Czech Republic

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Prepared by: Allen & Overy (Czech Republic) LLP, organizační složka	
Coverage: EFET Combined Power and Gas Legal Opinion	
Date of opinion: 17 January 2023	

Summary

Types of Counterparty *What types of counterparty are covered by the opinion?*	Entities organized and existing in the Czech Republic, which may be: a) a bank, b) the Czech National Bank, c) a trading company in the form of a limited liability company, a joint-stock company, a general commercial partnership, a limited partnership or a European company, d) a securities dealer, e) an insurance company, f) an investment company, g) an investment fund with legal capacity, h) a municipality, i) a region, j) an association of local government.	Pages 6 – 8
Types of Transaction *What types of transaction are eligible for close-out netting?*	In order for receivables (claims) from the relevant contracts to be eligible for close-out netting, the subject-matter of such contracts must either be cash, investment instruments, emission allowances or commodities, as well as rights and claims related to those contracts, or such receivables must be claims either from a financial collateral arrangement or from a similar legal relation under foreign law. Certain purely physically settled derivative products may not satisfy the definition of investment instruments and will not constitute investment instruments altogether. This means that although some Individual Contracts are not eligible for close-out netting by virtue of being investment instruments, they are nevertheless eligible because they relate to a commodity, i.e. by virtue of their subject-matter being a	Pages 23 – 24

	commodity or an emission allowance.	
Automatic Early Termination *Does the opinion require or recommend that automatic early termination applies to a counterparty organised in the jurisdictions?*	We do not recommend electing Automatic Early Termination. If elected, the Automatic Early Termination provisions of each General Agreement would be enforceable as a matter of Czech law in insolvency proceedings in respect of a party that is a Czech Entity. However, its election results in unnecessary uncertainty as to when exactly termination occurs as it is normally difficult to determine exactly when a party becomes insolvent.	Pages 17 – 21
Early termination provision *Is the early termination provision of the agreement enforceable in the jurisdiction?*	The early termination provision is enforceable in the Czech Republic.	Pages 17 – 21
Close-out netting *Is the close-out netting provision of the agreement enforceable in a local insolvency?*	The provisions of each General Agreement providing for the netting of termination values in determining a single lump-sum termination amount would be enforceable under Czech law in insolvency proceedings in respect of a party that is a Czech Entity, regardless of whether or not Individual Contracts are terminated due to the relevant Czech Entity's insolvency or not. This conclusion would not be affected by the fact that the Czech Entity entered into the General Agreement on a multibranch basis. Where the Base Currency is not the Czech Koruna (CZK) under a General Agreement and a party that is a Czech Entity becomes subject to insolvency proceedings, Czech law is likely to require that such net termination amount is converted into CZK before it is paid.	Pages 22 – 28, 36 – 37
Characterization of collateral *Would laws of jurisdiction characterize transfer of collateral as effecting an unconditional transfer of ownership or is there risk of re-characterizing such transfer as creating a security interest?*	We believe there is no risk of re-characterization of the transfer as the creation of security interest.	Pages 36 – 38
Further action required *Is any action required to ensure that ownership title continues to rest with Party B?*	No further actions need to be undertaken to ensure that the Transferee has continuing title in the collateral received.	Page 37
Amendments necessary *Are there any recommended amendments to the standard documents?*	• If Automatic Early Termination is elected, we recommend agreeing at least a 30 day grace period under § 10.5(c)(iv) of a General Agreement commencing on the filing of the petition by a creditor. Another option would be to remove the petition as a trigger of Early Automatic Termination altogether and specify that Individual Contracts will terminate automatically when the insolvency court makes a declaration of insolvency. • We recommend amending § 10.5(c) of each General Agreement so that the insolvency of a Mutual Fund or a Sub-Fund is covered by adding the following wording in § 10.5(c) of each General Agreement following the words	Page 18 Pages 20 – 21

	"winding-up or liquidation" in item (iv): *"or a [mutual fund]/[SICAV]/[sub-fund]* [1] *to the assets of which Individual Contracts relate managed by a party has instituted against it a proceeding seeking a judgment of bankruptcy".* • Any payments in non-Czech currencies to non-residents may be restricted for a maximum period of 30 days unless prolonged by the approval of the Chamber of Deputies of the Parliament of the Czech Republic should a state of emergency in the foreign exchange economy be declared by the Czech government or its prime minister. Parties may include an additional Material Reason for situations when a Czech Entity would not be able to perform its obligations under the General Agreement or Individual Contracts due to the declaration of a state of emergency. The language for this purpose may be as follows: *"Due to a state of emergency (in Czech, nouzový stav) having been declared by the government of the Czech Republic, it becomes unlawful for a party (the other party being the Terminating Party) to perform any contingent or other obligation which that party has under any Individual Contract."*	Page 27
Other remarks *Does the opinion specify issues that you deem to be of specific interest in negotiating an agreement with a counterparty in the jurisdiction?*	No other remarks.	

[1] Delete as applicable.

MEMORANDUM OF LAW
FOR THE EUROPEAN FEDERATION OF ENERGY TRADERS

Enforceability under Czech Law of Close-out Netting Provisions under the EFET General Agreements Concerning the Delivery and Acceptance of Electricity and Natural Gas and Validity and Enforceability of Collateral Arrangements under the EFET Credit Support Annexes to the EFET General Agreements

17 January 2023

1. INTRODUCTION

The European Federation of Energy Traders (the **EFET**) asked us to prepare a legal opinion considering, among others, the enforceability under Czech law of close-out netting provisions of the EFET General Agreements Concerning the Delivery and Acceptance of Electricity and Natural Gas and the validity and enforceability of collateral arrangements under each EFET Credit Support Annex to the EFET General Agreements.

2. SUMMARY OF CONCLUSIONS

On the basis of the assumptions and subject to the qualifications set out in this memorandum, our conclusions are that:

(a) Assuming that the parties have not selected Automatic Early Termination, the provisions of each General Agreement entitling a non-defaulting party (the Terminating Party) to terminate all Individual Contracts in insolvency proceedings in respect of a counterparty that is a Czech Entity would be enforceable as a matter of Czech law.

(b) If elected, the Automatic Early Termination provisions of each General Agreement would be enforceable as a matter of Czech law in insolvency proceedings in respect of a party that is a Czech Entity.

(c) The provisions of each General Agreement providing for the netting of termination values in determining a single lump-sum termination amount would be enforceable under Czech law in insolvency proceedings in respect of a party that is a Czech Entity, regardless of whether or not Individual Contracts are terminated due to the relevant Czech Entity's insolvency or not. While some Individual Contracts are not eligible for close-out netting by virtue of being investment instruments, they are nevertheless eligible because they relate to a commodity, i.e., by virtue of their subject-matter being a commodity.

(d) Enforceability of the determination of a single lump-sum termination amount under Czech law in insolvency proceedings is not subject to a requirement that parties to an agreement containing such determination must fall within certain class or possess a special status (i.e. they do not have to hold eligible financial counterparty status), as is the case of financial collateral arrangements.

(e) Where the parties select a Base Currency other than the Czech Koruna (**CZK**) under a General Agreement and a party that is a Czech Entity becomes subject to insolvency proceedings, Czech law is likely to require that such net termination amount is converted into CZK before it is paid.

(f) The conclusions relating to the enforceability of close-out netting in insolvency proceedings in respect of a party that is a Czech Entity would not be affected by the fact that the Czech Entity entered into the General Agreement on a multibranch basis.

(g) Upon the start of insolvency proceedings in relation to the Foreign Counterparty in Country H (as defined below), separate insolvency proceedings would not commence automatically in the Czech Republic in relation to the assets and liabilities of its Czech Branch. The Czech authorities would only be required to defer to the proceedings in Country H if the Foreign Counterparty has its registered seat in another EU Member State.

(h) If there were to be a separate insolvency proceeding in the Czech Republic with respect to the assets and liabilities of a Czech Branch (as defined below) and the Foreign Counterparty's position under the General Agreement was included, then the Czech courts would recognise the close-out netting provisions of the General Agreement to the same extent as described in parts 7 and 8 below.

(i) Actions taken by an insolvency administrator or court in a jurisdiction where close-out netting may not be enforceable would not affect the conclusions referred to in paragraphs (a) – (g) above and would not affect the treatment of a multibranch General Agreement as a single agreement under Czech law.

(j) Transfers of collateral in the form of outright transfer of cash under the Credit Support Annexes are not governed by Czech law and, so long as the collateral is delivered prior to the commencement of the insolvency proceedings in respect of the Czech Entity, such transfers are recognised in the Czech Republic and protected from negative effects of the insolvency proceedings, provided that the parties are eligible legal entities to the financial collateral arrangements as listed in Annex 2 and provided that Eligible Credit Support in the form of cash is used. The same conclusion applies also in respect of a Czech Branch entering and delivering Collateral as Transferee under the Credit Support Annex.

3. REVIEWED DOCUMENTS

For the purposes of this memorandum, we reviewed the following documents:

(a) the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1) published on 20 December 2000;

(b) the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a)) published on 21 September 2007 (together with item (a), the **Electricity General Agreements**);

(c) the Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0) published 16 December 2013;

(d) the Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0) published on 1 October 2015;

(e) the EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0) published in February 2018;

(f) the EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 6.1) published on 4 November 2021;

(g) the EFET French Capacity Certificates Appendix (Version 1.0) published in March 2013,

(h) the EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1) published on 20 December 2000;

(i) the GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1) published on 20 December 2000;

(j) the GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a)) published on 21 September 2007;

(k) the EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0) published on 14 December 2013;

(l) the EFET EECS Certificate & National Scheme Certificate Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.1 (b)) published on 4 November 2021;

(m) the UK ETS Allowances Appendix (Power) (Version 1.0) published on 29 July 2021;

(n) the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0) published on 6 January 2003;

(o) the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a)) published on 11 May 2007 (together with item (n), the **Natural Gas General Agreements** and, together with the Electricity General Agreements, the **General Agreements** and each individually the **General Agreement**);

(p) the EFET Sample Amendment Agreement to § 14 (VAT and Taxes), the definition of "Other Tax" and "Zero-Rated" in Annex 1, and the Election Sheet to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published in July 2007;

(q) the EFET Sample Amendment Agreement to § 8 (Remedies for Failure to Deliver and Accept the Contract Quantity) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published in October 2005;

(r) the Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published on 16 December 2013;

(s) the EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0 (a) (Version 5.1) published on 4 November 2021;

