subject to special regimes which may have the effect of:

(i) reducing the scope of financial instruments susceptible to be entered into by such institutions such as collective investment undertakings, *sociétés de crédit foncier* (“**SCF**”), *sociétés de financement de l’habitat* (“**SFH**”), public entities (the French State, local governments, certain public establishments (*établissements publics*);

(ii) excluding their eligibility to be subject to Insolvency Proceedings, Conciliation Proceedings or Ad Hoc Proceedings; and

(iii) restricting the ability of a counterparty to exercise close out netting remedies such as is the case for a SCF, SFH or certain public entities;

all as more fully described in Annex 10.

2 Prohibition of attachment raises the principle of enforcement mode including the restriction to recourse to the remedy of set-off which often has been assimilated to an enforcement procedure. We do believe, however, that the remedy of set-off should be available to public entities referred to in the Financial Netting Regime as the provisions of the French Netting Law which specifically contemplate that public enterprises (“*établissements publics*”), local governments (“*collectivités territoriales*”), the French State, the “*Caisse de la dette publique*” and the “*Caisse d’amortissement de la dette sociale*”, Banque de France, the “*Institut d’émission des départements d’Outre-Mer*”, and the “*Institut d’émission d’Outre-Mer*” are specifically referred in the French Netting Law as possible counterparties thereunder under the French Netting Law Regime. That specific legislation should in our view be construed as a special derogation and prevail over general principles of general application.

3 specific remedies, such as specific performance or injunction, other than those culminating in a judgment for the payment of money may not be available in front a French court; a French court may issue an award of damages where specific performance cannot be ordered or an award of damages is determined adequate

4 claims under the Agreements may become time-barred

5 in respect of payment obligations, (x) Article 1343-5 of the French Civil Code allows a French court (i) to grant time to a debtor or reschedule payments for a period of up to two years having taken into account the position of the debtor and the requirements of the creditor, (ii) to decide that any payments should be applied first against repayment of principal or that amounts shall bear interest at a lower rate, and (iii) to suspend any enforcement measures commenced by creditors; contractual interest or penalties for late payment can be postponed for a period fixed by the French court and can be limited or increased; in addition, specific conditions would apply for Public Entities; and (y) Article 1231-5 of the French Civil Code allows a French court to limit or increase the amount of payment due under any penalty obligation which, taking into consideration the respective position of the parties, is considered by the relevant French court to be manifestly excessive or derisory;

6 a French court may reduce or increase the amount of interest or damages (including default interest) where it considers that the level of interest or damages is manifestly excessive or negligible or reduce that amount in the case of partial performance

7 where the Agreements contain a conditional obligation in relation to which the determination as to whether such condition has been satisfied is left to the discretionary power of the obligor or a provision which entitles the obligations to be determined at the discretion of one of the Parties, French courts may invalidate or decline to enforce such condition or provision, in particular on the ground of Articles 1163, 1104 and 1304-2 of the French Civil Code;

8 in an action before a French court, the provisions of the Agreements whereby the certificates and determinations of any Party will be conclusive and binding, may be set aside by the French court which could proceed to its own determination;

9 French courts may, if requested, render a judgment in the foreign currency in which a debt is expressed. However, if a judgment awarded by a French court were to be expressed in Euro, it would normally be expressed by reference to the exchange value of the relevant amount of the said foreign currency at the rate of exchange prevailing on the effective date of payment or on the date of the judgment. It should be noted, that if, after having obtained a judgment from a French court, a party to the Agreements were to seek a separate judgment on the basis of any clause relating to exchange rate indemnities, the court might hold that such clause did not survive the original judgment. Notwithstanding the statement made above, the French Insolvency Law provides that creditors' claims denominated in forcing currencies are to be converted into Euro at the rate applicable on the date of the court decision declaring the bankruptcy.

10 Any provision contained in the Agreements to the effect that failure to exercise or delay in exercising any right or remedy shall not operate as a waiver of such rights or remedies may not be effective.

11 pursuant to Article 1104 of the French Civil Code, agreements must be negotiated, formed and performed in good faith (*de bonne foi*); this principle, which is part of French public policy (*ordre public*), is subject to wide interpretation and application by French courts

12 As a general rule, proxies, mandates, agency agreements and powers of attorneys may be terminated at will (*ad nutum*) at any time notwithstanding that they are expressed to be irrevocable. In order to be valid and binding on the principal, such proxies, mandates and powers of attorneys must have a limited purpose and not be drafted in a general way and in broad terms.

13 We express no opinion regarding the enforceability under the laws of the French Republic of the payment of the Final Net Settlement Amount referred to in the Agreements in respect of which a Party, against which a Safeguard Proceeding, a Judicial Reorganization Proceeding or a Judicial Liquidation Proceeding has been opened, may be under the duty to pay to the other Party. Once the Final Net Settlement Amount has been determined in favour of the Non-Defaulting Party such Final Net Settlement Amount is indeed likely to constitute an unsecured Claim for which a proof of claim needs to be filed.

14 We express no opinion with respect to any tax law matters arising out of or in connection with the Agreement.

15 any document which is not in French language will need to be translated into French by an official sworn translator (*traducteur assermenté*) before it may be used for any purpose with Public Entities or submitted as evidence in any proceedings in France; documents may be provided in English without being translated before the international chamber of the Commercial Court of Paris and the international chamber of the Paris Court of Appeal;

16 We express no opinion with respect to the effects of Insolvency Proceedings in any jurisdiction other than the French Republic.

17 French courts proceedings may be set aside or stayed if earlier or concurrent proceedings have been commenced elsewhere;

18 the invalidity of a provision may invalidate an agreement as a whole, notwithstanding any provision therein to the contrary, if the clause affected by invalidity constituted a decisive factor in the

undertaking of the Parties, or of one of them; a French court may decide that agreements are mutually dependent, notwithstanding any provision therein to the contrary, and may decide that the termination of an agreement gives rise to the lapse (*caducité*) of another agreement on the ground of Article 1186 of the French Civil Code;

19 interest (including default interest) accrued on principal cannot bear interest unless it has been due for at least one year except in relation to financial instruments referred to in I to III of Article L. 211-1 FMC;

20 Where a public entity is acting as the French Counterparty, the Agreements should be used and executed in their French language version, all in accordance with the provisions of law N°94-665 dated August 1994 related to the use of the French language.

21 the Agreements may be amended orally by the Parties thereto notwithstanding provisions therein to the contrary;

22 a debtor may be released from its obligations by force majeure

23 the validity of the Agreements may be affected by one of the grounds for lack of consent (*vices du consentement*) set out in Article 1130 of the French Civil Code; there are three grounds for lack of consent under French law: mistake, fraud and duress; a mistake would occur where the consent of one Party has been given on the basis of a false representation relating to a material aspect of an agreement's subject matter and on which such Party has relied to enter into the agreement; fraud involves some fraudulent behaviour of one Party which causes the other Party to enter into the contract on the reliance of a false representation; the fraudulent behaviour does not need to take the form of a positive action and can also be characterised when a Party refrains from disclosing a material information to the other; duress refers to the situation where one Party is forced to enter into a contract because of actual physical constraint or threats towards itself or its assets.

24 any contractual limitation or exclusion of liability, in case of wilful misconduct (*faute dolosive*) or gross negligence (*faute lourde*), would be unenforceable under French law;

25 the validity of the Agreements may be affected by any breach from the French Counterparty or the other party of their information duty set out in Article 1112-1 of the French Civil Code

26 the chosen law and any mandatory law of any country may not be applied by French Courts if its application would be manifestly incompatible with French public policy (*ordre public*) and the chosen law will not restrict the application of overriding mandatory provisions (*lois de police*) of French law by French court;

27 we have not reviewed and therefore we express no opinion as to the validity and enforceability under French law of any agreement or any provision thereof other than the Agreements even if referred to in such Agreements;

28 where any obligations of any person are to be performed in jurisdictions outside France, such obligations may not be enforceable under French law to the extent that such performance thereof would be illegal or contrary to overriding mandatory provisions under the laws of such jurisdiction;

29 any provision under either of the Agreements providing that any calculation or certification is to be conclusive and binding will not be enforceable if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary, if not supported by other evidence provided independently 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;

30 French courts may re-characterise an agreement or undertaking notwithstanding the characterisation given to such agreement or undertaking by the parties thereto; indeed, pursuant to Article 12 of the French Civil Procedure Code, a judge has the duty to give an agreement its correct characterisation notwithstanding the characterisation given to such agreement by the parties thereto; for instance, a

judge may re-characterise a contract if there are elements (such as the parties' conduct or amendments) which evidence that the parties' common intention entails another characterisation;

31 French courts may consider that two or more agreements are deemed as being indivisible (*contrats indivisibles*) forming one entire agreement (*ensemble contractuel*) based on factors which would evidence the parties' intention to treat such agreements as a whole (such evidence being sovereignly assessed by the French courts on a case-by-case basis), such as factors evidencing their intention to establish legal or economical links between such agreements, which is known as the theory of indivisibility of contracts, so that where one of these agreements is ended (for whatever reason, including termination or voidness), the other agreements forming part of the whole agreement are automatically ended as well and cannot be maintained;

32 the existence of a fraud (*fraude*) or a sham (*fictivité*) may affect the opinions expressed above

33 if the other party is still creditor of the French Counterparty under the relevant Agreement, once termination right and close-out provisions are exercised pursuant to the relevant Agreement, the other party may only enforce a payment obligation under the relevant Agreement if it benefits from an officially recognised act (*titre exécutoire*), including in particular, a French court decision which has executor force (*force exécutoire*), subject to the EU Judgment Regulation;

34 If a French Counterparty becomes subject to a resolution proceeding pursuant to Articles L. 613-49 et seq. of the FMC or subject to an early intervention measure or a resolution measure pursuant to Articles L. 613-34 et seq. of the FMC, decision or action taken by the Resolution Authority (as defined in Annex 10), the Opinions expressed in paragraph 4 above are subject to the qualifications set out in Annex 10 below;

35 we draw your attention to the possibility that the withdrawal of the United Kingdom from the European Union may have an impact on the regulations and legal concepts referred to in this opinion once the withdrawal is effective, notably in respect of Agreements governed by English law and subject to the jurisdiction of English courts

36 Article 1195 of the French Civil Code gives the right to the affected Party to renegotiate the relevant contract and, in fine, in the absence of agreement between the Parties and at the request of one of them, a French court has the power to revise the contract or terminate it; except for obligations arising transactions on securities and financial contracts referred to Article I to III to article L. 211-1 of the FMC;

37 any payment under either of the Agreements involving a country which is currently the subject of United Nations, European Community or national sanctions (an "**Affected Country**"), any person or body resident in, incorporated in, or constituted under the laws of any Affected Country or exercising public functions in any Affected Country, or any person or body controlled by any of the foregoing may be subject to restrictions pursuant to such sanctions as implemented in French law; obligations of that party under the Agreements may be unenforceable or void;

38 we have not addressed issues which may arise under EMIR and implementing regulations in this Opinion; it should be noted, however, that under EMIR, certain Underlying Agreement may need to be centrally cleared by financial or non-financial counterparties; furthermore, derivative contracts will need to be reported to a trade repository and risk mitigation techniques will need to be applied to those derivative contracts which are not subject to the clearing obligation.

