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To: European Federation of Energy Traders (EFET)

Date: 2 November 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 the laws of England and Wales in relation to a number of questions raised in your instruction letter dated 2 July 2020 (the "**Instruction Letter**"), in connection with the following documents:

(a) 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**");

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

(c) 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

(d) 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**").

1.2 For the purposes of giving this Opinion, we have only examined the standard form documents listed in Part 1 to Annex 1 to this Opinion (the "**Opinion Documents**"). We have not made any searches or enquiries concerning or affecting any person, or any corporate records of such persons.

1.3 This Opinion is in respect of English law, being the laws of England and Wales, as at the date first stated in this Opinion (the "**Effective Date**"). 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 Effective Date or changes in law which have taken, may occur, or take effect, after the Effective Date of this Opinion.

1.4 This Opinion only purports to be an analysis of the issues raised by the Instructions and does not purport to be an analysis of all issues which could arise in entering into the Opinion Documents. For example, it does not deal with matters related to the capacity, power or authority of a person to enter into an Opinion Document, the use of such a power for a proper purpose or for the benefit of beneficiaries, compliance with any constituent documents of any person, or any matters related to security granted in connection with an Opinion Document.

1.5 This Opinion is addressed exclusively to EFET and its members who have subscribed to the EFET Legal Module and is for their sole benefit; and may not be relied upon by any other person or legal entity or corporation, and may not be disclosed, used, quoted or circulated to any other person or legal entity without EFET's and Reed Smith LLP's prior written approval, provided that this Opinion may be shared with EFET's advisors, advisors of EFET's legal committee members, and the competent regulatory authorities responsible for regulating EFET's legal committee members, and provided further that such advisors and regulatory authorities may not rely on this Opinion.

2 EXECUTIVE SUMMARY

Subject to the other terms of this Opinion (including, without limitation, the assumptions and reservations set out in Annexes 2 and 3), the position under English law in respect of the questions raised in the Instruction Letter can be summarised as follows:

2.1 The Agreements would generally be excluded from the scope of the Part A1 moratorium under the Insolvency Act 1986. This is because under Section A18(3) of the Insolvency Act 1986, the effect of the Part A1 moratorium does not apply to pre-moratorium debts which fall due before or during the moratorium which consist of amounts payable in respect of debts or other liabilities arising under a "contract or other instrument involving financial services" within the meaning of Schedule ZA2 of the Insolvency Act 1986.

2.2 The close-out netting provisions of a Master Agreement will be unaffected by Section 233B of the Insolvency Act limiting the use of "ipso facto" clauses. (See, in particular, paragraphs 5.2.52 et seq. for further detail).

2.3 Under English law, Insolvency Procedures are conducted in Sterling. Therefore, claims against an insolvent counterparty would be required to be converted into Sterling with reference to the exchange rates prevailing on the date on which the relevant Insolvency Procedure commenced, notwithstanding contractual requirements for such amount to be calculated and paid in another currency. (See, in particular, paragraph 5.2.13 for further detail).

2.4 The provisions of a Master Agreement governed by English law that provide for early termination for a Material Reason or on the occurrence of a close-out event in respect of a party, other than by reason of the insolvency of a party, and subsequent application of the close-out netting provisions are valid and enforceable. (See, in particular, paragraph 5.1.5 et seq for further detail).

2.5 Close-out netting and the calculation of a Final Net Settlement Amount under Sections 3 and 4 of the CPMA and §§ 7 and 8 of the MNA would be valid and enforceable in the event of the commencement of an Insolvency Procedure in England with respect to a counterparty to that agreement which is an English Company or a foreign company (each as defined below) save that in the event of the commencement of a liquidation or an administration in England with respect to a counterparty, the close-out netting provisions of the Master Agreements would operate subject to certain statutory provisions the effect of which would be substantially the same as that of the close-out netting provisions alone. (See, in particular, paragraph 5.2.25 and Section 2 of Annex 3 of this Opinion for further detail).

2.6 The early termination, close-out netting provisions and calculation and payment of a Final Net Settlement Amount under the provisions of the MNA and CPMA should not be voidable or challengeable in the event of the commencement of Insolvency Procedures. The outcome of the close-out netting provisions of the model Master Agreements will not be affected by the commencement of an Insolvency Procedure and the amount due in respect of the obligations of each Party would be a net sum. (See, in particular, paragraphs 5.2.5 and 5.2.6 for further detail).

2.7 The conclusions of this Opinion are generally unchanged in respect of a Party conducting business on a multibranch basis prior to insolvency. (See, in particular, paragraph 5.4 et seq for further detail).

2.8 Each transfer of collateral as Eligible Credit Support under the CSAs 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. (See, in particular, paragraphs 5.1.10 et seq for further detail).

2.9 The Opinion Documents governed by English law would be legal, valid, binding and enforceable as against a counterparty. (See, in particular, paragraph 5.6.1 for further detail).

2.10 Unless otherwise agreed between the Parties, and subject to evidentiary requirements, an orally agreed Individual Contract governed by English law will be enforceable provided that the requirements for the formation of a binding contract are satisfied. (See, in particular, paragraph 5.1.3 for further detail).

2.11 In general: (i) the English courts will uphold the Parties' choice of governing law; and (ii) the English courts will respect the Parties' submission to arbitration or the jurisdiction of specified courts under the relevant Opinion Documents. (See, in particular, paragraph 5.1.21 et seq for further detail).

2.12 If insolvency set-off takes effect in England and Wales, it would result in a net amount payable between the Parties which would also take account of any other mutual dealings between the Parties. (See, in particular, paragraph 5.2.73 for further detail).

2.13 The substance of this Opinion relating to the enforceability of the close-out netting provisions of the CSAs would not change by reason only of one or more Parties to the relevant Opinion Documents being a partnership that is, or becomes, subject to Insolvency Procedures. (See, in particular, Annex 6 for further detail).

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3 SCOPE AND DEFINITIONS

3.1 This Opinion is given on the basis that the counterparty to a relevant Agreement is an English company or a foreign company, including such persons (banks) which have permission to accept deposits by virtue of Part IV of FSMA and persons (insurance companies) which have such permission to carry out contracts of insurance in the UK. Please note that certain other types of person, not covered by this Opinion, may also have permission to accept deposits, including building societies and credit unions within the meaning of section 1 of the Credit Unions Act 1979.

3.2 This Opinion also covers English partnerships. To the extent that the counterparty is an English partnership this Opinion is modified to the extent detailed in Annex 6. Any counterparty which is a building society, a credit union, a local authority or a private individual is excluded from the scope of this Opinion.

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

"**attaching creditor**" has the meaning given to it in paragraph 2.13 of Annex 3.

"**Authorities**" and, each, an "**Authority**" has the meaning given to it in paragraph 5.7 of Annex 3.

"**Bail-in Safeguards Order**" has the meaning given to it in paragraph 5.33 of Annex 3.

"**Banking Act**" means the Banking Act 2009.

"**Banking Act SRR Code of Practice**" has the meaning given to it in paragraph 5.9 of Annex 3.

"**Bank Administration Procedure**" has the meaning given to it in section D of Annex 3.

"**Bank Administration Rules**" has the meaning given to it in paragraph 5.52 of Annex 3.

"**Bank Insolvency Rules**" has the meaning given to it in paragraph 5.47 of Annex 3.

"**Brexit**" means the UK's withdrawal from the European Union.

"**BRRD**" means the European Bank Recovery and Resolution Directive (2014/59/EU).

"**Brussels Convention**" means the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, as amended.

"**CEA**" means the Civil Evidence Act 1995.

"**Central Registry of Winding-Up Petitions**" means the computerised register of winding-up petitions and administration applications.

"**CIGA**" means the Corporate Insolvency and Governance Act 2020.

"**CJEU**" means the Court of Justice of the European Union.

"**Collateral Regulations**" means the Financial Collateral Arrangements (No. 2) Regulations 2003;

"**COMI**" has the meaning given to it in paragraph 5.4.1(c).

"**Companies Act 1989**" means the Companies Act 1989 as it has been amended from time to time.

"**Credit Institutions Regulations**" means the Credit Institutions (Reorganisation and Winding Up) Regulations 2004.

"**Cross-Border Insolvency Regulations**" means the Cross-Border Insolvency Regulations 2006.

"**CVA**" has the meaning given to it in paragraph 3.1 of Annex 3.

"**debtor Party**" has the meaning given to it in paragraph 2.13 of Annex 3.

"**defendant Party**" has the meaning given to it in paragraph 2.13 of Annex 3.

"**EAO**" has the meaning given to it in paragraph 8 of Annex 4.

"**EEA**" means the European Economic Area.

"**EFET Gas Opinion**" the Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas and its Collateral Arrangements dated 28 April 2021.

"**EFET Power Opinion**" the Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements dated 30 March 2021.

"**English Company**" means a company which is formed and registered under the Companies Act 2006, (or any predecessor legislation as defined in section 1171 of the Companies Act 2006) but does not include a company formed and registered under any of the former 'Companies Acts' in what was then Ireland, and excludes any company listed under Annex 5.

"**EU Insolvency Regulation**" means the Council of the European Union Regulation No.2015/848 on Insolvency Procedures (recast)[1] [2015] OJ L141/19.

"**EUWA 2019**" means the European Union (Withdrawal) (No. 2) Act 2019.

"**excluded arrangements**" has the meaning given to it in paragraph 5.2.68(c).

"**excluded contracts**" has the meaning given to it in paragraph 5.2.68(b).

"**excluded entities**" has the meaning given to it in paragraph 5.2.68(a).

"**FCA**" means the Financial Conduct Authority.

"**Financial Collateral Arrangement**" means an arrangement defined as such in the Collateral Regulations.

"**foreign company**" means a company (other than "Societias Europea" established pursuant to EU Council Regulation No. 2157/2001 as of 8 October 2001 on the European Company Statute) which is incorporated or formed under the laws of another jurisdiction with a branch or branches established or located in this jurisdiction.

"**FSCS**" means the Financial Services Compensation Scheme.

[1] The EU Insolvency Regulation applies to insolvency proceedings relating to debtors with their centre of main interests in an EU member state (other than Denmark) opened on or after 26 June 2017. Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1 continues to apply to insolvency proceedings opened before 26 June 2017.

"**FSMA**" means the Financial Services and Markets Act 2000.

"**Insolvency Act**" means the Insolvency Act 1986.

"**Insolvency Exit Regulations**" means the Insolvency (Amendment) (EU Exit) Regulations 2019/146.

"**Insolvency Procedures**" means are liquidation (including provisional liquidation), administration, bank insolvency, bank administration[2], investment bank special administration, special administration (bank insolvency), special administration (bank administration)[3], administrative receivership, receivership, moratorium, Part A1 Moratorium, company voluntary arrangements, schemes of arrangement under Part 26 of the Companies Act 2006, Restructuring Plans under Part 26A of the Companies Act 2006[4], and as applicable to a Party under English law as at the date of this Opinion.

"**Insolvency Rules**" means the Insolvency (England and Wales) Rules 2016.

"**Insolvency Set-Off Rules**" means in a winding-up or an administration under English law, Rule 14.24 and Rule 14.21 of the Insolvency Rules ("**Rule 14.24**" and "**Rule 14.21**" respectively), or Rule 14.25 of the Insolvency Rules ("**Rule 14.25**") and Rule 14.21, and each, an "**Insolvency Set-Off Rule**".

"**INSPRU**" means the Prudential Sourcebook for Insurers.

"**Instruction Letter**" has the meaning given to it in paragraph 1.1.

"**insurer**" has the meaning given it in article 2 of the Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 but excludes any:

(a) former or present underwriting member of the Society incorporated by the Lloyd's Act 1871;

(b) friendly society as incorporated under the Friendly Societies Act 1992;

(c) exempt person in respect of that activity or a person who effects or carries out contracts of insurance of certain specified kinds only in the course of, or for the purposes of, a banking business and which is incorporated and registered under the laws of this jurisdiction or formed under the laws of another jurisdiction (other than Scotland) with a branch or branches established or located in this jurisdiction; or

(d) person who is a "reinsurance undertaking" within the meaning of the Reinsurance Directive or who conducts exclusively Reinsurance business,

and additionally refers only to insurers which are incorporated and registered under the laws of this jurisdiction or formed under the laws of another jurisdiction (other than Scotland) with a branch or branches established or located in this jurisdiction.

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[2] Note that, in relation to a UK bank, the terms "liquidation" and "administration" when used in this Opinion shall include bank insolvency and bank administration, respectively (and the terms "liquidator" and "administrator" shall be construed accordingly).

[3] Note that, in relation to a UK investment bank (an undertaking to which the Investment Bank Regulations apply, being an institution which is incorporated in the UK, authorised under FSMA to safeguard and administer investments or deal in investments as principal, and holds assets for clients), the terms "liquidation" and "administration" when used in this Opinion shall include an investment bank special administration, a special administration (bank insolvency) and/or a special administration (bank administration) under the Investment Bank Regulations, as the context may require (and the terms "liquidator" and "administrator" shall be construed accordingly).

[4] Strictly, receivership, schemes of arrangement, and a Restructuring Plan are not insolvency proceedings properly so-called; however, since each procedure may be invoked in the case of parties in financial difficulties and given the potential resulting implications for matters the subject of this Opinion, both are included in the definition of "Insolvency Procedures", for convenience.

"**Insurers Winding up Regulations**" means the Insurers (Reorganisation and Winding Up) Regulations 2004.

"**Investment Bank Regulations**" means the Investment Bank Special Administration Regulations 2011.

"**IP completion day**" means the implementation period completion day, being, 11 pm GMT on 31 December 2020.

"**MiFID II**" means Directive 2014/65/EU on markets and financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

"**Onshored EU Insolvency Regulation**" means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (Retained EU Legislation), being the EU Insolvency Regulation as incorporated into English domestic law by the Withdrawal Acts, as amended by the Insolvency Exit Regulations.

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

"**Opinion Documents**" has the meaning given to it in paragraph 1.2.

"**Partial Property Safeguards Order**" means the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009.

"**Partial Property Transfer Delegated Act**" means the Commission Delegated Regulation (EU) 2017/867.

"**Part A1 Moratorium**" means a standalone moratorium incorporated into the Insolvency Act 1986 by the Corporate Insolvency and Governance Act 2020. "**Part 1 instrument**" has the meaning given to it in paragraph 5.41 of Annex 3.

"**Part 26 scheme of arrangement**" means a scheme of arrangement pursuant to Part 26 of the Companies Act 2006.

"**Part 26A restructuring plan**" means a restructuring plan pursuant to Part 26A of the Companies Act 2006.

"**PRA**" means the Prudential Regulation Authority.

"**RAO**" means the Financial Services and Markets Act (Regulated Activities) Order 2000 (SI 2001/544).

"**Recast Brussels Regulation**" means Regulation 1215/2012.

"**regulated Party**" has the meaning given to it in paragraph 1.2 of Annex 3.

"**Regulations**" has the meaning given to it in paragraph 5.8.2.

"**Regulator**" means the FCA or the PRA, and together the "**Regulators**".

"**Reinsurance**" has the meaning set out in the Reinsurance Directive.

"**Reinsurance Directive**" means Directive 2005/68/EC.

"**Restructuring Plan**" the compromise or arrangement procedure pursuant to the Part 26A of the Companies Act 2006.

“**Rome Convention**” means the Rome Convention on the Law Applicable to Contractual Obligations 1980.

“**Rome Regulations**” means the Rome I Regulation and Rome II Regulation together.

“**Rome Implementing Legislation**” means the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019), and the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020.

“**Rome I Implementing Legislation**” means the Contracts (Applicable Law) Act 1990 and the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009.

“**Rome I Regulation**” means Council Regulation No. 593/2008 of 17 June 2008.

“**Rome II Implementing Legislation**” means the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008.

“**Rome II Regulation**” means Council Regulation No. 864/2007 of 11 July 2007.

“**Scottish Party**” means a Party incorporated under the laws of Scotland.

“**segregated clients**” has the meaning given to it in paragraph 1.2 of Annex 3.

“**Settlement Finality Regulations**” means the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.

“**Solvency II Directive**” has the meaning given to it at footnote 75 of Annex 3.

“**SRR**” has the meaning given to it in paragraph 5.2(a) of Annex 3.

“**Statutory Insolvency Set-off**” has the meaning given to it in paragraph 2.4 of Annex 3.

“**stay period**” has the meaning given to it in paragraph 5.44 of Annex 3.

“**Sterling**” means the lawful currency for the time being of England and Wales.

“**Trade and Cooperation Agreement**” means the Trade and Cooperation Agreement between (i) the European Union and the European Atomic Energy Community and (ii) the United Kingdom of Great Britain and Northern Ireland.

“**UCTA**” means the Unfair Contract Terms Act 1977.

“**Underlying Agreement**” has the meaning given to it in the Instruction Letter.

“**UK**” means the United Kingdom of Great Britain and Northern Ireland.

“**UK bank**” means an entity incorporated under law of any part of the UK and having its head office in the UK, which has permission under Part IV of FMSA to accept deposits; but does not include insurance companies or credit unions within the meaning of section 1 of the Credit Unions Act 1979.

"**UK credit institution**" is a UK credit institution as defined in the Credit Institutions Regulations, which means an undertaking whose head office is in the UK with permission under Part 4A of FSMA to accept deposits or to issue electronic money, but does not include insurance companies or credit unions within the meaning of section 1 of the Credit Unions Act 1979.

"**UK insurer**" has the meaning given to it in the Insurers Winding up Regulations.

"**Withdrawal Acts**" means the European Union (Withdrawal) Act 2018 (the "**EUWA 2018**") and the European Union (Withdrawal Agreement) Act 2020.

"**1988 Lugano Convention**" means the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

"**2001 Brussels Regulation**" means the Council Regulation (EC) No. 44/2001.

"**2005 Hague Convention**" means the Hague Convention of 30 June 2005 on Choice of Court Agreements.

"**2007 Lugano Convention**" means the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

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 "**§**" or "**§§**" are to sections of the relevant Opinion Documents, as the context requires.

(d) References to a "**paragraph**" are to a paragraph of this Opinion, as the context requires.

(e) References to a "**section**" are to a section of this Opinion, as the context requires.

(f) 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

(g) An "**Insolvent Party**" is a Party which is or which becomes subject to an Insolvency Procedure and a "**Solvent Party**" is the other Party.

(h) In relation to a winding-up under the laws of this jurisdiction, the "**commencement**" of Insolvency Procedures refers to the time of the presentation of the petition for winding-up, or of the application for an administration order, or, if earlier, the time of the passing of a resolution by the company for voluntary winding-up, or, where the court has made a recognition order in respect of a foreign proceeding under the Cross-Border Insolvency Regulations, the date of the opening of the foreign proceedings.

(i) References to "**model Master Agreement**", "**model CPMA**" or "**model MNA**" shall have the characteristics and elections as set out under the subsection "*EFET/IECA Schedule Template Default Elections*" in the Instruction Letter.

(j) England and Wales comprise a single legal jurisdiction. References in this Opinion to English law or "**this jurisdiction**", and an English Party should be read as references to the laws of England and Wales, the jurisdiction of England and Wales, and an English or Welsh Party respectively.

(k) We refer to liquidation and winding up interchangeably. The terms are synonymous and mean liquidation or winding up only under English law.

3.5 We express no opinion:

(a) where both (i) the relevant Agreement is not governed by English law; and (ii) neither Party is an English company or an English branch of a foreign company;

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

(c) any matters of fact;

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

(e) on the laws of any other jurisdiction;

(f) as to any matters of fact or as to any competition law aspects raised by virtue of the publication of the Opinion Documents;

(g) as to the existence of any property or assets transferred or to be transferred pursuant to the relevant Agreement, whether any such property or assets is owned by the transferor thereof or whether the same is or may become subject to any equities, rights or interests in favour of any other person ranking in priority to the transferee thereof[5];

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

(i) any law which has been enacted and has not commenced;

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

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

3.6 This Opinion relates only to the types of transactions described in Part 2 in Annex 1 that will be covered by the relevant Agreement.

3.7 As set out at paragraph II.G of the Instruction Letter, we have made references to our opinions in the EFET Gas Opinion and the EFET Power Opinion.

3.8 This Opinion is based upon the express words of the Opinion Documents as they would be interpreted under English law and takes no account of how such words would be interpreted under, or the effect of, any other law which may govern the Opinion Documents.

3.9 Matters relating to UK tax law and on generally published practice of HM Revenue & Customs are outside the scope of this Opinion and we express no opinion on such matters herein.

4 ASSUMPTIONS

4.1 In addition to the (a) the assumptions contained in Annex 2, and (b) the qualifications set out in Annex 3, this Opinion is also subject to the following assumptions:

(a) Eligible Credit Support provided under each CSA will only take the form of either cash or letters of credit.

(b) In relation to any opinion relating to the rights of a transferor to retrieve collateral from an insolvent entity, such transferor is incorporated or organised under the laws of this jurisdiction.

[5] Under English conflicts of law principles, generally the law of the country where property is situate will determine the manner and effectiveness of any purported transfer of title in that property which is otherwise valid under English law

(c) In relation to any opinion relating to the rights of a transferee to hold collateral and apply and use that collateral in a close-out netting event, such transferee is incorporated or organised under the laws of this jurisdiction.

(d) Cash collateral is denominated in a freely convertible currency that is held under the control of the transferee.

5 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. **For ease of reference, we have also replicated in this Section 5, the questions and specific assumptions as raised in the Instruction Letter.**

5.1 Netting / Set-off absent an Insolvency

(a) **Model CPMA / Model MNA**

Would a transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement 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

5.1.2 We assume that such transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement is enforceable under English law. We refer to paragraphs 5.6 et seq of the EFET Gas Opinion and the EFET Power Opinion for a discussion on such enforceability requirements.

5.1.3 Unless it can be shown that the Parties intended otherwise, a transaction concluded orally which the Parties reference as being included in the Netted Agreement, Principal Agreement or Uncovered Transaction would be so included (even where no reference is made to the Netted Agreement, Principal Agreement or Uncovered Transaction as applicable). Where transactions are matched electronically rather than manually entered into, such transactions will be treated as validly concluded as a matter of English law.

5.1.4 The above analysis is not dependent on whether the relevant transaction was concluded before or after the execution of each Master Agreement. In particular, the provisions under Section D, Part I, Division 1 of the CPMA and §2.1 of the MNA provide that all transactions under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement entered into both before and after the date of each model Master Agreement are subject to such relevant Agreement.

Please opine on 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 under: (a) one or more physically settling transactions involving the same commodity or product; (b) one or more physically settling energy transactions involving two or more different classes or types of commodity or product; a combination of physically and financially settling transactions (transacted under two or more Underlying Agreements)[6].

[6] 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).

5.1.5 The provisions of the MNA and the CPMA, which allow for Early Termination for a Material Reason or on the occurrence of a Close-Out Event (other than due to insolvency) and close-out netting of the Netted Agreements, Principal Agreements or Uncovered Transaction would be enforceable under the laws of this jurisdiction.

Please analyse and provide 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.

5.1.6 An online search may be carried out against a Party at Companies House and an enquiry may be made in respect of a Party at the Central Registry of Winding-Up Petitions in London by telephone, online enquiry through an information services provider, or in person at the Companies Court General Office. In making such enquiry, the clerk should be asked to check for any filings that have been made against a Party.

5.1.7 However, searches and enquiries referred in paragraph 5.1.6 above are not conclusive. They will not necessarily reveal whether or not a resolution has been passed, an appointment made, or proceedings commenced, or a charge or other registrable document created, since particulars of such matters are not required to be filed with any court or registry immediately but only within a specified time period. In addition, the searches are not conclusively capable of disclosing whether an Insolvency Procedure has been commenced in England and they do not indicate if an Insolvency Procedure has been commenced elsewhere. In particular, the Central Registry of Winding-Up Petitions may not reveal whether a company voluntary arrangement has been initiated by the Party, whether a filing has been made in respect of the Part A1 Moratorium, whether receivers have been appointed to assets of the Party or whether a Part 26 scheme of arrangement or a Part 26A restructuring plan has been commenced by the Party. Where the Party is based outside London, there may be a delay in the Central Registry of Winding-Up Petitions receiving notice of filings and it would also be advisable to contact the court most local to the Party to enquire whether any insolvency related court filings have been made in relation to the Party. Searches against a Party can also be checked in the London Gazette but there will be delays between an actual filing and the notice of that filing being published in the London Gazette. Short of conducting the relevant searches and enquiries referred to in paragraph 5.1.6 above, creditors of a Party will generally be informed of, and asked to vote on, an impending creditors' voluntary liquidation or a form of restructuring (e.g. scheme of arrangement, restructuring plan or a company voluntary arrangement) by the Party itself.

5.1.8 Short of conducting the relevant searches and enquiries referred to in paragraph 5.1.6 above, creditors of a Party may be informed of an impending creditors' voluntary liquidation or a form of restructuring (e.g. scheme of arrangement, restructuring plan or a company voluntary arrangement) by the Party itself.

Please discuss and provide your opinion on 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.

5.1.9 We refer to our opinions set out in the EFET Gas Opinion and the EFET Power Opinion (in particular paragraph 5.1 thereunder), which provide a discussion on the relevant rules relating to the concepts of close-out netting and set-off of claims between parties in this jurisdiction.

(a) **CPMA CSA / MNA CSA**

Please opine 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

5.1.10 In respect of Eligible Credit Support that are letters of credit, we assume that there is no "transfer", but rather that the letter of credit is issued in favour of the Party demanding credit support. In considering the following questions, therefore, we express no view in relation to letters of credit since the questions assume a "transfer".

5.1.11 In respect of Eligible Credit Support that is cash, we assume that it is paid to and for the benefit of the Transferee. § 7 of each CSA provides that each Party “agrees that all right, title and interest in and to any Eligible Credit Support or Interest Amount which it transfers to the other Party under the terms of the relevant CSA will vest in the Transferee free and clear of any liens, claims, charges or encumbrances or any other interest of the Transferor or of any third person”. There is nothing elsewhere in the CSAs to indicate that the transfer of cash is intended to take effect as anything other than an outright payment (e.g. an assignment of the benefit of an account).

5.1.12 The English courts would look at the wording and the substance of the arrangements and would not re-characterise a transfer of cash as creating security interest unless a court considers that the evidence[7] shows that § 7 of the CSAs does not reflect the genuine intention and agreement of the Parties. The English courts would be concerned to ensure that the operation of the arrangement in practice is consistent with the Parties' characterisation of the arrangements but there is no particular bias on the part of the English courts for security arrangements as opposed to title transfer arrangements. Provided that the Parties reflect their true intentions in their contract, they are free to structure their transactions in whichever way they wish.

5.1.13 Our view is that English law would characterise each transfer of Eligible Credit Support, once payment is made to the Transferee, as effecting an unconditional transfer of ownership of the assets transferred, assuming that the Parties' genuine intention is the outright transfer of ownership. Accordingly, we are of the opinion that there is no material risk that the English courts would re-characterise such transfer 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.

5.1.14 If Eligible Credit Support in the form of cash is not paid into an account maintained in England and Wales by the Transferee, local law advice in respect of the foreign jurisdiction in which the cash is repayable should be obtained to ensure that the transfer would not be re-characterised since there is no clear authority as to whether or not the English courts would apply the law of such foreign jurisdiction to the question of the proper characterisation of a transfer of Eligible Credit Support.

5.1.15 Our Opinion on this question is unchanged regardless of whether the arrangements constituted by the EFET CSAs in relation to Eligible Credit Support comprising cash constitute a Financial Collateral Arrangement under the Collateral Regulations. If such arrangements do constitute a Financial Collateral Arrangement, please see paragraphs 5.2.10.

Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, please opine 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.

5.1.16 Where the Eligible Credit Support is located in England, no further action is required under English law to enforce or continue such ownership interest.

[7] Evidence that § 7 of each CSA does not reflect the genuine intention and agreement of the Parties with respect to Eligible Credit Support in the form of cash might include the Transferee of such cash: (1) segregating it from its own assets; (2) identifying it as belonging to the Transferor; or (3) not otherwise dealing with it as it would its own property.

5.1.17 Where the Eligible Credit Support is located in another jurisdiction, local law advice should be obtained to confirm that there are no requirements or further actions to enforce or continue such ownership interest.

Please opine 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?

5.1.18 The right to substitute Eligible Credit Support pursuant to § 6 of each CSA (e.g. substituting Euros for United States Dollars) is a contractual right only and does not affect our opinion expressed in paragraph 5.1.10 et seq. A substitution would amount to two outright transfers: (a) the Transferee returning Eligible Credit Support; and (b) the Transferor providing the substitute Eligible Credit Support.

5.1.19 The presence or absence of consent to substituting has no bearing on this question.

5.1.20 This Opinion excludes letters of credit which we consider incapable of being "transferred" as explained in paragraph 5.1.10 above.

Please opine 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.

5.1.21 Subject to paragraphs 5.2.15 et seq, the choice of law provisions of each CSA (as set out in the relevant Agreement, as applicable) would be recognised under English law. However, under English rules of private international law, the law applicable to the proprietary aspects of a transfer of a moveable asset is generally the law of the place where that asset is located (the lex situs). To the extent that such assets are located in a foreign jurisdiction, local law advice in respect of that foreign jurisdiction should be obtained on the position of the transfer of ownership of such assets.

5.1.22 In respect of Eligible Credit Support that is cash, the law governing the transferee's obligations would, in the absence of an agreement to the contrary, be the law of the place where the transferor can recover from the transferee.

5.1.23 In respect of letters of credit, we refer to our observations at paragraph 5.1.10 above.

Please opine on whether under local law of your jurisdiction, each CSA complies with any mandatory margining requirements applicable under the laws of your jurisdiction.

5.1.24 From IP completion day, all UK counterparties that enter into derivative contracts (both over-the-counter (OTC) and exchange-traded derivatives) are in scope of the retained EU law version of Regulation (EU) 648/2012 of 4 July 2012 ("**UK EMIR**"). UK 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 UK EMIR and related 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.

5.1.25 Article 11(3) of UK 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(15) of UK EMIR provides that the Prudential Regulation Authority ("**PRA**") make technical standards for financial counterparties that are PRA-authorised persons and the FCA may make technical standards for all other cases, specifying the risk-management procedures, including the levels and type of collateral and segregation arrangements and the supervisory procedures to ensure initial and ongoing validation of those risk-management procedures.

5.1.26 As a consequence, certain counterparties may be required in relation to certain Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable)[8] to comply with the margin obligation. These requirements first took effect from 4 February 2017 under EMIR, and continue to apply under UK EMIR.

5.1.27 The binding technical standards for risk mitigation techniques for OTC derivative contracts not cleared by a central counterparty ("**BTS**") are set out in the retained EU law version of Commission Delegated Regulation 2016/2251 of 4 October 2016 (UK Delegated Regulation). The BTS provides for two types of margin that must be exchanged: (i) variation margin, which covers current exposure, and is calculated using a mark-to-market position; and (ii) initial margin, which covers potential future exposure. The rules relating to margin are subject to phase-in requirements, with timings based on a counterparty's categorisation, and its derivatives volumes.

5.1.28 The CSAs are not in a form that complies with the requirements of the BTS. In the case of the initial margin requirement, this is primarily because the BTS requires that initial margin be protected from the default or insolvency of the collecting counterparty by segregating it on the books and records of a third-party holder or custodian or via other legally binding arrangements. The CSAs provide only for the outright transfer of margin and does not allow for the default or insolvency protection envisaged.

5.1.29 In the case of variation margin, the CSAs do not comply with the BTS as drafted and would require material amendment to be compliant, including amendment to the provisions governing the timings for the calculation and transfer of margin.

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?

5.1.30 Under English law, each CSA is in an appropriate form to create the intended outright transfer of ownership in the collateral to such recipient. There are no other requirements to be observed in England in order to ensure validity of such transfer in each type of Eligible Credit Support created by such providing party under each CSA.

5.1.31 This Opinion excludes letters of credit which we consider incapable of being "transferred" as explained in paragraph 5.1.10 above.

5.1.32 Where the Eligible Credit Support is located in England, no further action is required under English law to enforce or continue such ownership interest.

5.1.33 Where the Eligible Credit Support is located in another jurisdiction, local law advice should be obtained to confirm that there are no requirements or further actions to enforce or continue such ownership interest.

(a) **Model CPMA combined with the CPMA CSA / Model MNA combined with the MNA CSA**

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

[8] The margin obligation under UK EMIR will only apply to physically settled commodity contracts if additional conditions are met e.g. if traded by a financial counterparty or non-financial counterparty above the clearing threshold (as defined in UK EMIR) and the OTC derivatives contract is not cleared through a central counterparty. Following IP completion day, MiFID II, as implemented in the UK, carves out contracts on wholesale energy products (e.g., gas and power) as defined under article 2(4) of the retained EU law version of Regulation 1227/2021 of 25 October 2011, that are traded on an OTF and must be physically-settled.

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?

5.1.34 Assuming that Section 4 of the CPMA and Section 8 of the MNA are each valid and enforceable in this jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount by either party on the termination of Underlying Agreements, our view is that Section 11 of the CPMA CSA and Section 12 of the MNA CSA are each 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.

Please opine 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?

5.1.35 As discussed in paragraph 5.1.11 et seq, whilst § 7 of each CSA is intended to take effect as an outright payment to the transferee, the English courts would look at the wording and the substance of the arrangements to determine whether a transfer of cash creates a security interest. Depending on the genuine intention and agreement of the Parties, placing Eligible Credit Support with an independent third party collateral agent would suggest that the genuine intentions of the Parties are for the Eligible Credit Support to be held by the independent third party collateral agent on behalf for the relevant Party to each Master Agreement and relevant CSA. In other words, not an outright transfer of ownership.

5.1.36 If so, there would be a material risk that the English courts would recharacterise such transfer as intending to create or creating in favour of either Party a security interest in such Eligible Credit Support. The implications of such a recharacterisation would be that the transferee would not have ownership to the Eligible Credit Support but only a right against the transferor to require the transferor to transfer ownership of the Eligible Credit Support to the transferee.

5.2 Netting / Set-off in the context of an Insolvency

This section 5.2 is subject to the following additional assumptions:

(a) 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

(a) Model CPMA / Model MNA

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, please opine 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.

5.2.2 We are of the opinion that the provisions of the CPMA and MNA permitting the non-defaulting party (i.e. the Close-Out Party under the CPMA, or the Terminating Party under the MNA) to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) upon the occurrence of the insolvency of its counterparty would be enforceable in this jurisdiction.

Assuming the parties have 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[9]) 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, please opine 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?

5.2.3 We are of the opinion that the provisions of the CPMA or the MNA providing for automatic termination of the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) upon the occurrence of a Close-Out Event would be enforceable in this jurisdiction.

5.2.4 There is no reason why the Parties' intentions should not be upheld in this respect; in particular, if an express notice of termination clause is valid, there is no reason why the Parties should not be able to dispense with that notice. The automatic early termination rights which arise as a result of an insolvency based Close-Out Event under Division 1, Part II, Section A of the Schedule to the CPMA / §3.1 (C) of the MNA would be enforceable under the laws of this jurisdiction, whether termination takes the form of Close-Out on the occurrence of a Close-Out Event under Division 1, Part II, Section A of the Schedule to the CPMA or under §3 of the MNA, or by Automatic Termination under §6 of the MNA or under Division 1, Part II, Section C of the Schedule to the CPMA. This applies to early termination of the MNA, CPMA, and all Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and transactions in existence at the time under the relevant Agreements or Underlying Agreements.

Please opine 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.

5.2.5 Under English law the close-out netting and the calculation of a Final Net Settlement Amount under Sections 3 and 4 of the CPMA and §§ 7 and 8 of the MNA would be enforceable and effective save that in the event of the commencement of a liquidation or an administration in England with respect to a counterparty, the close-out netting provisions of the MNA and CPMA would operate subject to certain statutory provisions the effect of which would be substantially the same as that of the close-out netting provisions alone.

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

5.2.6 We are of the opinion that the early termination, close-out netting provisions and calculation and payment of a Final Net Settlement Amount under the provisions of the MNA and CPMA should not be voidable or challengeable in the event of the commencement of Insolvency Procedures. However, if Insolvency Procedures are commenced in relation to a Party, that Party would cease to be able to exercise any right to close-out under the model Master Agreements where (a) the other Party has already exercised its own right to close-out under the CPMA or MNA; or (b) close-out of the CPMA or MNA and Underlying Agreements has occurred automatically. Notwithstanding this, the outcome of the close-out netting provisions of the model Master Agreements will not be affected by the

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

commencement of an Insolvency Procedure and the amount due in respect of the obligations of each Party would be a net sum.

5.2.7 With respect to the calculation of the Final Net Settlement Amount, please note our comments at paragraphs 2.4 to 2.16 at Annex 3.

5.2.8 Under the laws of this jurisdiction, there are no rules obliging a non-defaulting party to terminate and close-out Underlying Agreements upon the default of the other party thereto. However there may be an argument that such non-defaulting party, by failing to terminate the agreement, has waived its right to do so.

5.2.9 Separately, following the Court of Appeal's judgment in *Lomas v JFB Firth Rixson*[10] and because § 10(B)(I) of the MNA gives the Suspending Party the right to suspend delivery or acceptance for so long as the Suspending Party has a right to Close-Out or a Potential Close-Out Event continues, it is likely that the English courts will construe such suspension rights to allow the Suspending Party to cease further deliveries under the each Netted Agreement and withhold payments owed by it to the other Party indefinitely (subject to contrary agreement by the Parties, for example if the Parties agree that such suspension rights shall cease by a longstop date irrespective of whether the underlying Material Reason has been cured).

5.2.10 In our view, the close-out netting provisions of the model Master Agreements would be enforceable in accordance with their terms in the event of the commencement of Insolvency Procedures and would create an obligation on the part of one of the Parties to pay the other the Final Net Settlement Amount save that in the event of the commencement of a liquidation or an administration in England with respect to a counterparty, the close-out netting provisions of the model Master Agreements would operate subject to certain statutory provisions the effect of which would be substantially the same as that of the close-out netting provisions alone. In addition, where the model Master Agreements are a financial collateral arrangement (for example, see paragraph 5.1.15 above), Regulation 12(1) of the Collateral Regulations provides that a close-out netting provision constituting a term of a financial collateral arrangement shall take effect in accordance with its terms, notwithstanding that the collateral-provider or collateral-taker under the arrangement is subject to winding-up proceedings or reorganisation measures (as such terms are defined in the Collateral Regulations).

5.2.11 We believe that the obligation to pay the Settlement Amount resulting from a close-out netting under a Netted Agreement, Principal Agreement or Uncovered Transaction or the obligation to pay a Final Net Settlement Amount under §8 of the MNA or a Net Set-Off Amount under Sections 3 and 4 of the CPMA, as applicable, as applicable, would be enforceable, although please note in particular the qualification relating to enforceability in the event of an Insolvency Procedure set out in Section 8 of Annex 3.

"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 Part 2 of Annex 1 for potential categories).

Your opinion should include a discussion of your jurisdiction's insolvency laws as they would apply to the close-out and netting via each model Master Agreement of obligations under different categories or types of traded products, and: (a) if any distinctions are applicable based on whether these products are traded under one or more Underlying Agreements, (b) if any distinctions are applicable when attempting to use a model Master Agreement to net / set-off physically settled transactions when these involve the purchase, sale and/or optioning of different commodity types or categories (e.g. the netting obligations related to gas, power and coal trading) ("Cross Product Netting"), and (c) if any distinctions are applicable based on whether both financially settled swaps, swaptions and derivative transactions

[10] *Lomas v JFB Firth Rixson, Inc.* [2012] EWCA Civ 419

and physically settled forwards and options are traded under one or more Underlying Agreements with respect to each Master Agreement.

Under English law, there are no special rules applicable in the case of insolvency or Insolvency Procedures for any of the following types of contracts:

(a) certain securities contracts, commodities contracts, futures and forwards contracts and swap agreements (and any master agreement relating to those contracts or agreements);

(b) "derivatives" within the meaning of Article 2(5) of Regulation (EU) No. 648/2012, as well as a master agreement for derivatives; and

(c) "spot contracts" within the meaning of Article 7(2) or 10(2) of Regulation 2017/565/EU.

Such transactions are dealt with under the applicable Insolvency Procedures in the same way and subject to the same procedures as set out in Annex 4.

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

5.2.12 In the event of any proceedings being brought in an English court in respect of a monetary obligation expressed to be payable in a currency other than Sterling that court would have power to give judgment expressed as an order to pay such currency.

5.2.13 However, Insolvency Procedures are conducted in Sterling. For the purpose of set-off pursuant to an Insolvency Set-Off Rule, (a) a debt incurred or payable in a foreign currency must state the amount of the debt in that currency[11], and (b) the office-holder (i.e. the liquidator or administrator that is authorised to make a distribution) must convert all such debts into Sterling at a single rate for each currency determined by that office-holder by reference to the exchange rates prevailing on the date the relevant Insolvency Procedure started[12]. Whilst there is no specific rule under the Insolvency Rules for the conversion of non-Sterling assets into Sterling for the purposes of the Insolvency Set-Off Rules, in practice, the liquidator or administrator may convert Non-Sterling claims into Sterling at a suitable market-based rate (i.e. at a different date and/or different exchange rate than as specified in an agreement). Further, where applicable, Regulation 14 of the Collateral Regulations provides that Rule 14.21 is not applicable in respect of a financial collateral arrangement if that arrangement provides for (a) another method of determining the relevant exchange rate into Sterling or (b) the debt owed by the party in liquidation or administration to be assessed in a non-sterling currency, unless "*the arrangement provides for an unreasonable exchange rate or the collateral-taker uses the mechanism provided under the arrangement to impose an unreasonable exchange rate*".

Please opine 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?

5.2.14 In our opinion, the model Master Agreements would be legal, valid and binding and enforceable under English law irrespective of the entity incorporated in this jurisdiction.

Please opine 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?

Governing law

[11] Rule 14.21 of the Insolvency Rules.
[12] Rule 14.21(2) of the Insolvency Rules.

5.2.15 The position differs depending on whether agreements are entered into: (i) before 17 December 2009, (ii) during the period starting on 17 December 2009 and ending on IP completion day; and (iii) after IP completion day.

5.2.16 In respect of agreements entered before 17 December 2009, the English Courts would generally uphold the Parties' express agreement for the domestic law of a country or state law to govern each model Master Agreement, subject to and in accordance with the provisions of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (the "**Rome Convention**"), as implemented into English law by the Contracts (Applicable Law) Act 1990, provided that the relevant contractual obligation is within the scope of, and the choice is permitted by, the Rome Convention. From IP completion day, the Rome Convention has ceased to apply to the UK on a reciprocal basis but forms part of retained EU law which may be amended by UK legislation.

5.2.17 In respect of agreements entered into during the period starting on 17 December 2009 and ending on IP completion day, the English Courts would generally uphold the Parties' express agreement for the domestic law of a country or state law to govern each model Master Agreement, subject to and in accordance with the provisions of Council Regulation No. 593/2008 of 17 June 2008 (the **Rome I Regulation**) on the law applicable to contractual obligations, as implemented into English law by the Contracts (Applicable Law) Act 1990 and the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 (together, the '**Rome I Implementing Legislation'**), provided that the relevant contractual obligation is within the scope of and the choice is permitted by the Rome I Regulation. The format of the Rome I Regulation (as defined below) closely follows that of the Rome Convention.

5.2.18 Division 1, Part IV of the CPMA Schedule does not specify any choice of law governing any non-contractual obligations arising out of or in connection with the CPMA. If the matter were raised before the English Courts with respect to an agreement entered into during the period starting on 17 December 2009 and ending on IP completion day (or with respect to events giving rise to damage, where such events occurred before IP completion day), the law governing such non-contractual obligations would be determined by the courts of England and Wales, subject to and in accordance with the provisions of Regulation No. 864/2007 of 11 July 2007 (the **Rome II Regulation** and, together with the Rome I Regulation, the **Rome Regulations**) on the law applicable to non-contractual obligations, as amended and incorporated into English law by the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (together, the '**Rome II Implementing Legislation**') provided that the relevant non-contractual obligation is within the scope of and the choice is permitted by the Rome II Regulation.

5.2.19 Following IP completion day (as to which, more generally, we refer you to paragraph 5.8 below), the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 amended the Rome Regulations, the Rome I Implementing Legislation and the Rome II Implementing Legislation as they take effect in English law with respect to an agreement entered into after IP completion day.

5.2.20 An English court may not recognise or uphold the express choice of English law to govern each model Master Agreement where doing so would be inconsistent with the Rome Regulations, the Rome I Implementing Legislation and the Rome II Implementing Legislation (in the case of an agreement entered into after IP completion day, as amended, by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019), and the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (together, the "**Rome Implementing Legislation**"). The Rome Implementing Legislation will not apply, or its effect is overridden or restricted (and therefore the parties' choice of law may be challenged), with regard to certain matters including, but not limited to, the following examples:

(a) the Rome Implementing Legislation does not apply to questions governed by the law of companies and other bodies corporate or unincorporated such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporated and the personal liability of officers and members as such for the obligations of the company or body;

(b) nothing in the Rome Implementing Legislation restricts the application of the rules of law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract, or where all of the elements relevant to the situation at the time an Opinion Document was entered into are connected with a country other than England;

(c) in relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place;

(d) the application of a rule of the law chosen by the parties may be refused if such application is manifestly incompatible with the public policy of the forum;

(e) the Rome Implementing Legislation does not apply to questions in relation to obligations arising under, or in connection with, bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(f) the Rome Implementing Legislation does not apply to questions in relation to the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(g) the Rome Implementing Legislation does not apply to questions in relation to obligations arising under, or in connection with obligations arising out of dealings prior to the conclusion of a contract; and

(h) the Rome Implementing Legislation does not apply to the law governing certain types of insurance contracts**.**

5.2.21 In addition, we express no opinion as to the choice of English law to govern contractual obligations falling outside the scope of the Rome I Regulation (as enacted in English law, and amended, by the Rome I Implementing Legislation, as amended) or to govern non-contractual obligations falling outside the scope of the Rome II Regulation, (as enacted in English law, and amended, by the Rome II Implementing Legislation, as amended).

5.2.22 Whilst the Court of Justice of the European Union ("**CJEU**") is the primary judicial body for interpreting the Rome Regulations in the EU, following IP completion day, the jurisdiction of the CJEU in the UK ceased (as to which, more generally, we refer you to paragraph 5.8). It is possible that the interpretation and application of the Rome Regulations (as amended and incorporated into English law by the Rome I Implementing Legislation, as amended, and the Rome II Implementing Legislation, as amended) by the English courts will deviate from that of the CJEU in relation to the Rome Regulations

Arbitration

5.2.23 Where the Parties have elected in § 12.4 of the MNA for arbitration, and court proceedings were commenced before the English Courts in breach of that election, the English Courts will stay the proceedings before them in favour of arbitration as specified in § 12.4 of the MNA provided that:

(a) § 12.4 of the MNA is not null and void, inoperative or incapable of being performed;

(b) the Party seeking a stay of the proceedings in the English courts had not taken any step in those proceedings to answer the substantive claim[13]; and

[13] Examples include without limitation, (i) serving a defence (however informal); (ii) seeking or resisting an order for strike out or summary judgment; (iii) lodging a counterclaim in response to the claim; (iv) applying for security for costs; (v) attending a case management conference; (vi) requiring disclosure of documents; (vii) applying for an extension of time for compliance with the requirements of the Civil Procedure Rules; (viii) taking steps to agree directions for the progress of the case.

(c) the subject matter of the claim is capable of being resolved by arbitration or is not otherwise non-arbitrable for reasons of public policy or otherwise.

5.2.24 Withdrawal from the EU will not generally affect substantive arbitration law, as arbitration is excluded from the scope of the European jurisdiction and enforcement regime under Regulation 1215/2012 (**Recast Brussels Regulation**), it being subject to its own regime under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Arbitration Convention).

Jurisdiction

5.2.25 Where the Parties have agreed that the courts of a country are to have exclusive jurisdiction to settle any disputes which arise under or in connection with each model Master Agreement, the English Courts will, subject to paragraphs 5.2.26 to 5.2.34 below, generally uphold the Parties' agreement.

5.2.26 Before IP completion day, disputes arising under or in connection with each model Master Agreement will generally fall within the scope of the Recast Brussels Regulation which applied to legal proceedings commenced on or after 10 January 2015, provided that they concern civil and commercial matters and do not relate to certain matters, principally including:

(a) insolvency, winding-up or similar proceedings; or

(b) arbitration (including disputes relating to an arbitral award).

5.2.27 The Recast Brussels Regulation continues to apply to legal proceedings instituted before IP completion day and to the recognition and enforcement of judgments given in legal proceedings instituted before IP completion day.

5.2.28 Following IP completion day, the Recast Brussels Regulation and the Council Regulation (EC) No. 44/2001 (the '**2001 Brussels Regulation**') will cease to have effect in English law (as to which, more generally, we refer you to paragraph 5.8). As at the date of this Opinion, the UK is not party to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended (the "**Brussels Convention**"), or the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "**1988 Lugano Convention**"). Although the UK deposited an application to accede to the 2007 Lugano Convention with the Swiss Federal Department of Foreign Affairs (being the depository for the 2007 Lugano Convention), it is not currently a party to the 2007 Lugano Convention. However, in accordance with Article 67 (and 69) of the 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)' (the "**EUWA 2019**") and Regulation 92 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479), the English courts will continue to apply the Recast Brussels Regulation and 2007 Lugano Convention in respect of proceedings commenced and not concluded, prior to IP completion day.

5.2.29 Regulations 3, 4 and 6 of the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (SI 2018/1124), as amended by the Private International Law (Implementation of Agreements) Act 2020, provide that rights deriving from Articles 1 to 18, 23, 25(1) and (3) and 26 of the Hague Convention of 30 June 2005 on Choice of Court Agreements (the "**2005 Hague Convention**") will, following IP completion day, have force in law in the UK to determine the jurisdiction of the English courts where there is an exclusive choice of court agreement entered into after IP Completion Day designating one of the courts of the UK, a member state of the EU, Mexico, Singapore or Montenegro.

5.2.30 An English court may in certain circumstances not have jurisdiction, or may be obliged to decline jurisdiction, including where:

(a) the court may decline to exercise its jurisdiction in accordance with the doctrine of *forum non conveniens* ('inconvenient forum') where doing so is not inconsistent with the 2005 Hague Convention; or

(b) rights deriving from Articles 1 to 18, 23, 25(1) and (3) and 26 of the 2005 Hague Convention apply and the court determines that the parties to the contract have an agreement designating the exclusive jurisdiction of a court of one of the parties to the 2005 Hague Convention, other than the English courts.

5.2.31 In any case, a claim brought before the English court may potentially be struck out or limited in scope where the merits of the issues in dispute have already been judicially determined or should have been raised in previous proceedings between the parties (in accordance with the doctrines of *res judicata* or issue estoppel).

5.2.32 Whilst the English courts have the right to grant anti-suit injunctions to restrain a party to a contract pursuant to which the parties submit to the jurisdiction of the English courts from pursuing proceedings in relation to that contract in any other courts brought in breach of that submission to the jurisdiction of the English courts, the granting of any such injunction would be in the discretion of the court and we express no opinion as to whether the English courts would grant such or any other ancillary relief in relation to proceedings commenced in a foreign court.

5.2.33 In cases where a model Master Agreement has been amended to provide for the non-exclusive jurisdiction of the English courts, it will not be an agreement to which the 2005 Hague Convention applies on the basis that it does not provide an agreement by the parties to submit to the exclusive jurisdiction of the English courts, and accordingly, the English courts may, but are not obliged to, seize jurisdiction over proceedings instituted in relation to such model Master Agreement. The English courts have the discretion to decline to seize jurisdiction or limit the scope of any proceedings in England in accordance with applicable common law principles, including for example (without limitation):

(a) where the merits of the issues in dispute have already been judicially determined or should have been raised in previous proceedings between the parties (in accordance with the doctrines of *res judicata* or issue estoppel); or

(b) where England is not the appropriate forum for the resolution of the dispute in accordance with the doctrine of *forum non conveniens* ('inconvenient forum'); or

(c) jurisdiction is not based an exclusive a choice of court agreement to which the 2005 Hague Convention applies and the claimant is unable to serve its claim within the jurisdiction. In such circumstances, the claimant will require permission from the court to serve the claim outside the jurisdiction. The court may refuse such permission if the claim does not meet the applicable requirements specified in the Civil Procedure Rules 1998.

5.2.34 The English courts will not generally enforce an exclusive jurisdiction clause to grant an anti-suit injunction against bankruptcy proceedings in another jurisdiction but they may grant an anti-suit injunction (a discretionary remedy) against bankruptcy proceedings to set aside a transaction at an under-value or as a void preference or as defrauding creditors in order to enforce an arbitration clause.

Enforcement of judgments (other than in insolvency) in English courts.

5.2.35 The effect of the European regime for enforcement of judgements ceasing to apply after IP completion day is that jurisdiction and the enforcement of judgments will instead be determined by a combination of the existing common law and statute, which currently applies to cases falling outside the European regime, and (where it applies) the Hague Convention. At common law separate proceedings must be commenced to enforce a foreign judgment, which is treated as if it were a debt. There are also statutory regimes under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, which apply to particular countries which have made equivalent provision in their own law to ensure recognition and enforcement on a reciprocal basis. The Hague Convention gives effect to exclusive choice of court agreements in favour of contracting states and provides that the resulting judgment will be recognized and enforced in other contracting states.

5.2.36 The enforcement of judgments from EU courts in the UK will be determined by the statutory regime and the common law rules that currently apply to the enforcement of judgments from courts in non-EU countries. A much narrower class of judgments is enforceable under the statutory regime than under the European regime, and enforcement under the common law requires the judgment debtor to commence fresh proceedings to enforce the foreign judgment as a debt. The grounds on which enforcement can be resisted under the statutory regime and the common law are wider than under the European regime.

Please opine on whether, pursuant to the EU Parliament and Council Regulation No. 2015/848 of 20 May 2017 (the "EU Insolvency Regulation") most provisions of which became directly applicable in all Member States as from 26 June 2017, a bankruptcy court in your jurisdiction would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement if they differ from the analogous insolvency laws of your jurisdiction (please see paragraph 5.4 below where this topic is to be discussed at greater length). In addition, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, your opinion on whether the close-out netting and/or set-off provisions under each Master Agreement would nevertheless become valid by operation of the EU Insolvency Regulation?

5.2.37 Following IP completion day, the EU Insolvency Regulation was incorporated into English domestic law as retained EU law by the Withdrawal Acts, as amended by the Insolvency (Amendment) (EU Exit) Regulations 2019/146 (the "**Insolvency Exit Regulations**"). The Insolvency Exit Regulations amend the onshored version of the EU Insolvency Regulation (which we refer to in this Opinion as the 'Onshored EU Insolvency Regulation') so that, in broad terms and subject to certain transitional provisions, the jurisdictional requirements to commence insolvency proceedings, the rules as to the applicable law in those proceedings and the automatic recognition of EU insolvency proceedings in the UK, has ceased to apply[14]. Analogous changes were made to the Credit Institutions Regulations and the Insurers (Reorganisation and Winding Up) Regulations 2004 by the Credit Institutions and Insurance Undertakings Reorganisation and Winding Up (Amendment) (EU Exit) Regulations 2019/38.

5.2.38 Before IP completion date, a question arose as matter of English law as to whether Article 9 of the EU Insolvency Regulation applies where the law applicable to the insolvent debtor's claim was not the law of an EEA member state. The repeal of Article 9 within the Onshored EU Insolvency Regulation means this question no longer arises as a matter of English law, although following IP completion date an equivalent question could arise as a matter of the laws an EEA member state when considering an insolvent debtor's claim governed by English law. Our view prior to IP completion date was that Article 9 did apply where the law applicable to the insolvent debtor's claim was not the law of an EEA member state. This view was based on the fact that Article 9 does not expressly refer to the law of a Member State (whereas certain other articles in the EU Insolvency Regulation do include such express references) and so our view was that this reflected a deliberate choice that Article 9 not be so limited (otherwise such a limitation would have been expressly included in Article 9). Nonetheless, there was a minority view to the contrary, which was based at least partially on the 1996 Virgos-Schmit Report, a report by two academic jurists on the Convention on Insolvency Proceedings, a convention between EC member states which pre-dated the original EC Insolvency Regulation. The Report suggested that the predecessor of Article 9 should be interpreted as referring to the law of a Member State for "systemic reasons". Nonetheless, we considered the better view was that Article 9 applies whether or not the law applicable to the insolvent debtor's claim is that of an EEA member state, although it unlikely now this issue will fall to be determined by an English court.

5.2.39 In relation to the operation of the Onshored EU Insolvency Regulation in this jurisdiction, please see the analysis at paragraph 5.4 below.

[14] The title of Regulation No. 2015/848 as incorporated into English domestic law following IP completion day is Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (Retained EU Legislation).

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.

5.2.40 Neither of the above circumstances will impact on the enforceability or operation of each model Master Agreement.

Please analyse and opine on 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.

5.2.41 Under English law, there is no legal requirement or necessity for Parties to agree uniform default events across all types and categories of trades, rather than allowing such underlying default provisions to operate for their respective categories of trades. Each Underlying Agreement may have termination events which are specific to the type of transactions which are envisaged to be entered thereunder. Therefore, not least because of the foregoing reason, our view is that it is not necessarily in the best interests of the Parties to impose uniform default events and we would not recommend it.

(a) **CPMA CSA / MNA CSA**

Please opine 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.

5.2.42 The principal grounds upon which a transaction (which includes a transfer of collateral) could be avoided under English insolvency law and the relevant "suspect periods" are further detailed in paragraph 7 et seq in Annex 3 to this Opinion.

5.2.43 Assuming that the exchanged assets are of no greater value than the assets which they are replacing, the transaction is entered into with an unconnected party and at the time the transaction was entered into, the Party was able to pay its debts and remained able to pay its debts in consequence of the transaction, we consider that a substitution during any applicable "suspect period" for insolvency clawback actions available to an administrator or liquidator would not invalidate an otherwise valid transfer.

Please opine 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.

5.2.44 We repeat the answer set out at paragraphs 5.2.42 and 5.2.43 above.

Please set out 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.

5.2.45 Neither of the above circumstances will impact on the enforceability or operation of each model Master Agreement.

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

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

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

5.2.46 We repeat the answer set out in paragraphs 5.1.10 to 5.1.17 above.

Please analyse 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.

5.2.47 If Eligible Credit Support in the form of cash is not paid into an account maintained in England and Wales by the Transferee, local law advice in respect of the foreign jurisdiction in which the cash is repayable should be obtained to ensure that the transfer would not be re-characterised since there is no clear authority as to whether or not the English courts would apply the law of such foreign jurisdiction to the question of the proper characterisation of a transfer of Eligible Credit Support.

5.2.48 Where the Eligible Credit Support is located in another jurisdiction, local law advice should be obtained to confirm that there are no requirements or further actions to enforce or continue such ownership interest.

(c) **Model CPMA combined with the CPMA CSA / Model MNA combined with the MNA CSA**

Please opine 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.

5.2.49 The provisions of the model CPMA combined with the CPMA CSA, and the model MNA combined with the MNA CSA would be enforceable under the laws of this jurisdiction irrespective of the insolvency of the providing party incorporated or otherwise organised under this jurisdiction, subject in particular to our comments at paragraphs 5.1.10 to 5.1.17 above.

Please provide 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;

c. specifically, whether the EU Insolvency Regulation affects local jurisdiction conflict of law rules such as overruling local jurisdiction insolvency laws if the parties to the Master Agreement have opted for a jurisdiction other than the jurisdiction relevant to the insolvent party. In particular, your opinion on whether or not a bankruptcy court in your jurisdiction would apply the EU Insolvency Regulation to

close-out netting and/or set-off such that it would apply the governing law of the Master Agreement or CSA as the law applicable to close-out netting and/or set-off or whether it would seek to apply local law in its stead;

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

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

5.2.50 In relation to items (a) and (b) above, please refer to Annex 4 for an overview of Insolvency Procedures generally. In this section we have summarised the changes to English insolvency law that result from the Corporate Insolvency and Governance Act 2020.

Corporate Insolvency and Governance Act 2020

5.2.51 CIGA came into force on 26 June 2020. CIGA made several temporary and permanent changes to UK insolvency and company law in response to the COVID-19 pandemic. The temporary changes include, for example, a relaxation of wrongful trading laws and a restriction on the presenting winding up petitions. These changes were originally due to remain in force until 30 September 2020 unless extended by statutory instrument. The application of certain of these measures was extended to dates that vary between 30 December 2020 and 31 March 2022[15].

5.2.52 CIGA also introduced significant permanent changes to the law of corporate insolvency in several areas relevant to this Opinion:

(a) the introduction of a new standalone moratorium into the Insolvency Act available to certain eligible companies, which will give such companies various protections from creditors for the duration of the moratorium (the "**Part A1 Moratorium**");

(b) the introduction of the new Restructuring Plan; and

(c) the introduction of a ban (subject to certain important exclusions) on the operation or exercise in contracts for the supply of goods or services, of provisions granting termination and other rights to a Party due to its counterparty entering into certain insolvency or restructuring procedures ("*ipso facto*" clauses).

5.2.53 We discuss each of these changes in turn.

The moratorium

5.2.54 CIGA inserts a new Part A1 and Schedules ZA1 and ZA2 into the Insolvency Act. These provisions amend the Insolvency Act to allow an "eligible company" in certain circumstances to obtain a Part A1 Moratorium, giving it various protections from creditors. Subject to certain exceptions discussed

[15] The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of Relevant Period) Regulations 2020 SI 2020/1031, Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2020/1483, The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 SI 2021/375, Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021/718 and Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No. 2) Regulations 2021/1091. For the early termination of certain temporary provisions, see the Corporate Insolvency and Governance Act (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 SI 2020/1033. See also, Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 SI 2020/1349.

below, an eligible company is one which is registered under the Companies Act 2006 or any unregistered company that may be wound up under Part 5 of the Insolvency Act.

5.2.55 The main consequences of a company entering a Part A1 Moratorium are as set out below.

(a) A moratorium on certain creditor action: restrictions are placed on the ability of creditors to place the company in liquidation or administration. A creditor is also unable to institute, carry out or continue legal proceedings against the company (save for employment-related proceedings or with the permission of the court) or to enforce security over the company's property (subject to limited exceptions, namely steps to enforce security created under the Collateral Regulations or with the permission of the court).

(b) The introduction of restrictions on the enforcement or payment of "pre-moratorium debts" for which a company has a "payment holiday". The pre-moratorium debts for which a company has a "payment holiday" include, subject to limited exceptions, debts that have fallen due before the moratorium and debts that fall due during the moratorium.

5.2.56 A Part A1 Moratorium lasts an initial period of 20 business days, which may be extended by a further 20 business days by the court without creditor consent. Further extensions may be granted by the court or with the agreement of creditors. The company remains under the control of its directors during the Part A1 Moratorium, but the process is overseen by a monitor who must be a licensed insolvency practitioner.

5.2.57 Schedule ZA1 to the Insolvency Act specifies certain categories of entity which are excluded from being an "eligible company" for the purpose of the Part A1 Moratorium. The excluded entities include (among others):

(a) insurance companies[16];

(b) banks[17];

(c) investment firms[18];

(d) a company which is a recognised investment exchange, a recognised clearing house or a recognised CSD within the meaning of the FSMA; and

(e) a company with a registered office or head office outside the UK:

(1) the functions of which correspond to any of those referred to in paragraph 5.2.57(a) to (d) above and, if it were a company registered under the Companies Act 2006 in England and Wales, it would be excluded from being eligible by that paragraph; or

(2) which has entered into a transaction or done anything else that, if done in England and Wales by a company registered under the Companies Act 2006 in England and Wales, would result in the company being excluded by paragraph 5.2.57(a) to (d) above.

5.2.58 If it is not excluded by virtue of Schedule ZA1, an English Company would be an "eligible company" and therefore could be subject to the Part A1 Moratorium.

5.2.59 If an English Company is subject to the Part A1 Moratorium, Section A18 excludes from the scope of the "payment holiday" "debts or liabilities arising under a contract or other instrument involving financial

[16] Specifically, a company which carries on the regulated activity of effecting or carrying out contracts of insurance and is not an exempt person in relation to that activity.

[17] This includes companies that have permission under Part 4A of the FSMA to carry on the regulated activity of accepting deposits.

[18] As defined in section 258A of the Banking Act 2009. This includes a UK institution which is an investment firm for the purpose of the Capital Requirements Regulation (EU) No. 575/2013).

services." For the purpose of this provision, what constitutes a "contract or other instrument involving financial services" has the meaning given by Schedule ZA2 of the Insolvency Act. The list of such contracts or instruments includes, among others:

(a) certain securities contracts, commodities contracts, futures and forwards contracts and swap agreements (and any master agreement relating to those contracts or agreements);

(b) "derivatives" within the meaning of Article 2(5) of Regulation (EU) No. 648/2012, as well as a master agreement for derivatives; and

(c) "spot contracts" within the meaning of Article 7(2) or 10(2) of Regulation 2017/565/EU.

The list of such contracts is materially the same as the list of "excluded contracts" set out in Schedule 4ZZA and discussed below in the context of the ban on the exercise of "*ipso facto*" clauses.

5.2.60 The extremely broad scope of the exclusions discussed in paragraphs 5.2.57 to 5.2.59 above, mean that it is highly likely that each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA will fall within the exclusions so that payments in respect of each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA would fall outside of the "payment holiday" provisions[19].

The Restructuring Plan

5.2.61 CIGA added a new Part 26A to the Companies Act 2006 under which a company, a creditor or a shareholder can propose a Restructuring Plan. The Restructuring Plan is available with respect to a company liable to winding up under the Insolvency Act. The Restructuring Plan is similar, in broad terms, to a scheme of arrangement under Part 26 of the Companies Act 2006. The Restructuring Plan also includes a mechanism whereby the compromise or arrangement can be binding on a class or classes of creditors or shareholders without their consent (the so-called 'cross-class cram-down' procedure).

5.2.62 Please see Part 3 of Annex 3 for an/the analysis of how the commencement of a Restructuring Plan affects this Opinion.

Prohibition on the exercise of termination and other rights in contracts for the supply of goods or services ("ipso facto" clauses)

5.2.63 CIGA introduces a new Section 233B into the Insolvency Act 1986. Section 233B applies where a company becomes subject to a relevant insolvency procedure, being:

(a) a moratorium under Part A1 comes into force for the company;

(b) the company enters into administration;

(c) an administrative receiver of the company is appointed (other than in succession to another administrative receiver);

(d) the company goes into liquidation;

(e) a provisional liquidator of the company is appointed (otherwise than in succession another provisional liquidator); or

[19] That said, it is in theory possible that a transaction under each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA could fall outside the exclusions in Schedule ZA2 of the Insolvency Act, which could result in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA in relation to such transactions being subject to the "payment holiday" provisions in case of a moratorium. Review should be undertaken in each case to ensure an exclusion applies.

(f) a court order is made under section 901C(1) of the Companies Act 2006 in relation to the company (being an order summoning a meeting to consider a Restructuring Plan (as further detailed in Part 3 of Annex 3)).

5.2.64 Section 233B(3) of the Insolvency Act provides that a provision of a "contract for the supply of goods or services" to the company ceases to have effect when the company becomes subject to a relevant insolvency procedure, if and to the extent that, under that provision:

(a) the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure[20]; or

(b) the supplier would be entitled to terminate the contract or the supply or to do any other thing because the company becomes subject to the relevant insolvency procedure[21].

5.2.65 The new provisions also limit the exercise of termination provisions that arise before a company enters a relevant insolvency procedure. Section 233B(4) provides that where under a provision of a contract for the supply of goods and services to the company the supplier is entitled to terminate the contract or the supply because of an event occurring before when the company becomes subject to the relevant insolvency law procedure (and that entitlement also arises before that time), that right may not be exercised while the company is subject to a relevant insolvency procedure.

5.2.66 Section 233(B)(7) prohibits a supplier from making it a condition of any supply of goods or services after the time when the company becomes subject to the relevant insolvency procedure (or to do anything that has the effect of making it a condition of such supply) that any outstanding charges in respect of a supply made to the company before that time are paid.

Exclusions

5.2.67 The prohibition on the exercise of "ipso facto" clauses is subject to significant and wide-ranging exclusions. The Insolvency Act contains provisions that enable the scope of these exclusions be amended by statutory instrument.

5.2.68 The exclusions can be divided into three categories:

(a) Excluded entities: Schedule 4ZZA of the Insolvency Act excludes from the restrictions on "ipso facto" clauses in Section 233B the same set of financial services entities which Schedule ZA1 excludes from the scope of a moratorium (see paragraphs 5.2.57 and 5.2.58 above) ("**excluded entities**"). The exclusion of these entities from the restrictions on "ipso facto" clauses applies, irrespective of whether the excluded entity is the supplier or the company entering into the relevant insolvency procedure.

(b) Excluded contracts: Schedule 4ZZA of the Insolvency Act also excludes from the prohibitions on "ipso facto" clauses in Section 233B the same set of contracts which Schedule ZA1 excluded from the scope of a moratorium (see paragraph 5.2.59 to 5.2.60 above) ("**excluded contracts**"). As a result, the analysis set out in paragraph 5.2.60 above with respect to the different types of Individual Contract and their exclusion from the "payment holiday" provisions of the moratorium also applies to the prohibitions on "ipso facto" clauses.

(c) Excluded arrangements: the operation of certain specific arrangements and legislation are protected from the effects of Section 233B (the "**excluded arrangements**"). The excluded arrangements include (among others):

[20] This causes automatic termination provisions or other provisions providing for automatic changes to cease to have effect.

[21] This causes provisions allowing the supplier to terminate the contract or do other things (e.g. by giving notice) because of the company entering into a relevant insolvency procedures to cease to have effect.

(1) Financial Collateral Arrangements; and

(2) set-off and netting arrangements within the meanings given by sections 48(1)(c) and (d) of the Banking Act.

5.2.69 Section 48(1)(d) of the Banking Act defines "netting arrangement" as "arrangements under which a number of claims or obligations can be converted into a net claim or obligation and include, in particular, "close-out" netting arrangements, under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set off against each other or to be converted into a net debt". In our view, the close out netting provisions of each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA would fall within the scope of that definition[22].

5.2.70 In our view, the close-out netting provisions of each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA will be unaffected by Section 233B of the Insolvency Act because one of more of the following exclusions will apply:

(a) if one or more of the parties to each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA is an excluded entity (such as a bank or investment firm) then Section 233B will not apply;

(b) it is highly likely that each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA will constitute an excluded contract and therefore will fall outside Section 233B (see further the discussion in paragraphs 5.2.59 and 5.2.60 above);

(c) in our view, the close-out netting provisions of each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA will constitute an excluded arrangement because they fall within the exclusion for set-off and netting arrangements set out in paragraph 20 of Part 4 of Schedule 4ZZA to the Insolvency Act.

5.2.71 The Insolvency Act contains provisions enabling the scope of Schedule 4ZZA be amended by statutory instrument. This means there are future opportunities for the Secretary of State to amend the scope of the exclusions from Section 233B.

5.2.72 In relation to items (c) and (d) in the question above, we repeat our responses at paragraph 5.4 below.

5.2.73 In relation to item (e), the classes of set-off and netting available under the laws of this jurisdiction which are relevant to this Opinion are contractual set-off and Statutory Insolvency Set-Off (as defined at paragraph 2.4 of Annex 3).

(a) With respect to contractual set-off, there is no specific netting legislation in this jurisdiction and there is no rule under English law which would, in our view, apply to prohibit the Parties from entering into a contract providing for close-out netting and set-off of claims in the terms of each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA or which would render such terms ineffective. However, insolvency law does place restrictions on this general freedom to contract. For example, in the case of non-mutual set-off, the rule in *British Eagle International Airlines v Compagnie Nationale Air France* [1975] 1 WLR 758, may strike down contractual arrangements varying the pari passu principle of distribution in a liquidation.

(b) On the liquidation of a Party, Statutory Insolvency Set-off (further discussed in paragraphs 2.4 et seq. of Annex 3) is mandatory and results in a net amount being payable between the Parties in respect of all mutual credits, debits and dealings (thus bringing into account dealings between

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[22] In our view, the reference to a netting arrangement under Section 48(1)(d) of the Banking Act should not be read as being limited by the Commission Delegated Regulation under Article 76 of the BRRD, which restricts certain protections of netting arrangements entered into by credit institutions to where they relate to assets and liabilities arising under "derivatives" and "financial contracts" (as defined in BRRD). See further Annex 2.

the Parties outside of each model Master Agreement which fall within the scope of Statutory Insolvency Set-off). The same is true in the administration of a Party where the administrator intends to make a distribution to creditors and has delivered a notice to do so under Rule 14.29 of the Insolvency Rules. In the case of Statutory Insolvency Set-off, there is a requirement for "mutual dealings" between the parties, which means that a claim and cross and counterclaim must be made in the same right. Mutuality therefore requires the claims to be set off to be between the same persons and in the same capacity (please see paragraph 12 of Annex 2 below).

(c) The rule against "double proof" prevents two creditors proving for Statutory Insolvency Set-off purposes in a liquidation or administration in respect of the same debt. For example, a bank which has provided a letter of credit for an insolvent company (but for the benefit of a third party beneficiary) cannot prove in the liquidation for liability under that letter of credit at the same time as the third party beneficiary under such letter of credit (*Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626). Whilst both parties may not lodge proofs in respect of the same debt, there is no difficulty in the provider of the letter of credit notifying the office-holder of his prospective claim in the liquidation on the basis of an indemnity following liability on the letter of credit. The office-holder would then be at liberty to wait until dealings on the letter of credit between the solvent party and the provider of the letter of credit had been finalised before concluding the operation of the mandatory set-off account.

5.3 Cross Affiliate Netting and Set-off

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

5.3.1 In the case of Statutory Insolvency Set-off, there is a requirement for "mutual dealings" between the parties, which means that a claim and cross and counterclaim must be made in the same right. Mutuality therefore requires the claims to be set off to be between the same persons[23] and in the same capacity (please see paragraph 12 of Annex 2 below).

5.4 Multibranch Parties

This section 5.4 is subject to the following additional assumptions:
(A) In relation to item (a) immediately below, a Party is incorporated or organized in your jurisdiction but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered overseas offices in other jurisdictions; and
(B) For the purposes of addressing the multi-branch issues at items (b) and (c) immediately below, assume that an overseas counterparty is incorporated or organized outside your jurisdiction but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered offices in your jurisdiction.

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

[23] It should be noted that as opposed to branches, subsidiaries or affiliates are separate legal entities to other affiliate entities.

a. whether there would be any change in your conclusions expressed in [paragraph 5.2] above concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA (given the assumption in [(A)] above);

b. 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

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

5.4.1 In response to (a), there would be no change to our conclusions, subject to the following observations as to the insolvency jurisdiction of the English courts:

(a) The English courts have insolvency jurisdiction under the Credit Institutions Regulations in respect of all insolvency procedures of a UK credit institution incorporated in the UK, regardless of whether such UK credit institution has conducted business under the model Master Agreements on a multibranch basis.

(b) The English courts have insolvency jurisdiction under the Insurers Winding up Regulations in respect of all insolvency procedures of an insurer incorporated in the UK, regardless of whether such insurer has conducted business under the model Master Agreements on a multibranch basis.

(c) The Onshored EU Insolvency Regulation is applicable where (i) a Party is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking, and (ii) its "centre of main interests" ("**COMI**") is in the UK or in an EU member state other than Denmark and it has an establishment in the UK (within the meaning in the Onshored EU Insolvency Regulation). The Onshored EU Insolvency Regulation does not contain a definition of the term COMI. However, Article 3(1) of the Onshored EU Insolvency Regulation states that, the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be its COMI in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved from the UK to a member state or to the UK from a member state within the 3-month period prior to the request for the opening of insolvency proceedings. Furthermore, Recital 28 to the Onshored EU Insolvency Regulation states that, when determining the COMI, special consideration should be given to creditors and to their perception as to where the debtor conducts the administration of his interests.

5.4.2 Where a Party does not fall within any of the categories set out in paragraph 5.4.1 above, the English courts would have jurisdiction in respect of winding-up proceedings, subject to the comments in paragraphs 5.4.3 to 5.4.6 below.

5.4.3 A liquidator or administrator is required to include obligations arising from all Principal Agreements / Netted Agreements governed by the model Master Agreements in respect of all amounts to be calculated in accordance with the model Master Agreements (regardless of whether these obligations originate from multiple branches of such Party) in the calculation of amounts owed to and from the Defaulting Party.

5.4.4 A liquidator or administrator will not be able to undermine the "global" netting provisions of the model Master Agreements (whereby the Non-Defaulting Party may net obligations arising from all and any Individual Contracts governed by the terms of the model Master Agreements, regardless of the type of Principal Agreement / Netted Agreement or from which office it was entered into) by treating the obligations in respect of Principal Agreements / Netted Agreements entered into from the office in this jurisdiction separately from other obligations arising under the model Master Agreements or other Principal Agreements / Netted Agreements governed by the terms of the model Master Agreements.

5.4.5 Note that the Insolvency Exit Regulations repealed Article 7 and Article 9 of the EU Insolvency Regulation as it applies from IP completion date in English domestic law. Article 9 provided that 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*" and Article 9 set out an exception to that with respect to the "*rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors*" which were governed by the law of the State of the opening of proceedings. The repeal of these provisions means the Onshored EU Insolvency Regulation does not contain any specification with respect to when set-off is permitted[24].

5.4.6 Under the Cross-Border Insolvency Regulations, a court may recognise a foreign insolvency proceeding, and in consequence of such recognition may limit the application of English insolvency law, or apply certain of such provisions at times, or in circumstances, where they would not otherwise be available. In these circumstances the opinions in relation to English law expressed in this Opinion may not apply.

5.4.7 In response to (b), in respect of foreign mulitbranch parties, subject to the observations at paragraphs 5.4.8 to 5.4.12 below, in principle it is possible for the courts of this jurisdiction to initiate certain Insolvency Procedures in relation to a foreign company based on the mere presence of assets and liabilities in this jurisdiction. Such proceedings could be initiated by local creditors even if the relevant authorities did not do so.

5.4.8 In accordance with the Onshored EU Insolvency Regulation, the courts of England and Wales have jurisdiction in respect of Insolvency Procedures other than receivership, with respect to a Party:

(a) where the Party is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking;

(b) its COMI is in the UK or its COMI is in an EU member state other than Denmark; and

(c) the Party has an establishment in the UK (within the meaning in the Onshored EU Insolvency Regulation).

The Onshored Insolvency Regulation does not limit jurisdiction where there is no establishment in England and Wales. See paragraph 5.4.7 for the general position under English law as to jurisdiction. See paragraph 5.4.1(c) above in respect of COMI. See paragraphs 5.4.12 to 5.4.13 below where Party F's COMI is in Denmark or in a jurisdiction other than an EU member state.

5.4.9 The courts of Scotland have exclusive jurisdiction in relation to liquidation of a Party incorporated under the laws of Scotland (a "Scottish Party"). Accordingly, the English courts may defer to the courts of Scotland in relation to any question relating to the close-out netting provision in the Master Agreements arising in the liquidation of a Scottish Party. In a case involving Insolvency Procedures other than liquidation, it is less likely that the English courts would be expected to defer to the courts

[24] See paragraph 5.2.38 above in relation to a discussion on Article 9 of the EU Insolvency Regulation and its relevance to the Onshored EU Insolvency Regulation.

of Scotland than in a case involving liquidation. No view is expressed in this Opinion as to the effect of the laws of Scotland.

5.4.10 The courts having jurisdiction in relation to insolvency law in this jurisdiction are obliged to give assistance to courts in which concurrent insolvency proceedings have commenced under the laws of another jurisdiction. Such assistance may take the form of, for example, dealing with only those assets located in this jurisdiction or selectively applying provisions of foreign law in Insolvency Procedures which are otherwise generally governed by English law. The courts of this jurisdiction may accordingly apply foreign systems of law rather than English law where the insolvent Party is subject to insolvency proceedings in another jurisdiction[25]. Under Section 426 of the Insolvency Act 1986, a court with insolvency law jurisdiction in England and Wales has a discretion to apply the law of one of a list of certain specified jurisdictions (which includes Ireland and a number of other countries, mainly Commonwealth countries) to the insolvency of an entity (including a company incorporated and registered in England and Wales) if so requested by the competent court of that other jurisdiction. In exercising its discretion, the English court must have regard to the rules of private international law.

5.4.11 English courts may, in some circumstances, stay Insolvency Procedures where they are of the opinion that proceedings in another forum would be more convenient or if concurrent proceedings are being brought elsewhere, but will take into account whether or not this will prejudice creditors whose claims have a close connection with this jurisdiction.

5.4.12 Under the Cross-Border Insolvency Regulations, a court may recognise a foreign insolvency proceeding, and in consequence of such recognition may limit the application of English insolvency law, or apply certain of such provisions at times, or in circumstances, where they would not otherwise be available. (see paragraph 5.4.13 below). The court will only recognise collective proceedings (that is, proceedings undertaken for the benefit of all creditors). The Cross-Border Insolvency Regulations also do not apply to procedures concerning, among other entities, a UK credit institution or an EEA credit institution or any branch of either such institution, a person who has permission under or by virtue of Parts 4 or 19 of the Financial Services and Markets Act 2000 to effect or carry out contracts of insurance or an EEA insurer within the meaning of regulation 2 of the Insurers (Reorganisation and Winding Up) Regulations 2004.

5.4.13 Following an application for recognition under the Cross-Border Insolvency Regulations, if the foreign proceedings are ‘foreign main proceedings’ and are recognised by the courts of England and Wales, an automatic stay is granted to prevent certain types of creditor action, or action by the debtor itself, in the UK, including: (i) commencement of proceedings concerning the debtor's assets, rights, obligations or liabilities; (ii) execution against the debtor's assets; (iii) the transfer or disposal of the debtor's assets. The automatic stay may be modified by the court. The automatic stay will not affect a creditor's rights to enforce security over the debtor's property nor the ability to exercise rights of set-off. It will also not affect a creditor's ability to commence English insolvency proceedings. However, any English insolvency proceedings that are subsequently commenced will be non-main proceedings and limited to assets in the UK and to other assets that should be administered under the laws of England and Wales (taking into account the need to co-operate and communicate with the foreign court and foreign office holder). Where the foreign proceedings are ‘foreign non-main proceedings’ (i.e. where the debtor has its establishment but not its COMI in the UK) there is no automatic stay but, the English court may grant discretionary relief to protect the assets of the debtor or the interests of creditors in the same way as it can for ‘foreign main proceedings’.

5.4.14 In response to (c), subject to paragraph 5.4.15 below and section 2 in Annex 3, the administrator or liquidator in this jurisdiction would recognise the close-out netting provisions of the model Master Agreements in accordance with their terms in such circumstances and include the whole of the counterparty’s positions under the model Master Agreements for close-out netting purposes.

[25] Those specified jurisdictions are currently the other parts of the UK, the Channel Islands, the Isle of Man, Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Ireland, Malaysia, Montserrat, New Zealand, South Africa, St. Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands.

5.4.15 However, if a recognition order is made under the Cross Border Insolvency Regulations, a liquidator or administrator may be required to defer to the jurisdiction of the insolvency officer appointed in another state, because particular Underlying Agreements or underlying transactions or the claims of the defaulting Party against the non-defaulting Party arising under the model Master Agreements may be deemed to be situated outside this jurisdiction. Article 28 of Schedule 1 to the Cross Border Insolvency Regulations provides that, after recognition of a foreign main proceeding, the effects of any proceeding under English insolvency law in relation to the same debtor shall, insofar as the assets of that debtor are concerned, be restricted to assets that are located in England and Wales. See also paragraph 5.1.21 above.

5.5 <u>CSA Specific Permutations</u>

In relation to each of the questions in [paragraph 5.2] above, the assumption is that the providing party is a counterparty incorporated or otherwise organised in your jurisdiction. Please consider your answer to each question and indicate how your answer would be different, if at all, assuming instead that:

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

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

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

5.5.1 We repeat the answer set out at paragraph 5.4.14 above.

5.6 <u>General validity of each CPMA and each CSA and the Choice of Law and Jurisdiction</u>

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?

5.6.1 The (i) CPMA and the CPMA CSA, and (ii) the MNA and the MNA CSA would be valid, binding and enforceable under English law.

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

5.6.2 We refer you to our answers set out at 5.2.15 et seq.

5.7 <u>Other Provisions</u>

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.

5.7.1 Parties may wish to consider whether it is appropriate for § 12 of the MNA to be amended to (a) provide for notices to be delivered by way of electronic mail, or other electronic means; and (b) provide for when a notice delivered by way of electronic mail or other electronic means will be deemed to be delivered to the receiving Party.

5.7.2 Where a Party could be a publicly-owned or quasi-governmental entity, it would be beneficial if the relevant Agreement contained a representation that the execution of the relevant Agreement and any Individual Contracts constitutes, and the exercise of that Party's rights and the performance of its obligations there under will constitute, private and commercial acts done and performed for private and commercial purposes. This representation could be buttressed by a 'waiver of immunities' provision.

5.7.3 Where a Party is a foreign company and English courts are elected, it is advisable for that Party to be obliged to appoint a process agent located in England for the service of process in respect of any claims arising out of or in connection with the relevant Agreement (which agent should not have sovereign or diplomatic immunity).

5.8 <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 your have provided in respect of each Master Agreement and each CSA. For example, the effect of Brexit on this opinion.