(t) the EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0(a) (Version 4.0) published on 28 February 2018;

(u) the EFET IBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0) published on 4 December 2017;

(v) the EFET PVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0) published on 27 March 2020;

(w) the EFET Italian Gas Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published on 24 June 2004;

(x) the Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 2.0) published on 20 September 2013;

(y) the EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0) published on 26 May 2014;

(z) the EFET TVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0);

(aa) the EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0) published in October 2018;

(bb) the EFET Polish VP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published on 14 December 2013;

(cc) the EFET Portuguese VTP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published on 21 June;

(dd) the EFET Ukrainian Customs Warehouse Storage Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published in May 2021;

(ee) the EFET Ukrainian Border Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published in February 2020;

(ff) the EFET Recommended Clauses for use with Ukrainian Counterparties published in February 2020;

(gg) the EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published on 4 December 2017;

(hh) the EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published in 2016;

(ii) the EFET UK 5:5 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0) published on 7 September 2015;

(jj) the EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0) published on 7 September 2015;

(kk) the Change Letter EFET Trading Hub Europe amendments to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas published on 26 July 2021;

(ll) the UK ETS Allowances Appendix (Gas) (Version 1.0) published on 13 December 2021;

(mm) the EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0) and the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1) (Version 1.0) published on 20 November 2005;

(nn) the Amendment Agreement IBOR Transition wording for General Agreements, CPPNA, PPA and Appendices published on 4 November 2021;

(oo) the EFET Credit Support Annex to the General Agreement (Version 1.0(a)) published in September 2005;

(pp) the EFET Credit Support Annex to the General Agreement (Version 2.0) published in May 2010; and

(qq) the EFET Credit Support Annex to the General Agreement (Version 3.1) published on 4 November 2021 (together with items (oo) and (pp), the **Credit Support Annexes** and each individually the **Credit Support Annex** and, together with the General Agreements, the **Agreements** and each individually the **Agreement**).

(rr) the Ratification Letter for Amendments to Covered Principal Agreements governed by English law concerning the giving of notices ("E-Notice Agreement") published on 13 October 2020;

(ss) the Ratification Letter for Amendments to Covered Principal Agreements governed by German law concerning the giving of notices ("E-Notice Agreement") published on 13 October 2020;

(tt) the EFET Electronic Confirmation Agreement published on 20 March 2017;

(uu) the EFET Cross Product Payment Netting Agreement (Version 1) published on 20 October 2005;

(vv) the EFET Master Netting Agreement (Version 1.0) published in June 2010;

(ww) the Cross-Product Master Agreement (Version February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0) published on 23 June 2003;

(xx) the EFET Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0) published on 23 June 2003; and

(yy) the EFET Credit Support Annex to the Master Netting Agreement (Version 1.0) published on February 2011.

The instruction letter from EFET dated 11 July 2022 (the **Instruction Letter**) sets out the terms on which we are asked to advise.

Capitalised terms used in this memorandum that are not defined herein have the meaning ascribed to them under the Agreements.

4. SCOPE AND COUNTERPARTY COVERAGE

We give our opinions in this memorandum solely in respect of (i) each General Agreement; (ii) each Credit Support Annex; and (iii) each General Agreement combined with the relevant Credit Support Annex entered into by, among others, an entity organized and existing in the Czech Republic, which may be:

(a) a bank[1] incorporated in the form of a joint-stock company (in Czech, *akciová společnost*) licensed under Act No. 21/1992 Coll., on Banks, as amended (the **Banks Act**), including Česká exportní banka, a.s. whose activities are, in addition, governed by Act No. 58/1995 Coll, on Export Insurance and Finance, as amended (together, a **Czech Bank**);

[1] A Czech Bank under Czech law corresponds to the definition of a credit institution under Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (the **CRR**).

(b) the central bank of the Czech Republic (the **CNB**) governed by Act No. 6/1993 Coll., on the Czech National Bank, as amended (the **CNB Act**);

(c) a trading company (in Czech, *obchodní společnost*) incorporated under Act No. 90/2012 Coll., on Companies and Cooperatives, as amended (the **Corporations Act**) either in the form of a limited liability company (in Czech, *společnost s ručením omezeným*), a joint-stock company (in Czech, *akciová společnost*), a general commercial partnership (in Czech, *veřejná obchodní společnost*) or a limited partnership (in Czech, *komanditní společnost*) or European company (in Czech, *evropská společnost*) incorporated under Act No. 627/2004 Coll., on European Company, as amended organized or having its centre of main interest (**COMI**) within the meaning of Article 3(1) of Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the **Insolvency Regulation**) in the Czech Republic and each of them is an "entrepreneur" (in Czech, *podnikatel*) under Act No. 89/2012 Coll., Civil Code, as amended (the **Civil Code**) (each a **Czech Corporation**);

(d) a securities dealer[2] (in Czech, *obchodník s cennými papíry*) incorporated under the Corporations Act either in the form of a limited liability company (in Czech, *společnost s ručením omezeným*) or a joint-stock company (in Czech, *akciová společnost*) and licensed by the CNB under the Capital Market Act (No. 256/2004 Coll., as amended, the **CMA**) (a **Czech Securities Dealer**); or

(e) an insurance company (in Czech, *pojišťovna*) incorporated in the Czech Republic and authorised pursuant to Act No. 277/2009 Coll., on Insurance, as amended (the **Insurance Act**) (a **Czech Insurance Company**);

(f) an investment company (in Czech, *investiční společnost*) incorporated in the Czech Republic and authorised pursuant to Section 7 of Act No. 240/2013 Coll., on Management Companies and Investment Funds, as amended (the **MCIFA**) (a **Czech Investment Company**) acting in connection with the management of assets of (i) a mutual fund (in Czech, *podílový fond*) established under Section 102 *et seq.* of the MCIFA[3] (a **Mutual Fund**); or (ii) a Czech SICAV (in Czech, *akciová společnost s proměnným základním kapitálem*) established under Section 154 *et seq.* of the MCIFA[4] (a **Czech SICAV**) when it does not manage itself but delegates the management of its assets and liabilities onto the Czech Investment Company (an **Externally-Managed Czech SICAV**); or (iii) its sub-fund (a **Sub-fund** and together with the Mutual Fund, an **Externally-Managed Fund**);

(g) an investment fund with legal capacity[5] (in Czech, *investiční fond s právní osobností*) taking the form of a joint-stock company (in Czech, *akciová společnost*) or a Czech SICAV incorporated in the Czech Republic and authorised under the MCIFA (a **Self-**

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2 A Czech Securities Dealer under Czech law corresponds to the definition of a credit institution under Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (**MiFID 2**).

3 A mutual fund consists of assets and liabilities. The right of ownership to the assets in a mutual fund belongs jointly to unitholders in a portion according to the value of unit certificates owned by them. None of the unitholders may however request a separation of the assets in a mutual fund, apportionment of a mutual fund or dissolution of a mutual fund.

4 A joint stock company with variable capital (i.e., the Czech SICAV) is a joint stock company which issues shares with which the right of the shareholder is connected to their purchase on behalf of the company and that may create sub-funds. A sub-fund is, from an accounting and property perspective, a part separated from the assets and liabilities of the joint stock company with variable capital (i.e., the Czech SICAV).

5 The MCIFA divides the investment funds with legal capacity into 2 categories according to the persons who may invest in such investment funds. The first category comprises collective investment funds which may have a form of joint-stock company (in Czech, *akciová společnost*) and the second category comprises funds of qualified investors which may have a form of: (i) joint-stock company; (ii) limited liability company (in Czech, *společnost s ručením omezeným*); (iii) societas europea (in Czech, *evropská společnost*); (iv) limited partnership company (in Czech, *komanditní společnost*); or (v) cooperative (in Czech, *družstvo*).

Managed Investment Fund and, together with the Czech Investment Company managing the assets in an Externally-Managed Fund, a **Czech Investment Fund**);

(h) a municipality (in Czech, *obec, město* or *městys*) subject to Act No. 128/2000 Coll., on Municipalities, as amended (the **Municipalities Act**) (a **Czech Municipality**);

(i) a region (in Czech, *kraj*) subject to Act No. 129/2000 Coll, on Regions, as amended (the **Regions Act**) (a **Czech Region**);

(j) an association of local governments, being the Union of Cities and Municipalities of the Czech Republic (in Czech, *Svaz měst a obcí České republiky*) and the Association of Regions of the Czech Republic (in Czech, *Asociace krajů České republiky*) (together, the **Associations of Local Governments** and, together with a Czech Corporate, a Czech Bank, the CNB, a Czech Securities Dealer, a Czech Insurance Company, a Czech Investment Fund and a Czech Municipality, a **Czech Entity**).

We do not consider other entities whose business activities are regulated by special regulations, in particular pension funds management companies, pension funds, trust funds, private individuals (natural persons), public budgetary organisations, statutory corporations or funds. If you wish to enter into an Individual Contract under any General Agreement or exchange collateral under any Credit Support Annex, we recommend obtaining specific legal advice contemplating specific limitations that may apply in respect of those entities.

In this memorandum we may also refer to:

(a) a bank organised and licensed under the laws of a country other than the Czech Republic and having a branch in the Czech Republic (a **Foreign Bank**); or

(b) a securities dealer or investment firm organised and licensed under the laws of a country other than the Czech Republic and having a branch in the Czech Republic (a **Foreign Securities Dealer**).

4.2 Naming conventions

The name of each Czech Entity must identify the Czech Entity's legal form. The legal form is usually not spelled out in full but rather suffixed in an abbreviated form, as follows: limited liability company (in Czech, *společnost s ručením omezeným*) is usually identified by the suffix "s.r.o." or "spol. s r.o.", a joint-stock company (in Czech, *akciová společnost*) is usually identified by the suffix "a.s.", a general commercial partnership (in Czech, *veřejná obchodní společnost*) is usually identified by the suffix "v.o.s.", a limited partnership (in Czech, *komanditní společnost*) is usually identified by the suffix "k.s." and European company (in Czech, *evropská společnost*) is usually identified by the suffix "SE". However, the suffix itself does not allow for a distinction among Czech Entities with respect of their commercial activity. Such information is present in their respective business licence or authorisation they possess.

5. THE CNB, CZECH MUNICIPALITIES AND CZECH REGIONS

5.1 The CNB

The CNB is expressly exempted from the effects of the Act No. 182/2006 Coll., on Insolvency and Manners of its Resolution, as amended (the **Insolvency Act**).[6] Winding-up/Insolvency/Attachment under § 10.5(c) of a General Agreement therefore cannot occur in respect of

6 Section 6(1)(c) of the Insolvency Act.

the CNB. To the extent that insolvency is discussed in this memorandum with respect to a Czech Entity, the term "Czech Entity" does not cover the CNB.

