

FIA Europe
2nd Floor
36-38 Botolph Lane
London EC3R 8DE

Our ref: 70-40578622
Direct Dial: +33 14405 5156
E-mail: frederick.lacroix@cliffordchance.com

18 September 2014

Dear Sirs

CCP Opinion in relation to LCH.Clearnet SA

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 SA (the "**CCP**") as between the CCP 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 Section 3.

1. TERMS OF REFERENCE

- 1.1 Except where otherwise defined herein, terms defined in the CCP Documentation have the same meaning in this opinion letter.
- 1.2 This opinion relates to the service provided by the CCP in respect of clearing of the following types of transaction (each a "**Transaction**"): any Derivative Transaction, any CDS Transaction or any Repo Transaction which is registered at the CCP.
- 1.3 The CCP provides clearing services in respect of the following transactions which are not covered by this opinion: Securities and Fixed Income Securities (other than, for the avoidance of doubt, Repo Transactions).

1.4 We express no opinion as to any provisions of the Rules other than those on which we expressly opine. This opinion is given in respect of the CCP Documentation (as defined below) in force at the date of this opinion and the laws of France in force at the date of this opinion.

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 "**Affected Clearing Member**" has the meaning ascribed to such expression in the CDS Clearing Rule Book;
- 1.5.3 "**AMF**" means *Autorité des Marchés Financiers*;
- 1.5.4 "**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 than by title transfer of cash, such as transfers of securities or other negotiable instruments or pledges of any assets;
- 1.5.5 "**CCP Documentation**" means the Pledge Agreement and the Rules;
- 1.5.6 "**CDS Transaction**" means any credit default swap transaction;
- 1.5.7 "**CDS Clearing Rule Book**" means the CDS clearing Rule Book in its English version dated 24 March 2014 as published on the website of the CCP 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;
- 1.5.8 "**CDS Clearing Rules**" means the CDS Clearing Rule Book and the Procedures;
- 1.5.9 "**CDS Clearing Service**" has the meaning ascribed to such expression in the CDS Clearing Rule Book;
- 1.5.10 "**CDS Termination Amount**": means the Termination Amount in respect of the CDS Clearing Rule Book;
- 1.5.11 "**Civil Code**" means the French *code civil*;

- 1.5.12 "**Client**" has the meaning ascribed to: (i) such expression in the Derivatives Clearing Rule Book; or (ii) "CCM Client" in the CDS Clearing Rule Book, as applicable;
- 1.5.13 "**Clearing Services**" means any of: (i) the CDS Clearing Service; and (ii) the Derivatives Clearing Service;
- 1.5.14 "**Client Account**" means, as applicable: (i) an account with the CCP opened at the request and in the name of a Member in order to register all Trade Legs corresponding to Derivative Transactions and Repo Transaction executed for the account of such Member's Client(s); or (ii) an account with the CCP opened at the request and in the name of a Member in order to register all Cleared Transactions corresponding to CDS Transactions entered into for the account of such Member's Client(s);
- 1.5.15 "**Collateral Directive Regime**" means directive No. 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended (the "**Collateral Directive**"), as implemented into French law under articles L. 211-36 *et seq.* of the Financial Code;
- 1.5.16 "**Commercial Code**" means the French *code de commerce*;
- 1.5.17 "**Credit Institution WUD Regime**" means 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 (the "**Credit Institution WUD**"), as implemented into French law under articles L. 613-31-1 *et seq.* of the Financial Code;
- 1.5.18 "**Derivative Transaction**" has the meaning ascribed to "Derivative" in the Derivatives Clearing Rule Book;
- 1.5.19 "**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 English version dated 12 June 2014 as published on the website of the CCP and in force as at the date of this opinion;
- 1.5.20 "**Derivatives Clearing Rules**" means the Derivatives Clearing Rule Book and the Instructions;
- 1.5.21 "**Derivatives Clearing Services**" means these services provided by the CCP pursuant to article 1.3.1.5 of the Derivatives Clearing Rule Book and which relate to the Derivatives;

