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31 January 2014

Dear Sirs

IAS 32 – France – CCP – Formal Opinion – LCH.Clearnet SA (repos)

You have asked us to give an opinion as to the laws of France ("**this jurisdiction**") in relation to certain netting and set-off provisions in the Rules of the following CCP in relation to LCH.Clearnet SA (the "**CCP**"), in respect of its service for the clearing of repos of debt securities traded on certain trading venues, governed by the laws of France (the "**Service**"), as such provisions apply between the CCP and its clearing members (each a "**Clearing Member**").

We understand that your requirement is for the enforceability and validity of such netting and set-off provisions and collateral arrangements to be substantiated by a written and reasoned opinion 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 1st January 2014.

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

1. TERMS OF REFERENCE

- 1.1 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. We express no opinion as to any provisions of the Rules of the CCP other than those on which we expressly opine.
- 1.2 This opinion is given only in respect of payments (each an "**Applicable Amount**") due in respect of the payment of a repurchase price (net, where applicable, of any

income amount falling due on the repurchase date) in respect of repos cleared pursuant to the Service.

1.3 This opinion does not apply to any clearing services or transactions other than in respect of the Service specified.

1.4 We do not opine on:

1.4.1 the validity and enforceability of any provisions other than the Netting Provisions, as set out in paragraph 3 below;

1.4.2 the validity and enforceability of any collateral arrangement entered into between the Parties and pursuant to which collateral is provided by the Clearing Members to the CCP;

1.4.3 any liability to tax as a result of or in connection with the Service, or the tax treatment of any Contract, or the tax position of any party thereto;

1.4.4 any matters of fact or accounting policy (including any calculations or mathematic methods or formulae, any economic or financial information or figure as well as the adequacy or the relevance of any orders of priority for payments) or the reasonableness of any statements of opinion or intention expressed in relation to the Service, including any facts, events or circumstances arising as a result of the execution of any related documents by the Parties or the performance of the Parties' obligations deriving therefrom;

1.4.5 any laws of any jurisdiction other than France, including jurisdictions in which our firm has an office or correspondents;

1.4.6 any prudential treatment of any Clearing Member's exposure to the Relevant CCP (or any part thereof);

1.4.7 the compliance of the Netting Provisions with the provisions of EMIR; and

1.4.8 the enforceability of any net obligation resulting from any netting or set-off, whether pursuant to the Netting Provisions or otherwise.

1.5 This opinion letter relates solely to matters of French law and does not consider the impact of any laws (including insolvency laws) other than French law, even where, under French law, any foreign law falls to be applied. This opinion letter and the opinions given in it are governed by French law and relate only to French law as applied by the French courts as at 30 September 2013. All non-contractual obligations and any other matters arising out of or in connection with this opinion letter are governed by French law. We express no opinion in this opinion letter on the laws of any other jurisdiction.

1.6 **Definitions**

The following terms shall have the following meanings:

1.6.1 "**ACPR**" means the *Autorité de Contrôle Prudentiel et de Résolution*.

- 1.6.2 "AMF" means the *Autorité des marchés financiers*.
- 1.6.3 "**Applicable CM Opinion**" means, in respect of the Service, a legal opinion in respect of the enforceability of the Netting Provisions by or against a Clearing Member, including in the event of Insolvency Proceedings in respect of the Clearing Member.
- 1.6.4 "**BAU Netting Provisions**" means, in respect of the Service, the rules identified as such in Annex 1 (*Applicable Netting Provisions*) (which are contained in the Rules).
- 1.6.5 "**CCP Close-out Proceedings**" means any process initiated by the Clearing Member in accordance with the CCP Default Netting Provisions in relation to the default of the CCP.
- 1.6.6 "**CCP Default Netting Provisions**" means, in respect of the Service, the rules identified as such in Annex 1 (*Applicable Netting Provisions*) (which are contained in the Rules).
- 1.6.7 "**CCP Documentation**" means the contractual documents entered into between the Parties pursuant to which the Rules are (i) incorporated into such contractual documents and the Rules (ii) made contractually binding upon them.
- 1.6.8 "**CCP Event of Default**" means the event or circumstances identified in article 1.4.1.1 of the LCH Rule Book that gives a Clearing Member a right to commence CCP Close-out Proceedings.
- 1.6.9 "**Civil Code**" means the French *Code civil*.
- 1.6.10 "**Collateral Directive Regime**" means directive n° 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (as amended) (the "**Collateral Directive**"), as implemented into French law under articles L. 211-36 *et seq.* of the Financial Code.
- 1.6.11 "**Commercial Code**" means the French *Code de commerce*.
- 1.6.12 "**Contract**" means, in respect of the Service, a transaction which is registered at the CCP in respect of the Service.
- 1.6.13 "**Credit Institution WUD Regime**" means directive n° 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (the "**Credit Institution WUD**"), as implemented into French law under articles L. 613-31-1 *et seq.* of the Financial Code.
- 1.6.14 "**Default Proceedings**" means default proceedings taken by the CCP in accordance with the Member Default Netting Provisions in relation to the default of a Clearing Member.
- 1.6.15 "**EEA**" means the European Economic Area.

