

## NETTING ANALYSER LIBRARY

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19 December 2013

Dear Sirs

### **LCH.Clearnet SA/Prudential Regulation/CCP interim opinion**

You have asked us to give an opinion in respect of the laws of France ("**this jurisdiction**") as to the effect of certain netting and set-off provisions and collateral arrangements in relation to the *Banque Centrale de Compensation*, whose commercial name is LCH.Clearnet S.A. (the "**Clearing House**"), as between the Clearing House and its clearing members (each a "**Member**").

We understand that your requirement is for the enforceability and validity of such netting and set-off provisions and collateral arrangements to be substantiated by a written and reasoned opinion letter.

References herein to "**this opinion**" are to the opinion given in paragraph 3.

#### **1. TERMS OF REFERENCE**

- 1.1 Except where otherwise defined herein, terms defined in the Rules have the same meaning in this opinion letter.
- 1.2 The opinions given in paragraph 3 are in respect of a Member's powers under the Clearing House Documentation as at the date of this opinion. We express no opinion as to any provisions of the Rules other than those on which we expressly opine.
- 1.3 Where Transactions are governed by laws other than the laws of this jurisdiction, the opinions contained in paragraph 3 are given in respect of only those Transactions

which are capable, under their governing laws, of being terminated and liquidated in accordance with the provisions of the Netting Provisions.

- 1.4 The opinions given in paragraph 3.8 (*Non-cash Collateral*) are given only in relation to Non-cash Collateral comprising securities credited to an account on a full title transfer basis or under the Pledge Agreement.

1.5 **Definitions**

In this opinion, unless otherwise indicated:

- 1.5.1 **"ACPR"** means the *Autorité de contrôle prudentiel et de résolution*;
- 1.5.2 **"Additional Contribution Amount"** has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.3 **"Admission Agreement"** has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.4 **"Admitted Person"** has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.5 **"Affected Clearing Member"** has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.6 **"Allied Clearing House"** has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.7 **"Assessment Liability"** means a liability of a Member to pay an amount to the Clearing House (including a contribution to the assets or capital of the Clearing House, or to any default or similar fund maintained by the Clearing House), but excluding:
- (a) any obligations to provide margin or collateral to the Clearing House, where calculated at any time by reference to Transactions open at that time;
  - (b) membership fees, fines and charges;
  - (c) reimbursement of costs incurred directly or indirectly on behalf of or for the Member or its own clients;
  - (d) indemnification for any taxation liabilities;
  - (e) payment or delivery obligations under Transactions; or

- (f) any payment of damages awarded by a court or regulator for breach of contract, in respect of any tortious liability (*responsabilité délictuelle*) or for breach of statutory duty;
- 1.5.8 "**Cash Collateral**" means title transfer of cash by way of a wire transfer to the beneficiary's cash account. "Cash Collateral" does not include any collateral made otherwise and by title transfer of cash, such as transfers of securities or other negotiable instruments or pledges of any assets;
- 1.5.9 "**CDS**" means any credit default swap transaction;
- 1.5.10 "**CDS Admission Agreement**" has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.11 "**CDS Clearing Rule Book**" means the CDS clearing rule book in its final English version dated 9 December 2013 as published on the website of the Clearing House and in force as at the date of this opinion. The CDS Clearing Supplement does not form part of the CDS Clearing Rule Book and accordingly is not subject to this opinion letter;
- 1.5.12 "**CDS Clearing Rules**" means the CDS Clearing Rule Book and the Procedures;
- 1.5.13 "**CDS Clearing Service**" has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.14 "**CDS Default Fund**" means the default fund established and maintained in accordance with Title IV, Chapter IV of the CDS Clearing Rule Book;
- 1.5.15 "**CDS Default Fund Amount**" means the amount of CDS Default Fund as required pursuant to the CDS Clearing Rules;
- 1.5.16 "**CDS Termination Amount**": means the Termination Amount in respect of the CDS Clearing Rule Book;
- 1.5.17 "**Civil Code**" means the French *code civil*;
- 1.5.18 "**Clearing Agreement**" means a Model Form Clearing Agreement or an Equivalent Clearing Agreement;
- 1.5.19 "**Clearing House Documentation**" means the Clearing Agreement, Pledge Agreement and Rules;
- 1.5.20 "**Client**" has the meaning ascribed to it in the Derivatives Clearing Rule Book;

- 1.5.21 "**Clearing Services**" means any of: (a) the CDS Clearing Service; and (b) the Derivative Clearing Service;
- 1.5.22 "**Client Account**" means an account with the Clearing House opened at the request and in the name of the Member in order to register all Trade Legs corresponding to Transactions in Derivatives executed for the Member's Client(s);
- 1.5.23 "**Collateral Directive**" means the directive No. 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended;
- 1.5.24 "**Commercial Code**" means the French *code de commerce*;
- 1.5.25 "**Credit Institution WUD**" means the directive No. 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, as implemented into French law under articles L. 613–31–1 *et seq.* of the Financial Code;
- 1.5.26 "**Derivative(s)**" has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.27 "**Derivatives Clearing Rule Book**" means the clearing rule book applicable to the clearing of the Member's transactions in Derivatives, but excluding CDS, in its final English version dated 12 December 2013 as published on the website of the Clearing House and in force as at the date of this opinion;
- 1.5.28 "**Derivatives Clearing Rules**" means the Derivatives Clearing Rule Book, including all Instructions thereto;
- 1.5.29 "**Derivatives Clearing Services**" means services provided by the Clearing House pursuant to article 1.3.1.5 of the Derivatives Clearing Rule Book;
- 1.5.30 "**Derivatives Termination Amount**": means the Termination Amount in respect of the Derivatives Clearing Rule Book;
- 1.5.31 "**EMIR**" means the 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;
- 1.5.32 "**Equivalent Clearing Agreement**" means any agreement or other document entered into by or on behalf of a Member pursuant to which such Member agrees to be bound by the Rules as a Member but which contains no other

provisions which may be relevant to the matters opined on in this opinion letter;

- 1.5.33 "ESMA" means the European Securities and Markets Authority;
- 1.5.34 "Event of Default" means the opening of any Insolvency Proceeding or Failure to Pay;
- 1.5.35 "Failure to Pay" means the Member or, as the case may be, the Clearing House, failing at any time duly to comply with any of its obligations under the Rules or being likely to become unable to meet any of its obligations under such Rules;
- 1.5.36 "Financial Code" means the French *code monétaire et financier*;
- 1.5.37 "French Banking Separation Law" means the French law n° 2013-672 of 26 July 2013 on the separation and regulation of banking activities;
- 1.5.38 "House Account" means an account with the Clearing House opened at the request and in the name of a Member in order to register all Trade Legs corresponding to Transactions in Derivatives executed for the Member's own account;
- 1.5.39 "Insolvency Proceeding" has the meaning ascribed to it in Paragraph 3.1 (*Insolvency Proceedings*) below;
- 1.5.40 "Instruction" has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.41 "Model Form Clearing Agreement" means the template Admission Agreement and the template CDS Admission Agreement, in their final English version as published on the website of the Clearing House, in the form attached hereto at Annex 1;
- 1.5.42 "MTS Italy" has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.43 "Netting Provisions" means section 1.3.1 of the CDS Clearing Rule Book and chapter 4 ("*LCH Clearnet SA Default*") of Title I of the Derivatives Clearing Rule Book (*i.e.* articles 1.4.1.1 *et seq.* of the Derivatives Clearing Rule Book);

- 1.5.44 "**Non-cash Collateral**" means the non-cash collateral provided as margin to the Clearing House either: (i) on a full title transfer basis; or (ii) by way of a Belgian law security interest under the Pledge Agreement;
- 1.5.45 "**Party**" means any of the Clearing House and the relevant Member;
- 1.5.46 "**Pledge Agreement**" has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.47 "**Procedures**" has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.48 "**Regulated Market**" has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.49 "**Risk Committee**" has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.50 "**Rome I**" means the regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, as amended;<sup>1</sup>
- 1.5.51 "**Rule Book**": means any of the CDS Clearing Rule Book and the Derivatives Clearing Rule Book;
- 1.5.52 "**Rules**" means any of the CDS Clearing Rules and the Derivatives Clearing Rules;
- 1.5.53 "**Set-off Provisions**" means section 1.3.1 of the CDS Clearing Rule Book and chapter 4 ("*LCH Clearnet SA Default*") of Title I of the Derivatives Clearing Rule Book (*i.e.* articles 1.4.1.1 *et seq.* of the Derivatives Clearing Rule Book);
- 1.5.54 "**Settlement Finality Directive**" means the directive n°98/26/EEC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, as amended, as implemented into French law notably under articles L. 330-1 *et seq.* of the Financial Code;
- 1.5.55 "**Termination Amount**" means the single, net positive or negative amount, denominated in Euro and determined in accordance with the Rules;

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<sup>1</sup> The Rome I Regulation applies to contracts concluded on or after 17 December 2009 (article 28 of the Rome I Regulation). A choice of law made in a contract prior to 17 December 2009 will be subject to the 1980 Rome Convention on law applicable to Contractual Obligations.

- 1.5.56 "**Trade Leg(s)**" has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.57 "**Trading & Matching Platform**" has the meaning ascribed to it in the Derivatives Clearing Rule Book;
- 1.5.58 "**Transaction**" means any transaction in Derivatives or CDS which is registered at the Clearing House;
- 1.5.59 "**Unmargined Risk**" has the meaning ascribed to it in the CDS Clearing Rule Book;
- 1.5.60 references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy;
- 1.5.61 references to a "**Section**" or to a "**Paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be).

## 2. **ASSUMPTIONS**

We assume the following:

- 2.1 That, except with regards to the provisions discussed and opined on in this opinion letter, the Clearing House Documentation and Transactions are legally binding and enforceable against both Parties under their governing laws.
- 2.2 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Clearing House Documentation and Transactions; to perform its obligations under the Clearing House Documentation and Transactions; and that each Party has taken all necessary steps to execute and deliver and perform the Clearing House Documentation and Transactions.
- 2.3 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Clearing House Documentation and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Clearing House Documentation in this jurisdiction.
- 2.4 That both Parties have properly executed either: (i) the Model Form Clearing Agreement; or (ii) an Equivalent Clearing Agreement.



- 2.5 That, in the case of the opinion given at Paragraph 3.8.2 (*Transfer of Non-cash Collateral under the Pledge Agreement*) and when Non-cash Collateral is provided to the Clearing House as margin under the Pledge Agreement only, both Parties have properly executed the Pledge Agreement.
- 2.6 That the Clearing House Documentation and, where applicable, each security document has been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party. Neither Party at such time: (i) has ceased its payments (*cessation des paiements*) within the meaning of article L. 631-1 of the Commercial Code or article L. 613-26 of the Financial Code as applicable; or (ii) is or can be deemed to be, whether directly or indirectly, aware that the other party has ceased its payments (*cessation des paiements*) or, while it has not ceased its payments, faces difficulties that it is not able to overcome within the meaning of article L. 620-1 of the Commercial Code.
- 2.7 That each Party acts in accordance with the powers conferred by the Clearing House Documentation and Transactions; and that (save in relation to any non-performance leading to the taking of action by the Members under the Netting Provisions), each Party performs its obligations under the Clearing House Documentation and each Transaction in accordance with their respective terms.
- 2.8 That the Clearing House: (i) operates as a clearing house (*chambre de compensation*) within the meaning of article L. 440-1 of the Financial Code; and (ii) has been notified to the European Commission as a securities settlement system (*système de règlement et de livraison d'instruments financiers*) for the purposes of the Settlement Finality Directive.
- 2.9 That the Member:
- 2.9.1 has been validly admitted as a clearing member (*adhérent compensateur*) of the CDS Clearing Service and/or the Derivatives Clearing Services;
- 2.9.2 is a participant in the system operated by the Clearing House pursuant to and in accordance with article L. 330-1 of the Financial Code; and
- 2.9.3 is either licensed in France as a credit institution (other than a *société de crédit foncier* (SCF) governed by articles L. 515-13 *et seq.* of the Financial Code or a *société de financement de l'habitat* (SFH) governed by articles L. 515-34 *et seq.* of such code) or an investment services provider or has a comparable status within the meaning of article L. 211-36 of the Financial Code.



- 2.10 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing House Documentation, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing Agreement or Pledge Agreement.
- 2.11 That the Member is at all relevant times solvent and not subject to insolvency proceedings (including, for the avoidance of doubt, Insolvency Proceedings) under the laws of any jurisdiction.
- 2.12 That the obligations assumed under the Clearing House Documentation and Transactions are mutual between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it.
- 2.13 That there exists no other agreement or instrument (including *procédures* or *avis*) amending or otherwise affecting or being inconsistent with the provisions of the CDS Clearing Rule Book and the Derivatives Clearing Rule Book.
- 2.14 That the Pledge Agreement is valid, binding and enforceable in accordance with law chosen by the parties thereto to govern it, *i.e.* Belgian law, and qualifies as a financial collateral arrangement within the meaning of the Collateral Directive, as implemented by Belgian law.
- 2.15 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the creation and perfection of the security interests under the Rules pursuant to laws of any jurisdiction have been duly fulfilled, performed and effected.
- 2.16 That any cash comprising the Cash Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions. Such currency is not that of a country which is subject to United Nations' sanctions.
- 2.17 That the securities subject to a Non-cash Collateral are constituted solely of book entry securities within the meaning of article 2(1)(g) ('book entry securities collateral') of the Collateral Directive.
- 2.18 That none of the parties is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process.
- 2.19 That there are no rights of third parties in respect of the assets comprising the Cash Collateral or the Non-cash Collateral (as the case may be) nor any other impediments which would in any way affect the transfer of the Cash Collateral or the Non-cash Collateral, as the case may be, as contemplated by the CDS Clearing Service or the Derivatives Clearing Services, as the case may be.

- 2.20 That each Transaction gives rise to "instructions" within the meaning of article L. 330-1 of the Financial Code and "transfer orders" under the Settlement Finality Directive.
- 2.21 That the Member will have full legal title to any Non-cash Collateral immediately prior to posting to it, free and clear of any lien, claim, charge or encumbrance or any other interest of the Member or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system), without limitation, any restriction arising from any applicable client asset rules.
- 2.22 That the provision of Non-cash Collateral can be evidenced in writing or by electronic means and any other durable medium and such evidencing allows for the identification of the Non-cash Collateral (provided that, for this purpose, it is sufficient to prove that the book entry securities collateral has been credit to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account).
- 2.23 That the relevant Client Account and the relevant House Account are located in France.

### 3. OPINION

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in paragraph 4 below, we are of the following opinions.

