

LCH Limited
Aldgate House
33 Aldgate High Street
London EC3N 1EA

1 January 2021

Dear Sirs,

Membership, Insolvency, Security, Set-off and Netting and Client Clearing following Brexit

You have asked us to provide an opinion in respect of the laws of the Republic of Poland ("**this jurisdiction**") in response to certain specific questions raised by LCH Limited ("**LCH**") in relation to membership, insolvency, security, set-off and netting and client clearing.

1. TERMS OF REFERENCE

- 1.1 Our opinions are given in respect of Clearing Members which are Banks and Investment Firms acting through their offices in this jurisdiction, and all references to a "Relevant Clearing Member" in this opinion letter (the "**Opinion Letter**") shall be construed accordingly.
- 1.2 The opinions given in this Opinion Letter are applicable to all the Services other than those governed by the FCM Rulebook, Sponsored Clearing Regulations and Sponsored Clearing Procedures.
- 1.3 In this Opinion Letter:
 - 1.3.1 a reference to the "**Act on Financial Collateral Arrangements**" is a reference to *ustawa z dnia 2 kwietnia 2004 r. o niektórych zabezpieczeniach finansowych*;
 - 1.3.2 a reference to the "**Act on Settlement Finality**" is a reference to *ustawa z dnia 24 sierpnia 2001 r. o ostateczności rozrachunku w systemach płatności i systemach rozrachunku papierów wartościowych oraz zasadach nadzoru nad tymi systemami*;
 - 1.3.3 a reference to the "**Act on Trading**" is a reference to *ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi*;

- 1.3.4 a reference to a "**Bank**" is a reference to a domestic bank (*bank krajowy*) within the meaning of the Banking Law, established as a joint-stock company (*spółka akcyjna*), other than a bank holding a licence as a mortgage bank (*bank hipoteczny*) under *ustawa z dnia 29 sierpnia 1997 r. o listach zastawnych i bankach hipotecznych*;
- 1.3.5 a reference to the "**Banking Law**" is a reference to *ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe*;
- 1.3.6 a reference to the "**Bankruptcy Law**" is a reference to *ustawa z dnia 28 lutego 2003 r. Prawo upadłościowe*;
- 1.3.7 a reference to "**Bankruptcy Proceedings**" is a reference to the proceedings defined in section 3.2.1(e);
- 1.3.8 a reference to the "**BFG**" is a reference to *Bankowy Fundusz Gwarancyjny* acting in its capacity of the resolution authority (*organ przymusowej restrukturyzacji*) in Poland;
- 1.3.9 a reference to the "**BFG Act**" is a reference to *ustawa z dnia 10 czerwca 2016 r. o Bankowym Funduszu Gwarancyjnym, systemie gwarantowania depozytów oraz przymusowej restrukturyzacji*;
- 1.3.10 a reference to "**Brexit**" is a reference to the event consisting in the United Kingdom irrevocably and effectively ceasing to be a Member State of the EU;
- 1.3.11 a reference to the "**BRRD**" is a reference to Directive 2014/59/EU of the European Parliament and Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms;
- 1.3.12 a reference to the "**Civil Code**" is a reference to *ustawa z dnia 23 kwietnia 1964 Kodeks cywilny*;
- 1.3.13 a reference to a "**Clearing Membership Agreement**" is a reference to a Clearing Membership Agreement (as defined in the Rulebook), substantially in the form appended as Appendix 1 of this Opinion Letter;
- 1.3.14 a reference to "**Client Clearing Arrangements**" is a reference to the contractual arrangements by which a Relevant Clearing Member is bound to the LCH default management procedures in respect of Client Contracts, constituted by the Relevant Clearing Member's Clearing Membership Agreement and the General Regulations, including the Client Clearing Annex of the Default Rules of LCH;
- 1.3.15 a reference to a "**Client Contract**" is a reference to a Contract entered into for the account of a Clearing Client;

- 1.3.16 a reference to "**Directive 98/26/EC**" is a reference to Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems;
- 1.3.17 a reference to "**Directive 2001/24/EC**" is a reference to Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions;
- 1.3.18 a reference to "**Directive 2002/47/EC**" is a reference to Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (as amended);
- 1.3.19 a reference to "**Directive (EU) 2019/879**" is a reference to Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC;
- 1.3.20 a reference to a "**Deed of Charge**" is a reference to a deed of charge entered into between a Clearing Member and LCH in respect of all Charged Property transferred to LCH by that Clearing Member, 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));
- 1.3.21 a reference to an "**Early Intervention**" is a reference to an Early Intervention for Banks and an Early Intervention for Investment Firms;
- 1.3.22 a reference to an "**Early Intervention for Banks**" is a reference to the proceedings defined in section 3.2.1(a);
- 1.3.23 a reference to an "**Early Intervention for Investment Firms**" is a reference to the proceedings defined in section 3.2.2(c);
- 1.3.24 a reference to the "**EEA**" is a reference to the European Economic Area;
- 1.3.25 a reference to "**EMIR**" is a reference to Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories;
- 1.3.26 a reference to the "**EU**" is a reference to the European Union;
- 1.3.27 a reference to the "**EU Insolvency Regulation**" is a reference to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings;

- 1.3.28 a reference to a "**Financial Collateral Arrangement**" is a reference to financial collateral arrangements (*zabezpieczenia finansowe*) within the meaning of the Act on Financial Collateral Arrangements;
- 1.3.29 a reference to "**Financial Instruments**" is a reference to (1) securities or (2) instruments other than securities: (i) units in collective investment undertakings, (ii) money market instruments, (iii) options, futures contracts, swaps, forward rate agreements and other derivatives based on securities, currencies, interest rates, profitability ratios, emission allowances and other derivatives, financial indices or financial measures which are physically-settled or cash-settled (with the exception of the derivatives referred to in Article 10 of EU Regulation 2017/565), (iv) options, futures contracts, swaps, forward rate agreements and other derivatives which are based on commodities and which are cash-settled or may be cash-settled at the option of one of the parties, (v) options, futures contracts, swaps and other derivatives which are based on commodities, that can be physically settled, provided that they are traded in a system of trading in financial instruments, except for the wholesale energy products traded on an OTF that must be physically settled, (vi) not admitted to trading in a system of trading in financial instruments - options, futures contracts, swaps and other derivatives which are based on commodities, that can be physically settled, and which are not for commercial purposes and which have the characteristics of other derivative financial instruments, (vii) derivative instruments for the transfer of credit risk, (viii) contracts for difference, and (ix) options, futures contracts, swaps, forward rate agreements and other climate variables, freight rates, as well as derivatives based on inflation rates or other official statistics which are cash-settled or may be cash-settled at the option of one of the parties, as well as any other derivatives referred to in Article 8 of EU Regulation 2017/565, and other derivative contracts which have the characteristics of other derivative financial instruments, (x) emission allowances as defined in the Act on Trading, as well as (xi) certificates of deposit (issued by banks), and (xii) shares in limited liability companies;
- 1.3.30 a reference to "**Insolvency Proceedings**" is a reference to Bankruptcy Proceedings and Restructuring Proceedings;
- 1.3.31 a reference to an "**Insolvency Representative**" is a reference to a liquidator, administrator, receiver or analogous or equivalent official in this jurisdiction;
- 1.3.32 a reference to an "**Investment Firm**" is a reference to a brokerage house (*dom maklerski*) within the meaning of the Act on Trading, established as a joint-stock company (*spółka akcyjna*) or a limited liability company (*spółka z ograniczoną odpowiedzialnością*);
- 1.3.33 a reference to the "**KNF**" is a reference to *Komisja Nadzoru Finansowego* – the Polish financial supervisory authority;
- 1.3.34 a reference to "**LCH Agreements**" is a reference to the Clearing Membership Agreement, the Security Deed and the Deed of Charge;

- 1.3.35 a reference to "**Liquidation Proceedings**" is a reference to Liquidation Proceedings for Banks and Liquidation Proceedings for Investment Firms;
- 1.3.36 a reference to "**Liquidation Proceedings for Banks**" is a reference to the proceedings defined in section 3.2.1(c);
- 1.3.37 a reference to "**Liquidation Proceedings for Investment Firms**" is a reference to the proceedings defined in section 3.2.2(b);
- 1.3.38 a reference to an "**Omnibus Account**" is a reference to an omnibus account within the meaning of the Act on Trading, under which an omnibus account is an account in which securities not belonging to the holder of the omnibus account but belonging to another person who is or other persons who are the "owner(s)" of the securities in the omnibus account may be recorded;
- 1.3.39 a reference to the "**Opinion Documents**" is a reference to the Rulebook and the LCH Agreements;
- 1.3.40 a reference to the "**Parties**" is a reference to LCH and a single Relevant Clearing Member, and a reference to a "**Party**" is a reference to either of them;
- 1.3.41 a reference to "**Recovery Proceedings**" is a reference to the proceedings defined in section 3.2.2(a);
- 1.3.42 a reference to "**Reorganisation Measures**" is a reference to Early Interventions, Recovery Proceedings, Liquidation Proceedings and Resolution Proceedings;
- 1.3.43 a reference to "**Resolution Proceedings**" is a reference to the proceedings defined in section 3.2.1(d);
- 1.3.44 a reference to the "**Restructuring Law**" is a reference to *ustawa z dnia 15 maja 2015 r. Prawo Restrukturyzacyjne*;
- 1.3.45 a reference to "**Restructuring Proceedings**" is a reference to the proceedings defined in section 3.2.2(e);
- 1.3.46 a reference to the "**Rome I Regulation**" is a reference to Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations;
- 1.3.47 a reference to the "**Rulebook**" is a reference to the Rulebook, which includes: (i) the General Regulations as amended on 12 November 2020; (ii) the Default Rules as amended on 12 November 2020; (iii) the Settlement Finality Regulations as amended on 10 December 2019; and to the Product Specific Contractual Terms and Eligibility Criteria Manual as amended on 7 December 2020; and which as at the date of this opinion letter (the "**Opinion Date**") are located at <https://www.lch.com/resources/rules-and-regulations/ltd-rulebooks>; for the avoidance of doubt, a reference to the "**Rulebook**" is not a reference to

the FCM Rulebook and the FCM Product Specific Contractual Terms and Eligibility Criteria Manual;

- 1.3.48 a reference to a "**Security Deed**" is a reference to a security deed entered into between a Clearing Member and LCH, substantially in the form appended as Appendix 3 of this Opinion Letter;
- 1.3.49 a reference to "**Services**" is a reference to all the Services listed in section 1.2, and a reference to a "**Service**" is a reference to any one of them;
- 1.3.50 a reference to a Takeover is a reference to the proceedings defined in section 3.2.1(b);
- 1.3.51 unless the context otherwise requires, a reference to a "section" is a reference to a section of this Opinion Letter;
- 1.3.52 headings are for ease of reference only and shall not affect the interpretation of this Opinion Letter; and
- 1.3.53 any term not otherwise defined in this Opinion Letter shall have the meaning ascribed to such term in the relevant Opinion Document.
- 1.4 In this Opinion Letter, a reference to the word "**enforceable**" and any cognate terms is used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy or on the factual or commercial success of any enforcement measures.
- 1.5 In this Opinion Letter, a reference to the "**enforcement**" of Collateral under a Deed of Charge and any cognate terms means the act of: (i) the sale and application of the proceeds of the sale of the Collateral against monies owed; or (ii) the appropriation of the Collateral, in either case in accordance with the provisions of the particular Deed of Charge.
- 1.6 For the purposes of preparing our opinions given in this Opinion Letter we have reviewed the electronic versions of the Opinion Documents. We have reviewed the Opinion Documents in connection with the instructions to counsel provided as an attachment to the e-mail sent to us on 24 July 2018.
- 1.7 This Opinion Letter contains formal statements of opinion as to the laws of this jurisdiction in force as at the Opinion Date, as set out in section 3 (*Opinion*) below. It is based on our understanding of the Opinion Documents within the scope described in sections 1.8 and 1.9, and is subject to the assumptions set out in section 2 (*Assumptions*) and to the additional qualifications set out in section 4 (*Qualifications*).
- 1.8 The opinions given in this Opinion Letter are strictly limited to the specific questions raised by you as set out in section 3 (*Opinion*) below and do not extend to any other matters. We have assumed that any matters which are or could be material in the context of our delivery of this Opinion Letter have been disclosed to us.

- 1.9 For the purpose of issuing this Opinion Letter, we have made no investigation or verification, and we express no opinion, express or implied, with respect to:
- 1.9.1 the validity and enforceability of any provisions of any of the Opinion Documents without prejudice to the statement of opinion in section 3 (*Opinion*) below;
 - 1.9.2 any liability to tax as a result of or in connection with the Services, or the tax treatment of any Contract, or the tax position of any party thereto;
 - 1.9.3 any matters of fact (including any calculations or mathematical methods or formulae, any economic or financial information or figure as well as the adequacy or the relevance of any orders of priority for payments) or the reasonableness of any statements of opinion or intention expressed in relation to any Service, including any facts, events or circumstances arising as a result of the execution of any related documents by the Parties or the performance of the Parties' obligations deriving therefrom;
 - 1.9.4 the enforceability of any net obligation resulting from any netting or set-off;
 - 1.9.5 any laws of any jurisdiction other than this jurisdiction;
 - 1.9.6 the recognition and enforcement of foreign judgments as well as choice of law matters, except for those choice of law considerations where they are necessary for the purposes of the matters discussed in the scope of this Opinion Letter;
 - 1.9.7 any prudential treatment of any Relevant Clearing Member's exposure to LCH (or any part thereof), capital adequacy or other non-legal matter or on the ability of a Relevant Clearing Member to meet its financial or other obligations under the Opinion Documents, and this advice does not discuss or confirm the financial merits or the practical feasibility of the obligations envisaged in the Opinion Documents;
 - 1.9.8 whether any Relevant Clearing Member has good legal or other title to the assets or rights which are expressed to be subject to the security interest purported to be created by the Deed of Charge or the Security Deed, or as to the existence or value of any such assets or rights;
 - 1.9.9 in relation to any obligations or entitlements which may arise between Clearing Members *inter se* or between Clearing Members and any persons other than LCH;
 - 1.9.10 the compliance of the Opinion Documents with the provisions of EMIR;
 - 1.9.11 the impact on the opinions expressed in this Opinion Letter of:
 - (a) Directive 2014/65/UE of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending

Directive 2002/92/EC and Directive 2011/61/EU, and its implementing legislation in this jurisdiction;

- (b) Regulation (EU) no. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012 on OTC derivatives, central counterparties and trade repositories; and
- (c) the proposal for regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties.

- 1.10 We are not responsible for advising any party to the Opinion Documents other than LCH for the purposes of this Opinion Letter and the delivery of this Opinion Letter to any person other than LCH to whom a copy of this Opinion Letter may be communicated does not evidence the existence of any relationship of client and lawyer between us and such person.
- 1.11 This Opinion Letter is confined to matters of the laws of this jurisdiction in force as at the Opinion Date (including any EU law directly applicable in this jurisdiction), as applied and interpreted according to Polish case law published as at the Opinion Date. We express no opinion on EU law as it affects or would be applied in any jurisdiction other than this jurisdiction.
- 1.12 We assume no duty to update this Opinion Letter or inform LCH or any other person to whom a copy of this Opinion Letter may be communicated of any change in the law of this jurisdiction, or the legal status of any party to the Services, or any other circumstance that occurs, or is disclosed to us, after the Opinion Date, which might have an impact on the opinions given in this Opinion Letter.
- 1.13 The opinions given in this Opinion Letter express and describe Polish legal concepts in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying Polish law concepts. Any issues of interpretation arising in respect of the Opinion Documents or the opinions given in this Opinion Letter will be determined by the Polish courts in accordance with Polish law and we express no opinion on the interpretation that the Polish courts may give to any such expression or description.

2. ASSUMPTIONS

We have assumed the following:

- 2.1 LCH is a third-country CCP recognised pursuant to Article 25 of Regulation (EU) No 648/2012.
- 2.2 The EU legislation as it is applicable as at the date of this Opinion Letter is embedded into the domestic legal system of the United Kingdom with no substantive change. The Deed of Charge and the Security Deed constitute valid and enforceable financial

collateral arrangements under English law and benefit from the provisions of the UK legislation having implemented Directive 2002/47/EC in its current state as at the Opinion Date.

- 2.3 LCH is not insolvent for the purposes of any insolvency law and the LCH Agreements and each Contract have been entered into prior to the commencement of any insolvency procedure in respect of any Party under the laws of any jurisdiction.
- 2.4 The LCH Agreements and each Contract are legal, valid, binding and enforceable against both Parties under their governing laws and there are no provisions of the laws of any jurisdiction (other than this jurisdiction) which would be contravened by the execution of the LCH Agreements and each Contract; and that the particular Deed of Charge and the particular Security Deed create a valid and perfected security interest over the Collateral under their governing law and the governing law where the Collateral is located, such security interest being enforceable against the grantor thereof and any third parties under such law.
- 2.5 The Opinion Documents and each Contract are fully compliant with the provisions of EMIR.
- 2.6 Each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents, has the capacity, power and authority, and has otherwise complied with all applicable laws and regulations required to enable it lawfully to enter into and perform its obligations under the LCH Agreements and the Contracts and to ensure the legality, validity, enforceability and admissibility in evidence of the LCH Agreements and each Contract in this jurisdiction.
- 2.7 Each Party has entered into the LCH Agreements and each Contract in good faith, for the benefit of each of them respectively, on arms' length commercial terms; the execution and performance of the LCH Agreements and each Contract are in each Party's corporate interest.
- 2.8 The obligations assumed under the LCH Agreements and each Contract are mutual between the Parties, in the sense that the Parties are each individually and solely liable as regards the obligations owed by each other and are solely entitled to the benefit of obligations owed to each other, respectively. Mutuality (*wzajemność*) generally exists where each Party is individually and solely liable as regards the obligations owed by it and is solely entitled to the benefit of the 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 such in respect of which a party's rights or obligations or any interest therein have been transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law.
- 2.9 All obligations arising under the LCH Agreements and each Contract can only be settled through a payment in cash or a delivery of financial instruments.
- 2.10 None of the Parties is entitled to claim immunity from suit, attachment, execution or other legal process in relation to itself or its assets.

- 2.11 The LCH Agreements and each Contract are entered into, and any payment, delivery or transfer of Collateral is effected prior to the commencement of any Insolvency Proceedings and Reorganisation Measures against the Relevant Clearing Member.
- 2.12 Each Relevant Clearing Member has the capacity, power and authority to create the security under the Deed of Charge and the Security Deed.
- 2.13 Each Party, when posting Collateral pursuant to the Deed of Charge and the Security Deed has full legal title to such Collateral at such time, free and clear of any lien, claim, charge or encumbrance or any other interest of the posting party or of any third person.
- 2.14 All Collateral transferred pursuant to the Deed of Charge and the Security Deed is freely transferable and capable of being subject to the security interest provided for in the Deed of Charge and the Security Deed (as the case may be) and all acts or things required to be done by the laws of any jurisdiction to ensure the validity and enforceability *vis-à-vis* third parties of such security interest will have been effectively carried out.
- 2.15 The Collateral is located in England. The securities account, omnibus account, other account on which financial instruments other than securities are recorded, deposit account or other securities register in which the security interest established under the Deed of Charge or the Security Deed, as the case may be, has been recorded are maintained in England. The Cash Account is maintained in England and the law that governs an account agreement under which the Cash Account is maintained is not Polish law. The rights under the Deed of Charge are enforceable under English law and, as the case may be, under the law governing an account agreement under which the Cash Account is maintained.
- 2.16 The Securities that constitute the Charged Property under the Deed of Charge are book-entry Financial Instruments (*niematerialne instrumenty finansowe*).
- 2.17 LCH, acting as chargee under the Deed of Charge, maintains continued possession over the Charged Property.
- 2.18 The provision of Collateral to LCH has been evidenced in writing (which includes recording by electronic means and any other durable medium) such that it allows for identification of the Collateral to which it applies (provided that, for this purpose, it is sufficient to prove that the book entry securities Collateral has been credited to, or forms a credit in, the relevant account and that the cash Collateral has been credited to, or forms a credit in, a designated account).
- 2.19 The Relevant Clearing Member was not created by way of a Polish statute (*ustawa*) (unless the statute provides that such Relevant Clearing Member may be declared bankrupt) and was not created in the performance of an obligation imposed by a Polish statute (*ustawa*) as referred to in Article 6 sec. 4 of the Bankruptcy Law.

3. OPINION

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out under section 4 below we are of the following opinions in response to specific questions which are set out below.

General

3.1 Please opine on the ability of a Relevant Clearing Member to enter into the LCH Agreements and if there is anything which would prevent a Relevant Clearing Member from performing its obligations under the LCH Agreements. In particular, please can you answer the following: Would LCH be deemed to be domiciled, resident or carrying on business in the Relevant Jurisdiction by virtue of providing clearing services to a Relevant Clearing Member? If so, would LCH be required to obtain any additional licences or additional registrations before providing clearing services to a Relevant Clearing Member or are there any special local arrangements for the recognition of overseas clearing houses in these circumstances?

3.1.1 Article 25(1) of EMIR provides that a CCP established in a third country may provide clearing services to clearing members or trading venues established in the Union only where that CCP is recognised by ESMA. LCH, as a duly recognized central counterparty pursuant to the recognition procedure set out in article 25(1) of EMIR, may provide clearing services to a Relevant Clearing Member.

3.1.2 The Relevant Clearing Member will be able to enter into the LCH Agreements with LCH as a duly recognised central counterparty pursuant to the recognition procedure set out in Article 25(1) of EMIR, and LCH will not be required to obtain any additional licences or additional registrations in this jurisdiction before providing clearing services to a Relevant Clearing Member. There are no special local arrangements in this jurisdiction for the recognition of a CCP established in a third country that was recognised by ESMA based on Article 25 of EMIR.