- 1.6.16 **"EMIR"** means Regulation (EU) n° 648/2012 on OTC derivatives, central counterparties and trade repositories.
- 1.6.17 **"Finality Directive Regime"** means directive n° 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (as amended) (the **"Finality Directive"**), as implemented into French law under articles L. 330-1 *et seq.* of the Financial Code.
- 1.6.18 **"Financial Obligation"** means obligations arising from either:
- (a) any transaction in financial instruments provided that at least one party to such transaction is a public or regulated entity (article L. 211-36-I-1° of the Financial Code contains a list of such regulated entities, which include, among others, clearing houses, credit institutions and investment firms);
 - (b) any contract giving rise to a cash settlement (*règlement en espèces*) or a delivery of financial instruments provided, in such a case, that all the parties to such contract are public or regulated entities (as referred to in (a) above)¹; or
 - (c) any contract entered into within the framework of a system referred to in article L. 330-1 of the Financial Code², provided that the party subject to Insolvency Proceedings is a participant to a system within the meaning of article L. 330-1 of the Financial Code.
- 1.6.19 **"France"** (and the term "French" shall be construed accordingly) means the metropolitan territory of the French Republic and all overseas departments (*départements d'outre-mer*) and overseas provinces (*régions d'outre-mer*) but excludes overseas collectivities (*collectivités d'outre-mer*), Nouvelle Calédonie and the Austral and Antarctic territories. For the avoidance of doubt, Monaco is also excluded.
- 1.6.20 **"French Insolvency Law"** means the provisions of Book VI of the Commercial Code governing Insolvency Proceedings.
- 1.6.21 **"French Insolvency Proceedings"** means the insolvency proceedings defined as such in paragraph 4.1.
- 1.6.22 **"Insolvency Proceedings"** means the French Insolvency Proceedings and any analogous proceedings under the laws of any other jurisdiction.

¹ Other than any of those entities referred to in paragraphs 2(c) to 2(n) of article L. 531-2 of the Financial Code.

² The cross-reference to article L. 330-1 covers also interbank settlement systems or settlement-delivery systems for financial instruments established in an EEA Member State other than France.

- 1.6.23 "**Member Default Netting Provisions**" means, in respect of the Service, the rules identified as such in Annex 1 (*Applicable Netting Provisions*) (which are contained in the Rules).
- 1.6.24 "**Netting Provisions**" means the CCP Default Netting Provisions, the Member Default Netting Provisions and the BAU Netting Provisions.
- 1.6.25 "**Party**" means the CCP or the relevant Clearing Member and a reference to "**Parties**" is a reference to both of them.
- 1.6.26 "**Resolution Measures**" means the resolution measures defined as such in paragraph 4.2.2.
- 1.6.27 "**Rules**" means:
 - (a) the Clearing Rule Book of LCH.Clearnet SA, dated 27 September 2013 (the "**LCH Rule Book**");
 - (b) Instruction IV.4-2, "*Cash Payments*", dated 19 April 2013 (the "**Cash Payments Instruction**"); and
 - (c) Instruction IV.5-4, "*The Fixed Income Default Management Process for Transactions executed on Trading & Matching Platforms and the MTS Italy Regulated Market*", dated 26 July 2013 (the "**Fixed Income DMP Instruction**").

1.7 Interpretation

- 1.7.1 Terms not otherwise defined in this opinion shall have the meanings ascribed to them in the CCP Documentation.
- 1.7.2 Any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter.
- 1.7.3 Any reference to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.
- 1.7.4 Any reference to a "**paragraph**" is to a paragraph of this opinion letter (except where the context otherwise requires).

2. ASSUMPTIONS

For the purposes of our opinions, we make the following assumptions:

- 2.1 That each Party has the capacity, power and authority under all applicable law(s) to enter into the CCP Documentation, and to perform its obligations under the Rules and Contracts.