39 We express no opinion as to competition law or regulatory requirements applicable to a particular party (including prudential standards, financial stability standards and any regulatory requirements specific to any particular party to an Agreement or any regulatory capital treatment of the transactions envisaged by an Agreement with respect to any party).

40 The opinions expressed in this Opinion are subject to the effects of any United Nations, European Union or UK sanctions or other similar measures implemented or effective in the United Kingdom with respect to any Party which is, or is controlled by or otherwise connected with, a person resident in,

incorporated in or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.

41 Laws in connection with terrorism or money laundering may restrict or prohibit payments, transactions and dealings in certain cases.

42 A court will not necessarily accept without question the express provisions of an agreement. In other words, it will look to the substance of the provision, not merely the form. If an agreement does not accurately reflect the intended legal relationships between the parties to it, the court will admit extrinsic evidence to prove the nature of the agreement. Similarly, if the parties do not apply the agreement in practice, but act inconsistently with it, the court may decide that they have by implication varied the terms of the agreement.

43 Claims may become barred under the statutes of general application limiting the periods within which proceedings must be commenced.

Annex 4
Overview of Insolvency Proceedings

Insolvency

Any company conducting part of its business activity in France and, to the extent that the center of main interests of a company is deemed to be in France, would be subject to French proceedings affecting creditors, including court-assisted proceedings (*mandat ad hoc or conciliation* proceedings) and court-administered proceedings, being either safeguard proceedings, accelerated safeguard proceedings or accelerated financial safeguard proceedings (*sauvegarde* ("**Safeguard Proceeding**")*, sauvegarde accélérée* ("**Accelerated Safeguard Proceeding**"), *or sauvegarde financière accélérée ("***Accelerated Financial Safeguard Proceeding**"), judicial reorganization proceedings (*redressement judiciaire*) ("**Judicial Reorganization Proceeding**") or judicial liquidation proceedings (*liquidation judiciaire*) ("**Judicial Liquidation Proceeding**"). In general, French insolvency legislation favors the continuation of a business and protection of employment over the payment of creditors and could limit creditors' ability to enforce their rights.

Under the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, if a debtor is located in the European Union (other than Denmark), French courts shall have jurisdiction over the main insolvency proceedings if the debtor's center of main interests is situated in France. In the case of a debtor which is a legal person, the place of the registered office shall be presumed to be its center of main interests in the absence of proof to the contrary. In determining whether the center of main interests of a debtor is in France, French courts will take into account a broad range of factual elements.

The following is a general discussion of insolvency proceedings governed by French law for informational purposes only and does not purport to apply to a specific case or circumstance.

Grace Periods

In addition to insolvency laws discussed below creditors may be subject to Article 1244-1 et seq. of the French Civil Code.

Pursuant to the provisions of this article French courts may, in any civil or commercial proceedings involving the debtor (whether initiated by the debtor or the creditor) defer or otherwise reschedule over a maximum period of two years the payment dates of payment *obligations,* taking into account the debtor's financial position and the creditor's needs. The court may also decide that any amounts, the payment date of which is thus deferred or rescheduled, will bear interest at a rate that is lower than the contractual rate (but not lower than the legal rate, as published annually by the French government) or that payments made shall first be allocated to repayment of principal. A court order made under Article 1244-1 et seq. of the French Civil Code will suspend any pending enforcement measures, and any contractual default interest or penalty for late payment will not accrue or be due during the grace periods ordered by the relevant judge.

Insolvency Test

Under French law, a debtor is considered to be insolvent (*en état de cessation des paiements*) when it is unable to pay its due debts with its immediately available assets taking into account available credit lines, existing debt rescheduling agreements and moratoria.

The date of insolvency (*état de cessation des paiements*) is generally deemed to be the date of the court ruling commencing the insolvency proceedings, unless the court sets an earlier date, which may be carried back up to 18 months before the date of such court ruling.

Court-assisted Proceedings

A French debtor facing difficulties may in certain conditions request the commencement of court-assisted proceedings (*mandat ad hoc or conciliation*), the aim of which is to reach an agreement with the debtor's main creditors and stakeholders e.g. an agreement to reduce or reschedule its indebtedness.

Ad Hoc Proceedings may only be initiated by the debtor itself, in its sole discretion. In practice, Ad Hoc proceedings are used by debtors that are facing any type of difficulties but are not insolvent (see "—Insolvency test"). The proceedings are informal and confidential. They are carried out under the aegis of a court- appointed officer (*mandataire ad hoc*), whose name may be suggested by the debtor itself, under the supervision of the president of the court. The proceedings are not limited in time. The duties of the *mandataire ad hoc* are determined by the competent court (usually the commercial court) that appoints him or her, usually to facilitate negotiations with creditors. Any agreement between the debtor and its creditors will be negotiated on a purely consensual and voluntary basis: those creditors not willing to take part cannot be bound by the agreement nor forced to accept it. Ad Hoc Proceedings do not automatically stay any pending proceedings and creditors are not barred from taking legal action against the debtor to recover their claims but those that have accepted to

take part in the proceedings usually accept not to do so. In any event, the debtor retains the right to petition the relevant judge for a grace period under Article 1244-1 et seq of the French Civil Code (see "—Grace periods"). The agreement reached is reported to the president of the court but is not formally approved by it. The order of the president of the court appointing a *mandataire ad hoc* is notified for information purposes to the debtor's auditors.

Conciliation Proceedings may only be initiated by the debtor itself if it faces actual or foreseeable difficulties of a legal, economic or financial nature and is not insolvent (see "—Insolvency Test") or has not been insolvent for more than 45 calendar days. The proceedings are confidential by law. They are carried out under the aegis of a court-appointed conciliator (*conciliateur*), whose name may be suggested by the debtor itself, under the supervision of the president of the court. The proceedings may last up to four months (with the *conciliateur* being able to request a one-month extension). The duties of the *conciliateur* are to assist the debtor in negotiating an agreement with all or part of its creditors and/or trade partners that puts an end to its difficulties, e.g. providing for the restructuring of its indebtedness. Any agreement between the debtor and its creditors will be negotiated on a purely consensual and voluntary basis: those creditors not willing to take part cannot be bound by the agreement nor forced to accept it. Conciliation Proceedings do not automatically stay any pending proceedings and creditors are not barred from taking legal action against the debtor to recover their claims but those that have accepted to take part in the proceedings usually accept not to do so. In any event, the debtor retains the right to petition the judge which commenced the Conciliation Proceedings for a grace period under Article 1244-1 et seq. of the French Civil Code (see "—Grace Periods"), such decision being taken after hearing the *conciliateur*.

The *conciliation* agreement reached between the parties may be acknowledged (*constaté*) by the president of the Commercial Court at the request of the parties, which makes the agreement binding upon them (in particular, performance of the *conciliation* agreement prevents any action by the creditors party thereto against the debtor to obtain payment of claims governed by the *conciliation* agreement) and enforceable without further recourse to a judge (*force exécutoire*), but the Conciliation Proceedings remain confidential. The court can, at the request of the debtor, appoint the *conciliateur* to monitor the implementation of the agreement (*mandataire à l'exécution de l'accord*) during its execution.

Alternatively, the *conciliation* agreement may be approved (*homologué*) by the Commercial Court at the request of the debtor, which approval will have the same effect as its acknowledgement (*constatation*) as described above, except that in addition:

- creditors that, in the context of the Conciliation Proceedings provide new money, goods or services designed to ensure the continuation of the business of the debtor (other than shareholders providing new equity in the context of a capital increase) will enjoy a priority of payment over all pre-commencement and post-commencement claims (except with respect to certain pre-commencement employment claims and procedural costs) (the "**New Money Lien**"), in the event of subsequent Safeguard Proceedings, Judicial Reorganization Proceedings or Judicial Liquidation Proceedings;

- the works council or employee representatives are informed of the full terms of the *conciliation* agreement; the publicly available Court decision approving such agreement will however only disclose the amount of any New Money Lien and the guarantees and security interests granted to secure the same;

- when the debtor is submitted to statutory auditing, the *conciliation* agreement is transmitted to its statutory auditors; and

- in the event of subsequent Judicial Reorganization Proceedings or Judicial Liquidation Proceedings, the date of insolvency (see "—Insolvency test"), and therefore the starting date of the hardening period (as defined below; see "—The "hardening period" (*période suspecte*) in judicial reorganization and liquidation proceedings"), cannot be set by the court as of a date earlier than the date of the approval (*homologation*) of the agreement by the court (except in case of fraud).

Whether the *conciliation* agreement is acknowledged or approved, the court may, at the request of the debtor, appoint the *conciliateur* to monitor the implementation of the agreement (*mandataire à l'exécution de l'accord*) during its execution and, while the agreement is in force:

- interest accruing on the claims that are the subject to the *conciliation* agreement may not be compounded;

- the debtor retains the right to petition the court that commenced the Conciliation Proceedings for a grace period pursuant to Article 1244-1 et seq. of the French Civil Code (see "—Grace periods"), in relation to claims of creditors (other than public creditors) party to the Conciliation Proceedings that are not already subject to the *conciliation* agreement, in which case the decision would be taken after having heard the *conciliateur* (provided that the terms of his or her appointment included monitoring the implementation of the agreement, as referred to above); and

- a third party which had previously granted credit support (a guarantee or security interest) with respect to the debtor's *obligations* may benefit from the provisions of the *conciliation* agreement.

If the debtor breaches the terms of the *conciliation* agreement, any party to it may petition the president of the court for its termination. If such termination is granted, grace periods granted in relation to the Conciliation Proceedings may be revoked. Conversely*, provided* that the *conciliation* agreement is duly performed, any individual proceedings by creditors with respect to the claims dealt with by the *conciliation* agreement are suspended. The commencement of subsequent insolvency proceedings will automatically put an end to the *conciliation* agreement, in which case the creditors will recover their claims (decreased by the payments already received) and pre-existing security interests or guarantees.

Conciliation Proceedings in which a draft plan is supported by a large majority of creditors which is likely to meet the threshold requirements for creditors' consent in safeguard, will be a mandatory preliminary step of Accelerated Safeguard Proceedings or Accelerated Financial Safeguard Proceedings, as described below.

In the event of the adoption of a safeguard plan in the context of Safeguard Proceedings or of a reorganization plan in the context of Judicial Reorganization Proceedings, in either case commenced subsequently to the approval of a *conciliation* agreement, the court, with respect to claims benefiting from the New Money Lien, will not be able to impose a debt reduction or a payment deferral to a date later than the date on which the plan is adopted.