3.1.3 In our view, LCH will not be deemed to be domiciled or resident in this jurisdiction by virtue of providing clearing services to a Relevant Clearing Member. The laws of this jurisdiction do not provide for clear rules as to when and in what circumstances business is considered as carried out "in this jurisdiction". From the local law perspective, it is not entirely clear whether LCH will be deemed to be carrying on business in this jurisdiction by virtue of providing clearing services to a Relevant Clearing Member.

3.2 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?

- 3.2.1 A Relevant Clearing Member that is a Bank may be subject to the following types of Insolvency Proceedings and Reorganisation Measures:
- (a) early intervention (*wczesna interwencja*) regulated by the Banking Law (an "**Early Intervention for Banks**") (the provisions of the Banking Law regulating the Early Intervention for Banks are aimed at implementing the respective provisions of the BRRD);
 - (b) takeover of the Bank in accordance with the Banking Law (a "**Takeover**");
 - (c) liquidation proceedings (*likwidacja*) pursuant to the Banking Law ("**Liquidation Proceedings for Banks**");
 - (d) resolution proceedings (*przymusowa restrukturyzacja*) regulated by the BFG Act ("**Resolution Proceedings**"); the following resolution tools may be applied in Resolution Proceedings: (i) the sale of business tool (*przejęcie przedsiębiorstwa*); (ii) the bridge institution tool (*instytucja pomostowa*); (iii) the bail-in tool (*umorzenie lub konwersja zobowiązań*); (iv) the asset separation tool (*wydzielenie praw majątkowych*) (the asset separation tool may only be applied together with another resolution tool); and
 - (e) bankruptcy proceedings (*postępowanie upadłościowe*) regulated by the Bankruptcy Law ("**Bankruptcy Proceedings**").
- 3.2.2 A Relevant Clearing Member that is an Investment Firm may be subject to the following types of Insolvency Proceedings and Reorganisation Measures:
- (a) recovery proceedings (*postępowanie naprawcze*) carried out under Part IV, Chapter I, Section 2b (*Dział IV, Rozdział I, Oddział 2b*) of the Act on Trading ("**Recovery Proceedings**");
 - (b) liquidation proceedings (*likwidacja*) in accordance with the Act on Trading ("**Liquidation Proceedings for Investment Firms**");
 - (c) early intervention (*wczesna interwencja*) regulated by the Act on Trading, provided that such Relevant Clearing Member that is an Investment Firm carries out the activity referred to in Article 69 sec. 2 item 3¹ or 7², 8³, 9⁴ of the Act on Trading and, as such, is required to have an initial capital not lower than the PLN equivalent of EUR 730 000 (an

¹ i.e. the purchase or sale of financial instruments on own account (*nabywanie lub zbywanie na własny rachunek instrumentów finansowych*).

² i.e. provision of services in the performance of concluded emission guarantee agreements or the conclusion and performance of other agreements of a similar nature, if financial instruments are the subject matter thereof (*świadczeniu usług w wykonaniu zawartych umów o gwarancję emisji lub zawieraniu i wykonywaniu innych umów o podobnym charakterze, jeżeli ich przedmiotem są instrumenty finansowe*).

³ i.e. the operation of an MTF (*prowadzeniu ASO*).

⁴ i.e. the operation of an OTF (*prowadzenie OTF*).

"**Early Intervention for Investment Firms**") (the provisions of the Banking Law regulating Early Intervention for Investment Firms are aimed at implementing the respective provisions of the BRRD);

- (d) Resolution Proceedings, provided that such Relevant Clearing Member that is an Investment Firm which is authorised to carry out the activities referred to in Article 69 sec. 2 item 3 or 7 of the Act on Trading (our references in this Opinion Letter to Investment Firms or a Relevant Clearing Member that is an Investment Firm in the context of Resolution Proceedings are references to Investment Firms which meet these criteria);
- (e) proceedings for approval of an arrangement (*postępowanie o zatwierdzenie układu*), accelerated arrangement proceedings (*przyspieszone postępowanie układowe*), arrangement proceedings (*postępowanie układowe*) and remedial proceedings (*postępowanie sanacyjne*) under the Restructuring Law, provided that such Relevant Clearing Member is an Investment Firm other than an Investment Firm referred to in section 3.2.2(d) above ("**Restructuring Proceedings**").

3.2.3 Although we think that ultimately this is a matter to be determined under English law, in our opinion, Early Intervention for Banks, Early Intervention for Investment Firms, a Takeover, Liquidation Proceedings for Banks, Liquidation Proceedings for Investment Firms, Resolution Proceedings, Bankruptcy Proceedings, Recovery Proceedings and Restructuring Proceedings will 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.

3.2.4 **Would the Deed of Charge be effective in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Relevant 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 Relevant Clearing Member under the Deed of Charge? Would the Deed of Charge constitute a financial collateral arrangement (or equivalent) in your jurisdiction?**

Conflict of laws

3.2.5 Polish law distinguishes between the obligation to provide collateral (contractual rights) and the act of providing such collateral and its proprietary consequences (property rights).

3.2.6 The obligation to provide collateral and the choice of English law to govern such obligation will be recognised by the Polish courts under Article 3 sec. 1 of the Rome I Regulation. Therefore, subject to the limitations set out in the Rome I Regulation, the obligation to provide collateral will be effective in this jurisdiction if it is effective under the law that governs the Deed of Charge.

- 3.2.7 The law applicable to the property rights on collateral needs to be determined on the basis of the conflict of laws rules in effect in this jurisdiction and would, among other things, depend on the nature of the relevant collateral asset and its location.
- 3.2.8 As a general rule, pursuant to Article 41 of the Private International Law, rights *in rem* (property rights) are governed by the laws of the state in which the subject of the rights is located (therefore, as a rule, if the collateral is not located in this jurisdiction, the property rights will not be governed by the laws of this jurisdiction).
- 3.2.9 If a claim is effectively brought before a Polish court, we believe that the Polish courts will apply the following conflict of laws rules to the property rights on collateral in the form of financial instruments:
- (a) Article 44 of the Private International Law provides that the rights resulting from an entry in a securities account kept in a securities settlement system are governed by the laws of the country where that account is kept;
 - (b) if securities are held via an Omnibus Account, one person is the holder of the Omnibus Account and another person is or other persons are the owner(s) of the securities registered in it. The holder of an Omnibus Account is not considered the owner of the securities held via such an account. In order to determine who the actual owner or owners are, as a rule, the laws of this jurisdiction will not be applicable, and for the purpose of determining the owner(s) of the securities in this jurisdiction from the perspective of this jurisdiction it is sufficient for the owner(s) to be specified by the foreign custodian and to notify the Polish custodian who maintains the Omnibus Account thereof;
 - (c) pursuant to Article 12 sec. 2 of the Settlement Finality Act, where securities are provided as collateral security to participants in the system (please refer to sections 3.2.24-3.2.27 for the meaning of the "system" in the Settlement Finality Act), the National Bank of Poland, the central bank of another Member State or the central bank of Iceland, Lichtenstein or Norway, or the European Central Bank, and their rights with respect to the securities are recorded:
 - (i) in a register or account located in Poland – the rights of such entities attached to the securities are governed by Polish law; and
 - (ii) in a register or account located in another Member State, Iceland, Lichtenstein or Norway – the rights of such entities attached to the securities are governed by the laws of that other state;
 - (d) pursuant to Article 13 of the Act on Financial Collateral Arrangements, in respect of book-entry Financial Instruments, the laws of the

jurisdiction where the relevant securities account is maintained will be decisive in respect of the rights attached to the financial collateral, the priority of rights, and the steps required for the realisation of the financial collateral, as well as the good faith acquisition of the book-entry securities.

- 3.2.10 With respect to conflict of laws rules applicable to property rights on collateral in the form of cash, in our opinion, the conflict of laws rules will depend on whether the security interest is to be established:
- (a) on cash credited to an account – we believe that the Polish courts will apply the laws of the state in which the cash (the bank account) is located;
 - (b) on claims for the repayment of money credited to an account – we believe that the Polish courts will apply the laws of the state which governs the bank account agreement under which that account is maintained.
- 3.2.11 These conflict of laws rules are mandatory and cannot be changed by the Parties. Assuming all collateral is held outside of Poland, Polish law will not apply and the validity of the security interest will not be assessed from the perspective of Polish law.

Financial Collateral Arrangements

- 3.2.12 The Act on Financial Collateral Arrangements does not clearly state the criteria that need to be met for an arrangement to be considered to be a financial collateral arrangement (*zabezpieczenie finansowe*). Based on our interpretation of the Act on Financial Collateral Arrangements, an arrangement will be considered a financial collateral arrangement within the meaning of the Act on Financial Collateral Arrangements, if it meets the following criteria:
- (a) the collateral to be provided must consist of:
 - (i) cash (*środki pieniężne*) understood as money credited to an account and claims for the repayment of that money, including deposits on the money market;⁵ or
 - (ii) credit claims understood as pecuniary claims arising out of an agreement under which an institution authorised to grant credit under the Banking Law, the Act of 5 November 2009 on cooperative savings and credit unions, the provisions of law of

⁵ *Środki pieniężne na rachunku oraz roszczenia o wypłatę środków pieniężnych, w tym z lokat na rynku pieniężnym* (Article 3 sec. 1 of the Act on Financial Collateral Arrangements).

EU Member States or the provisions of law of EEA Member States, grants credit or loans;⁶ or

(iii) Financial Instruments understood as securities, money market instruments, units in collective investment undertakings and other financial instruments which are not securities, within the meaning of the Act on Trading, as well as certificates of deposit issued by banks (*bankowe papiery wartościowe*) and shares in limited liability companies;⁷

(b) the obligations secured by the financial collateral arrangement are financial claims (*wierzytelności finansowe*) understood as monetary claims or claims where the performance is limited to the delivery of Financial Instruments, including future claims, claims dependent on a condition or point in time;⁸

(c) the financial collateral is in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf; and

(d) at least one party to the financial collateral arrangement is an eligible party, and none of the parties to the financial collateral arrangement is an individual (*osoba fizyczna*).

3.2.13 With regard to eligible parties, a Bank and an Investment Firm will be an eligible party for the purposes of the Act on Financial Collateral Arrangements. Therefore, the other party to a financial collateral arrangement governed by that Act may be any entity other than an individual. The Act on Financial Collateral Arrangements does not provide that the collateral taker and the collateral provider must be established in an EU Member State. On this basis, in our opinion, a collateral arrangement may be considered a collateral arrangement in the scope of the Act on Financial Collateral Arrangements also if either the collateral taker or the collateral provider is established in a third country. Consequently, a Deed of Charge between a Bank or an Investment firm as the collateral provider and LCH as the collateral taker will meet the requirements referred to in section 3.2.12(d) above.

⁶ *Wierzytelność pieniężna wynikająca z umowy, w której instytucja upoważniona do udzielania kredytów na podstawie ustawy z dnia 29 sierpnia 1997 r. – Prawo bankowe, ustawy z dnia 5 listopada 2009 r. o spółdzielczych kasach oszczędnościowo-kredytowych, przepisów prawa państw członkowskich Unii Europejskiej lub przepisów prawa państw Europejskiego Obszaru Gospodarczego, udziela kredytu lub pożyczki* (Article 3 sec. 2a of the Act on Financial Collateral Arrangements).

⁷ *Papiery wartościowe, instrumenty rynku pieniężnego, tytuły uczestnictwa w instytucjach zbiorowego inwestowania oraz inne instrumenty finansowe niebędące papierami wartościowymi, w rozumieniu ustawy z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi, a także bankowe papiery wartościowe i udziały w spółkach* (Article point 2 of the Act on Financial Collateral Arrangements).

⁸ *Wierzytelności pieniężne lub wierzytelności, w których świadczenie polega na dostarczeniu instrumentów finansowych (wierzytelności finansowe), w tym wierzytelności przyszłe, zależne od terminu lub warunku albo okresowe* (Article 1 of the Act on Financial Collateral Arrangements).

- 3.2.14 It also needs to be mentioned that pursuant to the Act on Financial Collateral Arrangements it is required that a Financial Collateral Arrangement should specify the term (*termin*) for which the collateral is provided. This requirement can be interpreted in a manner such that the Financial Collateral Arrangement should specify a long-stop date after which it should expire (and the collateral be returned) regardless of whether the secured obligations will have been satisfied or not by that date. We note that the Deed of Charge and the Security Deed do not contain any such provision. As there is no similar requirement under Directive 2002/47/EC, in our view in the case of a Financial Collateral Arrangement governed by laws other than the laws of this jurisdiction this should not be regarded as an element determining whether the given Financial Collateral Arrangement is a financial collateral arrangement within the meaning of the Act on Financial Collateral Arrangements.
- 3.2.15 Based on our reading of the Deed of Charge, in our opinion, the Deed of Charge will constitute a Financial Collateral Arrangement within the meaning of the Act on Financial Collateral Arrangements, provided that: (i) if the collateral is established on Securities, the Securities fall within the scope of Financial Instruments, and (ii) the collateral is in the possession or under the control of LCH acting as the collateral taker or a person acting on LCH's behalf. If, for example, an agreement under which a Cash Account or a Securities Account is maintained contains a clause under which LCH has a right to limit withdrawals of monies from the Cash Account or the transfer of Securities from the Securities Account, in our opinion, the collateral will be considered to be in the possession or under the control of LCH. For the purpose of our opinions presented in this Opinion Letter we assume that the above-mentioned conditions for the Deed of Charge to be considered a financial collateral arrangement from the perspective of the Act on Financial Collateral Arrangement have been met.

Early Intervention

- 3.2.16 In our opinion, the Deed of Charge will be effective in the context of Early Intervention with respect to a Relevant Clearing Member. We do not think there is anything under Polish law that would prevent LCH from enforcing its rights under the Deed of Charge when Early Intervention is applied. LCH will not be required to take any particular steps or abide by any particular procedures for the purposes of enforcing against the collateral provided to it by a Relevant Clearing Member under the Deed of Charge.

Takeover

- 3.2.17 In our opinion, the Deed of Charge will be effective in the context of Takeover with respect to a Relevant Clearing Member. We do not think there is anything under Polish law that would prevent LCH from enforcing its rights under the Deed of Charge when Takeover is applied. LCH will not be required to take any particular steps or abide by any particular procedures for the purposes of enforcing against the collateral provided to it by a Relevant Clearing Member under the Deed of Charge.

Recovery Proceedings

- 3.2.18 In our opinion, the Deed of Charge will be effective in the context of Recovery Proceedings with respect to a Relevant Clearing Member. We do not think there is anything under Polish law that would prevent LCH from enforcing its rights under the Deed of Charge when Recovery Proceedings are instigated. LCH will not be required to take any particular steps or abide by any particular procedures for the purpose of enforcing against the collateral provided to it by a Relevant Clearing Member under the Deed of Charge.

Liquidation Proceedings for Banks

- 3.2.19 Under Article 155 of the Banking Law, the liquidator of the Bank has a right to change the content of an obligation undertaken within a year before the liquidation if as a result of this act in law the other party acquired a claim on conditions more favourable than the conditions applied at that time by the Bank. (We note that Article 155 of the Banking Law cross-refers to an obligation referred to in Article 146g of the Banking Law, which relates to an obligation of the bank taken over by another bank. Consequently, Article 146g refers to an obligation undertaken within a year before the takeover. Nonetheless, in our view, Article 155 should be interpreted as referring to an obligation within a year before the liquidation and not takeover.)
- 3.2.20 Articles 146g and 155 of the Banking Law refer to an obligation undertaken under an act in law. Although it is disputable and we cannot exclude a different interpretation by Polish courts, in the context of the Opinion Documents we are of the view that a reference in those provisions to an obligation might be understood as a reference to the LCH Agreements and/or to each particular Contract. As explained in section 3.2.19 above, for an obligation to be challenged on the basis of the provisions referred to above, the Bank's counterparty would need to acquire the claim against the Bank on preferential terms. Based on our understanding of the Deed of Charge, we do not think the Deed of Charge could be challenged on this basis.

Liquidation Proceedings for Investment Firms

- 3.2.21 If liquidation of an Investment Firm is opened, the Investment Firm's licence to provide investment services and activities will expire 3 months from the opening of the liquidation unless the KNF decides that it shall expire earlier. Until the licence expires, and unless the KNF states otherwise in its decision, the Investment Firm may only take actions related to the maintaining of payment accounts or resulting from portfolio management agreements, with no right to enter into new transactions, and actions resulting from derivatives acquired on behalf of clients which are aimed at terminating those investments by clients. We do not think that this will prevent LCH from enforcing its rights under the Deed of Charge.

Resolution Proceedings

- 3.2.22 Under Article 142 of the BFG Act, the BFG will be able to suspend the right to enforce security interests in relation to the assets of a Relevant Clearing Member, but for no longer than until the end of the business day (*dzień roboczy*) following the day on which the notice on the BFG's decision to suspend this right is published.
- 3.2.23 The BFG Act provides for an exemption to the BFG's power referred to in section 3.2.22, which applies to payment systems and security settlement systems. Pursuant to Article 142 of the BFG Act, the BFG will not be able to suspend the right to enforce security interests by a system operator or a system member for whose benefit the security interest was established in relation to membership in the system. (There is also a general rule set out in Article 68 of the BFG Act under which the exercising by the BFG of its powers cannot affect, among other things, the rights of an entity that is an operator or a member of a payment system or a settlement system, for whose benefit a security interest was established in relation to membership in the system.)
- 3.2.24 Article 2 point 61 of the BFG Act defines the term "payment system" (*system płatności*) as a payment system referred to in Article 1 point 1 of the Act on Settlement Finality. Based on the definition contained in Article 1 point 1 of the Act on Settlement Finality, a payment system is Polish law governed legal arrangement between three or more participants, including at least one of the categories of entities referred to in that provision (and this includes Banks and Investment Firms), excluding an indirect participant, with common rules for the clearing or execution of transfer orders. The National Bank of Poland may decide that an indirect participant may be considered a participant if this is justified on the grounds of systemic risk, provided that such indirect participant is known to the system.
- 3.2.25 Article 2 point 63 of the BFG Act defines the term "settlement system" (*system rozrachunku*) as a securities settlement system (*system rozrachunku papierów wartościowych*) referred to in Article 1 point 2 of the Act on Settlement Finality. Based on the definition contained in Article 1 point 2 of the Act on Settlement Finality, a securities settlement system is Polish law governed legal arrangement between three or more participants, including at least one of the categories of entities referred to in that provision (and this includes Banks and Investment Firms), excluding an indirect participant, with common rules for the clearing or execution of transfer orders. The KNF may decide that an indirect participant may be considered a participant if this is justified on the grounds of systemic risk, provided that such indirect participant is known to the system.
- 3.2.26 Therefore, based on the definitions set out in the BFG Act, a "payment system" and a "settlement system" referred to in the BFG Act are arrangements that are subject to Polish law. As such, based on a literal interpretation of the BFG Act, the exemptions applicable to a "payment system" or a "settlement system" apply to Polish law governed systems, and do not apply to systems governed by the law of other EU Member States or systems governed by the law of a third

country. This would lead to the conclusion that LCH could not rely on these exemptions.

- 3.2.27 Although the literal interpretation of the provisions of the BFG Act leads to the conclusion that the exemption referred to in section 3.2.23 applies if the security interest is related to a system governed by Polish law, we do not think that such an interpretation should be upheld by Polish courts and, in our opinion, it would be contrary to the rule of the pro-European interpretation of Polish law. The provisions of the BFG Act, which introduce these exemptions, implement the relevant provisions of the BRRD into national law. As the BRRD refers to systems designated for the purpose of Directive 98/26/EC, in our view the protections granted to systems under the BFG Act should apply to systems designated for the purpose of Directive 98/26/EC, even if such systems are governed by the law of an EU Member State other than Poland. In this context we note that although the Act on Settlement Finality, which implements Directive 98/26/EC in Poland, defines systems by reference to arrangements governed by Polish law, it also regulates certain aspects related to systems governed by the law of another Member State defined as an EU Member State (other than Poland), Iceland, Lichtenstein, and Norway. Even if such an interpretation were to be adopted and the reference to a "system" were to be understood as a reference to any system designated for the purpose of Directive 98/26/EC, LCH will not be considered to be a system for the purpose of these provisions. Recital (7) of Directive 98/26/EC provides that Member States may apply its provisions to their domestic institutions that participate directly in third-country systems and to collateral security provided in connection with participation in such systems, but Poland has not exercised this option.
- 3.2.28 Consequently, LCH will not be able to rely on the exemption referred to in section 3.2.22 available to systems.
- 3.2.29 However, the mentioned provision of the BFG Act is intended to implement the relevant provisions of the BRRD. Pursuant to Article 70(2)(b) of the BRRD, as amended by Directive 2019/879, resolution authorities shall not exercise the power to restrict the enforcement of security interests to central counterparties authorised in the Union pursuant to Article 14 of EMIR and third-country central counterparties recognised by ESMA pursuant to Article 25 of EMIR. The amendment has not been transposed into national law yet, although under Article 3 of Directive 2019/879 Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 28 December 2020 and apply those measures as of the date of their entry into force in national law, which shall be no later than 28 December 2020 (there are some exemptions but they do not relate to the mentioned amendments to Article 70(2)(b) of the BRRD). The amended provision of the BRRD is unconditional and sufficiently clear and precise and on this basis may be applied in Poland directly. In consequence, if Recovery Proceedings are opened against a Relevant Clearing Member, the BFG will not be able to

suspend LCH's right to enforce the security interests created under the Deed of Charge.

- 3.2.30 In the Resolution Proceedings, Article 156 of the BFG Act will apply. Under that provision, the opening of Resolution Proceedings, or the BFG exercising its powers, or the effects of the BFG exercising its powers, cannot, per se, constitute an enforcement event under the Act on Financial Collateral Arrangements, provided that the institution in resolution continues to perform its substantive obligations under the relevant agreement, including payment and delivery obligations and obligations to provide collateral. Therefore, LCH will not be able to enforce against the collateral provided under the Deed of Charge, if a Relevant Clearing Member still performs its obligations towards LCH.

Restructuring Proceedings

- 3.2.31 In accordance with the provisions of the Restructuring Law, in Restructuring Proceedings the debtor has the power of management over his assets, unless an administrator has been appointed. As a rule, if the debtor has lost the power of management over his assets the acts in law performed by the debtor concerning the assets with respect to which the debtor has lost the power of management are invalid. This principle does not apply to financial collateral arrangements, if the agreement was concluded or the financial collateral arrangement was established on the date of opening of the restructuring proceedings and the beneficiary under the financial collateral arrangement demonstrates that he did not know or, had he acted with due diligence could not have known that the restructuring proceedings have been opened. In such a case the financial collateral arrangement established by the debtor will be effective. The provisions of the Restructuring Law mentioned above refer to financial collateral arrangements established in accordance with the Act on Financial Collateral Arrangements. Although it is not entirely clear how the phrase "established in accordance with" the Act on Financial Collateral Arrangements should be interpreted, in our view the above-mentioned provisions should be interpreted in such a way that they apply to arrangements which qualify as financial collateral arrangements within the meaning of the Act on Financial Collateral Arrangements (please refer to sections 3.2.12 – 3.2.15 above).
- 3.2.32 Pursuant to Article 151 sec. 2 of the Restructuring Law, an arrangement does not cover, among other things, a claim secured with a pledge over the debtor's assets, in the part covered by the value of the subject of the collateral, unless the creditor granted consent to it being covered by the arrangement. Further, pursuant to Article 168 sec. 1 of the Restructuring Law, an arrangement does not breach the rights resulting from, among other things, a pledge, if they were established over the debtor's property, unless the beneficiary granted consent to the secured claim being covered by the arrangement. Although it is not stated in these provisions, in our opinion a pledge referred to in these provisions also includes financial pledges. It is not entirely clear whether the above provisions also cover security interests governed by law other than Polish law. Consequently, it is not entirely clear whether LCH's claims against a Relevant

Clearing Member will not be covered by the arrangement and whether LCH's rights under the Deed of Charge will not be affected by the arrangement.

Bankruptcy Proceedings

- 3.2.33 In the cases set out in the Banking Law (Article 158 of the Banking Law), the KNF may suspend the Bank's activity. During such suspension the Bank, among other things, does not satisfy its obligations, except for those connected with the incurring of reasonable costs of on-going activity. In our opinion, this provision will not prevent LCH from enforcing its rights under the Deed of Charge.
- 3.2.34 Pursuant to the Bankruptcy Law, the declaration of bankruptcy of a Bank or an Investment Firm that carries out activities in at least one EU Member State or an EEA Member State will not affect the rights *in rem* over assets located in the territory of the EU Member State or the EEA Member State other than Poland. Therefore, if the collateral is held by LCH on accounts in England and Wales, LCH will not be able to rely on this exemption. (Please also refer to section 3.4.15 below.)
- 3.2.35 Article 8 of the EU Insolvency Regulation provides that the opening of insolvency proceedings will not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
- 3.2.36 With respect to assets located outside this jurisdiction in a state that is not a EU Member States, there are no rules of the law of this jurisdiction which would render the creation of a security interest in such assets unenforceable. Therefore, in our opinion, the Deed of Charge will be effective even if the assets are located in England.
- 3.3 **Would LCH have the right to take the actions provided for under 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.**

Early Intervention

- 3.3.1 LCH would have the right to take the actions provided for under the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights

of set-off under Rule 8) in the event that a Relevant Clearing Member was subject to Early Intervention.

Takeover

- 3.3.2 LCH would have the right to take the actions provided for under the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8) in the event that a Relevant Clearing Member was subject to Takeover.

Recovery Proceedings

- 3.3.3 LCH would have the right to take the actions provided for under the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8) in the event that a Relevant Clearing Member was subject to Recovery Proceedings.

Liquidation Proceedings for Banks

- 3.3.4 LCH would have the right to take the actions provided for under the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 but) in the event that a Relevant Clearing Member was subject to Liquidation Proceedings for Banks.

Liquidation Proceedings for Investment Firms

- 3.3.5 LCH would have the right to take the actions provided for under the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8) in the event that a Relevant Clearing Member was subject to Liquidation Proceedings for Investment Firms.

Resolution Proceedings

- 3.3.6 When the Resolution Proceedings are instigated against a Relevant Clearing Member, LCH's right to take the actions provided for under the Default Rules will be limited. We are of this opinion for the reasons set out in sections 3.3.7 - 3.3.18 below.
- 3.3.7 LCH's right to take the actions provided for under the Default Rules might be adversely impacted by the BFG's exercising certain resolution powers.
- 3.3.8 Under Article 143 sec. 1 of the BFG Act, the BFG has the power to suspend the right to terminate an agreement entered into with an institution in resolution, for not longer than the end of the business day following the date of publication of the BFG's decision on the suspension of that right.
- (a) Article 143 sec. 7 of the BFG Act provides for an exemption related to payment systems and settlement systems. Under this provision, the BFG may not suspend the right to terminate an agreement for participation in

a payment system or a settlement system, as well as agreements related to participation in such a system, conferred to the system operator, a system participant, a central counterparty, the National Bank of Poland or the central bank of another EU Member State.

- (b) Article 143 sec. 7 of the BFG Act is drafted in such a way that might suggest that it refers to central counterparties in the context of payment systems and settlement systems governed by Polish law (please refer to sections 3.2.24 and 3.2.25) or the law of another EU Member State (please refer to section 3.2.27). This provision of the BFG Act is intended to implement the relevant provisions of the BRRD. Under Article 71(3) of the BRRD, as amended by Directive 2019/879, any suspension of the termination rights in accordance with Article 71(1) and (2) does not apply to: (a) systems or operators designated for the purpose of Directive 98/26/EC, (b) central counterparties authorised in the Union pursuant to Article 14 of EMIR and third-country central counterparties recognised by ESMA pursuant to Article 25 of EMIR, or (c) central banks. Unlike Article 143 sec. 7 of the BFG Act, Article 71(3) of the BRRD distinguishes between systems and central counterparties. What is more, the exemption provided for in Article 71(3) applies also to third country central counterparties recognised by ESMA pursuant to Article 25 of EMIR. The mentioned amendment to the BRRD has not yet been reflected in the local legislation. In our opinion, a pro-European interpretation of Polish law should be applied, such that the above-mentioned provision of Polish law should be interpreted in light of the relevant provision of the directive. On this basis, in our opinion, if Recovery Proceedings are opened against a Relevant Clearing Member, the BFG will have no power to suspend the termination rights under the Opinion Documents.
- (c) LCH will not be able to exercise its termination rights on the sole basis that Resolution Proceedings against a Relevant Clearing Member have been opened, if the principal obligations (*świadczenia główne*) under the agreement and the obligations regarding the established collateral continue to be performed.

3.3.9 Under Article 144, the BFG may suspend the performance of the due obligations of an entity in resolution for not longer than the end of the business day following the date of publication of the BFG's decision on the suspension of the performance of obligations.

- (a) The BFG Act in Article 144 sec. 1 of the BFG Act provides for certain limitations to the BFG's powers referred to in section 3.3.9, including: (i) the exemption applicable to obligations due to participation in a payment system or a settlement system, and (ii) obligations to a central counterparty.

- (b) This provision of the BFG Act is intended to implement the relevant provisions of the BRRD. Under Article 69(4) of the BRRD, as amended by Directive 2019/879, the resolution authority's power to suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party does not apply to any payment or delivery obligations owed to: (a) systems or operators designated for the purpose of Directive 98/26/EC, (b) central counterparties authorised in the Union pursuant to Article 14 of EMIR and third-country central counterparties recognised by ESMA pursuant to Article 25 of EMIR, or (c) central banks. The mentioned amendment to the BRRD has not yet been reflected in the local legislation. Our comments in section 3.3.8(b) relating to the pro-European interpretation of Polish law apply accordingly. On this basis, in our opinion, if Recovery Proceedings are opened against a Relevant Clearing Member, the BFG will have no power to suspend the performance of the due obligations owed by the Relevant Clearing Member to LCH.
- 3.3.10 Further, under Article 150 sec. 1 of the BFG Act, the BFG may modify the terms of an agreement to which the institution in resolution is a party, including to settle the agreement, transfer rights under the agreement to a third party, or replace a party to the agreement. LCH will not be able to rely on the systems-related exemption and, in consequence, the BFG will be able to exercise its power to modify the terms of the Opinion Documents.
- 3.3.11 Although LCH will not be able to rely on the systems carveouts, the BFG Act provides for certain safeguards that may give protection to some of LCH's rights under the Opinion Documents. Under Article 151 of the BFG Act, if the BFG modifies the terms of an agreement to which an institution in resolution is a party, or makes partial transfers of the assets of the institution in resolution, the property rights or obligations related to or resulting from the same legal transaction should be transferred in whole or altered or be subject to termination, so as not to restrict their purpose or the rights of the parties to the legal transaction and to maintain (i) the degree of securing the performance of the obligations arising under the established security interests, (ii) the option of set-off or netting. This applies to, among other things, financial collateral arrangements and agreements with set-off or netting rights.
- 3.3.12 With regard to bail-in, the BFG may apply the write-down and conversion powers to liabilities arising from derivatives. However, pursuant to Article 207 sec. 2 of the BFG Act, the BFG should close-out the derivatives before exercising the write-down or conversion powers. Article 207 sec. 3 of the BFG Act provides that where the derivative includes a netting clause, as part of the valuation under Article 137 sec. 2 and 3 of the BFG Act, the net amount under the derivative should be determined for the purpose of the write-down and conversion. Although in our view the wording of this provisions is inaccurate, we think it should be interpreted in such a way that in a situation where derivatives are subject to a netting agreement, for the purpose of the write-down

or conversion the liabilities arising under such derivatives should be determined on a net basis in accordance with the terms of the agreement.

- 3.3.13 Pursuant to Article 206 of the BRRD Act, the BFG has no power to exercise the write-down or conversion powers in relation to liabilities with a remaining maturity of less than seven days, resulting from participation in systems towards operators of the systems or participants in the system. This provision of the BFG Act is intended to implement Article 44(2)(f) of the BRRD. The mentioned provision of the BRRD has been amended by Directive 98/26/EC, such that now it refers not only to systems but also to central counterparties authorised in the Union pursuant to Article 14 of EMIR and to third-country central counterparties recognised by ESMA pursuant to Article 25 of EMIR. The mentioned amendment to the BRRD has not yet been transposed into the local legislation. Our comments in section 3.2.29 relating to the direct application of directives apply accordingly. On this basis, in our opinion, if Recovery Proceedings are opened against a Relevant Clearing Member, the BFG will have no power to exercise the write-down or conversion powers in relation to the liabilities with a remaining maturity of less than seven days owed to LCH.
- 3.3.14 Since secured liabilities cannot be subject to bail-in (Article 206 sec.1 point 2 of the BFG Act), in our view if derivatives are closed-out and the net amount is secured, the BFG will not be able to apply bail-in to it.
- 3.3.15 Article 222 of the BFG Act imposes a requirement to include in the terms of issue or an agreement a qualification that the instrument or the obligations may be subject to write down or conversion, and to obtain the consent of the acquirer of the financial instrument or the other party to the agreement to be bound by the effects of the decision on write down or conversion. The BFG may release the institution in question from this obligation. The requirement set out in Article 222 is limited to financial instruments and liabilities governed by the law of a third country.
- 3.3.16 As referred to in section 3.2.15, in our opinion the Deed of Charge will qualify as a financial collateral arrangement (*zabezpieczenie finansowe*) within the meaning of the Act on Financial Collateral Arrangements. Under Article 156 sec. 1 of the BFG Act, the enforcement rights under the arrangement cannot be exercised on the sole basis that Resolution Proceedings have been opened or the BFG has exercised its powers.
- 3.3.17 It is questionable whether the Automatic Termination Event will be enforceable if it is triggered by the opening of Resolution Proceedings against a Relevant Clearing Member. This is because in Resolution Proceedings the termination or modification of an agreement entered into with an entity in resolution is restricted. Under Article 157 sec. 2 of the BFG Act any contractual provisions stipulating that the relevant agreement may be terminated or modified if the Resolution Proceedings are conducted are void. Moreover, any contractual terms that prevent the attainment of the objectives of the resolution in whole or in part are ineffective against the institution in restructuring.

3.3.18 Based on Article 163 of the BFG Act, BFG has a power to withdraw from an agreement.

- (a) The BFG may exercise this power with respect to a mutual agreement in the situation where by the time a decision on the opening of resolution proceedings is delivered an obligation under the framework agreement has not been performed in full or in part. Instead of withdrawing from the agreement, the BFG may perform the obligation and request that the counterparty performs its obligations thereunder. Therefore, this provision gives the BFG "cherry-picking" rights. However, the BFG will not be able to exercise this power with respect to agreements the subject of which are "term financial transactions" or "lending of financial instruments" or "contracts for the sale and repurchase of financial instruments". The BFG Act does not define any of these terms. We believe that the phrase "term financial transactions" should be interpreted broadly and applied to most derivatives, whether OTC or exchange-listed derivative transactions including, in particular, futures, swaps transactions (basic swaps, bullion swaps, commodity swaps, cross-currency swaps, currency swaps, equity or equity index swaps, interest rate swaps, total return swaps), options (bond options, bullion options, commodity options, currency options, equity index options, equity options, interest rate options, swap options), forward transactions (commodity forwards, equity forwards), bullion trades, cap transactions, collar transactions, floor transactions, foreign exchange transactions, forward rate transactions, credit protection transactions and weather transactions. In our view, "same-day" spots (as opposed to spots settled on a T+1 or T+2 basis) and cash deposits do not fall within the scope of the exemption provided for in Article 163 sec. 4 of the BFG Act because of their nature, which is not compliant with the nature of "term financial transactions", "financial instruments lending transactions" or "contracts for the sale and repurchase of financial instruments". Consequently, provided that the Contracts qualify as term financial transactions or lending of financial instruments or contracts for the sale and repurchase of financial instruments, the BFG will not be able to exercise the power to withdraw from them.
- (b) The BFG may also exercise this power with respect to agreements that are not mutual agreements, unless a statutory law (*ustawa*) provides otherwise.

Restructuring Proceedings

3.3.19 When Restructuring Proceedings are instigated against a Relevant Clearing Member, LCH would have the right to take the actions provided for under the Default Rules if the LCH Agreement is considered to be a master agreement for the purpose of Article 250 of the Restructuring Law.

- 3.3.20 It is questionable whether the Automatic Termination Event will be enforceable if it is triggered by the opening of the Restructuring Proceedings against a Relevant Clearing Member. This is because in Restructuring Proceedings, the termination or modification of an agreement entered into with a debtor in restructuring is restricted. In particular, any contractual provisions stipulating that the relevant agreement may be terminated or modified upon the filing of a petition for bankruptcy or the commencement of bankruptcy proceedings (whether automatically or subject to a notice) are void. There is no specific provision in the Restructuring Law that disapplies the operation of this provision in respect of the master agreements referred to in Article 250 of the Restructuring Law. It may be argued that bearing in mind the purpose of Article 250, Article 250 constitutes *lex specialis* with respect to Article 247 of the Restructuring Law and that the limitations referred to above do not apply to master agreements within the meaning of Article 250 and, in consequence, an automatic early termination clause would be effective in the event of the opening of Restructuring Proceedings against a party to such an agreement. On the other hand, the automatic termination might not be regarded as termination of a master agreement by either party to it, as referred to in Article 250 of the Restructuring Law.

Bankruptcy Proceedings

- 3.3.21 When Bankruptcy Proceedings are instigated against a Relevant Clearing Member or a Relevant Clearing Member (other than a Bank) is declared bankrupt in another Member State, LCH would have the right to take the actions provided for under the Default Rules if the LCH Agreement is considered to be a master agreement for the purpose of Article 85. (Please also refer to section 3.3.24 below.)
- 3.3.22 Set-off will be subject to restrictions if bankruptcy proceedings are opened. If the liquidation amount under the master agreement within the meaning of Article 85 sec. 1 of the Bankruptcy Law is calculated, such liquidation amount can be subject to set-off in bankruptcy. If the liquidation amount under the master agreement within the meaning of Article 85 sec. 1 that is to be set off is not calculated, the general rules set out in the Bankruptcy Law will apply, and, in consequence:
- (a) it will be possible to set off claims if both claims existed before the bankruptcy proceedings were opened, even if one of them was not yet due;
 - (b) a set-off is not permitted if LCH, as the Relevant Clearing Member's debtor, acquired a claim through a transfer or endorsement after the declaration of bankruptcy of the Relevant Clearing Member or acquired it during the year immediately preceding the date bankruptcy was declared, while being aware that grounds to declare bankruptcy existed. However, claims may be set off if LCH became the Relevant Clearing Member's creditor as a result of the repayment of its debt for which it

was liable personally or with specific assets and provided that LCH was not aware of the existence of any grounds for the declaration of bankruptcy at the time it assumed liability for the Relevant Clearing Member's debt. In any case, claims may be set off if liability was assumed a year or more prior to the declaration of bankruptcy; and

- (c) LCH will not be able to set off its claims against the Relevant Clearing Member's claims if LCH became a debtor of the Relevant Clearing Member after the Relevant Clearing Member was declared bankrupt.

3.3.23 To exercise the set-off right when bankruptcy proceedings are opened against a Relevant Clearing Member, LCH would need to make a relevant statement at the latest when lodging the claim in the proceedings.

3.3.24 If Bankruptcy Proceedings are opened against a Relevant Clearing Member that is a Bank or an Investment Firm which carries out activity also in at least one EU or EEA Member State other than Poland, (i) set-off will be allowed if it is allowed under the law applicable to the Relevant Clearing Member's claim, and (ii) netting will be subject to the law that governs the netting agreement. The relevant provisions do not specify that this should be the law of an EU/EEA Member State and, as such, in our view this may also be the law of a third country. (Please also refer to section 3.4.15 below.)

3.3.25 It is questionable whether the Automatic Termination Event will be enforceable if it is triggered by the opening of Bankruptcy Proceedings against a Relevant Clearing Member. This is because in Bankruptcy Proceedings, the termination or modification of an agreement entered into with an insolvent debtor is restricted. In particular, any contractual provisions stipulating that the relevant agreement may be terminated or modified upon the filing of a petition for bankruptcy or the commencement of bankruptcy proceedings (whether automatically or subject to a notice) are void. There is no specific provision in the Bankruptcy Law that disapplies the operation of this provision in respect of the master agreements referred to in Article 85 of the Bankruptcy Law. It may be argued that bearing in mind the purpose of Article 85, Article 85 constitutes *lex specialis* with respect to Article 83 of the Bankruptcy Law and that the limitations referred to above do not apply to master agreements within the meaning of Article 85 and, in consequence, an automatic early termination clause would be effective in the event of the opening of Bankruptcy Proceedings against a party to such an agreement. On the other hand, the automatic termination might not be regarded as termination of a master agreement by either party to it, as referred to in Article 85 of the Bankruptcy Law.

3.4 Is there a "suspect period" prior to Insolvency Proceedings and/or Reorganisation Measures where Contracts with a Relevant 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 for the relevant

arrangements, from avoidance or challenge, available under the law of the Relevant Jurisdiction in respect of contracts in financial markets?

3.4.1 Under the Bankruptcy Law and under the BFG Act the following claw-back provisions apply:

- (a) any legal transactions performed by the bankrupt or an institution in resolution (respectively) during the year before the date of filing of a bankruptcy petition or opening of Resolution Proceedings (respectively) that result in the disposal of the assets thereof shall be ineffective vis-à-vis the bankrupt estate or the estate of the entity in resolution (respectively), if made for no consideration or if made for consideration but the value of the bankrupt's or the entity's in resolution (respectively) performance grossly exceeds the value of the consideration received by or stipulated for the bankrupt or the entity in resolution (respectively) or a third party;
- (b) creation of security (whether in the form of *in rem* security or "personal" security, such as a guarantee) in respect of a debt not yet due and payable and made by the bankrupt or the entity in resolution (respectively) during a period of six months before the date of filing of a bankruptcy petition or opening of Resolution Proceedings (respectively) shall also be ineffective (in Bankruptcy Proceedings – *vis-à-vis* the bankrupt estate). However, the recipient of the payment or security may by means of a suit or allegation demand that such actions be declared effective, if at the time the action was carried out the recipient was unaware of grounds for the declaration of bankruptcy.

Based on Article 127.4 of the Bankruptcy Law and Article 166 sec. 4 of the BFG Act, the claw-back provisions referred to above do not apply to collateralisation (including financial collateral arrangements) made before the date of declaration of bankruptcy or opening of Resolution Proceedings (as the case may be), relating to "term financial transactions" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" entered into in performance of the master agreement (*umowa ramowa*) if the master agreement provides that such transactions and contracts are entered into in performance of that master agreement and that termination of the master agreement results in termination of all the transactions entered into in its performance (the master agreement within the meaning of Article 85 sec. 1 of the Bankruptcy Law).

3.4.2 Pursuant to Article 128 of the Bankruptcy Law, any legal transaction carried out by the bankrupt for consideration with the bankrupt's affiliated company or person during a period of six months directly preceding the date on which the bankruptcy petition was filed will be found by the judge-commissioner ineffective vis-à-vis the bankruptcy estate. However, such transactions might be held effective if the counterparty demonstrates that there has not been any detriment to the creditors.