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- 2.2 That 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 and Contracts, and to ensure the legality, validity, enforceability or admissibility in evidence of the CCP Documentation, the Rules and the Contracts in this jurisdiction.
- 2.3 That, except as regards the Netting Provisions opined on in this opinion letter, the CCP Documentation and Contracts and the Rules are legal, valid, binding and enforceable under the law by which they are expressed to be governed.
- 2.4 That the CCP Documentation has been entered into by the Parties:
- 2.4.1 while none of the Parties is subject to any Resolution Measures, Insolvency Proceedings or analogous proceedings under the laws of any other jurisdiction;
 - 2.4.2 in good faith, for the benefit of each of them respectively, and
 - 2.4.3 on arms' length commercial terms.
- 2.5 That the AMF has approved the French language version of the LCH Rule Book (pursuant to article L. 440-1 of the Financial Code and article 541-1 of the AMF General Regulations), and neither the AMF nor the ACPR will have objection to the CCP using the LCH Rule Book. The English language version of the LCH Rule Book is the exact translation of the French language version of the LCH Rule Book.
- 2.6 That the obligations assumed under the CCP Documentation and Contracts are "mutual" (*récioproques*) between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it and solely entitled to the benefit of obligations owed to it.
- 2.7 That all obligations arising under the CCP Documentation in respect of the Service and/or any Contract can only be settled through a payment in cash (*règlement en espèces*) or a delivery of financial instruments (*livraison d'instruments financiers*).
- 2.8 That none of the provisions of the CCP Documentation are affected by fraud (*fraude*) or are pursuing a fraudulent purpose.
- 2.9 That each Party performs its obligations under the CCP Documentation and Contracts in accordance with their terms.
- 2.10 That, apart from any circulars, notifications and equivalent measures published by the CCP in accordance with the Rules, there are no other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the CCP Documentation or Contracts.
- 2.11 That each Applicable Amount which is to be set off or 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 and any act or thing which is required to be done or condition which is required to be satisfied by the parties in order to make such Applicable Amount due and payable have been satisfied.

- 2.12 That the CCP: (i) operates as a clearing house (*chambre de compensation*) within the meaning of article L. 440-1 of the Financial Code; and (ii) has been notified to the European Commission as a settlement-delivery system for financial instruments (*système de règlement et de livraison d'instruments financiers*) for the purposes of the Finality Directive and in accordance with article L. 330-1 of the Financial Code.
- 2.13 That the Clearing Member:
- 2.13.1 has been validly admitted as a clearing member (*adhérent compensateur*) of the Service, pursuant to and in accordance with article L. 440-2 of the Financial Code and Title II of the LCH Rule Book,
 - 2.13.2 is a participant in the system operated by the CCP pursuant to and in accordance with article L. 330-1 of the Financial Code, and
 - 2.13.3 is either licensed in this jurisdiction as a credit institution or an investment services provider or has a comparable status in another jurisdiction within the meaning of article L. 211-36 of the Financial Code.
- 2.14 Insofar as any transaction or obligation arising under a Contract or in connection with any default proceedings under the Default Rules is an "*instruction*" under the Finality Directive Regime, that there are no provisions in the rules of any relevant designated system (other than the CCP) which purport to override or are inconsistent with the Netting Provisions.
- 2.15 If securities are transferred as collateral subject to a security interest by the Clearing Members to the CCP, such securities are in a book-entry form and registered in the same jurisdiction as the jurisdiction in which such CCP is established.

3. **OPINION**

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

3.1 **Governing Law**

The choice of French law as the governing law of the Rules (including the Netting Provisions); as set out in article 1.3.5.1 of the LCH Rule Book, would be recognised by French courts, notwithstanding that the Clearing Member may not be incorporated, domiciled or established in this jurisdiction.

3.2 **Set-off prior to Insolvency Proceedings or CCP Close-out Proceedings**

- 3.2.1 Provided that neither Insolvency Proceedings nor CCP Close-out Proceedings in respect of the CCP has commenced (but notwithstanding that a CCP Event of Default unrelated to insolvency may have occurred):
- (a) except where the CCP has elected to apply the Member Default Netting Provisions as referred to in sub-paragraph (b), the BAU Netting Provisions provide for the Applicable Amounts to be set off and do not permit either Party to demand a gross payment; and

- (b) in the event of a default of a Clearing Member and where the Member Default Netting Provisions are activated by the CCP, such Member Default Netting Provisions will bring about a legally binding set-off of 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, and until such activation the BAU Netting Provisions will continue to apply.

3.2.2 We are of the opinion set out in paragraph 3.2.1(a) above in respect of the BAU Netting provisions because there is no rule of law in this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the BAU Netting Provision or the CCP Default Netting Provision, or which would render such terms ineffective.

3.2.3 We are of the opinion set out in paragraph 3.2.1(b) above in respect of the Member Default Netting Provision because it provides that the Contracts, which are not either transferred or closed out as part of the Member Default Netting Provisions, will have Applicable Amounts netted and set off and does not permit either Party to demand a gross payment, subject to the qualification set out in paragraph 4.3 and the Applicable CM Opinion.

3.3 CCP Default – Prior to CCP Close-out Proceedings

3.3.1 In the event of a CCP Event of Default (including as a result of opening of Insolvency Proceedings in respect of the CCP or analogous proceedings under the laws of any other jurisdiction) and prior to the commencement of CCP Close-out Proceedings:

- (a) except where the CCP has elected to apply the Member Default Netting Provisions as referred to in sub-paragraph (b), the BAU Netting Provisions provide for the Applicable Amounts to be set off and do not permit either Party to demand a gross payment; and
- (b) in the event of a default of the Clearing Member and where the Member Default Netting Provisions are activated by the CCP, the Member Default Netting Provisions will bring about a legally binding set-off of all Applicable Amounts payable by the Clearing Member and the CCP, together with amounts representing Applicable Amounts which are due (whether or not immediately payable) between the Clearing Member and the CCP, and until such activation the BAU Netting Provision will continue to apply.

3.3.2 We are of this opinion in respect of the BAU Netting provisions because the CCP Close-out Proceedings do not occur automatically upon the event of a CCP Default and, in absence of Insolvency Proceedings in respect of the CCP, the BAU Netting Provisions would continue to apply until such time as a Clearing Member triggers the CCP Close-out Proceedings pursuant to article 1.4.1.2 of the LCH Rulebook.

3.3.3 In respect of a situation where a Clearing Member is in default, as contemplated in paragraph 3.3.1(b), there is nothing in the Rules to prevent the CCP from exercising its rights under the Member Default Netting Provision. On the contrary, a defaulting Clearing Member may not initiate any rights of netting under the CCP Default Netting Provisions (article 1.4.1.3 of the LCH Rulebook). Therefore, any netting and set-off arrangement where both the CCP and a Clearing Member are in default would be governed by the BAU Netting Provisions or the Member Default Netting Provisions, subject to our opinion set out in paragraph 3.2, our qualification set out in paragraph 4.3 and the Applicable CM Opinion.

3.4 CCP Default – CCP Close-out Proceedings

3.4.1 If CCP Close-out Proceedings are commenced, the CCP Default Netting Provisions will confer to the relevant Clearing Members (other than a defaulting Clearing Member) 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 (whether or not immediately payable) between the Clearing Member and the CCP, effective at the election of the Clearing Member.

3.4.2 We are of this opinion because:

- (a) the Collateral Directive Regime establishes a legal regime which derogates from the French Insolvency Law.
- (b) Pursuant to article L. 211-36 of the Financial Code, financial obligations resulting notably from: (i) any contract giving rise to a cash settlement or a delivery of financial instruments when all the parties qualify for the purposes of article L. 211-36-2° of the Financial Code, which would be the case of the CCP and the Clearing Member; or (ii) from any contract entered into within the framework of a system referred to in article L. 330-1 of the Financial Code, which would be the case of the system operated by the CCP, would benefit from the Collateral Directive Regime.
- (c) Accordingly, as the Financial Obligations arising from the Contracts would fall within the scope of the Collateral Directive Regime, pursuant to article L. 211-40 of the Financial Code, no moratorium or stay under an Insolvency Proceeding (as defined below) against the CCP would prevent, delay or otherwise affect the exercise by the relevant Clearing Member of its rights to terminate, whether automatically or by notice, and liquidate the Contracts in accordance with the CCP Default Netting Provisions.

3.4.3 However, attention is drawn to:

- (a) the fact that the exercise of such termination and liquidation rights by the Clearing Members may be subject to a cure period. Indeed, article 1.4.1.1(i) of the LCH Rule Book provides that the exercise of

such rights may be affected by the fulfillment of the cure period, when applicable. According to such provision, *"except where such failure to pay is permitted or where LCH.Clearnet SA is acting in accordance with TITLE IV Chapter 5 [the Member Default Netting Provisions], LCH.Clearnet SA fails to make a payment due by LCH.Clearnet SA to a Clearing Member (other than to a Defaulting Clearing Member) under any novated Transaction, referred to in Article 1.4.1.0, and such failure has not been cured within 30 days from the date when the obligation to pay falls due"*; and

- (b) certain provisions of the Financial Code regarding Resolution Measures, as to which please refer to paragraph 4.2, may negatively impact the above opinion.

3.4.4 In addition, since the CCP is a credit institution, the following provisions of the Credit Institution WUD Regime would apply:

- (a) article L. 613-31-6-I-4³ provides that the adoption of reorganisation measures or the opening of winding-up proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the credit institution, where such a set-off is permitted by the law applicable to the credit institution's claim; and
- (b) article L. 613-31-5-4⁴ provides that the effects of reorganisation measures and winding-up proceedings on netting agreements shall be governed solely by the law of the contract which governs such agreements.

3.4.5 In accordance with these provisions, the rights of the affected Clearing Member under the CCP Default Netting Provisions shall be determined under French law, because the respective rights and obligations of the CCP and the affected Clearing Member arise from the LCH Rule Book and the Fixed Income DMP Instruction which are governed by French law, as to which please refer to paragraphs 3.4.2(a) and onwards above.

3.4.6 If a Clearing Member does not exercise its right of set-off under the CCP Close-out Proceedings (*i.e.* does not perform the actual calculations to determine the Termination Amount in accordance with article 1.4.1.9 of the LCH Rule Book), set-off between the liabilities of the Clearing Member and the defaulting CCP may still occur if certain conditions are met.

In principle, set-off cannot occur after the opening of Insolvency Proceedings against a company unless (i) such set off occurs between related claims (*dettes connexes*) and (ii) the claims of the solvent debtor have been duly declared to the insolvency officer of the insolvent creditor.

³ Which implements article 23 (*set off*) of the Credit Institution WUD.

⁴ Which implements article 25 (*Netting agreements*) of the Credit Institution WUD.

Claims are usually considered as related (*connexes*) when they arise from the same contract, from separate contracts linked together by a master agreement or a framework agreement, which are entered into with a view to achieving a single economic transaction and that reflects the intention of the parties to have unique and continuous contractual relationships with the same economic objectives (*ensemble contractuel unique* or *ensemble économique global*)⁵. We believe that the Rules which are of contractual nature pursuant to article L. 440-1 of the Financial Code may be considered as a framework agreement and, as a result, the liabilities arising out of the Contracts may still be set off against each other even where a Clearing Member chooses not to exercise its right of set-off under the CCP Close-out Proceedings.

3.4.7 During:

- (a) the cure period referred to in paragraph 3.4.3(a) above; and
- (b) the period between the commencement of Close-out Proceedings and a Termination Date⁶ (as such term is defined in the Rules) occurs,

the BAU Netting Provisions should apply as no contractual provision of the Rules provides otherwise.

3.5 **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.

4. **QUALIFICATIONS**

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

4.1 **Insolvency Proceedings**

A CCP established in France may be subject to the following bankruptcy, composition, reorganisation proceedings in France⁷ (together, the "**French Insolvency Proceedings**"):

⁵ Cass. com., 22 October 2013, no. 12-27044; Cass. Com., 8 October 2003, no. 02-13727

⁶ This term essentially refers to the date on which the close-out netting calculations should be performed by the relevant Clearing Member(s) following a CCP Event of Default.

⁷ Note that, in addition to Insolvency Proceedings, a commercial company may become subject in France to the following pre-insolvency proceedings: (i) *Mandat ad hoc*, as provided for in article L. 611–3 of the Commercial Code; and (ii) conciliation proceeding (*procédure de conciliation*), as provided for in article L. 611–4 of the same code. The opening of a *mandat ad hoc* proceeding or a conciliation proceeding does not entail an automatic stay of payments or actions. Nevertheless, the competent court can order a stay of deferral of payments for a period of up to two years if a creditor has started legal action against the debtor (article 1244–1 *et seq.* of the Civil Code). A conciliation proceeding only binds the parties to the conciliation agreement and remains confidential, save that where the conciliation agreement is acknowledged by the court (*homologué*) the terms thereof are no longer confidential.

- 4.1.1 safeguard proceeding (*procédure de sauvegarde*) ("**Safeguard Proceeding**") governed by articles L. 620–1 *et seq.* of the Commercial Code;
- 4.1.2 accelerated financial safeguard proceeding (*procédure de sauvegarde financière accélérée*) ("**Financial Safeguard Proceeding**") governed by articles L. 628–1 *et seq.* of the Commercial Code;
- 4.1.3 rehabilitation proceedings (*redressement judiciaire*) ("**Judicial Rehabilitation Proceeding**") governed by articles L. 631–1 *et seq.* of the Commercial Code; and
- 4.1.4 judicial liquidation (*liquidation judiciaire*) ("**Judicial Liquidation Proceeding**") governed by articles L. 640–1 *et seq.* of the Commercial Code.

4.2 Special considerations regarding credit institutions

4.2.1 General administrative powers of the ACPR

Credit institutions (*établissements de crédit*) established in France are subject to the supervision and control of the ACPR. Pursuant to article L. 613-27 of the Financial Code, Insolvency Proceedings may be opened against a credit institution only with the prior consent of the ACPR (*avis conforme*).