The CNB as a central bank of the Czech Republic is constituted by law. Currently there is no statutory provision negatively affecting the enforceability of the early termination of Individual Contracts and exercising close-out netting under the General Agreements (as specified in part 7) in respect of the CNB.

Also, the CNB has currently no immunity rights under Czech law preventing the enforcement of the early termination of Individual Contracts and exercising close-out netting under the General Agreements.

The CNB may enter into any trades on financial market with investment instruments and other securities, receivables and other assets in the form of purchases, sales, repo trades, deposits, loans or forwards. As a result, the CNB can enter into Individual Contracts under the General Agreement.

5.2 Czech Municipalities and Czech Regions

Czech Municipalities and Czech Regions are also exempted from the effects of the Insolvency Act.[7] Winding-up/Insolvency/Attachment under § 10.5(c) of a General Agreement therefore cannot occur in respect of Czech Municipalities and Czech Regions. To the extent that insolvency is discussed in this memorandum with respect to a Czech Entity, the term "Czech Entity" does not cover Czech Municipalities and Czech Regions.

The capacity of Czech Municipalities is generally governed by the Municipalities Act, whilst the capacity of Czech Regions is contained in the Regions Act. There is additional specific legislation relating to the City of Prague, namely Act No. 131/2000 Coll., on the City of Prague, as amended.

There is nothing in any of the above legislation which specifically prohibits the entry into any of the Individual Contracts by a Czech Municipality or a Czech Region. However there are certain generic requirements on all Czech Municipalities and Czech Regions. The key limitation is that they must use their assets "economically" and "in accordance with the aims of their existence under the law". In other words, a Czech Municipality or a Czech Region does not breach its duty to use its assets economically if it uses the assets in order to pursue its important interest and the use is sufficiently reasoned.

The main aim of the existence of a Czech Municipality is stated in the Municipalities Act and it is for it to act in accordance with its interests and the interests of its citizens. This language is clearly very wide and difficult to apply. Moreover, Czech Municipalities and Czech Regions may only transfer their assets at a price that is usual in the relevant place and time, except if the price of that asset is a regulated price. Any variation from such price must be substantiated otherwise such transfer will be invalid. In the context of an Individual Contract, we would interpret these restrictions to mean that Czech Municipalities and Czech Regions should only enter into Individual Contracts for hedging purposes.

A Czech Municipality or Czech Region must obtain the approval of its council and its assembly (its highest internal authority) to enter into any Individual Contract under a General Agreement. Evidence of such approval should be provided to the Czech Municipality's or Czech Region's counterparty on or before entering into the relevant Individual Contract. We recommend that the approvals should contain reasoning regarding the benefits of the Individual Contract that will be entered into for future goals of the Czech Municipality or Czech Region.

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7 Section 6(1)(b) of the Insolvency Act.

Czech Municipalities and Czech Regions will also need to comply with Act No. 151/1997 Coll., on Property Valuation, as amended (the **Valuation Act**), and Act No. 134/2016 Coll., on Public Procurement, as amended (the **Public Procurement Act**).

6. ASSUMPTIONS

6.1 General assumptions

For the purposes of this memorandum, we have made the following general assumptions that apply to all Agreements:

(a) Two institutions (either two professional clients[8] or a professional client and a non-professional corporation) enter into an agreement in the form of the General Agreement and the relevant Credit Support Annex. Other than for the purposes of part 10 below, the General Agreement and the Credit Support Annex are governed by law other than Czech law, including English law or German law. At least one of the institutions is a Czech Entity.

(b) No provision of any Agreement that is necessary for reaching the conclusions in this memorandum has been altered in any material respect (each such provision a **Core Provision**). The following provisions are considered to be the Core Provisions: §§ 10 and 11 (together with related definitions and provisions) of each General Agreement and §§ 3 and 7 of each Credit Support Annex. In our view, no selection contemplated by the Election Sheet to each General Agreement would be considered a material alteration for this purpose.

(c) In the Election Sheet to each General Agreement, the parties have agreed to what bank accounts payments will be made, including payments of the relevant Termination Amount.

(d) On the basis of the terms and conditions in each General Agreement and acting in a manner consistent with the intentions stated in that General Agreement, the parties over time enter into a number of Individual Contracts that are intended to be governed by that General Agreement. These Individual Contracts include any or all of those Individual Contracts described in appendix B of the Instruction Letter, a copy of which is attached to this memorandum as Annex 4.

(e) Individual Contracts entered into under each General Agreement provide for the physical delivery of commodities, green certificates or emission rights in exchange for cash. However, some of them may also provide for cash settlement.

(f) The obligations of each party under each General Agreement are legal, valid and binding under the relevant governing law[9] except, for the purposes of part 10, Czech law. There is no relevant bilateral or multilateral international treaty in place and effect that would govern any private international law (conflict of laws) matter between the parties. This assumption does not apply in our answers where we expressly mention the opposite.

(g) Where applicable, after entering into a General Agreement and one or more Individual Contracts and prior to their maturity, the Czech Entity becomes subject to voluntary or involuntary insolvency proceedings (in Czech, *insolvenční řízení*) under Czech law.

[8] Within the meaning of Article 4(10) of MiFID 2.

[9] We make this assumption because the courts of the Czech Republic will look to the governing law of the relevant contract to determine the basic contractual position before considering the effect of Czech insolvency law on that position.

After the relevant insolvency proceedings have commenced, the insolvency administrator seeks to assume the Individual Contracts that are profitable for the insolvent party and to reject the Individual Contracts that are unprofitable for the insolvent party.[10]

(h) There are no mandatorily applicable (in Czech, *nutně použitelné*) rules of law of the country where the Czech Entity's counterparty, a branch of that counterparty or, for the purposes of part 8, the Foreign Counterparty or the Non-Czech Branch, is located. This assumption is applicable only if, and to the extent that, such rules would affect the conclusions set out in this memorandum and if, according to the laws of that country, such rules must be applied regardless of the law governing the contract.

(i) With respect to a General Agreement concluded on or after 1 July 2006 but before 17 December 2009, there are no:

(A) mandatory rules (in Czech, *imperativní ustanovení*) of the country in which all the other elements relevant to the situation at the time of the choice are connected which cannot be derogated from by contract;

(B) mandatory rules (in Czech, *imperativní ustanovení*) of law of any other country with which the situation has a close connection;

(C) mandatory rules (in Czech, *imperativní ustanovení*) of law of the forum; and

(D) rules specified by Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (the **Rome Convention**) of the law application of which is manifestly incompatible with the public policy (in Czech, *veřejný pořádek*) of the forum.

This assumption is applicable only if, and to the extent that, such rules would affect the conclusions set out in this memorandum and if, according to the laws of that country, such rules must be applied regardless of the law governing the contract.

(ii) With respect to a General Agreement concluded on or after 17 December 2009, there are no:

(A) provisions of the law of the country in which all other elements relevant to the situation at the time of the choice of law are located which cannot be derogated from by agreement (in Czech, *ustanovení práva od nichž se nelze smluvně odchýlit*);

(B) provisions of Community law of one or more EU Member States in which all other elements relevant to the situation at the time of the choice of law are located which cannot be derogated from by agreement (in Czech, *ustanovení práva Společenství od nichž se nelze smluvně odchýlit*) (where appropriate as implemented in the EU Member State of the forum);

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10 This assumption does not apply to the CNB, Czech Municipalities and Czech Regions, as they cannot become subject to insolvency proceedings, as set out in part 5 above.

(C) overriding mandatory provisions (in Czech, *imperativní ustanovení*) of the law of the forum;

(D) overriding mandatory provisions (in Czech, *imperativní ustanovení*) of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those mandatory overriding provisions render the performance of the contract unlawful; and

(E) provisions of the law specified by the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the **Rome I Regulation**) application of which is manifestly incompatible with the public policy (in Czech, *veřejný pořádek*) of the forum.

This assumption is applicable only if, and to the extent that, such rules would affect the conclusions set out in this memorandum and if, according to the laws of that country, such rules must be applied regardless of the law governing the contract.

(i) Each party has the relevant power and capacity and is duly authorised to enter into and perform its obligations under each Agreement and Individual Contract. If one of the parties was, when entering into any of them, represented by a proxy or representative, such proxy or representative had full power and capacity and was fully competent and duly authorised to do so. Each Agreement and Individual Contract is duly executed and delivered by the parties in accordance with their constitutional legal acts or similar documents and with all applicable laws, regulations and permissions.

(j) Each party is personally liable as principal for its obligations under each Agreement and Individual Contract. Each party is beneficially entitled to its rights thereunder.

(k) No member of the governing, supervisory or other body and no other person who is authorised to act on behalf of one of the parties to the relevant General Agreement (an **Authorised Person**), any relative (in Czech, *osoby blízké*) of any Authorised Person or persons influenced or controlled by any Authorised Person is at the same time a party to the relevant Agreement or Individual Contract or is at the same time authorised to enter into them on behalf of any other party.[11]

(l) No party to the relevant Agreement or Individual Contract (or a person influenced or controlled by such party) is a founder or a shareholder of, person acting in concert with such a shareholder of, influencing or controlling person in relation to any other party or a member of its governing, supervisory or other body, or person influenced or controlled by the same person as, any other party to that Agreement or Individual Contract or, to the extent that the parties are connected in any of the ways described above, all relevant corporate approvals and other steps required by law have been obtained prior to entry into such Agreement or Individual Contract.

(m) Each Agreement or Individual Contract is entered into by each party prior to any action being taken in respect of either party for, or in connection with, the commencement of insolvency, bankruptcy, reorganisation, composition, debt discharge, dissolution, liquidation, administration, interim injunction, crisis prevention measure (in Czech,

[11] We make this assumption, and assumption 6.1(l), because of the relatively complex and strict Czech corporate laws in relation to intragroup trading, conflicts of interest and transactions between affiliates and other connected persons which if breached by a Czech Entity can lead to a contract being rendered null and void.

opatření k předcházení krizí), crisis management measure (including crisis resolution measures and actions or the appointment of a special manager) (in Czech, *opatření k řešení krize*) or any similar measure or action, court or other involuntary enforcement or public auction proceedings under applicable Czech law.