#### 3.1 Insolvency Proceedings

3.1.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which the Clearing House could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are governed by Book VI of the Commercial Code, being the following:<sup>2</sup>

- (a) safeguard proceeding (*procédure de sauvegarde*) ("**Safeguard Proceeding**") governed by articles L. 620-1 *et seq.* of the Commercial Code;

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<sup>2</sup> Note that, in addition to Insolvency Proceedings, the Clearing House may become subject in France to the following pre-insolvency proceedings: (i) *Mandat ad hoc*, as provided for in article L. 611-3 of the Commercial Code; and (ii) conciliation proceeding (*procédure de conciliation*), as provided for in article L. 611-4 of the same code. The opening of a *mandat ad hoc* proceeding or a conciliation proceeding does not entail an automatic stay of payments or actions. Nevertheless, the competent court can order a stay of deferral of payments for a period of up to two years if a creditor has started legal action against the debtor (articles 1244-1 *et seq.* of the Civil Code). A conciliation proceeding only binds the parties to the conciliation agreement and remains confidential, save that where the conciliation agreement is acknowledged by the court (*homologué*) the terms thereof are no longer confidential.

- (b) accelerated financial safeguard proceeding (*procédure de sauvegarde financière accélérée*) ("**Accelerated Financial Safeguard Proceeding**") governed by articles L. 628–1 *et seq.* of the Commercial Code;
- (c) rehabilitation proceedings (*redressement judiciaire*) ("**Judicial Rehabilitation Proceeding**") governed by articles L. 631–1 *et seq.* of the Commercial Code; and
- (d) judicial liquidation (*liquidation judiciaire*) ("**Judicial Liquidation Proceeding**") governed by articles L. 640–1 *et seq.* of the Commercial Code.

3.1.2 As a French credit institution, the Clearing House is subject to the supervision and control of the ACPR. Under article L. 613–27 of the Financial Code, Insolvency Proceedings may only be opened against a credit institution by a French commercial court having jurisdiction following the prior consent (*avis conforme*) of the ACPR. Under article L. 613–34 of the Financial Code, the ACPR may, among other things, designate a provisional administrator (*administrateur provisoire*) either at the request of the directors of the credit institution or upon its own initiative when the management of such credit institution cannot be pursued under normal conditions or when it has been subject to disciplinary sanctions. Such provisional administrator shall manage the activities of the credit institution concerned. The ACPR also designates a liquidator (*liquidateur*) for a credit institution, in case a Judicial Liquidation Proceeding is opened or pronounced. As the case may be, the liquidator may be entrusted with all powers of administration, management and representation of the relevant credit institution.

3.1.3 As a French credit institution, the Clearing House is also subject to the provisions of the Credit Institution WUD.

3.1.4 These procedures are together called "**Insolvency Proceedings**".

### 3.2 **Special provisions of law**

The following special provisions of law apply to Transactions by virtue of the fact that the Transactions are, or relate to, exchange-traded derivative products and are cleared through a central counterparty:

- 3.2.1 articles L. 440–1 *et seq.*, L. 330–1 *et seq.* and L. 211–36 *et seq.* of the Financial Code;
- 3.2.2 the AMF General Regulations (*Règlement général de l'AMF*); and

3.2.3 EMIR.

3.3 **Recognition of choice of law**

3.3.1 The choice of law provisions of the CDS Clearing Rule Book, the Derivatives Clearing Rule Book and the Pledge Agreement would be recognised under the laws of this jurisdiction, even if the Member is not incorporated, domiciled or established in this jurisdiction.

3.3.2 The choice of Belgian law to govern the Pledge Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in Belgium.

3.3.3 In "situations involving a conflict of laws", within the meaning of article 1.1 of the Rome I, a French court would apply article 3 (*Freedom of choice*) thereof and give effect to the choice of Belgian law to govern the relevant Pledge Agreement.

3.3.4 Such recognition would in any event be subject to all limitation provided for under the Rome I Regulation, in particular article 3.3 (on internal mandatory provisions of the law of the country in which all elements of the situation are located), article 9 (*Overriding mandatory provisions*) and article 21 (*Public policy of the forum*) thereof.

3.3.5 In addition, it should be noted that the scope and effect of a choice of law made by the parties is likely to be limited or contained by special conflict of laws rules applicable to specific matters and/or to specific situations, in particular in the context of Insolvency Proceedings.

3.3.6 Please also see our observations regarding the Pledge Agreement in Paragraph 3.8.2 (*Transfer of Non-cash Collateral under the Pledge Agreement*) below.

3.4 **Netting and Set-off: General**

3.4.1 *Netting Provisions*

(a) The Netting Provisions will be (and without fulfilment of any further conditions) enforceable in accordance with their terms so that, upon the occurrence of an Event of Default in relation to the Clearing House:

(i) the Member would be entitled to exercise its rights under the Netting Provisions applicable to such Clearing Service; and

- (ii) the Member would be entitled to receive or be obliged to pay only the net sum of the positive and negative mark-to-market values of the included individual Transactions under the relevant Clearing Service, together with other losses or gains referable to the Transactions under such Clearing Service.
- (b) We are of this opinion because article L. 330-1 of the Financial Code provides for the validity of netting and set-off provisions (*opérations de compensation*) between the Clearing House (as a "system used for the settlement and delivery of financial instruments" within the meaning of such provision) and a Member (as a direct participant of such system) and pursuant to the provisions of articles L. 211-36 through L. 211-40 of the Financial Code, no moratorium or stay under an Insolvency Proceeding affecting the Clearing House would prevent, delay or otherwise affect the exercise of such rights by the Member.
- (c) Pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against the Clearing House would not affect the exercise of netting and set off rights by the Member. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a French credit institution shall not affect the right of creditors to demand the set-off of their claims against the claims of such credit institution, where such a set-off is permitted by the law applicable to the credit institution's claim. French law permits such set off, notably for the reasons explained above.
- (d) In addition to the above, pursuant to article L. 613-31-5-4°, netting agreements ("conventions de compensation") are exclusively governed by the law applicable to the contract governing such agreement (i.e. French law in our case), and accordingly, an Insolvency Proceeding in respect of the Member should not affect such netting agreement.

However, attention is drawn to the fact that the exercise of such rights of the Member may be subject to a cure period. Indeed, article 1.3.1.1 of the CDS Clearing Rule Book provides that the exercise of such rights may be affected by the fulfilment of the cure period, when applicable. According to such provision, "constitute an *LCH Default*: (i) *LCH.Clearnet SA has failed to make a payment, or to redeliver Eligible Collateral when such payment or redelivery is due and*

*payable in accordance with the CDS Clearing Documentation, to a Clearing Member (other than to a Defaulting Clearing Member or in accordance with the first paragraph of Article 1.2.9.2) under any Cleared Transaction and such failure has not been cured by 17.00 on the third Business Day after the date on which notice of such failure is given by the Clearing Member to LCH.Clearnet SA ". In the same vein, article 1.4.1.1 of the Derivatives Clearing Rule Book provides that: "an LCH.Clearnet SA default shall occur if at any time: (...) LCH.Clearnet SA fails to make a payment due by LCH.Clearnet SA to a Clearing Member (other than to a Defaulting Clearing Member): under any novated Transaction and such failure has not been cured within 30 days from the date when the obligation to pay falls due (...)"*.

3.4.2 *Set-off Provision*

- (a) The Set-off Provision will be (and without fulfilment of any further conditions) enforceable in accordance with its terms so that upon the occurrence of an Event of Default in relation to the Clearing House :
  - (i) the Member would be entitled to exercise its rights in relation to a given Clearing Service, under the Set-Off Provisions applicable to such Clearing Service; and
  - (ii) any and all amounts owed by the Member to the Clearing House (including the Termination Amount (once calculated) and initial margin) under a given Clearing Service would be set off against any such amounts owed by the Clearing House to the Member under such Clearing Service where "any and all amounts" include in particular, sums posted as Collateral (as defined by the Rules) to the Clearing House by the Member, and sums posted as Collateral (as defined by the applicable Clearing Rules) by the Clearing House to the Member, including Variation Margins (as defined by the Rules) (where Variation Margin constitutes Collateral under the applicable Clearing Rules).
- (b) We are of this opinion for the same reasons as expressed in Paragraph 3.4.1 (*Netting Provisions*) above.

3.4.3 *Set-off between the CDS Termination Amount and the Derivatives Termination Amount*



- (a) Neither Rule provide for a set-off between the CDS Termination Amount and the Derivatives Termination Amount. Therefore, article L. 211-36-1 of the Financial Code according to which: "*The parties may provide for a single balance to be established regardless of whether these financial obligations are governed by one or more agreements or framework agreements*" would not apply, and relevant regime set forth by article L. 211-36 through L. 211-40 of the Financial Code (as to which please see Paragraph 3.4.1 (b)(i) above) would not benefit to the Member in this respect; and

the general rules applicable to set-off will apply. Accordingly, pursuant to article L. 622-7 of the Commercial Code, any payment of debts having arisen before the start of Insolvency Proceedings is strictly prohibited. As it is viewed as a means of payment, set-off falls within the scope of such prohibition. However, article L. 622-7 of the Commercial Code provides for an exception to such prohibition with respect to set-off between related or connected debts (*dettes connexes*) being exercised after the start of Insolvency Proceedings, provided however that the claims of the non-insolvent party against the insolvent party have been duly filed with the relevant insolvency officer (*déclaration de créances*)<sup>3</sup>. French case law holds that obligations are connected when resulting from one contract or when carried out pursuant to one and the same contract which has defined the framework of the business relationship of the parties such as a master agreement<sup>4</sup>, or when, in the absence of a master agreement, the obligations are carried out pursuant to different contracts which constitute a single global contractual arrangement.<sup>5</sup> Accordingly it is doubtful that the obligations in relation to the Transactions between the Clearing House to the Member under the CDS Clearing Rule Book and the obligations in relation to the Transactions between the Member and the Clearing House, under the Derivatives Clearing Rule Book, would be regarded as connected in accordance with the rules set out in article L. 622-7 of the Commercial Code, in the absence of a master agreement or a contractual arrangement linking the Rule Books together<sup>6</sup>. As a consequence, in the event that Insolvency Proceedings would be

<sup>3</sup> Article L. 622-24 of the Commercial Code.

<sup>4</sup> Cass. com. 12 December 1995.

<sup>5</sup> Cass. Com. 5 April 1994; 9 May 1995; 1 April 1997 and 31 March 1998.

<sup>6</sup> Note that, according to article L. 440-1 of the Financial Code, the legal relationships between the Clearing House and the Member are of contractual nature



commenced against the Clearing House, we believe that set-off would not apply between the CDS Termination Amount and the Derivatives Termination Amount.

### 3.5 Netting and Set-Off: House Accounts and Client Accounts

3.5.1 House Accounts and Client Accounts shall be opened in relation to each of CDS Clearing Service and the Derivatives Clearing Services. The Clearing House opens House Accounts and Clients Accounts:

- (a) in relation to Derivatives Clearing Services, in accordance with the provisions of Chapter 2 of the Title 3 of the Derivatives Clearing Rule Book; and
- (b) in relation to CDS Clearing Service, respectively in accordance with the provisions of Chapter 2 of Title 3 and Chapter 2 of Title 5 of the CDS Clearing Rule Book.

3.5.2 In accordance with article 39.4 of EMIR, articles 3.2.1.9 and 3.2.3.4 provide for segregation between Client Accounts and House Accounts.<sup>7</sup>

3.5.3 Likewise, in respect of Margin Accounts related to the CDS Clearing Service, article 4.1.1.1 of the CDS Clearing Rule Book provides that: "*for each Clearing Member, all calculations and determinations (including calculation of the House Margin Requirement, Client Margin Requirement, House Variation Margin Requirement and Client Variation Margin Requirement) performed by LCH.Clearnet SA pursuant to Title IV, Chapter 2 and Sections 2 and 3 of the Procedures shall be undertaken separately in respect of its House Margin Account and each of its Client Margin Accounts, notwithstanding that in respect of its Client Margin Accounts, LCH.Clearnet SA will: (i) require a Clearing Member to transfer Collateral to meet its Total Client Margin Requirement and/or make Cash Payments where the Total Client Variation Margin Requirement is due to LCH.Clearnet SA; and/or (ii) make Cash Payments to a Clearing Member where the Total Client Variation Margin Requirement is due to such Clearing Member, in accordance with Sections 2 and 3 of the Procedures.*" Similarly, article 4.2.3.2 of the CDS Clearing Rule Book provides that: "*All payments required to be made, in accordance with this article 4.2.3.2, will be netted in the manner set out in Section 3 of the Procedures*". In this respect, paragraph 3.7 (e) of Section 3 of

<sup>7</sup> Article 39.4 of EMIR states that "A CCP shall offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients ('individual client segregation')".

the Procedures (dated 9 December 2013) provides for a calculation of Margins to be made on a gross basis, separately, in respect of the House Margin Account, and in respect of the Client Margin Accounts, of a same Member.

3.5.4 Similarly, article 1.4.1.10 of the Derivatives Clearing Rule Book provides that: "*Neither LCH.Clearnet SA nor a Clearing Member, as the case may be, shall be permitted to effect payment netting between the House Termination Amount on the one hand and the Client Termination Amounts on the other hand.*"

3.5.5 Finally, these rules shall be interpreted in the light of article 39.9(b) of EMIR which provides that "*the netting of positions recorded on different accounts is prevented*". More generally, article 39.9(a) of EMIR requires assets and positions to be recorded in separate accounts, and does not provide for any exemption hereof. Moreover, article 39.9(c) of EMIR provides that: "*the assets covering the positions recorded in an account are not exposed to losses connected to positions recorded in another account*".

### 3.6 **Netting and Set-Off: Cross-Product Netting**

3.6.1 Subject to Paragraph 3.5 (*Netting and Set-Off: House Accounts and Client Accounts*) above, with respect to the each Clearing Service, the effect of the relevant Netting Provisions is to apply close-out netting to all Transactions cleared by the Member with the Clearing House, under the Clearing Service concerned.

### 3.7 **Cash Collateral**

3.7.1 With respect to the CDS Clearing Service, in accordance with article 3.2.3.1 of the CDS Clearing Rule Book: "*Cash Collateral provided by Clearing Members to satisfy its House Margin Requirements and its House Excess Collateral if any will be provided by way of full title transfer (...)*." Similarly, with respect to the Derivatives Clearing Services, article 7 of Instruction IV.4-1 of the Clearing House provides that: "*As a principle, the Collateral LCH.Clearnet SA is provided with in order to secure the Clearing Members' financial obligations shall be transferred in full ownership.*"

3.7.2 In addition, with respect to the CDS Clearing Service, each Member will be required to make cash payments to meet its variation margin obligations in respect of each of its margin accounts provided that such amounts are due and payable, in accordance with article 4.2.5.1 of the CDS Clearing Rule Book. Likewise, with respect to the Derivatives Clearing Services, article 4.2.0.1 of

the Derivatives Clearing Rule Book provides that the Clearing House shall debit or credit variation margin on a daily basis.