- 1.5.22 "**Derivatives Termination Amount**" means the Termination Amount in respect of the Derivatives Clearing Rule Book;
- 1.5.23 "**EMIR**" means 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;
- 1.5.24 "**ESMA**" means the European Securities and Markets Authority;
- 1.5.25 "**Event of Default**" means the opening of any Insolvency Proceeding or Failure to Pay;
- 1.5.26 "**Failure to Pay**" means the Member or, as the case may be, the CCP, 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;
- 1.5.27 "**Financial Code**" means the French *code monétaire et financier*;
- 1.5.28 "**French Banking Separation Law**" means French law n° 2013-672 of 26 July 2013 on the separation and regulation of banking activities;
- 1.5.29 "**House Account**" means, as applicable: (i) an account with the CCP opened at the request and in the name of a Member in order to register all Trade Legs corresponding to Derivative Transactions and Repo Transactions executed for such Member's own account; or (ii) an account with the CCP opened at the request and in the name of a Member in order to register all Cleared Transactions corresponding to CDS Transactions entered into for such Member's account;
- 1.5.30 "**Insolvency Proceeding**" has the meaning ascribed to such expression in Paragraph 3.1 below;
- 1.5.31 "**Instruction**" means any of the instructions published by LCH.Clearnet SA in relation to the Derivatives Clearing Rule Book;
- 1.5.32 "**Instruction II.1–2**" means the Instruction II.1–2, "Specific provisions applicable to an Allied Clearing House" dated 27 June 2011;
- 1.5.33 "**Instruction IV.3–1**" means the Instruction IV.3–1, "The Cash and Derivatives Default Fund for Securities and Derivatives Product Groups (except MTS Italy Regulated Market)" dated 12 December 2013;

- 1.5.34 "**Instruction IV.3-2**" means the Instruction IV.3-2, "The Fixed Income Default Fund for Trading & Matching Platforms and the MTS Italy Regulated Market" dated 12 December 2013;
- 1.5.35 "**Instruction IV.4-1**" means the Instruction IV.4-1, "Collateral accepted to meet Margin Requirements" dated 12 December 2013;
- 1.5.36 "**Instruction IV.4-2**" means the Instruction IV.4-2, "Cash Payments", dated 19 April 2013;
- 1.5.37 "**Instruction V.4-2**" means the Instruction V.4-2, "The Triparty Repo Default Fund" dated 12 June 2014;
- 1.5.38 "**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);
- 1.5.39 "**Non-cash Collateral**" means the non-cash collateral provided as margin to the CCP either: (i) on a full title transfer basis; or (ii) by way of a Belgian law security interest under the Pledge Agreement;
- 1.5.40 "**Party**" means the CCP or the relevant Member, as applicable;
- 1.5.41 "**Pledge Agreement**" has the meaning ascribed to such expression in the CDS Clearing Rule Book;
- 1.5.42 "**Procedure**" means any of the procedures published by LCH.Clearnet SA in relation to the CDS Clearing Rule Book;
- 1.5.43 "**Repo Transaction**" has the meaning ascribed to "Repo" and "Triparty Repo" in the Derivatives Clearing Rule Book;
- 1.5.44 "**Rome I**" means 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;¹
- 1.5.45 "**Rule Book**": means any of the CDS Clearing Rule Book and the Derivatives Clearing Rule Book;

¹ 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.

- 1.5.46 "**Rules**" means any of the CDS Clearing Rules and the Derivatives Clearing Rules;
- 1.5.47 "**Section 3 of the Procedures**" means Section 3 of the Procedures, "Collateral and Cash Payment" dated 24 March 2014;
- 1.5.48 "**Section 6 of the Procedures**" means Section 6 of the Procedures, "CDS Default Fund" dated 9 December 2013;
- 1.5.49 "**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);
- 1.5.50 "**Settlement Finality Directive Regime**" means directive No. 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 (the "**Settlement Finality Directive**"), as implemented into French law under articles L. 330-1 *et seq.* of the Financial Code;
- 1.5.51 "**Termination Amount**" means the net sum or sums determined in accordance with the Netting Provisions;
- 1.5.52 "**Trade Leg(s)**" has the meaning ascribed to such expression in the Derivatives Clearing Rule Book;
- 1.5.53 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; and
- 1.5.54 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 expressly discussed and opined on in this opinion letter, the CCP 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 CCP Documentation and Transactions; to perform its obligations under the CCP Documentation and Transactions; and that each Party has taken all necessary steps to execute and deliver and perform the CCP 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 CCP Documentation and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the CCP Documentation in this jurisdiction.
- 2.4 That each Party acts in accordance with the terms of the CCP Documentation and Transactions; and that (save in relation to any non-performance leading to the taking of action by a relevant Member under the Netting Provisions), each Party performs its obligations under the CCP Documentation and each Transaction in accordance with their respective terms.
- 2.5 That there are no other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the CCP Documentation.
- 2.6 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 CCP as margin under the Pledge Agreement only, both Parties have properly executed the Pledge Agreement.
- 2.7 That the CCP Documentation and, where applicable, each security document has been entered into prior to the commencement of any insolvency procedure, Resolution Measures or any similar measures or procedures, 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; (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; or (iii) is subject to any of Resolution Measures (*in respect of which please refer to Paragraph 4.1 below*) or any similar measure or procedure under the laws of any jurisdiction in respect of either Party.
- 2.8 That the CCP: (i) operates as a central counterparty (*contrepartie centrale*) within the meaning of article L. 440-1 of the Financial Code and EMIR; (ii) has been notified to ESMA and authorised by ESMA to act as central clearing counterparty for the



purposes of EMIR; and (iii) 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 validly been admitted as a clearing member (*adhérent compensateur*) of the Derivatives Clearing Services; and/or as a clearing member (*adhérent compensateur*) qualifying as a CCM (with the meaning ascribed to such expression in the CDS Clearing Rule Book) of the CDS Clearing Service;

2.9.2 is a participant in the system operated by the CCP 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. 513-2 *et seq.* of the Financial Code or a *société de financement de l'habitat* (SFH) governed by articles L. 513-28 *et seq.* of such code) or an investment services provider (other than a portfolio management company (*société de gestion de portefeuille*) or has a comparable status within the meaning of article L. 211-36 of the Financial Code.

2.10 That the Member is at all relevant times solvent and not subject to insolvency proceedings (including, for the avoidance of doubt, Insolvency Proceedings), resolution measures (including, for the avoidance of doubt, the Resolution Measures as defined in Paragraph 4.1 below) under the laws of any jurisdiction.

2.11 That the obligations assumed under the CCP 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.

2.12 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.

2.13 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.

- 2.14 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.
- 2.15 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.
- 2.16 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.
- 2.17 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.
- 2.18 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.
- 2.19 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).
- 2.20 That the relevant Client Account and the relevant House Account are both located in France.

3. OPINION

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

3.1 Insolvency Proceedings

3.1.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which the CCP 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:²

- (a) safeguard proceeding (*procédure de sauvegarde*) governed by articles L. 620–1 *et seq.* of the Commercial Code;
- (b) accelerated safeguard proceeding (*procédure de sauvegarde accélérée*) governed by articles L. 628-1 *et seq.* of the Commercial Code;
- (c) accelerated financial safeguard proceeding (*procédure de sauvegarde financière accélérée*) governed by articles L. 628–9 *et seq.* of the Commercial Code;
- (d) rehabilitation proceedings (*redressement judiciaire*) governed by articles L. 631–1 *et seq.* of the Commercial Code; and
- (e) judicial liquidation (*liquidation judiciaire*) governed by articles L. 640–1 *et seq.* of the Commercial Code.

As a French credit institution, the CCP 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

² 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.

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.

As a French credit institution, the CCP is also subject to the Credit Institution WUD Regime.

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

If the CCP becomes subject to Insolvency Proceedings, this will constitute an Event of Default in respect of the CCP.

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 derivative products and are cleared through a central counterparty:

- 3.2.1 articles L. 440–1 *et seq.* of the Financial Code, the Settlement Finality Directive Regime and the Collateral Directive Regime;
- 3.2.2 the general regulations (*règlement général*) of the AMF; and
- 3.2.3 EMIR.

3.3 **Recognition of choice of law**

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.

We are of this opinion because:

- 3.3.1 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: (i) French law to govern CDS Clearing Rule Book and the Derivatives Clearing Rule Book; and (ii) Belgian law to govern the relevant Pledge Agreement.
- 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 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.

3.3.4 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 in the context of Insolvency Proceedings as referred to in Paragraph 3.3 and 3.4 below.

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

3.4.1 The Netting Provisions will be immediately (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 CCP:

- (a) the Member would be entitled immediately to exercise its rights under the Netting Provisions, so that:
- (b) subject to Paragraph 3.6 ("*Netting and Set-Off: House Accounts and Client Accounts*") below, 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 all Transactions, together with other losses or gains referable to such Transactions.

The Termination Amounts described in this Paragraph will include the value of any margin (whether initial margin or variation margin) transferred by one Party to the other Party as collateral on a title transfer basis and owed by the second Party to the other in respect of the relevant Transactions.

In respect of Repo Transactions,

- (a) the Netting Provisions give the Member the right to terminate and close-out in a timely manner all Repo Transactions upon an Event of Default in relation to the CCP, so that:
- (b) gains and losses on Repo Transactions will be netted so that a single net sum is payable by or to the Member.

- 3.4.2 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 CCP (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)³ 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 CCP would prevent, delay or otherwise affect the exercise of such rights by the Member.
- 3.4.3 Pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against the CCP 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.
- 3.4.4 In addition to the above, pursuant to article L. 613-31-5-4° of the Financial Code, 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.
- 3.4.5 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

³ Please note however that for this provision to apply, a Transaction must give rise to "instructions" within the meaning of article L. 330-1 of the Financial Code and to "transfer orders" under the Settlement Finality Directive.

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 (...)*".

- 3.4.6 Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Member.
- 3.4.7 In addition, both the Derivatives Clearing Rule Book and the CDS Clearing Rule Book provide for a set-off between the CDS Termination Amount and the Derivatives Termination Amount, under the conditions set forth in such Rules. Article 1.4.1.9 of the Derivatives Rule Book provides that: "*To the extent a Clearing Member is also a member of the CDSClear service(s) provided by LCH.Clearnet SA, such Clearing Member shall aggregate the House Termination Amount and the house termination amount calculated in respect of a house account structure held in connection with such CDSClear service(s) where LCH.Clearnet SA is subject to a default in accordance with the Clearing Rules and the rules applicable to CDSClear, in order to produce one net termination amount owed in relation to the Clearing Service and such CDSClear service(s) provided by LCH.Clearnet SA (...)*". Similarly, article 1.3.1.9 of the CDS Clearing Rule Book provides that: "*To the extent a Clearing Member is a member of another clearing service(s) provided by LCH.Clearnet SA, such Clearing Member shall aggregate the House Termination Amount and the house termination amount calculated in respect of a house account structure held in connection with such other clearing service(s) where LCH.Clearnet SA is subject to an LCH Default in accordance with the CDS Clearing Rules and a default in accordance with rules applicable to such other clearing service(s), in order to produce one net termination amount owed in relation to the CDS Clearing Service and such CDSClear service(s) provided by LCH.Clearnet SA (...)*".
- 3.4.8 Finally, the Rules do not contain a "walkaway" clause (*i.e.* a provision which would permit the Member to make a lower payment than the Termination Amounts calculated in respect of the Transactions, together with other losses or gains referable to the Transactions).

3.5 Set-Off

The Set-off Provision will be immediately (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 CCP;

- 3.5.1 the Member would be immediately entitled to exercise its rights under the Set-off Provision, so that:
- 3.5.2 any and all amounts owed by the Member to the CCP would be set off against any amounts owed by the CCP to the Member, so that in particular:
 - (a) the Termination Amount (once calculated); and
 - (b) the value of any margin (whether initial margin or variation margin) transferred by one Party to the other Party as Collateral (as defined by the Rules) on a title transfer basis and owed by the second Party to the other would be included in the set-off so that the Member would be entitled to receive or be obliged to pay only the net sum resulting from the set-off of such amounts.

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 CCP (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).

- 3.5.3 Furthermore, pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against the CCP 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.
- 3.5.4 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.

- 3.5.5 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"*.
- 3.5.6 Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Member.
- 3.5.7 Finally, both the Derivatives Clearing Rule Book and the CDS Clearing Rule Book provide for a set-off between the CDS Termination Amount and the Derivatives Termination Amount, under the conditions set forth in such Rules. In this respect, article 1.4.1.9 of the Derivatives Rule Book provides that: *"To the extent a Clearing Member is also a member of the CDSClear service(s) provided by LCH.Clearnet SA, such Clearing Member shall aggregate the House Termination Amount and the house termination amount calculated in respect of a house account structure held in connection with such CDSClear service(s) where LCH.Clearnet SA is subject to a default in accordance with the Clearing Rules and the rules applicable to CDSClear, in order to produce one net termination amount owed in relation to the Clearing Service and such CDSClear service(s) provided by LCH.Clearnet SA (...)"*. Similarly, article 1.3.1.9 of the CDS Clearing Rule Book provides that: *"To the extent a Clearing Member is a member of another clearing service(s) provided by LCH.Clearnet SA, such Clearing Member shall aggregate the House Termination Amount and the house termination amount calculated in respect of a house account structure held in connection with such other clearing*

service(s) where LCH.Clearnet SA is subject to an LCH Default in accordance with the CDS Clearing Rules and a default in accordance with rules applicable to such other clearing service(s), in order to produce one net termination amount owed in relation to the CDS Clearing Service and such other clearing service(s) provided by LCH.Clearnet SA (...)".

3.6 Netting and Set-Off: House Accounts and Client Accounts

- 3.6.1 Where a Member has exercised its rights under the Netting Provision, a Termination Amount payable in respect of any Client Account of a Member would not be aggregated with or netted against a Termination Amount payable on any House Account of the Member.
- 3.6.2 This is because, in accordance with article 39.4 of EMIR, each of articles 3.2.1.9 of the Derivatives Clearing Rule Book and 3.2.3.4 of the CDS Clearing Rule Book provide for segregation between Client Accounts and House Accounts.⁴
- 3.6.3 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 (d) of Section 3 of the Procedures

⁴ 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')".

provides for a calculation of Margins to be made separately, in respect of the CCM House Margin Account (as defined in the CDS Clearing Rule Book), and in respect of the CCM Client Margin Accounts (as defined in the CDS Clearing Rule Book), of a same Member.

- 3.6.4 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 or Global House Termination Amount if applicable, on the one hand and the Client Termination Amounts on the other hand.*"
- 3.6.5 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*".

3.7 Cash Collateral

- 3.7.1 Payments made by a Member to the CCP as cash margin constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the CCP, such cash would be treated as the property of the CCP.
- 3.7.2 However, the amount of cash so provided would constitute a debt owed by the CCP to the Member as principal.
- 3.7.3 This is because 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 or to create House Excess Collateral, will be provided by way of full title transfer (...).*" Likewise, article 5.2.4.1 of the CDS Clearing Rule Book provides that: "*Cash Collateral provided by CCMs to satisfy its CCM Client Margin Requirements or to create CCM Client Excess Collateral, will be provided by way of full title transfer and will be held by LCH.Clearnet SA in accordance with Section 3 of the Procedures.*"
- 3.7.4 Similarly, with respect to the Derivatives Clearing Services, article 7 of Instruction IV.4-1 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".

- 3.7.5 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 CCP shall debit or credit variation margin on a daily basis.
- 3.7.6 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 CCP, such cash would be treated as the property of the CCP though without being available to its creditors generally.
- 3.7.7 We are of this opinion because article L. 440–7 of the Financial Code expressly provides that deposits should be 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.
- 3.7.8 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 CCP.
- 3.7.9 Furthermore, article 541-31 *et seq.* of the AMF's General Regulations 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.
- 3.7.10 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 "value of 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 in the case of a CCM, any Collateral transferred (or due to be transferred) to the relevant CCM 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 "value of 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.

- 3.7.11 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, and in accordance with article 1.4.1.7 of the Derivatives Clearing Rule Book, 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.

- 3.7.12 In addition to the foregoing, with respect to the Derivatives Clearing Services, article 8 of Instruction IV.4–1 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 CCP'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 CCP in the books of *Banque de France*, within the time limits set-out in a notice. Similarly, article 5 of Instruction IV.4–2 provides that variation margin shall be paid in cash denominated in euro through the CCP's access to the Ancillary System Interface of TARGET2 for final payment in TARGET2.
- 3.7.13 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.*"
- 3.7.14 If Cash Collateral is due to be returned by the CCP to the Member, such Member would have a claim against the CCP for the return of such Cash Collateral. Articles L. 440-7, indent 2 and L. 440-8 of the Financial Code provide that a deposit placed by a Member to a clearing house [including the CCP] cannot be claimed by and any of the following persons: (i) a creditor of a client of a Member (a *donneur d'ordre*); (ii) a creditor of a Member of a clearing house [including the CCP]; (iii) a creditor of an investment firm, (iv) a creditor of the clearing house [including the CCP] itself; or (v) a court-appointed official (*mandataire de justice*), 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

Any securities provided to the CCP as margin would be treated as the property of the CCP. Equivalent securities to such securities would be returnable to the Member in the event of Insolvency Proceedings relating to the CCP, subject to the Member satisfying its obligations to the CCP.

However, in the event the CCP fails to return such securities, the value of these securities provided to the CCP as margin would constitute a debt payable by the CCP and such debt would be able to be set off under the Set-off Provision.

This is because:

- (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 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 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 CCP as cover for margin and constituting Non-cash Collateral would be treated as the property of the CCP and accordingly, the Member would only have a claim for the return of the same against the CCP, subject to the Member satisfying its obligations to the CCP.

- (d) This is because article L. 440–7 of the Financial Code 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 Non–cash Collateral posted by way of title transfer would constitute a debt owed by the CCP 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 CCP to the Member in case of an Event of Default in relation to the CCP.
- (f) With respect to the Derivatives Clearing Services, we should note that article 17 of Instruction IV.4–1 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) Likewise, with respect to the CDS Clearing Service, paragraph 3.4 (d) of Section 3 of the Procedures 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 transfer to be recorded in any of its House Collateral Accounts, and in the case of a CCM only, in any of its CCM client Collateral Accounts, in which case the relevant securities will be transferred to 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, in accordance with article L. 440–7 of the Financial Code, 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, 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, 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 Margin Requirements (as defined in the CDS Clearing Rule Book) over the last sixty Clearing Days (as defined in the CDS Clearing Rule Book); and
 - (ii) a minimum contribution of Euro 10 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 CCP 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 CCP.
- (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 CCP 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 CCP, the CCP 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 CCP 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 CCP has established three separate default funds:
 - (i) the "cash and derivatives Default Fund" which covers defaults of Members authorised to clear Transactions on Securities and/or Derivatives product groups (excluding MTS Italy);
 - (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 ; and
 - (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 shall contribute *pro rata* its risk associated with Open Positions of such Member, calculated by the CCP in accordance with Instruction IV.3-1 or Instruction 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

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 CCP.