(n) Each Agreement or Individual Contract is entered into, and each payment or delivery made thereunder is made, at arm's length so that no element of gift or undervalue from one party to the other party is involved and without any intention of the former party to prefer the latter party in the event of the former party becoming insolvent.

(o) The Czech Entity is, at the time it enters into each Agreement and Individual Contract, not insolvent (in Czech, *v úpadku*) under applicable Czech law and is not under a threat of insolvency and it will not cause itself to become insolvent under applicable Czech law as a result of entering into the Agreement or Individual Contract.

(p) A Czech Bank has entered into each Agreement and Individual Contract in compliance with the special rules on conducting banking business contained in the Banks Act, Act No. 374/2015 Coll., on Framework for the Recovery and Crisis Resolution on the Financial Market, as amended (the **Crisis Resolution Act**) and related laws and regulations. The Czech Bank remains compliant with those rules for the entire duration of the contractual relationship under each Agreement and Individual Contract.

(q) The CNB has entered into each Agreement and Individual Contract in compliance with special rules governing its capacity and assets contained in the CNB Act and related laws and regulations. The CNB remains compliant with those rules for the entire duration of the contractual relationship under each Agreement and Individual Contract.

(r) A Czech Securities Dealer has entered into each Agreement and Individual Contract in compliance with the special rules on conducting investment firm business contained in the CMA, the Crisis Resolution Act and related laws and regulations. The Czech Securities Dealer remains compliant with those rules for the entire duration of the contractual relationship under each Agreement and Individual Contract.

(s) A Czech Insurance Company has entered into each Agreement and Individual Contract in compliance with special rules on conducting insurance business (including rules on placement of financial reserves by insurance companies and on the separation of their life and non-life lines of business) contained in the Insurance Act and related laws and regulations. The Czech Insurance Company remains compliant with those rules for the entire duration of the contractual relationship under each Agreement and Individual Contract. Each Individual Contract entered into under any General Agreement is of the type that a Czech Insurance Company may enter into under the special rules contained in the Insurance Act.

(t) A Czech Investment Fund has entered into each Agreement and Individual Contract in compliance with special rules on conducting collective investment business (including rules on separation of assets of mutual funds, and any relevant prospectus (in Czech, *statut*) of a mutual fund managed by the Czech Investment Company) contained in the MCIFA and related laws and regulations. The Czech Investment Fund remains compliant with those rules for the entire duration of the contractual relationship under each Agreement and Individual Contract. Each Individual Contract entered into under any General Agreement is of the type that a Czech Investment Fund may enter into under the special rules contained in the MCIFA and any other applicable laws.

(u) A Czech Municipality has entered into each Agreement and Individual Contract in compliance with special rules governing its capacity, assets and administration contained in the Municipalities Act, Act No. 151/1997 Coll., on Property Valuation, as amended (the **Valuation Act**), Act No. 134/2016 Coll., on Public Procurement, as amended (the **Public Procurement Act**) and related laws and regulations. The Czech Municipality remains compliant with those rules for the entire duration of the contractual relationship under each Agreement and Individual Contract. The Czech Municipality's council and assembly duly approved each Agreement and Individual Contract.

(v) A Czech Region has entered into each Agreement and Individual Contract in compliance with special rules governing its capacity, assets and administration contained in the Regions Act, the Valuation Act, the Public Procurement Act and related laws and regulations. The Czech Region remains compliant with those rules for the entire duration of the contractual relationship under each Agreement and Individual Contract.

(w) At the time of, or at any time before, the initiation of insolvency proceedings in relation to the relevant Czech Entity, no involuntary enforcement, public auction or interim injunction has been ordered by a Czech court against that Czech Entity, in respect of any existing, future or contingent receivable under each Agreement and Individual Contract between the parties.

(x) The parties have complied with all relevant regulatory and similar obligations when entering into each Agreement and Individual Contract. In particular, the parties:

(i) have complied with and fulfilled all obligations on conducting business in the financial markets and customer care as envisaged by the applicable laws, rules and regulations (including those set out in or implementing Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (**MiFID II**) or Directive 2013/36/EU of the European Parliament and the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC);

(ii) have complied with Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (the **SFTR**), Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (the **EMIR**) and Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (the **BMR**) including any regulatory technical standards or other rules adopted and published in relation to either of the SFTR, the EMIR or the BMR;

(iii) have complied with Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (the **REMIT**) including any regulatory technical standards or other rules adopted and published in relation to the REMIT; and

(iv) where one party is a manufacturer of PRIIP or seller of PRIIP[12] and the other party being a Czech Entity is a non-professional client in the sense of the CMA provided to the Czech Entity, in relation to each Individual Contract, a key information document in accordance with (i) Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (the **PRIIPs Regulation**), (ii) Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents (the **KID Regulation**), (iii) and all regulatory technical standards and other adopted and published regulations and interpretative opinions issued by the European Securities and Market Authority (**ESMA**) or the CNB in relation to the PRIIPs Regulation or the KID Regulation.

(y) To the extent that it applies, the parties entered into each Agreement and Individual Contract in compliance with Act No. 340/2015 Coll., on Register of Contracts, as amended (the **Register of Contracts Act**.[13]

(z) The assets used for the performance of each Individual Contract have not been acquired through any criminal activity, and the Czech Entity is not under the risk of forfeiture of property, confiscation of a thing or seizure of a thing under Act No. 40/2009 Coll., the Criminal Code, as amended.

(aa) A state of emergency (in Czech, *nouzový stav*) pursuant to Constitutional Act No. 110/1998 Coll., on Security of the Czech Republic, as amended (the **Act on the Security of the Czech Republic**) has not been declared; or, if it was declared, no payments in foreign currency or abroad generally, interbank transfers of money from abroad to the Czech Republic and/or sale of securities abroad were suspended in accordance with Act No. 240/2000 Coll., the Crisis Act, as amended (the **Crisis Act**).[14]

6.2 Credit Support Annexes specific assumptions

For the purposes of the assessment of the enforceability and validity of transfer of title in collateral provisions under related Credit Support Annexes, we make the following additional assumptions:

[12] As defined in Article 4(3) of the PRIIPs Regulation.

[13] The Register of -Contracts Act took effect on 1 July 2016 and requires that contracts concluded with certain public-sector entities (the **Relevant Entities**) be, subject to exemptions, concluded in writing, or in any other way enabling the publication of a contract through the Register of Contracts, and published in an on-line Register of Contracts maintained by the Ministry of Interior. The Relevant Entities include, for example, the Czech Republic itself, municipalities and regional governments, state-owned enterprises, health insurers and Czech corporations directly or indirectly majority owned by the state or by one or more municipalities or regional governments. The exemptions from the publication requirement include, for example, contracts performed predominantly outside the territory of the Czech Republic, contracts concluded on regulated markets, or cases where the Relevant Entity is a joint stock company that has securities admitted to trading on a regulated market (this exemption has ceased to apply as of 1 November 2019). The act explicitly states that it applies regardless of the governing law of the contract. As of 1 July 2017, a contract that is subject to the requirement of publication in the Register of Contracts will not become effective until it is published in the register and will automatically be deemed void *ab initio* if not published within three months from its conclusion. However, the requirement that a contract must be concluded in writing, or in any other way enabling the publication of a contract through the Register of Contracts and published in the Register of Contracts has applied already from 1 July 2016.

[14] A state of emergency may be declared by the Czech government for 30 days (and may be extended for as long as necessary), if the sovereignty, territorial integrity, democratic foundations of the Czech Republic or, to a large extent, internal order and security, lives and health, property or the environment are directly threatened, or if international obligations on common defence need to be fulfilled. In case of a prolongation of the state of emergency, the Czech government needs approval from the Chamber of Deputies of the Parliament of the Czech Republic. During the state of emergency, the Czech government may restrict certain rights and freedoms as well as impose certain obligations and prohibitions, including prohibitions of certain activities of a financial nature or with respect to foreign exchange.

(a) Although each of the Credit Support Annexes is a bilateral arrangement that contemplates that either party may be required to transfer the Eligible Credit Support to the other party depending on movements in exposure (Credit Support Amount) under the relevant Credit Support Annex, for the sake of simplicity the same party is the Transferor at all relevant times under the applicable Credit Support Annex.

(b) The Transferor is a Czech Entity and the Transferee is not a Czech Entity.

(c) No Core Provision of the relevant Credit Support Annex has been altered in any material respect. The making of standard elections in the Credit Support Annex and the specification of standard variables (consistent with the other assumptions in this memorandum) would not in our view constitute material alterations, unless we expressly indicate otherwise below. There are no other agreements, contracts or arrangements entered into between the parties or between a party and a third person except for the General Agreement or Individual Contract and the relevant Credit Support Annex, and no matters of fact that may affect the conclusions set out in this memorandum[15].

(d) The Eligible Credit Support provided under each Credit Support Annex will only take the form of either cash, letters of credit or parent company guarantees. Cash collateral is denominated in a freely convertible currency credited to an account (as opposed to physical notes and coins) held under the control of the Transferee.

(e) The Eligible Credit Support is not encumbered and the Transferor has acquired and retains proper legal title to the Eligible Credit Support and is entitled to transfer it under the Credit Support Annexes in line with its terms.[16]

6.3 Multi-branch specific assumptions

For the purposes of our answers addressing the multi-branch issues, we make the following additional assumptions:

(a) For the purposes of answering questions 8.1 and 8.2, a Czech Entity has entered into Individual Contracts under the General Agreements through offices in the Czech Republic as well as through one or more branches or other duly registered overseas offices in jurisdictions other than the Czech Republic (a **Non-Czech Branch**). After entering into these Individual Contracts and prior to the maturity thereof, the Czech Entity becomes subject to voluntary or involuntary proceedings under the insolvency laws of the Czech Republic.

(b) For the purposes answering question 8.1, we assume that the Czech Entity's COMI within the meaning of Article 3(1) of Insolvency Regulation is in the Czech Republic.

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15 This assumption means, among other things, that neither party has entered with the other party to the Agreement or with any third person into any agreement, contract or arrangement under which it would for instance be possible to pledge the Eligible Credit Support as an asset of a third party or otherwise provide that Eligible Credit Support as a security in favour of a third person after its transfer to the Transferee.