- 3.7.3 Consequently, cash margin (whether initial margin or variation margin) would constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the Clearing House, such cash would be treated as the property of the Clearing House though without being available to its creditors generally.
- 3.7.4 We are of this opinion because article L. 440–7 of the Financial Code, as amended by the French Banking Separation Law, expressly provides that deposits made by clearing members to a clearing house in the form of a financial collateral arrangement provided for in article L. 211-38 of the Financial Code, *i.e.* either by way of title transfer or by way of a security interest or any other form as provided for by the clearing rules.
- 3.7.5 Article L. 440–7 of the Financial Code further provides that no creditor of a clearing house may avail himself of any right whatsoever over such deposits, even on the basis of Insolvency Proceedings affecting the Clearing House.
- 3.7.6 Furthermore, article 541-23 of the general regulation of the French Financial Markets Authority (*Autorité des Marchés Financiers*) provides that clearing houses calculate and call the sums of money that clearing members must remit to cover or guarantee their commitments or positions. Such sums encompass initial margin, variation margin and, generally, all types of security deposit.
- 3.7.7 Under each Rule Book, Cash Collateral will be taken into account by each Member in the calculation of the Termination Amount(s) relating to the Clearing Service governed by such Rule Book:
- (a) Under the CDS Clearing Rule Book, in respect of the Client Accounts of a Member, in accordance with the first indents (i) and (ii) of article 1.3.1.6 thereof, which indeed respectively provide that the Member shall take into account:
- (i) the "*repayment by the Clearing Member or LCH.Clearnet SA of Variation Margin in respect of Open Positions registered in the corresponding Client Margin Account*"; and
- (ii) the "*value of the repayment or redelivery by LCH.Clearnet SA of all Collateral recorded in the relevant Client Collateral Account (including any Collateral transferred (or due to be*

*transferred) to the relevant Client Collateral Account by LCH.Clearnet SA pursuant to Article 1.3.1.3(iv)) in respect of such Client Cleared Transactions, as the case may be, in each case without applying any haircuts to the valuation of the Collateral",*

in the calculation of the Termination Amount in respect of each of its Client Accounts; and

(b) in respect of the House Account of a Member, the second indents (i) and (ii) of article 1.3.1.6 of the CDS Clearing Rule Book respectively provide that the Member shall take into account:

- (i) the "*repayment by the Clearing Member or LCH.Clearnet SA of Variation Margin in respect of Open Positions registered in its House Margin Account*"; and
- (ii) the "*value of the repayment or redelivery by LCH.Clearnet SA of all Collateral recorded in its House Collateral Account in respect of such House Cleared Transactions, without applying any haircuts to the valuation of the Collateral*",

in the calculation of the Termination Amount in respect of its House Account.

3.7.8 Likewise, under the Derivatives Clearing Rule Book, indent (ii) of article 1.4.1.5 thereof provides that the Member shall take into account the "*value of all other amounts which it owes to LCH.Clearnet SA and which LCH.Clearnet SA owes to it, in each case whether future, liquidated or unliquidated, actual or contingent*". For the purpose of this calculation, the Member shall determine "*the value of all Collateral that, as of the Termination Date, LCH.Clearnet SA is due to return to it in accordance with the Clearing Rules without applying any haircuts to such valuation*". Given the broad meaning of the expression "*all other amounts*", we believe that any amount owed in respect of variation margin obligations would be included in the Termination Amount(s) calculated with respect to the Derivatives Clearing Services.

3.7.9 In addition to the foregoing, with respect to the Derivatives Clearing Services, article 8 of Instruction IV.4-1 (*Collateral accepted to meet Margin requirements*) provides that: "*The transfer in full ownership of cash transferred as Collateral to LCH.Clearnet SA occurs when the relevant accounts are credited.*" To this end, article 9 of such instruction provides that

payments in euro are performed through the Clearing House's access to the Ancillary System Interface of TARGET2 for final payment in TARGET2 and credited on a TARGET2 account opened in the name of the Clearing House in the books of Banque de France, within the time limits set-up in a notice. Similarly, article 5 of Instruction IV.4-2 (*Cash Payments*) provides that variation margin shall be paid in cash denominated in euro through the Clearing House's access to the Ancillary System Interface of TARGET2 for final payment in TARGET2.

- 3.7.10 Article 12 of Instruction IV.4-1 further provides that: *"The payments in other currencies than Euro are credited on accounts opened in the name of LCH.Clearnet SA with the Central Securities Depositories of Reference, Securities settlement systems, national central banks or commercial banks described in Annex 1, in compliance with the time limits set-up in a Notice, on the day of issuance of the situation report. This solution does not apply to the Intra-day Margin call."*
- 3.7.11 If Cash Collateral is due to be returned by the Clearing House to the Member, such Member would have a claim against the Clearing House for the return of such Cash Collateral. Such claim would benefit from the protection of articles L. 440-7, indent 2 and L. 440-8 of the Financial Code, which provide that no creditor of the ordering client (*donneur d'ordre*), of a member of a clearing house, of an investment service provider, or, if applicable, of the clearing house itself or a court-appointed official (*mandataire de justice*) may rely on any right whatsoever over deposits made by clearing members to a clearing house, even on the basis of Part I or Part II of Book VI of the Commercial Code (*i.e.* on the basis of Insolvency Proceedings).

### 3.8 Non-cash Collateral

- 3.8.1 Transfer of Non-cash Collateral on a full title transfer basis
- (a) With respect to the CDS Clearing Service, article 3.2.3.2 of the CDS Clearing Rule Book provides that: *"At the option of each Clearing Member, and in accordance with Section 3 of the Procedures, Eligible Collateral may be transferred by the relevant Clearing Member to LCH.Clearnet SA to satisfy its House Margin Requirement or to create House Excess Collateral, either on a full title transfer basis pursuant to Article L. 440-7 of the French Monetary and Financial Code, or by way of a Belgian law security interest with no title transfer pursuant to the applicable provisions of Belgian law."*

- (b) Similarly, with respect to the Derivatives Clearing Services, article 7 of Instruction IV.4-1 of the Clearing House provides that: "*As a principle, the Collateral LCH.Clearnet SA is provided with in order to secure the Clearing Members' financial obligations shall be transferred in full ownership.*" Article 17 of Instruction IV.4-1 of the Clearing House further provides that: "*The transfer in full ownership of Securities as Collateral to LCH.Clearnet SA occurs when the relevant accounts are credited, in accordance with articles L. 440-7 and L. 440-8 of the [Financial Code] (...)*".
- (c) Any securities provided on a full title transfer basis to the Clearing House as cover for margin and constituting Non-cash Collateral would be treated as the property of the Clearing House and accordingly, the Member would only have a claim for the return of the same against the Clearing House, subject to the Member satisfying its obligations to the Clearing House.
- (d) This is because article L. 440-7 of the Financial Code referred to above, which has been amended by the French Banking Separation Law, provides that "*deposits posted by clients with (...) members of a clearing house or posted by the said members with a clearing house to cover or guarantee positions on financial instruments take the form of a financial collateral arrangement referred to in article L. 211-38 or any other form provided for in the operating rules.*"
- (e) However, the value of the Non-cash Collateral would constitute a debt owed by the Clearing House to the Member. The value of Non-cash Collateral shall be effectively taken into account by the Member in the calculation of any amount owed by the Clearing House to the Member in case of an Event of Default in relation to the Clearing House. In the event of Insolvency Proceedings relating to the Clearing House, concerning the enforceability of the Netting Provisions and the Set-off Provision with respect to CDS Clearing Service and the applicable general French insolvency rules relating to the termination and set-off with respect to the Derivatives Clearing Services, please refer to paragraph 3.4 (*Netting and Set-off: General*) above.
- (f) With respect to the Derivatives Clearing Services, we should note that article 17 of Instruction IV.4-1 of the Clearing House further provides that: "*the Securities shall be credited on accounts opened in the name of LCH.Clearnet SA with the Central Securities Depositories of Reference, Securities settlement systems, national central banks or*



*commercial banks described in Annex 1 [of such Instruction], on the day when the situation report has been issued, within the time limits set out in a Notice."*

- (g) In the same vein, with respect to the CDS Clearing Service, paragraph 3.4 (d) of Section 3 ("*Collateral and cash payment*") of the Procedures (dated 9 December 2013) provides that, save in respect of the Belgian law security interest under the Pledge Agreement (*on which please see paragraph 3.8.2 below*), "*Eligible Collateral must be provided by way of full title to be recorded in any of its Collateral Accounts, in which case the relevant securities will be transferred with LCH.Clearnet SA, its nominated custodian or Central Securities Depository by instruction through Euroclear Bank or ESES (Euroclear France) (...)*".

### 3.8.2 Transfer of Non-cash Collateral under the Pledge Agreement

In respect of securities provided by way of a Belgian law security interest under the Pledge Agreement, French law does not prevent a Member from providing Collateral (in the form of securities) through the Pledge Agreement. Indeed, for the purposes of giving full effect to the provisions of EMIR, French Banking Separation Law has amended article L. 440-7 of the Financial Code to clarify that collateral may be provided by clearing members to a clearing house in the form of a financial collateral arrangement (*garantie financière*) provided for in article L. 211-38 of the Financial Code, i.e. either by way of title transfer or by way of a security interest (*constitution de sûreté*).

## 3.9 Members' Assessment Liabilities

A Member's Assessment Liability is as follows.

### 3.9.1 With respect to the CDS Clearing Service

- (a) In accordance with Section 6 of the Procedures ("*Default Fund*") (dated 9 December 2013), the CDS Default Fund shall be at least equal to Euro 100 million, but is not capped at a specific amount.
- (b) Under article 4.4.1.3 of the CDS Clearing Rule Book and in accordance with Section 6 of the Procedures (dated 9 December 2013), a Member's contribution to fund the CDS Default Fund shall be equal to the greater of:



- (i) such Member's proportionate share of the CDS Default Fund Amount, each Member's proportionate share being based on its Unmargined Risk; and
- (ii) a minimum contribution of Euro 100 million.

For each Member, where the initial calculation of its contribution to the CDS Default Fund yields an amount greater than the minimum contribution amount set out in Paragraph (ii) above, the Clearing House shall recalculate the Contribution Requirement of such Member such that each Member's Contribution Requirement is a proportionate share of the CDS Default Fund Calculation Amount.

- (c) Pursuant to articles 4.4.1.4 and 4.4.3.4 of the CDS Clearing Rule Book, upon the occurrence of an Event of Default with respect to a Member participating in the CDS Clearing Service, each Member has an unconditional obligation during the CDS Post-Default Period to pay a single Additional Contribution Amount to the CDS Default Fund if required to do so by the Clearing House.
- (d) Pursuant to article 4.4.1.8 of the CDS Clearing Rule Book, if a Member is subject to a material change in its business such that the Member's Margin Requirement is increased by 10% or more (other than as a result of Extraordinary Margin being called), the Clearing House may recalculate its Contribution Requirement.
- (e) In accordance with article 1.2.9.2 of the CDS Clearing Rule Book, if the Member fails to pay the contribution to the Clearing House, the Clearing House may withhold any payments it would otherwise be obliged to make under the CDS Clearing Rules to such Member up to the value of the contribution for so long this contribution remains unpaid. If the failure to pay the contribution is continuing, the Clearing House may determine that such failure constitutes an Event of Default in respect of such Member, in the conditions set forth in the CDS Clearing Rule Book and may take any of the measures in respect of such Member, including, among others, the termination of the Member's membership of the CDS Clearing Service.

### 3.9.2 With respect to the Derivatives Clearing Services

- (a) In accordance with article 4.3.0.1 of the Derivatives Clearing Rule Book, the Clearing House has established three separate default funds:

- (i) the "cash and derivatives Default Fund" which covers defaults of Admitted Persons authorised to clear Transactions on Securities and/or Derivatives product groups (excluding MTS Italy) or on Bluenext; and
- (ii) the "fixed income Default Fund" which covers defaults of Members authorised to clear Transactions executed on or reported by Trading & Matching Platforms and MTS Italy Regulated Market the
- (iii) the "Triparty Repo Default Fund" which covers default of Members authorised to clear Triparty Repos, within the meaning of the Derivatives Clearing Rule Book.

The below-described rules apply to each of these three default funds.

- (b) Pursuant to article 4.3.1.1 of the Derivatives Clearing Rule Book, a Member (or an Admitted Person) shall contribute *pro rata* its uncovered risk calculated by the Clearing House in accordance with Instructions IV.3-1 or IV.3-2.
- (c) Pursuant to article 4.3.3.1 of the Derivatives Clearing Rule Book, upon the declaration of an Event of Default with respect to a Member/Admitted Person participating in the Derivatives Clearing Service, each Member/Admitted Person shall be required to replenish its contribution in the same default fund to the required level in such time as notified by the Clearing House.
- (d) In accordance with article 4.5.2.2 of the Derivatives Clearing Rule Book, if the Member fails to make the contribution to the Clearing House may determine that such failure constitutes an Event of Default in respect of such Member, in the conditions set forth in the Derivatives Clearing Rule Book and may take any of the measures in respect of such Member, including, among others, the termination of the Member's membership of the Derivatives Clearing Service.
- (e) In respect of Allied Clearing Houses only, the above-mentioned rules regarding the default funds do not apply. In accordance with articles 2.1.1.6 and 2.1.1.7 of the Derivatives Clearing Rule Book, Instruction II.1-2 provides that the default fund contribution obligation, under article 4.3.0.1 *et seq.* of the Derivatives Clearing Rule Book, is replaced by an exchange between the Clearing House and the Allied

Clearing House of a specific adequate additional Margin calculated in accordance with the terms of this Instruction.

#### 4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications:

##### 4.1 Resolution powers of the ACPR

The Financial Code, as amended by the French Banking Separation Law, contains certain provisions which may affect our opinions expressed in this Opinion Letter, in particular the following:

- 4.1.1 As a credit institution and if and to the extent it would meet certain criteria to be determined by decree, the Clearing House may be subject to resolution measures ordered by the ACPR, if it were to fall, or (based on objective elements showing that it) were likely to fall, in the near term, into any of the following situations: (i) its own funds fall below the capital requirements upon which the maintenance of its license is conditioned; or (ii) it is unable to pay its debt or is likely to be unable to pay its debts whether immediately or in the near term; or (iii) it requires extraordinary public financial assistance.
- 4.1.2 Such resolution measures (the "**Resolution Measures**") which are governed by a new article L. 613-31-16-I of the Financial Code, may notably include:
- (a) the appointment by the ACPR of a provisional administrator, it being specified that, according to the French Banking Separation Law, any contractual provision providing that such appointment triggers an event of default would be void<sup>8</sup>;
  - (b) the transfer to a third party (the "**Receiving Entity**") of all or part of one or several business units (*branches d'activités*) of the Clearing House<sup>9</sup>; and/or (ii) the transfer to a bridge institution (*établissement-relais*) (the "**Bridge Institution**") of all or part of its assets, rights and obligations<sup>10</sup> (each of such measures being referred herein to as a "**Transfer**"). The French Banking Separation Law further provides that in case of Transfer, outstanding agreements relating to the business, assets, rights or obligations so transferred shall remain executory and may not be terminated nor give rise to any set off merely

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<sup>8</sup> Paragraph 2<sup>o</sup> of article L. 613-31-16-I.