At the request of the debtor and after the creditors taking part in the Conciliation Proceedings have been consulted on the matter, the *conciliateur* may be appointed with a mission to organize the partial or total sale of the debtor which could, in particular, be implemented in the context of subsequent Safeguard, Judicial Reorganization or Liquidation Proceedings. Provided that they comply with certain requirements, any offers received in this context by the *conciliateur* may be directly considered by the court in the context of Safeguard, Reorganization or Liquidation Proceedings after consultation of the State prosecutor.

As a matter of law, any contractual provision that (i) modifies the conditions for the continuation of an ongoing contract by reducing the debtors' rights or increasing its *obligations* simply by reason of the designation of a *mandataire ad hoc* or of the commencement of Conciliation Proceedings or of a request submitted to this endor

(ii) requires the debtor to bear, by reason only of the appointment of a *mandataire ad hoc* or of the commencement of Conciliation Proceedings, more than three-quarters of the fees of the professional advisors retained by creditors in connection with these proceedings, is deemed null and void.

Court-Administered Proceedings - Safeguard

A debtor which experiences difficulties that it is not able to overcome may, in its sole discretion, initiate safeguard proceedings (*procédure de sauvegarde*) with respect to itself, *provided* that it is not insolvent (see "—Insolvency test"). Creditors of the debtor are not notified of, nor invited to attend the hearing before the court at which the commencement of Safeguard Proceedings is requested. Following the commencement of Safeguard Proceedings, a court-appointed administrator (*administrateur judiciaire*) is (except for small companies where the court considers that such appointment is not necessary) appointed to investigate the business of the debtor during an "observation period" (being the period starting on the date of the court decision commencing the proceedings and ending on the date on which the court takes a decision on the outcome of the proceedings), which may last up to 18 months. The role of the court-appointed administrator is also to assist the debtor in preparing a draft safeguard plan (*projet de plan de sauvegarde*) that it will circulate to its creditors. Creditors do not have effective control over the proceedings, which remain in the hands of the debtor assisted by the court-appointed administrator. The court-appointed administrator will, in accordance with the terms of the judgment appointing him or her, exercise ex post facto control over decisions made by the debtor (*mission de surveillance*) or assist the debtor to make all or some of the management decisions (*mission d'assistance*), all under the supervision of the court.

During the Safeguard Proceedings, payment by the debtor of any debts incurred prior to the commencement of the proceedings is prohibited, subject to very limited exceptions. For example, the court can authorize payments for prior debts in order to discharge a lien on property needed for the continued operation of the debtor's business or to recover goods or rights transferred as collateral in a fiduciary estate (*patrimoine fiduciaire*).

Creditors must be consulted on the manner in which the debtor's liabilities will be settled under the safeguard plan (debt forgiveness and payment terms) prior to the plan being approved by the court. The rules governing consultation will vary depending on the size of the business.

Standard consultation: this applies to debtors whose accounts are not certified by a statutory auditor or prepared by a chartered accountant, and who have 150 employees or less or a €20.0 million of turnover or less.

In such case, the administrator notifies the proposals for the settlement of debts to the court-appointed creditors' representative, who obtains the agreement of each creditor who filed a claim, regarding the debt remissions and payment times proposed. Creditors are consulted individually or collectively.

French law does not state whether the debt settlement proposals can vary according to the creditor and whether the principle of equal treatment of creditors is applicable at this consultation stage. According to legal commentaries and established practice, differing treatment as between creditors is possible, *provided* that it is justified by the difference in situation of the creditors and approved by the court-appointed creditors' representative. In practice, it is also possible at the consultation stage to make a proposal for a partial payment of claims over a shorter time period instead of a full payment of such claims over the maximum possible length of the plan (ten years).

Creditors whose payment terms are not affected by the plan or who are paid in cash in full as soon as the plan is approved are not required to be consulted.

Creditors which do not respond within 30 days of their receipt of the debt settlement proposal (other than debt for equity swaps) made to them are deemed to have accepted it. The creditors' representative keeps a list of the responses from creditors, which is notified to the debtor, the court-appointed administrator and the controllers.

Within the framework of a standard consultation, if the creditors refuse the proposals that were submitted to them, the court that approves the safeguard plan (*plan de sauvegarde*) can impose on them a uniform rescheduling of their claims (subject to the specific regime of claims benefiting from the New Money Lien) over a maximum period of ten years (except for claims with maturity dates of more than the deferral period set by the court, in which case the maturity date shall remain the same), but no waiver of any claim or debt-for-equity swap may be imposed without the relevant creditor's individual acceptance.

Following a court imposed rescheduling, the first payment must be made within a year of the judgment adopting the plan (in the third and subsequent years, the amount of each annual instalment must be of at least 5% of the amount of each debt claim (except for agricultural businesses)) or on the first payment date following the initial maturity of the claim if it is later than the first payment date provided for by the plan, in which case the amount of such first payment is equal to what the creditor would have received had he been paid in accordance with the uniform payment rescheduling applying to the other creditors.

Committee-based consultation: This applies to large companies, (whose accounts are certified by a statutory auditor (*commissaire aux comptes*) or established by a chartered-accountant (*expert-comptable*) and with more than 150 employees or a turnover greater than €20.0 million), or upon the debtor's or the administrator's request and with the consent of the court in the case of debtors that do not exceed the aforementioned thresholds.

The consultation involves the submission of a proposed safeguard plan for consideration by two creditors' committees which are established by the court-appointed administrator on the basis of the claims that arose prior to the judgment commencing the proceedings:

- one for credit institutions or assimilated institutions and entities having granted credit or advances in favor of the debtor (the "credit institutions committee"); and

- the other one for suppliers having a claim that represents more than 3% of the total amount of the claims of all the debtor's suppliers— and other suppliers invited to participate in such committee by the court- appointed administrator (the "major suppliers committee").

If there are any outstanding debt securities in the form of *obligations* (such as bonds or notes and including capital market debt instruments), a general meeting of all holders of such debt securities will be established (the "bondholders' general meeting"), in which all such holders are to take part irrespective of whether or not there are different issuances or of the governing law of those *obligations*.

The proposed plan:

- must "take into account" subordination agreements entered into by the creditors before the commencement of the proceedings;

- may treat creditors differently if it is justified by their differences in situation; and

- may, inter alia, include a rescheduling or cancellation of debts (subject to the specific regime of claims benefiting from the New Money Lien), and/or debt-for-equity swaps (debt-for-equity swaps requiring the relevant shareholder consent).

If the plan provides for a share capital increase, the shareholders may subscribe to such share capital increase by way of a set-off against their claims against the debtor (as reduced according to the provisions of the plan, where applicable).

Creditors which are members of the credit institutions committee or the major suppliers committee may also prepare an alternative safeguard plan that will also be put to the vote of the committees and of the general bondholders meeting, it being specified that approval of any such alternative plan is subject to the same two-thirds majority vote in each committee and in the bondholders' general meeting and gives rise to a report by the court-appointed administrator (*administrateur judiciaire*). Bondholders are not permitted to present their own alternative plan.

The committees must approve or reject the safeguard plan within a minimum of 20 to 30 days of its submission. The period may be extended or shortened but may never be shorter than 15 days. The plan must be approved by a majority vote of each committee (two-thirds of the outstanding claims of the creditors casting a vote).

Each member of a creditors' committee or of the bondholders' general meeting must, if applicable, inform the court-appointed administrator of the existence of any agreement relating to: (i) the exercise of its vote or (ii) the full or total payment of its claim by a third party, as well as of any subordination agreement. The court-appointed administrator shall then submit to such person a proposal for the computation of its voting rights in the creditors' committee/bondholders' general meeting. In the event of disagreement, the matter may be ruled upon by the president of the Commercial Court in summary proceedings at the request of the creditor or of the court- appointed administrator.

The amounts of claims secured by a trust (*fiducie*) granted by the debtor do not give rise to voting rights. In addition, creditors whose repayment schedule is not modified by the plan, or for which the plan provides for a payment of their claims in cash in full as soon as the plan is adopted or as soon as their claims are admitted, do not need to be consulted on the plan nor take part in the vote.

Following the approval of the plan by the two creditors' committees, the plan will be submitted for approval to the bondholders' general meeting at the same two-thirds majority vote. Following approval by the creditors' committees and the bondholders' general meeting, and determination of the rescheduling of the claims of creditors that are not members of the committees or bondholders (see below), the plan has to be approved (*arrêté*) by the court. The court must verify that the interests of all creditors are "sufficiently protected" and that required shareholder consent (if applicable) has been obtained. Once approved by the relevant court, the safeguard plan will be binding on all the members of the committees and all bondholders (including those who did not vote or voted against the adoption of the plan).

Creditors outside the creditors' committees or the bondholders' general meeting are consulted in accordance with the standard consultation process referred to above.

If the debtor's proposed plan is not approved by both committees and the bondholders' general meeting within the first six months of the observation period (either because they do not vote on the plan, or because they rejected it), this six month period may be extended by the court at the request of the court appointed administrator for a period not exceeding the duration of the observation period, in order for the plan to be approved through the committee based consultation process. Absent such extension, the court can still adopt a safeguard plan within the time remaining until the end of the observation period. In such a case, the rules are the same as the ones applicable for the standard consultation process described above.

If the court empowers the court-appointed administrator to convene a shareholders' meeting in order to take corporate resolutions with respect to the modification of the debtor's by-laws (including modifications of its share capital) required by a safeguard plan, the court may order that, under certain conditions, the shareholders' decisions be adopted by a majority vote of the shareholders attending or represented, as long as such shareholders own at least half of the shares with voting rights.

If no proposed safeguard plan whatsoever is adopted by the committees, at the request of the debtor, the court- appointed administrator, the *mandataire judiciaire* or the State prosecutor, the court may convert the Safeguard Proceedings into Judicial Reorganization Proceedings if it appears that the adoption of a safeguard plan is impossible and if the end of the Safeguard Proceedings would certainly lead to the debtor shortly becoming insolvent.

Specific case — Creditors that are public institutions: Public creditors (financial administrations, social security and unemployment insurance organizations) may agree to grant debt remissions under conditions that are similar to those that would be granted under normal market conditions by a private economic operator placed in a similar position. Public creditors may also decide to enter into subordination agreements for liens or mortgages, or relinquish these security interests. Public creditors examine possible remissions, within the framework of a local administrative committee (*Commission des Chefs de Services Financiers*). The tax administrations may grant relief from all direct taxes. With regards to indirect taxes, relief may only be granted from default interest, adjustments, penalties or fines.

Court-Administered Proceedings — Accelerated Safeguard and Accelerated Financial Safeguard

A debtor which is the subject of Conciliation Proceedings may request the commencement of accelerated safeguard proceedings (*procédure de sauvegarde accélérée*) or accelerated financial safeguard proceedings (*procédure de sauvegarde financière accélérée*).

The Accelerated Safeguard Proceedings and accelerated financial safeguard proceedings have been designed to "fast-track" difficulties faced by large companies, i.e. those:

- which publish consolidated accounts in accordance with Article L.233-16 of the French Commercial Code; or

- which publish accounts certified by a statutory auditor or established by a certified public accountant and have (i) more than 20 employees or (ii) a turnover greater than €3.0 million (excluding VAT) or (iii) whose total balance sheet exceeds €1.5 million.

