



OUR REF F0595.5/TZS/AMK
YOUR REF

Special Instructions

The Futures & Options Association
2nd Floor
36-38 Botolph Lane
London
EC3R 8DE

Copy to:
The International Swaps and Derivatives Association
One Bishops Square
London
E1 6AD

Dear Sirs

IAS 32 – Scotland – CM – Formal Opinion - Eurex (swaps and options)

1. Background

- 1.1 You have asked us to give an opinion as to the laws of Scotland ("this jurisdiction") in relation to certain netting and set-off provisions in the Rules of Eurex Clearing AG (the "CCP"), in respect of its service for clearing options or interest rate swaps (the "Service"), governed by the laws of the Federal Republic of Germany, as such provisions apply between the CCP and clearing members of the CCP ("Clearing Members") which are Scottish Banks (as defined below).
- 1.2 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 for the purposes of demonstrating compliance with International Accounting Standard 32 ("IAS 32") and the clarification amendments made to IAS 32 in December 2011 and effective on 1 January 2014.
- 1.3 References in this letter to "this Opinion" are to this opinion letter.

2. Terms of Reference

- 2.1 This Opinion is given in respect of the Netting Provisions of the CCP and the laws of this jurisdiction in force as at 30 September 2013 (the "Opinion Date"). We express no opinion as to any provisions of the Rules of the CCP other than those on which we expressly opine.
- 2.2 This Opinion is given only in respect of Clearing Members which are Scottish Banks.
- 2.3 The insolvency proceedings ("Insolvency Proceedings") which may apply to a Clearing Member under the laws of this jurisdiction are:
 - 2.3.1 the approval of a voluntary arrangement in respect of it under Part 1 of the Insolvency Act;
 - 2.3.2 the obtaining of an initial moratorium by the directors of it where they propose a voluntary arrangement under Part 1 of the Insolvency Act;
 - 2.3.3 the appointment of an administrator to it under Schedule B1;
 - 2.3.4 the appointment of an administrative receiver over the whole (or substantially the whole) of its property by or on behalf of the holder of a floating charge granted either prior to 15

5th Floor, 1 Exchange Crescent
Conference Square
Edinburgh EH3 8UL
DX 551970 Edinburgh 53
T: +44 (0)131 228 9900
F: +44 (0)131 228 1222
www.shepwedd.co.uk

191 West George Street
Glasgow
G2 2LB
DX GW409 Glasgow
T: +44 (0)141 566 9900
F: +44 (0)141 565 1222

Condor House
10 St. Paul's Churchyard
London EC4M 8AL
DX 98945 Cheapside 2
T: +44 (0)20 7429 4900
F: +44 (0)20 7329 5939

1 Berry Street
Aberdeen
AB25 1HF
DX AB44 Aberdeen
T: +44 (0)1224 343 555
F: +44 (0)1224 343 555

- September 2003 or in connection with one of the excepted arrangements detailed in sections 72B to 72GA of the Insolvency Act;
- 2.3.5 its voluntary winding up under the Insolvency Act;
 - 2.3.6 its compulsory winding up under the Insolvency Act;
 - 2.3.7 a scheme of arrangement under Part 26 of the Companies Act; and
 - 2.3.8 the entry by it into bank insolvency or bank administration under the Banking Act.
- 2.4 The opinions are given in respect of only such of those CCP Contracts which, under their governing laws (and all other applicable law), are legal, valid, binding, enforceable and capable of being terminated and liquidated in accordance with the relevant Netting Provisions.
- 2.5 No opinions are given in this Opinion on (or in relation to):
- 2.5.1 the availability of any judicial remedy;
 - 2.5.2 any matters of fact;
 - 2.5.3 the enforceability of any net obligation resulting from the operation of the Netting Provisions;
 - 2.5.4 any provisions of the CCP Documentation or the Rules other than the Netting Provisions;
 - 2.5.5 the enforceability or effectiveness of any purported declaration of trust (or any provision which requires any asset to be held on trust) by any party under the CCP Documentation;
 - 2.5.6 any person found or alleged to be a trustee of a constructive, implied, resulting or other trust constituted by operation of law or who is a trustee in sequestration, or an executor acting in that capacity;
 - 2.5.7 any tax that may arise or be suffered as a result of the entry into or performance of the CCP Documentation, any Transaction or any CCP Contract; or
 - 2.5.8 any accounting policies.
- 2.6 For the purposes of this Opinion we have reviewed the documents listed in Schedule 1 and no other documents.
- 2.7 This Opinion relates solely to matters of Scots law as applied by the Scottish courts as at the Opinion Date and we express no opinions on the laws of any jurisdiction other than Scotland. In particular, this Opinion does not consider the impact of the law of any other jurisdiction, even where, under Scots law, the law of that jurisdiction falls to be applied.
- 2.8 This Opinion and all non-contractual matters which arise out of it are governed by Scots law.
- 2.9 This opinion does not apply to any clearing services or transactions other than in respect of the Services.

3. Definitions

- 3.1 In this Opinion:
- 3.1.1 "**1989 Act**" means the Companies Act 1989.
 - 3.1.2 "**Applicable Amount**" means, in respect of the Service, each amount identified as such in Annex B which is payable by the Clearing Member or the CCP in respect of each CCP Contract.
 - 3.1.3 "**Applicable Netting Provisions**" means the BAU Netting Provisions, CCP Default Netting Provisions or Member Default Netting Provisions, as appropriate.

- 3.1.4 "**Banking Act**" means the Banking Act 2009.
- 3.1.5 "**BAU Netting Provisions**" means, in respect of the Service, the rules identified as such in Annex B (which are contained in the Rules), in the form set out in Annex A.
- 3.1.6 "**building society**" means a building society (within the meaning of section 119 of the Building Societies Act 1986).
- 3.1.7 "**CCP Contract**" means a contract between the CCP and the Clearing Member which arises as a result of the clearance of a Transaction at or by the CCP (and which is on the same terms as that Transaction).
- 3.1.8 "**CCP Default Netting Rules**" means, in respect of the Service, the rules identified as such in Annex B (which are contained in the Rules), in the form set out in Annex A.
- 3.1.9 "**CCP Documentation**" means, in respect of the Service, the documents, agreements, acts and other things pursuant to which the Rules are made contractually binding between the Parties.
- 3.1.10 "**CI Regulations**" means Credit Institutions (Reorganisation and Winding Up) Regulations 2004.
- 3.1.11 "**Clearing House**" means a UK Clearing House or an Overseas Clearing House.
- 3.1.12 "**Collateral Regulations**" the Financial Collateral Arrangements (No. 2) Regulations 2003.
- 3.1.13 "**Companies Act**" means the Companies Act 2006.
- 3.1.14 "**Default Proceedings**" means default proceedings as defined in Party VII, being proceedings taken by the CCP pursuant to the Default Rules.
- 3.1.15 "**Default Rules**" means, in respect of the Service, those parts of the CCP Documentation for that Service which constitute "default rules" for the purposes of Part 7, being the rules of the CCP which provide for the taking of action in the event of a Clearing Member appearing to be unable, or likely to become unable, to meet its obligations in respect of one or more market Contracts connected with the CCP.
- 3.1.16 "**designated system**" means a designated system for the purposes of the Settlement Finality Regulations.
- 3.1.17 "**EMIR**" means Regulation (EU) No. 648/2012 on OTC derivatives, central counterparties and trade repositories.
- 3.1.18 "**FCA**" means the United Kingdom Financial Conduct Authority.
- 3.1.19 "**FSMA**" means the Financial Services and Markets Act 2000.
- 3.1.20 "**Insolvency Act**" means the Insolvency Act 1986.
- 3.1.21 "**Insolvency Representative**" means a provisional liquidator, interim liquidator, liquidator, administrator, receiver or other insolvency practitioner or representative appointed to or in respect of a Clearing Member in relation to any Insolvency Proceedings.
- 3.1.22 "**Member Default Netting Provisions**" means, in respect of the Service, the rules identified as such Annex B (which are contained in the Rules), in the form set out in Annex A.
- 3.1.23 "**Netting Provisions**" means, in relation to the Service, the CCP Default Netting Rules, Member Default Netting Provisions, and BAU Netting Provisions of the relevant CCP in relation to that Service.

- 3.1.24 "**Overseas Clearing House**" means a recognised clearing house which is not a recognised central counterparty and which is incorporated in a jurisdiction other than a jurisdiction of the United Kingdom.
- 3.1.25 "**Part 7**" means Part 7 of the Companies Act 1989.
- 3.1.26 "**Party**" means the CCP or the relevant Clearing Member and a reference to "**Parties**" is a reference to the CCP and a particular Clearing Member.
- 3.1.27 "**PRA**" means the United Kingdom Prudential Regulation Authority.
- 3.1.28 "**recognised clearing house**" means a recognised clearing house within the meaning of section 285 of FSMA and for the purposes of Part 7.
- 3.1.29 "**recognised central counterparty**" means a recognised central counterparty within the meaning of section 285 of FSMA and for the purposes of Part 7.
- 3.1.30 "**recognised investment exchange**" means a recognised investment exchange within the meaning of section 285 of FSMA and for the purposes of Part 7.
- 3.1.31 "**Recognition Requirements Regulations**" means the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001.
- 3.1.32 "**Rules**" means the rules and procedures of the CCP.
- 3.1.33 "**Scottish Bank**" means a company which is formed and registered in Scotland under the Companies Act or the former Companies Acts (as defined in section 1171 of the Companies Act) and which:
- (i) has permission to accept deposits under Part 4A of FSMA; and
 - (ii) does not also have permission under Part 4A of FSMA to effect or carry out contracts of insurance.
- 3.1.34 "**Settlement Finality Directive**" means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998;
- 3.1.35 "**Settlement Finality Regulations**" means the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.
- 3.1.36 "**Transaction**" means a transaction between the Clearing Member and another clearing member of the CCP which is cleared through or by the CCP.
- 3.1.37 "**UK bank**" means an undertaking incorporated in or formed under the law of any part of the United Kingdom and having its head office in the United Kingdom, which has permission under Part IV of FSMA to accept deposits; but for the purposes of this Opinion does not include insurance companies or credit unions within the meaning of section 31 of the Credit Unions Act 1979.
- 3.1.38 "**UK Clearing House**" means a recognised clearing house which is not a recognised central counterparty and which is incorporated in the United Kingdom.
- 3.2 In this Opinion:
- 3.2.1 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;
- 3.2.2 references to "**the opinions**" or to an "**opinion**" are to the opinions or an opinion given in this Opinion; and

3.2.3 references to a "**paragraph**" are (except where the context otherwise requires) to a paragraph of this Opinion.