<sup>9</sup> Paragraph 4<sup>o</sup> of article L. 613-31-16-I.

<sup>10</sup> Paragraph 5<sup>o</sup> of article L. 613-31-16-I.

as a result of such transfer, notwithstanding any contractual or statutory provisions to the contrary<sup>11</sup>; and

- (c) the suspension of close-out netting rights in relation to any contracts entered into by the Clearing House until 17:00 at the latest on the business day following the day of publication of the ACPR's decision.<sup>12</sup>

4.1.3 However, the effects of Resolution Measures may be subject to the following limitations or attenuations set out in the French Banking Separation Law:

- (a) assets, rights and obligations which are subject to a contract referred to article L. 211-36-1 of the Financial Code<sup>13</sup>, together with their ancillary rights, may be capable of being assigned or transferred only in whole, but not in part; and
- (b) a counterparty under such a contract may not be entitled to exercise its acceleration and close out netting rights thereunder on the sole ground of a Resolution Measure having been ordered by the ACPR<sup>14</sup>, unless such measure entails a Transfer, and such rights are exercised in relation to assets, rights and obligations governed by those contracts (as well as their ancillary rights) which are not assigned or transferred to the Receiving Entity or the Bridge Institution as the case may be<sup>15</sup> in which case such acceleration and close-out netting rights may be exercised against the credit institution subject to Resolution Measures.

## 4.2 Re-use of collateral

Pursuant to article L. 211-38-III of the Financial Code, the right for the collateral taker to reuse collateral assets is subject to the following conditions:

4.2.1 the right of re-use must be expressly set out in the collateral agreement;

4.2.2 the collateral taker must return equivalent collateral assets, *i.e.*:

- (a) in respect of securities, the securities returned to the collateral provider has an obligation to return securities issued by the same issuer or

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<sup>11</sup> Paragraphs 4 and 5° of article L. 613-31-16-I.

<sup>12</sup> Paragraph 14° of article L. 613-31-16-I.

<sup>13</sup> Essentially, derivative, securities lending or sale and repurchase (repo) contracts.

<sup>14</sup> However, this rule does not prevent such counterparty to exercise its acceleration and close-out netting rights against the Bridge Institution or the Receiving Entity on any other ground than such Resolution Measure.

<sup>15</sup> Article L. 613-31-16-IV.

debtor, forming part of the same issue or category and of the same nominal amount, currency and description or other assets, when the parties so provide, following the occurrence of any event relating to or affecting any financial instruments provided as financial collateral; and

(b) in respect of cash, the same amount in the same currency.

4.2.3 In accordance with article 39(8) of EMIR, the Clearing House shall have a right of use relating to the margins or default fund contributions collected *via* a security financial collateral arrangement, within the meaning of article 2(1)(c) of the Collateral Directive, provided that the use of such arrangements is provided for in the operating rules of the clearing house. In addition, EMIR further requires that the Member shall confirm its acceptance of the operating rules in writing. Finally, the clearing house shall publicly disclose that right of use, which shall be exercised in accordance with article 47 of EMIR.

4.2.4 Finally, attention is drawn to the fact that, pursuant to article 53(2) of EMIR, if the Clearing House enters into an interoperability arrangement with another clearing house, and only provides initial margins to such clearing house under a financial collateral arrangement, the receiving clearing house shall have no right of use over the margins provided by the other clearing house.

#### 4.3 Use of Collateral

Terms defined in the CDS Clearing Rules shall have the same meaning when used in this paragraph 4.3.

With respect to the CDS Clearing Service:

4.3.1 The use of the Collateral recorded in the House Collateral Account of an Affected Clearing Member

(a) The use of the Collateral recorded in the House Collateral Account to cover any losses incurred by LCH SA following the liquidation of an Affected Clearing Member's Client Cleared Transactions<sup>16</sup> raises the question as to whether it complies with the letter of article 39.9(c) of EMIR which provides that "the requirement to distinguish assets and positions with the CCP in accounts is satisfied where [...] (c) the assets

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<sup>16</sup> Article 4.3.3.1(i)(b)(C) of the CDS Clearing Rule Book applying due to cross-reference made to Article 4.3.3.1 in Article 1.3.1.6, second indent (ii).

covering the positions recorded in an account are not exposed to losses connected to positions recorded in another account".

- (b) In the Questions and Answers on EMIR published by the ESMA on 5 August 2013 (the "ESMA Q&A"), ESMA has taken the view that it was possible for a central counterparty to "*facilitate the use of surplus margin on a defaulted clearing member's house account (that would otherwise have been payable by the CCP to the estate of the clearing member) to meet any obligation of the clearing member in respect of losses on a client account of that clearing member*"<sup>17</sup>.
- (c) ESMA has justified this interpretation on the basis of: (i) the policy objective of article 39 of EMIR (as reflected in recital 64) to grant a high level of protection to clients; and (ii) article 45 of EMIR which provides that a central counterparty "*shall use the margins posted by a defaulting clearing member prior to other financial resources when covering losses*".
- (d) However, since the interpretation of ESMA, as expressed in the ESMA Q&A, is not binding upon a court, it cannot be excluded that a court takes a different view and considers that, on the basis of a literal interpretation of article 39(9)(c), the Collateral recorded in the House Collateral Account, which consist of assets covering positions recorded in the house account (*i.e.* the "House Trade Account" in the context of the CDS Clearing Rule Book), could not be exposed to losses connected to positions recorded in other accounts (*i.e.* the Client Trade Accounts in the context of the CDS Clearing Rule Book).

#### 4.3.2 The use of the Available Client Collateral Buffer of an Affected Clearing Member

- (a) The use of the Available Client Collateral Buffer to cover any losses incurred by LCH SA following the liquidation of an Affected Clearing Member's House Cleared Transactions<sup>18</sup> raises the question as to whether it complies with article 39.9(c) of EMIR, as quoted in Paragraph 4.3.1.

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<sup>17</sup> ESMA, Questions and Answers dated 5 August 2013, Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories, quest. 8(f)(1), p.32.

<sup>18</sup> Article 4.3.3.1(a)(B) of the CDS Clearing Rule Book applying due to cross-reference made to Article 4.3.3.1 in Article 1.3.1.6, second indent (ii).



- (b) Since the Client Collateral Buffer is meant to ease the novation of Client Trade Legs in the event there is insufficient Client Excess Collateral recorded in a particular Client Collateral Account, Question 8(f)(2) of the ESMA Q&A – which reads "*Can a CCP, with a clearing member's permission, use the clearing member's own assets (i.e. assets that were not posted by a client of the clearing member) to support the registration of client trades?*" – seems to address the issue raised by the use of the Client Collateral Buffer. However, in its response to this question, ESMA covers only the situation where the own assets of a clearing member is recorded in a client account to fulfil the margin requirements of such client account. In such a case, ESMA considers that, once collateral has been recorded in a client account, it "*could no longer be used to meet any losses on the defaulting clearing member's house account*". The Client Collateral Buffer works differently in the sense that it is never recorded in any Client Account Structure prior to the occurrence of a default of a Clearing Member. It is only used to allow the novation of Client Trade Legs until the following Collateral Call when the Clearing Member transfers sufficient Collateral into the relevant Client Collateral Account.
- (c) On the basis that it seems to us that ESMA does not directly address the situation of the Available Client Collateral Buffer, we believe that there are arguments to support the view that such use of the Available Client Collateral Buffer complies with article 39.9(c) on the basis that:
- (i) at the time of the LCH Default, the Available Client Collateral Buffer does not cover any Cleared Transactions of such Affected Clearing Member and, as a result, falls outside the scope of the prohibition set out in article 39.9(c); and
- (ii) in line with the arguments used by ESMA to justify the use of surplus margin on a defaulted clearing member's house account to meet losses on client accounts:
- (A) EMIR seeks to protect the assets of the clearing members' clients (as reflected in recital 64 of EMIR) and, as a result, require that the clients' assets be segregated from their clearing member's assets in the books and records of both the clearing members and the central counterparties. Indeed, the Buffer Collateral Account comprises solely Collateral transferred by a Clearing Member in its own name and for its own



account (as opposed to Collateral registered in Client Collateral Accounts which comprise Collateral transferred by the Clearing Member for the account of its Clients). Therefore, using the Available Client Collateral Buffer to cover losses incurred on House Cleared Transactions would not in any way affect the protection of the Clients' Collateral; and

- (B) Article 45 of EMIR prescribes the use of margins posted by a defaulting clearing member prior to other financial resources. Since the Available Client Collateral Buffer is solely comprised of a Clearing Member's own assets, it could be argued that LCH SA should be allowed to provide for the use of such Available Client Collateral Buffer to meet losses on House Cleared Transactions.
- (C) However, it cannot be totally excluded that a court takes the view that, since the Collateral registered in the Buffer Collateral Account is initially transferred by the Clearing Member to allow the novation of Client Trade Legs and potentially cover losses on Client Cleared Transactions, it may not be used, even for the portion equal to the Available Client Collateral Buffer, to cover losses connected to Cleared Transactions recorded in another account (*i.e.* the House Cleared Transactions in the present context). This interpretation may be further supported by the letter of the French version of article 39(9)(c) of EMIR which takes into account the purpose behind the transfer of assets ("*Actifs destinés à couvrir*")<sup>19</sup> while the English version only refers to the actual use of the a clearing member's assets ("assets covering the positions").

#### 4.4 Enforcement

Where the collateral benefits from the provisions of article L. 211–38 of the Financial Code relating to financial collateral arrangements, then no specific formalities are required for the sake enforcing the collateral, save however that article L. 211–38–II–3° of the Financial Code imposes that the enforcement is made at normal market

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<sup>19</sup> This phrase may be translated in English as "*assets intended to cover the positions*")

conditions in accordance with valuation terms that shall have been agreed upon the parties in the collateral arrangement.

#### 4.5 **Default interests and indemnities**

- 4.5.1 Pursuant to article L. 622–28 of the Commercial Code, interest ceases to accrue as of the date of the court decision ordering the commencement of the insolvency proceedings. This applies to contractual and statutory rates of interest including penalty interest and increase in rates of interest except in case of interest accruing on loans with a maturity of one year or more or in respect of deferred payment terms contracts with a maturity of one year or more. Accordingly, the inclusion in the calculation provided for in the Netting Provisions of interest accrued after the commencement of the insolvency proceedings might not be enforceable.
- 4.5.2 Under article 1152 of the Civil Code, French courts have discretion to decrease the amount of those agreed indemnities, damages and penalties which they regard as manifestly excessive.
- 4.5.3 A French court may in its discretion decline to give effect to any indemnity for legal costs incurred by an unsuccessful litigant.

#### 4.6 **Foreign law and jurisdiction**

- 4.6.1 If the performance of the provisions of the Pledge Agreement is contrary to French public policy as applicable in international matters (*ordre public international*), then French courts would refuse to give effect to those provisions. French law does not provide for a definition of French public policy as applicable in international matters (*ordre public international*) or of French mandatory rules (*lois de police*). Whether a rule belongs to one of these categories would be determined ex-post and on a case by case basis, by the courts and such a determination reflects a very unpredictable vision of what French courts consider public policy in international matters should be in the absence a general theory that may sustain the analysis.
- 4.6.2 Despite the parties' submission to the jurisdiction of the courts of Brussels, the parties to the Pledge Agreement may apply to French courts for such provisional or protective measures as may be available (such as provisional attachments on assets located in France, or summary proceedings to obtain an order for payment).

#### 4.7 Enforceability of claims

An enforceable obligation is an obligation of a type which the French courts enforce. This does not mean however that a French court would always order the defaulting party to comply with its obligations in accordance with the exact terms of the Clearing House Documentation and Transaction documents.

##### 4.7.1 *Specific performance*

Depending on the circumstances and the characteristics of a non-monetary obligation, the remedy of specific performance (*exécution en nature*) of that obligation may not be available in a French court, which often will only give remedies culminating in a judgment for the payment of money.

##### 4.7.2 *Good faith and abuse of rights*

The principles concerning inter alia good faith (*bonne foi*) and abuse of rights (*abus de droit*) in the performance of contracts may operate to limit the exercise of rights and powers under the Clearing House Documentation and Transactions or in certain cases may operate to impose liability on the party acting in breach of such principles.

##### 4.7.3 *Debt rescheduling*

In respect of payment obligations, a French court has power under articles 1244-1 to 1244-3 of the Civil Code to grant time to a debtor or reschedule its debts (in either case for a maximum period of two years), taking into account the position of the debtor and the needs of the creditor.

##### 4.7.4 *Judgment currency*

In the event of any proceedings being brought in a French court in respect of a monetary obligation expressed to be payable in a currency other than euro, a French court would probably render a judgment expressed as an order to pay, not such currency, but its euro equivalent at the exchange rate prevailing on the date of the judgment or, if the Court so decides at the request of the plaintiff, at the date of payment. French law requires that all debt claims in insolvency proceedings be converted into euro at an exchange rate determined by the court at the date of commencement of the proceedings.

4.7.5 *Force majeure, etc.*

Enforcement of non-monetary obligations may be restricted by certain general principles of French law including the rules relating to *force majeure* or *exception d'inexécution*.

4.7.6 *Judge's interpretation*

The judge in interpreting a contract is not limited to considering its express terms but may also take into account all relevant circumstances; his interpretation cannot, save in exceptional circumstances, be set aside by the *Cour de cassation*.

4.7.7 *Claims under French law*

Under French law, claims may become barred by effluxion of time (*prescription*) or may be or become subject to a defense of set-off (*compensation*) or counterclaim (*demande reconventionnelle*).

4.8 **Qualifications relating to special provisions of law**

The list of special provisions in paragraph 3.2 (*Special provisions of law*) above is not an exhaustive list of all French laws that may apply to the Clearing House Documentation and Transactions, their interpretation and enforcement (which, among other things, shall be subject to general principles of French contract law and laws particular to individual Members).

4.9 **Other qualifications**

4.9.1 In respect of the entering of any party into each Transaction, our opinion (including on the enforceability and effectiveness of the Netting Provisions and the Set-Off Provisions) relates only to the situation where at the time it entered into the Transaction or at the time it has delivered or transferred any collateral or made the payments thereunder and in each case before the formal commencement of any Insolvency Proceedings, neither Party: (i) has ceased its payments (*cessation des paiements*) within the meaning of article L. 631-1 of the Commercial Code or article L. 613-26 of the Financial Code as applicable; or (ii) was or could be deemed to be, whether directly or indirectly, aware that the other party has ceased its payments (*cessation des paiements*) or, while it had not ceased its payments, faced difficulties that it was not able to overcome within the meaning of article L. 620-1 of the Commercial Code.