The regime applicable to standard Safeguard Proceedings is broadly applicable to Accelerated Safeguard or Accelerated Financial Safeguard Proceedings, to the extent compatible with the accelerated timing, since the total duration of Accelerated Safeguard Proceedings is three months and the duration of Accelerated Financial Safeguard Proceedings is only one month (unless the court decides to extend it by an additional month).

In particular, the creditors' committees and the bondholders' general meeting are required to vote on the proposed safeguard plan within a minimum period of 15 days of it being notified to them in the case of Accelerated Safeguard Proceedings, or within eight days in the case of Accelerated Financial Safeguard Proceedings.

The plan in the context of Accelerated Safeguard Proceedings or Accelerated Financial Safeguard Proceedings is adopted following the same majority rules as in standard safeguard proceedings and may notably provide for rescheduling, debt cancellation and conversion of debt into equity capital of the debtor (debt-for-equity swaps requiring relevant shareholder consent).

While Accelerated Safeguard Proceedings apply to all creditors, Accelerated Financial Safeguard Proceedings apply only to "financial creditors" (i.e., creditors that belong to the credit institutions committee and bondholders general meeting), the payment of whose debt is suspended until adoption of a plan through Accelerated Financial Safeguard Proceedings. The debtor will be prohibited from paying any amounts (including interest) relating to debts incurred prior to the commencement of the proceedings, to any creditor to whom the Accelerated Safeguard or Accelerated Financial Safeguard Proceedings (as the case may be) apply. Such amounts may be paid only after the judgment of the court approving the safeguard plan and in accordance with its terms. Creditors other than financial creditors (such as public creditors, the tax or social security administrators and suppliers) are not directly impacted by Accelerated Financial Safeguard Proceedings. Their debts will continue to be due and payable in the ordinary course of business according to their contractual or legal terms.

To be eligible for Accelerated Safeguard Proceedings or Accelerated Financial Safeguard Proceedings, the debtor must fulfil three conditions:

- the debtor must be subject to ongoing Conciliation Proceedings when it applies for the commencement of the proceedings;

- as is the case for regular Safeguard Proceedings, the debtor must face difficulties which it is not in a position to overcome; and

- the debtor must have prepared a draft safeguard plan ensuring the continuation of its business as a going concern which is supported by enough of its creditors involved in the proceedings to render likely its adoption by the relevant committees within a maximum of three months following the commencement of Accelerated Safeguard Proceedings (or within a maximum of up to two months following the commencement of Accelerated Financial Safeguard Proceedings).

If a plan is not adopted by the creditors and approved by the court within the applicable deadline, the court shall terminate the proceedings. The court cannot reschedule amounts owed to the creditors outside of the committee process.

The list of claims of creditors party to the Conciliation Proceedings certified by the statutory auditor shall be deemed to constitute the filing of such claims for the purpose of Accelerated Safeguard Proceedings or, as applicable, Accelerated Financial Safeguard Proceedings (see below) unless the creditors otherwise elect to make such a filing (see below).

Status of Creditors during Safeguard, Accelerated Safeguard, Accelerated Financial Safeguard, Judicial Reorganization or Judicial Liquidation Proceedings

Contractual provisions pursuant to which the commencement of the safeguard or insolvency proceedings constitutes an event of default are not enforceable against the debtor. Nor are "contractual provisions modifying the conditions of continuation of an ongoing contract, diminishing the rights or increasing the *obligations* of the debtor solely upon the opening of reorganization proceedings" (in accordance with a decision of the French Supreme Court dated 14 January 2014, n° 12-22.909, which case law is likely to be extended to Safeguard, Accelerated Safeguard or Accelerated Financial Safeguard Proceedings).

However, the court-appointed administrator can unilaterally decide to terminate ongoing contracts (*contrats en cours*) which it believes the debtor will not be able to continue to perform if such termination is necessary for the safeguard of the debtor and does not materially prejudice (*atteinte excessive*) the conterparty's interest. Conversely, the court-appointed administrator can require that other parties to a contract continue to perform their *obligations* even though the debtor may have been in default, but on the condition that the debtor fully performs its post-commencement contractual *obligations* (and *provided* that, in the case of reorganization proceedings, absent consent to other terms of payment, the debtor pays cash on delivery).

A contract may however be terminated following a summon (mise en demeure) by the counterparty to the administrator to decide to continue or not the contract. If the administrator does not reply within one month (which can be extended by a further month), the contract may be terminated.

The commencement of Judicial Liquidation Proceedings, however, automatically accelerates the maturity of all of a debtor's *obligations* unless the court orders the continued operation of the business with a view to the adoption of a "plan for the sale of the business" (*plan de cession*) (which it may do for a period of three months, renewable once); in such case, the acceleration of the *obligations* will only occur on the date of the court decision adopting the "plan for the sale of the business" or on the date on which the continued operation of the business ends.

As from the court decision commencing the proceedings:

- accrual of interest is suspended, except in respect of loans for a term of at least one year, or of contracts providing for a payment which is deferred by at least one year (however, accrued interest can no longer be compounded);

- the debtor is prohibited from paying debts incurred prior to the commencement of the proceedings, subject to specified exceptions (which essentially cover the set-off of related (*connexes*) debts and payments authorized by the insolvency judge (*juge commissaire*) to recover assets for which recovery is justified by the continued operation of the business;

- the debtor is prohibited from paying debts having arisen after the commencement of the proceedings, unless they were incurred for the purposes of the proceedings or of the observation period or in consideration of services rendered/goods provided to the debtor;

- debts duly arising after the commencement of the proceedings and which were incurred for the purposes of the proceedings or of the observation period, or in consideration of services rendered/goods provided to the debtor during this period, must be paid as and when they fall due and, if not, will be given priority over debts incurred prior to the commencement of the proceedings (with certain limited exceptions, such as claims secured by a New Money Lien), provided that they are duly filed within one year of the expiry of the observation period;

- creditors may not pursue any individual legal action against the debtor (or a guarantor of the debtor where such guarantor is a natural person and the proceedings are Safeguard, Accelerated Safeguard or Accelerated Financial Safeguard Proceedings) with respect to any claim arising prior to the court decision commencing the proceedings, if the objective of such legal action is:

- to obtain an order for payment of a sum of money by the debtor to the creditor (however, the creditor may require that a court determine the amount due in order to file a proof of claim, as described below);

- to terminate a contract for non-payment of amounts owed by the creditor; or

- to enforce the creditor's rights against any assets of the debtor, except where such asset – whether tangible or intangible, movable or immovable – is located in another Member State within the European Union, in which case the rights in rem of creditors thereon would not be affected by the insolvency proceedings, in accordance with the terms of Article 5 of the EU Insolvency Regulation;

- in the context of Judicial Reorganization or Liquidation Proceedings only, absent consent to other terms of payment, immediate cash payment for services rendered pursuant to an ongoing contract (*contrat en cours*), will be required.

In Accelerated Financial Safeguard Proceedings, the above rules only apply to the creditors that fall within the scope of the proceedings (see above).

As a general rule, creditors domiciled in France whose debts arose prior to the commencement of proceedings must file a claim with the court-appointed creditors' representative within two months of the publication of the court decision in an official gazette (*Bulletin Officiel des annonces civiles et commerciales*); this period is extended to four months for creditors domiciled outside France. Creditors must also file a claim for the post- commencement non-privileged debts, with respect to which the two or four month period referred to above starts to run as from their maturity date. Creditors on whose behalves no claims have been submitted during the relevant period are, except for limited exceptions, barred from receiving distributions made in connection with the proceedings. Employees are not subject to such limitations and are preferred creditors under French law.

At the beginning of the proceedings, the debtor must provide the judicial administrator and the creditors' representative with the list of all its creditors and all of their claims. Where the debtor has informed the creditors' representative of the existence of a claim, the claim as reported by the debtor is deemed to be a filing of the claim with the creditors' representative on behalf of the creditor. Creditors are allowed to ratify or amend a proof of claim made on their behalf until the insolvency judge rules on the admissibility of the claim. They may also file their own proofs of claim.

In Accelerated Safeguard and Accelerated Financial Safeguard Proceedings, however, the debtor draws a list of the claims of its creditors having taken part in the Conciliation Proceedings, which is certified by its statutory auditors or accountant. Although such creditors may file proofs of claim as part of the regular process, they may also avail themselves of this simplified alternative and merely adjust if necessary the amounts of their claims as set forth in the list prepared by the debtor (within the above two or four month time limit). Creditors which did not take part in the Conciliation Proceedings must file their proofs of claim within the aforementioned deadlines.

In Accelerated Financial Safeguard Proceedings, debts owed to creditors other than banks, financial institutions or bondholders continue to be payable in the ordinary course.

If the court adopts a safeguard plan, accelerated safeguard plan, accelerated financial safeguard plan or reorganization plan, claims of creditors included in the plan will be paid according to the terms of the plan.

If the court adopts a plan for the sale of the business (*plan de cession*) of the debtor in Judicial Reorganization or Judicial Liquidation Proceedings, the proceeds of the sale will be allocated towards the repayment of its creditors according to the ranking of the claims. If the court decides to order the judicial liquidation of the debtor, the court will appoint a liquidator (usually the former creditors' representative) in charge of selling the assets of the debtor and settling the relevant debts in accordance with their ranking. However, in practice, where the sale of the business is considered, the court will usually appoint a court-appointed administrator to manage the debtor during the temporary continuation of the business operations (see above) and to organize the sale of the business process.

If the court adopts a plan for the sale of the business, it can also set a time period during which the assets that it deems to be essential to the continuation of the business of the debtor may not be sold without its consent.

French insolvency law assigns priority to the payment of certain preferred creditors, including employees, post- commencement legal costs (essentially, court officials fees), creditors who benefit from a New Money Lien (see above), post-commencement creditors and the French State (taxes and social charges). In the event of Judicial Liquidation Proceedings only, certain pre-commencement secured creditors whose claim is secured by real estate are paid prior to post commencement creditors.

As soon as insolvency proceedings are commenced, any unpaid amount of share capital of the debtor becomes immediately due and payable.

Judicial Reorganization or Liquidation Proceedings

Judicial Reorganization (*redressement judiciaire*) or Liquidation Proceedings (*liquidation judiciaire*) may be initiated against or by a debtor only if it is insolvent and, in the case of Judicial Liquidation Proceedings only, if the debtor's recovery is manifestly impossible. The debtor is required to petition for Judicial Reorganization or Liquidation Proceedings.

(or for Conciliation Proceedings, as discussed above) within 45 days of becoming insolvent; de jure managers (including directors) and, as the case may be, de facto managers are exposed to civil liability if it fails to do so.