In accordance with article L. 612-34 of the Financial Code, the ACPR may, among other things, appoint a provisional administrator (*administrateur provisoire*) either at the request of the directors of the relevant credit institution or upon its own initiatives when the management of the relevant credit institution cannot be pursued under normal conditions or when it has been subject to disciplinary sanctions. Such provisional administrator shall manage the activities of the relevant credit institution. If a Judicial Liquidation Proceeding is opened or pronounced against a credit institution, the ACPR may also appoint a liquidator (*liquidateur*). As the case may be, the liquidator may be entrusted with all powers of administration, management and representation of the credit institution.

4.2.2 Powers of the ACPR in respect of a credit institution (*établissement de crédit*) facing financial difficulties

As a credit institution (*établissement de crédit*), the CCP may be subject to resolution measures ordered by the ACPR, if it were to fall, or (based on objective elements showing that it) were likely to fall, in the near term, into any of the following situations: (i) its own funds fall below the capital requirements upon which the maintenance of its license is conditioned; or (ii) it is unable to pay its debt or is likely to be unable to pay its debts whether immediately or in the near term; or (iii) it requires extraordinary public financial assistance.

Such resolution measures (the "**Resolution Measures**") which are governed by a new article L. 613-31-16-I of the Financial Code, may notably include:

- (a) the appointment by the ACPR of a provisional administrator, it being specified that any contractual provision providing that such appointment triggers an event of default would be void⁸;
- (b) (i) the transfer to a third party (the "**Receiving Entity**") of all or part of one or several business units (*branches d'activités*) of the CCP⁹; and/or (ii) the transfer to a bridge institution (*établissement-relais*) (the "**Bridge Institution**") of all or part of its assets, rights and obligations¹⁰ (each of such measures being referred herein to as a "**Transfer**"). It is further provided that in case of Transfer, outstanding agreements relating to the business, assets, rights or obligations so transferred shall remain executory and may not be terminated nor give rise to any set off merely as a result of such transfer, notwithstanding any contractual or statutory provisions to the contrary¹¹; and
- (c) the suspension of close-out netting rights in relation to any contracts entered into by the credit institution (*établissement de crédit*) until 17:00 at the latest on the business day following the day of publication of the ACPR's decision¹².

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

- (a) where a Transfer is made in relation to part, but not all, of the assets, rights and obligations of the credit institution, such Transfer may not affect the functioning of a System, nor the rules of such System¹³;
- (b) in case of a Transfer of assets, rights and obligations subject to a contract benefiting from the Collateral Directive Regime¹⁴, such assets, rights and obligations (together with their ancillary rights) may be assigned or transferred only in whole and not in part¹⁵. Accordingly, a framework agreement (*e.g.* an ISDA Master Agreement) and transactions entered into on the basis thereof should be:
 - (i) if included in the scope of Transfer: transferred all together to the Receiving Entity or the Bridge Institution, as the case may be; or

⁸ Paragraph 2° of article L. 613-31-16-I of the Financial Code.

⁹ Paragraph 4° of article L. 613-31-16-I of the Financial Code.

¹⁰ Paragraph 5° of article L. 613-31-16-I of the Financial Code.

¹¹ Paragraphs 4 and 5° of article L. 613-31-16-I of the Financial Code.

¹² Paragraph 14° of article L. 613-31-16-I of the Financial Code.

¹³ Article L. 613-31-16-IV *bis* of the Financial Code.

¹⁴ Essentially, derivative, securities lending or sale and repurchase (repo) contracts.

¹⁵ Article L. 613-31-16-IV of the Financial Code.

- (ii) if excluded from the scope of Transfer: retained all together by the CCP;
- (c) a counterparty under a contract benefiting from the Collateral Directive Regime may not be entitled to exercise its acceleration and close-out netting rights thereunder on the sole ground of a Resolution Measure having been ordered by the ACPR, unless such measure entails a Transfer, and such rights are exercised in relation to assets, rights and obligations governed by those contracts (as well as their ancillary rights) which are not included in the scope of the Transfer and therefore remain with the CCP¹⁶.

4.3 Limitations arising from foreign insolvency law

4.3.1 The opinions set out in this opinion letter are subject to any limitations arising from (i) insolvency, bankruptcy, liquidation, administration, moratorium, reorganisation and similar proceedings opened under any foreign laws and affecting the rights of unsecured or secured creditors generally, or (ii) the effects in France of any such foreign laws.

4.3.2 The risk of the Netting Provisions being challenged by or before a French court under a foreign insolvency laws affecting an EEA Clearing Member may be mitigated by the application of the following sets of provisions:

(a) Under the Financial Collateral Regime:

Article L. 211-40 provides that foreign insolvency proceedings equivalent to those set out in the French Insolvency Law may not impede the application of the Financial Collateral Regime (including article L. 211-36-1) may not be impeded.