3.3 Except where otherwise defined herein, terms defined in the Rules of the CCP have the same meaning in this Opinion.

4. Assumptions

We assume the following:

- 4.1 Each Party has the capacity, power and authority under all applicable law(s) to enter into the CCP Documentation, each Transaction, each CCP Contract and to be bound by and perform its obligations thereunder (including its obligations under the Rules).
- 4.2 Each Party has taken all necessary steps and obtained and maintained all authorisations, approvals, licences and consents necessary to execute, deliver and perform the CCP Documentation, each Transaction, each CCP Contract, and to ensure the legality, validity, enforceability or admissibility in evidence of the CCP Documentation, each Transaction, and each CCP Contract in this jurisdiction.
- 4.3 The CCP Documentation and each Transaction and CCP Contract accurately reflect the true intentions of the Parties and have been entered into and are carried out by the Parties in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purposes of carrying on, and by way of, their respective businesses.
- 4.4 The CCP Documentation and the Rules (including the obligations to pay Applicable Amounts) are legal and valid and are binding and enforceable on or against (as the case may be) each Party, in each case under the law by which they are expressed to be governed and all other applicable law (other than, in respect of the Netting Provisions, the law of this jurisdiction).
- 4.5 The Netting Provisions were Rules which were in force on the Opinion Date.
- 4.6 The law chosen by the Parties to govern the CCP Documentation and the Rules is not Scots law.
- 4.7 The opinions given in paragraphs 5.2 to 5.4, are a correct statement of the effect of the relevant Netting Provisions under the governing law of the CCP Documentation and the Rules.
- 4.8 The CCP Documentation and each Transaction and CCP Contract has been entered into by the Parties prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.
- 4.9 Each payment which is to be netted under the BAU Netting Provisions is due and payable on the date on which the rights under the Netting Provisions are to be exercised.
- 4.10 Each Party performs its obligations under the CCP Documentation and Rules in accordance with their terms.
- 4.11 There are no:
 - 4.11.1 provisions of the CCP Documentation and the Rules which modifies, amends, supersedes or may otherwise affect the operation or enforceability of any Netting Provision (other than, for the avoidance of doubt, another Netting Provision); or
 - 4.11.2 other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the CCP Documentation or Rules in a way which would be material for the purposes of this Opinion,

and, in particular, in relation to the settlement of payments due in respect of Applicable Amounts, there are no provisions or rules of any relevant designated system (other than the CCP itself) which purport to override or are inconsistent with the Netting Provisions.

- 4.12 In relation to the opinions at paragraph 5.5 as regards the CCP Default Netting Rules and the Member Default Netting Provisions only, an applicable event of default has occurred in respect of the CCP or the Client Member (as appropriate) and, accordingly, that such Netting Provisions apply.
- 4.13 None of the Rules have been disallowed pursuant to section 300A of FSMA.
- 4.14 The CCP is at all material times:
 - 4.14.1 an Overseas Clearing House; and
 - 4.14.2 a system designated for the purpose of the Settlement Finality Directive in an EEA State (other than the United Kingdom) or Gibraltar.
- 4.15 Neither Party is a recognised investment exchange and the Clearing Member is not a Clearing House, recognised central counterparty, EEA central counterparty (as defined in section 285 of the 1989 Act) or third country central counterparty (as defined in section 285 of the 1989 Act).
- 4.16 Neither Party is:
 - 4.16.1 a "*group undertaking*" in relation to the other Party as that phrase is defined in Section 1161(5) of the Companies Act; or
 - 4.16.2 a "*bridge bank*" as defined in section 12 of the Banking Act.

5. Opinion

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out below, we are of the opinion that, under the laws of this jurisdiction:

5.1 Recognition of Choice of Law

The choice of law provisions of the CCP Documentation and the Rules would be recognised under the law of this jurisdiction notwithstanding that the CCP is not incorporated in this jurisdiction.

5.2 Set-off prior to Clearing Member default

5.2.1 Prior to the commencement of either Default Proceedings or Insolvency Proceedings in respect of the Clearing Member:

- (i) the BAU Netting Provisions confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP, effective at the election of either Party, and in each case in accordance with their terms; and
- (ii) if a default of the CCP has occurred, the CCP Default Netting Rules confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP together with amounts representing Applicable Amounts which are due but not yet payable between the Clearing Member and the CCP, effective at the election of the Clearing Member in each case in accordance with their terms.

5.2.2 We are of this opinion because under the laws of this jurisdiction a Scottish court would apply the law chosen by the Parties to govern the CCP Documentation and the Rules in determining the enforceability of the BAU Netting Provisions or CCP Default Netting Rules.

5.2.3 In Scotland, the general rules which govern set-off in an insolvency are common law rules (the "**Scottish Insolvency Set Off Rules**"). There is some case law which suggests that the Scottish Insolvency Set Off Rules may be applied when a person is insolvent (on a balance sheet or, possibly, cash flow basis) but in respect of which formal insolvency proceedings have not commenced. The relevant cases were decided in the context of a counterparty of the insolvent party attempting to rely on the Scottish Insolvency Set Off Rules to effect a set

off in circumstances where the general set-off rules outside of insolvency did not provide a right of set off but the Scottish Insolvency Set Off Rules would have. While we consider that a Scottish court would be unlikely to seek to apply the Scottish Insolvency Set Off Rules when determining the enforceability of a contractual set-off or netting provision in these circumstances, this risk cannot be discounted.

- 5.2.4 If a Scottish court did apply the Scottish Insolvency Set Off Rules in these circumstances, it may consider whether the BAU Netting Provisions or CCP Default Netting Rules are consistent with the Scottish Insolvency Set Off Rules. This is because a Scottish court may regard the Scottish Insolvency Set Off Rules as mandatory and, accordingly, may decide that any contractual netting or set-off provisions which are inconsistent with them are not enforceable to the extent of the inconsistency.
- 5.2.5 However, we consider that the BAU Netting Provisions and the CCP Default Netting Rules are generally consistent with the Scottish Insolvency Set Off Rules. Furthermore, the protections described in paragraph 6 (in relation to market contracts and Part 7) should apply and the additional protections provided under the Collateral Regulations and/or the Settlement Finality Regulations (on which see paragraph 7) may apply depending on the circumstances.

5.3 Clearing Member Insolvency – Prior to Default Proceedings

- 5.3.1 Following the commencement of Insolvency Proceedings in respect of the Clearing Member, but prior to the commencement of Default Proceedings:
- (i) the BAU Netting Provisions confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP, effective at the election of either Party in each case in accordance with their terms; and
 - (ii) if a default of the CCP has also occurred, the CCP Default Netting Rules confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP together with amounts representing Applicable Amounts which are due but not yet payable between the Clearing Member and the CCP, effective at the election of the Clearing Member in each case in accordance with their terms.
- 5.3.2 We are of this opinion for the following reasons:
- (i) Prior to the commencement of Insolvency Proceedings, under the laws of this jurisdiction a Scottish court would apply the law chosen by the Parties to govern the CCP Documentation and the Rules in determining the enforceability of the BAU Netting Provisions or CCP Default Netting Rules.
 - (ii) Following the commencement of Insolvency Proceedings, under the laws of this jurisdiction where:
 - (a) the Insolvency Proceedings are a "relevant reorganisation" or "relevant winding up" for the purposes of the CI Regulations¹; and
 - (b) the BAU Netting Provisions or CCP Default Netting Rules constitute "set off rights" or a "netting agreement" for the purposes of Regulation 28 or Regulation 34 respectively of the CI Regulations (on which please see paragraph 7.2 below),

¹ "Relevant reorganisation" and "relevant winding up" are defined for these purposes in Regulation 21 of the CI Regulations.

a Scottish court would apply the law chosen by the Parties to govern the CCP Documentation and the Rules in determining the enforceability of the BAU Netting Provisions or CCP Default Netting Rules.

- (iii) Following the commencement of Insolvency Proceedings which are not a "relevant reorganisation" or "relevant winding up" for the purposes of the CI Regulations and/or where Regulation 28 or Regulation 34 of the CI Regulations do not apply:
 - (a) a Scottish court would apply the law chosen by the Parties to govern the CCP Documentation and the Rules in determining the enforceability of the BAU Netting Provisions or CCP Default Netting Rules;
 - (b) a Scottish court may also consider whether the BAU Netting Provisions or CCP Default Netting Rules are consistent with the Scottish Insolvency Set Off Rules. This is because, as mentioned above, a Scottish court may regard the Scottish Insolvency Set Off Rules as mandatory and, accordingly, may decide that any contractual netting or set-off provisions which are inconsistent with them are not enforceable to the extent of the inconsistency;
 - (c) however, as mentioned above, we consider that the BAU Netting Provisions and the CCP Default Netting Rules are generally consistent with the Scottish Insolvency Set Off Rules; and
 - (d) furthermore the protections described in paragraph 6 (in relation to market contracts and Part 7) should apply and the additional protections provided under the Collateral Regulations, and/or the Settlement Finality Regulations (on which see paragraph 7) may apply depending on the circumstances.

5.4 Clearing Member Insolvency – Default Proceedings

- 5.4.1 If Default Proceedings are commenced against the Clearing Member, the Member Default Netting Provisions will confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP together with amounts representing Applicable Amounts which are due but not yet payable between the Clearing Member and the CCP, effective at the election of the CCP.
- 5.4.2 We are of this opinion for the reasons set out in paragraph 6.

5.5 Conditions

There are no rules of law of this jurisdiction which would require the fulfilment of any conditions before the exercise of rights of set-off under the Netting Provisions. It is not the case, as far as the laws of this jurisdiction are concerned, that such rights are enforceable only on the occurrence of some future event.

6. Market contracts and Part 7

6.1 Background

Where netting of market contracts made between a Clearing House and a third party under the default rules of the Clearing House, Part 7 will apply. Part 7 provides a number of protections the purpose of which is to prevent insolvency laws in this jurisdiction from applying to prevent or disrupt the netting.

6.2 Application of Part 7 to the Netting Provisions

Market contracts

- 6.2.1 For the purposes of this Opinion, in relation to Transactions which are cleared through a Clearing House, the following are market contracts for the purposes of Part 7:
- (i) contracts entered into by the Clearing House in its capacity as a clearing house, with one of its members for the purposes of enabling the rights and liabilities of that member under a transaction to be settled; and
 - (ii) contracts entered into by the Clearing House in its capacity as a clearing house, with one of its members for the purposes of providing central counterparty services to that member.
- 6.2.2 For these purposes, "central counterparty services" include services provided by the Clearing House to the parties to a transaction in connection with contacts between each of the parties and the Clearing House (in place of, or as an alternative to, a contract directly between the parties).
- 6.2.3 On this basis, we consider that CCP Contracts will be market contracts for the purposes of Part 7.