- 3.4.3 Similarly, pursuant to Article 167 of the BFG Act, any act in law carried out by the entity in resolution for consideration with (i) its owners, their representatives or spouses, (ii) its representatives or their spouses, (iii) its dominant entity, subsidiary, an affiliated company (in particular by way of being in the same group) or (iv) owners, representatives or their spouses which are in such a relation with the entities referred to in subsection (iii), during a period of six months directly preceding the date on which the resolution proceedings are opened is ineffective, provided that as a result of that act in law harm was caused to the entity in resolution. This, however, does not apply to an assignment agreement entered into in the form with an officially confirmed date (*data pewna*) not later than 6 months before the Resolution Proceedings were opened.
- 3.4.4 Moreover, under Article 128a of the Bankruptcy Law and Article 167 of the BFG Act an assignment of a future claim is ineffective if the claim will arise after the opening of the Bankruptcy Proceedings or Resolution Proceedings (respectively). Pursuant to Article 128a of the Bankruptcy Law and Article 167 sec. 4 of the BFG Act, this does not apply to an assignment agreement entered into in the form with an officially confirmed date (*data pewna*) not later than 6 months before the application to declare bankruptcy was filed.
- 3.4.5 Pursuant to Article 168 of the BFG Act, ineffective is any encumbrance of the property of the entity in resolution with a mortgage, maritime mortgage, pledge or registered pledge to secure a third party debt, made within one year directly preceding the opening of the Resolution Proceedings, where the debtor received no consideration or such consideration was disproportionate to the value of created security. Irrespective of the value of consideration, such encumbrance are ineffective if they secure obligations of persons and entities referred to in Article 167 of the BFG Act (please refer to section 3.4.3 above).
- 3.4.6 Similarly, pursuant to Article 130 of the Bankruptcy Law, the judge-commissioner will declare ineffective any encumbrance of the debtor's property with a mortgage, maritime mortgage, pledge or registered pledge to secure a third party debt, where the debtor received no consideration or such consideration was disproportionate to the value of created security. Irrespective of the value of consideration, the judge-commissioner will declare ineffective such encumbrance if it secures obligations of the debtor's affiliates. Such encumbrance might be held effective if the counterparty demonstrates that there has not been any detriment to the creditors.
- 3.4.7 Under the Restructuring Law the following claw-back provisions apply in relation to remedial proceedings (*postępowanie sanacyjne*):
- (a) any legal transactions performed by the debtor during the year before the date a petition for remedial proceedings was filed that result in the disposal of its assets shall be ineffective *vis-à-vis* the remedial estate, if made for no consideration or if made for consideration but the value of the debtor's performance materially exceeds the value of the consideration received by or stipulated for the debtor or a third party;

- (b) any security (whether in the form of *in rem* security or "personal" security, such as a guarantee) created within a year preceding the date of a petition for remedial proceedings was filed shall also be ineffective *vis-à-vis* the remedial estate, unless it was created directly in connection with a performance received by the debtor;
 - (c) any security (whether in the form of *in rem* security or "personal" security) created within a year preceding the date a petition for remedial proceedings was filed shall be ineffective *vis-à-vis* the remedial estate, if and to the extent that its value exceeds the value of the secured performance received by the debtor (including accessorial claims listed in the relevant security document) by more than 50%.
- 3.4.8 Article 135 sec. 2 of the Bankruptcy Law and Article 309 sec. 2 of the Restructuring Law constitute exceptions to the claw-back provisions in relation to financial collateral arrangements.
- 3.4.9 Pursuant to Article 527 of the Civil Code, if, as a result of a legal transaction effected by a debtor to the detriment of its creditors (i.e., where the debtor became insolvent or became insolvent to a greater extent as a result of the transaction) a third party has gained a benefit, each of the creditors (or, if the debtor is declared bankrupt, the relevant bankruptcy officer) may demand that that transaction be recognised as ineffective with regard to it, if:
- (a) the debtor consciously acted to the creditors' detriment; and
 - (b) the third party knew or, had it acted with due diligence could have known that the debtor was acting to the detriment of its other creditors (and the third party's knowledge is presumed if it remained in a permanent economic relationship with the debtor).

In general, out of bankruptcy or resolution, an action based on this article can be brought within five years of the date of the transaction in question, whereas in bankruptcy or resolution, an action can be brought by the Insolvency Representative or the BFG (respectively) within two years of the declaration of bankruptcy or opening of Resolution Proceedings or Recovery Proceedings (as the case may be); in certain circumstances, however, an action can be raised even after two years of the date of the declaration of bankruptcy, but in either case such actions are subject to a general period of five years, commencing on the date of the transaction in question.

- 3.4.10 As regards Article 527 of the Civil Code, as a matter of principle, the remedies available thereunder will apply to situations where the LCH Agreements are not effected at arm's length. If the LCH Agreements were effected on market terms they would not be challengeable based on the provisions of Article 527 of the Civil Code.

- 3.4.11 If Resolution Proceedings have been instigated, based on Article 68 sec.1 point 1) of the BFG Act the provisions of the BFG Act regulating invalidity or ineffectiveness of acts in law towards the institution in resolution do not apply to legal acts related to participation in a system, including the security interest related to participation in the system. For the reasons provided for in sections 3.2.24-3.2.27 above, we do not think LCH will be able to rely on this provision.
- 3.4.12 With respect to a Relevant Clearing Member that is an Investment Firm which may be subject to the EU Insolvency Regulation, if Recovery Proceedings or Bankruptcy Proceedings are opened against a Relevant Clearing Member, based on Article 16 of the EU Insolvency Regulation the rules relating to acts detrimental to all the creditors will not apply to a person who benefited from such act if the person provides proof that the act is subject to the law of an EU Member State other than this jurisdiction and that that law does not allow any means of challenging that act in the relevant case. Since the LCH Agreements are governed by English law this will not apply to actions taken under the LCH Agreements after Brexit.
- 3.4.13 Based on Article 469 of the Bankruptcy Law, in case of declaration of bankruptcy of a Relevant Clearing Member that is Bank or an Investment Firm that carries out activities in at least one EU Member State or an EEA Member State, provisions of the Bankruptcy Law relating to acts detrimental to all the creditors will not apply if the law applicable to the act does not provide for ineffectiveness of acts detrimental to creditors.
- 3.4.14 It is unclear whether the reference in Article 469 of the Bankruptcy Law to the law applicable to the act shall be understood as a reference to the law of the EU Member State only or to the law of any country. Since the provision refers to the "law" without specifying that this should be the law of an EU Member State, it could be argued that the provisions of the Bankruptcy Law relating to acts detrimental to all the creditors will not apply if the law applicable to the act does not provide for ineffectiveness of acts detrimental to creditors also if the law applicable to the act is the law of a country which is not an EU Member State. However, Article 469 of the Bankruptcy Law was intended to implement Article 30 of Directive 2001/24/EC which refers to the act detrimental to creditors as a whole which is subject to the law of a Member State. We think the better view is that it was the intention of the Polish legislative body to extend the scope of Article 30 of Directive 2001/24/EC such that in Poland it captures also acts governed by the law of a third country and, in consequence, the literal interpretation of Article 469 of the Bankruptcy Law should be applied.
- 3.4.15 Directive 2001/24/EC applies to investment firms as defined in point (2) of Article 4(1)⁹ of Regulation (EU) No 575/2013 of the European Parliament and

⁹ 'investment firm' means a person as defined in point (1) of Article 4(1) of Directive 2004/39/EC, which is subject to the requirements imposed by that Directive, excluding the following: (a) credit institutions; (b) local firms; (c) firms which are not authorised to provide the ancillary service referred to in point (1) of Section B of Annex I to Directive 2004/39/EC, which provide only one or more of the investment services and activities listed in points 1, 2, 4 and 5 of Section A of Annex I

of the Council and their branches located in Member States other than those in which they have their head offices. Investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC based on Article 1(2) of the EU Insolvency Regulation do not fall within the scope of this Regulation. Based on these provisions, investment firms as defined in point (2) of Article 4(1) of Regulation (EU) No 575/2013 fall within the scope of Directive 2001/24/EC and other investment firms fall within the scope of the EU Insolvency Regulation. However, based on Article 451 of the Bankruptcy Law, Article 469 of the Bankruptcy Law applies, amongst other things, to an Investment Firm and it does not clarify that this relates only to Investment Firms which correspond to those defined in Regulation (EU) No 575/2013. Consequently, with respect to Investment Firms which do not correspond to those defined in Regulation (EU) No 575/2013 there is an overlap between provisions of the Bankruptcy Law set out in Part III of the Bankruptcy Law (including Article 469 referred to in section 3.4.13 above) and Article 16 of the EU Insolvency Regulation referred to in section 3.4.12 above). We think the better view is that in the case of conflicting provisions (such as Article 469 of the Bankruptcy Law which refers to acts governed by the law without specifying that this is the law of an EU Member State, and Article 16 of the EU Insolvency Regulation which refers to the acts governed by law of an EU Member State), provisions of Part III of the Bankruptcy Law should be applied only to Investment Firms which fall within the scope of the definition set out in in point (2) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council, and any other Investment firms should be subject to provisions of the EU Insolvency Regulation.

3.5 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?

3.5.1 There is netting legislation in this jurisdiction.

3.5.2 Article 85 of the Bankruptcy Law introduces a special regime applicable to a master agreement (*umowa ramowa*) and "term financial transactions" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" entered into in its performance that effectively excludes the "cherry-picking" rights of the Insolvency Representative. We believe that the definition of "term financial transactions" in Article 85.2 of the Bankruptcy Law should be interpreted broadly and applied to most derivatives,

to that Directive, and which are not permitted to hold money or securities belonging to their clients and which for that reason may not at any time place themselves in debt with those clients;

'credit institution' means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account;

'local firm' means a firm dealing for its own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets, or dealing for the accounts of other members of those markets and being guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such a firm is assumed by clearing members of the same markets;

whether OTC or exchange-traded derivative transactions, our comments in section 3.3.18(a) related to the types of transactions that in our view will fall within the scope of this provision apply accordingly.

- 3.5.3 For the contractual arrangement between LCH and a Relevant Clearing Member to be considered a master agreement within the meaning of Article 85 of the Bankruptcy Law, it should: (i) set out a framework for the execution of the "term financial transactions" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" which are to be entered into in performance of such master agreement, and (ii) provide that termination of the master agreement results in termination of all the transactions entered into in its performance. In our view, for the contractual arrangement between LCH and a Relevant Clearing Member to be considered to be a master agreement within the meaning of Article 85 of the Bankruptcy Law, the Clearing Membership Agreement would need to be modified (please refer to section 3.5.10 below).
- 3.5.4 Under Article 85 sec. 4 of the Bankruptcy Law, if a master agreement within the meaning of this Article is terminated, the settlement method in the case of termination which is provided for in the master agreement will be observed. The Bankruptcy Law does not specify what should be understood by settlement method for the purpose of this provision. In our view, contractual terms which specify how the parties to the agreement settle their claims arising under the agreement in case the agreement is terminated should be considered to be a settlement method for the purpose of Article 85 sec. 4 of the Bankruptcy Law.
- 3.5.5 If the LCH Agreements were to be considered to be master agreements within the meaning of Article 85 of the Bankruptcy Law, in a situation where the Relevant Clearing Member is declared bankrupt either party – LCH or the Insolvency Representative, would have a right to terminate the relevant LCH Agreement (which would need to result in termination of all Contracts), and the settlement method (involving netting) set out in such a master agreement would be applied. The liquidation amount could be subject to set-off (a set-off that does not involve the liquidation amount would be subject to general restrictions for set-off provided for in the Bankruptcy Law). In our view, the arrangements set out in the Default Rules might qualify as the settlement method for the purpose of this provision.
- 3.5.6 However, if Bankruptcy Proceedings are opened against a Relevant Clearing Member that is a Bank or an Investment Firm which carries out activity also in at least one EU or EEA Member State other than Poland: (i) set-off will be permissible if it is permissible under the law applicable to that Relevant Clearing Member's claim, and (ii) netting will be subject to the law that governs the netting agreement. Although the relevant provisions are drafted slightly ambiguously, in our view they should be interpreted in such a way that it is sufficient for a Bank or an Investment Firm (as the case may be) to carry out activity in at least one EU/EEA Member State other than Poland in order to come under those provisions and that those provisions will cover set-off by the

Bank's or Investment Firm's counterparty from a third country and netting under a netting agreement with a third country counterparty. In our view, the set-off will be permissible if it is permissible under the law applicable to the Relevant Clearing Member's claim even if this is not the law of an EU/EEA Member State. Similarly, we believe that netting will be subject to the law that governs the netting agreement even if this is the law of a third country.

- 3.5.7 The opening of Bankruptcy Proceedings in relation to a Relevant Clearing Member will not affect the rights arising under the close-out netting provision (*klauzula kompensacyjna*) referred to in the Act on Financial Collateral Arrangements.
- 3.5.8 Article 250 of the Restructuring Law provides for rights which are similar to those under Article 85 of the Bankruptcy Law discussed above.
- 3.5.9 Where an obligation has been entered into (including under a Contract) after the commencement of Bankruptcy Proceedings or Restructuring Proceedings in relation to a Relevant Clearing Member, it may not be possible to include any amount which is due in respect of such an obligation in the netting, but in our opinion this would not impair the effectiveness of netting in respect of amounts due under Contracts entered into before the commencement of such Bankruptcy Proceedings or Restructuring Proceedings.
- 3.5.10 Bearing in mind our responses set out in sections 3.5.2-3.5.9, to the extent Polish netting rules apply (please refer to section 3.5.6 above), to fall within the scope of these rules, the contractual arrangement between LCH and the Relevant Clearing Member would need to be modified such that it is stated in an agreement between LCH and the Relevant Clearing Member that:
- (a) the contractual arrangement between LCH and the Relevant Clearing Member constitutes a master agreement within the meaning of Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law and all Contracts are entered into in performance of that master agreement; and
 - (b) termination of such a master agreement results in termination of all the Contracts entered into in its performance.
- 3.5.11 As referred to in section 3.5.5 above, pursuant to Article 85 sec. 3 of the Bankruptcy Law and Article 250 sec. 3 of the Restructuring Law, either party would have a right to terminate the master agreement and the settlement method provided for in the master agreement in the event of termination will be observed. These rules will be considered to be overriding mandatory provisions and will prevail over any termination rights and restrictions provided for in the master agreement.
- 3.5.12 Article 85 of the Bankruptcy Law and Article 250 sec. 3 of the Restructuring Law make references to a termination notice (*wypowiedzenie*) and to a

termination (*rozwiązanie*). Therefore, if Bankruptcy Proceedings or Restructuring Proceedings will be opened, either Party will be allowed to give the other Party a termination notice (*wypowiedzenie*). The Opinion Documents are governed by the laws of England and Wales and the terms of the master agreement and the laws of England and Wales will be decisive as to whether the termination notice will result in the immediate termination of the master agreement (which should result in termination of all Contracts – please refer to section 3.5.10 above), or during the period of time between the date of the termination notice and the termination date the master agreement (and all Contracts) is still binding between the Parties such that the Parties have the right to exercise their rights and are obliged to perform their obligations under the Opinion Documents, including the rights set out in Rule 6. We note, however, that under Article 83 of the Bankruptcy Law, any provision of a contract or agreement to which the bankrupt is a party that obstruct or prevent achievement of the purpose of bankruptcy proceedings is ineffective with respect to the bankruptcy estate (there are similar rules in the Restructuring Law and in the BFG Act). Although, bearing in mind the nature of the arrangements between LCH and the Relevant Clearing Members, we do not think that exercising the rights set out in Rule 6 will fall within the scope of this provision, ultimately this will depend on the circumstances of a given case.

- 3.5.13 Under the Bankruptcy Law and the Restructuring Law, the provisions of an agreement which provide for a modification or termination of the agreement in the event of filing for the opening of Bankruptcy Proceedings or Restructuring Proceedings (respectively) are ineffective. Although this is not stated clearly in the Bankruptcy Law or the Restructuring Law, in our view, this does not apply to master agreements within the meaning of Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law where the right to terminate such agreements is directly provided for in Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law. The provision in question is set out in a section of the Bankruptcy Law which deals with the consequences of declaration of bankruptcy. The right to terminate under this provision may be exercised after a party to the master agreement has been declared bankrupt. If a party has not yet been declared bankrupt but a bankruptcy petition has been filed with respect to it, it is not entirely clear whether its counterparty will be able to terminate the master agreement by exercising the statutory right provided for in the above-mentioned provision of the Bankruptcy Law, or such termination prior to the declaration of bankruptcy will be ineffective based on Article 83. As the Bankruptcy Law gives the right to terminate a master agreement even if bankruptcy is declared, we think the better view is that termination of the master agreement is possible also if bankruptcy has not yet been declared, even if a petition for bankruptcy had been filed. We cannot exclude interpretation that the rights of LCH set out in Rule 6 will be considered to be a modification of the agreement in the event of filing for the opening of Bankruptcy Proceedings or Restructuring Proceedings. It could be argued, however, that this is not an amendment to the agreement and only exercising the rights provided therein.

- 3.5.14 Another interpretation of Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law that could be applied is that all the arrangements set out in the Default Rules constitute an element of the settlement method in the case of termination of the master agreement. We note, however, that as we read the Default Rules, at least some of the arrangements set out therein apply before the actual termination of the master agreement.
- 3.5.15 Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law referred to above are not alternative to the relevant arrangements set out in the Default Rules, but they may make the arrangements set out in the Default Rules enforceable in Bankruptcy Proceedings and Restructuring Proceedings, provided that the LCH Agreements constitute a master agreement within the meaning of these provisions.
- 3.5.16 The BFG Act contains provisions that to some extent may be treated as netting legislation that may apply as an alternative to the relevant arrangements set out in the Default Rules. Please refer to section 3.3.12 which relates to the write-down and conversion powers of the BFG.
- 3.6 Can a claim for a close-out amount be proved for in Insolvency Proceedings without conversion into the local currency?**
- 3.6.1 Based on Article 251 of the Bankruptcy Law, a claim expressed in foreign currency will be recorded on the list of claims after it is converted into PLN based on the average exchange rate published by the National Bank of Poland (*Narodowy Bank Polski*) as at the date of the opening of the Bankruptcy Proceedings.
- 3.6.2 Since under Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law any party to a term financial transaction is allowed to terminate the agreement and calculate a settlement amount based on the mechanism provided for in that agreement, we believe that this also applies to the currency in which the settlement amount is to be calculated. In our view, if such calculated settlement amount is in a currency other than the Polish currency it would have to be converted into PLN if a claim were to be filed against the bankruptcy estate.

Exempting Client Clearing Rule

- 3.7 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 Relevant Clearing Members of all entity types or to only certain entity types.**
- 3.7.1 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 Relevant Clearing Member.

- 3.7.2 Under Article 39(11) of EMIR, Member States' national insolvency laws shall not prevent a CCP from acting in accordance with Article 48(5), (6) and (7) with regard to the assets and positions recorded in accounts as referred to in paragraphs 2 to 5 of this Article. The mentioned Article 48(5), (6) and (7) relate to the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member. No other Exempting Client Clearing Rule is available in Poland.

Default Outside Insolvency Proceedings or Reorganisation Measures

- 3.8 **If LCH were to: (i) declare a Relevant 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 Relevant Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?**

- 3.8.1 A Relevant Clearing Member is contractually bound to the Client Clearing Arrangements by way of its agreement to the Clearing Membership Agreement. In the absence of Insolvency Proceedings or Reorganisation Measures in respect of a defaulting Relevant Clearing Member, the choice of English law to govern the contractual aspects of the Client Clearing Arrangements will be recognised in this jurisdiction unless it involved the transfer of property rights, in which case the mandatory conflict of laws rules will need to be observed.

- 3.9 **If LCH were to: (i) declare a Relevant 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?**

- 3.9.1 Please see our response in section 3.8.1 above.

Insolvency-related Default

- 3.10 **If: (i) following the commencement of Insolvency Proceedings, a Relevant 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?

3.10.1 We understand that pursuant to the Default Rules, including in particular the Client Clearing Annex to the Default Rules¹⁰, the Contracts of Clearing Clients may be (i) transferred to a Backup Clearing Member, together with the Account Balances (a process known as "porting"); or (ii) closed out and liquidated in conjunction with the return of the Client Clearing Entitlement to the Clearing Client (or to the Defaulter for the account of the Clearing Client). In both cases, the Relevant Clearing Member is "deprived" of any entitlement to the collateral posted by it (in the form of either the Account Balance or the Client Clearing Entitlement), which in the case of porting is transferred to the Backup Clearing Member, while in the case of close-out is returned to the Clearing Client (or to the Defaulter for the account of the Clearing Client). In order to prevent the return of the Client Clearing Entitlements or the operation of the porting mechanism from being challenged under anti-deprivation rules or other similar rules of insolvency law, LCH intends to rely on either:

- (a) any law, regulation or statutory provision (having the force of law) of a governmental authority, the effect of which is to protect the operation of the LCH Rules, including in particular the Client Clearing Annex of the Default Rules, from challenge under the insolvency laws applicable to the Relevant Clearing Member (any such provision, an Exempting Client Clearing Rule); or
- (b) if no Exempting Client Clearing Rule would apply to a Relevant Clearing Member, the Security Deed. Clearing Members in respect of whom a suitable Exempting Client Clearing Rule is not available and who wish to offer client clearing are required to enter into a Security Deed in favour of each of their Clearing Clients. Under the terms of the Security Deed, the Relevant Clearing Member grants a security interest in favour of its Clearing Client over the receivable from LCH in respect of assets and positions held in an account with LCH on the relevant Clearing Client's behalf.

3.10.2 Under Article 39(11) of EMIR, Member States' national insolvency laws shall not prevent a CCP from acting in accordance with Article 48(5), (6) and (7) with regard to the assets and positions recorded in accounts as referred to in paragraphs 2 to 5 of this Article. The mentioned Article 48(5), (6) and (7) relate to the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member. In our view, based on this provision no insolvency officer appointed to the Defaulter or any other person could successfully challenge the porting by LCH of the Client Contracts

¹⁰ The relevant rules are General Regulation 11 and Rules 6 to 9 of the Client Clearing Annex (set out in Schedule 1 to the Default Rules).

and Account Balance of a Clearing Client to a Backup Clearing Member to the extent they fall within the scope of Article 48(5), (6) and (7) of EMIR.

3.10.3 Moreover, if the LCH Agreements constituted a master agreement within the meaning of Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law, there would be reasons to argue that the mechanism constitutes the settlement method provided for in the master agreement and, as such, is effective in Bankruptcy Proceedings and Recovery Proceedings.

3.11 If: (i) following the commencement of Insolvency Proceedings, a Relevant 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?

3.11.1 We understand from the provisions of the Client Clearing Annex to the Default Rules that, if porting does not take place, then LCH shall close out the Client Contracts and calculate the entitlement to Collateral and amounts in respect of the close-out of Relevant Contracts of the Defaulter in respect of the relevant Clearing, being the "Client Clearing Entitlement". LCH will then take instruction from the relevant Clearing Client who is an Individual Segregated Account Clearing Client, an Indirect Gross Account Clearing Client, a Custodial Segregated Client, an Identified Omnibus Segregated Clearing Client or an Affiliated Omnibus Segregated Clearing Clients and either: (i) pay the Client Clearing Entitlements to the Defaulter for the account of the relevant Clearing Clients; or (ii) pay the Client Clearing Entitlement directly to the relevant Clearing Client (subject to execution of documentation required by LCH). In each case this applies to both Clearing Clients who are exercising their rights under a Security Deed and Clearing Clients of an Exempt Client Clearing Member, following acceleration of its "Undertaking to Pay and Deliver", as provided for in the Rulebook. In respect of all Non-Identified Omnibus Segregated Clearing Clients, an "Aggregate Omnibus Client Clearing Entitlement" will always be returned to the Defaulter for the account of the relevant Clearing Clients.

3.11.2 In this respect, our opinions set out in sections 3.10.1 - 3.10.3 apply accordingly.

Reorganisation Measures

3.12 If: (i) following the implementation of Reorganisation Measures, a Relevant 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?

- 3.12.1 Porting and its effectiveness upon the implementation of the Reorganisation Measures is currently not regulated in local law. (Although we note that the BFG Act refers to porting in the context of resolution plans – the elements that a resolution plan needs to cover include a description of the options to maintain access to payment and settlement services and the assessment of the possibility to transfer a client's positions – Article 81 sec.1 point 12).)
- 3.12.2 In our view, if Reorganisation Measures were opened against a Relevant Clearing Member, and the Relevant Clearing Member is designated a Defaulter, the representative appointed to reorganise/manage the Defaulter or any other person will not be able to successfully challenge the actions of LCH and claim for the amount of the Account Balance.
- 3.13 **If: (i) following the commencement of Reorganisation Measures, a Relevant 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?**
- 3.13.1 Our responses set out in sections 3.12.1-3.12.2 apply accordingly.

Security Deed

- 3.14 **Would the Security Deed provide an effective security interest under the laws of this jurisdiction over the Account Balance or Client Clearing Entitlement in favour of the relevant Clearing Client? Would the Security Deed constitute a financial collateral arrangement (or equivalent) in your jurisdiction?**

Our responses set out in sections 3.2.12 - 3.2.15 apply accordingly to the Security Deed.

- 3.15 **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?**

3.15.1 To the extent the Polish conflict of laws rules refer to English law with respect to the creation of a security interest, no filing, registration or perfection requirements are required under the laws of this jurisdiction in addition to any English law requirements to ensure that Polish law recognises the validity of the security interest, as the recognition of English law as the law governing the security interest also extends to any filing, registration or perfection requirements.

3.15.2 Further, there are no filing, registration or perfection requirements under the laws of this jurisdiction law which are merely based on the status of a Relevant Clearing Member having its place of establishment, incorporation or registration in this jurisdiction.

3.16 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 Relevant Clearing Member?

Our responses set out in sections 3.2.5 - 3.2.36 apply accordingly.

General

3.17 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 Relevant Clearing Member of Client Clearing Services and which are not covered by the questions above.

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

Settlement Finality

3.18 On the basis that LCH will no longer receive protections pursuant to the Settlement Finality Directive (or on the basis it will not receive the protections as contemplated in Recital 7 of the Settlement Finality Directive), would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect finality of settlement of transfers of funds or securities (or both) from the Relevant Clearing Member to LCH? If so, please clarify from which point in time and in which circumstances finality protections in respect of such transfers 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 officer?

On the basis that LCH will no longer receive protections pursuant to the Settlement Finality Directive, in our opinion, in Insolvency Proceedings, the settlement of transfers of funds or securities (or both) will not be subject to challenge in this jurisdiction if the LCH Agreements constitute master agreements within the meaning of Article 85 of the Bankruptcy Law.

3.19 **On the basis that LCH will no longer receive the protections pursuant to the Settlement Finality Directive (or on the basis it will not receive the protections as contemplated in Recital 7 of the Settlement Finality Directive), 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.**

3.19.1 If Recovery Proceedings are opened against a Relevant Clearing Member, in our view LCH will lose finality protections upon the moment the Recovery Proceedings are opened. In our view, however, if Recovery Proceedings are opened against a Relevant Clearing Member, on the basis that LCH will no longer receive protections pursuant to the Settlement Finality Directive, in our opinion the settlement of transfers of funds or securities (or both) will not be subject to challenge in this jurisdiction if the LCH Agreements constitute master agreements within the meaning of Article 250 of the Restructuring Law.

3.19.2 If Resolution Proceedings are opened against a Relevant Clearing Member, in our view LCH will lose finality protections upon the moment the Resolution Proceedings are opened.

4. QUALIFICATIONS

The opinions expressed herein are subject to the following qualifications.

4.1 The obligations of the respective parties under an agreement can be cancelled or modified by a competent court if, following an extraordinary change of circumstances, the performance of the agreement would result in excessive difficulties or threaten one of the parties with substantial losses which the parties did not foresee when concluding the agreement. The above-mentioned rule, known as the *rebus sic stantibus* clause, is aimed at providing a remedy for a party in a situation where in the period between the conclusion of the agreement and the making of the performances set out in that agreement a material and unexpected change in the circumstances occurs and, as a result, the party obliged to make the performances would find itself in a situation resulting in a substantial loss being suffered by it. This remedy is designed to be an exception to the *pacta sunt servanda* rule. In the opinion of some legal scholars a deep economic crisis or major transformations in the structure of the domestic and international market may be classified as such extraordinary changes of circumstances. In one of its rulings the Supreme Court (*Sąd Najwyższy*) stated that an extraordinary change of circumstances should be understood as a state of affairs resulting from circumstances which are not covered by a typical contractual risk and are of an objective nature and, therefore, independent of the parties, which was not foreseen by them upon the conclusion of the agreement and could not have been foreseen by them on any basis. In our view, bearing in mind the current market situation and turbulences on the financial markets in the last few years, a situation where the market moves against one party should not be regarded as a situation not covered by the risk associated with the conclusion of agreements such as the LCH Agreements, or as a situation that the Parties entering into the LCH Agreements could not foresee and, in consequence,

should not be considered as an extraordinary change of circumstances. However, this will be assessed by the court each time on the basis of the circumstances of a given case.

- 4.2 All contracts and other sources of legal relationship are affected by certain fundamental principles of Polish civil law, such as the prohibition of the misuse of a party's legal right or privilege, the principle of taking into account the socio-economic purpose of each right or claim and the principles of social co-existence when interpreting the content of each agreement or legal instrument and other similar principles based on the concepts of equity and public order.
- 4.3 Under the laws of this jurisdiction, when examining the meaning of a contract, one should examine what the congruent intention of the parties and the purpose of the contract were, rather than simply rely on the literal wording of thereof. Therefore, when interpreting a contract, a Polish court can also take into consideration circumstances outside the scope of the wording of the contract that indicate the congruent intention of the parties and purpose of the contract, divergent from its literal wording.
- 4.4 Under the law of this jurisdiction, a right or remedy may be deemed to be waived impliedly (*per facta concludentia*), for example by taking no action in circumstances where the lack of action indicates (e.g. by reference to correspondence or other communication) the intention to grant a waiver. Similarly, a consent may be deemed to be granted impliedly, and an agreement may be deemed to be amended impliedly.
- 4.5 In this jurisdiction there is no doctrine of precedent, i.e. no rule or case upon which one can rely in reviewing or opining on matters relating to the law and there is a likelihood of different opinions and interpretations of the same issue of the law being reached or made by different courts; thus the rendering of opinions on the law of this jurisdiction does not warrant that a court considering a potential dispute will adopt the view or views expressed herein.
- 4.6 The opinions expressed herein are subject to the effects of any United Nations, EU or Polish sanctions or other similar measures implemented or effective in this jurisdiction with respect to the Party which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted under the laws of, or carries out business activity in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.

5. **RELIANCE**

This advice is given for the exclusive benefit of the addressee. In this advice 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 advice being made publicly available on the addressee'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 the addressee 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.



Clifford Chance
Janicka, Krużewski, Namiotkiewicz i wspólnicy
spółka komandytowa

**APPENDIX 1
Clearing Membership Agreement**

CLEARING MEMBERSHIP AGREEMENT

DATED

LCH.CLEARNET LIMITED

and
("the Firm")

Address of the Firm

THIS AGREEMENT is made on the date stated above

BETWEEN the Firm and LCH.CLEARNET LIMITED ("the Clearing House"), whose registered office is at Aldgate House, 33 Aldgate High Street, London, EC3N 1EA.

WHEREAS:

- A The Clearing House is experienced in carrying on the business of a clearing house and undertakes with each Clearing Member the performance of contracts registered in its name in accordance with the Rulebook;
- B The Clearing House has been appointed by certain Exchanges to provide central counterparty and other services in accordance with the terms and conditions of the Rulebook and certain agreements entered into between the Clearing House and such Exchanges;
- C The Clearing House also provides central counterparty and other services to participants in certain over-the-counter ("OTC") markets in accordance with the terms of this Agreement and the Rulebook;
- D The Firm desires to be admitted as a Clearing Member of the Clearing House to clear certain categories of Contract agreed by The Clearing House with the Firm and, the Clearing House having determined on the basis inter alia of the information supplied to it by the Firm that the Firm satisfies for the time being the relevant Criteria for Admission, the Clearing House agrees to admit the Firm as a Clearing Member subject to the terms and conditions of this Agreement.

NOW IT IS HEREBY AGREED as follows:-

1 Interpretation and Scope of Agreement

1.1. Unless otherwise expressly stated, in this Agreement:

- (a) "Cash Cover" means cover for margin (within the meaning of that term in the "Definitions" section of the Rulebook) provided in the form of a cash deposit with the Clearing House;
- (b) "Clearing Member" means a Person who has been admitted to membership of the Clearing House and whose membership has not terminated;
- (c) "Contract" means a contract or transaction eligible for registration in the Firm's name by the Clearing House in accordance with the Rulebook;
- (d) "Contribution" and "Contribution to the Default Fund" mean the sums of cash deposited by the Firm as cover in respect of the Firm's obligation to indemnify the Clearing House as provided by clause 9 of this Agreement and the Default Rules;
- (e) "Criteria for Admission" means criteria set out in one or more documents published from time to time by the Clearing House, being criteria to be satisfied by an applicant for admission as a Clearing Member in respect of the Designated Contracts which the applicant wishes to clear with the Clearing House;
- (f) "Default Fund" means the fund established under the Default Rules of the Clearing House to which the Clearing Member is required to contribute by virtue of clause 9 of this Agreement;
- (g) [DELETED]

- (h) "Default Notice" means a notice issued by the Clearing House in accordance with the Default Rules in respect of a Clearing Member who is or is likely to become unable to meet its obligations in respect of one or more Contracts;
 - (i) "Default Rules" means that part of the Rulebook having effect in accordance with Part IV of the Financial Services and Market Act 2000 (Recognition Requirements for Investment Exchange and Clearing Houses) Regulations 2001 to provide for action to be taken in respect of a Clearing Member subject to a Default Notice;
 - (j) "Designated Contract" has the meaning given to it in clause 2.1;
 - (k) "Exchange" means an organisation responsible for administering a market with which the Clearing House has an agreement for the provision of central counterparty and other services to Clearing Members;
 - (l) "Exchange Contract" means any contract which an Exchange has adopted and authorised Exchange Members to trade in under its Exchange Rules and in respect of which the Clearing House has agreed to provide central counterparty and other services;
 - (m) "Exchange Member" means any person (by whatever name called) being a member of, or participant in, a Market pursuant to Exchange Rules;
 - (n) "Exchange Rules" means any of the regulations, rules and administrative procedures or contractual arrangements for the time being and from time to time governing the operation of a Market administered by an Exchange and includes, without prejudice to the generality of the foregoing, any regulations made by the directors of an Exchange or by any committee established under the Rules, and, save where the context otherwise requires, includes Exchange Contracts, and the Rulebook;
 - (o) "Rulebook" means the Clearing House's General Regulations, Default Rules, Settlement Finality Regulations and Procedures and such other rules of the Clearing House as published and amended from time to time;
 - (p) "Market" means a futures, options, forward, stock or other market, administered by an Exchange, or an OTC market, in respect of which the Clearing House has agreed with such Exchange or, in respect of an OTC market, with one or more participants in that market, to provide central counterparty and related services on the terms of the Rulebook and in the case of an Exchange, pursuant to the terms of any agreement entered into with the Exchange;
 - (q) "Person" includes any firm, company, corporation, body, association or partnership (whether or not having separate legal personality) or any combination of the foregoing;
 - (r) "Procedures" means that part of the Rulebook by that name;
 - (s) "Registered Contract" means a contract registered in the Firm's name by the Clearing House in accordance with the Rulebook;
- 1.2. (a) References to "the parties" are references to the parties hereto, and "party" shall be construed accordingly;
- (b) References herein to a clause are to a clause hereof and clause headings are for ease of reference only;
- (c) Unless the context otherwise requires, words (including defined terms) denoting the singular shall include the plural and vice versa;

(d) References to writing include typing, printing, lithography, photography, facsimile transmission and other modes of representing or reproducing words in a visible form; and

(e) References herein to statutes, statutory instruments, the Rulebook, or provisions thereof are to those statutes, statutory instruments, Rulebook or provisions thereof as amended, modified or replaced from time to time.

1.3 This Agreement, the terms of any other agreement to which the Clearing House and the Clearing Member are party which relates to the provision of central counterparty and other services by the Clearing House, the terms of, and applicable to, each and every Registered Contract, the Rulebook and all amendments to any of the foregoing shall together constitute a single agreement between the Clearing House and the Clearing Member and both parties acknowledge that all Registered Contracts are entered into in reliance upon the fact that all such items constitute a single agreement between the parties.

1.4 A person who is not a party to this Agreement shall have no rights under or in respect of this Agreement.

2 Clearing Membership

2.1. The Firm is hereby admitted as a Clearing Member on the terms set out in this Agreement. The Firm shall be eligible to clear such categories of Contract (each a "Designated Contract") as the Clearing House shall from time to time notify to the Firm.

2.2. The Firm warrants that the information supplied by the Firm to the Clearing House in connection with the enquiry conducted by the Clearing House to determine whether the Firm satisfies for the time being the Criteria for Admission was and is at the date of this Agreement true and accurate in all material respects.

2.3. The Firm will ensure that it will at all times satisfy the Criteria for Admission. If at any time it has reason to believe that it no longer satisfies or may cease to satisfy any of such criteria the Firm shall immediately notify the Clearing House of the circumstances.

2.4. The Firm shall give written notice forthwith to the Clearing House of the occurrence of any of the following of which it is aware:-

(a) the presentation of a petition or passing of any resolution for the bankruptcy or winding-up of, or for an administration order in respect of, the Firm or of a subsidiary or holding company of the Firm;

(b) the appointment of a receiver, administrative receiver, administrator or trustee of the estate of the Firm;

(c) the making of a composition or arrangement with creditors of the Firm or any order or proposal in connection therewith;

(d) where the Firm is a partnership, an application to dissolve the partnership, the presentation of a petition to wind up the partnership, or any other event which has the effect of dissolving the partnership;

(e) where the Firm is a registered company, the dissolution of the Firm or the striking-off of the Firm's name from the register of companies;

(f) any step analogous to those mentioned in paragraphs (a) to (e) of this clause 2.4 is taken in respect of such persons as are referred to in those respective paragraphs in any jurisdiction;

(g) the granting, withdrawal or refusal of an application for, or the revocation of any licence or authorisation to carry on investment, banking or insurance business in any country;

- (h) the granting, withdrawal or refusal of an application for, or the revocation of, a license or authorisation by the Financial Conduct Authority, the Prudential Regulation Authority or membership of any self-regulating organisation, recognised or overseas investment exchange or clearing house (other than the Clearing House) under the Financial Services and Markets Act 2000 or any other body or authority which exercises a regulatory or supervisory function under the laws of the United Kingdom or any other state;
 - (i) the appointment of inspectors by a statutory or other regulatory authority to investigate the affairs of the Firm (other than an inspection of a purely routine and regular nature);
 - (j) the imposition of any disciplinary measures or sanctions (or similar measures) on the Firm in relation to its investment or other business by any Exchange, regulatory or supervisory authority;
 - (k) the entering of any judgment against the Firm under Section 150 of the Financial Services and Markets Act 2000;
 - (l) the conviction of the Firm for any offence under legislation relating to banking or other financial services, building societies, companies, credit unions, consumer credit, friendly societies, insolvency, insurance and industrial and provident societies or for any offence involving fraud or other dishonesty;
 - (m) the conviction of the Firm, or any subsidiary or holding company of the Firm for any offence relating to money laundering, or the entering of judgment or the making of any order against the Firm in any civil action or matter relating to money laundering;
 - (n) any enforcement proceedings taken or order made in connection with any judgement (other than an arbitration award or judgement in respect of the same) against the Firm; and
 - (o) any arrangement entered into by the Firm with any other Clearing Member relating to the provision of central counterparty and associated services by the Clearing House of Contracts or transactions entered into by the Firm after the effective date of termination of this Agreement.
- 2.5. The Firm shall give written notice forthwith to the Clearing House of any person becoming or ceasing to be a director of or a partner in the Firm or of the occurrence of any of the following in relation to a director of or a partner in the Firm, if aware of the same:-
- (a) the occurrence of any event specified in clause 2.4 (insofar as it is capable of materially affecting him); or
 - (b) any disqualification order under the Company Directors Disqualification Act 1986 or equivalent order in overseas jurisdictions.
- 2.6. The Firm shall give written notice forthwith to the Clearing House of any change in its name, the address of its principal place of business, registered office or UK office.
- 2.7. The Firm shall give written notice to the Clearing House forthwith upon its becoming aware that any person is to become or cease to be, or has become or ceased to be, a controller of the Firm, and shall in relation to any person becoming a controller of the Firm state:-
- (a) the controller's name, principal business and address;
 - (b) the date of the change or proposed change.

In this clause and in clause 2.9 "controller" means a person entitled to exercise or control the exercise of 20 per cent or more of the voting power in the Firm.

- 2.8. The Firm shall give written notice forthwith to the Clearing House of any change in its business which affects the Firm's ability to perform its obligations under this Agreement.
- 2.9. Where the Clearing House receives notification pursuant to any of clauses 2.3 to 2.8, or the Clearing House reasonably suspects that the Firm may no longer satisfy some or all of the Criteria for Admission or the criteria for clearing a Designated Contract, the Clearing House shall be entitled in its absolute discretion to call for information of whatsoever nature in order to determine whether the Firm continues to satisfy the Criteria for Admission or the criteria for clearing a Designated Contract. Without prejudice to the foregoing, the Clearing House may at any time call for information relating to the affairs (including the ownership) of any controller of the Firm or any person who is to become a controller of the Firm. The Firm shall forthwith on demand supply to the Clearing House information called for under this clause and shall ensure that such information is true and accurate in all respects.
- 2.10. The Firm undertakes to abide by the Rulebook and undertakes at all times to comply with other provisions of Exchange Rules so far as they apply to the Firm.
- 2.11. The Firm undertakes that at all times, to the extent the Firm is required under any applicable law to be authorised, licensed or approved in relation to activities undertaken by it, it shall be so authorised, licensed or approved.
- 2.12. The Firm agrees that in respect of any Contract for which central counterparty services are to be provided to the Firm by the Clearing House in accordance with the Rulebook, including, but not limited to, any contract made by the Firm under Exchange Rules on the floor of a Market (or through a Market's automated trading system) or otherwise, whether with a member of that Market or with a client or with any other person, and including any Contract entered into in an OTC market, the Firm shall contract as principal and not as agent.
- 2.13. The Firm shall furnish financial information to the Clearing House in accordance with the requirements of the Rulebook or such other requirements as the Clearing House may from time to time prescribe.
- 2.14. The Firm undertakes that, in its terms of business with its clients (being clients in respect of whom the Firm is subject to any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money):
- (a) where it is subject to Exchange Rules, it will at all times include a stipulation that contracts made under Exchange Rules with or for them shall be subject to Exchange Rules (including the Rulebook); and
 - (b) that money of such clients in the possession of the Clearing House may be dealt with by the Clearing House in accordance with the Rulebook without exception.
- 2.15. Without prejudice to clause 2.14 the Firm undertakes that its dealings with all its clients or counterparties shall be arranged so as to comply with the requirement that the Firm deals with the Clearing House as principal, and that all sums deposited with the Clearing House by way of Cash Cover (including the Firm's Contribution to the Default Fund) shall be deposited unencumbered and by the Firm acting as sole principal and as legal and beneficial owner.
- 2.16. The Firm undertakes not to assign, charge or subject to any other form of security, whether purporting to rank in priority over, pari passu with or subsequent to the rights of the Clearing House, any Cash Cover provided to the Clearing House, including its entitlement to repayment of its Contribution to the Default Fund or any part of it. Any purported charge, assignment or encumbrance (whether by way of security or otherwise) of Cash Cover provided to the Clearing House shall be void. The Firm shall not otherwise encumber (or seek to encumber) any Cash Cover provided to the Clearing House.