- 4.9.2 The Reims Court of Appeal (*Cour d'appel de Reims*) held on 26 June 2012 that an insolvency representative (*administrateur judiciaire*) was entitled to terminate an FBF master agreement entered into by the insolvent party in accordance with the provisions of the Commercial Code related to Insolvency Proceedings. However, this decision has not been confirmed by the French highest judicial court (*Cour de cassation*).
- 4.9.3 The Clearing House Documentation as well as any Transactions documents, where not in the French language, may need to be translated into French by an official sworn translator (*traducteur juré*) if submitted as evidence in any proceedings before a French court.
- 4.9.4 Pursuant to article 55 of decree n° 2005-1677 of 28 December 2005, the court decision opening an insolvency proceeding enters into effect on the date when such judgment is rendered in public hearing. This has the effect of implementing such judgment as of 00:00 a.m. of such date of entry.
- 4.9.5 We express no opinion as to the effect of the provisions of the Clearing House Documentation which entitle a party to determine facts unilaterally and conclusively, or entitle it to act on the basis of such determinations; a French court may, therefore, not consider as conclusive the certificates, calculations or determinations which the Clearing House Documentation provides are to be conclusive.
- 4.9.6 No opinion (other than where expressly opined upon herein) is expressed or implied in relation to the accuracy of any representation or warranty given by or concerning any of the parties to the Clearing House Documentation or whether such parties or any of them have complied with or will comply with any covenant or undertaking given by them or the terms and conditions of any obligations binding upon them.
- 4.9.7 We express no opinion as to whether any Party has complied with any applicable provisions of Title II of EMIR and any delegated or implementing acts adopted thereunder in respect of anything done by it in relation to or in connection with any of the Clearing House Documentation. However, article 12(3) of EMIR provides that any infringement of the rules under Title II of EMIR "*shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract*", consequently any failure by a party to so comply should not make the Clearing House Documentation invalid or unenforceable.

- 4.9.8 In a decision dated 26 September 2012, the French supreme court (Cour de cassation) held that a jurisdiction clause giving, for the sole benefit of one party, an unrestricted right to select the courts of its choice, was contrary to the purpose of article 23 of EC Regulation No. 44/2001, on the basis that such provision was "*potestative*". The supreme court confirmed the decision of the Paris court of appeal that considered the jurisdiction clause (even though inserted in a contract governed by foreign law) to be without effect. The scope of such decision is yet to be ascertained and therefore there is some doubt as to whether jurisdiction clauses of this kind will be found to be effective by French courts. Based on the French supreme court decision mentioned above, where a party to an agreement (even though governed by foreign law) is vested with discretion as to the performance of its obligations and such discretion is not constrained by reference to objective factors or standards (*e.g.* an independent third party or commonly accepted market practice), such obligations may be nullified on the ground that they were assumed subject to a "*condition purement potestative*" or for lack of determination. The Supreme court casts also some doubts as to whether the enforceability of unbalanced clauses such as one-way netting clauses could be challenged on the ground of "*potestativité*", although, as already mentioned above, it is not possible to draw firm conclusions as the exact scope of such decision.
- 4.9.9 Because article 1.4.1.7 of the Derivatives Clearing Rule Book (which describes the calculation of amounts to be taken into account by reference to indent (ii) of article 1.4.1.5 of such Rule Book) only deals with Collateral but no other amounts (including for instance variation margin), there is a doubt as to whether the intention of indent (ii) of article 1.4.1.5 is to cover any other amount but Collateral. By contrast, section 1.3.1 of the CDS Clearing Rule Book is much clearer as it expressly refers to the variation margin as being included in the calculation of any Termination Amount.

There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention.

This opinion is given for the sole benefit of the Futures and Options Association (the "FOA"). This opinion may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

- (a) such of the FOA's members (excluding associate members) as subscribe to the FOA's opinions library and whose terms of subscription give them access to this opinion

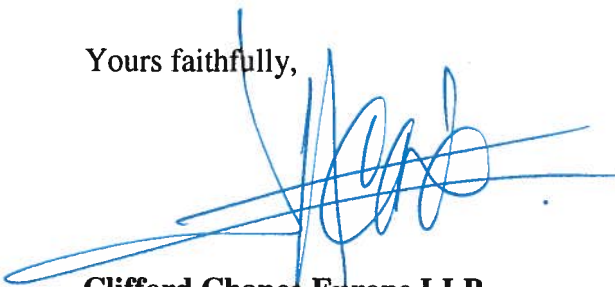


(each a "subscribing member") and the officers, employees, and professional advisors of such subscribing member;

- (b) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, and professional advisors of such affiliate;
- (c) any competent authority supervising a subscribing member or an affiliate of such subscribing member in connection with their compliance with their obligations under prudential regulation;
- (d) the officers, employees and professional advisors of the FOA; and

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made.

Yours faithfully,



**Clifford Chance Europe LLP**

Frédéric Lacroix

Avocat à la Cour, associé



**Annex 1: Model Form Clearing Agreement**



## ADMISSION AGREEMENT

BETWEEN

**"Banque Centrale de Compensation"**, a clearing house for Financial Instruments, with capital of € 113, 066 860,26 with its registered office at 18, rue du Quatre Septembre 75002 Paris, France, registered in the Commercial Register of Paris under the number 692 032 485, for the purposes hereof duly represented by \_\_\_\_\_, acting in the capacity of \_\_\_\_\_, ("**LCH.Clearnet SA** ")

ON ONE PART, and

\_\_\_\_\_, [with capital of \_\_\_\_\_], with its registered office at \_\_\_\_\_, recorded in \_\_\_\_\_, under the number \_\_\_\_\_, represented by M. \_\_\_\_\_, acting in the capacity of \_\_\_\_\_ and [by M. \_\_\_\_\_, acting in the capacity \_\_\_\_\_], ("**Clearing Member**")

ON THE OTHER PART

Collectively "**the Parties**"

WHEREAS:

### Preamble

LCH.Clearnet SA, as a Credit Institution duly authorised by the French Competent Authority for the purpose, is a clearing house for Financial Instruments.

In this capacity, within the framework of its statutory and regulatory prerogatives, LCH.Clearnet SA has established rules relating to its clearing activities hereinafter the "Clearing Rules".

The Clearing Member has been admitted to membership of LCH.Clearnet SA.

The admission application submitted by the Clearing Member specifies the membership category<sup>1</sup> and the Product Group<sup>2</sup> applied for.

Now therefore, the Parties have concluded the present Agreement.

<sup>1</sup> Individual Clearing Member or General Clearing Member

<sup>2</sup> Securities and/or Derivatives and/or Trading and Matching Platforms

## **1. PURPOSE**

**1.1** This Agreement sets out the terms and conditions on which LCH.Clearnet SA shall make available to the Clearing Member the activities set out in the Clearing Rules, and those on which the Clearing Member shall carry on its clearing activities.

**1.2** Signature of this Agreement supersedes and terminates any previous membership agreement which may have been in place between the Parties.

## **2. DEFINITIONS**

Terms used in this Agreement shall, unless specifically provided otherwise, have the meanings stipulated in the Clearing Rules.

## **3. DECLARATION AND UNDERTAKING**

**3.1** The Parties consider themselves as clearing professionals and declare that they have the resources and expertise required to perform the terms of this Agreement.

**3.2** The Clearing Member shall take all necessary steps regarding the technical access to LCH.Clearnet SA before starting activities under this Agreement.

## **4. MAIN OBLIGATIONS OF THE PARTIES**

Parties undertake to comply at all times with the Clearing Rules currently in force and as amended from time to time and with this Agreement.

## **5. COLLABORATION AND COMMUNICATION BETWEEN PARTIES**

**5.1** LCH.Clearnet SA undertakes to consult the Clearing Members, through their representatives bodies, on any change to the Clearing Rules, the Admission Agreement, contracts with LCH.Clearnet SA for the provision of related services and to any other element, having a major impact on the Clearing Members clearing and settlement activities falling within LCH.Clearnet SA's scope, prior to the implementation of such a change.

**5.2** This consultation shall not occur when it is impossible due to a case of extreme urgency requiring immediate action in order to preserve the interests of LCH.Clearnet SA and the Clearing Members. In this case, LCH.Clearnet SA shall send to the relevant representative body(ies) a notice giving the content of the change that has been implemented without them being consulted and describing the extreme urgency case as well as the interests at stake.

**5.3** LCH.Clearnet SA shall conduct the dialogue through existing representative organisations or any other existing or to be established bodies, according to the applicable terms of reference, which shall have experts available to discuss the matter in hand.

**5.4** As provided in Article 4, the Clearing Member shall be bound by any replacement, modification and amendment by LCH.Clearnet SA of the Clearing Rules, except in the event of timely and legally effective termination of this Agreement by the Clearing Member, with due observance of the termination procedure contained in the Clearing Rules.

**5.5** LCH.Clearnet SA shall use its best efforts to structure its Clearing Rules and organise its operations in such a way that all Clearing Members receive equality of treatment, without discrimination and irrespective of their residency.

**5.6** However, the Clearing Member acknowledges that regulatory issues, tax regimes, or applicable local or European law and other issues beyond the control of LCH.Clearnet SA may adversely affect the treatment that the Clearing Member does ultimately receive.

## **6. ACCOUNTS**

**6.1** The admission application shall detail the required Securities and cash accounts to be maintained by the Clearing Member.

**6.2** For Securities accounts, LCH.Clearnet SA may require the accounts to be held with a (international) central Securities depository or a Securities settlement system specified by LCH.Clearnet SA and for cash accounts the Clearing Members can choose to open its account in one of the commercial or central banks on the terms defined by LCH.Clearnet SA.

**6.3** The aforementioned accounts can be held either directly or through an agent holding an account in the relevant institution and who undertakes to fulfil the Clearing Member's obligation on the latter's behalf.

**6.4** The Clearing Member shall provide LCH.Clearnet SA with advance written notice of any change to details regarding any information regarding this Article.

**6.5** The Clearing Member or its agent, mandated to fulfil the Clearing Member's payment and/or delivery and/or Margin obligations towards LCH.Clearnet SA, shall provide a power of attorney granting LCH.Clearnet SA full power and authority to operate each such account. It shall maintain current such power and authority as long as this agreement remains in force.

## **7. FEES, COSTS AND PAYMENT TERMS**

**7.1** In consideration of the provision by LCH.Clearnet SA of central counterparty services, as described in the Clearing Rules, the Clearing Member shall pay LCH.Clearnet SA the fixed and variable commissions, costs, and fees.

**7.2** LCH.Clearnet SA may index or adjust those fixed and variable commissions, costs, and fees from time to time, taking into account certain factors such as its international competitive position and market developments. LCH.Clearnet SA shall give the Clearing Member reasonable prior notice of each such change.

**7.3** LCH.Clearnet SA directly debits the due and payable amounts from the relevant Clearing Member's accounts as described in Article 6. The Clearing Member receives an invoice describing those amounts.

If not, the Clearing Member shall pay within thirty (30) days upon receipt of the invoice or any other form of call from LCH.Clearnet SA.

**7.4** These sums shall be invoiced by LCH.Clearnet SA in euros excluding taxes (VAT at the legal rate in force in France to be added, when applicable).

**7.5** If the payment is not made in due time, the delay shall result in interest being charged at a rate equal to one and a half times the marginal lending rate fixed by the European Central Bank. The interest charge shall not imply any waiver of the right to damages due to late payment.

Furthermore, if the Clearing Member fails to pay the invoice in due time, LCH.Clearnet SA may suspend the fulfilment of their obligations as set out in this Agreement, however not until LCH.Clearnet SA has sent the Clearing Member a notice of failure and the period of payment

mentioned therein has lapsed without the full payment having been received.

LCH.Clearnet SA may assign its claim for payment to one or more third parties, in such a case and provided that the Clearing Member failed to pay in due time, in addition to the aggregate amount then due, it shall be liable for any reasonable legal or extra-legal collection costs incurred.

7.6 Payment shall be made without offset or postponement on any grounds whatsoever, except to the extent that an arbitration award or court decision has determined that the Clearing Member has a counterclaim eligible for offset or valid grounds for postponement.

## 8. WAIVER

No failure or delay by either Party in exercising any right or remedy provided by law under or pursuant to this Agreement shall prejudice such right or remedy or operate or be construed as a waiver or variation of it or preclude its exercise at any subsequent time and no single or partial exercise of any such right or remedy shall preclude any other or further exercise of any other right or remedy.

## 9. LANGUAGE

9.1 The Clearing Rules shall be drawn up or issued in English and in French. Versions in other languages might also be issued.

The English and French versions shall be of equal value.

9.2 This Agreement is drawn up in English and in French and any version can be signed. In case of any discrepancy between these versions, the signed version shall prevail. For information purposes the Agreement might be translated in the language of the Clearing Member at its request.

9.3 General communications of LCH.Clearnet SA as well as all applications, filings, correspondence with, and submissions to LCH.Clearnet SA by a Clearing Member may be in English, French, Portuguese or Dutch unless agreed otherwise by LCH.Clearnet SA.

9.4 The Clearing Member shall designate English or French-speaking correspondents who may be required to respond to requests made by LCH.Clearnet SA for information and documents.

## 10. TERMINATION

10.1 The Clearing Member may terminate the present Agreement at any time by registered letter to LCH.Clearnet SA giving a notice of at least ten Clearing Days.

The Clearing Member is then responsible for the transfer or closing-out of all its Open Positions, if they are not expired, before the end of the notice period.

10.2 Under the circumstances defined in the Clearing Rule Book, LCH.Clearnet SA can terminate this Agreement with at least a ten Clearing Day notice.

LCH.Clearnet SA then ensures the occurrence of the orderly closing-out or transfer, before the end of the notice period, in the terms and conditions set out in the Clearing Rules.

10.3 The effective termination of this Agreement does not relieve the Clearing Member from any of its obligations arising from Transactions entered into prior to such termination and

renders all amounts due by the Clearing Member under this Agreement immediately payable.

Within a ten day delay following the effective termination, LCH.Clearnet SA shall refund Collateral concerning the Clearing Member, including its contribution to the Clearing Funds, after having deducted all amounts corresponding to the remaining obligations stated in the paragraph above if they are still due.

**10.4** In any case the Party terminating the contract shall indicate to the other Party the reason for giving notice of termination.

**10.5** Any termination of this Agreement shall be co-ordinated with termination of any agreement providing technical access to LCH.Clearnet SA.

**10.6** The Clearing Member undertakes to inform its Clients and Trading Members or Associated Trading Member in case of any termination of its membership and any other relevant event referred to in the Clearing Rule Book.

## **11. AMENDMENTS**

LCH.Clearnet SA can make any amendments to these terms necessary to conform this Agreement to changes in laws, regulations or the Clearing Rules, as soon as such regulatory changes take effect.

## **12. CONFIDENTIALITY**

**12.1** Each of the Parties shall both during and after the arrangements contemplated by this Agreement have terminated :

- (a) keep confidential all information, whether in written or any other form, which has been disclosed to it by or on behalf of the other Party in confidence or which by its nature ought to be regarded as confidential (including, without limitation, any business information in respect of the other Party which is not directly applicable or relevant to the transactions contemplated by this Agreement);

and

- (b) procure that its officers, employees, representatives, agents and subcontractors keep secret and treat as confidential all such documentation and information.