Default rules

- 6.2.4 Under Part 7 the "default rules" of a Clearing House are the rules of it which provide for the taking of action in the event of a person appearing to be unable or becoming unable to meet its obligations in respect of one or more market contracts connected with the Clearing House.
- 6.2.5 On this basis, we consider that the Member Default Netting Provisions are default rules for the purposes of Part 7.
- 6.2.6 However, we consider that the BAU Netting Provisions and the CCP Default Netting Rules will not be default rules for the purposes of Part 7.
- 6.2.7 The CCP Default Netting Rules should however be rules of the CCP "as to the settlement of market contracts not dealt with under its default rules" ("**Non-Default Settlement Rules**") for the purpose of Part 7.
- 6.2.8 The BAU Netting Provisions should, in principal, also be Non-Default Settlement Rules. However, they will not be Non-Default Settlement Rules (and so the protections in Part 7 will not apply) to the extent that the set-off of Applicable Amounts pursuant to the BAU Netting Provisions does not constitute "settlement" of the relevant CCP Contracts.

6.3 Part 7 protections

- 6.3.1 Part 7 provides, among other things, that:
- (i) neither:
 - (a) a market contract;
 - (b) the default rules of a Clearing House; nor
 - (c) the Non-Default Settlement Rules of a Clearing House,
- can be held to be invalid at law on the ground of any inconsistency with the law relating to the distribution of assets of a person on winding-up or administration;

- (ii) the powers of a relevant office-holder and of a court under the Insolvency Act shall not be exercised in such a way as to prevent or interfere with:
 - (a) the settlement in accordance with the Non-Default Settlement Rules of a Clearing House of a market contract;
 - (b) any action taken under the default rules of a Clearing House
 - (iii) no order can be made under sections 242 or 243 of the Insolvency Act (relating to the avoidance of gratuitous alienations and unfair preferences) or the equivalent common law rules in relation to, among other things, a market contract or the provision of margin under a market contract;
 - (iv) sections 178 and 186 of the Insolvency Act (relating to the power to disclaim onerous property and the court's power to order rescission of contracts), any equivalent common law rules and any common law rule in relation to the ability of a liquidator to disclaim contracts do not apply to a market contract;
 - (v) section 127 of the Insolvency Act (relating to the avoidance of property disposition effected after the presentation of a winding-up petition) does not apply to a market contract or a disposition of property or provision of margin under a market contract.
- 6.3.2 Subject to the qualifications set out below, we consider that, where Part 7 applies to the BAU Netting Provisions, the CCP Default Netting Rules and the Member Default Netting Provisions (on which see paragraph 6.2 above) it will ensure that those provisions will be enforceable in the terms described in paragraphs 5.3.1 and 5.4.1 above in any Insolvency Proceedings in relation to a Clearing Member.

7. Other statutory protections

7.1 Collateral Regulations

7.1.1 Under the Collateral Regulations:

- (i) a "**Financial Collateral Arrangement**" is either a "title transfer financial collateral arrangements" or a "security collateral arrangements"; and
- (ii) a "**Close Out Netting Provision**" is a term of a Financial Collateral Arrangement or of an arrangement of which a Financial Collateral Arrangement forms part under which on the occurrence of an enforcement event, whether through the operation or netting or set-off or otherwise:
 - (a) the obligations of the parties are accelerated or become immediately due and expressed as an obligation to pay an amount representing the original obligations estimated current value or replacement cost or are terminated and replaced by an obligation to pay such an amount; or
 - (b) an account is taken of what is due from each party to the other in respect of such obligations and a net sum equal to the balance if the account payable by the party from whom the larger amount is due to the other party.

7.1.2 Where a Netting Provision is a Close Out Netting Provision:

- (i) Regulation 12 provides that that Netting Provision will remain effective on the taking or winding up or reorganisation measures (as defined in the Collateral

Regulations) in relation to any party in accordance with its terms. However, Regulation 12 will not apply where Regulation 12(1) of the Collateral Regulations does not apply if at the time the relevant financial obligations came into existence:

- (a) the CCP was aware, or should have been aware, that winding up proceedings or reorganisation measures (as defined in the Collateral Regulations) had commenced in relation to the insolvent Clearing Member;
 - (b) the CCP had notice that a meeting of creditors of the insolvent Clearing Member had been summoned under section 98 of the Insolvency Act 1986 or that a petition for the winding-up of the insolvent Clearing Member or for it to be placed in bank insolvency under the Banking Act was pending; or
 - (c) the CCP had notice that an application for an administration order was pending, or that a person had given notice of intention to appoint an administrator, in respect of the insolvent Clearing Member.
- (ii) Regulation 10 provides that section 127 of the Insolvency Act (relating to property dispositions after the commencement of a winding up) does not apply to:
- (a) avoid any transfers of property under the relevant Financial Collateral Arrangement; or
 - (b) prevent the Close Out Netting Provision from taking effect in accordance with its terms.

7.2 CI Regulations

- 7.2.1 Scottish Banks will be UK Credit Institutions for the purposes of the Credit Institution Regulations.
- 7.2.2 Regulation 28 of the CI Regulations provides that a relevant reorganisation or winding up shall not affect the right of creditors to demand the set-off of their claims against the claims of the affected UK Credit Institution where such set-off is permitted by the law applicable to the affected UK Credit Institution's claim. Accordingly, to the extent the Netting Provisions constitute set-off rights, the enforceability of those set-off rights should not be affected by the commencement of Insolvency Proceedings in this jurisdiction.
- 7.2.3 Regulation 34 of the CI Regulations provides that the effects of a relevant reorganisation or a relevant winding up on a netting agreement shall be determined in accordance with the law applicable to the relevant agreement. Accordingly, to the extent the Netting Provisions are a netting agreement for the purposes of regulation 34, the enforceability of those Netting Provisions should not be affected by the commencement of Insolvency Proceedings in this jurisdiction.

7.3 Settlement Finality Regulations

- 7.3.1 To the extent that the Member Default Netting Provisions or the CCP Default Netting Provisions would qualify as "default arrangements" of a designated system as defined in regulation 2(1) of the Settlement Finality Regulations (as to which we refer you to the CCP Opinion), pursuant to regulation 14 of the Settlement Finality Regulations:

- (i) the default arrangements of a designated system shall not be regarded as invalid at law on the grounds of inconsistency with the laws of this jurisdiction relating to the distribution of assets of a person subject to winding-up or administration; and
 - (ii) the powers of an insolvency official and of the courts of this jurisdiction under the Insolvency Act 1986 shall not be exercised in such a way as to interfere with any action taken under the default arrangements of a designated system.
- 7.3.2 Accordingly, to this extent, the enforceability or effectiveness of the Member Default Netting Provisions or CCP Default Netting Provisions will not be affected by the commencement of Insolvency Proceedings in respect of the Clearing Member.
- 7.3.3 The protection of the Netting Provisions which is provided by regulation 14 applies notwithstanding that the Clearing Member may be subject to Insolvency Proceedings in another jurisdiction. This is because the courts in this jurisdiction are prohibited by regulation 25 of the Settlement Finality Regulations from recognising or giving effect to the order of any court outside the United Kingdom or any act by a foreign insolvency official where such order or act would be prohibited by a court or insolvency official in the United Kingdom by regulation 14.

8. Qualifications

8.1 Insolvency proceedings in relation to the CCP

The opinions are subject to all laws relating to the bankruptcy, insolvency, liquidation, administration, receivership, moratorium, reconstruction or reorganisation of the CCP (whether in the jurisdiction of the CCP, this jurisdiction or any other jurisdiction).

8.2 Choice of Law

- 8.2.1 The Scottish courts' application of the choice of law to govern a contract entered into prior to 17 December 2009 could be modified to the extent provided by and in the circumstances set out in Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the "**Rome I Regulation**"), including in the following circumstances:

- (i) where all other elements relevant to the situation at the time of the choice of law are located in a country ("**Country X**"), other than the country whose law has been chosen, any provisions of the law of Country X which cannot be derogated from by agreement will apply; or
- (ii) where the obligations arising out of the contract have to be or have been performed in another country ("**Country Y**"), any overriding mandatory provisions of the law of Country Y rendering the performance of the contract unlawful may apply; or
- (iii) where the application of a provision of law of the governing law of the contract (as determined by the Rome I Regulation) is manifestly incompatible with the Scottish public policy, the provision may not be applied.

- 8.2.2 The Scottish courts' application of the choice of law to govern a contract entered into on or following 17 December 2009 could be modified to the extent provided by and in the circumstances set out in the Contracts (Applicable Law) Act 1990 (the "**1990 Act**"), including in the following circumstances:

- (i) effect may be given to the rules of law of a jurisdiction which cannot be derogated from by contract ("**Mandatory Rules**") where the contract has a close

- connection with that jurisdiction and, under the laws of that jurisdiction, those Mandatory Rules must be applied whatever the governing law of the contract;
- (ii) effect will be given by the Scottish courts of Mandatory Rules of this jurisdiction notwithstanding that the governing law of the contract is not Scots law; and
 - (iii) where the application of a provision of law of the governing law of the contract is manifestly incompatible with the Scottish public policy, the provision may not be applied.
- 8.2.3 The Scottish courts will only uphold the choice of a law other than Scots law to govern all or any part of the CCP Documentation where that choice has been expressly made in the CCP Documentation and is clear and unambiguous.
- 8.2.4 We express no opinion as to an choice of law to govern:
- (i) contractual obligations falling outside the scope of the Rome I Regulation or the 1990 Act; or
 - (ii) non-contractual obligations.
- 8.3 Qualifications in relation to market contracts**
- 8.3.1 Market contracts may be affected by action taken by a recognised investment exchange under its default rules and/or EMIR. Part 7 does not cater for the unlikely event of a conflict between action which a Clearing House wishes to take and operation of default rules of a recognised investment exchange in respect of a market contract, though we would expect the outcome to be either a transfer of the market contract (or a combination of market contracts and/or margin) to a person other than the defaulter under the procedures of the Clearing House or a close-out and netting.
- 8.3.2 If a creditor of a defaulter who has attached an amount owed by the other party to a market contract is itself subject to set-off, the ability to include that amount in a netting under default rules is not assured by Part 7.
- 8.3.3 Under section 164(4) of the Companies Act 1989, the value of any profit arising to the solvent party from any market contract entered into by it or, as the case may be, the amount or value of the margin or default fund contribution can be recovered by the relevant office-holder if the solvent party had notice (within the meaning of section 190(5) of that Act), at the time the relevant market contract was entered into, that a petition had been presented for the winding-up or bankruptcy or sequestration of the estate of the insolvent party.
- 8.3.4 A Clearing House is not obliged to take action following the default of a member unless required to do so pursuant to directions given by the appropriate regulator (the FCA or PRA, as applicable) under section 166 of the Companies Act 1989. The appropriate regulator may direct a Clearing House not to take action (or certain types of action) under its default rules in certain circumstances permitted by section 166.
- 8.3.5 Netting under the default rules of a Clearing House may not be effective against the attaching creditor if that creditor is in liquidation, since there may not be the requisite mutuality of obligations for effective set-off in such creditor's insolvency proceedings.