5.8.1 The UK withdrew from the European Union and the European Atomic Energy Community on 31 January 2020 in accordance with Article 185 of the EUWA 2019. 31 January 2020 was also 'exit day' for the purposes of the Withdrawal Acts. Additionally, the EUWA 2019 and the Withdrawal Acts provided that 31 January 2020 also marked the start of the transition, or implementation, period that ended on IP completion day. From IP completion day, the extent of the application of EU law in, and to, the UK is as set out in the 'Trade and Cooperation Agreement between (i) the European Union and the European Atomic Energy Community and (ii) the United Kingdom of Great Britain and Northern Ireland (the '**Trade and Cooperation Agreement**'). The Trade and Cooperation Agreement has been enacted into law in the United Kingdom and Northern Ireland by the European Union (Future Relationship) Act 2020 . The Trade and Cooperation Agreement has also entered into EU law.

5.8.2 From IP completion day, decisions of the CJEU will cease to have binding effect in respect of the laws of England and Wales. In addition, the 'European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020' (the "**Regulations**") come into force on IP completion day. The Regulations provide that that 'relevant courts' of England and Wales are not bound by any 'retained EU case law' (being, broadly, any principles laid down by, and any decisions of, the CJEU, as they have effect in EU law immediately before IP completion day, as those principles and decisions are modified by or under the EUWA 2018, or by other English domestic law from time to time), except where there is post-transition case law (being any principles laid down by, and any decisions of, a court or tribunal in England and Wales, as they have effect on or after IP completion day) which modifies or applies that retained EU case law and which is binding on the relevant court. For the purposes of the Regulations and this Opinion, the 'relevant courts' are:

(a) the Court Martial Appeal Court;

(b) the Court of Appeal in England and Wales;

(c) the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983; and

(d) the Lands Valuation Appeal Court.

5.8.3 In addition, the Supreme Court of England and Wales is not bound by any retained EU case law by virtue of Section 6(4) of the EUWA 2018. In deciding whether to depart from any retained EU case law, a relevant court or the Supreme Court must apply the same test as it would apply in deciding whether to depart from its own case law.

5.8.4 Although this Opinion is given in respect of English law as at the date hereof, certain elements of English law (in particular, those relating to the application of EU retained law after IP completion day) may be subject to change under the Regulations. We offer no view on the possible impact of such changes on the subject matter of this Opinion or the opinions expressed herein.

5.8.5 As IP completion day has now taken place, we have addressed the impact of Brexit where applicable in the ordinary sections of this Opinion.

Yours faithfully

Reed Smith LLP

Reed Smith LLP

Annex 1

Part 1 - List of Documents

1. Cross Product Master Agreement published in February 2000 by the Bond Market Association as further modified by Version 1.0 of the European Commodities Schedule published on 23 June 2003 by EFET/ International Energy Credit Association

2. The Guidelines (Version 1.0/ June 23, 2003)

3. Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0/ June 23, 2003)

4. Master Netting Agreement published by EFET (Version 1.0/June 2010)

5. The Election Sheet to the MNA (Version 1.0/ June 2010)

6. Guidance Notes to the EFET Master Netting Agreement (Version 1.0/ June 2010)

7. Credit Support Annex to the EFET Form Master Netting Agreement (Version 1.0/ February 2011)

Part 2 – Applicable Transactions[26]

(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

[26] 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.

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.

(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[27]. 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.

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

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

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

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

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

Economic Statistic Transaction. A transaction, 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 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 2
Assumptions

With your consent, unless otherwise provided in this Opinion, this Opinion is subject to the general assumptions set out below:

1 Each Party has the capacity, power and authority, under all applicable laws, to enter into and to exercise its rights and to perform its obligations under the Opinion Documents.

2 Each Party has duly authorised, executed and delivered the Opinion Documents.

3 Each Party has taken all necessary steps to ensure the legality, validity and admissibility in evidence of the Opinion Documents in this jurisdiction.

4 Where an Opinion Documents is expressed to be governed by a law other than English law, the relevant Opinion Document is legal, valid, binding and enforceable under the law by which it is expressed to be governed, and that Opinion Document is capable of being terminated and closed out in the manner envisaged by the relevant Agreement and capable of having a Termination Amount determined.

5 No law of a jurisdiction other than England and Wales 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 England and Wales.

6 The Opinion Documents are entered into between the Parties on bona fide commercial purposes and on arm's length terms.

7 Each Individual Contract, when duly and validly created, will not modify, avoid, vary, rescind, render unenforceable or be contrary to public policy, any provision of the Opinion Documents.

8 No substantive modifications have been made by the Parties to the Opinion Documents entered into between the Parties (including, without limitation, any changes to the core provisions or the addition of any provisions relating to close-out netting).

9 Apart from the Opinion Documents, there is no other agreement, instrument or arrangement between or affecting the Parties to the relevant Agreement which conflicts with, overrides, modifies or supersedes the relevant Agreement, EFET Credit Support Annex or any Individual Contract (save for any such agreement or arrangement in relation to the Individual Contract which is effected under the terms of the Opinion Documents) and, in particular, insofar as any transaction or obligation arising under the Opinion Documents is a transfer order under the Settlement Finality Regulations, there are no provisions in the rules of any relevant designated system which purport to override or are inconsistent with the Opinion Documents. In broad terms a "transfer order" constitutes an unequivocal instruction by a participant (within the meaning of the Settlement Finality Regulations) authorising:

(a) a payment of money by reason of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or an instruction which results in the discharge of a payment obligation as defined by the rules of a designated system; or

(b) a transfer of securities by means of a book entry on a register or otherwise.

10 The Opinion Documents, and each Individual Contract, are entered into by each Party prior to the commencement of any Insolvency Procedures in respect of either Party.

11 The Opinion Documents have been duly entered into and are not capable of being avoided for any reason other than those mentioned in section 2 of Annex 3.

12 Notwithstanding paragraphs 1 and 2 to this Annex, each Party is personally liable as principal for its obligations under the Opinion Documents and is beneficially entitled to its benefits under the Opinion Documents (in other words, there is full mutuality between the parties), and that no third party (an "Intervener") has any right to, interest in, or claim on any right or obligation of either Party under the Opinion Documents. "Mutuality" generally exists where each Party is personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it. The principal types of Intervener include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in respect of which a Party has a joint interest (including partnership) or in respect of which a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or court order (including, without limitation, pursuant to section 111 of FSMA).

13 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 relevant Agreement, each Party will duly perform its obligations under and in accordance with the respective Opinion Documents.

14 No person will engage in conduct which is unconscionable, dishonest, misleading or deceptive or likely to mislead or deceive (whether by act or omission) that might make any part of this Opinion incorrect. No person will engage in any other conduct, and there are no facts or circumstances not evident from the face of the Opinion Documents, that might make any part of this Opinion incorrect.

15 The Opinion Documents do not constitute market contracts within the meaning in section 155 of the Companies Act 1989 and do not constitute margin within section 190 of the Companies Act 1989. In broad terms a "market contract" includes (i) contracts entered into by a member of a recognised investment exchange on the exchange (with a person other than the exchange); and (ii) contracts entered into by a recognised investment exchange or a recognised clearing house with its respective members for the purpose of enabling the rights and liabilities of such members under transactions in investments to be settled.

16 None of the Opinion Documents is an agreement the making or performance of which constitutes, or is part of, a "regulated activity" within the meaning stated in FSMA, carried on by any party to it, and which either:

(a) is entered into by that party in contravention of section 19 of FSMA; or

(b) where the party is a person authorised for the purposes of FSMA, is entered into by that party in the course of carrying on the regulated activity in question and in consequence of something said or done by another person (a 'third party') in the course of a regulated activity carried on by the third party in contravention of section 19 of FSMA,

and, in any event, no Opinion Document is entered into by any person as a customer in consequence of a communication in relation to which there has been a contravention of section 21 of the FSMA.

17 In the case of any Party which is a foreign company, all acts, conditions or things required to be fulfilled, performed or effected in connection with the Opinion Documents have been duly fulfilled, performed and effected.

18 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 UK or Denmark, each branch will constitute an "establishment" within the meaning in the Onshored EU Insolvency Regulation.

19 Neither Party is a:

(a) "group undertaking" in relation to the other Party as defined in section 1161(5) of the Companies Act 2006.

(b) "small company" as defined in section 382 of the Companies Act 2006 or a "bridge bank" as defined in section 12 of the Banking Act 2009.

(c) "consumer" as defined in section 3(1) of the Unfair Terms in Consumer Contracts Regulations 1999.

20 Any Party which is an English company is not subject to a special regulatory or modified insolvency regime not contemplated by this Opinion.

Annex 3
Qualifications

This Opinion is also subject to the qualifications detailed in this Annex 3.

1. General Qualifications

1.1 The insolvency-related analysis in this Opinion is restricted to the position where the relevant insolvency proceedings are governed by English law. We express no opinion as to whether English law would, in fact, govern such proceedings, whether or not conducted in the courts of England and Wales.

1.2 A Party which is an authorised person under FSMA (**a** "**regulated Party**") may be required, pursuant to client money rules under Section 137B of FSMA, to procure the agreement of the other Party not to set off any amount due from that other Party to the regulated Party in respect of agreements made by the regulated Party for the account of any of his clients whose monies are required to be treated by the regulated Party as client money ("**segregated clients**") against any amount due from the regulated Party in respect of other agreements made between the Parties. We express no opinion as to the effect under the laws of this jurisdiction of an relevant Agreement between a regulated Party and a segregated client.

1.3 There are some matters which are not determined by reference to governing law, but which are mandatory in the forum, irrespective of the choice of governing law. In particular, where all the elements relevant to a situation being adjudicated upon were, at the time the choice of law was made, connected with a particular country, the courts of this jurisdiction may apply those rules of law of that country which cannot be derogated from by contract.

1.4 Any provision of the relevant Agreement and/or an Individual Contract stating that a failure or delay on the part of any Party in exercising any right or remedy under the relevant Agreement and/or Individual Contract shall not operate as a waiver of such right or remedy may not be effective.

1.5 To the extent any provision of the relevant Agreement provides that that any matter is expressly to be determined by future agreement, the relevant provision may be unenforceable or void for uncertainty.

1.6 The rights of a party to enforce its rights under an Opinion Document may be limited or affected by:

(a) breaches by that party of its obligations under an Opinion Document or misrepresentations made by it in, or in connection with, an Opinion Document;

(b) conduct of that party in relation to an Opinion Document which is unlawful; or

(c) conduct of that party in relation to an Opinion Document which gives rise to an estoppel or claim against that party by the party against whom it is seeking to enforce its rights under the Document.

1.7 An obligation which imposes a detriment (e.g., interest payments) on a party may be unenforceable in its entirety or to the extent that the detriment (e.g. interest payments) is out of all proportion to the legitimate interest of the innocent party, if that detriment is held to constitute a penalty.

1.8 A provision that a statement, opinion, determination or other matter is final and conclusive will not necessarily prevent judicial enquiry into the merits of a claim by an aggrieved party.

1.9 The term "enforceable" as used in this Opinion means that the relevant obligations are of a type that the courts in England and Wales enforce and does not mean that these obligations will necessarily be enforced in all circumstances in accordance with their terms. In particular, but without limitation, the following matters affect the meaning of "enforceable":

(a) Injunctive relief and specific performance

The power of an English court to order specific performance of an obligation, to grant injunctive relief or any equitable remedy is discretionary and may not be available in all circumstances. Where damages would be regarded by the court as an adequate alternative remedy, an English court may not grant specific performance nor an injunction.

(b) Public policy

Rights or obligations of any person which could be unlawful or contrary to public policy under English law may not be enforced by an English court. Where obligations are to be performed in a jurisdiction outside England, they may not be enforceable under English law to the extent that performance would be illegal or contrary to public policy under the laws of that other jurisdiction. We are not aware of any provisions of the Opinion Documents which are contrary to public policy.

(c) Exercise of discretion

Where any Party to the Opinion Documents is vested with a discretion or may determine a matter in its opinion, that Party may be required to exercise its discretion in good faith, reasonably and for a proper purpose, and to form its opinion in good faith and on reasonable grounds. Any provision in the Opinion Documents providing that any calculation, determination or certification is to be conclusive and binding may not be effective if such calculation, determination or certification is fraudulent or manifestly incorrect and an English court may regard any certification, determination or calculation as no more than prima facie evidence.

(d) Time bar and set-off

The nature and enforcement of the rights and obligations of the parties under the Opinion Documents may (i) become time-barred under the Limitation Act 1980 or the Foreign Limitation Periods Act 1984, (ii) be affected failure to take action or laws (including, without limitation, laws relating to unfair contract terms or the enforcement of security interests), (iii) be affected by certain equitable remedies or (iv) be or become subject to defences of set-off or counterclaim.

(e) Frustration

Enforcement may be limited by the provisions of English law applicable to agreements held to have been frustrated by events happening after execution.

(f) Misrepresentation and fraud

The law relating to misrepresentation, mistake and fraud may mean that an Opinion Document, or part of it, is rescinded, and is therefore unenforceable.

(g) Human Rights Act

The enforcement of obligations may be limited or excluded by the provisions of the Human Rights Act 1998.

1.10 Where we express an opinion on the enforceability of the obligations of the Parties, such opinion relates to enforceability of those obligations subject to the terms of the Opinion Documents. For example, where an Opinion Document is expressed to be subject to conditions precedent, obligations under the Opinion Documents may not be enforceable until all such conditions have been satisfied and the Opinion Documents are unconditional in all respects; the question whether a provision of an Opinion Document which is invalid or unenforceable may be severed from other provisions is determined at the discretion of the courts. We express no opinion as to the effectiveness of §23.4 (*Partial Invalidity*).

1.11 In order to be effective, a submission to the jurisdiction of particular courts may require compliance with specific requirements because of the nature or location of the submitting Party and, accordingly, the submission made by such Party may not be effective if such requirements have not been complied with.

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

1.13 A judgment on the Opinion Documents, whether in the courts of this jurisdiction or elsewhere, may be held to supersede the Opinion Documents so that rights and obligations under the Opinion Documents (including the obligations to pay interest and regarding contractual currency) may not survive such judgment.

1.14 An English court (or an arbitral tribunal applying English law) may refuse to give effect to any provision in the Opinion Documents in respect of costs of enforcement (actual or contemplated) or of unsuccessful litigation before an English court or (or arbitration) where the English court (or the arbitral tribunal) itself makes or has itself made an order for costs.

1.15 Provisions in the relevant Agreement providing that the terms thereof can only be amended or varied or provisions thereof can only be waived by an instrument in writing and/or in accordance with specified provisions (such as §23.3 (*Amendments*)) may not be effective. The Parties to the relevant Agreement may be able to amend its provisions by oral agreement despite any provisions to the contrary.

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

1.17 If any Party is controlled by or otherwise connected with a person, or is itself resident in, incorporated in, or constituted under the laws of or exercising public functions in a country which is the subject of any sanctions (being any economic or trade sanctions, embargoes, regulations, freezing prohibitions or other restrictions relating to trade, investment, export, financing or making assets available for any of the foregoing), anti-blocking or anti-boycott law, order, decree or regulation of the governmental institutions or agencies of any of the United Nations or its Security Council, the United States of America, including the Office of Foreign Assets Control and the Department of State or the Office of Financial Sanctions Implementation of Her Majesty's Treasury or any other sanctions, anti-blocking or anti-boycott law, order or regulation, implemented or effective in the United Kingdom under the United Nations Act 1946, the Emergency laws (Re-enactments and Repeals) Act 1964, the Protection of Trading Interests Act 1980, the Anti-terrorism, Crime and Security Act 2001, the Sanctions and Anti-Money Laundering Act 2018, the EUWA 2018, or the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2019 or is otherwise the target of any such sanctions, then the obligations of that Party, or the other parties to an Opinion Document may be unenforceable, void or otherwise affected.

1.18 Laws in connection with the prevention of terrorism or money laundering may restrict or prohibit payments, transactions and dealings in certain cases.

1.19 The provisions of § 21(j) of the relevant Agreement may not be effective to exclude any liability for any representation or statement made by a party otherwise than in the Opinion Documents to which it is a party if such matters are not, in fact, as represented by that party.

1.20 Any provision of the Opinion Documents which constitutes, or purports to constitute, a restriction on the exercise of any statutory power by any Party or any other person may be ineffective.

1.21 A Party entering into an Opinion Document may, in doing so, be acting, or later be held to have acted, in the capacity of a trustee under an undocumented or partially documented constructive, implied, or resulting trust which may have arisen as a consequence of that Party's conduct or as a consequence of other circumstances.

1.22 A document may not be admissible in court proceedings unless applicable stamp duty has been paid.

1.23 Any indemnity in the Opinion Documents (or any communication issued pursuant thereto) may be void insofar as it relates to stamp duty payable in the UK.

1.24 Unenforceable debts and debts which are not admissible to proof under English law will not usually be eligible for Statutory Insolvency Set-Off.

1.25 A payment made under mistake may be liable to restitution.

1.26 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. For example, if the court determines that 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 conduct agreed to vary the terms of the agreement.

1.27 Under the Banking Act 2009 it is technically possible for a UK insurer which has permission under FSMA to accept deposits. Section 2(2)(c) of the Banking Act 2009 gives the Treasury the power to exclude a class of institutions from the definition of "bank". The Treasury exercised this power, by an order that came into force on 7 January 2010, to exclude any institution with permission under Part 4A of FSMA to effect or carry out contracts of insurance as principal. Therefore, for the purposes of this Opinion, the Banking Act 2009 and the regimes under that Act do not apply to any UK insurers.

1.28 If an English Company or Scottish Party is part of the British Crown in its capacity as officer or servant of the British Crown, it may not be possible to obtain an injunction or specific performance against that entity or to enforce any judgment or order against it or its assets.

1.29 If a foreign company is determined to be part of a government or one of the government departments pursuant to the State Immunity Act 1978, it may be able to claim immunity in relation to itself or its assets from suit or enforcement;

2. Liquidation and Administration

2.1 The Insolvency (England and Wales) Rules 2016 (in this Opinion, the "**Insolvency Rules**") came into force on 6 April 2017, replacing the Insolvency Rules 1986. There is a degree of uncertainty surrounding how certain insolvency procedures considered in this Opinion, that operate or did operate by reference to the Insolvency Rules 1986 or by reference to rules in analogous terms, should now be interpreted and we await further clarification in this regard. The same is true in respect of all of the secondary legislation that makes reference to the Insolvency Rules 1986. Some subordinate legislation is in force that explicitly maintains the application of the Insolvency Rules 1986 and the Insolvency Act 1986 (as in force on 5 April 2017) to certain specialist insolvency regimes that are outside the scope of this Opinion and amends other secondary and primary legislation to replace references to the Insolvency Rules 1986 with references to the Insolvency Rules. It is not clear, however, whether further amending legislation will be made or if reliance is to be placed on the Interpretation Act 1978 to supplant the new rules under the Insolvency Rules into the body of secondary legislation.

2.2 If the relevant Termination Date occurs after the commencement of a winding up with respect to a Party or it enters administration under the laws of this jurisdiction, the aggregation or set-off of amounts representing terminated obligations may be implemented under special statutory rules set out under the Insolvency Set-Off Rules rather than the specific provisions of the Opinion Documents.

2.3 In:

(a) a winding-up; or

(b) an administration where the administrator intends to make a distribution to creditors and has delivered a notice to do so under Rule 14.29 of the Insolvency Rules,

the aggregation or set-off of amounts representing terminated obligations must be implemented in accordance with the applicable Insolvency Set-Off Rules.

2.4 Set-off pursuant to the close-out netting provisions or an Insolvency Set-Off Rule (e.g. see paragraph 5.2.13) ("**Statutory Insolvency Set-Off**") would, in our view, result in a net amount payable between the Parties in respect of such amounts, subject to the other qualifications set out in this Opinion, and subject also to the inclusion in any Statutory Insolvency Set-Off of other mutual obligations between the Parties.

2.5 In a winding up by the courts of England and Wales under the laws of this jurisdiction, any dispositions of the Insolvent Party's property made after the commencement of the compulsory winding-up of such Party, are void under Section 127 of the Insolvency Act unless the court otherwise orders.

2.6 Accordingly, Transactions entered into after the commencement of the Insolvent Party's compulsory winding up and which constitute or involve the disposition of its property might not be capable of inclusion in a set-off pursuant the close-out netting provisions or Statutory Insolvency Set-Off, but this would not impair the effectiveness of the close-out netting provisions or Statutory Insolvency Set-Off in respect of Transactions entered into before the commencement of such compulsory winding up of such Party.

2.7 The provisions in the Insolvency Set-Off Rules relating to the set-off of mutual credits and debts do not apply to amounts which arise under Transactions entered into at certain times, and accordingly an English court might not allow such amounts to be included in an aggregation or set-off pursuant to the close-out netting provisions or Statutory Insolvency Set-Off. Such "certain times" are as far as relevant as follows:

(a) after the Insolvent Party entered administration;

(b) at a time when the Solvent Party had notice that; (i) an application for an administration order was pending; or (ii) any person had given notice of intention to appoint an administrator in respect of the Insolvent Party;

(c) at the time the obligation was incurred, the Solvent Party had notice that a decision had been sought from creditors under Section 100 of the Insolvency Act on the nomination of a liquidator or that a petition for the winding-up of the Insolvent Party was pending; or

(d) during a winding up of the Insolvent Party.

2.8 The exceptions in paragraph 2.7 of this Annex do not apply where the Opinion Documents constitutes a Financial Collateral Arrangement, or an arrangement of which a Financial Collateral Arrangement forms part, in which case see paragraph 5.2.13. This is on the assumption that if at the time a party to a Financial Collateral Arrangement entered into such an arrangement or the relevant financial obligations came into existence:

(a) that party was aware or should have been aware that winding up proceedings or re-organisation measures had commenced in relation to the other party;

(b) that party had notice that a statement as to the affairs of the other party had been sent to the other party's creditors under Section 99(1) of the Insolvency Act;

(c) that party had notice that a petition for the winding-up of the other party was pending;

(d) that party had notice that an application for an administration order was pending or that any person had given notice of an intention to appoint an administrator;

(e) that party had notice that an application for an administration order was pending or that any person had given notice of an intention to appoint an administrator and liquidation of the other party to the Financial Collateral Arrangement was immediately proceeded by an administration of that party.

2.9 Furthermore any debt which has been acquired by a Solvent Party by assignment or otherwise, pursuant to an agreement between the Solvent Party and any other person where that agreement was entered into at or after any of the times mentioned in paragraph 2.7 of this Annex above may also be excluded from an aggregation or set-off pursuant to the close-out netting provisions or Statutory Insolvency Set-Off.

2.10 Certain categories of claim may not give rise to a provable debt and thus may not be capable of inclusion in Statutory Insolvency Set-Off. For example, Rule 14.23 of the Insolvency Rules provides that, post-insolvency, interest due to a creditor is not a provable debt in the insolvency of a debtor insofar as it accrues after the debtor first entered administration or went into liquidation.

2.11 Liquidation and (where an administrator is authorised to make a distribution) administration are conducted in Sterling. We have addressed the conversion of non-Sterling claims in paragraphs 5.2.12 to 5.2.13.

2.12 In respect of any transaction entered into before the commencement of the winding-up of the Insolvent Party, under which property is to be delivered after the time of such commencement and in respect of which the Insolvent Party transfers ownership of the property to the Solvent Party after the time of such commencement, it may not be possible for the price payable in respect of such property transferred to be included in the net Termination Amount. However, if such a transaction is terminated before ownership of the property to be delivered under such Transaction is transferred, the gain or loss in respect of the Transaction calculated in accordance with the close-out netting provisions should be capable of being included in the net Termination Amount. Any action taken by the liquidator of the Insolvent Party to recover the price from the Solvent Party would not prejudice the effectiveness of the netting pursuant to the close-out netting provisions of other, valid, obligations.

2.13 Rule 14.25(7) provides that a sum shall be regarded as being "due" to or from an Insolvent Party for the purposes of Rule 14.25(2) whether (a) it is payable at present or in the future, (b) the obligation by virtue of which it is payable is certain or contingent, or (c) its amount is fixed or liquidated or is capable of being ascertained by fixed rules or as a matter of opinion. Therefore, in our view, in order to qualify for set-off under Rule 14.25, a sum does not have be due and payable prior to the time the Party goes into liquidation.

2.14 If any creditor (the "**attaching creditor**") of a Party (the "**defendant Party**") were to attach, execute, levy execution or otherwise exercise a creditor's process (whether before or after judgment) over or against any claim owing by the other Party (the "**debtor Party**") to the defendant Party under the Opinion Documents or a transaction, then the debtor Party would, following a Termination Date, be able to exercise its rights under the close-out netting provisions against the creditor of the defendant Party in respect of claims which existed at the date of the attachment or other process, including the claim which is the subject of the attachment or other process.

2.15 However, if the attaching creditor has become subject to Statutory Insolvency Set-Off before a Termination Date has occurred, it may be possible for the liquidator, administrator or other relevant insolvency official of the attaching creditor to claim the amounts subject to the attachment free of the debtor Party's rights under the Close-Out Netting Provision. This is because it may be argued that the debtor Party seeks to exercise a set-off right in respect of an amount which is now owed by the debtor Party to the attaching creditor rather than to the defendant Party, and a contractual provision which purports to create a right of set-off between non-mutual claims may not be effective in Statutory Insolvency Set-Off when applied to the attaching creditor.

2.16 That said, after the commencement of a winding-up of the defendant Party any attachment will be ineffective unless the court otherwise orders, and in our view, the court would not validate the attachment in order to defeat the rights of the debtor Party under the Close-Out Netting Provision.

2.17 To the extent that a transaction may be for the supply of electricity by an electricity supplier within the meaning of section 108, Schedule 6, Part III, paragraph 47(1), 2(a) of the Utilities Act 2000, to an entity subject to the Insolvency Procedures, under section 233 of the Insolvency Act 1986 the supplier may make it a condition of the giving of the supply that the relevant insolvency official personally guarantees the payment of any charges in respect of the supply. If such a guarantee is called upon before the commencement of a liquidation or an administration with respect to a Party, that circumstance may cause any claim with respect to the transaction to cease to be mutual and therefore to cease to be available for Statutory Insolvency Set-Off.

3. Voluntary arrangements, Schemes of arrangement and Restructuring Plans

Voluntary arrangements

3.1 A voluntary arrangement under the Insolvency Act (a "**CVA**") binds all unsecured creditors but cannot affect the right of a secured creditor to enforce its security except with that creditor's consent. Subject to the discussion below, the Non-Defaulting Party should have time to exercise its rights under the close-out netting provisions before the CVA is approved by creditors pursuant to a qualifying decision procedure of which the Non-Defaulting Party has notice. Every creditor of the company, the claim and address of which the person seeking the decision is aware of, should be given notice of the qualifying decision procedure but a CVA binds all unsecured creditors, including creditors who did not receive notice.

3.2 It is possible that the net claim (to the extent that it is not secured) could be reduced under the terms of the CVA.

Scheme of arrangement

3.3 As in the case of a CVA under the Insolvency Act 1986, a creditor of an English Company in financial difficulties would normally have notice of a meeting of creditors called to consider a scheme of arrangement under Part 26 of the Companies Act 2006.

3.4 The impact of a scheme of arrangement proposed by a Defaulting Party on an relevant Agreement depends upon the facts at the time and the terms of the proposed scheme of arrangement. Creditors in a scheme of arrangement vote in classes, according to their rights and, unlike a CVA, a scheme of arrangement can bind secured creditors. A scheme may purport to affect the rights of all classes of creditors (a so-called "all creditor scheme"), or the scheme may only purport to affect particular classes of creditors (for example certain financial creditors only).

3.5 Given the flexibility as to what can be proposed under a scheme of arrangement, whether a particular scheme of arrangement would compromise an relevant Agreement or affect the Non-Defaulting Party's ability to close-out would be fact specific.

3.6 Generally speaking, the Non-Defaulting Party should have time to exercise its rights under the close-out netting provisions the EFET Master Agreement before the scheme of arrangement is approved.

Restructuring Plan

3.7 Our analysis and conclusions in relation to a scheme of arrangement above also apply in relation to a Restructuring Plan.

3.8 The main difference between a scheme of arrangement and a Restructuring Plan is that the Restructuring Plan includes a "cross-class cram-down" procedure to cram-down dissenting classes of creditors and/or members. As a result, a Non-Defaulting Party is arguably at slightly higher risk that its rights under an relevant Agreement will be compromised under a Restructuring Plan of an English Company compared with a scheme of arrangement, if the Non-Defaulting Party is unable to close-out before the Restructuring Plan is sanctioned by the court.

3.9 As with a scheme of arrangement, the court will need to, among other things, adjudicate on the fairness of the restructuring proposal as a whole and, in particular, whether creditors that are subject to the cross-cram down procedure are no worse off under the Restructuring Plan than under the relevant alternative (being what the court considers is most likely to occur in relation to the company if the Restructuring Plan were not sanctioned) in determining whether or not to exercise its discretionary powers under the Insolvency Act to sanction the Restructuring Plan.

4. Moratorium

As noted in the discussion of CIGA, the Part A1 Moratorium is only available in respect of “eligible companies” and Individual Contracts would, in all likelihood, be excluded from its payment holiday provisions. Please note that, even where the moratorium does apply it would not affect the operation of the close-out netting provisions of an relevant Agreement, although it may affect the manner and timing of enforcement against an eligible company of any resulting net claim.

5. Banking Act

Our conclusions in this Opinion are subject to the provisions of the Banking Act, which came into force on 21 February 2009. The Banking Act introduced significant changes to the law relating to UK banks, as described in paragraph 5.1 below and in more detail in the paragraphs that follow[28].

(A) Key elements of the Banking Act

5.1 The Banking Act provides for a “special resolution regime” applicable to UK banks and other financial entities. Amendments to the Banking Act have widened the act’s scope.

5.2 The special resolution regime in relation to UK banks consists of:

(a) in Part 1 of the Banking Act, a set of five stabilisation options, which are exercised through four stabilisation powers (the “**SRR**”);

(b) the Bank Insolvency Procedure (which is a liquidation procedure for UK banks); and

(c) the Bank Administration Procedure (which is an administration procedure for UK banks) [29].

5.3 We comment on each of these elements below.

5.4 Part 1 of the Banking Act underwent substantial amendment as part of the implementation into English law of the European Bank Recovery and Resolution Directive[30] (the “**BRRD**”). From IP completion day,

[28] Building societies and credit unions also fall within the scope of the Banking Act. Insurance companies may also have fallen within the scope of the Banking Act as a technical matter, due to the way "bank" is defined in sections 2(1) and 91(1). This was not intended, and insurance companies are now excluded by virtue of The Banking Act 2009 (Exclusion of Insurers Order) 2010, SI 2010/35.
[29] The Banking Act, s 1(2).
[30] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive

the Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018 make various amendments to the implementation of BRRD to reflect the UK's exit from the EU.

5.5 The BRRD seeks to establish a common framework for the orderly resolution of failing credit institutions and investment firms within the European Union (as well as entities within the institutions group, if deemed relevant). Member states, including the UK, had an obligation to transpose and implement the BRRD into national law by 31 December 2014 and to apply the majority[31] of its provisions from 1 January 2015. The BRRD is a "minimum harmonisation" EU Directive, which aims to equip national authorities of the member states with the relevant resolution tools and powers to restructure failing institutions within the scope of the BRRD. Individual member states are free to adopt stricter rules and regulations in the context of resolution as long as they remain compliant with the provisions of the BRRD.

5.6 As part of the implementation of the BRRD, Part 1 of the Banking Act underwent extensive amendment by, *inter alia*, the Bank Recovery and Resolution Order 2014[32], which came into force on 1 January 2015. More recently, the Bank Recovery and Resolution Order 2016[33] made a number of further changes to the Banking Act regime.

5.7 Responsibility for operation of the SRR rests with the four public authorities with primary responsibility for the banking sectors, namely, the Bank of England, the Treasury and the Regulators (together, the "**Authorities**" and, each, an "**Authority"**). The PRA's role under the SRR is primarily to decide, together with the Bank of England, whether the general conditions for exercise of a stabilisation power in relation to a failing UK bank have been met[34]. The Regulators also have the right to be consulted on various matters. The stabilisation powers themselves may be exercised by the Bank of England or the Treasury, depending on the relevant circumstances, including the nature of the power being exercised.

5.8 We assume in relation to any such exercise that the relevant Authorities have decided that the relevant conditions to the exercise of those powers are satisfied in relation to that UK bank. The general conditions to the exercise of a stabilisation power set out in section 7 of the Banking Act broadly require that the UK bank is failing or is likely to fail and is beyond the reach of less drastic remedial action than application of the SRR. Such action must also be necessary having regard to the public interest in the advancement of the special resolution objectives and one or more of the special resolution objectives would not be met to the same extent by the winding up of the bank (whether under Part 2 of the Banking Act or otherwise) [35]. Sections 8 and 8ZA specify further specific conditions for a transfer to a private sector purchaser, bridge bank or asset management vehicle and section 9 specifies further specific conditions for a transfer of the UK bank into temporary public ownership.

5.9 Sections 5 and 6 of the Banking Act require the Treasury to issue a code of practice relating to, *inter alia*, the use by the Authorities of the stabilisation powers, the Bank Insolvency Procedure and the Bank Administration Procedure. The current version of the code of practice was issued in March 2017 (the "**Banking Act SRR Code of Practice**"). It is not binding on the Authorities, but market participants may find it helpful to refer to it with regard to the practical operation of the SRR.

5.10 Section 10 of the Banking Act provides for the establishment by the Treasury of a panel to advise the Treasury about the effect of the SRR on UK banks and the financial market in which they operate. The panel, known as the 'Banking Liaison Panel', was established shortly after the Banking Act came into

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82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L173/190.

[31] Article 130(1) of the BRRD allowed for member states to apply provisions relating to the "bail-in tool" from 1 January 2016 at the latest.

[32] SI 2014/3329.

[33] SI 2016/1239

[34] The Banking Act, s 7.

[35] In relation to the special resolution objectives, see the Banking Act, s 4.

effect and is composed of representatives from the Authorities as well as the FSCS, and various private sector representatives with expertise in the business of banks, financial law and insolvency law.

(B) Stabilisation options and powers

5.11 We consider first whether the application of any of the stabilisation powers set out in Part 1 of the Banking Act in relation to an UK bank could affect the validity or enforceability of the Opinion Documents against an UK bank. In the discussion below, in relation to the exercise of a stabilisation power, references to an "**Authority**" means either the Bank of England or the Treasury, as appropriate.

(i) Overview

5.12 The stabilisation options provide for: (i) private sector transfer of all or part of the business of the relevant entity; (ii) transfer of all or part of the business of the relevant entity to a bridge bank that is wholly or partially owned by and controlled by the Bank of England; (iii) transfer of all or part of the business of the relevant entity to an asset management vehicle owned (directly or indirectly) by the Bank of England or the Treasury and controlled by the Bank of England[36]; (iv) writing down certain claims of unsecured creditors of the relevant entity and/or converting certain unsecured debt claims to equity, (the "bail-in option"), which equity could also be subject to any future write-down; and (v) temporary public ownership (nationalisation) of all or part of the relevant entity[37].

5.13 The stabilisation options are achieved through the exercise of one or more of the "stabilisation powers" detailed at section 1(4) of the Banking Act, which are: (i) the share transfer powers (including share transfer instruments under section 15 and share transfer orders under section 16), (ii) the resolution instrument powers (which make provision for bail-in under section 12A), (iii) the property transfer powers (including property transfer instruments under section 33), and (iv) the third country instrument powers (including instruments made under sections 89H and 89I that recognise the effect of special resolution action taken under the laws of a country outside the UK).

5.14 The Authorities also have certain other wide powers under the Banking Act including the power to modify contractual arrangements in certain circumstances and powers for Treasury to disapply or modify laws (with possible retroactive effect) to enable the stabilisation powers under the Banking Act to be used effectively[38].

5.15 Please Note that certain "reverse" and "onward" transfers are also possible where one of the transfer options has been exercised.

(ii) Share or property transfer powers

5.16 The "share transfer powers" (as they are referred to in the Banking Act, although the power is broad enough to cover debt securities, warrants and certain other rights, as well as equity shares)[39] grant the Authorities the power to effect the transfer of securities issued by an UK bank and include certain other powers designed to ensure that the exercise of the share transfer power is fully effective. A share transfer by an Authority under the Banking Act would be made by a "share transfer order" or a "share transfer instrument" [40]. The exercise of the share transfer powers by an Authority in respect of an UK

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[36] This tool can only be used in conjunction with one of the other stabilisation tools: the Banking Act, s 8ZA(2).
[37] The Banking Act, s 1(3).
[38] In relation to the power to change law, see the Banking Act, s 75. We note that s 75(4)(a) states that the Treasury may disapply or modify the effect of a provision of an enactment but not a provision made by or under the Banking Act.
[39] The Banking Act, s 14.
[40] Under s 12A of the Banking Act, the Bank of England may exercise an analogous transfer power in a resolution instrument making provision for securities issued by a specified bank to be transferred to a resolution administrator or another person.

bank that is a party to the relevant Agreement would not affect the rights or obligations of the Parties and therefore have no impact on our conclusions in this Opinion.

5.17 The exercise by an Authority under the Banking Act of the property transfer powers would be by a "property transfer instrument"[41] or a "property transfer order"[42]. The property transfer powers include certain other powers designed to ensure that an exercise of the property transfer power is fully effective. The exercise of the property transfer powers may provide for the transfer of all property, rights and liabilities of an UK bank or for the transfer of some, but not all, of the property, rights or liabilities of an UK bank[43]. In the latter case, the transfer would be a "partial property transfer".

5.18 The Authorities have a broad discretion to decide which property, rights or liabilities are to be transferred. This would include "foreign property", which is defined in section 39 of the Banking Act to be property outside the UK and rights and liabilities under foreign law. As we are advising only in relation to English law in this Opinion, we must assume that the transfer by an Authority of foreign property by virtue of a property transfer instrument would be effective as to that foreign property.

5.19 We note that section 39 of the Banking Act imposes various obligations on the transferor UK bank (it is the "transferor" under the Banking Act notwithstanding the involuntary nature of the transfer) and the transferee to take necessary steps to ensure that the relevant transfer is effective under relevant foreign law[44], until which time the transferor holds the relevant property or right in trust for the benefit of the transferee or is required to discharge the relevant liability on behalf of the transferee[45].

5.20 The transfer of all of the property, rights and liabilities of an UK bank to a private sector purchaser, a bridge bank or asset management vehicle would necessarily include the relevant Agreement, including all Individual Contracts and annexes thereto. From the point of view of the other Party, the identity of its contracting counterparty would change. However, the analysis of validity and enforceability of the relevant Agreement, as a matter of English law would continue to be as set out in this Opinion.

(iii) Application of the partial property transfer power to an UK bank

5.21 In relation to a partial property transfer, the concern is that the Authorities could use such power to "cherry-pick" Individual Contracts covered by an Agreement or otherwise disrupt the mutuality of rights and obligations under that arrangement. Accordingly, the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009[46] (the **Partial Property Safeguards Order**) provides various protections from the effect of partial property transfers. Article 3(1) of the Partial Property Safeguards Order provides that a partial property transfer (to which the Partial Property Safeguards Order applies) may not provide for the transfer of some, but not all, of the "protected rights and liabilities" between a UK bank and a particular person under a "netting arrangement"[47] or a "set-off arrangement"[48].

5.22 Claims under a relevant Agreement in respect of Individual Contracts in Natural Gas or emissions allowances recognised for compliance with the EU emissions trading scheme would constitute protected rights and liabilities for the purpose of the Partial Property Safeguards Order. In the case of Natural Gas, this is because such Individual Contracts are contracts for the purchase, sale or delivery of a "commodity" for the purpose of the Partial Property Safeguards Order. In the case of emissions

[41] The Banking Act, s 33(1).
[42] Ibid, s 45, which applies to the temporary public ownership stabilisation option.
[43] ibid, s 33(2).
[44] ibid, s 39(3).
[45] ibid, s 39(4).
[46] SI 2009/322.
[47] ""netting arrangements" are arrangements under which a number of claims or obligations can be converted into a net claim or obligation and include, in particular, "close-out" netting arrangements, under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set off against each other or to be converted into a net debt," Banking Act, 48(1)(d).
[48] ""set-off" arrangements are arrangements under which two or more debts, claims or obligations can be set off against each other," Banking Act, 48(1)(c).

allowances recognised for compliance with the EU emissions trading scheme, this is because such emissions allowances are "financial instruments" as set out in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. Claims under a relevant Agreement in respect of Individual Contracts with respect to emission allowances not recognised for compliance with the EU emissions trading scheme, would be protected rights or liabilities where such Individual Contracts are (1) options, futures, swaps, forwards, contracts for differences or other derivative contract, or (2) a financial instrument[49]. Claims under a relevant Agreement in respect of Individual Contracts with respect to emission allowances which fall outside the above may not be protected rights or liabilities. The issue may turn on whether such Individual Contracts are contracts for the purchase, sale or delivery of a "commodity" for the purposes of the Partial Property Safeguards Order. We give no opinion as to whether emission rights or credits constitute a "commodity" for the purpose of the Partial Property Safeguards Order.

5.23 The definition of the term "netting arrangement" (like the terms "set-off arrangement") was, until IP completion day, subject to the Commission Delegated Regulation under Article 76 of the BRRD[50] (the "**Partial Property Transfer Delegated Act**"), which stated, in the context of netting and set-off arrangements, that such arrangements, where entered into between the relevant institution and a single counterparty, qualify as netting and set-off arrangements for the purposes of Article 76(2) of the BRRD if they relate to assets and liabilities arising under "derivatives" and "financial contracts". From IP completion day, these provisions of the Partial Property Transfer Delegated Act were repealed by the Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018/1394. Therefore, to obtain the protection of the Partial Property Safeguards Order it is not necessary for the netting or set-off arrangement to be related to "derivatives" or "financial contracts".

5.24 Therefore, our view is that the close-out netting provisions under the relevant Agreement where they apply to Individual Contracts shall be "protected rights and liabilities" within the scope of the Partial Property Safeguards Order save in the specific cases discussed above.

(iv) Continuity and other powers

5.25 Under the continuity powers conferred by sections 64(2) and 67(2) of the Banking Act, the relevant Authority has a number of wide-ranging powers including the ability to cancel or modify a contract between a "residual bank" or "transferred bank" and a third party[51]. The purpose of these provisions is to ensure that the transferred bank or the transferee of any part of the business of the residual bank (as applicable) is able to operate the transferred business effectively.

5.26 Article 3(2) of the Partial Property Safeguards Order confirms that a partial property transfer within the scope of the Partial Property Safeguards Order (as to which see above) may not include provision under the continuity powers that terminates or modifies any protected rights or liabilities between an UK bank and the party to the set-off arrangement or netting arrangement. No such explicit protection exists in the case of a full property transfer or a transfer of all or part of the ownership of the UK bank pursuant to powers granted under the Banking Act.

5.27 However, as discussed above, the continuity powers exist to ensure that the transferee or the transferred bank (as applicable) is provided with such services and facilities required to enable it to operate effectively[52] and we consider it unlikely that such powers would be used in such a way as to

[49] As set out in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

[50] Commission Delegated Regulation (EU) 2017/867 of 7 February 2017 on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council [2017] OJ L131/15.

[51] A "residual bank" is a bank all or part of whose business has been transferred in accordance with section 11(2)(b), 12(2), 12ZA(3), 41A(2) or 44D(2) of the Banking Act. A "transferred bank" is a bank all or part of the ownership of which has been transferred in accordance with section 11(2)(a), 12(2)(a) or 13(2) of the Banking Act or in respect of which a mandatory reduction instrument or resolution instrument (or supplemental resolution instrument) has changed the ownership (wholly or partly) of.

[52] The Banking Act, ss 63(2) and 66(2).

disrupt the operation of the close-out netting provisions under the relevant Agreement in the context of a transfer of ownership or full property transfer.

5.28 In addition to the continuity powers, there are other powers in the Banking Act that could at least potentially be used to modify or affect contractual rights. Section 75 gives power to the Treasury to change the law, including with retrospective effect (other than the Banking Act), for the purpose of enabling the powers under Part 1 of the Banking Act to be used effectively. Sections 23 and 40 also provide that share transfer instruments or orders or property transfer instruments may include incidental, consequential or transitional provision the scope of which are not clear, but which may potentially have an impact on contractual rights.

(v) Bail-in option

5.29 The fourth stabilisation option, the bail-in option, is exercised through the making of one or more resolution instruments. A resolution instrument made under section 12A of the Banking Act may make “special bail-in provision” with respect to a specified UK bank[53].

5.30 Pursuant to section 48B(1), “special bail-in provision” means any of the following (or any combination of the following):

(a) provision cancelling a liability owed by the bank;

(b) provision modifying, or changing the form of, a liability owed by the bank; and

(c) provision that a contract under which the bank has a liability is to have effect as if a specified right had been exercised under it.

5.31 When the Bank of England exercises the resolution instrument powers it must do so in accordance with section 12AA of the Banking Act[54].

5.32 The concern for the close-out netting provisions is primarily that special bail-in provisions could apply so as to reduce or eliminate the amount owed by the UK bank under a Specified Obligation with the effect that the ability of the other party to net amounts due in respect of those liabilities against liabilities owed by such party is commensurately reduced or eliminated.

5.33 However, in this respect, article 4 (Set-off and netting) of the Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014[55] (the “**Bail-in Safeguards Order”**) prohibits special bail-in provisions from being made in respect of a “protected liability”. A “protected liability” is a liability of the UK bank owed to a particular person which such person or the bank is entitled to set-off or net under a set-off arrangement or netting arrangement between the relevant person and the bank and that has not been converted into a net debt, claim or obligation or treated as if converted into a net debt[56]. Article 4(4)(b) states that a liability is treated as if converted into a net debt, claim or obligation if the amount due in relation to the liability is reduced by reference to any sums which the debtor would be able to “set off” against the liability in the event that the debtor decided to exercise set off or netting rights.

5.34 For these purposes, “set-off arrangements” means arrangements under which two or more debts, claims or obligations can be set off against each other and “netting arrangements” means arrangements under which a number of claims or obligations can be converted into a net claim or obligation and

[53] A property transfer instrument under sections 11(2), 12(2), 12ZA(3), 41A(2), 43(2) or 44D(2) or a supplemental property transfer instrument, may also make special bail-in provision with respect to the bank (see the Banking Act, ss 44B and 44BA).
[54] The Banking Act, s 12A(2B).
[55] SI 2014/3350.
[56] Where the liability relates to a derivative, financial contract or qualifying master agreement (discussed below) it must be converted into a net debt, claim or obligation (rather than be "treated as converted") whether in accordance with the relevant arrangements or through the making of special bail-in provision or otherwise.

includes, in particular, "close-out" netting arrangements, under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set off against each other or to be converted into a net debt[57].

5.35 As discussed above, we are of the view that the close-out netting provisions in the relevant Agreement would be a "netting arrangement" or "set-off arrangement" for these purposes but the issue then arises as to whether a liability arising under the close-out netting provisions is a "protected liability". A liability is not a protected liability for the purposes of the Bail-in Safeguards Order if it is of a type listed in article 4(3) of the Bail-in Safeguards Order. For present purposes liabilities which are not protected liabilities include (1) unsecured liabilities in relation to any instrument or contract which, at the date on which it was issued or made, had a maturity period of 12 months or more and is not a derivative, financial contract or qualifying master agreement[58] and (2) unsecured liabilities owed to another member of the same group as the relevant bank which are not owed in relation to derivatives, financial contracts or qualifying master agreements[59].

5.36 Under the Bail-in Safeguards Order, (a) "derivative" means a derivative as defined in Article 2(5) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories as it forms part of retained EU law which, in turn, (and interpreted in accordance with Article 94 of MiFID II, as it forms part of retained EU law) defines it by reference to certain provisions of MiFID II (as it forms part of retained EU law), encompassing only those financial instruments as set out in points (4) to (10) of Section C of Annex I to MiFID II (as it forms part of retained EU law); (b) "financial contract", for the purposes of this Opinion, means any or any combination of the following (other than a derivative): (i) a contract for the purchase, sale, transfer or loan of a transferable security, a group of transferable securities or index of transferable securities; (ii) a repurchase or reverse repurchase transaction on any transferable security, group of transferable securities or index of transferable securities; (iii) a commodities contract of a financial nature, including – (1) a contract for the purchase, sale, transfer or loan of a commodity, a group of commodities or an index of commodities for future delivery; (2) a swap or option on a commodity, a group of commodities or an index of commodities; (3) a repurchase or reverse repurchase transaction on any such commodity, group or index; (4) a futures contract, including a contract (other than a commodities contract) for the purchase, sale or transfer of property of any description under which delivery is to be made at a future date and at a price agreed when the contract is made; (c) a "qualifying master agreement" means a master agreement in so far as it relates to a derivative, financial contract or contract for the sale, purchase or delivery of the currency of the UK or another country, territory or monetary union[60]; and (d) undertakings are in the same group if they are group undertakings in respect of each other as defined in section 1161(5) of the Companies Act 2006[61].

5.37 It is our view that most of the types of the transactions under the Individual Contracts are "derivatives" or "financial contracts" as defined in the Bail-in Safeguards Order, but some types of transactions may not qualify as such. However, this would only cause such Individual Contracts not to be protected liabilities if they have an original maturity of 12 months or more or are with another member of the same group as the UK bank. In other cases, liabilities arising under an relevant Agreement would be protected liabilities under the Bail-in Safeguards Order.

5.38 The exclusions from the scope of the Bail-in Safeguards Order discussed above only apply to unsecured liabilities.

5.39 In addition, in the context of bail-in, we note that, under section 6B of Banking Act (which is technically a pre-resolution tool and not part of the SRR), the Bank of England must, where the section applies[62]

[57] The Banking Act, s 48P(2).
[58] The Bail-in Safeguards Order, art 4(3)(d).
[59] ibid, article 4(3)(e).
[60] ibid, art 5.
[61] ibid, art 4(5).
[62] See the Banking Act, s 6A for the circumstances in which section 6B applies. See section 81AA in respect of Banking Group Companies.

(which includes where the Bank of England or Treasury has decided to exercise a stabilisation power under the SRR in respect of the UK bank in circumstances where section 12AA does not apply), make an instrument (a "mandatory reduction instrument") containing the mandatory reduction provision. The "mandatory reduction provision" is essentially provision for the write-down or conversion of capital instruments and must be made in accordance with the principles and procedures specified in sections 6B and 6C. The capital instruments subject to these provisions are Common Equity Tier 1 instruments, Additional Tier 1 instruments and Tier 2 instruments[63]. Accordingly, the transactions under the Opinion Documents would not be directly affected by these provisions.

(vi) Overrides and stays

5.40 Under section 48Z(6) of the Banking Act (which applies, *inter alia*, where a contract or other agreement is entered into by an UK bank and the substantive obligations provided for in the contract or agreement continue to be performed), the following are to be disregarded in determining whether a default event provision (which includes a provision of an agreement that has the effect that, if a specified event occurs or situation arises, the agreement or any rights or duties thereunder are terminated or a sum becomes payable or other right accrues) applies:

(a) a crisis prevention measure or crisis management measure taken in relation to the bank or a member of the same group (as defined at section 474 of the Companies Act 2006) as the bank; and

(b) the occurrence of any event directly linked to the application of such a measure.

5.41 The terms "crisis management measure" and "crisis prevention measure" are defined at section 48Z(1) of the Banking Act by reference to the BRRD and include certain action taken under the Banking Act and the BRRD. In addition, a mandatory reduction instrument, a share transfer instrument, a property transfer instrument or a resolution instrument (each, a "**Part 1 instrument"**) or a share transfer order may, in circumstances where section 48Z(6) does not apply, provide that the Part 1 instrument or share transfer order should be disregarded in determining whether a default event provision applies[64].

5.42 In the present context, the effect of the section is that the right to terminate and close-out transactions in accordance with the close-out netting provisions would be ineffective in certain circumstances including where such rights arise as a result of the exercise of a stabilisation power in relation to the UK bank. However, such rights based on the existence or occurrence of other events or circumstances, should not be affected. Therefore, we do not consider that such power has an impact on the conclusions in this Opinion.

5.43 The BRR Order 2016 includes changes to the mandatory default override in section 48Z to allow default event provisions to take effect in accordance with their terms notwithstanding section 48Z(6), if provided for in a Part 1 instrument or share transfer order (or to take effect to the extent specified in the instrument or order)[65]. Such provision may be made only if the Bank of England (in the case of a Part 1 instrument) or HM Treasury (in the case of a share transfer order) considers that such provision would advance one or more of the special resolution objectives.

5.44 Under section 70A of the Banking Act, the Bank of England may suspend obligations to make a payment or delivery under a contract where one of the parties to the contract is a UK bank subject to a stabilisation power. This power is exercisable by way of provision in a share transfer instrument, property transfer instrument, resolution instrument or third-country instrument. Any such period of suspension must end no later than midnight at the end of the first business day following the day on which the instrument providing for the suspension is published[66] (the '**stay period**'). Section 70A(3)(c) clarifies that all the obligations of the parties to the relevant contract will be suspended. Any payments

[63] These terms are defined in the Banking Act, s 3.
[64] The Banking Act, s 48Z(7).
[65] The BRR Order 2016, art 15 and the Banking Act, s 48Z(6A).
[66] The Banking Act, s 70A(3).

or deliveries "due" under the relevant Agreement during the stay period, while not being made by either party, will instead become due and payable, or in the case of deliveries due to be performed, at the end of such period (subject to the terms of the relevant Agreement)[67]. Such stayed payment or delivery obligations will still be taken into account for the purposes of close-out netting provisions of an relevant Agreement if the UK bank should subsequently become subject to formal insolvency proceedings. Similarly, pursuant to section 70C of the Banking Act, the Bank of England may suspend the termination rights (which includes a right to close-out, set-off or net obligations or any similar provision that extinguishes an obligation of a party to the contract and a provision that prevents an obligation from arising under the contract) of any party to a contract with a bank under resolution, assuming that all the obligations under the contract to make payments or deliveries or provide collateral continue to be performed. Again, any such suspension must end no later than midnight at the end of the first business day following the day on which the relevant instrument providing for the suspension is published[68].

5.45 Noting that the restrictions under sections 70A and 70C of the Banking Act will not prejudice a party in seeking to enforce its rights against the UK bank under the Opinion Documents upon expiration of the stay, we do not consider that such powers have a material impact on our conclusions herein regarding the enforceability of the close-out netting provisions[69].

(C) Bank Insolvency Procedure

5.46 The Bank Insolvency Procedure is an additional procedure for winding up or liquidating an UK bank (if the UK bank has depositors who are eligible depositors). It is based on the provisions for the liquidation of an English Company, as described in this Opinion, but adapted to further the purposes of the Banking Act and, in particular, to transfer the accounts of eligible depositors to another financial institution or to facilitate rapid payments to such depositors under the FSCS established under Part XV of the Financial Services and Markets Act 2000[70].

5.47 The detailed operation of the Bank Insolvency Procedure is subject to the Bank Insolvency (England and Wales) Rules 2009 (the "**Bank Insolvency Rules"**)[71], which, for present purposes, are comparable to the provisions of the Insolvency (England and Wales) Rules 2016 that apply to the winding up of a English Company. Rule 72 of the Bank Insolvency Rules sets out an insolvency set-off provision that is, for present purposes, substantially the same as Rule 14.25 of the Insolvency (England and Wales) Rules 2016. The application of Rule 72 is modified by Rule 73 in respect of protected deposits. There are some differences between the two provisions, but these have no bearing on our conclusions in this Opinion[72].

5.48 The Bank Insolvency Procedure is not mandatory. For example, an ordinary winding up or liquidation of an UK bank under the Insolvency Act 1986 could still occur. It is likely, however, that the Bank Insolvency Procedure would be used where the Authorities decide that putting a failed UK bank straight into liquidation is the best or only viable course to take.

5.49 The Bank Insolvency Procedure may be initiated by any of the Secretary of State for Business, Energy and Industrial Strategy, the Bank of England or the PRA making an application to the court for a bank

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[67] ibid, s 70A(4).

[68] Note that, subject to section 48Z, termination rights can be exercised at the end of the suspension period pursuant to the contract, provided that, if the rights and liabilities have been transferred to another entity, the termination right must have been triggered by the new entity.

[69] The restrictions in sections 70A and 70C do not apply to a party to a contract with the UK bank that is an "excluded person" as defined in section 70D.

[70] Section 103(6) of the Banking Act sets out a table showing how the relevant provisions of the Insolvency Act 1986 have been modified for the purpose of the Bank Insolvency Procedure.

[71] SI 2009/356, which came into effect on 25 February 2009.

[72] Note that Rule 72 is based on Rule 4.90 of the Insolvency Rules 1986. Reference is also made to Rule 4.86 of the 1986 Rules which applies for the purpose of contingent obligations. Note also that Rule 74 (which also applies for the purposes of Rule 72 in relation to any sums due to the bank which are payable in a currency other than sterling) applies Rule 4.91 of the Insolvency Rules 1986 for the purposes of debts in a foreign currency.

insolvency order under section 95 of the Banking Act. In each case certain conditions and grounds must be satisfied, including (i) in the case of the Bank of England, that the PRA is satisfied that Condition 1 in section 7 of the Banking Act is met; and (ii) in the case of the PRA, that the Bank of England is satisfied that Condition 2 in section 7 of the Banking Act is met.

5.50 There are various technical differences between the winding up of an English Company under the Insolvency Act 1986 and a UK bank under the Bank Insolvency Procedure, but these have no material effect on our conclusions in relation to the issues discussed in this Opinion. In the event of an UK bank being made subject to the Bank Insolvency Procedure, the close-out netting provisions of the Opinion Documents would be enforceable against the UK bank for the reasons we have given in paragraph 3 of this Opinion in relation to an English Company.

(D) Bank Administration Procedure

5.51 The Bank Administration Procedure is an additional procedure for the administration of a failing UK bank. It is based on the provisions for the administration of an English Company, as described in this Opinion, but adapted to further the purposes of the Banking Act[73]. In particular, the Bank Administration Procedure is intended to be used in relation to a failing UK bank where there has been a partial transfer of business from the failing UK bank to a commercial purchaser or resolution company. The bank administrator appointed by the court would be empowered and required to ensure that the non-transferred part of the UK bank (referred to in the Banking Act as the "residual bank") provides services or facilities required to enable a private sector purchaser or resolution company that has acquired the transferred business to operate effectively.

5.52 The detailed operation of the Bank Administration Procedure is subject to the Bank Administration (England and Wales) Rules 2009 (the "**Bank Administration Rules**")[74], which are, for present purposes, comparable to the provisions of the Insolvency (England and Wales) Rules 2016 that apply to the administration of a company. Rule 61 of the Bank Administration Rules applies various provisions of the Insolvency Rules 1986 to the conduct of the Bank Administration Procedure, including Rule 2.85.

5.53 The Bank Administration Procedure would be initiated by the Bank of England making an application to the court for a bank administration order under section 142 of the Banking Act. The Bank Administration Procedure is not mandatory. For example, an ordinary administration under the Insolvency Act 1986 could still occur. It is highly likely, however, that where a transfer of part of the business of a failed bank has occurred, the Bank Administration Procedure would be commenced by the Bank of England in relation to the residual bank.

5.54 There are various technical differences between the administration of an English Company under the Insolvency Act 1986 and the Bank Administration Procedure, but these have no material effect on our conclusions in relation to the issues discussed in this Opinion. In the event of an UK bank being made subject to the Bank Administration Procedure, the close-out netting provisions of the Opinion Documents would be enforceable against the UK bank for the reasons we have given in paragraph 3 of this Opinion in relation to an English Company.

6. Insurers

6.1 Where a UK insurer has been proved to be unable to pay its debts, a court in this jurisdiction, if it thinks fit, can reduce the value of one or more of the contracts of the insurer on such terms and subject to such conditions as it thinks fit, in place of making a winding-up order pursuant to Section 377 of FSMA. The better view is that "contracts" for the purposes of Section 377 should be interpreted as referring to insurance policies only. However, we express no view as to the effect on the Insolvency Set-off provisions if a liability of a Party under the relevant Agreement or EFET Credit Support Annex were able to be reduced under Section 377.

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[73] Section 145(6) of the Banking Act sets out a table showing how the relevant provisions of the Insolvency Act 1986 have been modified for the purpose of the Bank Administration Procedure.
[74] SI 2009/357, which came into effect on 25 February 2009.

6.2 Rule 14.25 will apply on the winding up of a UK insurer.

6.3 The Insurers Winding Up Regulations require that where a long term or a general insurer or a composite insurer (as defined in Regulation 21(c)) is wound up, debts are paid out of the entire assets of the insurer in the following order of priority: preferential debts[75] (after the expenses of the winding up); insurance debts (broadly, policyholders' debts); the debts of ordinary creditors (Regulation 21). Paragraphs (3) and (4) of this Regulation provide that where the assets of an insurer are insufficient to cover all preferential debts, the preferential debts abate in equal proportions and where the assets are insufficient to meet all insurance debts, those debts abate in equal proportions. Paragraph (5) makes provision as to the priority of preferential debts (but only those debts) over property comprised in a floating charge.

6.4 The Insurers Winding Up Regulations, as amended by the Solvency 2 Regulations 2015 (SI 2015/575), deal separately with the re-organisation and winding up of insurance undertakings with respect to composite insurers[76] (where there is no arrangement to transfer the long-term business) providing for the separate application of assets representing the fund or funds of the insurer maintained by the insurer in respect of its long term business and those assets representing the fund or funds maintained in respect of its general business[77]. Accordingly, the long-term business assets are to be applied firstly in discharge of certain preferential liabilities (broadly preferential debts and insurance debts) attributable to the long-term business of the insurer, and the general business assets are to be applied in discharge of the same type of preferential liabilities but attributable to the general business. However, any excess in the assets attributable to the long-term business of a composite insurer, once all of such preferential liabilities attributable to the long-term business have been met, must be applied to meet any shortfall in assets of the general business and vice versa, should the excess be in the general business fund and the shortfall in the long-term fund (paragraphs (3) to (8) of Regulation 22). The order of priority specified in Regulation 21 in relation to long term and general insurers is to be applied in the winding up of the separate types (i.e., general and long-term business) of a composite insurer's business (Regulations 23 and 24). It is our view that, on the winding up of a non-transferring composite insurer, it may not be possible to net transactions under the relevant Agreement entered into in connection with the composite's long-term insurance business against transactions entered into in connection with its general insurance business and such mingling of transactions should be avoided. We have therefore assumed, for the purposes of the analysis in this Annex 3, that all transactions between a party and an English Insurance Company under the EFET Agreement are entered into for the purposes of either (a) the long-term insurance business of the English insurance company (in the case of an English insurance company that carries on long-term business) or (b) its other businesses (if any), and not a mixture of both.

6.5 A UK insurer carrying on long-term business is required under the Prudential Sourcebook for Insurers (“**INSPRU**”) to maintain a separate account in respect of the assets and liabilities attributable to its long-term business. Furthermore, pursuant to INSPRU and the FCA and the PRA's General Prudential Sourcebook, the long-term business assets must (subject to a few exceptions) not be applied other than for the purposes of its long-term business. Creditors who are not creditors of the long-term business do

[75] Preferential debts include claims on assets subject to “rights in rem” (The Solvency II Directive (2009/138/EC) (as amended by the Omnibus II Directive (2014/51/EU)) (the **Solvency II Directive**), Article 275(1). The term "rights in rem" is not defined in Title IV of the Solvency II Directive or in the Insurers Winding Up Regulations), but we consider that it will cover most, if not all, proprietary rights currently recognised by English law.
[76] The Solvency II Directive was transposed into UK law primarily by the Solvency 2 Regulations 2015 (SI 2015/575) with effect from 1 January 2016. The Solvency II Directive consolidated and repealed Directive 2001/17/EC and pursuant to Article 73 of the Solvency II Directive, and paragraph 2.3 of the PRA's Supervisory Statement SS8/15, an English insurance company will now, with certain exceptions, not be given permission carry on business as a composite insurance company. The main exceptions are for a few older English Insurance Companies established before 15 March 1979 and for pure reinsurers.
[77] Long-term insurance business would include, for example, life assurance, annuity and pension fund management whereas general insurance business would include what is sometimes known as "non-life" or "property and casualty" business (including, for example, household, vehicle, liability, accident and sickness insurance).

not have access to these assets unless and to the extent there is a surplus of assets in the long term fund.

7. Principal grounds upon which a transaction could be avoided under English insolvency law

Transactions at an undervalue

7.1 Under Section 238 of the Insolvency Act, a transaction entered into by a company at any time within a period of 2 years ending with the onset of insolvency (being, in broad terms, the earliest of: the date of initiation of proceedings for administration, liquidation, the date of presentation of a petition for an administration order, or where the court has made a recognition order in respect of a foreign proceeding) of the company with a person on terms that provide for the company to receive either no consideration, or a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by it, may be set aside by the court on the application by a liquidator or administrator (as the case may be) as a transaction at an undervalue, if at the time the transaction is entered into that company was unable to pay its debts within the meaning of Section 123 of the Insolvency Act or became unable to pay its debts within the meaning of that section in consequence of the transaction. It should be noted that a court would not set aside such a transaction if it were satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business and that at the time it did so there were reasonable grounds for the belief that it would benefit the company. Transactions entered into on arm's length terms and at the then prevailing market rates are unlikely to constitute transactions at an undervalue.

Preferences

7.2 Under Section 239 of the Insolvency Act, anything done or allowed to be done by a company within a period of 2 years (in the case of a preference which is given to a person who is connected with the company), or 6 months (in other cases) ending on the onset of insolvency (such period being in broad terms, similar to the periods for transactions at an undervalue, as defined in Section 7.1 above) of that company may be set aside by the court on the application by a liquidator or administrator (as the case may be) if, at the time it was done or allowed, that company was unable to pay its debts within the meaning of Section 123 of the Insolvency Act or became unable to pay its debts within the meaning of that section in consequence of the thing done or suffered, and that thing has the effect of putting any person in a better position, in the event of that company going into insolvent liquidation, than that person would have been in if the thing had not been done or suffered. However, the court will not make an order to set aside the relevant transaction if it is satisfied that the company which gave the preference was not influenced to give it by a desire to put that person in such better position.

Transactions defrauding creditors

7.3 Under Section 423 of the Insolvency Act, where a company has entered into a transaction at an undervalue, the court may, in certain instances, make such order as it thinks fit to restore the position to what it would have been if the transaction had never been entered into and for protecting the interests of persons who are victims (as defined by the Insolvency Act) of the transaction. An order shall only be made if the court is satisfied that the transaction was entered into for the purpose of putting assets beyond the reach of a creditor, or otherwise prejudicing the interests of a creditor. It should be noted that the court will need to be satisfied that the company actually intended to put assets beyond the reach of the creditor or to prejudice his interests as a result of entering into the transaction. Unlike the other provisions above, there is no time limit imposed on making the application and no requirement of insolvency at the time of the transaction or as a result of it. The application can be made by any victim of the transaction (i.e. any person who is or is capable of being prejudiced by the transaction) and not merely by a liquidator or administrator (as the case may be).

Extortionate credit transactions

7.4 Under Section 244 of the Insolvency Act, a transaction specifically for or involving the provision of credit to the company may be set aside by the court on the application of an administrator or a liquidator of the company within a specified period ending with the onset of insolvency (as defined above) if the transaction is or was extortionate. A transaction will be extortionate if, having regard to the risk accepted by the person providing the credit, the terms of it are, or were, such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit or it otherwise grossly contravened ordinary principles of fair dealing. It should be noted that the onus of proof is put in every case on to the person who gave the credit.

8. Enforceability in the event of an Insolvency Procedure

8.1 Enforceability of a claim against a Party subject to an Insolvency Procedure is subject to special restrictions and considerations. The usual enforcement remedies available against a Party which is not subject to an Insolvency Procedure will, as a general rule, not all be available where the Party is subject to such an Insolvency Procedure or to be available will require the consent of the relevant insolvency office holder appointed to the Insolvent Party or the leave of the court.

8.2 Claims of the creditors of the Party will, depending on the types of Insolvency Procedure in force in relation to the Party, have to be lodged with the appropriate Insolvency Representative and will be subject to determination in accordance with the specific procedures applicable to the relevant Insolvency Procedure.

Annex 4
Overview of Insolvency Procedures

1 The insolvency or reorganisation procedures (defined as "Insolvency Procedures" in paragraph 3.3 of this Opinion) to which a Party could be subject under English law, and which are relevant for the purposes of this Opinion, are liquidation (including provisional liquidation), administration, bank insolvency, bank administration[78], investment bank special administration, special administration (bank insolvency), special administration (bank administration)[79], administrative receivership, receivership, moratorium, Part A1 Moratorium, company voluntary arrangements, schemes of arrangement and Restructuring Plans (as defined at paragraph 3.3)[80].

2 The legislation applicable to Insolvency Procedures is:

(a) in relation to all Insolvency Procedures initiated after the date of this Opinion except schemes of arrangement and Restructuring Plans, the provisions of the Insolvency Act 1986, the Insolvency (England and Wales) Rules 2016 and the Corporate Insolvency and Governance Act 2020;

(b) in relation to schemes of arrangement, Part 26 of the Companies Act 2006;

(c) in relation to Restructuring Plans, Part 26A of the Companies Act 2006;

(d) in relation to a UK bank, the Banking Act, the Bank Insolvency (England and Wales) Rules 2009, the Bank Administration (England and Wales) Rules 2009, the Banking Act 2009 (Restrictions of Partial Property Transfers) Order 2009 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (the "**Credit Institutions Regulations**"), and in relation to a UK investment bank, the Investment Bank Special Administration Regulations 2011 (the "**Investment Bank Regulations**") and Investment Bank Special Administration (England and Wales) Rules 2011, and in relation to a UK credit institution[81], the Credit Institutions Regulations;

(e) the Cross-Border Insolvency Regulations 2006; and

(f) in relation to insurers[82], Part XXIV of FSMA, the Insurers (Winding Up) Rules 2001, the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2010, Third

[78] Note that, in relation to a UK bank (an institution incorporated in, or formed under the law of any part of, the UK, which has permission under Part IV of FSMA to accept deposits), the terms "liquidation" and "administration" when used in this Opinion shall include bank insolvency and bank administration, respectively (and the terms "liquidator" and "administrator" shall be construed accordingly).
[79] Note that, in relation to a UK investment bank (an undertaking to which the Investment Bank Regulations apply, being an institution which is incorporated in the UK, authorised under FSMA to safeguard and administer investments, deal in investments as principal or agent, manages an AIF or a UCTIS, acts as trustee or depositary of an AIF or a UCTIS (as those terms are defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001) and holds assets for clients), the terms "liquidation" and "administration" when used in this Opinion shall include an investment bank special administration, a special administration (bank insolvency) and/or a special administration (bank administration) under the Investment Bank Regulations, as the context may require (and the terms "liquidator" and "administrator" shall be construed accordingly).
[80] Strictly, the Part A1 Moratorium, receivership, schemes of arrangement and Restructuring Plans are not insolvency proceedings properly so-called; however, since each procedure may be invoked in the case of parties in financial difficulties and given the potential resulting implications for matters the subject of this Opinion, they are included in the definition of "Insolvency Procedures", for convenience.
[81] As such term is defined in the Credit Institutions Regulations.
[82] Under s 355 of the Financial Services and Markets Act 2000 the term "insurer" has such meaning as may be specified in an order made by the Treasury. The Treasury made such an order in the form of the Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001, SI 2001/2634. Article 2 of that Order provides as follows: "In Part XXIV of the Act (insolvency), 'insurer' means any person who is carrying on

Parties (Rights against Insurers) Act 2010, the Insurers (Reorganisation and Winding Up) Regulations 2004 (in the case of insurance undertakings only) and INSPRU.

3 In relation to an obligation which is a transfer order[83] as defined in Settlement Finality Regulations, the Settlement Finality Regulations will also be applicable. If any of the Opinion Documents constitutes a "financial collateral arrangement" or an arrangement of which a "financial collateral arrangement" forms part, the Collateral Regulations will also apply.

4 Following IP completion day, the Council of the European Union Regulation No. 2015/848 on Insolvency Proceedings (recast) (the "**EU Insolvency Regulation**") was incorporated into English domestic law as retained EU law by the Withdrawal Acts, as amended by the Insolvency (Amendment) (EU Exit) Regulations 2019/146 (the "**Insolvency Exit Regulations**"). The Insolvency Exit Regulations amend the onshored version of the EU Insolvency Regulation (which we refer to in this Opinion as the 'Onshored EU Insolvency Regulation') so that, in broad terms and subject to certain transitional provisions, the jurisdictional requirements to commence insolvency proceedings, the rules as to the applicable law in those proceedings and the automatic recognition of EU insolvency proceedings in the UK, has ceased to apply[84]. Analogous changes were made to the Credit Institutions Regulations and the Insurers (Reorganisation and Winding Up) Regulations 2004 by the Credit Institutions and Insurance Undertakings Reorganisation and Winding Up (Amendment) (EU Exit) Regulations 2019/38.

5 However:

(a) subject to Section 426 of the Insolvency Act 1986, a foreign company may not enter administration or make a company voluntary arrangement unless it has its centre of main interests in England and Wales;

(b) administrative receivership is not available in respect of a foreign company and is only available for UK companies in certain limited circumstances;

(c) bank insolvency and bank administration are procedures only available in respect of a UK bank;

(d) investment bank special administration is a procedure only available in respect of a UK investment bank which is a deposit-taking bank with no eligible depositors; special administration (bank administration) is a procedure only available in respect of a UK investment bank which is a deposit-taking bank with or without eligible depositors[85]; and special administration (bank insolvency) is a procedure only available in respect of a UK investment bank which is a deposit-taking bank with eligible depositors; for these purposes, "eligible depositors" has the meaning given in Section 93(3) of the Banking Act, being, broadly,

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a regulated activity of the kind specified by article 10(1) or (2) of the Regulated Activities Order (effecting and carrying out contracts of insurance) but who is not – (a) exempt from the general prohibition in respect of that regulated activity; (b) a friendly society; or (c) a person who effects or carries out contracts of insurance all of which fall within paragraphs 14 to 18 of Part I of Schedule 1 to the Regulated Activities Order in the course of, or for the purposes of, a banking business".

[83] In broad terms, a "transfer order" constitutes an unequivocal instruction by a participant (within the meaning of the Settlement Finality Regulations) authorising: (i) a payment of money by reason of a book entry on the accounts of a credit institution, a central bank, a central counterparty or a settlement agent, or an instruction which results in the assumption or discharge of a payment obligation as defined by the rules of a designated system; or (ii) a transfer of title to, or interest in, securities by means of a book entry on a register or otherwise.

[84] The title of Regulation No.2015/848 as incorporated into English domestic law following IP completion day is Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (Retained EU Legislation).

[85] It is unclear whether special administration (bank administration) applies to all investment banks or just to those which are also deposit-taking banks. This is because of an inconsistency between regulation 9 of the Investment Bank Regulations (which provides that Schedule 2 (Special administration (bank administration)) of the Investment Bank Regulations only applies to investment banks which are also deposit-taking banks) and Schedule 2 itself which states that it applies to all investment banks.

depositors who are eligible for compensation under the Financial Services Compensation Scheme; and

(e) a foreign company may not enter into a scheme of arrangement unless it has a "sufficient connection" with England and Wales.

6 Under Part XXIV of FSMA, the "appropriate regulator" (being the UK Prudential Regulation Authority ("**PRA**") and/or the UK Financial Conduct Authority ("**FCA**")) is given specific powers to petition to commence and otherwise to participate in Insolvency Procedures relating to (i) any person that is (or has been) an authorised person under FSMA and (ii) any person carrying on (or who has carried on) a regulated activity without authorisation or exemption under FSMA. In relation to Insolvency Procedures which are bank insolvency, bank administration, investment bank special administration, special administration (bank administration) and special administration (bank insolvency), the PRA and/or the FCA, as the case may be, are given similar powers to intervene and rights to participate under the Banking Act and the Investment Bank Regulations, respectively.

7 Instead of, or in addition to, Insolvency Procedures, a UK bank may be subject to the "special resolution regime" under the Banking Act, which is considered at section 4 of Annex 3.

8 In addition to the Insolvency Procedures, there are a number of special insolvency procedures, measures and regimes in England and Wales for bodies operating in particular industries or sectors, particularly in areas in which there are public interest considerations which might not be adequately protected by the Insolvency Procedures. It is outside the scope of this Opinion to seek to enumerate all such procedures, measures and regimes. By way of example, however, a Party which holds a licence under Section 6(1)(b) or (c) of the Electricity Act 1989 and/or under Section 7 of the Gas Act 1986 may be the subject of an Energy Administration Order (an "**EAO**") under Section 154 of the Energy Act 2004. Whilst an EAO is in force, the affairs, business and property of the company are to be managed by a person appointed by the court. Whilst an EAO does not preclude an application for administration, a court may not grant such an order unless notice has been served on the Secretary of State and on the Gas and Electricity Markets Authority, a period of 14 days has elapsed since the last of those notices has been served and there is no application for an EAO that is outstanding. Similar restrictions apply to a winding-up petition and the enforcement of security.

Annex 5
Excluded English Companies

1. The following types of English Company are excluded from the scope of this Opinion, which are subject to special insolvency regimes under the Enterprise Act 2002:

    i. water and sewage undertakers under the Water Industry Act 1991;

    ii. a qualifying water supply licensee within the meaning of section 23(6) of the Water Industry Act 1991 or a qualifying sewerage licensee within the meaning of section 23(8) of the Water Industry Act 1991;

    iii. a licensed infrastructure provider within the meaning of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013;

    iv. protected railway companies under the Railways Act 1993 (as extended by the Channel Tunnel Rail Link Act 1996);

    v. air traffic services companies under the Transport Act 2000; and

    vi. a public-private partnership company under the Greater London Authority Act 1999.

2. We have not considered:

    i. issues relating to a clearing house organised as an English Company as, among other things, an relevant Agreement between a clearing house and a clearing member is usually subject to various considerations such as the clearing house structure and rules and therefore requires separate analysis;

    ii. infrastructure companies within the meaning of section 112 of the Financial Services (Banking Reform) Act 2013, which may be subject to FMI administration pursuant to Part 6 of that Act.

3. We also do not consider:

    i. a protected energy company within the meaning of section 154 of the Energy Act 2004 or an energy supply company within the meaning of section 94 of the Energy Act 2011;

    ii. a community interest company under the Companies (Audit, Investigations and Community Enterprise) Act 2004 and the Community Interest Company Regulations 2005 (each as amended);

    iii. a private registered provider of social housing under the Housing and Planning Act 2016 and the Housing Administration (England and Wales) Rules 2018 and Insolvency of Registered Providers of Social Housing Regulations 2018;

    iv. further education and sixth form colleges under the Technical and Further Education Act 2017 (together with the Education Administration Rules 2018 and the Further Education Bodies (Insolvency) Regulations 2018);

    v. a smart meter communication licensee under the Smart Meters Act 2018; or

    vi. an English Company that is an institution of a class specified in paragraph (2) of regulation 2 of the Investment Bank (Amendment of Definition) and Special Administration (Amendment) Regulations.

Annex 6
Opinion Relating to Entities Other Than Companies

This Opinion is also given in respect of Parties which are English partnerships. In relation to these entities, this Opinion is modified to the extent detailed in this Annex.

1 **PARTNERSHIPS**

1.1 For the purposes of the Opinion a reference to an "English partnership" is to a “partnership” within the meaning given in section 1 of the Partnership Act 1890 and to a “limited partnership” under section 4 of the Limited Partnerships Act 1907; and which is organised, established or formed under the laws of England and Wales; and, for the avoidance of doubt, which is not a limited liability partnership formed under the Limited Liability Partnerships Act 2000.

1.2 An English partnership has no separate legal capacity and is not a body corporate. It is therefore very different from limited companies under English law. That said, a partnership is treated as a separate legal entity for the purposes of certain insolvency proceedings under the Insolvency Act.

1.3 A partnership must have at least two partners, who shall have unlimited liability for the debts and obligations of the firm. A limited partnership must consist of one or more persons called general partners, who shall have unlimited liability for the debts and obligations of the firm, and one or more persons to be called limited partners, the liability of which is limited to the capital investment which the limited partner has agreed to make to the limited partnership. This means that a creditor of the limited partnership cannot look to the limited partner for recovery of a debt owed to it beyond the amount of capital contribution committed to the limited partnership by the limited partner.

1.4 Under partnership law, the liability of a partner in an English partnership (in the case of a limited partnership whether the partner is a general partner or a limited partner) is usually restricted to debts incurred at a time when that partner was a partner of the English partnership. Where there is a change in partners in a partnership, a new partner will not be liable for debts incurred before he or she becomes a partner unless the new partner enters into a novation under which he or she assumes liability for these debts and the creditor agrees to that assumption. Similarly, an incoming partner will not have rights under a contract entered into before he became a partner unless those rights have been novated or assigned in his favour.

1.5 The points made in paragraph 1.4 above are important for set-off purposes. Suppose a partnership has two partners (P1 and P2) at a time it incurs a liability to C, the creditor. At some time later, P3 becomes a partner without P3 assuming pre-existing liabilities. A little after that, C incurs a liability to the partnership. In this situation, C’s liability owed *to* the partnership (owed in legal terms to P1, P2 and P3) is not mutual with the liability owed *by* the partnership (in legal terms by P1 and P2 only) and therefore will not be capable of being set-off under Statutory Insolvency Set-Off.

1.6 In view of the issues discussed above, we recommend that contractual arrangements with counterparties that are English partnerships contain an undertaking by the partnership that its membership will not change (and if it does change, the change will be a Material Reason) save where (i) any exiting partner is released from partnership liabilities owed to the counterparty to the relevant Agreement; and (ii) any incoming partner becomes a joint creditor and debtor in respect of the partnership assets and liabilities including any partnership assets and liabilities with respect to the counterparty to the relevant Agreement.

1.7 **Additional Assumption**

1.7.1 Because set-off rights would or may be affected by a change in membership of an English partnership, we assume that where the relevant Agreement is entered into with an English partnership that the members of the English partnership remain constant for every dealing between the counterparty and the English counterparty.

1.8 **Additional Opinion**

1.8.1 Types of Insolvency Procedures applicable to partnerships (under the Insolvent Partnerships Order 1994 (as amended)) include the following:

(a) Voluntary Arrangements:

(i) for insolvent partnerships (Article 4); and

(ii) for members of insolvent partnerships (Article 5).

(b) Administration (Article 6).

(c) Winding up of insolvent partnership as an unregistered company on petition of a creditor where there are:

(i) no concurrent petition(s) against partner(s) (Article 7); and

(ii) concurrent petition(s) presented against one or more partner(s) (Article 8).

(d) Winding up of insolvent partnership as an unregistered company on petition of a partner where there are:

(i) no concurrent petition(s) presented against partner(s) (Article 9); and

(ii) concurrent petition(s) presented against all partner(s) (Article 10).

(e) Bankruptcy by joint petition of partners without winding-up of partnership (Article 11).

1.9 **Additional Qualifications**

1.9.1 It is not permissible to set off non-mutual debts or obligations under the Insolvency Set-Off Rules or section 323 of the Insolvency Act 1986 (each an "Insolvency Set-Off Rule"). A debt owed by a partner personally cannot, therefore, be set-off under an Insolvency Set-Off Rule against a debt owed by the creditors of the partnership. Under the insolvency laws of this jurisdiction, the Insolvency Set-off Rules are of mandatory application and will thus override any contractual provision to the extent that such provision is inconsistent with them. Debts owed by or to individual partners cannot be set-off against joint debts owed to or by the partnership because of absence of mutuality. Where mutuality exists, for example where there is a jointly owed claim against the partnership and jointly owed counterclaim by the partnership against the person claiming the debt, set-off under an Insolvency Set-Off Rule may occur.

1.9.2 In a bankruptcy under Article 11 of the Insolvent Partnerships Order 1994, any dispositions of the Insolvent Party's property made after the day of presentation of a bankruptcy petition or making of a bankruptcy application in respect of such Party are void under Section 284 of the Insolvency Act 1986 unless the court otherwise orders.

1.9.3 Article 4(1) of the Insolvent Partnerships Order 1994 applies the provisions of Part I of, and Schedule A1 to, the Insolvency Act 1986 which govern company voluntary arrangements, with appropriate modifications, to insolvent partnerships so that an insolvent partnership is entitled to propose a partnership voluntary arrangement. Both corporate and individual members of a partnership may enter into voluntary arrangements. The courts may not sanction a partnership voluntary arrangement unless every creditor of the partnership of whose claim and address the person summoning the meeting is aware is given notice of the qualifying decision procedure. The partnership voluntary arrangement binds every person who in accordance with the rules had notice of and was entitled to vote in the qualifying decision procedure. Approval of the creditors' qualifying decision procedure does not require unanimity of the affected creditors, whether or not present at the meeting. Furthermore, as a partnership may be wound up as an unregistered company, it may be possible for the court to sanction a scheme of arrangement in respect of its creditors or some of them. The court would not sanction a scheme of arrangement unless reasonable efforts were made to notify the creditors whose rights would be affected by the scheme of the meeting to approve that scheme and those voting fairly represented the interests of the creditors entitled to vote.

1.9.4 Such arrangements could affect both set-off rights of creditors and the value of claims which the creditors may have against the Insolvent Party. Any provision of such an arrangement which purports to unwind the application of the netting provisions would not bind the affected creditor if timely objection to the arrangement is made to the applicable court on the basis that it unfairly prejudices the interests of the creditor and the court grants an order the revoke the arrangement.