(b) Under the Finality Directive Regime

A similar solution is set out in article L. 330-2-III of the Financial Code in respect of instructions and netting operations introduced in a securities settlement system within the meaning of article L. 330-1-I of the Financial Code.

4.4 Avoidance under the Collateral Directive Regime

4.4.1 Pursuant to article L. 211-40 of the Financial Code, in respect of financial transactions and collateral benefiting from the provisions of the Collateral Directive Regime, the provisions of the law governing Insolvency Proceedings shall not impede (faire obstacle) the financial transaction close-out netting and the provision and enforcement of financial collateral.

¹⁶ Article L. 613-31-16-IV of the Financial Code.

- 4.4.2 Although an extensive interpretation of article L. 211–40 of the Financial Code may lead to the conclusion that the rules pertaining to the nullity of acts concluded during the Suspect Period shall be entirely disapplied in respect of financial transactions and collateral governed by the Collateral Directive Regime, it cannot be asserted with complete certainty. The Suspect Period is a period of time the duration of which is determined by the bankruptcy judge upon the judgment recognising that the cessation of payments (*cessation des paiements*) of the insolvent company has occurred¹⁷. The Suspect Period commences on the date of such judgment and extends for up to eighteen (18) months prior to the date of such judgment¹⁸. Articles L. 211–36 to L. 211–40 of the Financial Code derive from the Collateral Directive, which states in its article 8(1) that: "*Member States shall ensure that a financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided [...] in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures*" and in its article 8(3) that: "*where a financial collateral arrangement contains (a) an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or (b) a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, Member States shall ensure that the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be treated as invalid or reversed or declared void on the sole basis that [...] the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral*".
- 4.4.3 Considering that the EU Member States have the duty to implement the provision of the Collateral Directive without diminishing their import, it is reasonable to conclude that article L. 211–40 of the Financial Code shall exclude application of articles L. 632–1 of the Commercial Code, which provides for an automatic nullity of certain transactions entered into or performed during the Suspect Period (such as, in particular, notably imbalanced transactions, non-customary means of payment or payment of debt which are not due and payable) and, therefore, that the operations of the Collateral Arrangements (and in particular, set-off) would not be avoided on the basis of said article L. 632–1 of the Commercial Code.

¹⁷ Article L. 631–8 of the Commercial Code.

¹⁸ *Ibid.*

- 4.4.4 However, article 8 of the Collateral Directive also states that "*this Directive leaves unaffected the general rules of national insolvency law in relation to the voidance of transactions entered into during the prescribed period [...]*" (namely, the Suspect Period). In addition, recital n°16 of the preamble of the Collateral Directive makes it clear that this directive "*does not prejudice the possibility of questioning under national law the financial collateral arrangement and the provision of financial collateral as part of the initial provision, top-up or substitution of financial collateral, for example where this has been intentionally done to the detriment of the other creditors (this covers inter alia actions based on fraud or similar avoidance rules which may apply in a prescribed period)*".
- 4.4.5 Therefore, it cannot be excluded that article L. 211–40 of the Financial Code does not intend to overrule article L. 632–2 of the Commercial Code, which provides for a potential nullity of non–gratuitous acts (*actes à titre onéreux*) if the counterparty of the debtor (i.e. the French Party being subject to Insolvency Proceedings) was aware, at the time of conclusion of such acts, that the debtor was in the state of cessation of payments.

4.5 Enforceability of claims

An enforceable obligation is an obligation of a type which the French courts enforce. This does not mean however that a French court would always order the defaulting party to comply with its contractual obligations in accordance with its exact terms, in particular:

- 4.5.1 depending on the circumstances and the characteristics of a non–monetary obligation, the remedy of specific performance (*exécution en nature*) of that obligation may not be available in a French court, which often will only give remedies culminating in a judgment for the payment of money;
- 4.5.2 the principles concerning inter alia good faith (*bonne foi*) and abuse of rights (*abus de droit*) in the performance of contracts may operate to limit the exercise of rights and powers under the CCP Documentation or in certain cases may operate to impose liability on the party acting in breach of such principles;
- 4.5.3 in respect of payment obligations, a French court has power under articles 1244–1 to 1244–3 of the Civil Code to grant time to a debtor or reschedule its debts (in either case for a maximum period of two years), taking into account the position of the debtor and the needs of the creditor;
- 4.5.4 in the event of any proceedings being brought in a French court in respect of a monetary obligation expressed to be payable in a currency other than euro, a French court would probably render a judgment expressed as an order to pay, not such currency, but its euro equivalent at the exchange rate prevailing on the date of the judgment or, if the Court so decides at the request of the plaintiff, at the date of payment. French law requires that all debt claims in proceedings be converted into euro at an exchange rate determined by the court at the date of commencement of such proceedings;