8.4 **Valuation of future, contingent or unascertained obligations under the general law of insolvency set off in Scotland**

Date of valuation

- 8.4.1 There is almost no authority as to the date on which a set off (or "balancing of accounts in bankruptcy") under the general insolvency set-off rules in Scotland is effected, and no modern authority on the subject at all. However, we consider that it is more likely than not that that date would be the date of commencement of any Insolvency Proceedings of a Clearing Member (the "**Commencement Date**").
- 8.4.2 If the date that CCP Contracts are terminated, valued and set off for the purposes of the Netting Provisions occurs after the Commencement Date. The question therefore arises as to whether, if any valuation of future, contingent or unascertained obligations of either Party which fall to be included in the relevant Netting Provisions is required, that value is required to be calculated as at the Commencement Date notwithstanding that, under the CCP Documentation and Rules, it would be calculated as at a later date. We would make the following points in relation to this:
- 8.4.3 If we are correct that the valuation date would be the Commencement Date, then there is a risk that, in any Insolvency Proceedings in respect of a Clearing Member, a Scottish court would require valuation of the underlying obligations which are the subject of the netting or set-off to be made as at that date, at least for the purposes of calculating the CCP's (net) claim in those Insolvency Proceedings. This is because a Scottish court may regard the Scottish Insolvency Set Off Rules as mandatory and the designation of any other valuation date as an attempt to contract out of those rules.

Valuation methodology

- 8.4.4 There is very little authority in Scots law on the specific methodology to be applied to value future, contingent or unascertained obligations (both in the context of calculating the claims of a creditor in insolvency proceedings and in calculating the amount to be included in respect of such obligations in any insolvency set off calculation). It is accordingly not certain what approach a Scottish court would take if it was asked to consider the valuation of obligations in the context of the Netting Provisions.
- 8.4.5 However, we consider that, provided that the valuations of future, contingent or unascertained obligations for the purposes of the Netting Provisions is commercially reasonable, Scottish court would not seek to interfere with those calculations.

The Collateral Regulations, the CI Regulations and Part 7

- 8.4.6 It should be noted that, where the Applicable Netting Provisions is a Close Out Netting Provision for the purposes of the Collateral Regulations (on which please see paragraph 7.1 below) or the Clearing Member subject to winding-up proceedings or reorganisation measures for the purposes of the CI Regulations (on which please see paragraph 7.2 above), we consider that a Scottish court would not interfere with the valuation provisions in the Netting Provisions. The reason for this is that, as discussed below, the Collateral Regulations require that a close out netting should take effect in accordance with its terms. Similarly, under the CI Regulations, the effect of a relevant reorganisation or winding-up on a netting agreement is to be determined in accordance with the law applicable to the relevant agreement (in this case English law).
- 8.4.7 Under Part 7 where a Clearing House calculates and certifies a net sum due to or by a defaulter under its default rules, that debt (among other things):
- (i) may be claimed in the winding up or administration of the defaulter; and

(ii) shall be taken into account for the purposes of any set-off under the general insolvency set-off rules in Scotland.

8.4.8 Accordingly, where a net sum is calculated and certified by the CCP under the Member Default Provisions, we consider that the Scottish courts would not seek to interfere with the calculation of the net sum by reason of that calculation being inconsistent with the date of valuation of claims and valuation methodology required under the general Scots insolvency set-off rules.

8.4.9 In addition there is a reasonable argument that general insolvency set-off rules in Scotland are part of the law relating to the distribution of assets. If this argument is correct the effect of the provisions of the Netting Provisions in relation to the date of valuation and/or the valuation methodology would be protected under Part 7 (on which please see paragraph 6 above), whether or not the Netting Provisions were Member Default Provisions.

8.5 **Mutuality**

8.5.1 As noted in paragraphs 5.2.3 and 5.3.2 above, a Scottish court may consider whether any Netting Provisions are consistent with the Scottish Insolvency Set Off Rules in determining their enforceability where Insolvency Proceedings in respect of the Clearing Member have commenced or (possibly) the Clearing Member is insolvent but Insolvency Proceedings in relation to it have not commenced.

8.5.2 Where a Scottish court does this, it is unlikely to allow any Applicable Amounts which are the subject of a netting or set off under the Netting Provisions to be netted or set off against each other if they are not "mutual" between the Parties. This is because the Scottish Insolvency Set Off Rules only allows liabilities or obligations which are "mutual" to be set off against each other. For these purposes:

(i) where Applicable Amounts have arisen under CCP Contracts or CCP Documentation which a Party has entered into in one capacity (eg as agent, trustee of a trust or principal) may not be mutual with other Applicable Amounts that have arisen under CCP Contracts or CCP Documentation which that Party has entered into in another capacity²; and

(ii) an Applicable Amount which is subject to a mortgage, charge, pledge, lien, encumbrance, right in security or security interest or which has been arrested may not be mutual with any other Applicable Amount.

8.6 **Additional set off under the Scottish Insolvency Set Off Rules**

In the case of any Insolvency Proceedings in respect of a Clearing Member, where any sums are owed (or non-monetary obligations are required to be performed) by the Parties to each other under or in connection with the Applicable Netting Provisions or any CCP Contract³, a Scottish court would be likely to allow those sums (or non-monetary obligations) to be set off against each other under the Scots insolvency set off rules in such Insolvency Proceedings, at least for the purpose of calculating the overall (net) claim of the CCP in the insolvency of the Clearing Member⁴. This would be the case even if such a set off is not expressly provided for (or is prohibited) in the Applicable Netting Provisions.

² For the avoidance of doubt a contract entered into by a Clearing Member as agent for one third party would not be mutual with a contract entered into by that Clearing Member as agent for another third party. In addition, a contract entered into by a Clearing Member as trustee of a trust would not be mutual with a contract entered into by that Clearing Member as trustee of another trust.

³ The relevant sums might include any separate net sums which are calculated under the Applicable Netting Provisions.

⁴ Where a contingent, future, unascertained or non-monetary obligation that has not been converted to a monetary obligation that is due and payable under the Netting Provisions is to be included in such a set off, the court will be required to value that obligation if it.

8.7 Banking Act

- 8.7.1 The Banking Act provides for various remedies for a failing UK bank, which include the ability of the Treasury or the Bank of England to cause the transfer of securities issued by a UK bank or property of a UK bank to another person, by means of a "*share transfer order*", a "*share transfer instrument*", or a "*property transfer instrument*".
- 8.7.2 Section 75 of the Banking Act gives power to the Treasury to change the law (except the Banking Act itself) for the purpose of enabling the powers granted to the Financial Conduct Authority, the Prudential Regulation Authority, the Treasury and the Bank of England under Part I of the Banking Act to be used effectively. Such changes might affect private law rights and might be used with retrospective effect. Furthermore, under sections 23 and 40, a share transfer instrument or order, or a property transfer instrument, may include incidental, consequential or transitional provisions which might have impact on private law rights.
- 8.7.3 A property transfer instrument may apply to only part of a UK bank's assets and liabilities (such a transfer being referred to as a "*partial property transfer*"). This may be the case because the property transfer instrument concerned expressly applies to only part of the UK bank's business or because it is ineffective in relation to foreign property, which may include CCP Contracts or obligations arising under CCP Contracts which are governed by the laws of a non-UK jurisdiction. A partial property transfer could apply so as to cause the transfer of some, but not all, of the CCP Contracts (or obligations arising under CCP Contracts), with the result that the ability to set-off or net the amounts due in respect of different CCP Contracts against the amounts due in respect of others is impaired.
- 8.7.4 However, in this regard, Article 3 of the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (the "**Safeguards Order**") prohibits a partial property transfer which applies to some, but not all, of the "*protected rights and liabilities*" between a particular person and a UK bank. "*Protected rights and liabilities*" means rights and liabilities which a party is entitled to set off or net under a set-off arrangement, netting arrangement or title transfer Financial Collateral Arrangement, so long as they are not "*excluded rights*" or "*excluded liabilities*".
- 8.7.5 Accordingly, Article 3 of the Safeguards Order protects the Party which is not the affected UK bank against the adverse consequences of a partial property transfer affecting the Applicable Netting Provisions or CCP Contracts except if any CCP Contract is not a "*relevant financial instrument*" as defined in the Safeguards Order, Article 3 may not apply in relation to that CCP Contract. For these purposes "*relevant financial instrument*" means: (a) an instrument listed in section C of Annex I to the Markets in Financial Instruments Directive (2004/39/EC), read with Chapter VI of the Commission Regulation 1287/2006/EC; (b) any option, future, swap, forward, contract for differences or other derivative contract not falling within (a); and (c) any combination of the foregoing, a deposit, a loan, an instrument falling within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (disregarding the exclusions in article 77(2)(b) to (d)) or any contract for the sale, purchase or delivery of transferable securities, currency of any country, territory or monetary union, any precious metal or any other commodity.
- 8.7.6 Furthermore, under Article 6 of the Safeguards Order a property transfer order to which the Safeguards Order applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would have the effect of modifying, modifying the operation of or rendering unenforceable:
- (i) a market contract;
 - (ii) the default rules of a Clearing House; or

- (iii) the rules of a Clearing House as to the settlement of market contracts not dealt with under its default rules.

8.8 Recognition of foreign insolvency proceedings

- 8.8.1 Under section 426 of the Insolvency Act ("Section 426"), the Scottish courts may apply the law of one of a list of specified jurisdictions to the insolvency of an entity if so requested by the competent court of that other jurisdiction in giving assistance to those courts. Those specified jurisdictions are currently: other parts of the United Kingdom (ie, in respect of Scotland, England and Wales and Northern Ireland), the Channel Islands, the Isle of Man, Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Eire, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu, Virgin Islands, Malaysia, South Africa and Brunei Darussalam. Accordingly, the effectiveness of an Netting Provisions may be determined by reference to the laws of one of these jurisdictions (as to which we express no opinion) and the Scottish courts could take some other action which impacts on the effectiveness of the Netting Provisions.
- 8.8.2 At common law, a Scottish court may seek to assist the courts or insolvency representatives in a foreign jurisdiction in respect of insolvency proceedings in that jurisdiction and may accordingly exercise its discretion to (a) apply the law of the foreign jurisdiction rather than Scots law to determine the effectiveness of an Netting Provisions or (b) take some other action which impacts on the effectiveness of an Netting Provisions.
- 8.8.3 However, a court may not in pursuance of Section 426 (or any common law power of recognition) recognise or give effect to an order of a foreign court or an act of a foreign insolvency official insofar as this would be prohibited by Part 3 of the Collateral Regulations if made by a court in the United Kingdom or an office holder in any insolvency proceedings in the United Kingdom. Part 3 of the Collateral Regulations disapplies certain provisions of United Kingdom insolvency law in relation to Financial Collateral Arrangements (on which see paragraph 7.1 above). Regulation 10 and regulation 12 are in Part 3.
- 8.8.4 In addition, by virtue of section 183 of the 1989 Act, the Scottish courts are not, pursuant to section 426 of the Insolvency Act 1986 or any other enactment or rule of law, permitted to recognise or give effect to any order of a court exercising jurisdiction in relation to insolvency law in a country or territory outside the United Kingdom or any act of a person appointed in any such country or territory to discharge any functions under insolvency law, if the Scottish courts would be prevented from making such an order or a relevant office-holder would be prevented from doing such an act by virtue of a provision made by or under Part 7.
- 8.8.5 However, Section 183 may afford no protection against:
 - (i) the acts of a person whose functions do not arise under insolvency law (as defined in section 190(6) of the 1989 Act), such as a person exercising regulatory powers of intervention; or
 - (ii) acts or orders which are not prohibited by virtue of Part 7, such as the imposition of a moratorium on exercise of rights of set-off pending certain events; and
 - (iii) requests for assistance in exercising insolvency jurisdiction made by courts in other jurisdictions of the United Kingdom.
- 8.8.6 In addition, as described in paragraph 7.3 above, the Scottish courts will not recognise or give effect to the order of any court outside the United Kingdom or any act by a foreign insolvency official where such order or act would be prohibited by a court or insolvency official in the United Kingdom by regulation 14 of the Settlement Finality Regulations.