**12.2** This clause does not apply to information:

- (a) to the extent that French law, including but not limited to Article L 632-1 of the French monetary and financial code, provides for such information to be disclosed to any exchange, clearing organisation, or regulatory authority and that a confidentiality agreement is signed between LCH.Clearnet SA and such clearing organisations and exchanges;
- (b) to the extent that the information is necessary for the third party that the Clearing Member has mandated to fulfil its payment and/or delivery and/or Margin obligations towards LCH.Clearnet SA.
- (c) to the extent made available to the recipient Party by a third party who is entitled to divulge such information and who is not under any obligation of confidentiality in respect of such information to the other Party or which has been disclosed under an express statement that it is not confidential;



- (d) to the extent required to be disclosed by any applicable law or by any governmental or other regulatory or supervisory body or authority of competent jurisdiction to whose rules the Party making the disclosure is subject, whether or not having the force of law, provided that the Party disclosing the information shall notify the other Party of the information to be disclosed (and of the circumstances in which the disclosure is alleged to be required) as early as reasonably possible and provided it is legally allowed to do so, before such disclosure must be made and shall take all reasonable action to avoid and limit such disclosure;
- (e) disclosed to any applicable tax authority to the extent reasonably required to assist the settlement of the disclosing Party's tax affairs; or
- (f) which shall after the date of this Agreement become published or otherwise generally available to the public, except in consequence of a wilful or negligent act or omission by the other Party to this Agreement in contravention of these obligations, or to information which the recipient Party can prove was already known to it before its receipt from the disclosing Party.

**12.3** The provisions of this clause shall survive any termination of this Agreement for a period of 3 years.

**12.4** Either Party may, in their commercial activities, publicly refer to the name of the Clearing Member and its membership to LCH.Clearnet SA, and LCH.Clearnet SA may (without identifying the Clearing Member) use figures as to the Clearing Member's activity in the compilation of statistics for publication, and for similar purposes provided that the identity of the Clearing Member is not attributable.

**12.5** LCH.Clearnet SA shall not use or disclose information obtained in the course of its duties under the Clearing Rules for other purposes than those which are permitted under the Clearing Rules, unless LCH.Clearnet SA, or one or more of its employees, have a statutory obligation to do so.

### **13. DISPUTE RESOLUTION**

**13.1** Any dispute between the Parties that may arise out of or in connection with this Agreement which is not solved by an amicable settlement between the Parties, shall be dealt with by the French courts having jurisdiction. Notwithstanding the foregoing, and provided that annex 1 is filled in, the Parties may mutually agree, on a case by case basis, to refer the dispute to arbitration.

**13.2** The Parties acknowledge that they have the capacity to enter into an arbitration agreement. In case the Parties shall refer to arbitration. They hereby agree with the rules of the arbitration centre mentioned in the Annex 1 except regarding the appointment of the arbitrators which shall occur as follows.

**13.3** The language to be used in arbitration proceedings and in any relevant document shall be the English, except if the Parties agree otherwise in writing. All up-to-date relevant documentation shall be provided to LCH.Clearnet SA by the Clearing Member before the former decides whether or not resort to arbitration for the matter at stake as described in Article 13.1.

The dispute shall be submitted to binding arbitration before a panel of three arbitrators consisting of two party-nominated (non-impartial) arbitrators, one nominated by the LCH.Clearnet SA and one nominated by the Clearing Member, and a third (impartial) (hereinafter the "umpire"). After the Parties have agreed to use arbitration they shall notify the

each other, the name, address and occupation of the arbitrator they nominated. The two arbitrators so selected shall, within 30 calendar days of the appointment of the second arbitrator, select an umpire. If the arbitrators are unable to agree upon an umpire, each arbitrator shall submit to the other arbitrator a list of three proposed individuals from which list the other Arbitrator shall choose one individual. The names of the two individuals so chosen shall be subject to a draw, whereby the individual drawn shall serve as umpire.

**14. APPLICABLE LAW**

The present Agreement is governed by and construed according to French law.

**15. ASSIGNMENT**

The Clearing Member may not under any circumstances assign this Agreement in whole or in part.

**16. SEVERABILITY**

If one or more provisions of this Agreement are deemed to be invalid or ruled to be invalid in application of a statute or regulation or following a final decision of a competent court, the other provisions hereof shall remain in full force and effect.

**17. ADDRESSES FOR SERVICES OF NOTICES AND OTHER COMMUNICATIONS**

The Parties elect to be permanently resident:

- for the Clearing Member, at its registered office or branch in case the activity is located at the latter as specified in the admission application.
- for LCH.Clearnet SA, at its head office, 18, rue du Quatre Septembre, 75 002 Paris - FRANCE

**18. EFFECT - TERM**

This Agreement has been entered into for an indefinite period of time and takes effect on notification by LCH.Clearnet SA of its acceptance of the Clearing Member's membership application and the fulfilment of all conditions precedent imposed on the Applicant. It may be terminated in the conditions set out in Article 10.

It has been duly signed in duplicate in \_\_\_\_\_ (place)

On \_\_\_\_\_ (date),

**LCH.Clearnet SA**

Name :  
Capacity :

**The Clearing Member**

Name :  
Capacity

**ANNEX 1**  
**REGARDING DISPUTES REFERRED TO IN ARTICLE 13 THE ARBITRATION CENTRE**  
**CHOSEN BY THE PARTIES IS :**

---

Name :

Address :

Phone number :

## CDS ADMISSION AGREEMENT

THIS AGREEMENT is made on [●]

### BETWEEN

- (1) "Banque Centrale de Compensation", a clearing house for financial instruments, incorporated as a French law *société anonyme* with its registered office at 18, rue du Quatre Septembre 75002 Paris, France, registered in the Commerce and Companies Register of Paris under the number 692 032 485, for the purposes hereof duly represented by Jean-Marie Boudet, acting in the capacity of Chief Risk Officer Europe, ("LCH.Clearnet SA"); and
- (2) [●], with its registered office at [●], incorporated in [●], [[recorded in][registered at]] [●], under the number [●], (the "CDS Clearing Member"),  
  
(each a "Party" and collectively, the "Parties").

### WHEREAS

- (A) LCH.Clearnet SA is a clearing house within the meaning of Article L. 440-1 of the French Monetary and Financial Code and Article 2 (1) of Regulation (EU) n° 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.
- (B) LCH.Clearnet SA acts as a central counterparty for clearing Original Transactions entered into between the CDS Buyer and the CDS Seller in accordance with the CDS Clearing Documentation. LCH.Clearnet SA is under the supervision of its Competent Authorities within the scope of their respective remit as granted by their national law and has additionally been notified to the European Commission as a securities settlement system for the purposes of the Settlement Finality Directive.
- (C) In this capacity, within the framework of its statutory and regulatory prerogatives, LCH.Clearnet SA has established the CDS Clearing Documentation, in accordance with which it clears Original Transactions, supervises the Cleared Transactions registered in the name of the Clearing Members, calculates the associated risk, calls Margin to cover this risk, ensures the proper settlement of the Cleared Transactions as central counterparty, manages the CDS Default Management Process and performs all other functions specified in the CDS Clearing Documentation.
- (D) The CDS Clearing Member desires to be admitted to membership of the CDS Clearing System for the purpose of clearing Original Transactions and LCH.Clearnet SA, having determined that the CDS Clearing Member satisfies for the time being the relevant criteria for admission, agrees to admit the CDS Clearing Member to membership of the CDS Clearing System, subject to the terms and conditions of this Agreement, as amended from time to time.

## **1 PURPOSE AND SCOPE**

- 1.1** This Agreement sets out the terms and conditions on which LCH.Clearnet SA agrees to admit the CDS Clearing Member to membership of the CDS Clearing Service pursuant to the CDS Clearing Documentation, and those on which the CDS Clearing Member shall undertake its CDS clearing activities pursuant to and in accordance with the CDS Clearing Documentation.
- 1.2** Execution of this Agreement supersedes and terminates any previous membership agreement which may have been in place between the Parties with respect to the CDS Clearing Service.
- 1.3** Without prejudice to Section 20 below, this Agreement, together with:
- 1.3.1** the terms of any other agreement relating to the provision of the CDS Clearing Service by LCH.Clearnet SA to which the Parties are party;
  - 1.3.2** the terms of and applicable to each and every Cleared Transaction;
  - 1.3.3** the CDS Clearing Documentation; and
  - 1.3.4** all amendments duly made to any of the foregoing,

shall together constitute a single agreement between the Parties, and both Parties acknowledge that all Cleared Transactions are entered into in reliance upon the fact that all such items constitute a single agreement between the Parties.

## **2 DEFINITIONS AND INTERPRETATION**

- 2.1** Capitalised terms used in this Agreement shall, unless specifically provided otherwise, have the meanings stipulated in the document entitled "CDS Clearing Rule Book" published by LCH.Clearnet SA, as amended from time to time (the "**CDS Clearing Rule Book**").
- 2.2** References in this Agreement to a Section are to a Section of this Agreement unless otherwise indicated, and Section headings are for ease of reference only.
- 2.3** Unless the context otherwise requires, words (including defined terms) denoting the singular shall include the plural and vice versa.
- 2.4** References to writing include typing, printing, lithography, photography, facsimile transmission, and other modes of representing or reproducing words in a visual form.
- 2.5** References in this Agreement to statutes, statutory instruments, the CDS Clearing Documentation (or any document forming part of the CDS Clearing Documentation) or provisions thereof, are to those statutes, statutory instruments, the CDS Clearing Documentation (or any document forming part of the CDS Clearing Documentation) or provisions thereof as amended, modified or replaced from time to time.

## **3 CLEARING MEMBERSHIP**

- 3.1** The CDS Clearing Member is hereby admitted as a clearing member of the CDS Clearing Service on the terms set out in this Agreement. The CDS Clearing Member shall be eligible to clear all categories of Original Transactions contemplated under the CDS Clearing

Service from time to time, subject in each case to meeting any additional requirements specified in the Procedures from time to time.

- 3.2** The CDS Clearing Member warrants that the information supplied to LCH.Clearnet SA for the purposes of determining whether it has satisfied the conditions for admission, as set out in Title II (*Membership*) of the CDS Clearing Rule Book and Section 1 of the Procedures (*Membership*), was when provided and is at the date of this Agreement true and accurate in all material respects.
- 3.3** The Parties undertake to comply at all times with this Agreement and the CDS Clearing Documentation, as amended from time to time.
- 3.4** LCH.Clearnet SA and the CDS Clearing Member each represent to the other that, as at the date of this Agreement, and at all times prior to the termination of this Agreement:
- 3.4.1** it is duly incorporated or otherwise organised and validly existing under the laws of its jurisdiction of incorporation;
  - 3.4.2** it has the power and authority to enter into this Agreement and has taken all necessary corporate actions to authorise the execution of this Agreement;
  - 3.4.3** to the extent it is required under Applicable Law to be authorised, licensed or approved in relation to activities undertaken by it, that all required governmental and/or regulatory and other consents with respect to this Agreement, have been obtained and are in full force and effect and that any or all conditions of any such consents have been and are complied with;
  - 3.4.4** it has full knowledge and understanding of the provisions of the CDS Clearing Documentation and shall abide by its obligations under the CDS Clearing Documentation;
  - 3.4.5** execution, delivery and performance of this Agreement do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets;
  - 3.4.6** its obligations under this Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law));
  - 3.4.7** no Event of Default or LCH Default, as applicable, with respect to it has occurred and is continuing and no Event of Default or LCH Default, as applicable, would occur as a result of its entering into or performing its obligations under this Agreement; and
  - 3.4.8** there is not pending or, to its knowledge, threatened against it, any action, suit or proceeding at law or in equity or before any court, tribunal, governmental body, agency or official or any arbitrator that is likely to affect the legality, validity or

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enforceability against it of this Agreement or its ability to perform its obligations under this Agreement.

- 3.5 The Parties agree that the maximum amount of any fine that LCH.Clearnet SA can impose on the CDS Clearing Member, pursuant to Paragraph 8.3 of Section 8 of the Procedures (*Disciplinary Proceedings*), is as set out in the fine grid at Schedule 3 to this Agreement.

#### 4 DELEGATION

The CDS Clearing Member irrevocably delegates LCH.Clearnet SA, in favour of each of its Clients, in the payment to each of its Clients of an amount equal to the CDS Client Clearing Entitlement calculated in respect of each of its Clients, if any. The Delegation is a *délégation imparfaite* governed by articles 1275 *et seq.* of the French Civil Code and the CDS Clearing Documentation. Accordingly, the CDS Clearing Member irrevocably:

- (i) directs LCH.Clearnet SA to pay to each of its Clients, an amount equal to the relevant CDS Client Clearing Entitlement, if positive; and
- (ii) agrees that, upon LCH.Clearnet SA paying the amount due in accordance with the Delegation to each Client of the CDS Clearing Member, LCH.Clearnet SA shall irrevocably be discharged *pro tanto* from paying an amount equal to the relevant CDS Client Clearing Entitlement to the CDS Clearing Member automatically without further notice;

For the avoidance of doubt, this Delegation shall not restrict or otherwise prejudice the entitlement of the CDS Clearing Member to any Collateral in relation to its House Margin Account save as expressly provided above.

#### 5 TRANSFER OF CLIENT PLEDGED ELIGIBLE COLLATERAL FOLLOWING AN EVENT OF DEFAULT

The CDS Clearing Member covenants that, immediately upon LCH.Clearnet SA issuing a Default Notice declaring it to be a Defaulting Clearing Member and requesting it to transfer Client Pledged Eligible Collateral, in accordance with the CDS Clearing Rule Book and Section 3 of the Procedures, the CDS Clearing Member will transfer the ownership of the Client Pledged Eligible Collateral to LCH.Clearnet SA to facilitate:

- (i) the transfer of Ported Collateral to an appointed Backup Clearing Member; and/or
- (ii) the payment of the CDS Client Clearing Entitlement,

in accordance with the CDS Clearing Rules.

#### 6 FEES, COSTS AND PAYMENT TERMS

- 6.1 In consideration of being granted membership of the CDS Clearing Service, the CDS Clearing Member shall pay LCH.Clearnet SA fees in accordance with Section 1.2.6 (*Fees*) of the CDS Clearing Rule Book.

- 6.2 All fees shall be payable by the CDS Clearing Member to LCH.Clearnet SA, in Euro, on a monthly basis in accordance with Section 6.5.