- (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 CCP 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 (as defined in the Derivatives Clearing Rules) 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 CCP 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 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 CCP 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 Financial Code, any contractual provision providing that such appointment triggers an event of default would be void⁵;
- (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 CCP⁶; and/or (ii) the transfer to a bridge institution (*établissement-relais*) (the "**Bridge Institution**") of all or part of its assets, rights and obligations⁷ (each of such measures being referred herein to as a "**Transfer**"). The Financial Code 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 as a result of such transfer, notwithstanding any contractual or statutory provisions to the contrary⁸; and
- (c) the suspension of close-out netting rights in relation to any contracts entered into by the CCP until 17:00 at the latest on the business day following the day of publication of the ACPR's decision.⁹

4.1.3 However, the effects of Resolution Measures may be subject to the following limitations or attenuations set out in the Financial Code :

- (a) where a Transfer is made in relation to part, but not all, of the assets, rights and obligations of the Relevant Clearing Member, such Transfer may not affect the functioning of a system mentioned in article L. 330-1 of the Financial Code, nor the rules of such system¹⁰;

⁵ Paragraph 2° of article L. 613-31-16-I.

⁶ Paragraph 4° of article L. 613-31-16-I.

⁷ Paragraph 5° of article L. 613-31-16-I.

⁸ Paragraphs 4 and 5° of article L. 613-31-16-I.

⁹ Paragraph 14° of article L. 613-31-16-I.

¹⁰ Article L. 613-31-16-V of the Financial Code.

- (b) in case of Transfer of assets, rights and obligations which are subject to a contract referred to article L. 211-36-1 of the Financial Code¹¹, together with their ancillary rights, may be capable of being assigned or transferred only in whole, but not in part; and
- (c) 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 ACPR¹², 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 be¹³ in which case such acceleration and close-out netting rights may be exercised against the credit institution subject to Resolution Measures.

It should be noted that the French Banking Separation Law which introduced into French law the Resolution Measures does not provide rules articulating the resolution procedures vis-à-vis Insolvency Proceedings, while the two proceedings may pursue different objectives and provide for conflicting provisions, save that article L. 613-27 of the Financial Code gives the power to the ACPR to decide whether or not an Insolvency Proceeding may be opened against a Credit Institution.

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 collateral taker has an obligation to return securities issued by the same issuer or debtor, forming part of the same

¹¹ Essentially, derivative, securities lending or sale and repurchase (repo) contracts.

¹² 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.

¹³ Article L. 613-31-16-IV.

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 CCP 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 CCP 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 Default interests and indemnities

4.3.1 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.

4.3.2 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.

4.3.3 A French court may in its discretion decline to give effect to any indemnity for legal costs incurred by an unsuccessful litigant.

4.4 Foreign law and jurisdiction

4.4.1 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.

4.4.2 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).

4.5 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 CCP Documentation and Transaction documents.

4.5.1 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.

4.5.2 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 CCP Documentation and Transactions or in certain cases may operate to impose liability on the party acting in breach of such principles.



4.5.3 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.

4.5.4 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.

4.5.5 *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*.

4.5.6 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*.

4.5.7 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*).

4.6 Other qualifications

4.6.1 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.

- 4.6.2 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*).
- 4.6.3 The CCP 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.
- 4.6.4 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.
- 4.6.5 We express no opinion as to the effect of the provisions of the CCP 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 CCP Documentation provides are to be conclusive.

4.6.6 Please note that article L. 611–16 of the Commercial Code, introduced into French law by an ordinance dated 12 March 2014 which entered into force on 1 July 2014¹⁴ (the "**Ordinance**"), provides notably that any contractual provision amending the terms of continuation of an executory contract (*contrats en cours*) by reducing the rights, or increasing the obligations, of the debtor solely because of:

- (a) the appointment of a *mandataire ad hoc*, pursuant to article L. 611–3 of the Commercial Code;
- (b) the commencement of conciliation proceedings (*procédure de conciliation*), pursuant to article L. 611–4 of the Commercial Code; or
- (c) a request for the above purposes,

shall be deemed null and void (*réputée non-écrite*).

