

1 March 2013

The Futures & Options Association

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

Dear Sirs,

CCP Opinion in relation to KDPW_CCP

You have asked us to give an opinion in respect of the laws of the Republic of Poland ("**this jurisdiction**") as to the effect of certain netting and collateral arrangements in relation to KDPW_CCP S.A. (the "**Clearing House**") between the Clearing House and its clearing members (*uczestnicy rozliczający*) (each a "**Member**").

As we understand it, your requirement is for the enforceability and validity of such netting and collateral arrangements to be substantiated by a written and reasoned opinion letter.

This opinion relates to exchange traded derivatives contracts and it does not relate to cleared OTC derivative contracts. In particular, we do not opine on any Clearing House's documentation relating to the OTC derivative contracts, including, without limitation, the Rules of Transaction Clearing (non-organised trading) (*Regulamin Rozliczeń Transakcji (obróć niezorganizowany)*).

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

1. TERMS OF REFERENCE

- 1.1 Except where otherwise defined herein, terms defined in the Rules have the same meaning in this opinion letter.
- 1.2 The opinions given in Section 3 are in respect of a Member's powers under the Clearing House Documentation as at the date of this opinion. We express no opinion

as to any provisions of the Clearing House Documentation other than those on which we expressly opine.

- 1.3 Where Transactions are governed by laws other than the laws of this jurisdiction, the opinions contained in Section 3 are given in respect of only those Transactions which are capable, under their governing laws, of being the subject of the Clearing Novation.
- 1.4 The opinions given in Section 3.7 are given only in relation to Non-cash Collateral comprising securities credited to an account.
- 1.5 **Definitions**

In this opinion, unless otherwise indicated:

- 1.5.1 **"Assessment Liability"** means the liability of a Member to pay an amount to the Clearing House (including a contribution to the assets or capital of the Clearing House, or to any default or similar fund maintained by the Clearing House), but excluding:
- (a) any obligations to provide a margin or collateral to the Clearing House, where such margin or collateral was calculated at any time by reference to Transactions open at that time;
 - (b) membership fees, fines and charges;
 - (c) reimbursement of costs incurred, directly or indirectly, on behalf of, or for, the Member or its own clients;
 - (d) indemnification for any taxation liabilities;
 - (e) payment or delivery obligations under the Transactions; or
 - (f) any payment of damages awarded by a court or regulator for breach of contract, in respect of any tortious liability or for breach of statutory duty.
- 1.5.2 **"Bankruptcy Proceedings"** means bankruptcy proceedings with a liquidation option (*postępowanie upadłościowe obejmujące likwidację majątku*) or bankruptcy proceedings with a composition option (*postępowanie upadłościowe z możliwością zawarcia układu*) under the Bankruptcy Law;
- 1.5.3 **"Clearing Agreement"** means a participation agreement (*umowa o uczestnictwo*) referred to in the Rules;
- 1.5.4 **"Clearing House Documentation"** means the Clearing Agreement, the Detailed Clearing Rules and the Rules;

1.5.5 **"Clearing Novation"** means "clearing novation" (*nowacja rozliczeniowa*), i.e. a way of clearing transactions described in Article 45h of the Act on Trading, where the Clearing House, upon the acceptance of a Transaction for clearing, the Clearing House enters into the rights and obligations of a party to the Transaction vis-à-vis: (i) the other party to the Transaction, if the other party is a Member and undertook to the Clearing House to perform the obligations resulting from the clearing of Transactions entered into by it; or (ii) a Member being the other party to the clearing of a Transaction through which the entity entering into Transactions that are the subject of clearing exercises its rights and obligations resulting from such Transactions. As a result of the clearing novation the following legal relationships replace the original Transaction:

- (a) in the situation described in point (i) above: the party to the Transaction has the rights and/or obligations vis-à-vis the Clearing House (corresponding to the rights and/or obligations of that party vis-à-vis the other party to the original Transaction); and
- (b) in the situation described in point (ii) above: (X) the party to the Transaction has rights and/or obligations vis-à-vis the Member who contractually undertook to that party to clear its Transactions in the Clearing House; and (Y) the Member referred to above has rights and/or obligations vis-à-vis the Clearing House (both in the case described in (X) and in (Y) corresponding to the rights and/or obligations of that party vis-à-vis the other party to the original Transaction).

1.5.6 **"Client Account"** means an account with the Clearing House opened in the name of a Member in relation to Transactions entered into by the Member on account of the Member's clients;

1.5.7 **"Detailed Clearing Rules"** means the KDPW_CCP Detailed Clearing Rules (*Szczegółowe Zasady Prowadzenia Rozliczeń Transakcji przez KDPW_CCP*);

1.5.8 **"Event of Default"** means any of the following in relation to the Clearing House: instigation of Bankruptcy Proceedings, instigation of Recovery Proceedings, instigation of court enforcement proceedings (*postępowanie egzekucyjne*) or opening of liquidation;

1.5.9 **"House Account"** means an account with the Clearing House opened in the name of a Member in relation to Transactions entered into by the Member on its own account;

1.5.10 **"Insolvency Representative"** means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction, in particular a

bankruptcy receiver (*syndyk*), bankruptcy estate administrator (*zarządca sądowy*) and court supervisor (*nadzorca sądowy*);

- 1.5.11 "**KDPW**" means Krajowy Depozyt Papierów Wartościowych S.A.;
- 1.5.12 "**Non-cash Collateral**" means the non-cash collateral provided to the Clearing House as a margin under the Rules and the Detailed Clearing Rules;
- 1.5.13 "**Party**" means the Clearing House or the relevant Member;
- 1.5.14 "**Recovery Proceedings**" means recovery proceedings (*postępowanie naprawcze*) under the Bankruptcy Law;
- 1.5.15 "**Rules**" means the Rules of Transaction Clearing (organised trading) (*Regulamin Rozliczeń Transakcji (obróć zorganizowany)*);
- 1.5.16 "**Transaction**" means a legal relationship concerning financial instruments arising from a transaction made in securities trading or on a derivative instruments market (in respect of exchange traded derivatives), or from a novation of such a transaction;
- 1.5.17 a reference to the "**Act on Trading**" is to the Act on Trading in Financial Instruments of 29 July 2005 (*Ustawa z dnia 29 lipca 2005 roku o obrocie instrumentami finansowymi*);
- 1.5.18 a reference to the "**Settlement Finality Act**" is a reference to the Act on Settlement Finality in Payment and Securities Settlement Systems and the Principles of Supervision Over Those Systems of 24 August 2001 (*Ustawa z dnia 24 sierpnia 2001 roku o ostateczności rozrachunku w systemach płatności i systemach rozrachunku papierów wartościowych oraz zasadach nadzoru nad tymi systemami*);
- 1.5.19 a reference to the "**Bankruptcy Law**" is a reference to the Act - Bankruptcy and Recovery Proceedings Law of 28 February 2003 (*Ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze*);
- 1.5.20 references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy;
- 1.5.21 references to a "**section**" or to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be).

2. ASSUMPTIONS

We assume the following:

- 2.1 That, except with regard to the provisions discussed and opined on in this opinion letter, the Clearing House Documentation and the Transactions are legally binding and enforceable against both Parties under their governing laws.
- 2.2 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Clearing House Documentation and the Transactions; to perform its obligations under the Clearing House Documentation and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the Clearing House Documentation and the Transactions.
- 2.3 That each Party has obtained, complied with the terms of, and maintained all authorisations, approvals, licences and consents required to enable it to lawfully enter into and perform its obligations under the Clearing House Documentation and the Transactions and to ensure the legality, validity, enforceability and admissibility in evidence of the Clearing House Documentation in this jurisdiction.
- 2.4 That the Clearing House Documentation has been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.
- 2.5 That each Party acts in accordance with the powers conferred by the Clearing House Documentation and the Transactions; and that each Party performs its obligations under the Clearing House Documentation and each Transaction in accordance with their respective terms.
- 2.6 That the Transactions are subject to the Clearing Novation.
- 2.7 That the Transactions are capable, under the Rules, of being settled by the Clearing House under the Clearing Novation.
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing House Documentation, there are no other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing Agreement.
- 2.9 That no provision of the Clearing House Documentation that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect.
- 2.10 That a Member is at all times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.

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- 2.11 That (save as discussed at paragraph 3.5) the obligations assumed under the Clearing House Documentation and the Transactions are mutual between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it.
- 2.12 That the Clearing House is a participant of the securities settlement system (*system rozrachunku*) operated by KDPW, as referred to in Article 15.1 of the Settlement Finality Act, and this system is appropriate for the settlement of the Transactions.
- 2.13 That KDPW and the Clearing House have entered into an agreement under which KDPW delegated to the Clearing House the clearing of Transactions entered into on the regulated market, clearing transactions entered into on an alternative trading system as regards dematerialised securities, and operating a system securing the liquidity of clearing transactions, including a system for guaranteeing the clearing of transactions entered into on the regulated market, and that this agreement is valid and binding.

3. OPINION

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

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which the Clearing House could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are: Bankruptcy Proceedings and Recovery Proceedings (the "**Insolvency Proceedings**").

The legislation applicable to Insolvency Proceedings is the Bankruptcy Law and to, a limited extent, the Act on Trading.

3.2 Special provisions of law

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

3.3 Recognition of choice of law

The choice of law provisions set out in paragraphs 1a and 17.2 of the Rules in the Clearing House Documentation would be recognised under the laws of this jurisdiction, even if a Member is not incorporated, domiciled or established in this jurisdiction.

3.4 Netting: General

Upon the occurrence of an Event of Default in relation to the Clearing House, a Member would be entitled to receive or be obliged to pay only the net sum of the positive and negative values of the individual Transactions accepted for clearing by the Clearing House.

We are of this view because pursuant to Article 45h of the Act on Trading upon the acceptance of a Transaction for clearing in a manner which leads to a Clearing Novation, the performance of the obligations arising as a result of the Clearing Novation between the Member and the Clearing House occurs through the fulfilment of the clearing/settlement performance determined as a result of the clearing of the Transaction. In this case the clearing/settlement performance is: a (i) performance due under a Transaction entered into by the Clearing House; or (ii) the sum of performances of the same type, due under a Transaction entered into by the Clearing House, to which the Clearing House is entitled with respect to the Member being the other party to the novated Transaction, reduced by the sum of the performances of the same type, due under the Transaction entered into by the Clearing House, which the Clearing House is obliged to make to that Member, or (iii) the sum of performances of the same type due under the Transaction entered into by the Clearing House, to which the Member being the other party to the novated Transaction is entitled with respect to the Clearing House, reduced by the sum of the performances of the same type, due under the Transaction entered into by the Clearing House, which that Member is obliged to make to the Clearing House.

Moreover, so long as the Clearing House is a participant of settlement system operated by KDPW, pursuant to Article 45e of the Act on Trading, an Event of Default or any other legal remedies resulting in the suspension or ceasing of the repayment of the Clearing House's indebtedness or limiting its capacity with respect to the free disposal of its assets, does not cause any legal effects in relation to the funds in a deposit account, collective account, securities account, cash account or bank account of a member, used for the settlement of transactions in the scope in which those funds are designated for settlement of transactions by KDPW as the entity carrying out the settlement, even if the proceedings have been initiated, winding up opened or other legal remedy undertaken prior to its settlement having been made. Similarly, an Event of Default or any other legal action referred to above does not cause any legal effects with respect to the entity entitled under the collateral in relation to the subject of collateral arrangement established by that participant.

The Clearing House, as a member of the settlement system operated by KDPW is subject to a specific regime under the Bankruptcy Law. In a situation where a settlement order was introduced into the settlement system before the Clearing House is declared bankrupt, the legal effects of the settlement order resulting from its

introduction into the system and the results of its netting will be uncontestable by and binding on third parties. The entering of a settlement order into the system after bankruptcy is announced will have a similar effect, provided that the order is performed on a system working day commencing on the date on which bankruptcy has been declared, and, upon the order becoming irrevocable, KDPW, as the entity operating the settlement system was not aware and could not have been aware about the declaration of bankruptcy.

Further, there is no rule in the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by a Member.

3.5 Netting: House Accounts and Client Accounts

Upon the occurrence of an Event of Default in relation to the Clearing House, amounts payable on any Client Account would not be aggregated with, or netted against, amounts payable on any House Account.

This is because pursuant to the Rules, a netting is made separately with respect to the obligations and claims of a Member resulting from the Transactions entered into by the Member for its own account (House Account) and with respect to the obligations and claims resulting from the claims entered into on the account of the clients of the Member (Client Account).

3.6 Cash Collateral

Payments made by a Member to the Clearing House as a cash margin constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the Clearing House after the obligations arising under the participation in the settlement system are fulfilled, such cash would be treated as the property of the Clearing House available to its creditors generally.

However, the amount of cash so provided would constitute a debt owed by the Clearing House to the Member as principal.

3.7 Non-cash Collateral

Any securities provided to the Clearing House as cover for the margin and constituting Non-cash Collateral would be treated as the property of the Clearing House and be returnable to a Member, even in the event of Insolvency Proceedings relating to the Clearing House, subject to the Member's satisfying its obligations to the Clearing House.

This is because pursuant to Article 66 of the Bankruptcy Law, the assets of a participant /member of a payment system or securities clearing system necessary in

order to perform the obligations resulting from participation in the system, which arose prior to bankruptcy being declared, do not form part of the bankruptcy estate of such member. The assets which remain after these obligations are performed will be included in the bankruptcy estate of the Clearing House.

3.8 Members' Assessment Liabilities

A Member's Assessment Liability is as follows.

In connection with the clearing of Transactions entered into on the regulated market, Members are obliged to make payments to the Clearing House, out of which a fund securing the proper performance of the obligations resulting from those transactions is created (the "**Clearing Fund**"). The amount of the payments is determined by the Clearing House and it is dependent on the level of obligations which may arise as a result of the activity of the Member being cleared by the Clearing House regarding Transactions entered into on the regulated market, whereby the amount may also be dependent on the Member's financial standing. Payment from Members consist in the contribution of cash or treasury securities which meet specific requirements.

Pursuant to the Rules of the Clearing Fund, the liabilities and claims of a Member on account of the payments made to the Clearing Fund are subject to set-off against the liabilities and claims of that Member resulting from the regulation of payments to the Security Fund (as defined below), with respect to the margin and on-going settlements of transactions entered into on the derivative instruments market.

The Clearing House also maintains a fund securing the proper clearing of transactions entered into on the alternative trading system (the "**Security Fund**"). The Security Fund is created out of the payments made by the Members. The amount of the payments is determined by the Clearing House and is dependent on the level of obligations which may arise as a result of the activity of the Member being cleared by the Clearing House as regards Transactions entered into on an alternative trading system.

The assets of the Clearing Fund and the assets of the Security Fund constitute the joint property of the Members. However, if the Clearing Fund is used up as a result of a Member's actions, the obligations of that Member may be determined individually. The instigation of Bankruptcy Proceedings, the instigation of Recovery Proceedings, the instigation of court enforcement proceedings (*postępowanie egzekucyjne*), the opening of liquidation or undertaking of other legal remedies resulting in the suspension or ceasing of the repayment of indebtedness or limiting capacity with respect to the free disposal of its assets, does not cause legally affect in relation to the funds of the Clearing Fund or of the Security Fund.

4. QUALIFICATIONS

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

4.1 Netting

- 4.1.1 The Clearing Novation is a fairly new concept in this jurisdiction. The regulations concerning the Clearing Novation were introduced in 2012 and, as at the date of this opinion letter, have not been tested in practice and were not subject to any court rulings. The Clearing Novation was implemented in the Clearing House Documentation in December 2012. The regulations concerning the Clearing Novation are in many cases ambiguous and their interpretation may lead to conflicting conclusions.
- 4.1.2 The Clearing House Documentation does not contain provisions allowing a Member to close out and net, if the Clearing House becomes subject to Insolvency Proceedings.
- 4.1.3 It is not entirely clear whether Article 45e of the Act on Trading applies also in the case of the instigation of Bankruptcy Proceedings, the instigation of Recovery Proceedings, the instigation of court enforcement proceedings (*postępowanie egzekucyjne*), the opening of liquidation or the undertaking of other legal remedies against the Clearing House resulting in the suspension or ceasing of the repayment of its indebtedness or limiting its capacity with respect to the free disposal of its assets. In our view, bearing in mind that the provision applies to "members" or other entities entering into transactions and that pursuant to the Act on Trading, the term "member" should be understood as an entity that is a member of, among others, the settlement system of KDPW, and in our view it also applies to the Clearing House as it participates in the KDPW settlement system which settles transactions (and currently the Clearing House is indeed a member of KDPW).

Provided that the Clearing House is a member of the KDPW settlement system as a securities settlement system within the meaning of the Settlement Finality Act, in the event of the bankruptcy of the Clearing House, the cash and financial instruments collected in and credited to the Clearing House's current account, unencumbered with third party property rights, as well as financial instruments credited to the Clearing House's current account as security for a credit facility obtained under the securities settlement system, can be used for the performance of the Clearing House's obligations arising from settlement orders entered into the system at the latest on the working day of the system commencing on the date on which bankruptcy were declared. Neither this property nor any other assets of the Clearing House, necessary for the performance of the obligations resulting from membership in the system,

which arose prior to the Clearing House being declared bankrupt, will form part of the bankruptcy estate of the Clearing House. The subject of the collateral arrangement established in connection with membership in the settlement system referred to above will also not be included in the bankruptcy estate.

- 4.1.4 However, pursuant to Article 45h.14 of the Act on Trading, if the Clearing House is declared bankrupt, Article 85 of the Bankruptcy Law applies to Transactions that are settled through the Clearing Novation "accordingly". This is interpreted in meaning that, if a statute states that a relevant provision applies to a particular situation or a particular entity "accordingly", this means that the relevant provision may apply to that particular situation or that particular entity "without any changes" (i.e. directly), "with changes" (i.e. with modifications resulting from different circumstances) or that it may "not apply". It is not entirely clear what meaning should be attributed in the context of the Clearing Novation to the word "accordingly".
- 4.1.5 Article 85 of the Bankruptcy Law introduces a special regime in relation to early termination of a "framework agreement" and the set-off of "term financial contracts" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" entered into in the performance thereof that effectively excludes the "cherry-picking" rights of the Insolvency Representative. Pursuant to Article 85.3 of the Bankruptcy Law, if the Clearing House is declared bankrupt, a framework agreement may be terminated and, following such termination, the Insolvency Representative or the counterparty (a Member) is allowed to calculate any settlement amount based on a mechanism provided under such terminated agreement. In order to be recognised as a "framework agreement" within the meaning of Article 85 of the Bankruptcy Law, such agreement should: (i) set out a framework for the execution of "term financial contracts" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" which will be entered into in the performance of such "framework agreement" and (ii) contain provisions providing that its termination results in the termination of all transactions entered into in its performance.
- 4.1.6 It may be questioned whether the Clearing House Documentation is a "framework agreement" within the meaning of Article 85.1 of the Bankruptcy Law and whether the Transactions entered into under that Clearing House Documentation constitute transactions entered into in the performance of that framework agreement. Moreover, the Clearing House Documentation does not provide for any specific provisions setting out a mechanism for calculation of a settlement amount in the case of termination. As referred to above, Article 85 of the Bankruptcy Law applies to "term financial contracts" and/or "lending of

financial instruments" and/or "contracts for the sale and repurchase of financial instruments" and it is not entirely clear whether that Article applies only to transactions subject to the Clearing Novation which are either "term financial contracts" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments", or to any transactions which may be subject to the Clearing Novation pursuant to the Act on Trading. The application of Article 85 to transactions subject to the Clearing Novation "accordingly" might be interpreted in such a way that the rules set out in Article 85.3 may apply to any transaction subject to the Clearing Novation and not only those falling within any of the categories referred to above.

4.2 Choice of law

4.2.1 Pursuant to Article 12.2 of the Settlement Finality Act, where securities are provided as collateral security to a system participant, the National Bank of Poland, a central bank of an EU member state other than Poland or a central bank of Iceland, Liechtenstein or Norway, or the European Central Bank, and their rights with respect to the securities are recorded:

- (a) in a register or account located in this jurisdiction – the rights of such entities arising from the securities are governed by the laws of this jurisdiction; and
- (b) in a register or account located in another EU Member State, Iceland, Liechtenstein or Norway – the rights of such entities arising from the securities are governed by the laws of that other State.

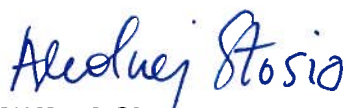
There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention.

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Yours faithfully,



Clifford Chance,

Janicka, Krużewski, Namiotkiewicz

i Wspólnicy spółka komandytowa