- 6.3** The CDS Clearing Member shall issue a Power of Attorney in favour of LCH.Clearnet SA to allow the debiting or crediting of the TARGET2 Account (or the relevant cash account of its TARGET2 Payment Agent), which is used to satisfy Collateral Calls made by LCH.Clearnet SA using its LCH House TARGET2 Account in accordance with Section 3 of the Procedures, for the purposes of fee payments pursuant to Section 6.1.
- 6.4** LCH.Clearnet SA may index or adjust the fees published on the Website from time to time at its discretion. LCH.Clearnet SA shall give the CDS Clearing Member no less than thirty (30) calendar days' prior notice of any such change.
- 6.5** On the date falling ten (10) Business Days after the end of each calendar month, LCH.Clearnet SA shall debit any due and payable fees (the "**Fee Balance**") from the relevant CDS Clearing Member's TARGET2 Account (or the relevant cash account of its TARGET2 Payment Agent) using its Power of Attorney. On or before the fifth Business Day after the end of each calendar month, LCH.Clearnet SA shall issue an invoice to the CDS Clearing Member detailing the Fee Balance to be debited pursuant to this Section 6.5 (the "**Fee Notice**").
- 6.6** In circumstances where LCH.Clearnet SA is not able to debit the Fee Balance from the relevant CDS Clearing Member's TARGET2 Account (or the relevant cash account of its TARGET2 Payment Agent) using its Power of Attorney, the CDS Clearing Member shall pay the Fee Balance to LCH.Clearnet SA within thirty (30) calendar days of receiving the Fee Notice from LCH.Clearnet SA and in such manner as specified in the Fee Notice.

## **7 MARKET DATA, END OF DAY CONTRIBUTED PRICES AND MARKET LCH SETTLEMENT PRICES**

- 7.1** Subject to Section 7.3, LCH.Clearnet SA may require the CDS Clearing Member to provide it with Market Data. The CDS Clearing Member will satisfy its obligation to provide LCH.Clearnet SA with Market Data by acting in accordance with the procedure set out in Section 5 (*CDS Clearing Operations*) of the Procedures.
- 7.2** The CDS Clearing Member hereby warrants that it has put in place such arrangements as are necessary for it to provide LCH.Clearnet SA with Market Data in accordance with Section 5 (*CDS Clearing Operations*) of the Procedures and will inform LCH.Clearnet SA of any termination or material change to such agreement that will impede its fulfilment of obligations with respect to the provision of Market Data.
- 7.3** LCH.Clearnet SA acknowledges that the CDS Clearing Member shall not be obliged to provide Market Data which it is restricted from disclosing by law or regulation or as a result of agreements with third parties which predate the date of this Agreement. In the absence of any notification at the date of this Agreement by the CDS Clearing Member, LCH.Clearnet SA shall be entitled to assume no such third party agreements exist.
- 7.4** In respect of any Market Data provided to LCH.Clearnet SA in accordance with this Agreement and the CDS Clearing Documentation:
- 7.4.1** the CDS Clearing Member will retain all ownership and intellectual property rights or other rights in respect of that Market Data;

- 7.4.2 LCH.Clearnet SA will keep that Market Data securely and properly protected against theft, damage, loss and unauthorised access;
- 7.4.3 LCH.Clearnet SA will treat the CDS Clearing Member's Market Data as strictly confidential and shall not display, disclose, distribute, identify or otherwise make it available to any person other than to:
- (i) a third party data aggregator that is responsible for compiling the End of Day Contributed Prices in accordance with the CDS Clearing Documentation (a "**Third Party Data Aggregator**"); or
  - (ii) the CDS Clearing Member that has provided it;
- 7.4.4 LCH.Clearnet SA may only use the Market Data to aggregate it, or permit a Third Party Data Aggregator to aggregate it, with the Market Data received from all other Clearing Members for the purpose of creating the End of Day Contributed Prices for the CDS Clearing Service and LCH.Clearnet SA will not use the Market Data received from the CDS Clearing Member for any other purpose.
- 7.5 LCH.Clearnet SA may only use any data aggregated from the Market Data, including the End of Day Contributed Prices (the "**Aggregated Data**"):
- 7.5.1 for the purpose of the CDS Clearing Service, for clearing and settlement, including:
- (i) to calculate the Margin Requirements, Variation Margin Requirements or Contribution Requirement of each Clearing Member;
  - (ii) to calculate Markit LCH Settlement Prices;
  - (iii) to value Cleared Transactions; and
  - (iv) to distribute Markit LCH Settlement Prices and provide valuation reporting to each Clearing Member; and
- 7.5.2 for the purpose of responding to:
- (i) ad hoc queries from Clearing Members and industry bodies (but not systematic, regular distribution) relating to the CDS Clearing Service; and
  - (ii) surveys conducted by relevant international organisations (such as IOSCO) relating to the CDS Clearing Service.
- provided that where the responses to queries or surveys pursuant to this Section 7.5.2 are to include the Markit LCH Settlement Prices, this data may be communicated only with the prior consent of the Third Party Data Aggregator, such consent not to be unreasonably withheld.
- 7.6 LCH.Clearnet SA shall not use or share any Aggregated Data with third parties other than a Third Party Data Aggregator (whether for fees or otherwise), save with the written prior consent or at the written proposal of at least 50% of Clearing Members by reference to the volume of Open Positions held in the Clearing Members' House Margin Accounts.
- 7.7 LCH.Clearnet SA hereby undertakes that it has full rights and authority to provide Markit LCH Settlement Prices to the CDS Clearing Member and to allow the CDS Clearing

Member to use and/or disclose the Markit LCH Settlement Prices for the purposes set out in Section 4.2.8 (*Markit LCH Settlement Price*) of the CDS Clearing Rule Book.

- 7.8** The CDS Clearing Member acknowledges and agrees that any Third Party Data Aggregator shall be an intended third party beneficiary of Section 4.2.8 (*Markit LCH Settlement Price*) of the CDS Clearing Rule Book.
- 7.9** Nothing in Section 7.7 shall prevent the CDS Clearing Member from using the Markit LCH Settlement Prices (and any other Aggregated Data provided to it) for any purpose where it is permitted to do so by the relevant Third Party Data Aggregator or any other third party with the requisite authority.
- 7.10** Where LCH.Clearnet SA makes Market Data available to a Third Party Data Aggregator, LCH.Clearnet SA shall procure that the Third Party Data Aggregator:
- 7.10.1** acknowledges, and agrees to, the CDS Clearing Member rights as set out in Section 7.4.1;
  - 7.10.2** maintains protections in order to ensure that Market Data is securely and properly protected against theft, damage, loss and unauthorised access;
  - 7.10.3** does not display, disclose, distribute, identify or otherwise make the Market Data available, other than in connection with the Third Party Data Aggregator's permitted use of End of Day Contributed Prices;
  - 7.10.4** consents to the CDS Clearing Member using the Markit LCH Settlement Prices for the purposes set out in Section 7.7 above.
- 7.11** Nothing in this Section 7 or Section 11 prevents LCH.Clearnet SA from:
- 7.11.1** using or disclosing Market Data, Markit LCH Settlement Prices or Aggregated Data where it is required to do so by Applicable Law or where required or formally requested to do so pursuant to an order of a competent court or by a Regulatory Body; or
  - 7.11.2** using (but not displaying, disclosing or identifying) Market Data, Markit LCH Settlement Prices or Aggregated Data (i) upon the advice of the Risk Committee and (ii) in accordance with the terms of the licence granted to LCH.Clearnet SA by the Third Party Data Aggregator.
- 7.12** Nothing in this Section 7 or Section 11 prevents the CDS Clearing Member from using or disclosing Markit LCH Settlement Prices, or other Aggregated Data provided to it, for whatsoever purpose where such Markit LCH Settlement Prices, or other Aggregated Data, as the case may be, are:
- 7.12.1** made available to the public by either LCH.Clearnet SA or a Third Party Data Aggregator, by virtue of Applicable Law, the order of a Regulatory Body or otherwise; or
  - 7.12.2** received by the CDS Clearing Member other than as a result of a breach of any agreement entered into between LCH.Clearnet SA and the CDS Clearing Member (including this Agreement).

- 7.13** Amendments to this Section 7 will become effective if LCH.Clearnet SA obtains the written prior consent of, or receives a written proposal from, at least 50% of Clearing Members by reference to the volume of Open Positions held in the Clearing Members' House Margin Accounts.

## **8 LANGUAGE**

- 8.1** This Agreement and the CDS Clearing Documentation shall be drawn up and issued in English, provided that the CDS Clearing Rule Book shall be drawn up and issued in French for the purpose of its approval by the AMF. Different language versions or translations of this Agreement and/or the CDS Clearing Documentation may also be issued for information purposes.
- 8.2** Subject to Article 1.1.3.8 of the CDS Clearing Rule Book, in the event of inconsistency between different language versions or translations of this Agreement or the CDS Clearing Documentation, the English language version shall prevail.
- 8.3** General communications of LCH.Clearnet SA as well as all applications, filings, correspondence with, and submissions to LCH.Clearnet SA by the CDS Clearing Member may be in either English or in French, unless expressly agreed otherwise by LCH.Clearnet SA. Upon the request of the CDS Clearing Member, any communications issued by LCH.Clearnet SA in French will also be provided in English.
- 8.4** The Persons nominated and notified to LCH.Clearnet SA, pursuant to Article 2.2.1.1(xiii) of the CDS Clearing Rule Book, as being responsible for the clearing operations of the CDS Clearing Member and authorised to act on behalf of the CDS Clearing Member in respect of all transactions with or involving LCH.Clearnet SA under the CDS Clearing Documentation, shall be either English or French-speaking, unless expressly agreed otherwise by LCH.Clearnet SA.

## **9 TERM AND TERMINATION**

- 9.1** This Agreement has been entered into for an indefinite period of time and takes effect on notification by LCH.Clearnet SA of its acceptance of the CDS Clearing Member's application for membership of the CDS Clearing Service and the fulfilment of all conditions precedent imposed by LCH.Clearnet SA on the CDS Clearing Member.
- 9.2** This Agreement shall terminate on the date that termination of the CDS Clearing Member's membership is deemed effective in accordance with the CDS Clearing Rule Book.
- 9.3** The termination of this Agreement is without prejudice to accrued rights and obligations of the CDS Clearing Member under the CDS Clearing Documentation or arising from Cleared Transactions entered into prior to such termination and settlement of all amounts due and payable to, or by, the CDS Clearing Member from, or to, LCH.Clearnet SA (as the case may be) shall be dealt with in accordance with the CDS Clearing Documentation.
- 9.4** Any termination of this Agreement shall be co-ordinated with termination of any agreement providing technical access to LCH.Clearnet SA for the purpose of the CDS Clearing Service provided by LCH.Clearnet SA in accordance with the CDS Clearing Documentation.



## 10 AMENDMENTS

- 10.1 Subject to Section 7.13, LCH.Clearnet SA shall be permitted to amend this Agreement, as necessary, to comply with a change in Applicable Law or the CDS Clearing Documentation, as soon as such change takes effect, or in accordance with the procedure described in Section 1.2.2 (*Modification*) of the CDS Clearing Rule Book.
- 10.2 LCH.Clearnet SA shall be permitted to amend Schedule 3 to this Agreement from time to time following consultation with the Risk Committee.
- 10.3 The terms of this Agreement (other than the tax representations set out in Schedule 1 to this Agreement and the tax forms set out in Schedule 2 to this Agreement) must at all times be materially equivalent to the terms included in the CDS Admission Agreement that LCH.Clearnet SA has entered into with each other Clearing Member, admitted on the same basis, in relation to the CDS Clearing Service.

## 11 CONFIDENTIALITY

- 11.1 Each Party ("**Recipient**") undertakes to the other Party (each, a "**Disclosing Party**") to treat as confidential all the information and/or documents, in any form whatsoever, obtained:
- 11.1.1 in performing this Agreement;
  - 11.1.2 participating in any Clearing Member or LCH.Clearnet SA committees which may be established by LCH.Clearnet SA from time to time;
  - 11.1.3 from the Disclosing Party either directly or from any other person which concerns the business, operations, customers or users of the Disclosing Party including any data and/or electronic data files,
- whether or not such items are associated with a notice of confidentiality (the "**Confidential Information**").
- 11.2 The Recipient may only use and disclose the Confidential Information for the purposes of, and in accordance with, this Agreement and the CDS Clearing Documentation (the "**Permitted Purpose**").
- 11.3 The Recipient may only provide its employees, directors, subcontractors and professional advisers (together with their respective employees, directors or any other representatives, subcontractors and professional advisers ("**Permitted Users**")) with access to the Confidential Information on a strict "need-to-know" basis. The Recipient shall ensure that each of its Permitted Users is bound to hold all Confidential Information in confidence to the standard required under this Agreement. Where a Permitted User is not an employee or director of the Recipient (and is not under a professional duty to protect confidentiality) the Recipient shall ensure that the Permitted User shall, prior to receiving the Confidential Information, enter into a written confidentiality undertaking with the Recipient on substantially equivalent terms to this Agreement, a copy of which shall be provided to the Disclosing Party upon request.



- 11.4** In consideration of being given some information or having it made available, the Recipient agrees it shall treat as strictly confidential and shall not disclose or allow to be disclosed to any person:
- 11.4.1** the Confidential Information;
  - 11.4.2** the fact it has received any Confidential Information;
  - 11.4.3** the existence of any discussions or negotiations between the Parties in this matter; or
  - 11.4.4** details of the Permitted Purpose and any of the proposals, terms, conditions, facts or other matters relating to any of the foregoing,
- unless and to the extent it is authorised to do so pursuant to this Section 11.
- 11.5** The Parties acknowledge that property in the Confidential Information shall not pass to the Recipient, and the property of the media on which it is conveyed shall not pass to the Recipient.
- 11.6** This Section 11 does not apply to any information which:
- 11.6.1** is in or subsequently enters the public domain other than as a result of a breach of this Section 11; or
  - 11.6.2** has been or is subsequently received by the Recipient from a third party and the Recipient is under no confidentiality obligation in respect of that information other than under this Agreement; or
  - 11.6.3** has been or is subsequently independently developed by the Recipient without use of the Disclosing Party's Confidential Information; or
  - 11.6.4** the Disclosing Party has agreed in writing may be disclosed.
- 11.7** The CDS Clearing Member agrees to establish and adhere to adequate procedures (including, without limitation, the establishment of appropriate information barriers) and take all steps to ensure that any Permitted User to whom Confidential Information has been disclosed shall not use any part or all of that Confidential Information for any purpose outside the scope of the Permitted Purpose.
- 11.8** Each Permitted User may disclose Confidential Information (or, where the Permitted User is an individual, his or her employer) and give the Disclosing Party prompt advance written notice of the disclosure in accordance with Section 1.2.12 (*Confidentiality*) of the CDS Clearing Rule Book.
- 11.9** Notwithstanding the foregoing, either Party may, in their commercial activities, publicly refer to the name of the CDS Clearing Member and its membership to LCH.Clearnet SA, and LCH.Clearnet SA may (without identifying the CDS Clearing Member) use figures as to the CDS Clearing Member's activity in the compilation of statistics for publication, and for similar purposes provided that the identity of the CDS Clearing Member is not attributable.
- 11.10** The provisions of this Section 11 shall survive any termination of this Agreement but shall expire on the third anniversary of the date the Confidential Information was first provided to the Recipient, without prejudice to confidentiality obligations under any Applicable Law

which would prevent the Recipient from disclosing or using the Confidential Material other than pursuant to and in accordance with this Section 11.