3 Remuneration

- 3.1. The Clearing House shall be entitled to charge the Firm such fees, charges, levies and other dues, on such events, and calculated in accordance with such scales and methods, as are for the time prescribed by the Clearing House and, where relevant, for Exchange Contracts, after consultation with the relevant Exchange.

- 3.2. The Clearing House shall give the Firm not less than fourteen days' notice of any increase in such fees, charges, levies or other dues.

4 Facilities Provided by the Clearing House

4.1. Provision of Central Counterparty Services

- (a) Details of all Contracts to be registered by the Clearing House in the name of the Firm and in respect of which central counterparty services are to be provided shall be provided to the Clearing House in accordance with the Rulebook and any other agreement entered into between the Clearing House and the Firm.
- (b) Provided that a Contract meets the criteria for registration of that Contract in the name of the Firm and is a Designated Contract, and subject to the Rulebook, the Clearing House shall enter into a Registered Contract with the Firm in respect thereof. Each such Contract shall be registered in accordance with the Rulebook and the Clearing House shall perform its obligations in respect of all Registered Contracts in accordance with this Agreement and the Rulebook.

4.2. Maintenance of Records

The Clearing House agrees that for a period of ten years after termination of a Registered Contract it shall maintain records thereof. The Clearing House may make a reasonable charge to the Firm for the production of any such records more than three months after registration.

4.3. Information

The Clearing House will provide to the Firm such information at such times as is provided for by the Rulebook.

4.4. Accounts

The Clearing House agrees to establish and maintain one or more accounts for the Firm in accordance with the Rulebook. Accounts will be opened and kept by the Clearing House in such manner as will not prevent the Firm from complying with requirements of any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money and the rules of such regulatory organisation as the Firm may be subject to in respect of their cleared business.

5 Default

In the event of the Firm appearing to the Clearing House to be unable, or to be likely to become unable, to meet any obligation in respect of one or more Registered Contracts, or failing to observe any other financial or contractual obligation under the Rulebook, the Clearing House shall be entitled to take all or any of the steps set out in that regard in the Rulebook, including (but not limited to) the liquidation of all or any of the Registered Contracts.

6 Disclosure of Information

The Firm agrees that the Clearing House shall have authority to disclose any information of whatsoever nature concerning the Firm to such persons as is provided for by the Rulebook.

7 Partnership

If the Firm is a partnership, the liability of each partner in the Firm hereunder and under any Registered Contract shall be joint and several and, notwithstanding an event which would by operation of law give rise to the dissolution of the partnership, or entitle a partner to seek an order to dissolve the partnership, including, but not limited to, the event of the death, bankruptcy, winding-up or dissolution of any such partner, the respective obligations of the Clearing House and all other partners shall remain in full force and effect. If the Firm is a partnership, the Firm undertakes that if any new partner joins the Firm, the Firm shall procure that such new partner becomes jointly and severally liable alongside existing partners in respect of obligations of the Firm to the Clearing House outstanding at the date of such new partner's accession to the Firm.

8 Term

- 8.1. Subject to clause 8.3 either party (provided, in the case of the Firm, that the Clearing House has not issued a Default Notice in respect of the Firm) may terminate this Agreement by giving to the other party notice in writing, such notice to specify the effective date of termination ("the termination date") which shall be a business day not less than three months after the date of the notice, and this Agreement shall, subject to clause 8.2(b), terminate on the termination date. By the close of business on the termination date the Firm shall ensure that all Registered Contracts in the Firm's name have been closed-out or transferred so that there are no open Registered Contracts to which the firm is party at the end of the termination date.
- 8.2. If, under clause 8.1, the Firm has not closed out or transferred all Registered Contracts by the set termination date the Clearing House shall, at its sole discretion, be entitled to:
 - (a) liquidate any such Registered Contracts in accordance with the Rulebook; and
 - (b) require that the Firm remains a member of the Clearing House until such time as there are no Registered Contracts in existence to which the Firm is a party and the effective date of termination of this Agreement shall be postponed until such time.
- 8.3. If the Firm is in breach of or in default under any term of this Agreement or the Rulebook, or if the Clearing House has issued a Default Notice in respect of the Firm, or if the Clearing House reasonably determines that the Firm no longer satisfies the Criteria for Admission as a Clearing Member, the Clearing House may in its absolute discretion terminate this Agreement in writing either summarily or by notice as follows.

Any termination by notice under this clause 8.3 may take effect (subject as follows) on the expiry of 30 days or such longer period as may be specified in the notice. A notice given by the Clearing House under this clause may at the Clearing House's discretion allow the Firm a specified period in which to remedy the breach or default or to satisfy the Criteria for Admission as the case may be, and may specify what is to be done to that end, and may provide that if the same is done to the satisfaction of the Clearing House within that period the termination of this Agreement shall not take effect; and if this Agreement has terminated after the Clearing House has allowed the Firm such a period for remedy or satisfaction, the Clearing House shall then notify the Firm of the fact of termination. The Clearing House may, if the Clearing House has issued a Default Notice in respect of the Firm immediately, and in any other case after the effective date of termination, take such other action as it deems expedient in its absolute discretion to protect itself or any other Clearing Member including, without limitation, the liquidation of Registered Contracts but without prejudice to its own rights in respect of such contracts.

- 8.4. Upon the termination of this Agreement for whatever reason the Firm shall unless otherwise agreed cease to be a Clearing Member.

9 Default Fund

- 9.1. In this clause the term "Excess Loss" bears the meaning ascribed to it in the Rulebook.
- 9.2. The Firm, as primary obligor and not surety, hereby indemnifies the Clearing House in respect of any Excess Loss, and undertakes to deposit cash with the Clearing House as collateral for its obligations in respect of such indemnity, in accordance in each case with the Default Rules.

- 9.3. The Firm shall, in accordance with the Default Rules, continue to be liable to indemnify the Clearing House in respect of any Excess Loss arising upon any default occurring before the effective date of termination of this Agreement. Subject thereto, the indemnity hereby given shall cease to have effect on the effective date of termination of this Agreement, unless a Default Notice is issued by the Clearing House in respect of the Firm, in which case the indemnity hereby given shall cease to have effect after the date three months after the date of issue of such Default Notice.
- 9.4. Save as provided expressly by the Default Rules, the Firm shall not be entitled to exercise any right of subrogation in respect of any sum applied in satisfaction of its obligations to the Clearing House under this clause 9.

10 Force Majeure

Neither party shall be liable for any failure in performance of this Agreement if such failure arises out of causes beyond its control. Such causes may include, but are not limited to, acts of God or the public enemy, acts of civil or military authority, fire, flood, labour dispute (but excluding strikes, lock-outs and labour disputes involving the employees of the party intending to rely on this clause or its sub-contractors), unavailability or restriction of computer or data processing facilities or of energy supplies, communications systems failure, failure of a common depository, clearing system or settlement system, riot or war.

11 The Rulebook

In the event of conflict between the Rulebook and the provisions of this Agreement the Rulebook shall prevail.

12 Notices

- 12.1. Any notice or communication to be made under or in connection with this Agreement shall be made in writing addressed to the party to whom such notice or communication is to be given; save that a notice or communication of an urgent nature shall be given or made orally and as soon as reasonably practicable thereafter confirmed in writing in conformity hereto. A notice may be delivered personally or sent by post to the address of that party stated in this Agreement, or to such other address as may have been notified by that party in accordance herewith.
- 12.2. Where a notice is sent by the Clearing House by post it shall be deemed delivered 24 hours after being deposited in the post first-class postage prepaid in an envelope addressed to the party to whom it is to be given in conformity to clause 12.1, or in the case of international mail, on the fourth business day thereafter. In all other cases notices shall be deemed delivered when actually received.

13 Law

- 13.1. This Agreement shall be governed by and construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to hear and determine any action or dispute which may arise herefrom. The Clearing House and the Firm each irrevocably submits to such jurisdiction and to waive any objection which it might otherwise have to such courts being a convenient and appropriate forum.
- 13.2. The Firm irrevocably waives, with respect to itself and its revenues and assets all immunity on the grounds of sovereignty or other similar grounds from suit, jurisdiction of any court, relief by way of injunction, order for specific performance or for recovery of property, attachment of its assets (whether before or after judgement) and execution or enforcement of any judgement to which it or its revenues or assets might otherwise be entitled in any proceedings in the courts of any jurisdiction and irrevocably agrees that it will not claim any such immunity in any proceedings.

14 Service of Process

Without prejudice to any other mode of service, and subject to its right to change its agent for the purposes of this Clause on 30 days' written notice to the Clearing House, the Firm (other than where it is incorporated in England and Wales or otherwise has an office in England and Wales) appoints, as its agent for service of process relating to any proceedings

before the courts of England and Wales in connection with the Firm the person in London as notified to the Clearing House in writing with the application for admission.

IN WITNESS whereof the parties hereto have caused this Agreement to be signed by their duly authorised representatives the day and year first before written.

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for **LCH.CLEARNET LIMITED**

(Signature)

(Print Name and Title)

for **LCH.CLEARNET LIMITED**

LCH.CLEARNET LIMITED

Aldgate House 33 Aldgate High Street London EC3N 1EA

Tel: +44 (0)20 7426 7000 Fax: +44 (0)20 7426 7001

Internet: <http://www.lchclearnet.com>

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**C L I F F O R D
C H A N C E**

**CLIFFORD CHANCE,
JANICKA, KRUŻEWSKI, NAMIOTKIEWICZ
I WSPÓLNICY SPÓŁKA KOMANDYTOWA**

**APPENDIX 2
Deed of Charge**

A company whether incorporated in England and Wales or an overseas company.

CHARGE BY CLEARING MEMBER

CHARGE SECURING OWN OBLIGATIONS

Date of Execution: _____

Date of Delivery:
(to be completed by LCH.Clearnet Limited) _____

Name and Address of Chargor: _____

Clearing Membership Agreement Date: _____

Chargor's Account: _____

THIS DEED made on the date above-stated **BETWEEN THE ABOVE-NAMED CHARGOR** ("the Chargor") and **LCH.CLEARNET LIMITED** ("the Clearing House")

WITNESSES as follows :

1. **Interpretation**

- (1) Any reference herein to:
 - (a) any statute or to any provisions of any statute shall be construed as a reference to any statutory modification or re-enactment thereof and to any regulations or orders made thereunder and from time to time in force; and
 - (b) an agreement or instrument shall be to that agreement or instrument as amended from time to time.
- (2) A reference herein to collateral or cash being "provided" includes the act of (i) transferring, (ii) delivering, or (iii) crediting to an account or effecting, directly or indirectly, any of the foregoing.
- (3) The Clause headings shall not affect the construction hereof.

1A. **The Secured Obligations**

- (1) The Chargor shall pay to the Clearing House all monies (including settlement costs, interest and other charges) which now are or at any time hereafter may be or become due or owing by the Chargor to the Clearing House on the account identified above (or, but only if no account is identified, on all accounts of the Chargor with the Clearing House) and discharge all other liabilities of the Chargor (whether actual or contingent, now existing or hereafter incurred) to the Clearing House on the said account (or, if no account is identified, on all accounts of the Chargor with the Clearing House) in each case when due in accordance with the Clearing Membership Agreement and the Clearing House's Rulebook referred to therein (the Clearing Membership Agreement and the Clearing House's Rulebook as from time to time amended, renewed or supplemented being hereinafter referred to as "**the Agreement**") or, if the Agreement does not specify a time for such payment or discharge, promptly following demand by the Clearing House.
- (2) In the event that the Chargor fails to comply with sub-paragraph (1) above, the Chargor shall pay interest accruing from the date of demand on the monies so demanded and on the amount of all other liabilities at the rate provided for in the Agreement or, in the event of no such rate having been agreed, at a rate determined by the Clearing House (the rate so agreed or determined to apply

after as well as before any judgment), such interest to be paid upon demand of the Clearing House in accordance with its usual practices and to be compounded with principal and accrued interest in the event of its not being duly and punctually paid.

- (3) The monies, other liabilities, interest and other charges referred to in sub-paragraph (1) of this Clause, the interest referred to in sub-paragraph (2) of this Clause and all other monies and liabilities payable or to be discharged by the Chargor under or pursuant to any other provision of this Deed are hereinafter collectively referred to as "**the Secured Obligations**".

1B. **Holding of Collateral**

- (1) The Chargor shall, in accordance with the Procedures, transfer collateral to the Clearing House. Where such collateral takes the form of Securities, the Clearing House shall hold such Securities for the Chargor, subject to the terms of (and including the security constituted by) this Deed.
- (2) From time to time, in accordance with the Procedures and in the context of a transfer of one or more contracts and related cover from one member of the Clearing House to the Chargor at the request of a client of that other member or the Chargor, the Clearing House shall designate that certain Securities which it previously held for a third party are instead held by the Clearing House for the Chargor and form part of the collateral provided by the Chargor in satisfaction of its requirements under the Procedures. Upon such designation, the Clearing House shall hold such Securities for the Chargor, subject to the terms of this Deed.
- (3) The Clearing House will identify in its own books that any Securities referred to in sub-paragraphs (1) or (2) above are held by it for the account of and (as between the Chargor and the Clearing House) belong to the Chargor (subject to the terms of this Deed) and shall be recorded in the Securities Account (as defined below) which shall be subject to the security constituted by this Deed. Where the Clearing House holds any such Securities in an account (including an omnibus account) at any Clearance System or with any Custodian Bank with any other Securities, the Clearing House will take all actions within its control to ensure that such Securities are recorded in accounts with the Clearance System or Custodian Bank (as applicable) in which the Clearing House's own assets are not recorded.
- (4) All Distributions in the form of cash received by the Clearing House on any Securities which are held by the Clearing House for the account of the Chargor in accordance with sub-paragraphs (1) or (2) above and any cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a

title transfer basis) shall be received by the Clearing House for its own account and paid into one or more accounts in the Clearing House's name, with a corresponding and equal credit arising on and being recorded in the Cash Account (as defined below) whereupon such Distributions and other cash so provided to the Clearing House as recorded in the Cash Account shall be held by the Clearing House for the account of the Chargor and shall be subject to the security constituted by this Deed and designated as such in the Clearing House's books and records.

- (5) The Clearing House may hold any Securities pursuant to this Clause 1B (*Holding of Collateral*) in one or more omnibus accounts with a Custodian Bank or Clearance System, as the case may be, together with other Securities which it holds for other third parties which have granted a charge over such assets in favour of the Clearing House in a form substantially the same as this Deed but no other Securities. The Clearing House shall ensure that any such omnibus account with a Clearance System or Custodian Bank is clearly identified as an account relating to Securities held by the Clearing House on behalf of third parties.
- (6) The Clearing House undertakes to the Chargor that it will at all times ensure that, pursuant to the terms governing any account with any Clearance System or Custodian Bank in which any Securities are held for the Chargor, any claim or security interest which that Clearance System or Custodian Bank may have against or over such Securities shall be limited to any unpaid fees owed by the Clearing House to such Clearance System or Custodian Bank in respect of such account.

2. **Charge**

- (1) The Chargor acting in due capacity (as defined in sub-paragraph (3) below) (and to the intent that the security so constituted shall be a security in favour of the Clearing House extending to all beneficial interests in the assets hereby charged and to any proceeds of sale or other realisation thereof or of any part thereof including any redemption monies paid or payable in respect thereof) hereby separately assigns, charges and pledges by way of first fixed security and by way of continuing security to the Clearing House, until discharged by the Clearing House in accordance with this Deed, for the payment to the Clearing House and the discharge of all the Secured Obligations, the Charged Property.
- (2) It shall be implied in respect of sub-paragraph (1) above that the Chargor is charging the Charged Property free from all charges and encumbrances (whether monetary or not) and from all other rights exercisable by third parties (including liabilities imposed and rights conferred by or under any enactment) except for any charge or lien routinely arising in favour of a Custodian Bank or Clearance System and applying to assets held by the Clearing House with that Custodian Bank or Clearance System and any third party's beneficial interest in

the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property.

(3) In this Deed:

"acting in due capacity" in relation to the Chargor means that each of the dispositions of property hereby effected by the Chargor is made with full title guarantee in accordance with the Law of Property (Miscellaneous Provisions) Act 1994 except as expressly permitted or contemplated under this Deed;

"Cash Account" means any account maintained by the Clearing House on its books for the account of the Chargor in which an amount equal to any cash Distributions or cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis) are recorded;

"Charged Property" means at any time all present and future rights, title and interest of the Chargor in and to:

- (i) all Securities from time to time recorded in and represented by the Securities Account and held by the Clearing House for the account of the Chargor in accordance with Clause 1B;
- (ii) all Distributions including without limitation Distributions in the form of cash;
- (iii) all cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis);
- (iv) the Securities Account; and
- (v) the Cash Account;

"Chargor Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Chargor maintains any cash account or securities account;

"Clearance System" shall be construed as a reference to any system from time to time used or constituted for the clearing, collective safe custody or central deposit of securities, and any depository for any of the foregoing;

"Clearing Membership Agreement" means in relation to the Chargor the Clearing Membership Agreement between the Chargor and the Clearing House

having the date specified on the first page of this Deed, as such agreement may be amended and or replaced from time to time;

"Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Clearing House maintains any cash account or securities account;

"Default Notice" has the meaning given to it in the Default Rules;

"Default Rules" has the meaning given to such term in the Clearing Membership Agreement;

"Deed" means this charge made between the Chargor and the Clearing House on the date above-stated, as the same may be amended, supplemented or restated from time to time;

"Distributions" means all rights, benefits and proceeds including, without limitation:

- (a) any dividends or interest, annual payments or other distributions; and
- (b) any proceeds of redemption, substitution, exchange, bonus or preference, under option rights or otherwise,

in each case attaching to or arising from or in respect of any Securities forming part of the Charged Property;

"Procedures" means the one or more documents containing the working practices and administrative requirements of the Clearing House for the purposes of implementing the Clearing House's Rulebook and Default Rules from time to time in force, or procedures for application for and regulation of clearing membership of the Clearing House;

"Receiver" means a receiver, receiver and manager or an administrative receiver as the Clearing House may specify at any time in the relevant appointment made under this Deed, which term will include any appointee made under a joint and/or several appointment by the Clearing House;

"Securities" shall be construed as a reference to bonds, debentures, notes, stock, shares, bills, certificates of deposit and other securities and instruments, including Distributions in the form of Securities (and without limitation, shall include any of the foregoing not constituted, evidenced or represented by a certificate or other document but by any entry in the books or other records of the issuer, a trustee or other fiduciary thereof, or a Clearance System); and

"Securities Account" means any account maintained by the Clearing House

on its books for the account of the Chargor in which Securities are recorded.

3. **Release**

- (1) Upon the Clearing House being satisfied that the Secured Obligations have been irrevocably paid or discharged in full, the Clearing House shall, at the request and cost of the Chargor, release or discharge (as appropriate) all the Charged Property from the security created by this Deed provided that, without prejudice to any remedy which the Chargor may have if the Clearing House fails to comply with its obligations under this Clause, such actions shall be without recourse to, and without any representations or warranties by, the Clearing House or any of its nominees
- (2) The Chargor may, in the circumstances specified in sections 1.1.2 and 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), request that part or all of the Charged Property, or the proceeds thereof, be returned or repaid to, or to the order of, the Chargor. Where, pursuant to such a request, the Clearing House returns or repays any of the Charged Property, or the proceeds thereof, pursuant to sections 1.1.2 or 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), such Charged Property shall be released or discharged (as appropriate) from the security interest created over such Charged Property and the proceeds thereof pursuant to Clause 2(1) with effect from the time such Charged Property, or the proceeds thereof, are transferred by the Clearing House to, or to the order of, the Chargor in accordance with the Procedures.

4. **Income**

Prior to a Default (as defined in Clause 11(1) below), the Clearing House consents to the payment or transfer of any and all Distributions received by the Clearing House in respect of any Charged Property to the Chargor (and upon such payment or transfer, the Distributions shall be released from the security constituted by this Deed) provided that, in the Clearing House's reasonable view, the Clearing House would still have sufficient security, following such payment or transfer, to secure the Secured Obligations.

5. **Voting rights, calls and other obligations in respect of the Securities**

- (1) The Chargor must pay all calls and other payments due and payable in respect of any Securities and must comply with all requests (including requests for information by any listing or other authority), obligations and conditions relating to the Securities. In any case of default by the Chargor in this respect the Clearing House may if it thinks fit make any such payments on behalf of the Chargor (but shall be under no obligation to do so) in which event any sums so paid shall be reimbursed by the Chargor on demand by the Clearing House and until reimbursed shall bear interest in accordance with Clause 1A(2) above.

- (2) The Chargor shall not exercise or be entitled to exercise any voting rights, powers and other rights in respect of the Securities which are held by the Clearing House for the account of the Chargor pursuant to this Deed.

6. **Reinstatement**

If any discharge, release or arrangement is made by the Clearing House in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation, administration or otherwise, without limitation, then the liability of the Chargor and the security created by this Deed will continue or be reinstated as if the discharge, release or arrangement had not occurred.