16 This assumption means that, among other things, in relation to the Eligible Credit Support provided and/or transferred no prohibition to encumber or dispose of the Eligible Credit Support has been agreed or created, including as a right *in rem* under Section 1761 of the Civil Code or otherwise (including as a suspension of the right to dispose of the Eligible Credit Support under Section 97(1)(e) of the CMA), nor has there been agreed or created any negative pledge obligation under Section 1309(2) of the Civil Code, and that no such prohibition or obligation has been registered in the register of pledges (in Czech, *rejstřík zástav*) maintained by the Notarial Chamber of the Czech Republic pursuant to the Act on Notarial Procedures (Act No. 358/1992 Coll., as amended) (the **Register of Pledges**) or in a public register (in Czech, *veřejný seznam*). This assumption further means that, among other things, the Eligible Credit Support provided and/or transferred is not a part of an enterprise or other collective asset that is subject to a pledge of enterprise or that other collective asset.

(c) For the purposes of answering questions 8.3 and 8.4, we assume that a corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution (the **Foreign Counterparty**) incorporated, organized or having its COMI in a country (**Country H**) other than the Czech Republic has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including in each case a branch of the Foreign Counterparty located in and subject to the laws of the Czech Republic (the **Czech Branch**).

(d) For the purposes of answering question 8.3, we assume that the Foreign Counterparty's COMI is outside the Czech Republic and that, after entering into Individual Contracts under the General Agreements and prior to the maturity thereof, the Foreign Counterparty becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

(e) For the purposes of answering questions 8.3 and 8.4, we assume that close-out netting under the General Agreements would be enforced in accordance with its terms in the proceedings for the Foreign Counterparty in Country H.

6.4 Confirmation practices specific assumptions

For the purposes of answering questions 11.1 to 11.5, we make the following additional assumptions:

(a) When entering into an Individual Contract, the counterparties in each case (i) make oral reference to the General Agreement when concluding the relevant Individual Contract over the phone; or (ii) refer to the General Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT or other means of electronic transmission).

(b) Parties may or may not (i) use the EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations; or (ii) enter into the EFET Electronic Confirmation Agreement.

6.5 General enforceability specific assumptions

For the purposes of part 10, we make the following additional assumptions:

(a) Both parties had a real opportunity to influence the content of the fundamental terms of each Agreement and each Individual Contract and assumed the risk of a change in circumstances under Section 1765(2) of the Civil Code.

(b) Each party has entered into each Agreement and each Individual Contract, and has made all its acts thereunder, freely and seriously, certainly and comprehensively, in good faith and not with the intention to contradict the law or the sense or purpose of the law or evade the law.

7. ENFORCEABILITY OF CLOSE-OUT NETTING UNDER THE GENERAL AGREEMENTS

Winding-up, Insolvency or Attachment

7.1 *Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the General Agreement or upon other events not specified therein?*

(1) The election of Automatic Early Termination has no effect on the enforceability of the close-out mechanism under the General Agreements under Czech law. However, its election results in unnecessary uncertainty as to when exactly termination occurs. For example, it is normally difficult to determine exactly when a party becomes insolvent[17] or breaches a repeated representation. We therefore do not recommend electing Automatic Early Termination.

7.2 *If yes, would it be necessary or recommendable to modify the scope of Automatic Termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in §10.5(c)(iv) of the General Agreement?*

(2) We do not recommend electing Automatic Early Termination. However, if elected, we note the following.

(3) It is not uncommon for unsubstantiated or frivolous petitions to be filed by creditors in Czech insolvency proceedings. Czech courts are obliged to refuse the insolvency petition without undue delay and within seven days at the latest, provided that it is clearly groundless (in Czech, *zjevně bezdůvodný*). Regardless of the statutory deadline, there have been cases when Czech courts have not issued a ruling on these petitions for weeks or months.

(4) To enable sufficient time for the court to determine whether or not an insolvency petition is clearly groundless, we recommend agreeing at least a 30 day grace period under § 10.5(c)(iv) of a General Agreement commencing on the filing of the petition by a creditor. Another option would be to remove the petition as a trigger of Early Automatic Termination altogether and specify that Individual Contracts will terminate automatically when the insolvency court makes a declaration of insolvency (in Czech, *rozhodnutí o úpadku*).[18]

(5) If, following close-out netting, the Terminating Party has a claim for the payment of the Settlement Amount against the party that is subject to a Winding-up, Insolvency or Attachment Material Reason, the claim must be filed within two months of the insolvency court making a declaration of insolvency.[19]

7.3 *If you are recommending that Automatic Termination, be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect?*

(6) Please refer to our answer in part 7.2 above.

7.4 *Assuming you recommend Automatic Termination to apply, are the provisions of the General Agreement terminating the General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the General Agreement (adjusted as necessary pursuant to the laws of the Czech Republic) enforceable under the laws of the Czech Republic or is there a risk that the automatic termination could be challenged by a liquidator,*

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17 As opposed to insolvency proceedings being initiated against it and an entry appearing in the insolvency register.

18 As noted above, it might take months for the insolvency court to deal with a groundless insolvency petition. However, given the pending insolvency proceedings, the party being subject to insolvency proceedings might get into financial constraints as the existence of the insolvency proceedings becomes public knowledge.

19 Please note that certain claims might qualify as so-called preferential claims and may not be subject to strict rules on the filing of claims.

receiver or third party? Please supply specific language for purposes of customizing §10.4 of the General Agreement to implement your recommendation and the optimal termination timing.

(7) We do not recommend electing Automatic Early Termination. However, if elected, we note the following.

(8) Although the question is not expressly addressed in the Insolvency Act[20], the termination provisions of the General Agreements, including automatic early termination under § 10.4 of the General Agreements, would be enforceable under Czech law. The General Agreements are not governed by Czech law and a Czech insolvency court would, as a matter of Czech private international law (Act No. 91/2012 Coll, on Private International Law, as amended (the **Private International Law Act**)), the Rome Convention and the Rome I Regulation be required to apply English, German or other law, as applicable, as the law governing the General Agreements (including its termination provisions), subject to our answer in part 13 as well as the assumption that there is no relevant bilateral or multilateral international treaty in place and effect that would govern any private international law (conflict of laws) matter between the parties.

(9) There are no published court judgments or articles by legal commentators in the Czech Republic to suggest the invalidity or unenforceability under Czech law of contractual termination provisions in the context of performance of close-out netting enabling the Terminating Party to terminate Individual Contracts following the occurrence of a Material Reason comprising Winding-up/Insolvency/Attachment in respect of the defaulting party.

(10) The definition of "close-out netting" in Section 193 of the CMA (as discussed in part 7.8) expressly foresees that, following the occurrence of an agreed event, the mutual receivables and obligations of the relevant parties which are covered by the close-out netting provision may cease to exist.

(11) Generally, the enforceability of close-out netting as specified under § 10 of each General Agreement, is further expressly confirmed (with respect to the close-out netting mechanism as contemplated by the CMA) in Section 366(2) of the Insolvency Act, which sets out that the provisions of the Insolvency Act do not affect close-out netting pursuant to the CMA, provided that the close-out netting arrangement has been entered into prior to the initiation of insolvency proceedings.[21,22] Since termination of claims forms an integral part of the close-out netting mechanism as contemplated by the CMA, as far as such mechanism is concerned, the close-out netting provisions of the General Agreement would be enforceable in insolvency proceedings in respect of a Czech Entity, provided that the General Agreement and all relevant Individual Contracts entered into thereunder are duly executed (i.e., in a way which can be evidenced in writing or alternatively by a record that allows its reproduction in an unaltered condition) prior to the moment when the initiation of insolvency proceedings takes its effects, i.e., any time prior to the moment of publication of the notice of initiation of insolvency proceedings in the insolvency register (please see our discussion of what constitutes the decisive moment of the initiation of insolvency proceedings in part 1.1 of Annex 1).

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20 In connection with the winding-up and reorganisation of monetary institutions (in Czech, *peněžní instituce*) the International Private Law Act also expressly sets out that close-out netting arrangements are governed solely by the law which governs the contract applicable to such close-out netting arrangements.

21 As to whether the close-out provisions of the General Agreements constitute close-out netting as defined under Czech law, please refer to our answer in part 7.8.

22 In order for a party to a General Agreement to be able to file any net claim against a Czech Entity with the Czech insolvency court, it will need to follow the procedures specified in the Insolvency Act (otherwise the net amount could be disregarded in the Czech Entity's insolvency proceedings).

(12) It is possible that any payments or deliveries made by one party to the other (and retained by such other party) during the period from the relevant moment of Automatic Early Termination pursuant to § 10.4 of each General Agreement to the date for payment determined under § 10.3(d) of each General Agreement could be regarded by the Czech insolvency courts as unjust enrichment of the relevant recipient. However, whether or not this is the case would most likely be a question governed by the law governing the relevant General Agreement. If such payments or deliveries constituted unjust enrichment, we would argue that any claims for the return of such unjust enrichment would be covered by close-out netting because they constitute "a right and/or claim related to a contract" within the meaning of Section 2(a) of Act No. 408/2010 Coll., on Financial Collateral Arrangements, as amended (the **Financial Collateral Act)** to which the definition of close-out netting contained in Section 193 of the CMA cross-refers (please see our discussion in part 7.8).

7.5 *Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the General Agreement) upon the occurrence of an event described in § 10.5(c) of the General Agreement, would it be necessary or recommendable to modify the scope of termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would permit the Terminating Party to terminate and/or (ii) adding other Material Reasons upon the occurrence of which it should be entitled to terminate)?*

(13) We recommend amending § 10.5(c) of each General Agreement so that the insolvency of a Mutual Fund or a Sub-Fund is covered.

(14) Both Mutual Funds and Sub-funds are pools of assets and do not have their own legal capacity, meaning that they cannot enter into General Agreements or Individual Contracts themselves. However, under Sections 388b and 388c of the Insolvency Act, Mutual Funds and Sub-funds, respectively, are deemed to have procedural capacity for the purposes of their insolvency.

(15) As per part 4(f), it will be the Czech Investment Company acting in connection with the management of the assets of the Mutual Fund or Sub-fund that enters into Individual Contracts relating to the assets of the Mutual Fund or Sub-fund. The General Agreements cover the insolvency of a counterparty, i.e., of the Czech Investment Company. Given that the credit risk of an Individual Contract with a Czech Investment Company acting in connection with the management of assets of a Mutual Fund or a Sub-fund depends on the creditworthiness of the Mutual Fund or Sub-fund, it is recommendable to include their insolvency in the General Agreements, too.