Where the debtor requested the commencement of Judicial Reorganization Proceedings and the court, after having heard the debtor, considers that Judicial Liquidation Proceedings would be more appropriate, it may order the commencement of the proceedings which it determines to be most appropriate. The same would apply if the debtor requested the commencement of Judicial Liquidation Proceedings and the court considered that Judicial Reorganization Proceedings would be more appropriate. In addition, at any time during the Safeguard Proceedings observation period, upon request of the debtor, the court-appointed administrator, the creditors' representative (*mandataire judiciaire*) or the State prosecutor, the court may convert Safeguard Proceedings into Reorganization Proceedings or Liquidation Proceedings if it appears that the debtor was already insolvent at the time of the court decision opening the proceedings. In all cases, the court's decision is only taken after having heard the debtor, the court-appointed administrator, the creditors' representative, the State prosecutor and the workers' representatives (if any).

In the event of reorganization, an administrator (*administrateur judiciaire*) is usually appointed by the court to investigate the business of the debtor during an observation period, which may last up to 18 months, and make proposals either for the reorganization of the debtor (by helping the debtor to elaborate a reorganization plan, which is similar to a safeguard plan), or the sale of the business or the liquidation of the debtor. The court- appointed administrator will assist the debtor in making management decisions (*mission d'assistance*) or may be empowered by the court to take over the management and control of the debtor (*mission d'administration*).

Committees of creditors and bondholders general meeting may be created under the same conditions as in Safeguard Proceedings (see above). At any time during the observation period, the court can, at the request of the debtor, the court-appointed administrator, the creditors' representative (*mandataire judiciaire*), the State prosecutor or at its own initiative, order the partial stop of the activity (*cessation partielle de l'activité*) or order the liquidation of the debtor. At the end of the observation period, the outcome of the proceedings is decided by the court.

In reorganization proceedings, in case a shareholders' meeting needs to vote to bring the shareholders' equity to a level equal to at least one half of the share capital as required by Article L.626-3 of the French Commercial Code, the administrator may appoint a trustee (*mandataire de justice*) to convene a shareholders' meeting and to vote on behalf of the shareholders which refuse to vote in favour of such a resolution if the draft restructuring plan provides for a modification of the equity to the benefit of a third party(ies) undertaking to comply with the reorganization plan.

If the proposed reorganization plans are manifestly not likely to ensure that the debtor will recover or if no reorganization plan is proposed, the court, upon the request of the court-appointed administrator, can order the total or partial transfer of the business.

In Judicial Reorganization Proceedings if (i) the company has at least 150 employees, or if it controls (within the meaning of the French labor code) one or more companies having together at least 150 employees, (ii) the disappearance of the company is likely to cause serious harm to the national or regional economy and (iii) the modification of the company's share capital seems to be the only credible way to avoid harm to the national or regional economy and allows the continued operation of the business as a going concern, then following (x) the review of the options for a total or partial sale of the business and at the request of the court-appointed administrator or of the State prosecutor and (y) at least 3 months having elapsed as from the court decision commencing the proceedings, provided that the shareholders meetings required to approve the modification of the company's share capital required for adoption of the reorganization plan have refused such modification, the insolvency court may either:

- appoint a court officer (*mandataire*) in order to convene the shareholders meeting and vote the share capital increase in lieu of the shareholders having refused to do so, up to the amount provided for in the reorganization plan; or

- order, in favor of the persons who have undertaken to perform the reorganization plan, the sale of all or part of the share capital held by the shareholders having refused the share capital increase and holding, directly or indirectly a portion of the share capital providing them with a majority of the voting rights (including as a result of an agreement with other shareholders) or a blocking minority in the company's shareholder meetings; the minority shareholders have the right to withdraw from the company and request that their shares be purchased by the transferees.

In the event of a sale ordered by the court, the price of the shares shall, failing agreement between the parties, be set by an expert designated by the court in summary proceedings.

In either of the above cases, the reorganization plan shall be subject to the undertaking of the new shareholders to hold their shares for a certain time period set by the court which may not exceed the duration of the reorganization plan.

If the court decides to order the judicial liquidation of the debtor, the court will appoint a liquidator, which is generally the former creditors' representative (*mandataire judiciaire*). No maximum time period is provided by law to limit the duration of the Judicial Liquidation Proceedings. The liquidator is vested with the power to represent the debtor and perform the liquidation operations (mainly liquidate the assets and settle the liabilities to the extent the proceeds from the liquidated assets are sufficient, in accordance with the creditors' priority order for payment). The liquidator will take over the management and control of the debtor and the managers of the debtor are no longer in charge of its management.

Concerning the liquidation of the assets of the debtor, there are two possible outcomes:

- an asset sale plan (in which case a court-appointed administrator (*administrateur judiciaire*) will usually be appointed to manage the debtor and organize such sale of the business); or

- a sale of the individual assets of the debtor, in which case the liquidator may decide to:
  - launch auction sales;
  - sell on an amicable basis each asset for which spontaneous purchase offers have been received, (the formal authorization of the bankruptcy judge being necessary to conclude the sale agreement with the bidder); or
  - request, under the supervision of the bankruptcy judge, all potential interested purchasers to bid on each asset, as the case may be, by way of a private competitive process whereby the bidders submit their offers only at the hearing without the proposed prices being disclosed before such hearing (*procédure des plis cachetés*).

The court will end the proceedings when either no due liabilities remain, the liquidator has sufficient funds to pay off the creditors (*extinction du passif*), or continuation of the liquidation process becomes impossible due to insufficiency of assets (*insuffisance d'actif*).

The court may also terminate the proceedings:

- when the interest of the continuation of the liquidation process is disproportionate compared to the difficulty of selling the assets; or
- in the event where there are insufficient funds to pay off the creditors, by appointing a *mandataire* in charge of continuing ongoing lawsuits and allocating the amounts received from these lawsuits between the remaining creditors.

The *"hardening period" (période suspecte) in Judicial Reorganization and Liquidation Proceedings*

The date of insolvency (*cessation des paiements*) of a debtor is deemed to be the date of the court order commencing the proceedings, unless the court sets an earlier date, which may be no earlier than 18 months before the date of such court order. Also, except in the case of fraud, the insolvency date may not be set at a date earlier than the date of the final court decision that approved an agreement (*homologation*) in the context of Conciliation Proceedings (see above). The insolvency date is important because it marks the beginning of the hardening period (*période suspecte*), being the period from the insolvency date of the debtor to the court decision commencing the Judicial Reorganization or Liquidation Proceedings affecting it.

Certain transactions entered into during the hardening period are automatically void or voidable by the court.

- Automatically void transactions include transactions or payments entered into during the hardening period that may constitute voluntary preferences for the benefit of some creditors to the detriment of other creditors. These include transfers of assets for no consideration or for a nominal consideration, contracts under which the obligations of the debtor significantly exceed the reciprocal *obligations* of the other party, payments of debts not due at the time of payment, payments of debts that are due made in a manner which is not commonly used in the ordinary course of business and security granted for previously incurred *obligations*, provisional attachment or seizure measures (unless the attachment or seizure predates the date of insolvency), operations relating to stock options, the transfer of any assets or rights to a trust arrangement (*fiducie*) (unless such transfer is made as security for a debt simultaneously incurred), any amendment to a trust arrangement (*fiducie*) that affects assets or rights already transferred in the trust as security for debt incurred prior to such amendment, and notarized declarations of exemption of assets from seizure (*déclaration d'insaisissabilité*).
- Transactions which are voidable by the court include payments made on debts that are due, transactions for consideration and notices of attachments made to third parties (*avis à tiers détenteur*), seizures (*saisie attribution*) and oppositions made during the hardening period, in each case if the court determines that the creditor knew that the debtor was insolvent at the relevant time. Transactions relating to the transfer of assets for no consideration are also voidable when entered into during the six-month period prior to the beginning of the hardening period.

There is no hardening period prior to the opening of Safeguard, Accelerated Safeguard or Accelerated Financial Proceedings, since the condition required to commence such proceedings is that the company is not insolvent within the meaning of French law.

Annex 5
Default Election

The model Master Agreements, upon which we are being asked to opine, will have the following characteristics:

Underlying Agreements

- 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.

Excluded Agreements

- **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

- 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

- **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.

Excluded Events

- **CPMA: Division 1, Part II, Section B** / **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

- **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.

- **CPMA: Division 1, Part III / MNA: Section12.1, Part 1 of the Election Sheet:** - Additional Acknowledgements and Representations – none.

- **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.

- **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, Section12.5(A) shall be operative in respect of Party A and Party B.

- **The following** shall apply:

	CPMA: Division 1, Part VIII	**MNA: Election Sheet**
Set-off of Final Net Settlement Amount	10.1	Section 10.1(A)
No Waiver	10.2	Automatically included (see Section 10.8 of the MNA)
Suspension	10.4	Section 10.1(B)
Automatic Early Termination &	10.5	Section 6.4
Adjustment for Bankruptcy		
Benefit of Credit Support	10.7	Section 9.1
Withholding Final Net Settlement Amount	10.8	No equivalent

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

- CPMA only: Division 2, to apply as set out in the Schedule.

Annex 6

Transactions entered into under the Underlying Agreements[23]

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 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.

[23] 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.

C. Other Transactions

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) 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) or commodity price (in the case of a commodity cap).

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

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) or commodity price (in the case of a commodity floor).

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.

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

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

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

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

Bullion 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 on a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

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

Equity Index Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of shares of an issuer or a basket of shares of several issuers for payment of a specified price for settlement either on a "spot" or two-day basis or a specified future date. The transaction may be settled by physical delivery of the agreed quantity of shares in exchange for the specified price or may be cash settled based on the difference between the index value on the settlement date and the specified index value.

Equity Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of shares included in an equity index for payment of a specified price for settlement either on a "spot" or two-day basis or a specified future date. The transaction may be settled by physical delivery of the agreed quantity of shares in exchange for the specified price or may be cash settled based on the difference between the market price of the shares on the settlement date and the specified price.

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) 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.

Equity or Equity Index 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.

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

Bond 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.

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 to the other party (in consideration for the original cash payment plus a premium).

Credit Protection Transaction[24]. 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 (e.g., 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. Credit protection transactions may also be physically settled by payment of a specified fixed amount by one party against delivery of specified Reference Obligations by the other party. A credit protection transaction may also refer to a "basket" of two or more Reference Entities.

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

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts

[24] Some market participants may refer to credit protection transactions as credit swaps, credit default swaps or credit default options.

in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

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

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

Economic Statistic Transaction. A transaction, 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 statistical data on macro economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Economic Statistic 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 macro economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike level.

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. The transaction may be settled by physical delivery of the agreed currency or unit of account in exchange for payment of the agreed other currency or unit of account, or may be cash settled a based on the difference between the market price of the agreed other currency or unit of account on the settlement date and the specified price.

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

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

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 from such other party at a future date.