- 8.8.7 Unless it is otherwise required to recognise insolvency proceedings conducted in a foreign jurisdiction, a Scottish court may refuse to recognise proceedings (even in the jurisdiction of incorporation or organisation of the party subject to the proceedings) where it is of the opinion that:
- (i) the insolvency proceedings offend against some fundamental principle of public policy;
 - (ii) there has been a breach of natural justice;
 - (iii) the insolvency proceedings are tainted by fraud or have been invoked to avoid Scottish proceedings;
 - (iv) the insolvency proceedings are to enforce the penal laws of another country; or
 - (v) the insolvency proceedings are solely to enforce the revenue laws of another country.

8.9 **Gratuitous alienations and unfair preferences**

- 8.9.1 Under section 242 of the Insolvency Act a transaction entered into at any time within certain specified periods ending with the commencement of certain Insolvency Proceedings whereby assets of the relevant party are "alienated" may be reduced and an order for restoration of the property made on application to the court. The court will not grant such an order if it is shown that after the date of the alienation the assets of the relevant party were greater than its liabilities or the alienation was made for adequate consideration or it was a birthday, Christmas or other conventional gift or was a charitable gift to a non-associate which in all the circumstances it was reasonable to make⁵.
- 8.9.2 Under section 243 of the Insolvency Act anything done within specified periods ending with the commencement of certain Insolvency Proceedings which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors may be challenged and reduced. However certain transactions cannot be challenged, namely:
- (i) a transaction in the ordinary course of business;
 - (ii) a payment in cash for a due debt, unless such payment was collusive with the purpose of prejudicing the general body of creditors;
 - (iii) a transaction whereby the parties to it undertake reciprocal obligations, unless the transaction is collusive as aforementioned; and
 - (iv) the granting of a mandate authorising payment of arrested funds to the arrestee where decree for payment or a warrant for summary diligence has been given and this was preceded by arrestment on the dependence of the action or followed by arrestment in execution⁶.
- 8.9.3 However, as noted in paragraph 6.3.1 above, no order can be made under sections 242 or 243 or the equivalent common law rules in relation to, among other things, a market contract or the provision of margin under a market contract

⁵ It is also possible under common law to challenge a transaction giving rise to an alienation where the Clearing Member did not receive adequate consideration. There is no time limit beyond which such a challenge becomes unavailable. However, for a challenge to succeed, the Clearing Member would need to be insolvent (on a balance sheet or cash from basis) for the whole of the period from the transaction giving rise to the alienation until the date of formal insolvency proceedings.

⁶ It is also possible under common law to challenge a preference in favour of a creditor. There is no time limit beyond which such a challenge becomes unavailable. However, for a challenge to succeed, the Clearing Member would need to be insolvent (on a balance sheet or cash from basis) for the whole of the period from the transaction giving rise to the preference until the date of formal insolvency proceedings.

8.10 General

- 8.10.1 Failure by the CCP to exercise its rights under the Netting Provisions prior to the approval of a scheme of arrangement under Part 26 of the Companies Act or a voluntary arrangement under Part I of the Insolvency Act (if applicable) by the Clearing Member's creditors may prejudice the CCP's rights to enforce the Netting Provisions or any CCP Contracts.
- 8.10.2 Any provision to the effect that any calculation, determination or certification will be conclusive and binding will not be effective if such calculation, determination or certification is fraudulent, and a Scottish court may regard any calculation, determination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified. Furthermore, notwithstanding the terms of the Netting Provisions, the certification, determination, notification or opinion of any party as to any matter therein provided might be held by a Scottish court not to be conclusive if it could be shown to the satisfaction of the court to have any unreasonable or arbitrary basis. However, where a Clearing Member is in liquidation or administration and the net sum due under the Member Default Netting Provisions is calculated under the Default Rules of a Clearing House and certified by the clearing house as due by the Clearing Member, that net sum is the amount which the clearing house may claim in the relevant Insolvency Proceedings⁷.
- 8.10.3 Where the obligations owed to a Clearing Member under an Netting Provisions or a CCP Contract have been arrested by a third party creditor of that Clearing Member, it may not be possible for those rights to be the subject of any included in any netting pursuant to the Netting Provisions.
- 8.10.4 An exchange contract⁸ is unenforceable in the United Kingdom if (i) it involves the currency of any member of the International Monetary Fund and (ii) it is contrary to the exchange control regulations of any member of the International Monetary Fund which are maintained or imposed consistently with the International Monetary Fund Agreement.
- 8.10.5 The opinions expressed in this Opinion are subject to the effects of any United Nations, European Union or UK sanctions or other similar measures implemented or effective in the United Kingdom with respect to any Party which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.

9. Other issues

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

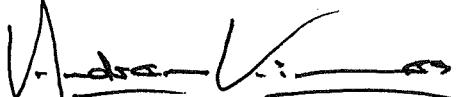
⁷ However where a sum is taken into account in relation to a contract entered into at a time when the clearing house had notice of the application or petition for the relevant Insolvency Proceedings, the value of any profit arising as a result of it being taken into account can be claimed by the Insolvency Representative from the Clearing House.

⁸ "Exchange contract" here has the meaning used in the International Monetary Fund Netting Provisions and related legislation, and is not a reference specifically to on-exchange derivative contracts. There is inconsistent authority on what amounts to an "exchange contract" for these purposes. It is not clear whether the term encompasses any contract which in any way affects a country's exchange resources or only a contract for the exchange of one currency for another, although the better view is probably that the latter (narrow) interpretation is correct.

10. Reliance

- 10.1 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 any of the following (each a "Permitted Person"):
- 10.1.1 the International Swaps and Derivatives Association, Inc. ("ISDA");
 - 10.1.2 such of the FOA's members (excluding associate members) or ISDA'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;
 - 10.1.3 any affiliate of a subscribing member (being a member of the subscribing member's group, as defined in FSMA) and the officers, employees, and professional advisors of such affiliate;
 - 10.1.4 any auditor of a subscribing member or of an affiliate of a subscribing member for statutory accounting purposes; and
 - 10.1.5 the officers, employees and professional advisors of the FOA,
- 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.
- 10.2 We accept responsibility to the FOA in relation to the matters opined on in this Opinion. However, the provision of this Opinion is not to be taken as implying that we assume any other duty or liability to any Permitted Person. The provision of this Opinion does not create or give rise to any client relationship between this firm and any Permitted Person.

Yours faithfully



Andrew Kinnes

For and on behalf of Shepherd and Wedderburn LLP

andrew.kinnes@shepwedd.co.uk

0131 473 5212

ANNEX A**Part 1****BAU Netting Provisions**Chapter 1, Part 1, Condition 1.3.1**Set-off of claims between the Clearing Member and Eurex Clearing AG**

Unless otherwise provided in the relevant Special Clearing Provisions, the Elementary Clearing Model Provisions, the Individual Clearing Model Provisions or the Net Omnibus Clearing Model Provisions, Eurex Clearing AG is at any time entitled to set off its claims vis-à-vis a Clearing Member against claims of such Clearing Member vis-à-vis Eurex Clearing AG in accordance with the rules set forth below.

(1) Set-off Procedure within Standard Agreements**(a) Set-off of Cash Claims**

Eurex Clearing AG shall be entitled to set off any of its cash claims under a specific Standard Agreement against other cash claims of the Clearing Member under that Standard Agreement, in each case excluding Settlement Claims in cash and Residual Payment Claims (each as defined in Paragraph (b) below). Cash claims arising in respect of OTC Credit Derivative Transactions (Chapter VIII Part 2) may only be set off by Eurex Clearing AG against cash claims resulting from one or more other OTC Credit Derivative Transactions.

(b) Set-off of Settlement Claims

Settlement Claims against a Clearing Member under a specific Standard Agreement can only be set off by Eurex Clearing AG against Settlement Claims of that Clearing Member arising under that Standard Agreement in accordance with the following:

- (aa) only Settlement Claims arising from the same Transaction Type may be set off; and
- (bb) only Settlement Claims being part of the same Set-Off Cluster (as defined below) may be set off.

Notwithstanding Paragraph (aa) above, Eurex Clearing AG and the Clearing Member may agree in advance to include in a Set-Off Cluster Settlement Claims arising from different Transaction Types in accordance with the following provisions:

- (A) Settlement Claims pursuant to Chapter II and Settlement Claims pursuant to Chapter V Part 2;
- (B) Settlement Claims pursuant to Chapter III and Settlement Claims pursuant to Chapter IV.

Any residual cash claims resulting from a set-off within a particular Set-Off Cluster may be set off against other residual cash claims in the same currency resulting from a set-off within any other Set-Off Cluster under the same Standard Agreement (each of these cash claims resulting from such set-off a "Residual Payment Claim").

"Settlement Claims" means, with respect to Transactions that provide for a Physical Delivery, (i) all payment and delivery claims arising from Transactions under Chapter II from, and including, the time

of the exercise or assignment (*Zuteilung*) of the relevant Transaction and (ii) all payment and delivery claims arising from Transactions under Chapters III, IV and V.

Settlement Claims will be divided into one or more clusters (each a "**Set-Off Cluster**"). At any time, a Set-Off Cluster shall be composed of Settlement Claims only in accordance with the following prerequisites:

- (I) the Settlement Claims shall relate to Securities with the same securities identifier; and
- (II) the Settlement Claims shall to be settled in the same currency; and
- (III) the Settlement Claims shall be settled by crediting the same Securities account at the Settlement Location; and
- (IV) the set-off of the Securities delivery obligations arising under the selected Settlement Claims shall result in a full set-off of all such Securities delivery obligations; for such purposes Eurex Clearing AG may also partially include certain Settlement Claims in the relevant Set-Off Cluster.

(c) Processing Method

The Clearing Member may opt to either allow Eurex Clearing AG to generally set off all Settlement Claims (the "**Net Processing**") or to generally exclude all Settlement Claims from such set-off (the "**Gross Processing**"). The Clearing Member is entitled to specify exemptions for certain Settlement Claims from the relevant applicable processing method.

(d) Chaining

The Clearing Member may require that Settlement Claims of certain buy and sell Transactions shall form part of the same Set-Off Cluster in whole or in part.

(e) Cash Deferral

If a Clearing Member elected the Positive Procedure pursuant to Number 1.4.2 Paragraph (2) (a), such Clearing Member may require a further exemption from the Net Processing method and block the set-off of Settlement Claims from certain sell Transactions in which case Eurex Clearing AG may assign Settlement Claims from buy Transactions to such Settlement Claims from sell Transactions. Such blocked Settlement Claims from sell Transactions and assigned Settlement Claims from buy Transactions shall neither be subject to a set-off nor be fulfilled before the blocking of such Settlement Claims from sell Transactions is released by the Clearing Member.

(f) Declaration of Set-off

Eurex Clearing AG shall declare the set-off by the provision (*Zurverfügungstellung*) of the daily internal cash account (set out in Number 4.3) statement with respect to any set-off pursuant to Paragraph (1) (a) above, or of the settled cash transaction report or the actual settlement delivery report (*1st-Lieferreport*) with respect to any set-off pursuant to Paragraph (1) (b) above.

(g) Effectiveness of Set-off

Each set-off effected pursuant to this Paragraph (1) shall become effective on the latest due date of any of the claims subject to such set-off.

(2) Set-off procedure across Standard Agreements**(a) General Rules**

(aa) Eurex Clearing AG shall be entitled to set off cash payment claims arising from Transactions other than Settlement Claims (the "Payment Claims") under a specific Standard Agreement with other Payment Claims of the Clearing Member in the same currency which, in each case, are due and payable under any other Standard Agreement.

The relevant Clearing Member may elect in a Clearing Agreement pursuant to the Individual Clearing Model Provisions or pursuant to the Net Omnibus Clearing Model Provisions to exclude such set-off of Payment Claims across Standard Agreements.

(bb) Further, Eurex Clearing AG shall be entitled to set off Payment Claims and Residual Payment Claims, but excluding cash claims which are to be settled against Physical Delivery under a specific Standard Agreement with other Residual Payment Claims of the Clearing Member in the same currency which, in each case, are due and payable under any other Standard Agreement.

(b) Set-off Declaration

Eurex Clearing AG shall declare the set-off by the provision (*Zurverfügungstellung*) of the daily internal cash account (set out in Number 4.3) statement with respect to any set-off pursuant to Paragraph (2) (a) (aa) above, or the settled cash transaction report or the actual settlement delivery report (*1st-Lieferreport*) with respect to any set-off pursuant to Paragraph (2) (a) (bb) above.

(c) Effectiveness of Set-off

Each set-off effected pursuant to Paragraph (2) (a) above shall become effective upon payment of the relevant balance resulting from such set-off in accordance with Number 1.4 or instantly if no payment is due as a consequence of such set-off.

*Chapter I, Part 3, sub-part A, Condition 2.3***2.3 Set-off**

Any claims of a party to the relevant Standard Agreement arising from Covered Claims and claims to provide cover in respect of the Segregated Margin or the Segregated Variation Margin pursuant to Numbers 5 and 6 may be set off against claims arising from Covered Claims or claims to provide cover in respect of the Segregated Margin or the Segregated Variation Margin pursuant to Numbers 5 and 6 of the respective other party. The provisions of Number 1.3.1 Paragraph (1) and (2) of the General Clearing Provisions shall apply mutatis mutandis.

Any other set-off of claims between the parties to a Standard Agreement shall be prohibited.

*Chapter I, Part 3, sub-part C, Condition 2.3***2.3 Set-off**

Any claims of a party to the relevant Corresponding Standard Agreement arising from Covered Claims and claims to provide cover in respect of the Segregated Margin or the Segregated Variation Margin pursuant to Subpart C Numbers 4 and 5 may be set off against claims arising from Covered Claims or claims to provide

cover in respect of the Segregated Margin or the Segregated Variation Margin pursuant to Subpart C Numbers 4 and 5 of the respective other party.

Any other set-off of claims between the parties to the relevant Corresponding Standard Agreement shall be prohibited.

Chapter I, Part 4, Condition 5

5. Set-off

Any claims of Eurex Clearing AG and the Clearing Member under the Standard Agreement in respect of Net Omnibus Transactions, including claims to provide cover in respect of Net Omnibus Margin or Net Omnibus Variation Margin pursuant to Numbers 6 and 7, may be set off against claims arising from Net Omnibus Transactions or claims to provide cover in respect of Net Omnibus Margin or the Net Omnibus Variation Margin pursuant to Numbers 6 and 7 of the respective other party. Number 1.3.1 Paragraph (1) and (2) of the General Clearing Provisions shall apply mutatis mutandis.

Any other set-off of claims between Eurex Clearing AG and the Clearing Member under the Standard Agreement as well as any set-off of the Difference Claim (as defined in Number 8.3.2) shall be prohibited; the rights of Eurex Clearing AG under Number 8.6 shall remain unaffected.

Part 2

Member Default Netting Provisions

Clearing Member default: Chapter I, Part 1, Conditions 7.2 and 7.3

7.2 Termination Events

7.2.1 Subject to Number 7.2.2, if at any time any of the termination events set out in Paragraphs (1) to (12) (each a "**Termination Event**") has occurred and is continuing with respect to a Clearing Member, Eurex Clearing AG may either

- (i) give written notice thereof to such Clearing Member and designate a reasonable grace period to remedy the relevant Termination Event (each a "**Grace Period**"), which may be extended by Eurex Clearing AG from time to time, (the "**Grace Period Notice**") or
- (ii) if – taking into account all relevant circumstances of the specific case – it would be unreasonable (*unzumutbar*) to set a Grace Period or if the relevant Termination Event cannot be remedied, give a written termination notice to such Clearing Member (the "**Termination Notice**") specifying the date and time on which the Termination shall occur.

Prior to the delivery of a Grace Period Notice or Termination Notice, as the case may be, with respect to a Termination Event, other than a Termination Event pursuant to Paragraph (1) (Failure to Pay; Failure to Deliver Margin), Paragraph (5) (Insolvency related Events), Paragraph (7) (Regulatory Actions), Paragraph (9) (Opening of Reorganisation or Restructuring Procedures and Similar Measures) and Paragraph (12) (Termination for serious cause (*Kündigung aus wichtigem Grund*)) above, Eurex Clearing AG shall

- (a) attempt to notify, and consult with, the relevant Clearing Member regarding the relevant event,
- (b) consider in good faith whether delivering a Grace Period Notice or a Termination Notice is proportionate, having regard to
 - (aa) other courses of action available to Eurex Clearing AG, (in particular the opening of Disciplinary Proceedings pursuant to the Disciplinary Procedures Rules (as defined in each case in Number 14.2.1),
 - (bb) the interests of the Clearing Member and its clients, and
 - (cc) whether the Termination Event has a material adverse impact on the ongoing financial soundness of Eurex Clearing AG or the proper performance of the Clearing, and
- (c) ensure that the decision to deliver a Grace Period Notice or Termination Notice, as the case may be, has been approved by the chairman of the Executive Board of Eurex Clearing AG, a member of the Executive Board of Eurex Clearing AG or any other senior personnel of Eurex Clearing AG that Eurex Clearing AG deems to be appropriate.

A Termination occurs (a) in the case of item (i) above, with effect from the end of the Grace Period if the Termination Event specified in the Grace Period Notice continues and Eurex Clearing AG has notified the Clearing Member that such Termination Event has not been remedied by the Clearing Member to Eurex Clearing AG's satisfaction by the end of the Grace Period, or (b) in the case of item (ii) above on the date and time specified in the Termination Notice (the date of such Termination being the "**Termination Date**" and the respective termination time being the "**Termination Time**").

Where Eurex Clearing has commenced Disciplinary Proceedings against a Clearing Member with respect to an Alleged Breach (as defined in the Disciplinary Procedures Rules), Eurex Clearing AG shall for as long as such Disciplinary Proceedings are continuing, refrain from delivering a Termination Notice to such Clearing Member on the basis of those facts that have led to the determination of the Alleged Breach by Eurex Clearing AG.

(1) Failure to Pay; Failure to Deliver Margin

The Clearing Member fails to pay any amount due under the Clearing Conditions to Eurex Clearing AG or fails to deliver any Eligible Margin Assets to Eurex Clearing AG in respect of a due request for delivery of Margin or Variation Margin or fails to perform any Redelivery Claim when due under a Standard Agreement between Eurex Clearing AG and the Clearing Member.

(2) Failure to comply with Clearing Conditions

The Clearing Member fails to comply with any of its obligations under the Clearing Agreement (incorporating the Clearing Conditions) or is in breach of any of its representations given in a Clearing Agreement.

(3) Failure to comply with Clearing License prerequisites

The Clearing Member is no longer in compliance with the prerequisites for the granting of any of its Clearing License(s) set forth in Number 2.1.2 Paragraphs (2) to (5), Number 2.1.3 or in the relevant Special Clearing Provisions.

(4) Repudiation or objection to amendments to the Clearing Conditions

The Clearing Member (i) repudiates any of the terms and conditions of the Clearing Agreement or the Clearing Conditions or (ii) objects to an amendment to the Clearing Agreement or the Clearing Conditions and Eurex Clearing AG cannot reasonably be expected to continue its relationship with such Clearing Member, in particular, if such objections would lead to different versions of the Clearing Conditions being applicable to several Clearing Members, Non-Clearing Members or Registered Customers, respectively, and the application of different versions of the Clearing Conditions would not be technically feasible.

(5) Insolvency related Events

(a) In relation to a Clearing Member having its registered seat and centre of main interest or, where it is a credit institution, being headquartered (*mit Hauptniederlassung*) in the Federal Republic of Germany:

(aa) any event occurs which constitutes a cause for the initiation of insolvency proceedings (*Eröffnungsgrund*) as set out in sections 17 to 19 of the German Insolvency Code (*Insolvenzordnung*);

(bb) a petition for insolvency proceedings in respect of its assets (*Antrag auf Eröffnung eines Insolvenzverfahrens*) is filed; or

(cc) actions are taken pursuant to section 21 of the German Insolvency Code (*Insolvenzordnung*) by a competent court;

(b) with respect to any Clearing Member not falling within the scope of Paragraph (5) (a) above, any action, legal proceedings or other procedure or step is taken in relation to any of the following events or any of the following events occurs:

(aa) the suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, termination of existence, liquidation, administration, reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise), bankruptcy, insolvency, judicial management or curatorship;

(bb) a settlement, deferred payment, debt restructuring, transfer, restructuring, composition, compromise, assignment or similar arrangement of the Clearing Member with any of its creditors;

(cc) the appointment of a liquidator, trustee, receiver, administrative receiver, administrator, compulsory manager or other similar officer in respect of that Clearing Member or any of its assets; or

(dd) or any analogous procedure or step is taken in any jurisdiction,

provided that this Paragraph (5) (b) shall not apply to any procedure or step taken in relation to a solvent reorganisation of the relevant Clearing Member.

(6) Violation of Regulatory Provisions

Non-compliance with regulatory requirements by the Clearing Member, provided that non-compliance with such requirements may, in the reasonable opinion of Eurex Clearing AG, materially impair the proper fulfilment of the obligations under the Clearing Agreement.

(7) Regulatory Actions

Any administrative order issued to a Clearing Member pursuant to Sections 45 – 48s KWG, except for measures according to Sections 48a, 48j, 48k German Banking Act (*Kreditwesengesetz – KWG*), as well as any similar measures issued in relation to a Clearing Member under foreign law.

(8) Split-up of Rights and Duties under the Clearing Agreement

Any partial non-transfer of rights and duties under the Clearing Agreement as a result of any administrative order issued to the Clearing Member pursuant to Sections 48a, 48j, 48k KWG, or any partial non-transfer of property, rights, liabilities or duties under the Clearing Agreement because of a similar measure under foreign law.

(9) Opening of Reorganisation or Restructuring Proceedings and Similar Measures

Any application for, commencement or order of reorganisation or restructuring proceedings (*Sanierungs- oder Reorganisationsverfahren*) according to the Act on the Restructuring of Credit Institutions (*Gesetz zur Reorganisation von Kreditinstituten*), as well as any similar measure under foreign law, in respect of the Clearing Member.

(10) Change in Law and other similar Causes

(a) Any change takes place in the laws of the Federal Republic of Germany or the laws applicable to the Clearing Member or the relevant Non-Clearing Member or Registered Customer, respectively, or the official interpretation or application of such laws which, in the

reasonable opinion of Eurex Clearing AG, have a material adverse impact on the interests or services of Eurex Clearing AG under the Clearing Conditions or the interests of the other Clearing Members, or

(b) any similar event occurs having a similar adverse impact on the interests or services of Eurex Clearing AG under the Clearing Conditions or the interests of other Clearing Members.

(11) Non-Compliance with Outsourcing Requirements

Non-compliance with the obligation to terminate the Outsourcing or to re-assume the Outsourced Functions upon the exercise of the veto right by Eurex Clearing AG pursuant to Number 15.2.10.

(12) Termination for serious cause (*aus wichtigem Grund*)

Eurex Clearing AG declines to continue the Clearing of Transactions with the Clearing Member due to the occurrence of an event which gives rise to a serious cause (*wichtiger Grund*) and the continuation of the Clearing Agreement, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected.

7.2.2 If at any time an Insolvency Termination Event has occurred with respect to the Clearing Member, a Termination shall occur with immediate effect as of such time (the date of such Termination being the "**Termination Date**" and the respective termination time being the "**Termination Time**"). An "**Insolvency Termination Event**" occurs if German insolvency proceedings commence over the estate of the Clearing Member (*Eröffnung des Insolvenzverfahrens*) or the Clearing Member is subject to the commencement of similar proceedings under the laws of any other jurisdictions.

7.3 Consequences of a Termination

The consequences of a Termination are set out in the Elementary Clearing Model Provisions, the Individual Clearing Model Provisions or the Net Omnibus Clearing Model Provisions, as applicable. Any Difference Claim pursuant to the Elementary Clearing Model Provisions, the Individual Clearing Model Provisions or the Net Omnibus Clearing Model Provisions shall be determined as follows:

7.3.1 Upon the occurrence of a Termination Date, the Difference Claim shall be determined for each Standard Agreement by way of combining (*Saldieren*) the Single Transaction Amounts of all Transactions under such Standard Agreement terminated as of the Termination Time and the Aggregate Value of the Redelivery Claims under such Standard Agreement, all as defined below.

The final amount of the Difference Claim resulting from such combination shall (i), if it is a positive figure for the party entitled to value the Difference Claim, be owed to it by the other party, or (ii), if it is a negative figure for the party entitled to value the Difference Claim, be owed by it to the other party.

The value of the Difference Claim shall be determined by the party specified in Number 7.3.3 on the Valuation Date pursuant to the Clearing Conditions. If the party entitled to value the Difference Claim fails to value the Difference Claim on the Valuation Date the other party shall be entitled to value the Difference Claim.

7.3.2 The "**Valuation Date**" shall be (i) the Termination Date if the Termination Time falls before 17:23 hours (Frankfurt am Main time) (the "**Day-Break Time**"), or (ii) the Business Day immediately following the Termination Date, if the Termination Time falls on or after the Day-Break Time. The Difference Claim shall be denominated in the currency last agreed in writing between Eurex Clearing AG and the Clearing Member (the "**Termination Currency**").

7.3.3 The party entitled to value the Difference Claim is, (i) with respect to a Standard Agreement between Eurex Clearing AG and the Clearing Member, Eurex Clearing AG and, (ii) with respect to a Standard

Agreement between the Clearing Member and the Non-Clearing Member or Registered Customer, respectively, the Non-Clearing Member or Registered Customer, respectively.

7.3.4 For the purpose of the determination of the Difference Claim:

(1) The "**Single Transaction Amount**" shall be determined with respect to each Transaction under the relevant Standard Agreement terminated as of the Termination Time and shall equal its Market or Exchange Price as of the Valuation Date.

If a price has been agreed for the Transaction which is due but neither has been paid nor been taken into account yet in the Market or Exchange Price, the Single Transaction Amount shall be adjusted to reflect such agreed price.

When making such calculation, (i) any amount due to be paid as a primary obligation under the relevant Transaction, but unpaid as at the Valuation Date, and (ii) the value of any assets due to be delivered as a primary obligation under the relevant Transaction, but not yet delivered, as at the Valuation Date (each an "**Unpaid Amount**") shall be taken into account.

(2) "**Market or Exchange Price**" means, with respect to a Transaction or a group of Transactions:

(a) with respect to Eurex Transactions (Chapter II), FWB Transactions (Chapter V Part 1 and 2), XIM Transactions (Chapter V Part 3), ISE Transactions (Chapter VI) and EEX Transactions (Chapter VII), in each case other than OTC Transactions, the applicable determined exchange price (*festgestellter Börsenpreis*) on the Valuation Date determined in the Market in which it has been concluded, or

(b) with respect to an OTC Transactions described in Chapter II and V, the determined exchange price (*festgestellter Börsenpreis*) that would apply to the corresponding exchange transaction described in Chapter II and V on the Valuation Date in a Market, or

(c) with respect to Transactions described in Chapter III and IV the applicable market price (*Marktpreis*) on the Valuation Date determined in the Market in which it has been concluded, or

(d) with respect to Transactions described in Chapter IX, the applicable determined exchange price (*festgestellter Börsenpreis*) or applicable market price (*Marktpreis*) of the Underlying Securities on the Valuation Date determined in the relevant market of the Underlying Securities, or

(e) with respect to Transactions described in Chapter VIII or if none of the cases set forth under (a) to (d) applies, a model for the valuation of the market value (*Marktpreis*) of Transactions (which may, depending on the circumstances, be the auction price), which considers market risks and market prospects, *inter alia*, taking into account asset classes, volatility and liquidity.

The valuation model referred to in Paragraph (e) above and further procedures regarding the determination by Eurex Clearing AG of the prices referred to in Paragraphs (a) to (d) above will from time to time be published in accordance with Number 16.1; such published valuation model or further procedures shall form part of these Clearing Conditions.

(3) "**Aggregate Value of the Redelivery Claims**" means, with respect to a party to the relevant Standard Agreement, the sum of the Market and Exchange Prices of the applicable number or amount of the relevant equivalent Eligible Margin Assets subject to all of its terminated Redelivery Claims against the other party as of the Termination Time.

(4) "**Market or Exchange Price**" means, with respect to a terminated Redelivery Claim, as applicable:

- (a) the amount in the Termination Currency of any equivalent Eligible Margin Asset in form of cash on the Valuation Date; or
- (b) the exchange or market price in the Termination Currency of any equivalent Eligible Margin Assets other than cash on the Valuation Date.

7.3.5 Upon the occurrence of a Termination with respect to a Clearing Member, all Clearing Agreements to which such Clearing Member is a party shall terminate upon all Difference Claims have been paid in full in cash or otherwise been satisfied in full as determined by Eurex Clearing AG (irrespective whether or not this results from an enforcement of Margin or a use of Contributions to the Clearing Funds) and upon the effective release of the Contributions to the Clearing Funds in accordance with the Clearing Conditions.

Part 3

CCP Default Netting Provisions

Clearing House Default; Chapter 1, Part 1, Condition 9

9 Termination Rules with respect to Eurex Clearing AG

If at any time a Failure to Pay Event (as defined below) or an Insolvency Event (as defined below) has occurred with respect to Eurex Clearing AG, the following applies:

9.1 All current or future primary obligations (including payment and delivery obligations) arising from all Transactions and all Redelivery Claims under the relevant Standard Agreement between Eurex Clearing AG and the relevant Clearing Member in accordance with Numbers 2.1.4, 10.2.2 and 10.2.3 of the Elementary Clearing Model Provisions Subpart A, Number 2.1.2 of the Individual Clearing Model Provisions or Number 2.1.2 of the Net Omnibus Clearing Model Provisions, respectively, shall expire and may no longer be performed by the relevant obligor. Further all due but unsatisfied obligations to deliver Margin or Variation Margin, Segregated Margin or Segregated Variation Margin, Net Omnibus Margin or Net Omnibus Variation Margin, as applicable, under the relevant Standard Agreement expire. These expired primary obligations and delivery obligations, respectively, are reflected by the difference claim pursuant to Number 9.2 below.

9.2 By signing the Clearing Agreement a difference claim of either party to the relevant Standard Agreement between Eurex Clearing AG and the relevant Clearing Member is created. This difference claim shall become unconditional and immediately due against the respective other party upon the expiry of the primary obligations and delivery obligations, respectively, referred to in Number 9.1, and shall be determined on the basis of the Market or Exchange Prices applicable with respect to the relevant terminated Transactions or Redelivery Claims on the second Business Day following (i) the Failure to Pay Event or (ii) the Insolvency Event. Numbers 7.3.1 through 7.3.4 shall apply *mutatis mutandis*.

9.3 The following events shall constitute a Failure to Pay Event or an Insolvency Event with respect to Eurex Clearing AG:

- (1) A "**Failure to Pay Event**" occurs if (a) a Payment Default or (b) a Non-Payment of the Cash Settlement Amount following a Delivery Default (each as defined below) occurs.
- (2) An "**Insolvency Event**" occurs if the *Bundesanstalt für Finanzdienstleistungsaufsicht* files a petition for the opening of insolvency proceedings over the assets of Eurex Clearing AG.