7. **Warranties and Undertakings**

The Chargor hereby represents and warrants to the Clearing House and undertakes on an ongoing basis that:

- (i) the Chargor is duly incorporated or organised and validly existing under the laws of its jurisdiction of organisation or incorporation;
- (ii) the Chargor and each of its subsidiaries has the power to own its assets and carry on its business as it is being conducted;
- (iii) subject to any legal or equitable interest which any common depository, Clearance System or Custodian Bank may have in any Securities and to any third party's beneficial interest in the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property, the Chargor is and will at all times during the subsistence of the security and security interest hereby constituted, be the sole and lawful owner of, and be entitled to the entire beneficial interest in, the Charged Property free from mortgages or charges (other than as a result of the security created under this Deed, any charge or lien arising in favour of any Clearance System or Custodian Bank and any charge in favour of the Chargor) or other encumbrances and no other person (save as aforesaid) has any rights or interests therein;
- (iv) save as contemplated by Clause 3(2), the Chargor has not sold or agreed to sell or otherwise disposed of or agreed to dispose of, and will not at any time during the subsistence of the security hereby constituted sell or agree to sell or otherwise dispose of or agree to dispose of, the benefit of all or any rights, titles and interest in and to the Charged Property or any part thereof;
- (v) the Chargor has and will at all material times have the necessary power to enable the Chargor to enter into and perform the obligations expressed to be assumed by the Chargor under this Deed;

- (vi) this Deed constitutes legal, valid, binding and enforceable obligations of the Chargor and is a security over, and confers a first security interest in, the Charged Property and every part thereof, effective in accordance with its terms (subject to applicable bankruptcy, resolution, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law));
- (vii) all necessary authorisations and filings to enable or entitle the Chargor to enter into this Deed have been obtained and are in full force and effect and will remain in such force and effect at all times during the subsistence of the security hereby constituted;
- (viii) the execution of this Deed does not violate any agreement to which the Chargor is a party or breach any obligation to which the Chargor is subject and does not conflict with any law or regulation applicable to it (if such conflict would adversely affect the Clearing House's rights under this Deed) or its constitutional documents;
- (ix) it has been and shall at all times remain expressly agreed between the Chargor and each of the Chargor's clients or other persons who are for the time being (or would be, but for the provisions of this Deed) entitled to the entire beneficial interest in all or any parts of the Charged Property that, in relation to any assets from time to time held by the Chargor or delivered to the Chargor for the account of any such client or other person which at any time form part of the Charged Property, the Chargor may, free of any interest of any such client or other person therein which is adverse to the Clearing House, charge or otherwise constitute security over such assets in favour of the Clearing House on such terms as the Clearing House may from time to time prescribe and, in particular but without limitation, on terms that the Clearing House may enforce and retain such charge or other security in satisfaction of or pending discharge of all or any obligations of the Chargor to the Clearing House;
- (x) in no case is the Chargor or the Chargor's client or other person who is for the time being the lawful owner of or person entitled to the entire beneficial interest in any part of the Charged Property, nor will the Chargor, client or other such person be, in breach of any trust or other fiduciary duty in placing or authorising the placing of any Charged Property (or rights, benefits or proceeds forming part of the Charged Property) under this Deed;
- (xi) no corporate actions, legal proceedings or other procedure or steps have been taken in relation to, or notice given in respect of, a composition, compromise, assignment or arrangement with any creditor of the Chargor or in relation to the suspension of payments or moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of, or the appointment of an administrator

to, the Chargor (other than any which will be dismissed, discharged, stayed or restrained within 15 days of their instigation) and no such step is intended by the Chargor (save for the purposes of any solvent re-organisation or reconstruction which has previously been approved by the Clearing House);

- (xii) the Chargor undertakes to abide by the Procedures as in effect from time to time.

8. **Negative Pledge**

- (1) The Chargor hereby undertakes with the Clearing House that at no time during the subsistence of the security hereby constituted will the Chargor, otherwise than:

- (i) in favour of the Clearing House; or
- (iii) with the prior written consent of the Clearing House and in accordance with and subject to any conditions which the Clearing House may attach to such consent,

create, grant, extend or, except in relation to any charge or lien in favour of any Clearance System or Custodian Bank, permit to subsist any mortgage or other fixed security or any floating charge or other security interest on, over or in the Charged Property or any part thereof. The foregoing prohibition shall apply not only to mortgages, other fixed securities, floating charges and security interests which rank or purport to rank in point of security in priority to the security hereby constituted but also to any mortgages, securities, floating charges or security interests which rank or purport to rank *pari passu* therewith or thereafter.

- (2) Sub-paragraph (1) above does not, during the subsistence of the security hereby constituted, operate to prevent the Chargor from continuing to hold a security interest in the Charged Property previously created in favour of the Chargor, *provided always* that the interest in favour of the Chargor shall rank after the security created by this Deed.

9. **Preservation of Charged Property**

- (1) Until the security hereby constituted shall have been discharged, the Chargor shall ensure, unless required by law or regulation to restrict any transfer (in which case the Chargor shall immediately notify the Clearing House of such restrictions), that all of the Charged Property is and at all times remains free from any restriction on transfer.
- (2) The Chargor shall not, to the extent that the same is within the control of the Chargor, permit or agree to any variation of the rights attaching to or conferred by the Charged Property or any part thereof without the prior consent of the

Clearing House in writing.

- (3) The Clearing House shall not have any right of use or re-hypothecation right, in respect of the Charged Property, whether under Regulation 16 of the Financial Collateral Arrangements (No.2) Regulations 2003, the New York Uniform Commercial Code or any applicable Federal law of the United States or otherwise, *provided that* this provision shall not affect the powers of the Clearing House under Clauses 12 (*Power of Sale*) and 13 (*Right of Appropriation*) or any other rights to enforce the security interest herein created against the Charged Property.

10. **Further Assurance**

- (1) In the case of any part of the Charged Property situated in the United States of America, it is acknowledged and agreed by the Chargor that this Deed shall also constitute a security agreement for the purpose of creating a security interest in the Charged Property under applicable provisions of the Uniform Commercial Code or other applicable laws or regulations of the State of New York. For purposes hereof, "**Charged Property situated in the United States of America**" means: (i) in the case of any securities account and/or securities entitlements or other rights or assets or investment property credited to a securities account as financial assets, a securities account maintained with a securities intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; (ii) in the case of any deposit account and/or any amounts credited to a deposit account, a deposit account maintained with a bank whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; and (iii) in the case of any commodity account or any commodity contract credited to a commodity account such commodity account is maintained with a commodity intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC . In furtherance of the foregoing and without limiting the generality of Clause 2 (*Charge*) above, in order to secure the payment, performance and observance of the Secured Obligations, the Chargor hereby grants to the Clearing House a continuing security interest in, right of set-off against, and an assignment to the Clearing House of all of the Charged Property situated in the United States of America and all rights thereto, in each case whether now owned or existing or hereafter acquired or arising and which shall include, without limitation, all of the Chargor's interests in any deposit accounts, investment property and securities entitlements (as such terms are defined in the Uniform Commercial Code of the State of New York; the "**NY UCC**"), together with all proceeds (as defined in the NY UCC) and products of all or any of the property described above.
- (2) The Chargor undertakes promptly to execute and do (at the cost and expense of the Chargor) all such deeds, documents, acts and things as may be necessary or desirable in order for the Clearing House to enjoy a fully perfected

security interest in the whole of the Charged Property, including without limitation the deposit of the Charged Property with a Clearance System or Custodian Bank (as applicable) and the perfection of pledges or transfers under such laws, of whatever nation or territory, as may govern the pledging or transfer of the Charged Property or part thereof or other mode of perfection of this Deed and the security interest expressed to be created hereby. Without limiting the foregoing, the Chargor agrees with and covenants to the Clearing House that with respect to all Charged Property situated in the United States of America consisting of investment property, money, instruments, securities, securities entitlements, other financial assets and commodity contracts (as defined in the NY UCC), such Charged Property shall be held, maintained or deposited, as applicable, in a securities account or commodity account (in the case of commodity contracts) (such that, in each case, the Clearing House shall become the entitlement holder thereof, as defined in the NY UCC) or a deposit account (as defined in the NY UCC), in the case of Charged Property that may be credited to a Deposit Account, in the name of the Clearing House, or, if permitted by the Procedures, may be maintained and held in the Chargor's name at a Chargor Custodian Bank (whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC) which shall have executed and delivered to the Clearing House an agreement whereby such Chargor Custodian Bank agrees that it will comply with entitlement orders of the Clearing House without further consent by the Chargor. Notwithstanding anything to the contrary herein, in respect of any Charged Property situated in the United States of America, the Clearing House shall comply with all non-waivable requirements of the NY UCC with respect to how the secured party must deal with collateral under its control or in its possession.

11. **Enforcement of Security**

(1) On and at any time:

- (i) if a Default Notice is served on the Chargor in accordance with Rule 3 of the Default Rules; or
- (ii) if the Chargor requests the Clearing House to exercise any of its powers under this Deed,

(each such event a "**Default**"), the security created by or pursuant to this Deed is immediately enforceable and the Clearing House may, without notice to the Chargor or prior authorisation from any court, in its absolute discretion:

- (a) enforce all or any part of the security created by this Deed (at the times, in the manner and on the terms it thinks fit) and take possession of (provided that the Clearing House will not be liable, by reason of entering into possession of any Charged Property, to account as mortgagee in possession or for any loss on realisation or for any default

or omission for which a mortgagee in possession may be liable unless such loss, default or omission is caused by the Clearing House's gross negligence or wilful misconduct) and hold, sell, or otherwise dispose of all or any part of the Charged Property (at the time, in the manner and on the terms it thinks fit); and

- (b) whether or not it has appointed a Receiver, exercise all or any of the powers, authorisations and discretions conferred by the Law of Property Act 1925 (as varied or extended by this Deed) on chargees and by this Deed on any Receiver or otherwise conferred by law on chargees or Receivers.
- (2) The power of sale and other powers conferred by section 101 of the Law of Property Act 1925 on mortgagees, as varied and extended by this Deed, shall arise (and the Secured Obligations shall be deemed due and payable for that purpose) on the date of this Deed and shall be exercisable in accordance with Clause 11(1).

12. **Power of Sale**

- (1) If a Default has occurred, the Clearing House shall have and be entitled without prior notice to the Chargor to exercise the power to sell or otherwise dispose of, for any consideration (whether payable immediately or by instalments) as the Clearing House shall think fit, the whole or any part of the Charged Property and may (without prejudice to any right which it may have under any other provision hereof) treat such part of the Charged Property as consists of money as if it were the proceeds of such a sale or other disposal. The Clearing House shall be entitled to apply the proceeds of such sale or other disposal in paying the costs of such sale or other disposal and (subject to the rights or claims of any person entitled in priority to the Clearing House) in or towards the discharge of the Secured Obligations, the balance (if any) to be paid to the Chargor or other persons entitled thereto. Such power of sale or other disposal shall operate as a variation and extension of the statutory power of sale under section 101 of the Law of Property Act 1925.
- (2) The restriction contained in section 103 of the Law of Property Act 1925 on the exercise of the statutory power of sale shall not apply to any exercise by the Clearing House of its power of sale or other disposal. In favour of a purchaser a certificate in writing by an officer or agent of the Clearing House that either or both of such powers has arisen and is exercisable shall be conclusive evidence of that fact.
- (3) Upon any such default or failure as aforesaid the Clearing House shall also have with respect to any part of the Charged Property situated in the United States of America all of the rights and remedies of a secured party under the NY UCC or any other applicable law of the State of New York and all rights provided herein or in any other applicable security, loan or other agreement, all of which

rights and remedies shall to the full extent permitted by law be cumulative.

13. **Right of Appropriation**

- (1) To the extent that any of the Charged Property constitutes "financial collateral" and this Deed and the obligations of the Chargor hereunder constitute a "security financial collateral arrangement" (in each case as defined in, and for the purposes of, the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003 No. 3226), as amended, (the "**Regulations**") the Clearing House shall have the right (at any time following the occurrence of a Default) to appropriate all or any part of such financial collateral in or towards discharge of the Secured Obligations and may exercise such right to appropriate upon giving written notice to the Chargor. For this purpose, the parties agree that the value of such financial collateral so appropriated shall be determined as follows:
- (a) if the financial collateral is listed or traded on a recognised exchange or by reference to a public index, its value will be taken as the value at which it could have been sold on the exchange or which is given in the public index on the date of appropriation; and
 - (b) in any other case, the value of the financial collateral will be such amount as the Clearing House reasonably determines having taken into account advice obtained by it from an independent investment or accountancy firm of national standing selected by it.
- (2) The parties agree that the method of valuation provided for in this Deed shall constitute a commercially reasonable method of valuation for the purposes of the Regulations.

14. **Immediate Recourse**

The Chargor waives any right it may have of first requiring the Clearing House to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Chargor under this Deed. This waiver applies irrespective of any law or any provision of this Deed to the contrary.

15. **Consolidation of Securities**

Subsection (1) of section 93 of the Law of Property Act 1925 shall not apply to this Deed.

16. **Effectiveness of Security**

- (1) This Deed shall be in addition to and shall be independent of every other security which the Clearing House may at any time hold for any of the Secured Obligations. No prior security held by the Clearing House over the whole or any part of the Charged Property shall merge into the security hereby constituted.

- (2) This Deed shall remain in full force and effect as a continuing security unless and until the Clearing House discharges it.
- (3) Nothing contained in this Deed is intended to, or shall operate so as to, prejudice or affect any bill, note, guarantee, mortgage, pledge, charge or other security of any kind whatsoever which the Clearing House may have for the Secured Obligations of any of them or any right, remedy or privilege of the Clearing House thereunder.

17. **Avoidance of Payments**

If the Clearing House considers that any payment or discharge of the Secured Obligations is capable of being avoided or reduced by virtue of any bankruptcy, insolvency, liquidation or similar laws then such payment or discharge shall not be considered to have been made for the purposes of determining whether the Secured Obligations have been irrevocably paid or discharged in full.

18. **Power of Attorney**

The Chargor hereby irrevocably appoints the Clearing House to be the Chargor's attorney and in the Chargor's name and on the Chargor's behalf and as the act and deed of the Chargor to sign, seal, execute, deliver, perfect and do all deeds, instruments, mortgages, acts and things as may be, or as the Clearing House may consider to be, requisite for carrying out any obligation imposed on the Chargor under Clause 10 (*Further Assurance*) above, or for enabling the Clearing House to exercise its power of sale or other disposal referred to in Clause 12 (*Power of Sale*) above or for carrying out any such sale or other disposal made under such power into effect, or exercising any of the rights and powers referred to in Clause 9 (*Preservation of Charged Property*) above, including without limitation the appointment of any person as a proxy of the Chargor. The Chargor hereby undertakes to ratify and confirm all things done and documents executed by the Clearing House in the exercise of the power of attorney conferred by this Clause.

19. **Receivers and Administrators**

- (1) At any time after having been requested to do so by the Chargor or after this Deed becomes enforceable in accordance with Clause 11 (*Enforcement of Security*) above the Clearing House may by deed or otherwise (acting through an authorised officer of the Clearing House), without prior notice to the Chargor:
 - (a) appoint one or more persons to be a Receiver of the whole or any part of the Charged Property;
 - (b) appoint one or more Receivers of separate parts of the Charged Property respectively;

- (c) remove (so far as it is lawfully able) any Receiver so appointed; and
 - (d) appoint another person(s) as an additional or replacement Receiver(s).
- (2) Each person appointed to be a Receiver pursuant to sub-paragraph (1) above will be:
- (a) entitled to act individually or together with any other person appointed or substituted as Receiver;
 - (b) for all purposes deemed to be the agent of the Chargor which shall be solely responsible for his acts, defaults and liabilities and for the payment of his remuneration and no Receiver shall at any time act as agent for the Clearing House; and
 - (c) entitled to remuneration for his services at a rate to be fixed by the Clearing House from time to time (without being limited to the maximum rate specified by law including the Law of Property Act 1925).
- (3) The powers of appointment of a Receiver shall be in addition to all statutory and other powers of appointment of the Clearing House under the Law of Property Act 1925 (as extended by this Deed) or otherwise and such powers shall remain exercisable from time to time by the Clearing House in respect of any part of the Charged Property.
- (4) Every Receiver shall (subject to any restrictions in the instrument appointing him but notwithstanding any winding-up or dissolution of the Chargor) have and be entitled to exercise, in relation to the Charged Property in respect of which he was appointed, and as varied and extended by the provisions of this Deed (in the name of or on behalf of the Chargor or in his own name and, in each case, at the cost of the Chargor):
- (a) all the powers conferred by the Law of Property Act 1925 on mortgagors and on mortgagees in possession and on receivers appointed under that Act;
 - (b) all the powers of an administrative receiver set out in Schedule 1 to the Insolvency Act 1986 (whether or not the Receiver is an administrative receiver);
 - (c) all the powers and rights of an absolute owner and power to do or omit to do anything which the Chargor itself could do or omit to do;
 - (d) the power to delegate (either generally or specifically) the powers, authorities and discretions conferred on it by this Deed (including the

power of attorney) on such terms and conditions as it shall see fit. Such delegation shall not preclude either the subsequent exercise or any subsequent delegation or any revocation of such power, authority or discretion by the Receiver itself; and

- (e) the power to do all things (including bringing or defending proceedings in the name or on behalf of the Chargor) which seem to the Receiver to be incidental or conducive to:
 - (i) any of the functions, powers, authorities or discretions conferred on or vested in him;
 - (ii) the exercise of any rights, powers and remedies of the Clearing House provided by or pursuant to this Deed or by law (including realisation of all or any part of the Charged Property); or
 - (iii) bringing to his hands any assets of the Chargor forming part of, or which when got in would be, Charged Property.

- (5) The receipt of the Clearing House or any Receiver shall be a conclusive discharge to a purchaser and, in making any sale or disposal of any of the Charged Property or making any acquisition, the Clearing House or any Receiver may do so for such consideration, in such manner and on such terms as it thinks fit.
- (6) No purchaser or other person dealing with the Clearing House or any Receiver shall be bound to inquire whether the right of the Clearing House or such Receiver to exercise any of its powers has arisen or become exercisable or be concerned with any propriety or regularity on the part of the Clearing House or such Receiver in such dealings.
- (7) Any liberty or power which may be exercised or any determination which may be made under this Deed by the Clearing House or any Receiver may be exercised or made in its absolute and unfettered discretion without any obligation to give reasons.

20. **No liability**

Neither the Clearing House nor any receiver appointed pursuant to this Deed shall be liable by reason of: (a) taking any action permitted by this Deed; or (b) any neglect or default in connection with the Charged Property; or (c) the taking possession or realisation of all or any part of the Charged Property, except in the case of gross negligence or wilful default upon its part.

21. **Remedies, Time or Indulgence**

- (1) The rights, powers and remedies provided by this Deed are cumulative and are not, nor are they to be construed as, exclusive of any right of set-off or other rights, powers and remedies provided by law.
- (2) The obligations of the Chargor under this Deed shall not be affected by any act, omission or circumstance which, but for this provision, might operate to release or otherwise exonerate the Chargor from its obligations under this Deed or affect such obligations including (without limitation and whether or not known to the Chargor or the Clearing House):
 - (a) any unenforceability, illegality, invalidity or non-provability of any obligation of the Chargor or any other person; or
 - (b) any incapacity or lack of power, authority or legal personality or dissolution or change in the members or status of the Chargor or any other person.
- (3) No failure on the part of the Clearing House to exercise, or delay on its part in exercising, any of the rights, powers and remedies provided by this Deed or by law (collectively "**the Clearing House's Rights**") shall operate as a waiver thereof, nor shall any single or partial waiver of any of the Clearing House's Rights preclude any further or other exercise of that or any other of the Clearing House's Rights.
- (4) The Clearing House may in its discretion grant time or other indulgence or make any other arrangement, variation or release with any person not party hereto (irrespective of whether such person is liable with the Chargor) in respect of the Secured Obligations or in any way affecting or concerning them or any of them or in respect of any security for the Secured Obligations or any of them, without in any such case prejudicing, affecting or impairing the security hereby constituted, or any of the Clearing House's Rights or the exercise of the same, or any indebtedness or other liability of the Chargor to the Clearing House.

22. **Costs, Charges and Expenses**

All costs, charges and expenses of the Clearing House incurred in the exercise of any of the Clearing House's Rights, or in connection with the execution of or otherwise in relation to this Deed or in connection with the perfection or enforcement of all security hereby constituted shall be reimbursed to the Clearing House by the Chargor on demand on a full indemnity basis together with interest from the date of the same having been incurred to the date of payment at the rate referred to in Clause 1A(2) above.

23. **Accounts**

All monies received, recovered or realised by the Clearing House under this Deed (including the proceeds of any conversion of currency) may in the discretion of the Clearing House be credited to any suspense or impersonal account and may be held in such account for so long as the Clearing House shall think fit (with interest accruing thereon at such rate, if any, as the Clearing House may deem fit) pending their application from time to time (as the Clearing House shall be entitled to do in its discretion) in or towards the discharge of any of the Secured Obligations.

24. **Currency**

- (1) For the purpose of or pending the discharge of any of the Secured Obligations the Clearing House may convert any monies received, recovered or realised or subject to application by the Clearing House under this Deed (including the proceeds of any previous conversion under this Clause) from their existing currency of denomination into such other currency of denomination as the Clearing House may think fit, and any such conversion shall be effected at such commercial spot selling rate of exchange then prevailing for such other currency against the existing currency as the Clearing House may in its discretion determine.
- (2) References herein to any currency extend to any funds of that currency and for the avoidance of doubt funds of one currency may be converted into different funds of the same currency.

25. **Notices**

- (1) Any notice or demand (including any Default Notice) requiring to be served on the Chargor by the Clearing House hereunder may be served on any of the officers of the Chargor personally, or by letter addressed to the Chargor or to any of its officers and left at its registered office or any one of its principal places of business, or by posting the same by letter addressed in any such manner as aforesaid to such registered office or any such principal place of business.
- (2) Any notice or demand (including any Default Notice) sent by post in accordance with sub-paragraph (1) of this Clause shall be deemed to have been served on the Chargor at 10 a.m. Greenwich Mean Time on the business day next following the date of posting. In proving such service by post it shall be sufficient to show that the letter containing the notice or demand (including any Default Notice) was properly addressed and posted and such proof of service shall be effective notwithstanding that the letter was in fact not delivered or was returned undelivered.