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

Annex 7

French Netting Law

The French Netting Law is applicable to financial obligations resulting either:

(i) from transactions on financial instruments (within the meaning of Article L. 211-1-1 of the FMC) or on units listed in Article L.229-7 of the French Environment Code (i.e. emissions allowance), spot FX transactions, or sale, purchase or delivery transaction on gold, silver, platinum, palladium or other precious metals or commodities represented by other transactions , if only one of the parties to the transactions is a "**Qualifying Party**" (see below); or

(ii) from any contract giving rise to cash settlement or to delivery of financial instruments or commodities (marchandises) represented by a warehouse receipt (*reçu d'entreposage*), if **both** parties to the contract are Qualifying Party, excluding those entities referred to in paragraphs c) through n) of paragraph 2° of article L. 531-2 of the FMC), (the "**Eligible Qualifying Parties**") (see below)

Article L. 211-36 of the FMC provides indeed that for the sole purposes of this section (i.e. Articles L. 211-36 to L. 211-40-1 of the FMC**,** in other word, the French Netting Law), option contracts, futures, swaps and any other forward contracts other than those mentioned in Article L. 211-1 III of the FMC D. 211-1 A-I are considered as forward financial instruments, provided that, when such instruments must be settled by physical delivery, they give rise, in the context of trading, to registration by a recognized clearing house or to periodical margin calls.

Though there are no guidelines on the timing of the periodical margin calls, we are of the view that such calls should be on a daily basis, in accordance with EMIR requirements and the RTS.

(each of the transactions and contracts referred to in (i) and (ii) is referred to as a "**Qualifying Transaction**"),

(the "**Financial Netting Regime Conditions**").

Qualifying Party

A Qualifying Party is one of the following entity. An Eligible Qualifying Party is one of the following entity excluding those entities to in sub-paragraphs c) through n) of paragraph (f) 2° below (flagged by an star '*' for convenience purpose)

(a) a credit institution ("*établissement de crédit*") ;

(b) a financing company ("*société de financement*");

(c) an investment services provider ("*prestataire de services d'investissement*") which includes:

- an investment firm ("entreprise d'investissement");
- a credit institution authorised to provide investment services;

but to the exclusions of asset management company (*société de gestion de portefeuille*)

(d) a public establishment ("*établissement public*") which includes an *établissement public à caractère industriel et commercial* ("*EPIC*") and an *établissement public administratif* ("*EPA*");

(e) a local authority ("*collectivité territoriale*");

(f) an institution, firm or establishment referred to in Article L. 531-2 of the FMC.

The following are within the scope of Article L. 531-2 of the FMC:

1°

(a) the State, the *Caisse de la dette publique* and the *Caisse d'amortissement de la dette sociale*,

(b) the *Banque de France*;

(c) the *Institut d'émission des départements d'outre-mer* and the *Institut d'émission d'outre-mer*;

2°

a) insurance and reinsurance enterprises governed by the French Insurance Code;

b) collective investment undertakings referred to in Article L. 214-1 I of the FMC (Alternative Investment Funds ("AIF" (*fonds d'investissement alternatifs ("FIA"*); ie; (i) in Paragraph 4 of Sub-section 2 of Chapter IV of Title 1st of Book II of the FMC (real property investment partnerships ("*sociétés civiles de placement immobilier*") and forestry-linked saving companies ("*sociétés d'épargne forestière*")) and in (ii) Sub-section 5 of Section 2 of Chapter IV of Title 1st of Book II of the FMC (securitization entities ("*organismes de titrisation*"))as well as their asset management companies ("AIFM")

c) pension funds (*institutions de retraite professionnelles*) referred to in Article L. 381-1 of the French Insurance Code, pension institutions referred to in Article L. 370-2 of the French Insurance Code, in respect of the transactions contemplated in Article L. 370-2 of the said code, as well as legal entities managing pension funds referred to in Article 8 of Order n°2006-344 of 23 March 2006;*

d) undertakings which solely provide investment services to (i) legal entities controlling such undertakings, (ii) legal entities which the latter control and (iii) legal entities which they control, except in the case where investment services are provided for collective investment undertakings managed by a management which is part of the same group. For purposes of this paragraph d), "control" means a direct or indirect control within the meaning of Article L. 233-3 of the Commercial Code and "group" is to be understood within the meaning of article L.233-17-2 of the Commercial Code;*

e) undertakings whose investment services activities are restricted to the management of an employee savings system;*

f) undertakings whose activities are restricted to operations referred to in paragraphs d) and e) above;*

g) undertakings persons who provide investment services in an ancillary manner in the course of a professional activity within the meaning of Article 4 of the Delegated Regulation (EU) n° 2017 /565, to the extent as it is governed by legal or regulatory provisions or a code of ethics which do not formally exclude provision of such investment service;*

h) crowdfunding investments advisors, within the conditions and limits set forth in Chapter VII of Title IV [of the FMC,]*

i) persons who do not provide any investment services other than dealing on own account financial instruments other than commodity derivatives within the meaning of Regulation (EU) 600/2014 of 15 May 2014 on markets in financial instruments, units referred to in

Article L. 229-7 of the French Environment Code or derivatives instruments whose underlying assets are the latter. However, the following are not exempted in this respect:*

- market makers (*teneur de marché*);

- members of a regulated market or multilateral trading facility and persons who have direct electronic access to a trading venue, to the exception of non-financial entities carrying out transactions on a trading venue whose contribution to reducing risks directly related to their commercial or treasury financing activities or those of their groups within the meaning of Article L.233-17-2 of the Commercial Code can be objectively measured;

- persons who use a high-frequency algorithmic trading technique;

- persons trading on their own account when executing client orders;

- persons benefiting from an exemption under a), b) and j) are not required to fulfil the conditions set out in this i) in order to benefit from the exemption;

j) persons dealing on their own account, including market makers, in commodity derivatives within the meaning of Regulation (EU) n° 600/2014 of 15 May 2014 on markets in financial instruments, in units referred to in Article L. 229-7 of the French Environment Code or derivative instruments whose underlying assets are the latter, or persons providing investment services other than dealing on own account in respect of these same financial instruments to customers or suppliers of their main activity, provided that these services, individually or in aggregate form, are ancillary, according to criteria defined by decree, to their main activity considered at group level within the meaning of Article L. 233-17-2 of the Commercial Code, where this main activity does not consist in the provision of investment services, banking operations or payment services, nor in the performance of the market-making function in relation to commodity derivatives.*

However, the following are not exempted in this respect:

- people who use a high-frequency algorithmic trading technique;

- persons dealing on their own account when executing client orders;

k) financial investment advisers, under the conditions and within the limits contemplated in Chapter I of Title IV [of the FMC];*

l) persons providing investment advice in the course of the provision of another professional activity not covered by this Title [of the FMC i.e. Articles L.531-0 et seq. of the FMC], provided that the provision of such advice is not specifically remunerated,*

m) central securities depositories within the meaning of Regulation (EU) n° 909/2014 of 23 July 2014 on improving securities settlement in the European Union and central securities depositories, except as provided for in Article 73 of that Regulation;*

n) when providing investment services in commodity derivatives, transmission network operators performing their tasks under Articles L. 321-6 to L. 321-17 or L. 431-3 to L. 431-6 of the French Energy Code, Regulations (EC) n° 714/2009 and (EC) n° 715/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges of electricity and natural gas transmission networks, network codes or guidelines adopted pursuant to those texts, persons acting as service providers on behalf of network operators to carry out the tasks referred to in this n) and operators or administrators of energy balancing mechanism, pipeline network or a system keeping in balance the supplies and uses of energy when conducting such tasks;*

o) persons subject to article L. 229-5 of the French Environment Code who, when they negotiate units referred to in article L.229 -7 of the same code, do not execute orders in the name of clients and who do not provide any investment services other that negotiation for own account, provided that such persons people do not use a high-frequency algorithmic trading technique .

For the purposes of this article, a market maker is a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against that person's proprietary capital at prices defined by that person

Subsidiaries referred to in Article L.511-47 cannot benefit from the authorization exemption provided for in this Article

(g) a clearing house;

(h) a non-resident establishment with a comparable status

(i) an international financial organisation or body which France or the European Union is a member of.

Transactions on financial instruments

Article L. 211-1 of the FMC defines financial instruments which include financial securities and financial contracts:

a) financial securities include:

1) shares and other securities issued by stock companies;

2) debt instruments, other than payment instruments (“effets de commerce”) and loan notes (“bons de caisse”);

3) units or shares in collective investment undertakings (“organismes de placement collectifs” — “OPCs”).

b) financial contracts, also known as forward financial instruments which are further defined in Article D. 211-1 A of the FMC.

Under Article D. 211-1 A I of the FMC, financial contracts include:

1) Options, futures, swaps, forward rate agreements and any other forward contracts relating to financial instruments, currencies, interest rates, yields, financial indices or financial measures which may be settled physically or in cash;

2) Options, futures, swaps, forward rate agreements and any other forward contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties otherwise than by reason of a default or other termination event.

3) Options, futures, swaps and any other forward contracts relating to commodities that can be physically settled provided that they are traded on a regulated market and/or a multilateral trading facility;

4) Options, futures, swaps, and any other forward contracts relating to commodities, that can be physically settled not otherwise mentioned in 3. above and not being for commercial purposes, which have the characteristics of other forward financial instruments, having regard to whether, inter alia, they are cleared and settled through a recognized clearing house or are subject to regular margin calls;

5) Forward contracts for the transfer of credit risk;

6) Financial contracts for differences;

7) Options, futures, swaps, forward rate agreements and any other forward contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties otherwise than by reason of a default or other termination event;

8) Any other forward contract relating to assets, rights, obligations, indices and measures not otherwise mentioned in 1 through 7 above, which have the characteristics of other forward financial instruments, having regard to whether, inter alia, it is traded on a regulated market or a multilateral trading facility, is cleared and settled through a recognised clearing house or is subject to regular margin calls.

Forward financial instruments also cover the equivalent of the above mentioned instruments under foreign law.

Annex 8

Instruction Letter

Annex 9

List of French Counterparty

The French Counterparty to which this memorandum relates is either (a) a corporate entity, (b) a credit institution, (c) an investment services provider, (d) an insurance company, (e) an *établissement public*, (f) a *collectivité territoriale*, (g) the *Banque de France*, (h) the *Caisse des dépôts et consignations* or (i) the French State (the French State together with the *établissements publics*, the *collectivités territoriales*, the *Banque de France* and the Caisse des dépôts et consignations, the "**Public Entities**"), as described below.