Please note that a similar decision has been rendered by the French *Cour de cassation* on 14 January 2014 with respect to rehabilitation proceedings (*redressement judiciaire*) and we cannot exclude that French courts would take the same position with respect to other French insolvency proceedings, specifically the safeguard proceedings (*procédure de sauvegarde*) or the judicial liquidation (*liquidation judiciaire*).

The provisions introduced by the Ordinance, as well as the decision of the French *Cour de cassation* referred to above, could be interpreted as a limitation to the right of a counterparty under a contract benefiting from the Collateral Directive Regime to close-out and enforce collateral.

However, the scope of the new provisions introduced by the Ordinance and their interaction with the application of the Collateral Directive Regime remain uncertain, especially because, while such provisions are contained in Book VI of the Commercial Code which, according to article L. 211–40 of the Financial Code, shall not impede the application of such regime, the transposition of the Collateral Directive though predates the provisions of the Ordinance. As a result, it is unclear whether or not the French lawmakers intended to restrict the application of the Collateral Directive Regime.

¹⁴ Ordinance no. 2014-326 of 12 March 2014 reforming the prevention of businesses' difficulties and insolvency proceedings.

- 4.6.7 For a payment by way of set-off to occur on or after the commencement of an Insolvency Proceeding in respect of a CCP (including if such payment occurs pursuant to the Set-Off Provisions), the Member will have to declare its claims against such CCP to the creditors' representative (*mandataire judiciaire* or *liquidateur judiciaire*, depending on the type of Insolvency Proceedings) in accordance with, and within the time period provided by article L. 622-24 *et seq.* of the Commercial Code, including those claims which are expected to be extinguished by application of the set-off provisions.
- 4.6.8 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 CCP 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.
- 4.6.9 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 CCP 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 CCP Documentation invalid or unenforceable.
- 4.6.10 Article L. 211-38-II-3° of the Financial Code imposes that the enforcement of collateral is made at normal market conditions in accordance with valuation terms that shall have been agreed upon the parties in the collateral arrangement.
- 4.6.11 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" (as defined in Chapter I of the Derivatives Clearing Rule Book, which definition does not literally refers to margins) 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.

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- (b) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings; and
- (c) any competent authority supervising a subscribing member or its affiliates

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 and in preparing this opinion we have not had regard to the interests of any such person.

This Opinion was prepared by Clifford Chance Europe LLP on the basis of instructions from FIA Europe in the context of the netting requirements of the Basel III capital rules in the EU and US and Clifford Chance Europe LLP has not taken instructions from, and this Opinion does not take account of the specific circumstances of, any subscribing member. In preparing this Opinion, Clifford Chance Europe LLP had no regard to any other purpose to which this Opinion may be put by any subscribing member.

By permitting subscribing members to rely on this Opinion as stated above, Clifford Chance Europe LLP accepts responsibility to such subscribing members for the matters specifically opined upon in this Opinion in the context stated in the preceding paragraph, but Clifford Chance Europe LLP does not have or assume any client relationship in connection therewith or assume any wider duty to any subscribing member or their affiliates. This Opinion has not been prepared in connection with, and is not intended for use in, any specific transaction.

Furthermore this Opinion is given on the basis that any limitation on the liability of any other adviser to FIA Europe or any subscribing member, whether or not we are aware of that limitation, will not adversely affect our position in any circumstances.

Yours faithfully,

Clifford Chance Europe LLP

A handwritten signature in blue ink, appearing to read 'Frédérick Lacroix', with a long horizontal flourish extending to the right.

Frédérick Lacroix
Avocat à la Cour, associé