**11.11** Upon request by the Disclosing Party, the Recipient shall, as far as practicably possible, promptly return to the Disclosing Party, or destroy (at its discretion), the Confidential Information and all copies thereof in the possession or control of the Recipient, and shall certify in writing that the Permitted User has not retained any of the Confidential Information, except to the extent that the Confidential Information forms part of:

11.11.1 the permanent records of the Recipient which it is bound by applicable legal or regulatory requirement or any compliance policy applicable to it to preserve; or

11.11.2 any electronic records which are customarily backed up in the normal course of the Recipient's business,

in which event the Recipient may retain the Confidential Information in strictest confidence in accordance with the provisions of this Section 11.

**11.12** Where the CDS Clearing Member ceases to participate in any Clearing Member or LCH.Clearnet SA committee as may be established by LCH.Clearnet SA from time to time, the CDS Clearing Member shall, to the extent reasonably practicable to do so, promptly:

11.12.1 return to LCH.Clearnet SA by a secure method of transportation all or any part of the Confidential Information; or

11.12.2 destroy such information and shall certify to LCH.Clearnet SA in writing that it has done so,

(at its discretion), provided that the CDS Clearing Member is permitted to retain a copy to the extent that the Confidential Information forms part of the CDS Clearing Member's permanent records which it is bound by applicable legal or regulatory requirement or any compliance policy applicable to it to preserve.

**11.13** Without affecting any other rights or remedies that each Party may have, each Party acknowledges that the other may be irrevocably harmed by any breach of the terms of this Section 11 and that damages alone may not necessarily be an adequate remedy. Accordingly, each Party will be entitled to the remedies of injunction, specific performance and other equitable relief, or any combination of these remedies, for any threatened or actual breach of the terms of this Section 11, and no proof of special damages will be necessary to enforce this Agreement.

**11.14** The provisions of this Section 11 shall not restrict or otherwise affect the rights of LCH.Clearnet SA to disclose Confidential Information pursuant to and in accordance with Section 1.2.12 (*Confidentiality*) of the CDS Clearing Rule Book. By entering into this Agreement, the CDS Clearing Member expressly consents to the disclosure of information by LCH.Clearnet SA pursuant to and in accordance with the CDS Clearing Rule Book.

## **12 TAX**

**12.1** All payments made under or in connection with this Agreement shall be subject to the tax provisions set out in Section 1.2.17 (*Tax*) of the CDS Clearing Rule Book.

- 12.2 LCH.Clearnet SA and the CDS Clearing Member each make to the other, as at the date of this Agreement and at all times prior to termination of this Agreement, the tax representations specified as applicable to it in Schedule 1 to this Agreement.
- 12.3 The tax representations described in Articles 1.2.10.3(xii) and 1.2.17.2 of the CDS Clearing Rule Book are those tax representations set out in Schedule 1 to this Agreement and made pursuant to Section 12.2, as applicable to the relevant Party.
- 12.4 LCH.Clearnet SA and the CDS Clearing Member will deliver to each other the relevant forms, documents or certificates specified as applicable to it in Schedule 2 to this Agreement in each case by the date so specified or, if none is specified, as soon as reasonably practicable following reasonable request from the other Party.
- 12.5 The forms, documents and certificates described at Articles 1.2.17.2, 1.2.17.5 and 1.2.17.6 of the CDS Clearing Rule Book are those forms, documents and certificates specified in Schedule 2 to this Agreement and that are to be delivered pursuant to Section 12.4 above, as applicable to the relevant Party.

### 13 HEDGING ISDA AGREEMENT

#### 13.1 The Parties agree that:

- 13.1.1 all transactions entered into between them for the purpose of Hedging (each, a "**Hedging Transaction**") will be governed by; and
- 13.1.2 any document, exchange of telexes, exchange of electronic messages on an electronic messaging system or an exchange of emails confirming any such Hedging Transaction (each, a "**Confirmation**") will supplement, form a part of and be subject to,

an agreement in the form of the ISDA 2002 Master Agreement as published by ISDA (the "**Hedging ISDA Agreement**") as if they had executed an agreement in such form (but without any Schedule except for the elections and provisions set out in Section 13.2 below) on the Trade Date of the first such Hedging Transaction between them, notwithstanding anything to the contrary in a Confirmation.

#### 13.2 The following elections and provisions will be incorporated into the Hedging ISDA Agreement:

- 13.2.1 English law will be the governing law;
- 13.2.2 the Automatic Early Termination provision of Section 6(a) of the Hedging ISDA Agreement will not apply to LCH.Clearnet SA;
- 13.2.3 the Automatic Early Termination provision of Section 6(a) of the Hedging ISDA Agreement [[will]/[will not]] apply to the CDS Clearing Member;
- 13.2.4 for the purposes of Sections 3(e) and 3(f), as applicable, of the Hedging ISDA Agreement, LCH.Clearnet SA and the CDS Clearing Member each make the representations specified as applicable to it in Schedule 1 to this Agreement; and
- 13.2.5 for the purposes of Sections 4(a)(i) and 4(a)(ii) of the Hedging ISDA Agreement, LCH.Clearnet SA and the CDS Clearing Member each agree to deliver the tax

forms, documents or certificates specified as applicable to it in Schedule 2 to this Agreement.

**13.3 Each Party:**

**13.3.1** represents to the other Party, on the date of this Agreement and on each date on which it enters into a Hedging Transaction, that it has full knowledge and understanding of the provisions of the Hedging ISDA Agreement; and

**13.3.2** agrees that it will perform its obligations under the Hedging ISDA Agreement in accordance with the terms of such Hedging ISDA Agreement.

**14 SEVERABILITY**

If one or more provisions of this Agreement are deemed to be invalid or ruled to be invalid in application of a statute or regulation or following a final decision of a competent court, the other provisions hereof shall remain in full force and effect.

**15 GENERAL**

**15.1** Nothing in this Agreement shall be deemed to constitute a partnership between the Parties, nor constitute either Party the agent of the other Party for any purpose.

**15.2** The rights, powers, remedies and privileges of each Party under this Agreement:

**15.2.1** may be exercised as often as necessary;

**15.2.2** are cumulative and not exclusive of any rights, powers, remedies and privileges provided by Applicable Law; and

**15.2.3** may be waived in writing and specifically. Delay or failure in exercising any right is not a waiver of that right.

**15.3** The CDS Clearing Documentation constitutes the entire agreement and understanding of LCH.Clearnet SA and the CDS Clearing Member with respect to its subject matter. LCH.Clearnet SA and the CDS Clearing Member acknowledge that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in the CDS Clearing Documentation) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in the CDS Clearing Documentation will limit or exclude any liability of a Party for fraud.

**16 TRANSFER**

Subject to the CDS Clearing Documentation, neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by LCH.Clearnet SA or the CDS Clearing Member without the prior written consent of the other Party.

## 17 NOTICES

17.1 Any notice or communication to be made under or in connection with this Agreement shall be made in writing to:

17.1.1 The CDS Clearing Member at its registered office or branch (in case the activity is located at the latter), as specified in its application for membership of the CDS Clearing Service; and

17.1.2 LCH.Clearnet SA at its head office at 18, rue du Quatre Septembre, 75002 Paris, France.

17.2 LCH.Clearnet SA shall deliver any notice or communication which is required to be given to the CDS Clearing Member pursuant to the CDS Clearing Documentation by electronic transmission, email, facsimile or telephone to the email address, facsimile number or telephone number specified by the CDS Clearing Member in its application for membership of the CDS Clearing Service. The CDS Clearing Member may, by notice to LCH.Clearnet SA, change the details at which notices or communications are to be given to it.

17.3 The CDS Clearing Member consents to LCH.Clearnet SA providing the address specified pursuant to Section 1.6(ii) of the CDS Dispute Resolution Protocol to any other Clearing Member of the CDS Clearing Service solely for the purposes of sections 1.6(ii) and 9.3 of the CDS Dispute Resolution Protocol.

## 18 DISPUTE RESOLUTION

18.1 For the avoidance of doubt, all Disputes shall be referred to and finally resolved by arbitration or by litigation, as applicable, in accordance with the CDS Dispute Resolution Protocol, subject to the provisions of Sections 8 (*Disciplinary Proceedings*) and 9 (*Complaint Resolution*) of the Procedures.

18.2 The version of the CDS Dispute Resolution Protocol in force as at the date of execution of this Agreement is attached as Schedule 4 to this Agreement. For the avoidance of doubt, the CDS Dispute Resolution Protocol may be amended from time to time by LCH.Clearnet SA in accordance with Section 1.2.2 (*Modification*) of the CDS Clearing Rule Book.

## 19 ELECTION OF DOMICILE / PROCESS AGENT

19.1 Without prejudice to the dispute resolution provisions set out in Section 18 above:

19.1.1 the CDS Clearing Member irrevocably elects domicile with [●] at [●] [*CDS Clearing Member: Please specify an entity and address in Paris*] for the purposes of any litigation in accordance with Section 6 of the CDS Dispute Resolution Protocol;

19.1.2 if it is not incorporated in England or Wales, the CDS Clearing Member either:

- (i) irrevocably appoints [●] [*CDS Clearing Member: Please specify an entity in England or enter "NOT APPLICABLE"*] as its agent under the CDS Clearing Documentation (including this Agreement) for service of process; or



- (ii) consents to having service effected upon it at [●][CDS Clearing Member: **Please specify an entity in England or enter "NOT APPLICABLE"**], and agrees that valid service at such branch shall constitute effective service on it,

in any ancillary proceedings before the English courts in connection with any arbitration proceedings pursuant to the CDS Dispute Resolution Protocol; and

19.1.3 LCH.Clearnet SA irrevocably appoints LCH.Clearnet Group Limited at Aldgate House, 33 Aldgate High Street, London EC3N 1EA as its agent under the CDS Clearing Documentation (including this Agreement) for service of process in any ancillary proceedings before the English courts in connection with any arbitration proceedings pursuant to the CDS Dispute Resolution Protocol.

- 19.2 The CDS Clearing Member may, at its discretion, change its elected domicile in Paris for the purposes of Section 19.1.1 above by giving notice of its new elected domicile in Paris to LCH.Clearnet SA in accordance with Section 17 above. Any document served on the CDS Clearing Member at its former elected domicile (i) before such notification is received by the serving Party or (ii) 15 Business Days after such notification is received by the serving Party will be deemed validly served. For the avoidance of doubt, any document served on the CDS Clearing Member at its new elected domicile in Paris will be deemed validly served as from the date of the relevant notification sent by the CDS Clearing Member.
- 19.3 If any person appointed as process agent under this Section 19 is unable for any reason to so act, the appointing Party must immediately give notice of this to the other Party in accordance with Section 17 above, and must immediately (and in any event within 7 days of the event taking place) appoint a substitute process agent, in accordance with sub-section 19.1.2(i) or 19.1.3 as applicable, or, in the case of the CDS Clearing Member, an applicable branch located in England or Wales at which it consents to have service effected upon it, in accordance with sub-section 19.1.2(ii).
- 19.4 If, where applicable, the branch specified under this Section 19 ceases to be able to act in such capacity or no longer has an address in England or Wales, the CDS Clearing Member must immediately give notice of this to LCH.Clearnet SA in accordance with Section 17 above, and must immediately (and in any event within 2 days of the event taking place) select a substitute branch at which it consents to have service effected upon it, in accordance with sub-section 19.1.2(ii), or a process agent, in accordance with sub-section 19.1.2(i).
- 19.5 Each Party agrees that: (i) service shall be deemed completed on delivery to the relevant process agent appointed under this Section 19; and (ii) failure by such process agent to notify such Party of any process, or failure by such Party to receive such notification, will not invalidate the relevant proceedings.
- 19.6 The CDS Clearing Member agrees that, where applicable: (i) service shall be deemed completed on delivery to the branch appointed under this Section 19; and (ii) failure by such branch to notify the CDS Clearing Member of any process, or failure by the CDS Clearing Member to receive such notification will not invalidate the relevant proceedings.
- 19.7 This Section 19 does not affect any other method of service allowed by law.



## 20 GOVERNING LAW

For the avoidance of doubt, the governing law applicable to this Agreement and any non-contractual obligations arising out of, relating to or having any connection with this Agreement shall be as set out in Section 1.2.14 (*Governing Law*) of the CDS Clearing Rule Book.

**SCHEDULE 1**  
**TAX REPRESENTATIONS**

**Part 1 – Representations made by LCH.Clearnet SA**

For the purposes of Sections 12 and 13 of this Agreement, LCH.Clearnet SA makes the following representation(s):

Payee Tax Representation(s)

(i)

Payer Tax Representation(s)

(ii)

**Part 2 – Representations made by the CDS Clearing Member**

For the purposes of Sections 12 and 13 of this Agreement, the CDS Clearing Member makes the following representation(s):

Payee Tax Representation(s)

(i)

Payer Tax Representation(s)

(ii)

**SCHEDULE 2**

**TAX FORMS TO BE DELIVERED**

**Part 1 – Tax forms to be provided by LCH.Clearnet SA**

For the purposes of Sections 12 and 13 of this Agreement, LCH.Clearnet SA agrees to deliver the following document(s) in each case by the date specified:

<b>Form/Document/Certificate</b>	<b>Date by which to be delivered</b>
Any form or document accurately completed and in a manner reasonably satisfactory to the CDS Clearing Member that may be required or reasonably requested in order to allow the CDS Clearing Member to make a payment without any deduction or withholding for or on account of any Tax or with deduction or withholding at a reduced rate, including, without limitation, an executed United States Internal Revenue Service Form W-9 or Form W-8BEN and/or W-8ECI (or any successor thereto).	Promptly upon reasonable demand by the CDS Clearing Member.

**Part 2 – Tax forms to be provided by the CDS Clearing Member**

For the purposes of Sections 12 and 13 of this Agreement, the CDS Clearing Member agrees to deliver the following document(s) in each case by the date specified:

<b>Form/Document/Certificate</b>	<b>Date by which to be delivered</b>
Any form or document accurately completed and in a manner reasonably satisfactory to LCH.Clearnet SA that may be required or reasonably requested in order to allow LCH.Clearnet SA to make a payment without any deduction or withholding for or on account of any Tax or with deduction or withholding at a reduced rate, including, without limitation, an executed United States Internal Revenue Service Form W-9 or Form W-8BEN and/or W-8ECI (or any successor thereto).	Promptly upon reasonable demand by LCH.Clearnet SA.

## SCHEDULE 3

## FINE GRID

Breach	Fine (EUR)
Failure to provide a complete price submission file on a Clearing Day as part of the price submission procedure set out in Section 5 of the Procedures.	10,000

**SCHEDULE 4**  
**CDS DISPUTE RESOLUTION PROTOCOL**

**[VERSION IN FORCE AS AT THE DATE OF EXECUTION OF THE AGREEMENT TO BE INSERTED]**

**THIS AGREEMENT** has been duly signed in duplicate in \_\_\_\_\_ (place) on

\_\_\_\_\_ (date),

By \_\_\_\_\_

LCH.Clearnet SA

Name:

Title:

By \_\_\_\_\_

*[CDS Clearing Member]*

Name:

Title: