

BY E-MAIL

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Vienna, 1st January 2021

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Re: Legal Opinion in respect of the LCH Limited EMIR-compliant model

Dear Sirs,

In light of the UK's imminent exit from the European Union (**EU**) you have asked us to provide advice in respect of the laws of Austria with regard to certain questions raised by LCH Limited (**LCH**) relating to membership, insolvency, security, set-off, netting and client clearing with respect to entities incorporated in Austria which are clearing members of LCH (the **Clearing Members**) and entering into the Clearing Membership Agreement, the Deed of Charge, the Security Deed and the Rulebook (all as defined in section 3 below). On 25 September 2020, the Board of Supervisors of the ESMA (as defined below) adopted a new decision (entering into force on the date of its notification) to recognise LCH as a third-country central counterparty (**CCP**) under Article 25 of EMIR. The recognition decision will take effect on the date following Brexit under a "no-deal scenario". Therefore, as of the date of this legal opinion, LCH is validly recognised by the ESMA as a CCP pursuant to Article 25 of EMIR and may provide clearing services to clearing members or trading venues established in Austria.

The relevant questions together with the corresponding responses are set out in full in section 5 below.

1. MANDATE TERMS

- 1.1** This Opinion (**Opinion**) contains formal statements of opinion as to Austrian law on the matters set out in section 5 below. It is based on our understanding of LCH's clearing services as described in the Opinion Documents listed in section 3 below. The Opinion is subject to the assumptions set out in section 4 (Assumptions) below and to the qualifications set out in section 6 (Qualifications) below.
- 1.2** Our responses are strictly limited to the specific questions raised by you as set out in section 5 (Opinion) below and do not extend to any other matters.

- 1.3** We have not advised any party to the Opinion Documents. We have been instructed to issue the Opinion by LCH, and the delivery or disclosure of the Opinion to any other person does not evidence the existence of any relationship of client and lawyer between us and such person.
- 1.4** For the purpose of issuing this Opinion, we have made no investigation or verification, and we express no opinion, express or implied, with respect to:
- 1.4.1** any liability to tax and Austrian tax laws;
- 1.4.2** any accounting matters;
- 1.4.3** any regulatory matters except to the extent that we address relevant provisions of Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (*EMIR*) where relevant for assessing the effects of Section 20 (4) and 25b (2) of the Austrian Insolvency Code (*Insolvenzordnung, IO*);
- 1.4.4** any matters of fact or the reasonableness of any statements of opinion or intention expressed in relation to the Opinion Documents, including any facts, events or circumstances arising as a result of the execution of any related documents by the parties thereof or the performance of the parties' obligations therefrom;
- 1.4.5** the validity and enforceability of any of the Opinion Documents (other than those provisions of the Opinion Documents on which we explicitly opine herein);
- 1.4.6** the enforceability of any net obligation resulting from any netting or set-off;
- 1.4.7** the laws of any jurisdiction other than Austria, including jurisdictions in which our firm has an office;
- 1.4.8** Austrian credit institutions holding a licence as a covered bond bank or mortgage bank (*Hypothekenbank*) with respect to any transactions relating to or included in the cover register (*Deckungsregister*) and we do not give an opinion on general regulatory restrictions under the Austrian Mortgage Bond Act (*Hypothekenbankgesetz*) and other acts related thereto; and
- 1.4.9** obligations and assets otherwise allocated by a Credit Institution to a specific asset or cover pool as maybe required under applicable internal rules.
- 1.5** References to the word "enforceable" and cognate terms in this Opinion are used to refer to the ability of a Party to exercise its contractual rights in accordance with the terms of contracts to which it is a party and without risk of successful challenge. We do not opine on the availability of any judicial remedy or on the factual or commercial success of any enforcement measures.
- 1.6** Our comments are limited strictly to the laws of Austria as they are in force on the day of this Opinion (including any European Union regulations directly applicable in Austria), as

applied and construed according to published court decisions in Austria. We express no opinion on European Union law as it affects or would be applied in any jurisdiction other than Austria.

- 1.7 We assume no obligation to update or supplement this Opinion to reflect any facts or circumstances which may after the date hereof come to our attention or any changes in law which may hereafter occur.
- 1.8 In this Opinion Austrian legal terms and concepts are expressed in English terms and not in their original Austrian terms. The translation of these terms and concepts into English may not accurately represent the scope and extent of the intended term or concept in Austria. The Opinion may, therefore, be relied upon only under the express condition that any issue of interpretation will be governed by Austrian law. For the avoidance of doubt, we have included in this Opinion where appropriate in italics the Austrian legal term.
- 1.9 For the avoidance of doubt, the point in time of formal commencement of Insolvency Proceedings (i.e. the opening of Insolvency Proceedings) is in all likelihood not the point in time in which a Credit Institution is insolvent.

2. DEFINITIONS

- 2.1 Words and expressions defined in the Opinion Documents shall, unless otherwise defined herein or the context otherwise requires, have the meaning ascribed to such terms in the Opinion Documents.
- 2.2 For purposes of this Opinion,
- 2.2.1 **ABGB** means the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*);
- 2.3 **BaSaG** means the Austrian Act on Recovery and Resolution of Credit Institutions;
- 2.3.1 **BRRD** means Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms;
- 2.3.2 **BWG** means the Austrian Banking Act (*Bankwesengesetz*);
- 2.3.3 **CIWUD** means Directive 2001/24/EC of 4 April 2001 on the reorganization and winding up of credit institutions;¹
- 2.3.4 **Company** means an Austrian corporation (*Kapitalgesellschaft*) only; it may be organized as a joint stock corporation (*Aktiengesellschaft – AG*) or as a limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*). European Companies (*Societas*

¹ As amended by Article 117 BRRD.

Europaea – SE), which are established under Regulation (EC) 2157/2001 will not be included in this definition.

- 2.4** **Credit Institution** means an Austrian CRR-credit institution pursuant to the Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms ("**CRR**");
- 2.4.1** **ESMA** means the European Securities and Markets Authority;
- 2.4.2** **EUIR** means Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (recast);
- 2.4.3** **FMA** means the Austrian Financial Market Authority (*Finanzmarktaufsicht*);
- 2.4.4** **Insolvency Proceedings** mean insolvency proceedings under Austrian law;
- 2.5** **MiFID2** means Directive 2014/65/EU of 15 May 2014 on markets in financial instruments;
- 2.5.1** **Reorganisation Measures** mean pre-insolvency reorganisation, restructuring and/or resolution measures under Austrian law; and
- 2.5.2** **Parties** mean LCH and a single Clearing Member to which this opinion applies, and each a **Party**.
- 2.5.3** **RTS** means the Commission Delegated Regulation (EU) 2017/867 on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council

3. DOCUMENTS

- 3.1** For the purposes of this Opinion we have reviewed the following documents as provided to us:
 - 3.1.1** the General Regulations (as of July 2020), the Procedures (as published on LCH's website dated 10 October 2019), the Settlement finality Regulations (as of December 2019), the Default Rules (as of April/May 2020) (**Rulebook**) and the Product Specific Contract Terms And Eligibility Criteria Manual dated March/May 2020;
 - 3.1.2** the Clearing Membership Agreement (as defined in the Rulebook) which is substantially in the form appended as Appendix 1 to this Opinion;
 - 3.1.3** the deed of charge entered into between a Clearing Member and LCH in respect of all Charged Property transferred to LCH by that Clearing Member which is substantially in the form of the Deed of Charge set out in Appendix 2 and which contains no material modifications to the wording set out in Clause 2 of that annexed form (for the avoidance

of doubt, a change to the numbering of the clause or other provision in which the relevant wording appears in a particular deed of charge would not (in either such case) of itself constitute a "material modification" for these purposes) (**Deed of Charge** and together with the Clearing Membership Agreement, the **Agreements**); and

3.1.4 the Security Deed (as defined in the Rulebook) which is substantially in the form appended as Appendix 3 to this Opinion.

3.2 The documents referred to in sections 3.1.1 to 3.1.4 are referred to as the **Opinion Documents**.

3.3 The Opinion Documents are the only documents or records we have examined and we have conducted no searches or other enquiries for the purposes of this Opinion unless explicitly stated otherwise herein.

4. ASSUMPTIONS

4.1 For the purpose of this Opinion, we have relied solely on facts as they exist as at the date of this Opinion, and we have made the following assumptions which we have not independently verified:

4.1.1 LCH does not enjoy the benefit of the protections of Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems (**SFD**).

4.1.2 The UK incorporates a regime which is exactly equivalent to the current regime which implements Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements and the SFD.

4.1.3 The Deed of Charge and the Security Deed constitute financial collateral arrangements under English law.

4.1.4 The Opinion Documents and Agreements have been validly agreed between all Parties and incorporated and form part of the legal relationship between LCH and its Clearing Members.

4.1.5 The Opinion Documents and Contracts are enforceable in accordance with their terms (other than those provisions of the Opinion Documents on which we opine).

4.1.6 Each Party is duly incorporated and has the capacity, power and authority under all applicable laws to enter into and to exercise its rights and to perform its obligations in connection with the Opinion Documents and Contracts.

4.1.7 Each Party has obtained, complied with the terms of, and maintained all authorisations, approvals, licenses and consents required to enable it lawfully to enter into and perform its obligations under the Opinion Documents and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Opinion Documents in Austria.

- 4.1.8** The Opinion Documents and Contracts have been properly authorised, executed and delivered by each Party in accordance with all applicable laws.
- 4.1.9** The Opinion Documents and Contracts have been entered into, and each of the Contracts referred to therein is carried out, by each of the Parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 4.1.10** Each Party is as of the date of this Opinion solvent and not subject to any regulatory pre-insolvency, reorganisation or insolvency proceedings under the laws of any jurisdiction.
- 4.1.11** There is no current or pending stoppage of payment situation (including Austrian law *Zahlungsunfähigkeit*), no status of over-indebtedness (including Austrian law *Überschuldung*) and no reasons justifying the filing for the opening of insolvency proceedings under the laws of any jurisdiction as of the date of this Opinion. Each of the Opinion Documents is entered into by the Parties prior to the opening of any insolvency or bankruptcy proceedings against either Party.
- 4.1.12** None of the Parties is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process. To the extent any entity established under Austrian public law enters into the Opinion Documents or Contracts, the execution of such agreement constitutes, and the exercise of that Party's rights and performance of its obligations thereunder will constitute, private and commercial acts done and performed for private and commercial purposes.
- 4.1.13** Any Collateral provided in connection with the Opinion Documents will exclusively consist of either cash or securities. Securities will be collectively held or dematerialised securities booked to an account.
- 4.1.14** That any cash provided as Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 4.1.15** To the extent any transfers of Collateral or the creation of security interest over Collateral are subject to mandatory property laws (rights in rem, *Sachenrecht*), such property laws are complied with.
- 4.1.16** The pledges granted and the outright title transfers made by Clearing Members under the Opinion Documents to LCH are made over accounts held in the UK and/or assets booked on accounts held in the UK, are valid, and the requirements of the relevant applicable law governing the creation, transfer and/or enforcement of these pledges and title transfers are complied with, under all applicable laws (other than this jurisdiction).
- 4.1.17** There are neither rights of third parties in respect of the assets comprising the Collateral nor any other impediments which would in any way affect the transfer of the Collateral as contemplated by the Opinion Documents.

- 4.1.18** No Party to the Opinion Documents and Contracts will be considered a consumer (*Verbraucher*) pursuant to the Austrian Consumer Protection Act (*Konsumentenschutzgesetz*);
- 4.1.19** Clearing Members qualify as Companies;
- 4.1.20** There is no other agreement, instrument, arrangement or dealing between any of the Parties which modifies, supersedes or affects the Opinion Documents and Contracts.
- 4.1.21** The obligations assumed under the Opinion Documents and Contracts are mutual between the parties, in the sense that the parties are each individually and solely liable as regards obligations owing by each other and are solely entitled to the benefit of obligations owed to each other, respectively. Mutuality (*Gegenseitigkeit*) generally exists where each party is individually and solely liable as regards obligations owed by it and is solely entitled to the benefit of obligations owed to it. Circumstances in which the requisite mutuality is missing, include, without limitation, where a party is acting as agent for another person, or is a trustee, or in respect of which a party has a joint interest (including partnership) or such in respect of which a party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law.
- 4.1.22** The opinions given in this Opinion relate only to Austrian law as applied by the Austrian courts as at the day of this Opinion. We express no opinion on the laws of any other jurisdiction, even where, under Austrian law, a foreign law would be applicable. All acts, conditions or things required to be fulfilled, performed or effected in connection with the Opinion Documents and Agreements under the laws of each relevant jurisdiction have been duly fulfilled, performed and effected.

5. OPINION

On the basis of the foregoing mandate terms and assumptions and subject to the qualifications set out in section 6 below, as well as subject to any matters not disclosed to us, we are of the following opinion in response to the specific questions which are set out in italics as at the date hereof.

MEMBERSHIP

5.1 *Please opine on the ability of a Clearing Member to enter into the Agreements and if there is anything which would prevent a Clearing Member from performing its obligations under the Agreements?*

a) There are no specific statutory limitations or regulatory requirements which would limit the capacity of an appropriately authorised Clearing Member to enter into the Agreements.

b) The activities of the Clearing Member may, however, be subject to banking licence requirements under section 4 (1) BWG. To the extent a Clearing Member trades financial instruments (such as OTC derivatives) for its own account or on behalf of others, it would conduct licensable trading business (section 1 (1) No. 7 BWG). To the extent the Clearing Member either keeps securities in safe custody or administers securities for other parties, such activities would constitute licensable custody business (section 1 (1) No. 5 BWG).

Pursuant to section 879 ABGB a contract which violates a legal prohibition or public policy is null and void. The provisions of the BWG prohibiting the conduct of banking business for unregulated entities are generally not seen as prohibitions within the meaning of section 879 ABGB. Section 100 BWG stipulates that parties who conduct banking transactions without the required authorisation are not entitled to any remuneration, in particular interest or commission fees associated with these transactions. The legal invalidity of the consideration for such transactions does not render the overall banking transaction legally invalid. However, agreements trying to invalidate Section 100 BWG and suretyships and guarantees associated with these transactions are legally invalid.

- 5.2** *Would LCH be deemed to be domiciled, resident or carrying on business in Austria by virtue of providing clearing services to a Clearing Member? If so, would LCH be required to obtain a licence or be registered before providing clearing services to a Clearing Member or are there any special local arrangements for the recognition of overseas clearing houses in these circumstances?*

As LCH is validly recognized as a CCP pursuant to Article 25 of EMIR, LCH may act as CCP in Austria without any additional licenses or registrations.

- 5.3** *Insolvency, Security, Set-off and Netting*

Please identify the different types of Insolvency Proceedings and Reorganisation Measures. Would any of these not be covered by those events entitling LCH to liquidate, transfer or otherwise deal with Contracts as provided for in Rule 3 or Rule 5 of the Default Rules? Are any other events or procedures not envisaged in Rule 3 or Rule 5 of the Default Rules relevant?

Sections 5.3.1 to 5.3.6 (inclusive) contain a short overview of mandatory insolvency, regulatory, reorganisation, recovery and resolution and related proceedings under Austrian law. Our specific answer to this question is given in section 5.3.7.

- 5.3.1** General

There are two main types of proceedings pursuant to the IO: reorganisation proceedings (*Sanierungsverfahren*) and insolvency proceedings (*Konkursverfahren*). Reorganisation proceedings are aimed at the reorganisation of a Company on the basis of a reorganisation plan, qualifying as Reorganisation Measures for the purpose of this Opinion. Insolvency Proceedings are aimed at the sale of the Company's business or its liquidation.

a) Insolvency Proceedings under Austrian law

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Clearing Member could be subject under the laws of Austria, and which are relevant for the purposes of this Opinion, are the procedures laid down in the IO. The IO provides in sections 217 to 251 for the most relevant provisions related to Insolvency Proceedings with transnational elements.

Insolvency Proceedings may be opened by the competent insolvency court (*Insolvenzgericht*) upon the application of the debtor itself or of any creditor provided such creditor has a legal interest in and substantiates a reason for the opening of Insolvency Proceedings (sections 69 and 70 IO), and provided further a reason for the opening of Insolvency Proceedings exists. The IO enumerates the following reasons for the opening of Insolvency Proceedings:

- (i) Illiquidity (*Zahlungsunfähigkeit*) qualifies as the debtor's inability to settle its payment obligations when due. This is indicated when the debtor has ceased to make payments (section 66 (1) IO). According to the Austrian Supreme Court illiquidity exists if the debtor is unable to not pay more than 5% of its due debts (meaning, when the debtor is only able to pay maximally 94.99% of its due debts). Illiquidity does not exist if there is only a temporary delay in payments (*vorübergehendes Zahlungsunvermögen*) which, according to literature does not persist for more than three months.
- (ii) Over-indebtedness (*Überschuldung*) qualifies as an existing assets insufficiency. In contrast to illiquidity the future financial earnings capacity has to be taken into account. Therefore, over-indebtedness exists if a negative balance sheet and a negative existence forecast (*negative Fortbestehungsprognose*) exist.
- (iii) Illiquidity and over-indebtedness are mandatory insolvency filing requirements. The management of the debtor is obliged to file for insolvency without undue delay and within a maximum period of 60 days from the date illiquidity occurs (section 69 (2) IO). If the management fails to file for insolvency within this deadline, it risks personal civil and criminal liability.

With respect to Credit Institutions only the FMA may file for the opening of Insolvency Proceedings (section 82 (3) BWG).

In the opening order the insolvency court appoints an insolvency administrator (*Insolvenzverwalter*). As of the opening of the Insolvency Proceedings the insolvent Clearing Member's right to manage and transfer assets belonging to the insolvency estate is vested in the insolvency administrator. Any dispositions of the insolvent Clearing Member over its property made after the opening of Insolvency Proceedings become ineffective with respect to the insolvency creditors pursuant to section 3 IO.

b) Territorial scope of application of Insolvency Proceedings

- (i) Insolvency Proceedings under Austrian law apply to all local assets of the insolvent Clearing Member. It is unclear whether or not foreign assets are covered (*Universalitätsprinzip*).² In any event this is the case where a treaty exists or the EUIR or CIWUD applies (section 237). Whether or not Austrian insolvency courts have jurisdiction for opening Insolvency Proceedings over the assets of a Clearing Member depends on the rules governing the relevant proceedings. The international scope of application of Insolvency Proceedings is governed by EUIR and CIWUD. The EUIR applies to insolvency proceedings as specified in Article 1 (1) EUIR. The EUIR is not applicable, inter alia, to insolvency proceedings concerning insurance companies, CRR-credit institutions, MiFID2-investment firms and other firms, institutions and undertakings to the extent that they are covered by CIWUD and UCITS³ and AIFs⁴ (Article 1 (2) EUIR).

The European Court of Justice takes the view that the application of provisions of the EUIR generally does not depend on the existence of a cross-border link to another EU member state unless a relevant provision of the EUIR expressly requires such link. A cross-border link to a non-EU member state is sufficient.⁵ Within this scope of application Article 3 (1) EUIR gives the courts of the EU member states where the "centre of main interests" of a debtor is situated the ability to open main insolvency proceedings. In case of a legal entity, the place of the registered office is presumed to be the centre of its main interests. These proceedings are generally governed by the law of the EU member state where such proceedings are opened. They are, with regard to other EU member states, international in scope being effective in all EU member states unless secondary proceedings are opened in another EU member state. The only main insolvency proceedings permitted under Annex A of the EUIR under the laws of Austria would be Insolvency Proceedings. If the "centre of main interests" of a debtor is in an EU member state, under Article 3 (2) EUIR, the courts of another EU member state

² Decision of the Austrian Supreme Court dated 20 February 1986, 7Ob 663/85.

³ As defined in Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

⁴ As defined in Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers.

⁵ ECJ-Judgement of 16 January 2014, Case C-328/12.

may open "territorial proceedings" or, after the opening of main proceedings, "secondary proceedings" (limited to winding-up proceedings) in the event that such debtor possesses an "establishment" within the territory of such other EU member state. The applicable law of such territorial or secondary insolvency proceedings is the law of that other EU member state.

- (ii) Outside the scope of application of the EUIR Austrian courts have jurisdiction to open Insolvency Proceeding if one connecting factor of section 63 IO is given. The connecting factors of section 63 IO are the location of enterprises or in absence of such habitual abodes, establishments or assets.

If a Clearing Member is a Credit Institution or an insurance company then Austrian courts shall have jurisdiction to open Insolvency Proceedings only if Austria is considered to be the home member state (section 244 IO), which is the case if the registered main office is located in Austria. Furthermore, Austrian courts shall have jurisdiction to open Insolvency Proceedings against credit institutions or insurance companies with their registered office outside the EEA only if a branch office or branch establishment has been set up in Austria.

c) Reorganisation Measures

Prior to Insolvency Proceedings, a Company may be subject to business reorganization measures according to the Austrian Business Reorganisation Act (*Unternehmensreorganisationsgesetz, URG*). Measures in the context of the URG constitute Reorganisation Measures sui generis and aim at restoring the financial soundness of a Company. The relevant aspect of the URG is the obligation of the members of the managing body to file for Reorganisation Measures under the URG in case certain thresholds are triggered. These thresholds are (i) an equity ratio below 8% and (ii) a theoretical debt redemption period of more than 15 years. The members of the managing body may be held personally liable if they do not comply with this obligation (section 22 URG).

Impending illiquidity (*drohende Zahlungsunfähigkeit*) qualifies as a reason for the opening of Reorganisation Measures under the IO.

Credit Institutions (pursuant to sec 1 para 2 BWG) cannot be subject to reorganisation measures under the IO and the URG, but can be subject to recovery and resolution measures under the BaSaG (implementing the BRRD into Austrian law).

5.3.2 Credit Institutions

- (i) Credit Institutions may be subject to Insolvency Proceedings under the BWG and IO (both acts implementing various provisions of CIWUD into Austrian law).

In addition to Insolvency Proceedings, Credit Institutions may be subject to receivership proceedings (*Geschäftsaufsichtsverfahren*) under the BWG and recovery and resolution measures under the BaSaG.

Insolvency Proceedings aim at winding up a Credit Institution and satisfying its creditors with the proceeds of the liquidation, whereas receivership proceedings under the BWG and recovery and resolution measures under the BaSaG are intended to enable the Credit Institution to recover and to continue its business.

- (ii) Receivership Proceedings under the BWG are permitted only if the over-indebtedness or insolvency is - in the court's view – likely to be remedied. Receivership proceedings may be opened by the court upon application by the credit institution or the FMA. The court appoints a receiver who controls the management of the credit institution, may veto resolutions of the management board and approves measures that exceed the ordinary course of business. Apart from this, the credit institution may continue its ordinary business.

The main effects of the opening of receivership proceedings over a credit institution are a general moratorium regarding all payment claims (including existing and future interest and cost relating to such claims), existing claims must not be secured, paid or satisfied in any other way and no Insolvency Proceedings may be opened on the account of existing claims which are subject to the moratorium.

Receivership ends if it is either lifted by the court or if Insolvency Proceedings are opened. Upon application, the court must lift the receivership proceedings if the over-indebtedness or insolvency has ceased to exist, or if one year has lapsed since the commencement of the receivership proceedings.

Receivership is a reorganisation measure within the meaning of Article 2 CIWUD. Pursuant to section 81 para 1 BWG, Austrian law applies throughout the EEA for receivership proceedings commenced in Austria, the pre-conditions for the commencement and the effects of such receivership proceedings. The legal effects of receivership proceedings opened in Austria extend to the entire assets of an Austrian credit institution including its branches within the EEA.

According to section 83 BWG, the courts competent for the opening of Insolvency Proceedings are also competent for receivership proceedings against Austrian credit institutions.

Following the above, Insolvency Proceedings and receivership proceedings of Credit Institutions (including their foreign branches) would be governed exclusively by Austrian law (*lex fori concursus*).

These measures should in the case at hand not restrict LCH – see in particular points 5.4.4, 5.5.1 and 5.7.3 below.

- (iii) Prior to receivership proceedings or Insolvency Proceedings, a Credit Institution can also be subject to certain regulatory measures (*Befristete Maßnahmen*) if the fulfilment of its obligations towards creditors, in particular with respect to the security of the assets entrusted it, is at risk. In such case, the FMA can make certain orders – with a maximum duration of 18 months – to avert such risk (section 70 (2) BWG).

As a regulatory measure, the FMA can, inter alia, prohibit the credit institution from continuing its business in whole or in part. Moreover, the FMA may appoint an expert commissioner (*Regierungskommissär*) who may prohibit individual transactions or, if the FMA has prohibited the credit institution from continuing its business in whole or in part, allow individual transactions.

Such regulatory measures also qualify as a reorganisation measure within the meaning of Article 2 CIWUD. Austrian law applies throughout the EEA for regulatory measures commenced in Austria, the preconditions for the commencement and the effects of such regulatory measures.

These measures should in the case at hand not restrict LCH – see in particular points 5.4.4, 5.5.1 and 5.7.3 below.

- (iv) Additional regulatory proceedings under the BaSaG may be instituted and measures may be taken by the FMA as resolution authority with respect to Credit Institutions in order to avoid the insolvency of any such institution or Company.

If the conditions for resolution as defined in the BaSaG are met, the FMA can take any action in accordance with the BaSaG to achieve the resolution objectives including resolution orders and together with or independent from a resolution order any other action under the BaSaG.

The conditions for the resolutions of Credit Institutions are met if the ongoing existence of such entities is endangered, the implementation of a resolution action to achieve one or more resolution objectives is necessary and proportionate (*erforderlich und verhältnismäßig*) and the situation cannot be remedied through measures other than resolution action with the same certainty (section 49 (4) BaSaG).

Other tools are, inter alia, bail-in instruments (*Gläubigerbeteiligung, Instrument der Beteiligung von Inhabern relevanter Kapitalinstrumente*), transfers of assets and liabilities, bridge institutions (*Brückeninstitute*), sale of the Company, suspending the enforcement of rights, claims and security interests.

Article 27 BRRD and section 44 BaSaG stipulate that where an institution infringes or, due, inter alia, to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which

may include the institution's own funds requirement plus 1,5 percentage points, is likely in the near future to infringe the requirements of CRR, CRD, Title II of MiFID2 or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of MiFIR the FMA may set early intervention measures (as for example requiring the management body of the Credit Institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable).

- (v) Article 76 BRRD, which was implemented in Austrian law as Sec 109 BaSaG, provides for general safeguards for counterparties of, inter alia, title transfer collateral arrangements, set-off and netting arrangements (hereinafter referred to as the **Protected Arrangements**) in the course of partial transfers of assets, rights or liabilities of an institution.

In addition thereto, Article 77 BRRD, which was implemented in Austrian law as section 110 BaSaG, provides for a general protection in the sense that the transfer of some, but not all, of the rights and liabilities secured under such Protected Arrangements and the modification or termination of rights and liabilities that are secured under such Protected Arrangements through the use of ancillary powers should be prevented (the provision is unclear and heavily discussed in literature). LCH as a recognised CCP pursuant to Article 25 of EMIR can in this context refer to the safeguards set forth in section 109 para 2 No. 3 and 4 BaSaG for set-off arrangements and netting arrangements post-Brexit (subject to any further potential requirements specified in the RTS).

- (vi) As regards derivative exposures, bail-in must follow close-out – that is, obligations arising under derivative instruments may not be bailed in until the relevant derivatives have been closed out (section 91 (1) BaSaG). Where a derivative liability has been excluded from the application of the bail-in tool under section 86(4) BaSaG, resolution authorities shall not be obliged to terminate or close out the derivative contract; in all other cases the resolution authorities must terminate or close out the derivative contract. Where derivative transactions are subject to a netting agreement, the resolution authority or an independent valuer shall determine as part of the valuation under sections §§ 54 – 57 BaSaG the liability arising from those transactions on a net basis in accordance with the terms of the agreement (in the case at hand: the Default Rules).

Furthermore, section 86 (2) No. 2 BaSaG stipulates that the bail-in tool applies to all liabilities with the exemption of, inter alia, secured liabilities pursuant to section 2 No. 67 BaSaG. Secured liabilities are liabilities where the right of the creditor to payment or other form of performance is secured, including, inter alia, secured derivative transactions (as far as the liabilities are secured by the value of the collateral). Thus, before the Clearing Member's default, gross exposures under any transaction cannot be bailed in to the extent that they are "secured liabilities". It is therefore clear that bilateral contracts between members and a CCP are secured liabilities for this purpose. They are therefore protected by this provision

as well as by section 91 (1) BaSaG. However, once exposures have been netted out in the default process, it is necessarily true that if the outcome is an amount owed by the Clearing Member to the CCP, that such exposure will be uncollateralised, since all the available margin will have been used up before arriving at that negative number. Thus, a net balance owed by a member to the CCP after default will not be regarded as collateralised. In relation to Receivership Proceedings (with the main effect of a moratorium) please see point 5.3.2 (ii) above.

5.3.3 Insurance companies

Insolvency Proceedings of Austrian insurance companies are governed by sections 307 et seq of the Austrian Insurance Supervision Act 2016 (*Versicherungsaufsichtsgesetz 2016, VAG*). Pursuant to section 309 VAG insurance companies cannot be subject to reorganisation proceedings (*Sanierungsverfahren*) under the IO.

An application for Insolvency Proceedings may be filed solely by the FMA (section 309 VAG), which is obliged to do so if the prerequisites for the Insolvency Proceedings are met. Upon initiation of the proceedings the competent court appoints a trustee (*Kurator*) which attends the interests of the policy holders (section 310). Claims of policy holders under cover pools form a special estate (*Sondermasse*) and are satisfied preferentially (section 312 VAG).

If the initiation of Insolvency Proceedings would adversely affect the interests of policy holders, the FMA may decide to prohibit payments, in particular, to policy holders and or to alleviate the obligations of the insurance Company under life insurance in order to overcome the financial distress (section 316 VAG).

5.3.4 MiFID2-investment firms

Insolvency Proceedings of Austrian MiFID2 investment firms are governed by sections 77 et seq of the Austrian Securities Supervision Act 2018 (*Wertpapieraufsichtsgesetz 2018, WAG*). The application for Insolvency Proceeding may be filed solely by the FMA (section 79 WAG), which is obliged to do so if the prerequisites for the Insolvency Proceedings are met.

Pursuant to section 79 WAG MiFID2 investment firms cannot be subject to reorganisation proceedings (*Sanierungsverfahren*) under the IO.

The receivership proceedings under the BWG apply *mutatis mutandis* for investment firms (see above).

Furthermore, MiFID2 investment firms are subject to the regulatory proceedings of the BaSaG (section 1 BaSaG).

5.3.5 Investment Funds and Alternative Investment Funds

There are no special Insolvency Proceedings applicable to UCITS or AIFs.

5.3.6 Pension Funds

Insolvency Proceedings of pension funds are regulated in the Pension Schemes Act (*Pensionskassengesetz*, **PKG**). The provisions are nearly identical (*mutatis mutandis*) to those of the VAG (see above).

5.3.7 Rule 3 of the Default Rules provides that LCH may take steps listed in Rule 6 of the Default Rules (among others, terminating all or part of the relevant Contracts) "... in the event of a Clearing Member appearing to the clearing House to be unable, or to be likely to become unable, to meet its obligations in respect of one or more Contracts." While this provision is governed by English law under which its preconditions (for example the term "likely") and effects have to be construed (on which we do not opine) it appears that steps may be taken by LCH already at an early stage, i.e. in the case of a likely payment default as regards one single Contract.

LCH's right to take steps under Rule 3 of the Default Rules covers situations of financial difficulty of a Clearing Member at a very early stage, and therefore would apply in situations preceding the actual opening of Insolvency Proceedings, Reorganisation Measures, receivership proceedings and regulatory measures and proceedings as outlined above under the laws of Austria. Subject to the interpretation of the Default Rules under English law, we cannot exclude that regulatory measures and proceedings may be taken for reasons that do not (yet) affect the Clearing Member's ability to meet its obligations under a Contract (which would enable LCH to take steps in accordance with Rule 3 of the Default Rules). However, a general termination event preceding a situation in which a Clearing Member "... likely to become unable, to meet its obligations in respect of one or more Contracts..." may be difficult to define and prove.

The opening of regulatory measures and proceedings themselves would also be covered by Rule 5(e) of the Default Rules: "... a Regulatory Body takes or threatens to take action against or in respect of the Clearing Member under any statutory provision or process of law ..." as we would construe that provision (which is, however, a matter of English law, on which we do not opine). Whether or not the FMA, in particular as resolution authority under BaSaG, qualifies as "Regulatory Body" is a matter of interpretation of the Rulebook which is governed by English law. We cannot exclude that measures under the BaSaG, in particular early intervention measures, will be initiated before Rule 5(e) of the Default Rule is triggered.

5.4 *Would the Deed of Charge be effective in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Clearing Member? Is there anything that would prevent LCH from enforcing its rights under the Deed of Charge? Would LCH be required to take any particular steps or abide by any particular procedures for the purposes of enforcing against Collateral provided to it by a Clearing Member under the Deed of Charge? Would the Deed of Charge constitute a financial collateral arrangement (or equivalent) in your jurisdiction?*

5.4.1 We understand that under the Deed of Charge collateral is provided by the Clearing Member in favour of LCH in order to secure all obligations of that Clearing Member arising under or in connection with the Clearing Membership Agreement and the Clearing House Rulebook. Collateral consists of securities and rights relating thereto and held by the Clearing Member with LCH as custodian in designated securities accounts. We understand that these accounts are established in the UK and the relevant account relationship is governed by English law. These accounts are subject to a security interest in favour of LCH under the Deed of Charge.

The Deed of Charge provides that all cash forming part of the collateral shall be paid to and retained by LCH in a cash account and any such monies which may be received by the Clearing Member shall pending such payment be held in trust for LCH. We further understand that the Deed of Charge does not permit LCH as the secured party to dispose of any of the Charged Property prior to a Default (as defined in the Deed of Charge) and that LCH does not become unrestricted title holder in the Charged Property. LCH does not acquire a right of reuse or comparable rights with respect to the Charged Property (as defined in the Deed of Charge).

5.4.2 The choice of English law concerning the obligation to create security under the Opinion Documents will generally be recognised by Austrian courts under Article 3 (1) of the Regulation (EC) 593/2008 on the law applicable to contractual obligations (*Rome I*).

Furthermore, the choice of English law to govern the Deed of Charge will also generally be recognised by the Austrian courts if the Deed of Charge is granted over claims governed by English law and securities held in safe custody with LCH in the UK. Rome I does not apply in this context (see Article 1 d Rome I). The Austrian International Private Law provides that a foreign law can be chosen only when there is a foreign nexus (LCH's "books and records" account located in England).

However, for the sake of completeness and the avoidance of any doubt, an Austrian court would not apply, observe, uphold and give effect to the choice of English law as the governing law of the Opinion Documents, if and insofar this would lead to a result which violates public policy (*ordre public*) in Austria. Effect may be given to the overriding mandatory provisions (*Eingriffsnormen*) of the law of another jurisdiction where the obligations arising under the Opinion Documents have to be or have been performed, in so far as those overriding mandatory provisions would render the performance of any of the Opinion Documents unlawful. In this case, Austrian courts will apply Austrian law insofar as it is mandatory irrespective of the choice of English law to govern the Opinion Documents. Where the choice of law to govern the Opinion Documents relates to non-contractual obligations (*außervertragliche Schuldverhältnisse*), the courts of Austria will determine the governing law in accordance with Article 14 of Rome II.

5.4.3 Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements (*FCD*) was implemented into Austrian law by the Austrian Financial Collateral Act (*Finanzsicherheiten-Gesetz, FinSG*).

In general, the FinSG applies to financial collateral arrangements (*Finanzsicherheiten*) if both the collateral taker and the collateral provider are financial market participants (*Finanzmarktteilnehmer*) as defined in section 2 (1) FinSG, such as, inter alia, CCPs.

In addition, section 2 (2) FinSG provides that also those financial collateral agreements which are entered into between, on the one side, a financial market participant such as a CCP and, on the other side, a legal entity, a sole entrepreneur, or a partnership, shall be treated as eligible arrangements under the FinSG and thereby fall under the scope of the FinSG.

The FinSG does not link the term CCP to the requirement of being an EU entity. Therefore, as LCH is validly recognized as a CCP pursuant to Article 25 EMIR, LCH qualifies as a financial market participant under FinSG, regardless of whether it is an EU entity or a third country entity. If the Clearing Member is also a financial market participant such as, inter alia a CRR credit institution, a MiFID2 investment firm, a UCITS, an insurance company (AIFs, however, do not qualify as financial market participant under the FinSG); a legal entity; a sole entrepreneur; or a partnership, the financial collateral arrangements with LCH fall under the scope of the FinSG.

Assuming that this will be in any event the case, we are of the opinion that the Deed of Charge constitutes a financial collateral arrangement under the FinSG.

- 5.4.4** As a result, in our view, as the Deed of Charge constitutes a financial collateral arrangement under the FinSG, the security interest granted under the Deed of Charge is effective and enforceable in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Clearing Member. This should also apply in relation to receivership, FMA regulatory and resolution measures pursuant to BaSaG (see above in point 5.3.2 (v); the relevant provision is unclear and heavily discussed in literature; therefore we cannot predict whether the FMA or Austrian courts will follow our approach).

The FinSG should supersede any other contradicting Austrian law in this context as *lex specialis*.

Therefore, LCH is not required to take any particular steps or to abide by any specific procedures in order to enforce its rights under the Deed of Charge. Sections 5 et seq FinSG provide for a prompt enforcement of financial securities.

General rights to challenge or to declare actions void under the IO, however, are not affected by the FinSG pursuant to section 11 (2) FinSG (see section 5.6 below).

- 5.5** *Would LCH have the right to take the actions provided for the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 but not at this stage considering those actions specifically provided for in the Client Clearing Annex to the Default Rules) in the event that a Relevant Clearing Member was subject to Insolvency Proceedings or Reorganisation Measures? Is it necessary or recommended that LCH should specify that certain Insolvency Proceedings and/or Reorganisation*

Measures will constitute an Automatic Early Termination Event in accordance with Rule 3 of the Default Rules? If the answer is affirmative, please identify those specific Insolvency Proceedings and/or Reorganisation Measures to which the answer applies and briefly explain your reasoning.

5.5.1 Pursuant to Rule 3 of the Default Rules, any steps taken under Rule 6 shall serve the purpose (i) to discharge all the Clearing Member's rights and liabilities under or in respect of all Contracts to which it is party or upon which it is or may be liable and (ii) to complete the process set out in Rule 8. Accordingly, Rule 6 entitles LCH to terminate Contracts entered into with the Clearing Member, and we understand that Contracts which are dealt with in Rule 6 may or may not be automatically terminated in accordance with Rule 5 of the Default Rules (stipulating certain events which give LCH the right to take the actions as contemplated by Rule 6). Furthermore, under Rule 6 LCH may also take other steps, including incurring new and additional obligations of such defaulting Clearing Member for the purpose of settling or liquidating any open Contracts (for example by way of entering into opposite Contracts or by exercising any options on behalf of the defaulting Clearing Member). Rule 6 also enables LCH to realise security granted to LCH by the defaulting Clearing Member.

In a second step, Rule 8 as we understand, provides for a process to be completed by LCH to determine net amounts remaining payable between LCH and the defaulting Clearing Member, i.e. LCH is permitted to aggregate, i.e. set off any sums payable by and to a defaulting Clearing Member with respect to each "kind of account" (as such term is defined in Rule 11 (b) of the Default Rules, i.e. each separated client account and the Clearing Member's own account) including any cash collateral.

In our view, the termination rights under Rules 3 and 6, the automatic termination under Rule 5 and the set-off under Rule 8 constitute close-out netting provisions (together the **Netting Provisions**) and, therefore, where we refer in the following Austrian law treatment of netting, our reasoning is applicable to these provisions. Contractual close-out netting provisions provide for a method of reducing the parties' exposure by terminating outstanding transactions, calculating their values and determining compensation payments for all outstanding transactions that are subsequently netted against each other. Accordingly, they are subject to both the laws applicable to early termination and to set-off.

We are of the opinion that LCH may take the actions as set out in the Default Rules in the event that a Clearing Member was subject to Insolvency Proceedings or Reorganisation Measures due to the following reasons (this should also apply in relation to receivership, FMA regulatory and resolution measures pursuant to BaSaG; see above in point 5.3.2 (v) and 5.3.2 (vi); however, the relevant provision is unclear and heavily discussed in literature, therefore we cannot predict whether the FMA or Austrian courts will follow our approach):

5.5.2 In relation to netting agreements, within the scope of application of the CIWUD it has to be noted that Article 25 CIWUD provides that netting agreements (such as the Netting

Provisions) shall be governed solely by the law of the contract which governs such agreements. Article 25 CIWUD is implemented into Austrian law by section 811 BWG. Within the scope of application of CIWUD, there is no ability for the *lex fori concursus* to make determinations on voidness, voidability or the unenforceability of legal acts which are detrimental to all creditors.

As a consequence, contractual netting arrangements would be governed solely by their applicable law. In such case, English law would apply and the set-off contemplated thereby would be valid, under the assumption it is valid under English law.

5.5.3 Within the scope of application of the EUIR it has to be noted that pursuant to Article 7 (2) lit m EUIR the law of the EU member state opening the insolvency proceedings (*lex fori concursus*) determines the rules relating to the voidness, voidability, and unenforceability of legal acts which are detrimental to all creditors. Article 9 (1) EUIR provides that the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim. Article 9 (2) EUIR, however, provides that the protection for set-off/netting pursuant to Article 9 (1) EUIR does not preclude actions for voidness, voidability or unenforceability as referred in Article 7 (2) lit m EUIR. Consequently, Article 9 (2) EUIR preserves the ability of the *lex fori concursus* to declare the provisions void despite the protection in Article 9 (1) EUIR.

5.5.4 Under Austrian law, mandatory restrictions regarding the Netting Provisions in Insolvency Proceedings are contained in Sections 19 et seq IO.

Set-off/netting in Insolvency Proceedings is permitted only if the requirements for set-off/netting have already been met on the date following the publication of the opening of the Insolvency Proceedings. Maturity of the claims is, however, not required and the claims may be conditional on the date following the publication of the decision opening the Insolvency Proceedings. Set-off/netting requires that the claims to be set off legally exist between the parties on the publication day at the latest of the decision opening the Insolvency Proceedings, even if they become mature and are set-off at a later point of time.

Therefore, if one or both of the claims to be set-off come into existence after or on the day immediately following the publication day of the decision opening the Insolvency Proceedings, set-off/netting is not permissible. In this regard, the Austrian Supreme Court has generally adopted a wide approach with regard to the conditionality of obligations and has accepted that conditional obligations (i.e. obligations the existence of which depends on the satisfaction or occurrence of certain conditions) may be set off, even if their creation depends on a future, uncertain event.

In an international context, section 223 IO provides that the unilateral set-off/netting right (*einseitige Aufrechnungserklärung*) of a creditor who is a creditor and debtor already on the publication day (at the latest) of the decision opening the Insolvency Proceedings is not affected by the opening of Insolvency Proceedings, if such set-off/netting is permitted

under the law governing the claim of the insolvent debtor, such governing law to be understood to include the substantial contractual law as well as the rules on set-off/netting under any insolvency law of such jurisdiction. This means that even where set-off in Insolvency Proceedings may not be allowed under Austrian insolvency law it may nevertheless be permitted under foreign law governing the claim of the insolvent debtor (i.e. English law).

Furthermore, section 233 IO contains specific provisions for netting agreements (*Aufrechnungsvereinbarungen*) providing that netting agreements shall exclusively be governed by the law applicable to such agreements (i.e. English law).

Sections 223 and 233 IO in this context apply to all types of Austrian entities covered by this Opinion.

5.5.5 Provisions regarding the treatment of the Netting Provisions in the context of Insolvency Proceedings are also contained in the FinSG. Section 9 (1) FinSG provides that a close-out netting provision would be effective in accordance with its terms notwithstanding the commencement of Insolvency Proceedings in respect of the collateral provider and/or the collateral taker and/or notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

Unless otherwise agreed, close-out netting may be carried out without prior notice, judicial authorisation or consent, public auction or observing a waiting period (Section 9 (2) FinSG).

The interaction of the close-out netting provision of the FinSG with sections 223 and 233 IO mentioned above is unclear, as Austrian law lacks published precedents.

a) One possible construction would be to give it the same meaning as section 223 IO, thereby subjecting netting arrangements to the same general rules as set-off. In effect, this would mean that the interaction described above would not be affected by the special rule on netting arrangements, as the netting arrangements would simply qualify as a set-off provision, thereby being covered by the general rule.

b) Another possible interpretation would be that the general rules on set-off (section 223 IO) apply only with respect to unilateral set-offs whereas the special rules on netting arrangements (sec 233 IO) apply to contractual set-off and are therefore specific to the general rule. This could be interpreted as if contractual netting arrangements are solely to be governed by their applicable law and are not even subject to the provisions regarding avoidance and nullity of the country where the proceedings are opened. In such case, English law would be applicable (even without having regard to Austrian avoidance, voidability or enforceability rules) and the set-off contemplated thereby would be valid, under the assumption it is valid under English law. We are of the view that this interpretation is convincing and should prevail over the interpretation described in the previous paragraph.

c) In addition to point 5.5.5. b above and as far as Austrian law would apply, set-off would only be permissible for obligations that have been due prior to the institution of Insolvency Proceedings between the same Parties (section 19 IO). Thus, close-out netting would not be available in such case.

There is some ambiguity whether the special provisions for the permissibility of set-off of claims arising from financial contracts listed in section 20 para 4 IO which have been terminated due to insolvency would be applicable in the case at hand (see also below under 5.5.6).

No relevant precedents, express rulings or legal literature exist on this subject, but we believe that there could be an argumentation available that these arrangements in the case at hand fall under this exemption-provision of section 20 para 4 IO.

5.5.6 In relation to contractual termination rights of LCH the IO imposes certain restrictions on the possibility of terminating agreements in the event of insolvency:

a) Restrictions in relation to termination

(i) The debtor's counterparty (e.g. LCH) cannot terminate an agreement within six months from the date following the publication of the decision opening the Insolvency Proceedings, if the termination jeopardizes the continuation of the debtor's business. Although termination for good cause remains possible, the IO explicitly states that, upon the opening of Insolvency Proceedings, the deterioration of the debtor's financial situation and the non-fulfilment of a claim which already became due before the date following the publication of the decision opening the Insolvency Proceedings do not qualify as good cause for the termination of an agreement. However, the restriction, *inter alia*, does not apply, if the counterparty itself faces severe personal or economic damage (section 25a IO). We are of the opinion that LCH will in most cases not be able to demonstrate good cause.

(ii) A contractual clause providing for a termination right or the automatic termination in case of the opening of Insolvency Proceedings in respect of one of the parties is void (section 25b IO).

b) Rescission right of the insolvency administrator

From the day immediately following the publication of the decision opening the Insolvency Proceedings, the insolvency administrator may decide whether to uphold an agreement which has not yet been fulfilled by both parties or to rescind it (sections 21 et seq IO). The decision of the insolvency administrator needs to be rendered within a deadline determined by the insolvency court on demand of the contractual counterparty, failing which the rescission of the agreement is assumed.

c) However, pursuant to section 25b (2) IO the outlined termination restrictions do not apply to agreements pursuant to section 20 (4) IO. Section 20 (4) IO stipulates that claims from contracts dissolved due to the opening of insolvency proceedings may be set-off, inter alia, concerning in Annex II CRR listed off-balance-sheet finance transactions, including derivative instruments for the purpose of the transfer of credit risk (see also above under 5.5.5).

Therefore, as far as the Rulebook falls under Section 20 (4) IO, LCH would face no issues in relation to the contractual termination rights in the LCH Rulebook upon insolvency of the Credit Institution and MiFID investment firm.

5.6 *Is there a “suspect period” prior to Insolvency Proceedings and/or Reorganisation Measures where Contracts with a Clearing Member could be avoided or challenged and, if so, what are the grounds? What are the risks for LCH in entering into Contracts and in taking Collateral in respect of those Contracts during such a period? Are any special protections or exemptions from the relevant arrangements for avoidance or challenge available under the law of the Relevant Jurisdiction in respect of contracts in financial markets?*

5.6.1 In the event of Insolvency Proceedings, the insolvency administrator may challenge legal actions and transactions which have taken place within certain suspect periods before the date following the publication of the decision opening the Insolvency Proceedings and which relate to the assets of the insolvent (illiquid or over-indebted) debtor, provided that these acts have reduced the funds or harmed the satisfaction of other creditors.

The IO sets forth various circumstances for challenge. Such provisions are essentially the following:

a) Pursuant to section 28 No. 2 IO (intent to disadvantage creditors (*Anfechtung wegen Benachteiligungsabsicht*)), legal acts may be challenged if they have caused disadvantage to the creditors of the bankrupt debtor and if the debtor's intention to cause disadvantage must have been known to the counterparty and if the legal acts occurred up to two years prior to the date following the publication of the decision opening the Insolvency Proceedings.

If the counterparty had actual knowledge of this intention, the time limit between the date following the publication of the decision opening the Insolvency Proceedings and the challenged legal act is extended to ten years (section 28 no 1 IO).

b) According to sec 28 No. 4 IO (fraudulent conveyance (*Anfechtung wegen Vermögensverschleuderung*)), the right of avoidance applies to certain contracts (including purchase and exchange contracts) discriminating creditors and entered into by the debtor within one year preceding the date following the publication of the decision opening the Insolvency Proceedings with the intention of e.g. selling the goods for an unusual and unjustified low price, if the counterparty to the contract had knowledge of this intention or should have had knowledge of this intention when acting with due diligence.

Not only can the transaction itself constitute fraudulent conveyance, but also a clear disproportion between the transaction and the assets of the debtor.

c) Section 30 IO (preferential treatment (*Anfechtung wegen Begünstigung*)) permits the challenge of legal acts which were carried out by the bankrupt debtor after the occurrence of insolvency or after an application for insolvency or during 60 days prior to application, if (i) the creditor has obtained security or satisfaction which he was not entitled to receive the way he did or at this time, or (ii) if security or satisfaction was given to a creditor with the intention to favour this creditor over other creditors. The intention must be known to the favoured creditor or should have been known to him if he had acted with due care. A challenge pursuant to Sec 30 IO is not possible if the legal acts were carried out more than one year before the date following the publication of the decision opening the Insolvency Proceedings.

d) Pursuant to Sec 31 IO (knowledge of insolvency of the debtor (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*)), legal acts of the debtor which lead to the satisfaction or collateralisation of a creditor or transactions which are disadvantageous to creditors can be challenged, if the acts or transactions were undertaken within six months prior to the date following the publication of the decision opening the Insolvency Proceedings, provided that the debtor was already insolvent (illiquid or over-indebted) at the point of time such acts were undertaken or concluded and inter alia the following conditions are met:

- (i) at the moment a legal act was undertaken, the insolvency was known to the other Party or must have been known if due care had been applied; or
- (ii) in respect of legal transactions which are disadvantageous to the creditors, the counterparty of the debtor is aware of the insolvency or the insolvency is unknown to him because of negligence. The disadvantage for the other creditors must be objectively foreseeable.

The right of challenge can also apply to transactions without consideration which took place within two years before the date following the publication of the decision opening the Insolvency Proceedings (section 29 No. 1 IO).

Within the scope of application of EUIR, Article 7 para 2 lit m EUIR provides that in Austrian Insolvency Proceedings, Austrian law would also govern the question of invalidity, voidability or relative invalidity of legal acts for reason of causing disadvantage to the creditors. Section 221 (2) No. 13 IO contains a similar provision.

Pursuant to Article 16 EUIR (and section 229 IO) this provision does not apply if the person, who gained an advantage due to such legal act, can prove that (i) the legal act was governed by the law of another Member State and (ii) pursuant to the law of such other Member State the legal act cannot be challenged. Section 229 IO contains a comparable rule for Insolvency Proceedings outside the scope of the EUIR regard to legal acts governed by the law of a third country. According to some literature, the applicability

of section 229 IO requires that Insolvency Proceedings opened under Austrian law are recognised by the foreign country (in the case at hand: UK); however, no specific case law is available on whether this requirement must be met.

- 5.6.2** Following this, there would generally be a risk of challenge under Austrian law of any legal acts during the preference period if any of the conditions set out above are met. It cannot be assessed via a general estimate how likely in practice each individual challenging ground listed in point 5.6.1 above will be of a material concern to LCH in the case at hand as this varies from case to case.

However, if, under applicable English law (as the law governing the Opinion Documents) such acts cannot be challenged, Austrian challenge rules should not apply. This rule is unclear and heavily discussed in literature; there is neither case law nor any guidance on this topic.

This would apply solely to actions occurring prior to the initiation of Insolvency Proceedings, but not during the Insolvency Proceedings.

- 5.6.3** In addition to the aforesaid challenge rights under the IO, there are general challenge rights governed by the Austrian Avoidance Code (*Anfechtungsordnung, AO*). These rights are not contingent on Insolvency Proceedings and apply to actions deemed detrimental to creditors. The two most important types of actions affected are actions with the intent to disadvantage creditors (*Anfechtung wegen Benachteiligungsabsicht*) pursuant to section 2 lit a AO and actions qualified as fraudulent conveyance (*Anfechtung wegen Vermögensverschleuderung*) according to section 2 lit b AO. However, in practice challenges pursuant to the AO are rarely seen.

- 5.6.4** As regards financial collateral arrangements, the FinSG expressly stipulates that the above outlined challenging rights and rights to declare an action void remain unaffected by the respective laws (section 11 (2) FinSG).

- 5.7** *Is there relevant netting legislation in the Relevant Jurisdiction that, in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Relevant Clearing Member, might apply as an alternative to the relevant arrangements set out in the Default Rules?*

- 5.7.1** Set-off under general civil law

Under Austrian law, the Parties may set off their reciprocal claims to the extent they correlate to each other as debtor and creditor.

Furthermore, a unilateral declaration of set-off based on statutory law and unless otherwise agreed, would be conditional on the following requirements (sections 1438 ff ABGB):

- (i) a set-off statement (*Aufrechnungserklärung*) of the Party, which sets off;

- (ii) similarity (*Gleichartigkeit*) of the claims (the claims must be of the same nature, i.e. both are money claims);
- (iii) maturity (*Fälligkeit*) of the claims;
- (iv) the correctness of the claim (*Richtigkeit*) i.e. enforceability of the claim; and
- (v) no contractual set-off prohibitions.

In the case at hand, there are no indications that these requirements would not be met.

5.7.2 Set-off under the IO

Under the IO, mandatory restrictions regarding set-off in Insolvency Proceedings are contained in sections 19 et seq of the IO.

Set-off in Insolvency Proceedings is permitted only if the requirements for set-off have already been met as of the publication day of the decision opening the Insolvency Proceedings. Maturity of the claims is, however, not required and the claims may be conditional at the time of the opening of the Insolvency Proceedings. It is, however, required that the claims to be set off legally exist between the Parties prior to the opening of Insolvency Proceedings, even if they become mature and are set-off at a later point of time.

Therefore, if one or both the claims to be set off come into existence a day after the publication day of the decision opening Insolvency Proceedings, set-off is not permissible. For instance, close out netting of claims, which arise upon the termination of the contract because of the opening of Insolvency Proceedings would generally not be permitted.

The Austrian Supreme Court has generally adopted a wide approach with regard to the conditionality of obligations and has accepted that conditional obligations (i.e. obligations the existence of which depends on the satisfaction or occurrence of certain conditions) may be set off, even if their creation depends on a future, uncertain event.

In the case at hand, these restrictions will not apply if the relevant claims to be set off come into existence on the publication day of the decision opening the Insolvency Proceedings at the latest.

5.7.3 Set-Off in receivership proceedings

Whereas Insolvency Proceedings aim at winding-up a Credit Institution and satisfying its creditors with the liquidation proceeds, receivership proceedings opened over a Credit Institution are intended to enable the Credit Institution to recover and continue its business. Accordingly, the legal consequences of these proceedings differ.

Receivership is a reorganisation measure within the meaning of Article 2 CIWUD. Section 86 (1) BWG provides that all claims against the Credit Institution, which have been created

prior to the opening of the receivership proceedings, are granted a statutory respite until the receivership is ended, even if such claims have become mature after the opening of the receivership proceedings. Further, section 86 (3) BWG provides that claims created prior to the opening of receivership proceedings may neither be secured, nor be paid nor be satisfied in any way during receivership proceedings. Depending on the report of the receiver on the financial status of the credit institution and its ability to meet a specific percentage of liabilities accrued before the commencement of receivership proceedings the court may permit satisfaction of the claims to a certain extent (section 86 (2) BWG).

The effects of these provisions on set-off in receivership proceedings are judged ambiguously in Austrian legal literature and no case law has been published on this issue. According to certain Austrian commentators, a set-off of the claims created before the opening of receivership proceedings is not allowed in receivership proceedings due to the absence of maturity following the respite of the claims. Other Austrian commentators regard set-off as a satisfaction of the claims and therefore regard set-off in receivership proceedings as not admissible. However, according to relevant Austrian literature, set-off in receivership proceedings should be permitted where the claims would have been able to be set off prior to the opening of receivership proceedings.

If a court would endorse the latter view, we would assume that under Austrian law the ability to set off claims would in particular require that prior to the opening of receivership proceedings the claims have already existed reciprocally between the Parties and that they were mature and unconditional.

In an international context, section 81c BWG, which has implemented Article 23 CIWUD on the reorganisation and winding-up of credit institutions, states that the adoption of Reorganisation Measures (including receivership proceedings) in relation to a credit institution does not affect the right of a creditor to set-off, provided that such set-off is permitted by the law governing the credit institution's claim. This provision must be read in conjunction with section 81I BWG, which has implemented Article 25 CIWUD and states that netting agreements shall be governed solely by the law governing such agreement.

Section 81c BWG applies specifically in the event of Reorganisation Measures (including receivership proceedings) being opened against a credit institution, i.e. already at a stage prior to the opening of Insolvency Proceedings.

Therefore, LCH will be able to rely on sections 81c and 81I BWG in order to effect the Netting Provisions if receivership proceedings are opened (i.e. already at a stage prior to the opening of Insolvency Proceedings).

Section 81c BWG stipulates:

"(1) The initiation of reorganisation measures as defined in Article 2 of Directive 2001/24/EC does not affect the right of creditors to offset their claims against those of the credit institution in cases where such offsetting is permitted by the law applicable to the credit institution's claims (set-off).

(2) Para. 1 does not preclude actions for voidness, voidability or unenforceability pursuant to Article 10 (2)(l) of Directive 2001/24/EC."

Section 81l BWG stipulates:

"Netting agreements are governed exclusively by the law applicable to such agreements."

5.7.4 *Can a claim for a close-out amount be proved for in Insolvency Proceedings without conversion into the local currency?*

In order to receive payment of claims in Insolvency Proceedings, the creditor of an insolvent party must register its claims with the Insolvency Administrator within a certain period of time supporting the registration with relevant documents and state the basis and amount of the claim (section 103 IO).

After the opening of Insolvency Proceedings, for the purposes of such registration cash payment claims against an insolvent party in a currency other than Euro must be converted into Euro at the conversion rate applicable at the time of the commencement of Insolvency Proceedings (section 14 IO).

CLIENT CLEARING

5.8 *Please opine on the availability and effectiveness of any law, regulation or statutory provision (having the force of law) in the Relevant Jurisdiction which (if so designated by LCH) would be expected to qualify as an Exempting Client Clearing Rule. Please clarify whether the relevant Exempting Client Clearing Rule would be expected to apply to Clearing Members of all entity types or to only certain entity types.*

We understand that an "Exempting Client Clearing Rule" would be any law or regulation protecting the validity of actions taken under the Client Clearing Annex of the Default Rules (in particular the porting of client assets and positions to a backup clearing member) from challenge under the insolvency laws applicable to the Clearing Member.

5.8.1 There is no law, regulation or statutory provision in Austria qualifying as an Exempting Client Clearing Rule. The FinSG aims at protecting clearing operations from interferences with Austrian insolvency law to some extent (in particular, as concerns provided collateral). However, characterising the relevant provisions as Exempting Client Clearing Rule is not feasible.

5.8.2 The direct applicability and the priority of Article 48 EMIR vis-à-vis opposing Austrian law generally lead to the result that Austrian law provisions mitigating or frustrating EMIR provisions must not be applied (priority of application (*Anwendungsvorrang*)).

We have to emphasise that the scope of the priority of application of EMIR-provisions have not yet been determined by Austrian courts. We can, thus, not definitely opine whether the

priority of EMIR-provisions (together with the stipulations of the FinSG) protect the operation of the Client Clearing Annex of the Default Rules from challenge under Austrian insolvency laws.

5.8.3 Furthermore, LCH does not have the benefit of the protections of the SFD and its local implementation (see assumption).

5.9 *If LCH were to: (i) declare a Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Reorganisation Measures in respect of that clearing member and (ii) seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?*

5.9.1 We understand that "porting" includes the transfer of Client Contracts of a Clearing Member together with the Account Balances pursuant to the Default Rules, including the Client Clearing Annex. In such case, the Clearing Member is deprived of any entitlement to the collateral posted by it (Account Balance) as it is transferred to the Backup Clearing Member.

5.9.2 As outlined under section 5.6, there are specific reasons and periods prior to the initiation of Insolvency Proceedings during which certain actions may be challenged.

5.9.3 Apart from these challenging rights and standard civil law objections (e.g. error, violation of bones mores, etc.) we are not aware of any possibility to challenge the actions of LCH and claim for the amount of the Account Balance.

5.10 *If LCH were to: (i) declare a Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Reorganisation Measures in respect of that clearing member; and (ii) seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the Relevant Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?*

For the return of Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter the answer of section 5.9 applies mutatis mutandis.

5.11 *If (i) following the commencement of Insolvency Proceedings, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could an insolvency officer appointed to the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?*

- 5.11.1** In general, following the initiation of Insolvency Proceedings an insolvency administrator appointed may contest/challenge the actions of LCH by claiming a violation pursuant to sections 25 et seq IO.
- 5.11.2** Furthermore, with the opening of the Insolvency Proceedings transactions by the Clearing Member as debtor concerning the insolvent estate become ineffective with respect to the insolvency creditors pursuant to section 3 IO. Should the estate be enriched thereby, then the equivalent shall be returned to the other party. Paying an obligation to the debtor after the opening of the Insolvency Proceedings does not discharge the obligated party unless the payment is put at the disposal of the insolvent estate or the obligated party was unaware of the opening of Insolvency Proceedings at the time of payment and being unaware was not caused by neglecting due care (should have known).
- 5.11.3** The provisions of the FinSG (as stated above in section 5.6), however, should effectively prevent the actions of LCH of being successfully contested as, in particular, sections 5 et FinSG foresee a porting mechanism. In addition, Article 48 EMIR expressly requires CCPs to dispose of procedures to port Client Contracts as one alternative in case a Clearing Member defaults. Measures taken by a CCP in accordance with EMIR upon a default of one of its Clearing Members are valid as a matter of Austrian insolvency law.

For the sake of clarification: this also applies to a non-EU CCP which is recognised pursuant to Article 25 of EMIR (such as LCH).

- 5.12** *If (i) following the commencement of Insolvency Proceedings, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could an insolvency officer appointed to the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?*
- 5.12.1** For the return of Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter the answer of section 5.11 applies mutatis mutandis.
- 5.12.2** As regards the return of Client Clearing Entitlements, Article 48 of EMIR expressly requires CCPs to dispose of procedures to liquidate Client Contracts as the other alternative in case a Clearing Member defaults.
- 5.13** *If (i) following the implementation of Reorganisation Measures, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?*

- 5.13.1** Porting the Client Contracts and the Account Balance of a Clearing Client to a Backup Clearing Member following the implementation of Reorganisation Measures is not subject to the challenging rights set forth in section 5.6 above.
- 5.13.2** Austrian law generally refers to English law as far as contract aspects of actions taken in connection with the Default Rules are concerned, while restrictions under Insolvency Proceedings, Reorganisation Measures and regulatory proceedings may affect porting. A general exemption from restrictions under Insolvency Proceedings could apply if porting constitutes a necessary measure under Article 48 EMIR. Furthermore, exemptions would be available if porting involves financial collateral under FinSG. Meaning, measures taken by a CCP in accordance with EMIR upon a default of one of its Clearing Members are valid (in the case of Reorganisation Measures). For the sake of clarification: this also applies to a non-EU CCP which is recognised pursuant to Article 25 EMIR (such as LCH).
- 5.13.3** In addition, other (mandatory) rights to contest the actions of LCH, however, remain unaffected, such as objections regarding the validity of the agreement, violation of bones mores, error, etc.
- 5.14** *If (i) following the commencement of Reorganisation Measures, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?*

For the return of Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter following the initiation of Reorganisation Measures the answer of section 5.13 applies mutatis mutandis.

- 5.15** *Would the Security Deed provide an effective security interest under the laws of the Relevant Jurisdiction over the Account Balance or Client Clearing Entitlement in favour of the relevant Clearing Client? Would the Security Deed constitute a financial arrangement (or equivalent) in your jurisdiction?*
- 5.15.1** Yes, the Security Deed provides for an effective security interest over the Account Balance or the Client Clearing Entitlement in favour of the relevant Clearing Client under the laws of Austria. Austrian courts would recognize the Security Deed and qualify it as a right *in rem*, most likely as a pledge, if all perfection requirements according to English law are fulfilled. Please refer to section 5.16 regarding international private law stipulations.
- 5.15.2** As regards the qualification of the Security Deed as financial arrangement the answer of section 5.4.3 applies mutatis mutandis.
- 5.16** *Are there any perfection steps which would need to be taken under the laws of the Relevant Jurisdiction in order for the Security Deed to be effective?*

- 5.16.1** According to Austrian international private law, in particular section 31 of the Austrian International Private Law Act (*Internationales Privatrechtsgesetz, IPRG*), the effectiveness of rights *in rem* are governed by the laws of the location of the relevant object (*lex rei sitae*).

In case of book entry securities, section 33a IPRG contains a special provision stating that securities will be governed by the jurisdiction the securities account is subject to.

As a result, the perfection steps have to be assessed in accordance with the laws of the relevant securities account.

In case the securities are governed by English or any other foreign law according to the above provisions, Austrian law does not require any further or separate perfection steps.

- 5.16.2** Further, there are also no filing or registration requirements under Austrian law which are merely based on the status of the Clearing Member having its place of establishment, incorporation or registration in Austria.

- 5.17** *Is there any risk of a stay on the enforcement of the Security Deed in the event of Insolvency Proceedings or Reorganisation Measures being commenced in respect of a Clearing Member?*

Please see above in 5.4 the provisions of Austrian law as regards the enforcement of a security interest governed by English law in particular in Insolvency Proceedings.

- 5.18** *Please provide brief details of any other significant legal or regulatory issues which might be expected to arise in connection with the provision by a Clearing Member of Client Clearing Services and which are not covered by the Questions above.*

- 5.18.1** We are not aware of any such issues.

- 5.18.2** For the sake of completeness:

a) Banking activities could be denied enforceability if they are seen as gambling contracts. A specific rule in section 1 (5) BWG limits the applicability of the provisions regarding gambling contracts and declares that these provisions are not applicable to banking activities carried out by licensed banks. Foreign CRR-credit institutions acting in Austria are treated like Austrian CRR-credit institutions licensed in Austria in this respect.

b) Trading for one's own account or on behalf of others in, inter alia, MiFID2-financial instruments qualify as licensable banking business pursuant to section 1 (1) no 7 BWG. Therefore, Austrian entities trading in such instruments must hold this banking license.

c) The non-compliance with licence requirements on the side of the Clearing Member can result only in sanctions against the Austrian Entity and would not render the LCH Agreements null and void (section 100 BWG) provided that no collusive behaviour of LCH exists.

SETTLEMENT FINALITY

- 5.19** *On the basis that LCH will no longer receive protections pursuant to the SFD, would the commencement of Insolvency Proceedings in respect of a Clearing Member affect finality of settlement of transfers of funds or securities (or both) from the Clearing Member to LCH? If so, please clarify from which point in time and in which circumstances finality protections in respect of such transfer would be lost. Can settlement of transfers of funds or securities (or both) be subject to challenge in your jurisdiction? What would constitute the grounds for such challenge? For example, will only post-petition transactions or transactions at an undervalue be likely to be vulnerable to challenge? In relation to such challenges, would the underlying transactions be deemed to be voided automatically or would the underlying transaction be voidable and require challenge by the insolvency administrator?*
- 5.19.1** The Austrian Finality Act (*Finalitätsgesetz, FG*) implements the SFD into Austrian law. The FG aims at reducing systemic risk in securities and payment settlement systems by safeguarding that payment and transfer orders entered into a system are final in the sense that they are valid and protected against the risk of insolvency of the participants in the system. This insolvency protection also applies to set-offs and collateral provided in connection with the system. Further, the FG contains provisions on conflicts of laws.
- 5.19.2** Section 16 FG (implementing Article 8 SFD) provides that in case of insolvency over the assets of a participant in the System (i.e. the Austrian Entity), the rights and obligations of the Austrian Entity arising out of or in connection with the participation in the system shall be governed by the law governing the system. Further, pursuant to section 17 FG, the rights of a system operator or of a participant to collateral provided to them in connection with a system or any interoperable system, and the rights of central banks of the member states or the European Central Bank to Collateral security provided to them, shall not be affected by Insolvency Proceedings against the participant (in the system concerned or in an interoperable system), the system operator of an interoperable system which is not a participant, a counterparty to central banks of the member states or the European Central Bank or any third Party which provided the Collateral security.
- 5.19.3** On the basis that LCH will no longer receive protection pursuant to the SFD, we believe that underlying post-petition transactions or transactions at an undervalue will not be deemed to be voided automatically (with the exemption of section 3 IO, see point 5.11.2 above) but are subject to the general challenge rules (sections 28 to 31 IO) by the insolvency administrator. However, with the opening of the Insolvency Proceedings transactions by the Clearing Member as debtor concerning the insolvent estate become ineffective with respect to the insolvency creditors pursuant to section 3 IO (see above under section 5.11.2).
- 5.20** *On the basis that LCH will no longer receive the protections pursuant to the SFD, are there any circumstances (such as the commencement of Reorganisation Measures) which might*

give rise to a loss of finality protections before the commencement of Insolvency Proceedings? If so, please clarify from which point in time and in which circumstances finality protections would be lost?

Please refer, in particular, to sections 5.3 and 5.6 above.

6. QUALIFICATIONS

6.1 General qualifications

- 6.1.1** No opinion is expressed on matters of fact.
- 6.1.2** An agreement on the exclusive competence of a foreign jurisdiction does not prejudice a Party to file a claim with the Austrian court and the court will hear the case unless the defendant raises an objection not later than the deadline for submission of an answer to the claim and before the defendant has presented its submissions on the dispute.
- 6.1.3** No opinion is expressed on the tradeability of any of the rights and assets granted as security under any of the Opinion Documents.
- 6.1.4** In case of enforcement by filing a claim in an Austrian court or applying for enforcement under Austrian law, court fees or similar enforcement fees will become payable.
- 6.1.5** If any Party to any of the Opinion Documents knew or ought reasonably to have known that any representation, warranty or statement in any of the Opinion Documents was incorrect, inaccurate or incomplete or any covenant was or could reasonably be expected to be impossible to be fulfilled, such person may be limited in enforcing its rights under the relevant Opinion Documents under Austrian law.
- 6.1.6** If recognition of an arbitral award or court judgment rendered abroad or enforcement is sought by filing a claim in an Austrian court, the translation of foreign language documents into the Austrian language will be required and costs (such as court fees, attorney's fees and duties) will become payable.

6.2 Arbitration clause

The validity of an arbitration clause will generally be evaluated on the basis of the law applicable to the arbitration clause. If the arbitration clause has been concluded by proxy, the law applicable to the validity of the representation will have to be determined. Generally, this is the law of the seat of the represented party. Austrian law requires (contractual) representatives to hold a specific power of attorney authorising the conclusion of arbitration clauses. Representatives holding such specific power of attorney may validly bind the represented party to submit disputes to arbitration.

Dual representation (i.e. the conclusion of a contract through the joint representative of two parties) must be permissible under the applicable law. Under Austrian law, such transactions fall under the term of self-dealing and must be explicitly authorised by the represented parties. For the sake of legal certainty, such authorisation should be obtained in advance in writing.

Consequently, whether foreign arbitral awards rendered on the basis of an arbitration clause concluded by a representative can be enforced against the represented party is subject to the condition that the represented party explicitly authorised the representative to conclude an arbitration clause. In addition, self-dealing must be permitted under the applicable law. Therefore, in order to minimise the risk of non-enforceability under Austrian law, the contracts between the LCH and the Clearing Members should include a special power of attorney explicitly authorising LCH to conclude arbitration clauses on behalf of the Clearing Member. Further, a clause by which the Clearing Members accept self-dealings and the conclusion of dealings with third parties also represented by LCH is required.

We do not opine on the enforceability of the rules of the arbitration proceedings agreed upon as the Regulation 33 of the General Regulations refers to the relevant Exchange Rules or ATP Market Rules. The Exchange Rules in turn are defined as "the rules, administrative procedures, Memorandum and Articles of Association or bye-laws which regulate an Exchange" and the ATP Market Rules as "the rules, administrative procedures, Memorandum and Articles of Association or bye-laws which regulate an ATP and the market administered by it". As we did not review any Exchange Rules or ATP Market Rules for the purpose of this opinion, we cannot ascertain whether these rules governing arbitration proceedings would be enforceable before an Austrian court.

6.3 FinSG

The FinSG contains provisions aiming at facilitating transactions in financial markets, *inter alia* clearing transactions.

For this reason the FinSG includes provisions relating to national Insolvency Proceedings. The objective of these provisions is to exclude financial collateral from the enforcement and realization under national Insolvency Proceedings and any other objections arising

out of national law, which the financial collateral is – according to the choice of law – not subject to.

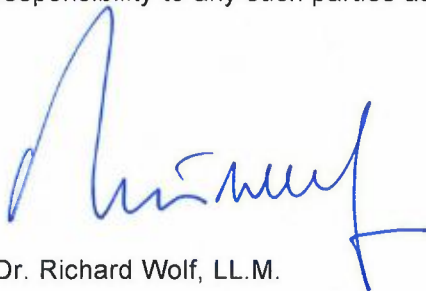
We are of the view that financial collateral arrangements under the FinSG are effective and enforceable in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Clearing Member; the FinSG should supersede any other contradicting Austrian law in this context as *lex specialis*.

However, there is neither clear literature nor explicit legislation or Supreme Court rulings supporting / confirming this view. The risk of divergent rulings, even though unlikely, cannot be excluded.

In any event challenging rights and rights to declare an action void remain unaffected by the FinSG. Further, there is no clear legislation or Supreme Court ruling on the scope of the objections or other rights affected by the FinSG.

* * *

This letter and the opinion expressed herein are to be governed by and construed in accordance with Austrian law as it stands at the date of this letter. This opinion is given for the exclusive benefit of LCH. In this opinion we do not assume any obligation to notify or inform you of any developments subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time. It may not, without prior written consent, be relied on by any other person. We consent to a copy of this opinion being made publically available on LCH's website and being shown to: (i) actual and prospective clearing members and clearing clients; (ii) relevant regulators; and/or (iii) legal counsel appointed by LCH or any person listed in (i) above to advise on matters of the laws of other jurisdictions, in each case for information purposes only and solely on the basis that we assume no responsibility to any such parties as a result or otherwise.



Dr. Richard Wolf, LL.M.

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