26. **Provisions Severable**

Each of the provisions contained in this Deed shall be severable and distinct from one another and if at any time any one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of each of the remaining provisions of this Deed shall not in any way be affected, prejudiced or impaired thereby.

27. **Clearing House's Discretions**

Any liberty or power which may be exercised or any determination which may be made hereunder by the Clearing House may (save where stated to the contrary) be exercised or made in the absolute and unfettered discretion of the Clearing House which shall not be under any obligation to give reasons thereof.

28. **Third Party Rights**

A person who is not a party to this Deed has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this Deed.

29. **Law and Jurisdiction**

This Deed, and any non-contractual obligations arising herefrom, shall be governed by and construed in accordance with English law, and the Chargor hereby irrevocably submits to the non-exclusive jurisdiction of the English courts; provided that with respect to issues arising as a result of the provisions of Clause 10(1) above or the use of this Deed as a security agreement as provided therein, this Deed shall be governed by and construed in accordance with applicable laws of the State of New York.

The Chargor

Executed as a **DEED** by

The Chargor

[CHARGOR NAME]

.....
Signature of Director

.....
Name of Director

.....
Date

.....
Signature of Director/Secretary

.....
Name of Director/Secretary

.....
Date

**The Clearing House
LCH.Clearnet Limited**

.....
Signature of Authorised Signatory

.....
Name of Authorised Signatory

.....
Title of Authorised Signatory

.....
Date

.....
Signature of Authorised Signatory

.....
Name of Authorised Signatory

.....
Title of Authorised Signatory

.....
Date

Dated _____

and

LCH.CLEARNET LIMITED

**CHARGE BY CLEARING MEMBER
SECURING OWN OBLIGATIONS**

**APPENDIX 3
Security Deed**

SECURITY DEED

CONTENTS

Clause	Page
1. Definitions and Interpretation	1
2. Undertaking to Pay	3
3. Security.....	3
4. Multiple Deeds	3
5. Restrictions and Further Assurance.....	4
6. Payments	4
7. Enforcement and Remedies.....	4
8. Provisions Relating to Client.....	5
9. Amendments to the Security Deed.....	5
10. Additional Clients.....	6
11. Saving Provisions	6
12. Discharge of Security	7
13. Miscellaneous Provisions	8
Schedule 1 Rights of Client	10
Schedule 2 Clients.....	11
Schedule 3 Additional Security Deed	12
1. Definitions and Interpretation	12
2. Operative Provisions	13
3. Multiple Deeds	13

THIS SECURITY DEED is dated [*Insert Date of Execution*] and made by way of deed poll by [CLEARING MEMBER] in its capacity as chargor (the "**Chargor**").

WHEREAS:

- (A) In order to facilitate the clearing of certain transactions with LCH.Clearnet Limited (the "**Clearing House**"), the Chargor has entered into one or more agreements with one or more of its clients and may enter into further agreements with such clients and/or one or more agreements with further clients, in each case that govern the terms upon which the Chargor will act as Clearing Member in respect of Client Clearing Business of that client (each such agreement, together with any related collateral, security or margining agreement, a "**Clearing Agreement**").
- (B) The Chargor is executing this Security Deed in order to maximise the ability to move positions corresponding to transactions under the Clearing Agreements to Backup Clearing Members upon the occurrence of an Enforcement Event or to provide for certain receivables to be delivered from the Clearing House to the Clients directly.

It is agreed as follows:

1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions:**

Capitalised terms used but not defined in this Security Deed including in the Recitals shall have the meaning given to them in the LCH Rules. In addition, the following expressions shall have the following meanings:

"**Associated LCH Transactions**" means, in respect of a Client, the Contracts entered into by the Chargor with the Clearing House on behalf of such Client.

"**Authorisation Date**" means the date falling 6 months after 25 October 2013, unless the Clearing House notifies the Chargor that the Authorisation Date will be a date (the "**New Authorisation Date**") other than the then current Authorisation Date, in which case the Authorisation Date will be such New Authorisation Date. For the avoidance of doubt multiple notifications may be made and the New Authorisation Date specified in the last such notification will be the Authorisation Date.

"**Charge**" means the security interest created or expressed to be created by this Security Deed.

"**Charged Assets**" means the assets subject, or expressed to be subject, to the Charge or any part of those assets.

"**Clearing Agreement**" has the meaning ascribed to such term in Recital (A) to this Security Deed.

"**Clearing Default**" means the Chargor becoming a defaulter for the purposes of Rule 4 of the LCH Default Rules.

"**Clearing House**" has the meaning ascribed to such term in Recital (A) to this Security Deed.

"Client" means each of the clients listed in Schedule 2 to this Security Deed being, in each case, a Clearing Client who is party to a Clearing Agreement. For the avoidance of doubt, an individual Clearing Client may be party to more than one Clearing Agreement with the Chargor (due to such Clearing Client (i) receiving Client Clearing Services from the Chargor in respect or more than one Service and/or (ii) being a Clearing Client in respect of whom the Chargor has opened more than one Client Account relating to a Relevant Client Clearing Business), and in each such capacity the relevant Clearing Client will constitute a separate "Client" for the purposes of this Security Deed and will be separately identified (including with details of the relevant Service and details of the LCH identifier for the relevant Client Account) in Schedule 2 to this Security Deed.

"Effective Date" means the Authorisation Date or the date of this Security Deed, whichever is later.

"Enforcement Event" means the occurrence of a Clearing Default in relation to the Chargor in accordance with the LCH Rules.

"Insolvency Act" means the Insolvency Act 1986.

"LCH Rules" means the rules, regulations, procedures or agreements (including the LCH General Regulations and the LCH Default Rules), applicable to the Chargor and/or Associated LCH Transactions, in each case as published by the Clearing House and as the same may be amended from time to time.

"Liabilities" means all present and future obligations, moneys, debts and liabilities due, owing or incurred by the Chargor to a Client under or in connection with the Transaction Documents.

"LPA" means the Law of Property Act 1925.

"Relevant Account Property" means, in respect of a Client, the Account Balance relating to such Client, as determined by the Clearing House in accordance with the LCH Rules following an Enforcement Event.

"Relevant Clearing Agreement" means, in relation to a Client, the Clearing Agreement to which such Client is a party.

"Relevant Client Clearing Return" means, in respect of a Client, the Client Clearing Entitlement relating to such Client, as determined by the Clearing House in accordance with the LCH Rules following an Enforcement Event.

"Security" means a mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.

"Transaction Documents" means this Security Deed and the Relevant Clearing Agreement.

1.2 **Construction:**

1.2.1 Unless a contrary indication appears, any reference in this Security Deed to:

- (a) "**assets**" includes present and future properties, revenues and rights of every description;
- (b) the "**Chargor**", a "**Client**" or any "**party**" shall be construed so as to include its successors in title and permitted transferees;
- (c) an agreement, confirmation or instrument is to a reference to that agreement or instrument as amended, novated, supplemented, extended, restated (however fundamentally and whether or not more onerous) or replaced;
- (d) a "**person**" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
- (e) a "**regulation**" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation;
- (f) the singular includes the plural and vice versa; and
- (g) a provision of law is a reference to that provision as amended or re-enacted.

1.2.2 Clause and Schedule headings are for ease of reference only.

2. **UNDERTAKING TO PAY**

The Chargor undertakes to pay each of its Liabilities when due in accordance with its terms.

3. **SECURITY**

With effect from the Effective Date, the Chargor, with full title guarantee and as security for the payment of all Liabilities, charges absolutely in favour of each Client all its present and future right, title and interest in and to the Relevant Client Clearing Return and the Relevant Account Property.

4. **MULTIPLE DEEDS**

This Security Deed shall be treated as if it were a separate deed in favour of each of the Clients listed in Schedule 2 to this Security Deed, as if the Chargor had executed a separate deed in favour of each such Client so that this Security Deed confers rights severally in favour of each Client.

5. RESTRICTIONS AND FURTHER ASSURANCE

5.1 Security

The Chargor agrees that it shall not create or permit to subsist any Security over any Charged Assets except for the Charge.

5.2 Distribution of Charged Property

The Chargor hereby acknowledges and agrees that, following the occurrence of a Clearing Default, the Clearing House shall act in accordance with the LCH Rules and any other laws and regulations applicable to it in determining how the Charged Assets are to be distributed and that such action by the Clearing House shall be without prejudice to any protections afforded to it pursuant to the LCH Rules and any such other laws and regulations.

5.3 Margining

The Chargor agrees that, prior to the operation of Clause 13.1, it shall provide margin in respect of any Associated LCH Transactions to the Clearing House on an Individual Segregated Account basis or an Omnibus Segregated Account basis (as may be agreed between the Chargor and the relevant Client) in accordance with the LCH Rules.

6. PAYMENTS

6.1 No Enforcement Event

Subject as otherwise provided in this Security Deed, and for so long as no Enforcement Event has occurred, the Chargor shall be entitled to receive and retain all payments or transfers made to it in respect of the relevant Client Account in accordance with the LCH Rules. For the avoidance of doubt, the Chargor shall not be entitled to deal with the Charged Assets at any time while the Charge is in effect.

6.2 Post Enforcement Event

Following the occurrence of an Enforcement Event, the Client shall be entitled to receive directly from the Clearing House all Charged Assets and payments or transfers made in respect of a Charged Asset.

7. ENFORCEMENT AND REMEDIES

7.1 Enforcement Event

The Security created on the Effective Date shall only be enforceable, and the powers conferred by Section 101 of the LPA as varied and extended by this Security Deed shall only be exercisable, following the occurrence of an Enforcement Event.

7.2 **Power of Sale**

The statutory power of sale and the other statutory powers conferred on mortgagees by Section 101 of the LPA as varied and extended by this Security Deed shall arise on the Effective Date of this Security Deed.

7.3 **Section 103 LPA**

Section 103 of the LPA shall not apply to this Security Deed.

8. **PROVISIONS RELATING TO CLIENT**

8.1 **Client's Rights**

At any time after the occurrence of an Enforcement Event, the Client shall have the rights set out in the Schedule hereto.

8.2 **Application of Proceeds**

Subject to Clause 13.1, all amounts or assets received or recovered by the Client in the exercise of its rights under this Security Deed shall be applied in the following order: (i) in or towards the payment of the Liabilities in such order as the Client thinks fit, but in any case acting in good faith and in a commercially reasonable manner, and (ii) in payment of any surplus to the Chargor.

8.3 **Power of Attorney**

The Chargor by way of security irrevocably appoints the Client as its attorney (with full power of substitution), on its behalf and in its name or otherwise, in such manner as the attorney thinks fit, but in any case acting in good faith and in a commercially reasonable manner, to exercise (following the occurrence of an Enforcement Event only) any of the rights conferred on the Client in relation to the Charged Assets or under the LPA or the Insolvency Act. The Chargor ratifies and confirms and agrees to ratify and confirm whatever any such attorney shall do in the exercise or purported exercise of the power of attorney granted by it in this Clause 8.3.

9. **NOTIFICATION OF NEW AUTHORISATION DATE**

9.1 The Chargor agrees that the Clearing House may notify the Chargor of a New Authorisation Date by publishing a notification on the Clearing House's website.

9.2 The Chargor agrees that notice of a New Authorisation Date will be deemed to have been delivered to the Chargor upon the publication of a notice of such New Authorisation Date on the Clearing House's website.

10. **AMENDMENTS TO THE SECURITY DEED**

The Chargor may from time to time amend or revoke the terms of this Security Deed without the Client's consent, provided, however, that the Chargor undertakes:

- 10.1 not to amend or revoke this Security Deed without the prior written consent of the Clearing House; and
- 10.2 to amend this Security Deed from time to time in order to reflect such changes as may be prescribed by the Clearing House to the "Security Deed" (as defined in the LCH Rules, and upon which this Security Deed is based) from time to time in accordance with the LCH Rules.

11. **ADDITIONAL CLIENTS**

The Chargor may, after the date of this Security Deed, grant a charge on the terms of this Security Deed to one or more additional clients. On each occasion when the Chargor wishes to exercise this right, it will execute a further security deed substantially in the form set out in Schedule 3 to this Security Deed (an "**Additional Security Deed**") and will deliver to the Clearing House a copy of such Additional Security Deed, including an annex which sets out the details of the relevant client(s). For the avoidance of doubt, an Additional Security Deed may be given in respect of one or more clients.

12. **SAVING PROVISIONS**

12.1 **Continuing Security**

Subject to Clause 13, the Charge is continuing security and will extend to the ultimate balance of the Liabilities, regardless of any intermediate payment or discharge in whole or in part.

12.2 **Reinstatement**

If any discharge, release or arrangement (whether in respect of the obligations of the Chargor or any security for those obligations or otherwise) is made by the Client in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation or otherwise, without limitation, then the liability of the Chargor and the Charge shall continue or be reinstated as if the discharge, release or arrangement had not occurred.

12.3 **Waiver of Defences**

Neither the obligations of the Chargor under this Security Deed nor the Charge will be affected by an act, omission, matter or thing which, but for this Clause 12.3, would reduce, release or prejudice any of its obligations under any Transaction Document or the Charge (without limitation and whether or not known to the Chargor or the Client) including:

- 12.3.1 any time, waiver or consent granted to, or composition with, the Chargor or other person;
- 12.3.2 the release of the Chargor or any other person under the terms of any composition or arrangement with any creditor of any affiliate;
- 12.3.3 the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over

assets of, the Chargor or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;

12.3.4 any amendment, novation, supplement, extension, restatement (however fundamental and whether or not more onerous) or replacement of any Transaction Document or any other document or security; or

12.3.5 any insolvency or similar proceedings.

12.4 Immediate Recourse

The Chargor waives any right it may have of first requiring the Client (or any trustee or agent on its behalf) to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Chargor under this Security Deed. This waiver applies irrespective of any law or any provision of a Transaction Document to the contrary.

12.5 Additional Security

The Charge is in addition to and is not in any way prejudiced by any other guarantees or security now or subsequently held by the Client.

13. DISCHARGE OF SECURITY

13.1 Final Redemption

Immediately upon there no longer being any Liabilities remaining (or, if earlier, immediately upon it no longer being possible for an Enforcement Event to occur), the Client shall be deemed to have immediately released, reassigned or discharged (as appropriate) the Charged Assets from the Charge and therefore:

13.1.1 the Chargor may retain for its own account; and

13.1.2 the Client shall therefore promptly pay or transfer to the Chargor,

any amounts or other assets received by such party from the Clearing House in respect of the Charged Assets. For the avoidance of doubt, it is acknowledged that the Chargor's rights under this Clause 13 shall constitute an equity of redemption (and therefore a proprietary interest to the extent of such equity of redemption) in the Charged Assets and any amounts or other assets the subject of such rights shall be returned by the Client to the Chargor.

13.2 Consolidation

Section 93 of the LPA shall not apply to the Charge.

14. MISCELLANEOUS PROVISIONS

14.1 Payments

All payments by the Chargor under this Security Deed (including damages for its breach) shall be made to such account, with such financial institution and in such other manner as the Client may direct.

14.2 Remedies and Waivers

No failure to exercise, nor any delay in exercising, on the part of the Client any right or remedy under this Security Deed shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Security Deed are cumulative and not exclusive of any rights or remedies provided by law.

14.3 Partial Invalidity

If, at any time, any provision of this Security Deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

14.4 Governing Law

This Security Deed and any non-contractual obligations arising out of or in connection with it are governed by English law.

14.5 Jurisdiction

In relation to any proceedings, each party to this Security Deed irrevocably submits to the exclusive jurisdiction of the courts of England and waives any objection to proceedings in such courts on the grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum. Each such submission is made for the benefit of the other party and shall not affect the right of any party to take proceedings in any other court of competent jurisdiction nor shall the taking of proceedings in any court of competent jurisdiction preclude any party from taking proceedings in any other court of competent jurisdiction (whether concurrently or not) unless precluded by law.

14.6 [Agent for Service of Process; Chargor

The Chargor hereby irrevocably appoints [Name of Agent] of [Address in England] to receive service of process on its behalf as its authorised agent for service of process in England. If for any reason such agent ceases to be such agent for service of process, the Chargor shall forthwith appoint a new agent for service of process in England. Nothing in this Security Deed shall affect the right to serve process in any other matter permitted by law.]

This Security Deed has been delivered on the date stated at the beginning of this Security Deed.

[CHARGOR]

[INSERT APPROPRIATE SIGNATURE BLOCK]

SCHEDULE 1 RIGHTS OF CLIENT

Following the occurrence of an Enforcement Event, the Client shall have the right, either in its own name or in the name of the Chargor or otherwise and in such manner and upon such terms and conditions as the Client thinks fit, but in any case, acting in good faith and in a commercially reasonable manner, and either alone or jointly with any other person:

1. **Take possession:** to take possession of, get in and collect the Charged Assets and to require payment to it of revenues deriving therefrom;
2. **Deal with Charged Assets:** to sell, transfer, assign, exchange or otherwise dispose of or realise the Charged Assets to any person either by public offer or auction, tender or private contract and for a consideration of any kind (which may be payable or delivered in one amount or by instalments spread over a period or deferred);
3. **Borrow money:** to borrow or raise money either unsecured or on the security of the Charged Assets (either in priority to the Charge or otherwise);
4. **Rights of ownership:** to manage and use the Charged Assets and to exercise and do (or permit the Chargor or any nominee of it to exercise and do) all such rights and things as the Client would be capable of exercising or doing if it were the absolute beneficial owner of the Charged Assets;
5. **Claims:** to settle, adjust, refer to arbitration, compromise and arrange any claims, accounts, disputes, questions and demands with or by any person relating to the Charged Assets;
6. **Legal actions:** to bring, prosecute, enforce, defend and abandon actions, suits and proceedings in relation to the Charged Assets;
7. **Redemption of Security:** to redeem any Security (whether or not having priority to the Charge) over the Charged Assets and to settle the accounts of any person with an interest in the Charged Assets; and
8. **Other powers:** to do anything else it may think fit for the realisation of the Charged Assets or incidental to the exercise of any of the rights conferred on the Client under or by virtue of any Transaction Document, the LPA or the Insolvency Act.

**SCHEDULE 2
CLIENTS**

CLIENT NAME	RELEVANT SERVICE	CLIENT ACCOUNT (LCH IDENTIFIER)

**SCHEDULE 3
ADDITIONAL SECURITY DEED**

THIS SECURITY DEED is dated [*Insert Date of Execution*] and made by way of deed poll by [CLEARING MEMBER] in its capacity as chargor (the "**Chargor**").

WHEREAS:

- (A) In order to facilitate the clearing of certain transactions with LCH.Clearnet Limited (the "**Clearing House**"), the Chargor has entered into one or more agreements with one or more clients (each such agreement, a "**Clearing Agreement**").
- (B) The Chargor has previously entered by deed poll into a security deed dated [•] in favour of certain of its clearing clients (such security deed as amended from time to time, after as well as before the date of this Security Deed, the "**Original Security Deed**").
- (C) The Chargor is executing this Security Deed in order to maximise the ability of one or more additional Client(s) to move positions corresponding to transactions under the Clearing Agreements to Backup Clearing Members upon the occurrence of an Enforcement Event or to provide for certain receivables to be delivered from the Clearing House to the Clients directly.

It is agreed as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions:

- (a) For the purposes of this Security Deed, the following defined terms shall have the following meanings:

"**Client**" means each of the additional client(s) listed in the Annex to this Security Deed. For the avoidance of doubt, an individual Clearing Client may be party to more than one Clearing Agreement with the Chargor (due to such Clearing Client (i) receiving Client Clearing Services from the Chargor in respect or more than one Service and/or (ii) being a Clearing Client in respect of whom the Chargor has opened more than one Client Account relating to a Relevant Client Clearing Business), and in each such capacity the relevant Clearing Client will constitute a separate "Client" for the purposes of this Security Deed (save where the relevant Clearing Client in the relevant capacity is already a client for the purposes of the Original Security Deed or a another security deed entered into prior to the date of this Security Deed on substantially the same terms as this Security Deed) and will be separately identified (including with details of the relevant Service and details of the LCH identifier for the relevant Client Account) in the Annex to this Security Deed.

"**Effective Date**" means the Authorisation Date or the date of this Security Deed, whichever is later;

- (b) Capitalised terms used but not defined in this Security Deed including in the Recitals shall have the meaning given to them in the Original Security Deed.

1.2 **Construction:**

- (a) Unless a contrary indication appears, any reference in this Security Deed to:
 - (i) "**assets**" includes present and future properties, revenues and rights of every description;
 - (ii) the "**Chargor**", a "**Client**" or any "**party**" shall be construed so as to include its successors in title and permitted transferees;
 - (iii) an agreement, confirmation or instrument is to a reference to that agreement or instrument as amended, novated, supplemented, extended, restated (however fundamentally and whether or not more onerous) or replaced;
 - (iv) a "**person**" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
 - (v) a "**regulation**" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation;
 - (vi) the singular includes the plural and vice versa; and
 - (vii) a provision of law is a reference to that provision as amended or re-enacted.
- (b) Clause and Schedule headings are for ease of reference only.

2. **OPERATIVE PROVISIONS**

With effect from the Effective Date, this Security Deed is entered into on the same terms as the Original Security Deed, and each Client listed in the Annex to this Security Deed shall have the same rights and protections (subject to the same conditions and qualifications) as a "Client" under the Original Security Deed.

3. **MULTIPLE DEEDS**

The Chargor agrees that, where there is more than one Client listed in the Annex to this Security Deed, this Security Deed shall be treated as if it were a separate deed in favour of each such Client, as if the Chargor had executed a separate deed in favour of each such Client.

This Security Deed has been delivered on the date stated at the beginning of this Security Deed.

[CHARGOR]

[INSERT APPROPRIATE SIGNATURE BLOCK]

**ANNEX
CLIENTS**

CLIENT NAME	RELEVANT SERVICE	CLIENT ACCOUNT (LCH IDENTIFIER)