9.3.1 A "**Payment Default**" occurs if:

- (1) Eurex Clearing AG fails to make, when due, any payment (other than a payment of the Cash Settlement Amount following a Delivery Default) in respect of a payment claim of a Clearing Member against Eurex Clearing AG arising from a Transaction;
- (2) Eurex Clearing AG has received written notice (*Textform*) of such failure by the relevant Clearing Member ("**First Notification**");
- (3) Eurex Clearing AG has received a further written notice (*Textform*) of such failure after the expiry of a period of not less than three (3) calendar days after receipt of the First Notification ("**Second Notification**"); and

(4) Eurex Clearing AG's failure to make such payment to such Clearing Member continues – subject to the following paragraph – for a period of at least two (2) calendar days after the Second Notification, provided that the last day of such period shall be a Business Day.

For the purposes of this Number 9.3.1, a payment will be considered not to have been made by Eurex Clearing AG if no corresponding amount has been credited to the relevant account of the relevant Clearing Member. Delays in effecting such credit for technical reasons (i) which are outside the control of Eurex Clearing AG, as explained in writing (*Textform*) to the Clearing Member without undue delay, shall only lead to a Payment Default if Eurex Clearing AG's failure to make such payment to such Clearing Member continues for a period of one (1) calendar month after receipt of the Second Notification and (ii) which are within the control of Eurex Clearing AG shall, only lead to a Payment Default if Eurex Clearing AG's failure to make such payment to such Clearing Member continues for a period of ten (10) Business Days after receipt of the Second Notification. In the event of (i) Eurex Clearing AG shall use reasonable endeavours to effect such credit as soon as practicable. Eurex Clearing AG will notify the relevant Clearing Member without undue delay whether there is a case of (i) or (ii).

9.3.2 A **"Non-Payment of the Cash Settlement Amount following a Delivery Default"** occurs if with respect to a Transaction:

- (1) a Delivery Default; and
- (2) a Cash Settlement Payment Default occurs.

9.3.3 A **"Delivery Default"** occurs if:

- (1) Eurex Clearing AG fails to satisfy, when due, any delivery obligation of a Clearing Member arising from a Transaction;
- (2) Eurex Clearing AG has received, after the expiry of a period of not less than five (5) calendar days following the due date, written (*Textform*) notice from such Clearing Member making reference to this Number 9.3.3 and requesting Eurex Clearing AG to fulfil such delivery obligation (**"First Delivery Request"**);
- (3) Eurex Clearing AG has received from such Clearing Member a further written (*Textform*) notice requesting Eurex Clearing AG to fulfil such delivery obligation after the expiry of a further period of not less than ten (10) calendar days after receipt of the First Delivery Request (**"Second Delivery Request"**); and
- (4) Eurex Clearing AG has, after the expiry of a further period of not less than ten (10) calendar days after receipt of the Second Delivery Request, received a written (*Textform*) request of such Clearing Member for cash settlement of the relevant delivery obligation from Eurex Clearing AG (**"Cash Settlement Request"**).

Delays in effecting a delivery for technical reasons shall not lead to a Delivery Default. Upon receipt of a Cash Settlement Request by a Clearing Member (the date of such request, the **"Cash Settlement Request Date"**) Eurex Clearing AG shall no longer be obliged to make any delivery under the relevant Transaction. This obligation shall be replaced by an obligation of Eurex Clearing AG to pay to the Clearing Member the Cash Settlement Amount under the relevant Transaction (each a **"Cash-settled Transaction"**). For the avoidance of doubt, a failure to deliver under an Eurex Repo Transaction as described in Chapter IV Number 2.6 Paragraph (1) (a) (Failure to Deliver on the delivery date of the Front Leg) shall not give rise to a Failure to Pay Event pursuant to Number 9.3 Paragraph (1).

9.3.4 A **"Cash Settlement Payment Default"** occurs if:

(1) Eurex Clearing AG has, after the expiry of a period of not less than three (3) calendar days following the Cash Settlement Request Date, received the written (Textform) request of the Clearing Member to pay to it the Cash Settlement Amount ("Cash Settlement Payment Request"); and

(2) Eurex Clearing AG fails – subject to the following paragraph –, after the expiry of a further period of not less than two (2) calendar days after the receipt of Cash Settlement Payment Request (with the proviso that the last day of such period shall be a Business Day to pay to such Clearing Member the Cash Settlement Amount.

For the purposes of this Number 9.3.4, a payment will be considered not to have been made by Eurex Clearing AG if no corresponding amount has been credited to the relevant account of the relevant Clearing Member. Delays in effecting such credit for technical reasons for which Eurex Clearing AG (i) is not responsible, as explained in writing (Textform) to the Clearing Member without undue delay, shall not lead to a Cash Settlement Payment Default, (ii) is responsible shall only lead to a Cash Settlement Payment Default if Eurex Clearing AG's failure to make such payment to such Clearing Member continues for a period of ten (10) Business Days after receipt of the Cash Settlement Request.

9.3.5 For the purposes of this Number 9.3, "Cash Settlement Amount" means an amount determined by the Calculating Party (as defined in Paragraph (4) below) as follows:

(1) The Default Value of the assets which are the subject of the Delivery Default (the "Non-Delivered Assets") and the amount of the corresponding payment obligation of the Clearing Member shall be established by the Calculating Party.

(2) On the basis of the sums so established, account shall be taken of what is due from each party to the other under the relevant Transaction and the sums due from one party shall be set off against the sums due from the other and only the balance of the account shall be payable (by the party having the claim valued at the lower amount pursuant to the foregoing) and such balance shall be due and payable on the next following day which is a Business Day. For the purposes of this calculation, all sums not denominated in Euro shall be converted into Euro at the then current rate of exchange, as determined by the Calculating Party.

(3) "Default Value" means, with respect to any Non-Delivered Assets, the value of such assets determined by the Calculating Party by applying the following method:

The basis for this calculation shall be the settlement price determined by Eurex Clearing AG for Transactions to which the Non-Delivered Assets relate on the Business Day immediately prior to the Cash Settlement Request Date. In the event that (i) Eurex Clearing AG has not determined a settlement price for Transactions to which the Non-Delivered Assets relate on the Business Day immediately prior to the Cash Settlement Request Date or (ii) Eurex Clearing AG has determined such settlement price, but such settlement price does not reasonably accurately reflect the value of such transactions that would have been obtained from the relevant market if it were operating normally, the Calculating Party shall choose from among the Clearing Members being admitted at the relevant Market three Clearing Members who shall determine a market price of the Non-Delivered Assets. The average of the quoted prices (mid market offer) shall be the Default Value of the Non-Delivered Assets. If less than three quotations are provided as requested, the Calculating Party shall determine a settlement price for Transactions to which the Non-Delivered Assets relate acting in good faith and by using commercially reasonable procedures expected to produce a commercially reasonable result.

(4) "Calculating Party" means, for the purposes of this Number 9.3, Eurex Clearing AG unless Eurex Clearing AG is, for operational reasons, unable to make one or more calculations or determinations required to be made under this Number 9.3. In such event, Eurex Clearing AG shall promptly notify the relevant Clearing Member and "Calculating Party" then means such Clearing Member.

9.4 Rights of Eurex Clearing AG in respect of Transactions with other Clearing Members upon a Failure to Pay Event**9.4.1 Termination of Transactions in case of a Cash-settled Transaction**

(1) When Eurex Clearing AG has determined a Cash Settlement Amount for Non-Delivered Assets according to Number 9.3, Eurex Clearing AG shall be entitled to terminate Transactions with other Clearing Members pursuant to which Eurex Clearing AG has a due claim to receive Securities of the same kind.

(2) Eurex Clearing AG will terminate Transactions pursuant to Paragraph (1) above in the following order:

(a) the Transaction which is due for the longest period of time and as far as Transactions are due since the same period of time,

(b) the Transaction with the highest nominal of Securities to be delivered under this Transaction,

(c) the Transaction with the second, third, forth etc. highest nominal of Securities to be delivered under the relevant Transaction, until Eurex Clearing AG has terminated Transactions up to an amount of Securities which covers the original Transaction with respect to which Eurex Clearing AG is performing the Cash Settlement Payment.

As far as necessary Eurex Clearing AG is also entitled to terminate Transactions in part to meet the amount of Securities which covers the original size of the Cash-settled Transaction with respect to which Eurex Clearing AG has determined the Cash Settlement Amount.

(3) After the termination of a Transaction pursuant to Paragraph (1) above, the Clearing Member is no longer entitled to fulfil its original obligation by delivering the Non-Delivered Assets to Eurex Clearing AG. Eurex Clearing is entitled to a cash settlement of this Transaction. The Cash Settlement Amount shall be determined in accordance with the provisions of Number 9.3.5. Eurex Clearing AG will notify the respective Clearing Members of the termination and the determined Cash Settlement Amount.

(4) Termination of a Transaction pursuant to Paragraph (1) above shall result in a termination of the Corresponding Covered Transaction pursuant to the ICM-ECD Provisions. Paragraph (3) applies *mutatis mutandis* to such Corresponding Covered Transaction.

9.4.2 Termination of Transactions in case of a general Close-Out

If incompletely settled or unfulfilled Transactions of the relevant Markets are terminated by a Clearing Member following a Failure to Pay Event, Eurex Clearing AG, for its part, shall be entitled to terminate Transactions with other Clearing Members of any of the relevant Markets pursuant to which Eurex Clearing AG has a corresponding claim to receive Securities or payment. For the determination of such Transactions to become terminated Number 9.4.1 will apply accordingly.

Annex B

Rules and CCP Documentation

Applicable Amounts	BAU Netting Provisions	Member Default Netting Provisions	CCP Default Netting Rules
variation margin	Chapter I, Part 1, Condition 1.3.1	Chapter I, Part 1, Condition 7.2.1	Chapter I, Part 1, Condition 9
other amounts payable in respect of Transactions	Chapter I, Part 3, sub-part A, Condition 2.3	Chapter I, Part 1, Condition 7.3	
	Chapter I, Part 3, sub-part C, Condition 2.3		
	Chapter I, Part 4, Condition 5		

5th Floor, 1 Exchange Crescent
Conference Square
Edinburgh EH3 8UL
DX 551970 Edinburgh 53
T: +44 (0)131 228 9900
F: +44 (0)131 228 1222
www.shepweid.co.uk

191 West George Street
Glasgow
G2 2LB
DX GM409 Glasgow
T: +44 (0)141 566 9900
F: +44 (0)141 565 1222

Condor House
10 St. Paul's Churchyard
London EC4M 8AL
DX 98345 Cheapside 2
T: +44 (0)20 7429 4900
F: +44 (0)20 7329 5539

1 Berry Street
Aberdeen
AB25 1HF
DX AB44 Aberdeen
T: +44 (0)1224 343 555
F: +44 (0)1224 343 555

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