(16) Similarly, while a Czech SICAV does possess legal capacity, an Externally-Managed Czech SICAV does not manage itself but delegates the management of its assets and liabilities onto the Czech Investment Company (please see part 4(f) above). As a result, the Czech Investment Company will, in such a scenario, be the counterparty to the relevant General Agreement, and not the Externally-Managed Czech SICAV. This means that § 10.5(c) of the General Agreement will not cover Winding-up/Insolvency/Attachment of the Externally-Managed Czech SIVAC unless amended.

(17) For these purposes, it is sufficient to add the following wording in § 10.5(c) of each General Agreement following the words "winding-up or liquidation" in item (iv): *"or a [mutual fund]/[SICAV]/[sub-fund]*[23] *to the assets of which Individual Contracts relate managed by a party has instituted against it a proceeding seeking a judgment of*

[23] Delete as applicable.

bankruptcy". The market practice is for the relevant Mutual Fund, Czech SICAV or Sub-fund to be identified on the cover page of the General Agreement.

(18) We do not think that any other deletions or additions in § 10.5 of the General Agreements are necessary.

7.6 *Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the General Agreement) upon the occurrence of an event described in § 10.5(c) of the General Agreement are the provisions of the General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of the Czech Republic or is there a risk that (i) the entering into the General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?*

(19) Subject to our analysis in part 7.4, the termination provisions of the General Agreement are enforceable under Czech law.

7.7 *Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the General Agreement) upon the occurrence of an event described in § 10.5(c) of the General Agreement is there a risk that a termination notice given in accordance with the E-Notice Agreement (e.g., by e-mail with attached document in PDF format) (i) may not be recognised as valid termination notice by a liquidator, receiver or court or (ii) could the deemed receipt of the termination notice be challenged by a liquidator, receiver or court?*

(20) Provided that it is delivered to the recipient, the termination notice should be recognised as a valid termination notice since, under Czech law, there are no formal requirements pertaining to the form of a notice terminating Individual Contracts or the General Agreements. The only relevant formal requirement is that the receivables that are subject to a close-out netting mechanism must be evidenced in writing or alternatively by a record that allows its reproduction in an unaltered condition.[24]

(21) However, there is a risk that a Czech court would not recognise as valid a termination notice sent but not delivered to the recipient which is, at the same time, deemed to be delivered notwithstanding any evidence to the contrary under the terms of the E-Notice Agreement. Even though the E-Notice Agreement is not governed by Czech law, based on case law of the Supreme Court of the Czech Republic[25], a Czech court could consider this mechanism as being contrary to the Czech public order, given that the recipient is deemed to be aware of the notice regardless of whether or not that the notice was delivered.[26]

(22) We note that Czech law does not require the recipient of a notice to be aware of its delivery. Notices served via e-mail are deemed delivered as soon as they reach the recipients inbox, regardless of whether or not the recipient has actually read or opened it.

7.8 *Are the provisions in § 11 of the General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under*

[24] Section 193(1)(a) of the CMA.

[25] See decision No. 23 Cdo 1001/2021, covering the treatment of so-called legal presumptions (in Czech, *právní domněnka*) and fictions (in Czech, *právní fikce*).

[26] Please refer to part 13 for our conflict of laws analysis.

the laws of the Czech Republic or is there a risk that such determination could be challenged by a liquidator, receiver or third party?

(23) The close-out netting provisions in §§ 10 and 11 of the General Agreements are enforceable under the laws of the Czech Republic. Subject to the analysis in this part 7.8, we believe that they meet the requirements of Czech law for close-out netting (in Czech, *závěrečné vyrovnání*).

Definition of "close-out netting" under Czech law

(24) The definition of a close-out netting is contained in Section 193 of the CMA and expressly reads as follows[27]:

(1) "Close-out netting" means a contractual arrangement under Czech or foreign law,

(a) which can be evidenced in writing or alternatively by a record that allows its reproduction in an unaltered condition,

(b) which relates to claims of the contractual parties, including appurtenances to these claims, which are eligible to be secured by way of the financial collateral arrangement pursuant to the Financial Collateral Act, or to claims, including appurtenances to those claims, from a financial collateral arrangement or from similar legal relation under foreign law, and

(c) according to which if an agreed event occurs, the termination and replacement of debts which correspond to the claims of the parties stated in (b) above, or set-off of undue or, as the case may be, even due claims of the parties stated in (b) above occurs so that the result will be one claim of one contractual party and a corresponding debt of the other contractual party to pay the resulting (close-out) amount.

(2) The method of valuation of claims described in paragraph (1) lit. (b) above, the moment in time as to which the valuation must be performed, and the manner and time of the performance of the sole resulting claim must be included in a contractual arrangement on close-out netting and must not be contrary to the practice [(in Czech, *zvyklosti*)] *of the relevant financial markets.*

(3) A decision or another act of the court or administrative authority which affects rights of third parties and which was adopted with the aim of maintenance or recovery of the financial situation of one of the contractual parties, or with the aim of prohibition or restriction of performance of certain trades or transfer of monetary funds by one of the contractual parties, does not affect close-out netting arrangements provided that such close-out netting arrangement was entered into prior to the adoption of such decision or that other act.

(4) Paragraph (3) above will not apply to the effects of legal acts connected with the initiation of insolvency proceedings, entry to the liquidation proceedings or imposition of involuntary administration; exclusion of such effects are governed by different statutes. Paragraph (3) above will further not apply to the effects of legal acts connected with the application of measures under Title V, Chapter III, Section III or Title V, Chapter IV of Regulation (EU) 2021/23 of the European Parliament and of the Council.

[27] Given their significance, for the purposes of this memorandum we have translated these definitions rather precisely and literally which may lead to some phrasing that seems unusual in English.

What claims or transactions may form a part of close-out netting under Czech law?

(25) The sole purpose of the cross-reference to the Financial Collateral Act in Section 193 of the CMA is to define the scope of claims which are eligible for "close-out netting", which is the same as the scope of claims which are eligible to be secured by financial collateral arrangements. The cross-reference does not mean, and cannot be interpreted as meaning, that only claims which are secured by a financial collateral arrangement are covered by the definition of "close-out netting".

(26) It follows that close-out netting as contemplated by the CMA covers only those claims (including their appurtenances) which are eligible to be secured by way of the financial collateral arrangement, or claims (including their appurtenances) from a financial collateral arrangement or a similar legal relation under foreign law. Section 6(1) of the Financial Collateral Act then provides that financial collateral may secure solely a "claim of a financial nature" including appurtenances to this claim, regardless of whether it is a claim against the collateral provider or a third party.

(27) The definition of a claim of a financial nature contained in Section 2(a) of the Financial Collateral Act reads: "*claims of the contractual parties from contracts, the subject-matter of which are cash, investment instruments, emission allowances or commodities, as well as rights and claims related to those contracts*". Further, financial collateral arrangements, as expressly stipulated in Section 6(2) of the Financial Collateral Act, may also be established with respect to claims of a financial nature which are conditional or which will arise in the future.

(28) In order for receivables (claims) from the relevant contracts to be eligible for close-out netting, the subject-matter of such contracts must either be cash, investment instruments, emission allowances or commodities, as well as rights and claims related to those contracts, or such receivables must be claims either from a financial collateral arrangement or from a similar legal relation under foreign law.

(29) The definition of "investment instruments" in Section 3(1) of the CMA contains, among others, the following:

(a) options, futures, swaps, forwards and other instruments, the value of which relates to commodities, and which carry the right to cash settlement or the right of at least one of the parties to choose whether it wishes settlement in cash, unless the cash settlement is due to a default of a party to the derivative or due to another reason for an early termination of the derivative;

(b) options, futures, swaps, forwards and other instruments, the value of which relates to commodities and which carry the right to the delivery of this commodity and which are traded on a European regulated market[28] or on a multilateral trading facility or in an organised trading facility, except for wholesale energy products pursuant to Article 2(4) of REMIT[29], traded in an organised trading facility, from which arises a duty to supply the commodity;

(c) options, futures, swaps, forwards and other instruments, the value of which relates to commodities and which carry the right to the delivery of this commodity, which are not otherwise mentioned in paragraph (b) above, are not

[28] Section 55(2) of the CMA defines a European regulated market as a market with investment instruments similar to a regulated market that is entered in the list of regulated markets of an EU Member State.

[29] Article 2(4) of REMIT defines wholesale products as, among others, derivatives relating to electricity or natural gas produces, traded or delivered in the EU and derivatives relating to the transportation of electricity or natural gas in the EU.

for commercial purposes and which have the characteristics of other derivative investment instruments; and

(d) emission allowances.

(30) The above list is based on the list contained in Section C of Annex I to MiFID II. Certain derivative products may not be covered by this definition of investment instruments and will not constitute investment instruments altogether. In particular, the scope of parts (a) - (c) of the definition is significantly restricted by the requirements (as applicable) that the instrument in question:

(a) carries the right to cash settlement or the right of at least one of the parties to choose whether it wishes settlement in cash, unless the cash settlement is due to a default of a party to the derivative or due to another reason for an early termination of the derivative; or

(b) is traded on a European regulated market or on a multilateral trading facility or in an organised trading facility; or

(c) is not for commercial purposes and at the same time has the characteristics of other derivative financial instruments (as these terms are defined in Article 7 and 8 of Commission Delegated Regulation (EU) 2017/565, which implements the MiFID II (the **MiFID II Regulation**), and the CMA).

The above means that some forms of purely physically settled derivative products and other derivative products that could qualify as investment instruments only by virtue of Section 3(1)(k) of the CMA may not constitute investment instruments for the purposes of the CMA.

(31) Based on assumption (e) above, we understand that Individual Contracts entered into under the General Agreements generally provide for physical delivery of a commodity and may or may not provide for cash settlement. We also understand that they may or may not be traded on a European regulated market, a multilateral trading facility or an organised trading facility. Lastly, we understand that the Individual Contracts are likely to be entered into for commercial purposes. This means that the Individual Contracts listed in Annex 4 may not meet the criteria set out in paragraph (30) above.

(32) However, even if that is the case, Individual Contracts listed in Annex 4 are eligible for close-out netting by virtue of their subject-matter being a commodity or an emission allowance.

(33) Commodity is defined as "electricity, natural gas, emissions allowances, (green) certificates or capacity rights" in Annex 4. While there is no legal definition of a commodity in the Insolvency Act, the CMA or the Financial Collateral Act, Article 2(6) of the MiFID II Regulation does define a commodity as "any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity". The question is, then, whether these two definitions of a commodity overlap.