EFET description	**Covered by Opinion**	**Legal form(s)**
Corporation	Yes	A corporate entity shall mean a commercial company incorporated and existing under French law having one of the forms listed in the *Livre II Titre II* of the French Commercial Code, such form of companies being *société anonyme (SA), société par actions simplifiée (SAS), société en nom collectif (SNC)*, *société en commandite simple (SCS)*, *société en commandite par actions (SCA)* and *société a responsabilité limitée (SARL)*, other than credit institutions, investment services providers, insurance companies and investment fund management company.
Partnership	No	Such category would include the *société en participation and société de fait* (types of unregistered corporations), the associations, *syndicats* (unions) and the f*ondations* (foundations).
Credit institution or bank	Yes	A credit institution shall mean a corporation, as referred to in paragraph "Corporation" above, which is licensed as a credit institution pursuant to Article L. 511-9 of the FMC but not a *banque mutualiste* (mutual bank), a *banque coopérative* (co-operative bank), a *caisse d'épargne et de prévoyance* (saving bank), a *caisse de crédit municipal* (municipal bank).
Investment services provider or investment firm	Yes	An investment services provider (*prestataire de services d'investissement*) shall mean a corporation, as referred to in paragraph "Corporation" above, which, pursuant to Article L. 531-1 of the FMC, is licensed as either an investment firm, an asset management company or a credit institution authorised to provide investment services but not a *banque mutualiste* (mutual bank), a *banque coopérative* (co-operative bank), a *caisse d'épargne et de prévoyance* (saving bank), a *caisse de crédit municipal* (municipal bank).
Insurance company	Yes	An insurance company shall mean an insurance company incorporated as a *société anonyme*, which is regulated as an insurance company under Article L. 310-1 of the French Insurance Code.

EFET description	Covered by Opinion	Legal form(s)
Investment fund management company	Yes	An investment fund management company (*société de gestion d'actifs*) shall mean a corporation, as referred to in paragraph "Corporation" above, which, pursuant to Article L. 531-1 of the FMC, is licensed as an asset management company.
Municipality or county	Yes	A *collectivité territoriale* shall mean a French région ("**Region**"), a French *département* ("**Department**") or a French *municipalité* (a *municipalité*, together with a Region and a Department, the "**Local Entities**") but shall exclude *Collectivité territoriale* de Guyane, *Collectivité territoriale de Martinique, Polynésie française, Saint-Pierre-et-Miquelon, Wallis-et-Futuna, Mayotte, Saint-Martin, Saint-Barthélemy, Nouvelle-Calédonie and Terres australes et antarctiques françaises*.
Association of local government	No	
Publicly-owned corporation	Yes	An *établissement public* shall mean a French national (i) *établissement public industriel et commercial* or (ii) *établissement public administratif* but shall exclude *établissements publics d'habitation à loyer modéré* (known as offices publics de l'habitat); an *établissement public* is a French public special purpose legal entity created by law or decree to satisfy a public interest; each *établissement public* has a separate legal personality, financial autonomy and capacity to own assets but shall act in compliance with the principle of specialization. The *Banque de France* shall mean the entity referred to in Articles L. 141-1 and seq. of the FMC. The *Caisse des dépôts et consignations* shall mean the specific *établissement public* referred to in Articles L. 518-2 and seq. of the FMC.
Quasi-governmental entity	Yes	A quasi-governmental entity shall mean an *établissement public* as described in the paragraph "publicly-owned corporation" above.

Annex 10

Additional considerations in relation to credit institution and other specific entities

1 **Additional considerations in respect of credit institutions**

1.1 The role of the ACPR under the FMC in respect of insolvency of credit institutions

As far as Insolvency Proceedings concerning credit institutions are concerned, the EU Credit Institutions Reorganization and Winding up Directive applies. Credit institutions established in France are subject to the supervision and control of the *Autorité de contrôle prudentiel et de résolution* (the "**ACPR**").

Under Article L. 613-27 of the FMC, a Safeguard Proceeding, a Judicial Reorganisation Proceeding or a Judicial Liquidation Proceeding may only be opened against a credit institution or an investment firm by a commercial Court having jurisdiction following advice by the ACPR which is the supervisory authority for credit institutions and investment firms.

Likewise, a Conciliation Proceeding may only be opened against a credit institution or an investment firm following the advice of the ACPR.

Articles R. 613-14 and following of the FMC have set the mode under which such advice is to be given.

French banking supervisory authorities should have adequate advance warning of the difficulties encountered by a French counterparty which is either a credit institution or an investment firm in France.

Under the provisions introduced into the FMC as a result of the implementation into French law of the EU Credit Institutions Reorganization and Winding up Directive, the following principles should be noted:

- Article L. 613-31-3 of the FMC, implementing Article 3.1 of the EU Credit Institutions Reorganization and Winding up Directive, has confirms the principle of the universality of the estate. Article L. 613-31-3 of the FMC provides indeed that subject to the provisions of Articles L. 613-31-5 and L. 613-31-6 of the FMC[25] (see below), French authorities are the sole authorities empowered to decide on the implementation of reorganisation and winding up measures in a credit institution licensed in France (including branches established in other Member States or in member States of the European Economic Area) or in a branch in France of a credit institution whose head office is located outside of the European Economic Area. Such measures are effective on the territory of the other Member States including against third parties in such Member States (Article L. 613-31-3 of the FMC).

  Although the French implementing legislation of Article 3.2 of the EU Credit Institutions Reorganization and Winding up Directive has not specified or stated that such measures shall be applied in accordance with laws, regulations and procedures applicable in the home Member State[26], the prevailing view is, however, that Article L. 613-31-3 of the FMC, which provides that

[25] Articles L. 613-31-5 and L. 613-31-6 of the FMC contain a special conflict of laws rule for certain agreements such as netting agreements or agreements relating to temporary transfers of full title to financial instruments or set-off.
[26] Article 3.2 of the Directive on the Insolvency of Credit Institutions provides that the reorganisation measures shall be applied in accordance with the laws, regulations and procedures applicable in the Home Member State, unless otherwise provided in the Directive. They shall be fully effective in accordance with the legislation of that Member State throughout the Community without any further formalities, including as against third parties in other Member States, even where the rules of the host Member State applicable to

the reorganisation and winding up measures shall be fully effective on the territory of the other Member States including as against the third parties in such Member States, should be interpreted in light of Article 3.2 of the EU Credit Institutions Reorganization and Winding up Directive27. As indicated above, French case law has supported the principle of the universality of the estate.

Furthermore, the court which has territorial jurisdiction to hear Insolvency Proceedings matters is the court having jurisdiction in the place where the debtor has its head office (Article R. 600-1 of the French Code of Commerce).

- Article L. 613-31-5 4° of the FMC implementing Articles 25 through 27 of the EU Credit Institutions Reorganization and Winding up Directive, provides that as an exemption to the provisions of Article L. 613-31-3, the effects of a reorganisation or liquidation measure over inter alia netting agreements ("conventions de compensation"), agreements relating to temporary transfers of full title to financial instruments ("conventions portant cession temporaire d'instruments financiers") and transactions carried out on a regulated market, shall be governed solely by the law of the country which governs such agreements Article L. 613-31-5 of the FMC thus contains a special conflict of laws rule applicable in particular in respect of netting agreements and agreements relating to temporary transfers of full title to financial instruments.

  Although it is difficult in the absence of case law in this respect to express with certainty an opinion of the interpretation to be given to the special conflict of laws rule provided by the combination of Articles L. 613-31-3 and L. 613-31-5 of the FMC, the provisions of such Articles should be analyzed as meaning that in the event a credit institution incorporated in France is subject to reorganisation or liquidation measures, the effects of such measures shall be as contemplated under French laws and regulations which in the present instance is also the governing law of the Netted Agreement or the Principal Agreement.

- pursuant to Article L. 613-31-6 4° of the FMC implementing Article 23 of the EU Credit Institutions Reorganization and Winding up Directive, the adoption of reorganisation measures or the opening of winding-up proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the credit institution, where such a set-off is permitted by the law applicable to the credit institution's claim.

1.2 French Banking Resolution Regime

Articles L. 613-34 et seq of the FMC, which implements under French law the BRRD and BRRD 2 provides a legal and regulatory framework applicable to the resolution of French credit institutions and investment firms meeting certain conditions (the "**French Banking Resolution Regime**")[28].

In addition, France is a participant EU Member State of the Single Resolution Mechanism established by Regulation (EU) no. 806/2014 of 15 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 (the "**SRM Regulation**"), therefore the SRM Regulation applies directly to credit institutions and investment firms established in France.

If the French Counterparty which is in the scope of the French Banking Resolution Regime is considered as significant entity as listed in "the List of significant supervised entities and the list of less significant institutions" published by European Central Bank and as amended from time to time, the relevant resolution authority (the "**Resolution Authority**") will be the Single Resolution Board, in close cooperation with the French ACPR which may take resolution measures or actions to implement the

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them do not provide for such measures or make their implementation subject to conditions which are not fulfilled. The reorganisation measures shall be effective throughout the Community once they become effective in the Member State where they have been taken.

[27] David Robine : "Transposition de la directive assainissement et liquidation des établissements de crédit, Ordonnance du 21 octobre 2004", Dalloz, 2004, n° 44, p. 3202.

[28] The French Banking Resolution Regime has been implemented by way of Ordinance (*Ordonnance*) no. 2015-1024 of 20 August 2015, as ratified by the Act no. 2016-1691 of 9 December 2016.

Single Resolution Board's resolution decisions. For the purposes of this opinion, the Resolution Authority designates the relevant resolution authority to which the SRM Regulation and the Resolution Act confers the resolution tools and powers.

The Resolution Act sets out resolution tools, which may have significant impact on the enforceability of the close-out netting provisions and of the collateral arrangements against a French bank or investment firm under resolution, although, as required by the BRRD (as amended by BRRD 2), a safeguard is provided by the Resolution Act in respect of *netting agreements*, set-off agreements or title transfer financial collateral arrangements.

Restrictions to the enforcement of the Agreements may apply where the French Counterparty is subject to the provisions of the FMC resulting in particular from French law no. 2013-672 dated 26 July 2013 relating to the separation and regulation of banking activities and French Ordinance no. 2015-1024 dated 20 August 2015 implementing various provisions of the law of the European Union in financial matters implementing in particular the provisions of the BRRD, as amended and supplemented by Ordinance no. 2020-1636 dated 21 December 2020 relating the the resolution regime in the banking sector and implementing the provisions of BRRD 2(the "**Banking Law**").

BRRD 2 introduces the possibility for resolution authorities to suspend, for a limited period, certain contractual obligations before an institution is put under resolution. BRRD 2 provides that a resolution authority shall have the power to suspend any payment or delivery obligations pursuant to any contract entered into by the relevant entity provided that (i) it has been determined that the relevant entity is failing or likely to fail, (ii) there is no immediately available private sector measure that would prevent the failure of the relevant entity, (iii) the exercise of such power is deemed necessary to avoid the further deterioration of the financial conditions of the institution or entity, and (iv) the exercise of such suspension power is either (a) necessary to determine that a resolution action is necessary in the public interest or (b) necessary to choose the appropriate resolution actions or to ensure the effective application of one or more resolution tools. The period of such suspension shall not last longer than the period from the publication of a notice of suspension to midnight in the member State of the resolution authority of the relevant entity at the end of the business day following the day of the publication.

BRRD 2 introduces an obligation for the relevant entities to include, upon certain conditions, in financial contract in the meaning of BRRD they are a party to and governed by the law of a third country, terms by which the parties recognise that such financial contract may be subject to the exercise of stay powers by the resolution authority (the so-called "bail-in provisions"). Under such principle, any English law governed agreement with a French financial counterparty has to contain a bail-in clause whereby the counterparty recognises that the financial contract may be subject to exercise of stay of power by the ACPR as resolution entity.