- 4.5.5 enforcement of non-monetary obligations may be restricted by certain general principles of French Law including the rules relating to *exception d'inexécution*;
- 4.5.6 where any obligations of any person are to be performed in jurisdictions outside France, such obligations may not be enforceable under French law to the extent that such performance thereof would be illegal or contrary to public policy under the laws of such jurisdiction;
- 4.5.7 any provision providing for the repayment of costs and expenses which are incurred as a result of the exercise by a party of its rights (which may include costs of litigation) is limited by the power of the court or arbitral tribunal to decide the level of costs and expenses and to set those amounts;
- 4.5.8 the judge in interpreting a contract is not limited to considering its express terms but may also take into account all relevant circumstances; his interpretation cannot, save in exceptional circumstances, be set aside by the French supreme court (*Cour de cassation*); and
- 4.5.9 the enforcement in France of obligations of any Clearing Member under the CCP Documentation and of foreign judgements is subject to French rules of civil procedures. In particular, in order to enforce in France any document in connection with the CCP Documentation which is written in English, a certified translation into French of such CCP Documentation will be required.

4.6 Other qualifications

- 4.6.1 The CCP Documentation, where not in the French language, may need to be translated into French by an official sworn translator (*traducteur juré*) if submitted as evidence in any proceedings before a French court.
- 4.6.2 Pursuant to article 55 of decree n° 2005-1677 of 28 December 2005, the court decision opening an Insolvency Proceeding enters into effect on the date when such judgment is rendered in public hearing. This has the effect of implementing such judgment as of 00:00 a.m. of such date of entry.
- 4.6.3 We express no opinion as to the effect of the provisions of the CCP Documentation which entitle a party to determine facts unilaterally and conclusively, or entitle it to act on the basis of such determinations; a French court may, therefore, not consider as conclusive the certificates, calculations or determinations which such CCP Documentation provides are to be conclusive.
- 4.6.4 No opinion (other than where expressly opined upon herein) is expressed or implied in relation to the accuracy of any representation or warranty given by or concerning any of the parties to the CCP Documentation or whether such parties or any of them have complied with or will comply with any covenant or undertaking given by them or the terms and conditions of any obligations binding upon them.

4.6.5 A determination, calculation or certificate of any party might in certain circumstances be held by a French court not to be final, conclusive and binding (for example, if it could be shown to have been incorrect or to have any other unreasonable).

5. CONCLUDING REMARKS

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

6. RELIANCE

This opinion is given for the benefit of the Futures and Options Association (the "FOA"). This opinion may be disclosed to:

- (a) the International Swaps and Derivatives Association, Inc. ("ISDA")
- (b) 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;
- (c) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, and professional advisors of such affiliate; and
- (d) the officers, employees and professional advisors of the FOA,

(each a "**Relevant Person**"). Each Relevant Person is authorised to make a copy of this opinion available to its auditors solely as evidential matter in support of their evaluation of a Relevant Person's management's assertion that the requirements of IAS 32 have been met, and a copy of this opinion may be furnished to them in connection therewith. In authorising Relevant Persons to make copies of this opinion available to their auditors for such purpose, we are not undertaking or assuming any duty or obligation to Relevant Persons or their auditors or establishing any lawyer-client relationship with them. Further, we do not undertake or assume any responsibility with respect to financial statements of any Relevant Person.

We accept responsibility only to the FOA in relation to the matters opined on in this opinion.

Yours faithfully,

Clifford Chance Europe LLP

CLIFFORD CHANCE EUROPE LLP

Frédéric Lacroix

Avocat à la Cour, associé

pp: J. Lacroix

ANNEX 1
APPLICABLE NETTING PROVISIONS

Service ¹⁹	CCP	Applicable Amounts	BAU Provisions	Netting	Member Netting Provisions	Default Netting Provisions	Default Provisions
Clearing Service in respect of Repos	LCH.Clearnet SA	Payments in respect of repurchase price Income payments falling due on the repurchase date	Articles 3 and 7 of Instruction IV-2, "Cash Payments", dated 19 April 2013	Articles 4.5.1.1 to 4.5.2.13 of the LCH Clearing Rule Book and Articles 2.4 and 2.5 of Instruction IV.5-4, " <i>The Fixed Income Default Management Process for Transactions executed on Trading & Matching Platforms and the MTS Italy Regulated Market</i> ", dated 26 July 2013	Title I (<i>General Provisions & Legal Framework</i>), Chapter 4 (<i>LCH.Clearnet SA Default</i>) of the LCH Clearing Rule Book		

¹⁹ Terms used in this column have the meanings given to them in the Rules.