(34) The MiFID II Regulation definition clearly covers electricity and natural gas. Since we understand that the subject-matter of a green certificate or capacity right is also a commodity, the subject-matter of Individual Contracts relating to green certificates or capacity rights (electricity) can be considered to be a commodity. Whether or not emission allowances can be considered a commodity is irrelevant, since Individual Contracts relating to emission allowances will be eligible for close-out netting by virtue

of their subject-matter being an emission allowance.[30] As a result, all the Individual Contracts listed in Annex 4 will be eligible for close-out netting. This conclusion was essentially confirmed to us by the CNB.

Further conditions to be met for close-out netting mechanism to be recognised under Czech law

(35) As mentioned above, Section 193(2) of the CMA requires the following conditions to be met in order for the mechanism to be regarded as close-out netting: (i) the method of valuation of claims of the contractual parties; (ii) the moment in time as at which the valuation must be performed; and (iii) the manner and time of the performance of the sole resulting claim:

(a) must be included in a contractual arrangement on close-out netting; and

(b) must not be contrary to the practice (in Czech, *zvyklosti*) of the relevant financial markets.

(36) The requirement under paragraph (a) above does not appear to be controversial. The requirement under paragraph (b) regarding the absence of conflict with the practice on the relevant financial markets is less clear. There is no definition of either "the practice" or "the relevant financial markets" in the CMA or elsewhere in Czech law. No views of the relevant regulators or legal scholars have been published which would clarify the position.

(37) First of all, it is important to establish which financial markets will be regarded as "relevant". Among the possible interpretations, a court may decide, for example, that the relevant market includes (i) the capital markets in general; (ii) OTC derivatives, commodities or other similar markets; or (iii) a market determined using some other criteria. It is common sense that, in the circumstances where a Czech Entity enters into a General Agreement with a non-Czech counterparty, the cross-border (and not purely domestic) market should be regarded as "relevant".

(38) Although the phrase "practice" (in Czech, *zvyklost*) is not defined, the phrase "customs of trade" (in Czech, *obchodní zvyklost*), which is not dissimilar, is used in the Civil Code. Legal scholars describe "customs of trade" as certain stable rules which are in fact complied with by the market participants in general even though they are not expressly set out in law.[31] Customs of trade do not have to be reflected in contractual documentation of market participants. Customs of trade may be limited to a particular geographical or business area or even a particular case.[32] The Czech courts have held that the existence of a particular custom of trade will be determined on a case-by-case basis. The Czech courts would, among others, examine the documentation usually entered into by market participants, invite witnesses and review relevant expert opinion(s).

(39) It is possible that in the absence of a definition of "the practice" the Czech courts would to a certain extent make an analogy with the definition of "customs of trade" in the Civil Code.

(40) The determination of whether or not the features of the close-out netting provisions in the General Agreements, as set out in Section 193(2) of the CMA, are contrary to the practice in the relevant financial market is largely a matter of fact. We are therefore

[30] Sections 2(a) and 6(1) of the Financial Collateral Act.

[31] The market participants comply with the customs of trade not because of law but, for example, because it is advantageous for them to comply.

[32] It is clear from Section 193 of the CMA that the practice would have to exist in the relevant financial market in general (i.e., it would not be sufficient if the practice existed just between the relevant several counterparties – market participants).

unable to confirm the existence of any practice developed in the Czech Republic in any market regarding Individual Contracts entered into by a Czech Entity and a non-Czech counterparty and which would relate to close-out netting. However, in our opinion the determination of the Termination Amount is not very controversial as it works more like the calculation of a standard set-off. Nevertheless, for a Czech court it will be relevant whether the General Agreements contain a close-out mechanism recognisable as in line with the practice on a relevant market. Needless to say, EFET General Agreements are commonly used for cross-border Individual Contracts with commodities such as electricity/power or natural gas.

7.9 *Do the laws of the Czech Republic recognise that the close-out netting provisions in §§ 10 to 11 of the General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the General Agreement following a previous partial close-out.*

(41) Close-out netting, as defined in Section 193 of the CMA does not require eligible claims to arise from a single contract, as long as close-out netting arrangements are agreed between the two parties.

(42) Partial close-out netting is not contemplated by Section 193 of the CMA. It only contemplates full close-out netting as a result of which all the claims covered by the close-out netting provision are extinguished and replaced by a single claim. The CMA, however, does not require a close-out netting provision to cover all claims arising out of the contract (e.g., a General Agreement) containing the close-out netting provision.

(43) We therefore believe that the parties are free to agree that a certain category of Individual Contracts will or will not be subject to close-out netting under a General Agreement, provided that each such category is based on objective pre-agreed criteria. One such category could comprise Individual Contracts that are not eligible for close-out netting under Section 193 of the CMA, although we note that this should not arise if parties only enter into Individual Contracts listed in Annex 4 under a General Agreement. As long as the parties' agreement regarding nettable categories of Individual Contracts does not subvert the purpose of, and rationale behind, Section 193 of the CMA, it should be enforceable under Czech law.[33]

(44) Conversely, a close-out netting provision enabling partial close-outs could be considered unenforceable by Czech courts if the parties agreed a mechanism whereby the non-insolvent Terminating Party would be able to close-out Individual Contracts in such a way that the Terminating Party could require payments of Settlement Amounts from the insolvent Czech Entity (i.e., where the Terminating Party suffers a Loss as a result of the termination of an Individual Contract), while maintaining Individual Contracts under which the Termination Party would instead be required to pay Settlement Amounts to the insolvent Czech Entity (i.e., where the Terminating Party would make Gains as a result of the termination of an Individual Contract), thereby prejudicing the interests of the Czech Entity's other creditors.

[33] The purpose of Section 193 of the CMA is to enable mutual netting of claims of the parties so as to minimise credit risks arising out of the insolvency of the Czech Entity, not to enable the non-insolvent party to "pull out" money from the Czech Entity's insolvency estate without paying anything itself or without taking account of its own debts towards the Czech Entity.

(45) As there is no relevant case law regarding this issue and the statutory law is not definite, we are unable to make these conclusions as absolutes.

7.10 *Is the insolvent counterparty obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of the Czech Republic or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?*

(46) Pursuant to Section 175 of the Insolvency Act, a receivable such as a single netting amount denominated in a foreign currency, i.e., not denominated in CZK, must be converted into CZK using the foreign exchange rate published by the CNB on the date when insolvency proceedings were initiated or, if such receivable became due earlier, on the date when such receivable became due.

(47) The Insolvency Act does not expressly specify that the payments by the insolvency administrator to creditors following the determination of the insolvency estate must be denominated in CZK. It is, however, likely that the Insolvency Act contains an implied assumption that payments to creditors will only be made in CZK as otherwise the conversion of a non-CZK denominated claim under Section 175 would not make much sense. There are also no provisions in the Insolvency Act regarding currency fluctuations. Furthermore, we have not seen any court resolution on the distribution of proceeds from the insolvency estate where a payment has been made in a currency other than CZK.

(48) Therefore, we believe that a Czech insolvency court would not enforce a payment of the Termination Amount in a currency other than CZK.

(49) Any payments in non-Czech currencies to non-residents may be restricted for a maximum period of 30 days unless prolonged by the approval of the Chamber of Deputies of the Parliament of the Czech Republic should a state of emergency (in Czech, *nouzový stav*) in the foreign exchange economy be declared by the Czech government or its prime minister.

(50) If you wish, you may include an additional Material Reason for situations when a Czech Entity would not be able to perform its obligations under the General Agreement or Individual Contracts due to the declaration of a state of emergency. The language for this purpose may be as follows:

(51) "*Due to a state of emergency (in Czech, nouzový stav) having been declared by the government of the Czech Republic, it becomes unlawful for a party (the other party being the Terminating Party) to perform any contingent or other obligation which that party has under any Individual Contract.*"

7.11 *Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party based in your jurisdiction are dependent upon, or otherwise affected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?*

(52) Czech law, namely the Insolvency Act and the CMA, does not distinguish between different types of entities as regards the protection of close-out netting arrangements in an insolvency.

7.12 *Please specify if any of your conclusions in parts 7.1 to 7.11 above would be changed or qualified if the Parties would enter into several Individual Contracts for multiple types of products (e.g., some Individual Contracts would provide for delivery of electricity/natural gas, other ones for green certificates) under the same General Agreement? Is there a risk that any safe harbour provisions applicable to one type of product, but not the other, would cease to apply as a result?*

(53) The parties are not limited in the types of Individual Contracts that they enter into under the General Agreements and include in close-out netting thereunder, provided that all the Individual Contracts are eligible for close-out netting under Section 193 of the CMA, as described in detail in part 7.8 above.

Non-insolvency related Material Reasons

7.13 *Please discuss the issues outlined above under 7.9, 7.10, 7.11 and 7.12.*

(54) Our conclusions reached in parts 7.9, 7.10, 7.11 and 7.12 are applicable to non-insolvency Material Reasons. As stated in paragraph (24) above, close-out netting may be triggered by an agreed event, whereas Section 193(1)(c) of the CMA does not specify the nature of that event.

7.14 *Are the rights of the Terminating Party to terminate and close-out the General Agreement enforceable in accordance with the terms of the General Agreement, irrespective of the insolvency of the Czech Entity?*

(55) Yes. The definition of close-out netting in the CMA is referred to in Section 366(2) of the Insolvency Act which states that: "[t]*he provisions of this Act do not affect close-out netting pursuant to the CMA, provided that the close-out netting arrangement has been entered into prior to the initiation of insolvency proceedings"*. The Insolvency Act therefore offers catch-all protection to close-out netting arrangements contained in the General Agreements, provided that they (i) satisfy the requirements of Section 193 of the CMA (please see part 7.8); and (ii) had been entered into prior to the initiation of insolvency proceedings with respect to the Czech Entity (please see part 1.1 of Annex 1 explaining what constitutes the decisive moment of the initiation of insolvency proceedings).

(56) We note that "close-out netting" needs to be distinguished from ordinary "set-off". This distinction is required because post-bankruptcy set-off is generally permitted under Czech law only if certain qualifications are met (please see part 1.4 of Annex 1).

(57) However, under Section 366(3) of the Insolvency Act, the protection of close-out netting in an insolvency does not extend to avoidance transfers. The statutory rules on the avoidance transfers are set out in the Insolvency Act and apply only to transactions entered into by the Czech Entity that is subject to ongoing insolvency proceedings before a Czech insolvency court.