French Banking Law had anticipated and already reflected most of the provisions of BRRD 2.

Certain restrictions may apply where the French Counterparty is a credit institution or an investment firm[29] within the meaning of Article L. 613-34 of the FMC which could face resolution measures within the meaning of the Banking Law (a "**BRRD Entity**"). In particular:

(i) pursuant to Articles L. 613-56-4 and L. 613-56-5 of the FMC, the resolution college of the ACPR is entitled, in particular, to suspend any contractual obligation of a BRRD Entity[30] to pay or to deliver

[29] Please note that Article L613-34 excludes from its scope, certain investment firms depending on which investment services they are authorised to carry out.

[30] Under the Banking Law, subject to certain conditions being met, the ACPR is entitled to order resolution measures against a BRRD Entity when it is in default.
Pursuant to Article L. 613-49 of the FMC, for the purposes of resolution measures, a BRRD Entity is in default if the following conditions are satisfied:

(a) the supervision or resolution college of the ACPR has decided that such default is either in effect or predictable;
(b) there is no reasonable perspective that such default may be avoided in a reasonable delay other than with the application of a resolution measure; and

financial instruments, and to suspend any termination rights of a party to an agreement entered into with a BRRD Entity until no later than midnight on the business day (*jour ouvré*) following the publication of the ACPR's decision to order the suspension;

(ii) moreover, Article L. 613-50-3 of the FMC provides that the provisions of Articles L. 211-36-1 to L. 211-38 of the FMC cannot prevent the application of the restrictions mentioned in (i) above; the French Netting Law regime would consequently be ineffective in this case;

(iii) in accordance with article L.613-55-6 of the FMC, the resolution college may liquidate the positions relating to financial contracts or derivatives products, however, in relation to the valuation, the resolution college or the independents expert shall take into account existing set-off agreements

(iv) close-out netting rights under the Agreement are close-out netting rights provided by Articles L. 211-36-1 to L. 211-38 of the FMC; consequently, in the case where the resolution college of the ACPR would decide to suspend the exercise of the close-out netting rights of the other party under the Agreement, the Agreement would not be enforceable against the relevant BRRD Entity until no later than midnight on the business day (*jour ouvré*) following the publication of such decision by the ACPR; and

(v) in addition, pursuant to Articles L. 613-52 and L. 613-53 of the FMC, the resolution college of the ACPR may also decide (x) to transfer any or part of the assets, rights and obligations of a BRRD Entity to a third party, or (y) to use a bridge institution (*établissement-relais*) in charge of receiving, on a temporary basis, all or part of the assets, rights and obligations of the relevant BRRD Entity, in view of a subsequent transfer in accordance with the modalities set forth by the resolution college of the ACPR. The transfer referred to in (x) and (y) above could include the Agreements.

The Banking Law provides that notwithstanding any contrary legal or contractual provision, the contracts relating to the transferred activities continue and that no termination nor netting may take place solely by reason of such transfer[31] (Articles L. 613-52 and L. 613-53-3 of the FMC).

Pursuant to Article L. 613-54 of the FMC, the resolution college of the ACPR may also transfer any or part of the rights, assets or obligations of a BRRD Entity to an asset management vehicle (structure de gestion d'actif), in the view of liquidating them at the best price.

Besides, the ACPR may take some additional measures linked to the transfer of assets, rights and obligations of the BRRD Entity, including in particular:

(i) the modification or the cessation of certain terms of a contract entered into by the BRRD Entity (Article L. 613-56-3 II of the FMC);

(ii) the release of the security interests or any undertakings on the financial instruments, rights, assets or undertakings that are subject to the transfer (Article L. 613-56-2 I of the FMC).

In addition to the measures set out above, other measures taken on the basis of the Banking Law could include, in particular but not exclusively, the limitation or prohibition for the BRRD Entity to enter into certain types of transactions, the dismissal of any manager within the meaning of Article L. 511-13 of the FMC, the intervention of the fonds de garantie des dépôts et de résolution.

(c) a resolution measure is necessary in order to fulfil the objectives of the resolution as set out in Article L. 613-50 of the FMC and a winding-up procedure under *Livre VI* of the French Commercial Code could not fulfil such objectives.

[31] Although the articles of the FMC listed in this Opinion are not entirely clear on this point our interpretation would be that it is only the relevant Agreement which can be transferred. In addition, Article L. 613-57-1 of the FMC provides that the ACPR should, when transferring agreements similar to the Agreements, try not to affect netting agreements which consequently would prevent a cherry picking. However, the Banking Law has been drafted to provide flexibility to the ACPR and consequently is not always entirely clear. We would however, based on the arguments above, believe that the ACPR cannot do cherry picking.

The Agreement would not be enforceable against the relevant BRRD Entity if such Agreement were triggered as a result of a resolution measure taken by the resolution college of the ACPR. The ACPR decision to order suspension pursuant to Article L. 613-56-4 of the FMC will suspend the termination rights of a party to an agreement entered into with a BRRD Entity until no later than midnight on the business day (jour ouvré) following the publication of the ACPR's decision to order the suspension. The termination rights of the party to an agreement entered into with a BRRD Entity will be enforceable once the suspension is over. Consequently, if an event of default occurs during the suspension period, the non-defaulting Party will not be allowed to enforce the Agreement against the BRRD Entity.

2 Special considerations applicable to insurance companies

As to Insolvency Events concerning insurance undertakings, the EU Insurance Undertakings Insolvency Directive applies.

As regards insurance companies, it should be noted that Article L. 310-25 of the French Insurance Code provides that a Safeguard Proceeding, a Judicial Reorganisation Proceeding or a Judicial Liquidation Proceeding may be opened against an insurance company only at the request ("*à la requête*") of the Autorité de contrôle prudentiel.

Furthermore, such proceedings may also be opened by a Commercial Court having jurisdiction, either at its own initiative or upon request of the public prosecutor, following conforming advice ("*avis conforme*") by the of the *Autorité de contrôle prudentiel*.

Similar provisions apply in respect of Conciliation Proceedings.

Under the provisions introduced into the French Insurance Code as a result of the implementation into French law of the EU Insurance Undertakings Insolvency Directive, the following principles should be noted:

- Paragraph 1 of Article L. 326-20 of the French Insurance Code provides in particular that, unless otherwise provided for in Articles L. 326-21 to 326-29 of the French Insurance Code, reorganisation measures defined in Article L. 323-8 of the French Insurance Code and decisions concerning the opening of winding-up proceedings taken by the competent authorities of a Member State of the European Community other than the French Republic against an insurance company whose head office is situated within the territory of such State shall be fully effective within the territory of the French Republic without any further formalities, including as against third parties, once they become effective in the Member State where they have been taken. Such provisions also apply when reorganisation reasures or decisions concerning the opening of winding-up proceedings are taken against a branch of an insurance company whose head office is situated outside the European Community;
- Paragraph 3 of Article L. 326-20 contains the same principle in respect of reorganisation measures and decisions concerning the opening of winding-up proceedings taken by the competent French public authority against (i) an authorised company whose head office is situated in the French Republic or (ii) an authorised branch validly established in the French Republic of a company whose head office is outside the European Community;
- Article L. 326-25 of the French Insurance Code contains a special conflict of laws rule for set-off similar to that of Article L. 613-31-6 of the FMC in respect of credit institutions.

3 Special considerations applicable to real estate credit company (Sociétés de crédit foncier) and housing financing company (Sociétés de financement de l'habitat)

There are two types of French covered bond issuers: the real estate credit company (*Sociétés de crédit foncier*) and the housing financing company (*Sociétés de financement de l'habitat*) (together, the "**Covered Bond Issuers**").

Each Covered Bond Issuer is a financial institution created solely to: (i) grant or acquire secured loans, loans granted to, or guaranteed by, public sector entities or other eligible securities and (ii) finance such loans or securities by issuing covered bonds (respectively, *obligations foncières* or *obligations de financement de l'habitat*), other forms of privileged liabilities and non-privileged liabilities.

Pursuant to Article L. 513-10 and Article L. 513-28 of the FMC, Covered Bond Issuers can enter into derivatives transactions benefiting from the privilege set out in Article L. 513-11 of the FMC (the "**Privilege**") or into derivative transactions not benefiting from the Privilege32.

It results from the Privilege that sums due in respect of privileged liabilities shall be paid in priority to all other debts and Insolvency Proceedings shall not result in the acceleration of the privileged liabilities (as an exception to the French Insolvency Law). If Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement entered into between the Parties benefit from the Privilege, the provisions of the Agreement entitling the non-defaulting Party to early terminate all outstanding Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement upon the opening of an Insolvency Proceeding shall not be enforceable against the Covered Bond Issuers.

Such provisions would prevent the exercise of the close-out netting right under the French Netting Law.

4 Special considerations applicable Public Entities

Regarding the validity and enforceability of close-out netting provisions of the Agreement *vis-à-vis* Public Entities, Article L. 2311-1 of the *Code général des propriétés des personnes publiques* and general principles of administrative law provide respectively for the impossibility to seize assets of public legal entities and impossibility to enforce specific rights (*immunité d'exécution*). These two principles prevent the operation of enforcement proceedings (*exécution forcée*) and, by analogy, set-off mechanism (*compensation*) (as set-off is a type of mandatory payment). Both civil and administrative courts strictly apply this prohibition.

However, a law can allow the possibility to use set-off mechanisms against public legal entities. In this respect, according to Article L. 211-36 I of the FMC, financial obligations which can benefit from the French Netting Law include, in particular, the ones that result from Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement (which we have assumed above would be Qualifying Transactions) when at least one of the parties is an *établissement public*, the French State and the *Banque de France* or a local entity. Consequently, our view is that one should interpret Articles L. 211-36 and seq. of the FMC as setting out a special derogation to the above prohibition of set-off mechanisms against public legal entities. Indeed, otherwise one could wonder why *établissements publics*, the French State, the *Banque de France* and Local Entities have expressly been included in Article L. 211-36 1° of the FMC.

On this basis, we believe that our opinions in our answer above should apply to a French Counterparty which is an *établissement public*, the French State, the *Banque de France* or a Local Entity and the other party could seek recovery of any net balance in favour of the other party pursuant to a definitive judgment ordering payment of its debt by such a French Counterparty, in accordance with the provisions of Article 1 of Law no. 80-539 dated 16 July 1980 (as amended) relating to the enforcement of judgments against public legal bodies[33].

[32] As far as forward financial instruments are concerned, Article L. 513-10 of the FMC provides (i) that, under certain circumstances, a Covered Bond Issuer may enter into forward financial instruments and (ii) that amounts due in respect of forward financial instruments entered into for hedging its assets and liabilities, after set-off, if need be, benefit from a priority lien referred to in Article L. 513-11 of the FMC, as well as certain amounts due in respect of forward financial instruments entered into for hedging or managing the global risk on its assets, liabilities or off-balance sheet items.
[33] However, set-off of the debts and claims arising out of the transfers of collateral provided by public entities could be unenforceable.