(58) Generally, a Czech insolvency administrator can challenge transactions through which a debtor has reduced the sums available for the satisfaction of its creditors or has favoured certain creditors at the expense of others. These transactions are referred to as ineffective legal acts. The Insolvency Act recognises three specific categories of ineffective legal acts: (i) transfers at undervalue, (ii) preference transfers; and (iii) fraudulent transfers. However, the High Court in Prague has ruled[34] that other types

[34] Decision of the High Court in Prague No. 15 Cmo 72/2010.

of legal acts can also be ineffective if they led to the reduction of sums available for the satisfaction of creditors.

(59) The ineffectiveness of a legal act, including an act deemed to be ineffective by the Insolvency Act if carried out by the debtor following the commencement of insolvency proceedings (e.g., disposals of assets contrary to the restrictions imposed by the Insolvency Act), is established by the decision of a Czech insolvency court. In order to commence the court procedure, the insolvency administrator must file an action with the insolvency court against the debtor's counterparty. The insolvency administrator has the sole right to challenge the ineffectiveness of legal acts and must do so within one year from the date of the decision on the debtor's insolvency. If the insolvency administrator fails to file the claim within this period, the right to challenge the transaction will expire.

Transfers at Undervalue

(60) A transfer at undervalue is a legal act on the basis of which the debtor enters into a transaction without receiving consideration, or receives consideration substantially lower than the "usual price" for performing such a transaction, provided that the debtor entered into the transaction when insolvent or that the transaction led to the debtor's insolvency. The insolvency administrator may challenge a transaction entered into with a third party (other than a group company) if entered into within one year prior to the initiation of insolvency proceedings (three years if it concerns a group company).

(61) There are several specific acts that are automatically excluded from being classified as transfers at undervalue. These include: (i) performance imposed by statute; or (ii) legal acts which the debtor reasonably expected to bring reasonable profit, provided that the acts were not undertaken for the benefit of a group company and that the person for whose benefit the acts were undertaken could not have discovered, acting diligently, that the debtor was insolvent or that the acts might cause the debtor's insolvency.

(62) In light of the assumption in 6.1(n) and under the assumption that all Individual Contracts are made in good faith and for the purpose of compliance with the provisions of the Agreement, we believe that the Czech insolvency court would have to conclude that the General Agreement was entered into under reasonable expectations to save costs or for the Czech Entity to make a profit and that the transfer of the Termination Amount was then made in line with the agreed terms and undertaken at arm's length.

Preferential Transfers

(63) A preference transfer is a legal act which results in a creditor receiving greater consideration than it would have received in the debtor's bankruptcy, to the detriment of other creditors, provided that the debtor undertook the legal act when insolvent or that the legal act led to the debtor's insolvency. The insolvency administrator may challenge a transaction entered into with a third party (other than a group company), if entered into within one year prior to the initiation of insolvency proceedings (three years if it concerns a group company).

(64) The following acts are not preference transfers: (i) the granting of security by the debtor for an existing obligation, provided that the debtor obtained reasonable consideration in return; (ii) a legal act undertaken at arm's length (in Czech, *za podmínek obvyklých v obchodním styku*) pursuant to which the debtor received an adequate counter-performance or other proprietary benefit, provided that the act was not undertaken for the benefit of a group company and that the person for whose benefit the act was undertaken could not have discovered, acting diligently, that the debtor was insolvent or

that the act would cause the debtor's insolvency; or (iii) an act undertaken by the debtor in the course of a moratorium or after the commencement of insolvency proceedings under the conditions set out in the Insolvency Act.

(65) In light of the assumption in 6.1(n) and under the assumption that all Individual Contracts are made in good faith and for the purpose of compliance with the provisions of the Agreement, we believe that the Czech insolvency court would have to conclude that the General Agreement was entered into under reasonable expectations to save costs or make profits for the Czech Entity and that the transfer of the Termination Amount was then made in line with the agreed terms and undertaken at arm's length.

Fraudulent Transfers

(66) A fraudulent transfer is a legal act through which a debtor intentionally alienates its property so that it is not available for its creditors and where, given all of the circumstances, the counterparty was, or should have been, aware of the debtor's intention. The insolvency administrator may challenge fraudulent transfers if entered into within five years prior to the initiation of insolvency proceedings.

(67) In light of the assumption in 6.1(n) and under the assumption that all Individual Contracts are made in good faith and for the purpose of compliance with the provisions of the Agreement, the condition of intentional alienation cannot be met.

8. MULTIBRANCH PARTIES – ENFORCEABILITY OF CLOSE-OUT NETTING UNDER THE GENERAL AGREEMENTS

8.1 *Would there be any change in your conclusions reached under part 7 above based upon the fact that the Czech Entity has conducted business under the General Agreement on a multibranch basis prior to its insolvency?*

(68) As a matter of Czech law, Non-Czech Branches of a Czech Entity would not be regarded as separate entities. The Non-Czech Branches' legal acts, including the conclusion of Individual Contracts would be attributed to the founder of the Non-Czech Branch, i.e., to the Czech Entity. Therefore, our relevant conclusions expressed in part 7 above would remain unaffected

(69) Where the Insolvency Regulation is applicable to the Czech Entity, in line with Article 3(1) of the Insolvency Regulation, Czech insolvency courts have jurisdiction to open main insolvency proceedings with respect to the Czech Entity. In general, the effects of main insolvency proceedings cover all of the debtor's assets located in the EU Member States. Any commencement of insolvency proceedings should be recognised in all EU Member States as of the date it becomes effective in the Czech Republic.

(70) After the commencement of the main insolvency proceedings in an EU Member State, secondary insolvency proceedings[35] may be commenced in other EU Member States against branches and other assets located in such other EU Member States. Furthermore, pursuant to Article 12(1) of the Insolvency Regulation, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market will be governed solely by the law of the EU Member State applicable to that system or market.

[35] Secondary insolvency proceedings commenced in the Czech Republic are governed by the Insolvency Regulation and partly also by Section 430a of the Insolvency Act.

(71) Furthermore, we note that in situations where the Czech Entity is a Czech Bank, the Insolvency Regulation is not applicable to it and following the implementation of Directive 2001/24/EC of the European Parliament and Council of 4 April 2001 on the reorganisation and winding up of credit institutions (the **WUCI Directive**) through the Insolvency Act:

(a) the Insolvency Act does not apply to the Czech Bank unless the Czech Bank's banking licence has been revoked;

(b) the principle of single universal insolvency proceeding across the territory of all EU Member States has been introduced for banks and their branches having a single European banking licence.

8.2 *Would the General Agreement be treated as a single unified agreement by the Czech receiver under the laws of the Czech Republic, regardless of the treatment of the General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?*

(72) Yes. The General Agreements would be treated in accordance with our conclusions set out in parts 7.4, 7.8 and 7.14 above, regardless of any secondary insolvency proceedings commenced against Non-Czech Branches of the Czech Entity, including in jurisdictions where close-out netting is unenforceable.

8.3 *Would there be separate proceedings in the Czech Republic with respect to the assets and liabilities of the Czech Branch upon the start of the insolvency proceeding for the Foreign Counterparty in Country H? Or would the relevant authorities in the Czech Republic defer to the proceedings in Country H, so that the assets and liabilities of the Czech Branch would be handled as part of the proceedings for the Foreign Counterparty in Country H? Could local creditors of the Czech Branch initiate separate proceedings in the Czech Republic even if the relevant authorities in the Czech Republic did not do so?*

(73) As a starting point, the Insolvency Act does not contain any provisions dealing with cross-border insolvency proceedings other than those which are applicable within the European Union in the circumstances where the Insolvency Regulation or the WUCI Directive apply.

Insolvency proceedings commenced under the regime set out in the Insolvency Regulation

(74) In accordance with the Insolvency Regulation, after the commencement of the main insolvency proceedings in an EU Member State, secondary insolvency proceedings may be commenced in the Czech Republic against the Czech Branch. The effects of such proceedings are restricted only to the assets and liabilities of the respective Czech Branch. The Czech insolvency administrator is obliged to cooperate with the insolvency administrator appointed in the main insolvency proceedings and *vice versa* and must give that insolvency administrator an early opportunity to submit proposals on the realization or use of the assets in the secondary insolvency proceedings.

(75) The commencement of the secondary insolvency proceedings may be requested by the insolvency administrator in the main insolvency proceedings or any other person or authority empowered to do so under Czech law, including local Czech creditors whose claims arise from or are in connection with the operation of the Czech Branch.

(76) At the request of the insolvency administrator or the Foreign Counterparty, being a debtor in possession, the Czech insolvency court may stay the commencement of

secondary insolvency proceedings of the Czech Branch for up to three months if a temporary stay of individual enforcement proceedings have been granted in order to allow for negotiations between the debtor and its creditors and if suitable measures are in place to protect the interests of local creditors.

(77) Where the Insolvency Regulation is applicable, after the commencement of the secondary insolvency proceedings, any judgments handed down by an insolvency court deciding on the main insolvency proceedings concerning the course and closure of the insolvency proceedings, and compositions approved by that court, will be recognised in the Czech Republic with no further formalities under Article 32 of the Insolvency Regulation.

(78) The Czech insolvency courts may also commence insolvency proceedings in respect of the Czech Branch of Foreign Counterparties that are not covered by the Insolvency Regulation[36] if its opening is requested by a creditor residing or seated in the Czech Republic or whose claim against the Foreign Counterparty has arisen in connection with the activities of the Czech Branch. In this case, the Czech insolvency proceedings only apply to the Foreign Counterparty's assets located in the Czech Republic.

(79) Based on the above, we are of the opinion that close-out netting should be recognised and executed accordingly. The Czech insolvency administrator should thus be bound by the close-out netting and the netting rights of the counterparty of the Foreign Counterparty executing the General Agreement and any Individual Contracts via its Czech Branch, subject to our analysis set out in our answers to questions 7.8 and 7.14 above.

Insolvency proceedings commenced under foreign law outside the scope of the Insolvency Regulation

(80) In the scenario where neither the Insolvency Regulation nor the WUCI Directive apply (i.e., when the Foreign Counterparty is located outside the European Economic Area (the **EEA**)), in general, upon the start of the insolvency proceedings for the Foreign Counterparty in Country H, no separate proceedings would automatically start in the Czech Republic with respect to the assets and liabilities of the Czech Branch.

(81) If insolvency proceedings are commenced in Country H in respect of the Foreign Counterparty, generally, such proceedings would not have any effect in the Czech Republic[37], although, given that the Insolvency Regulation does not apply to credit institutions, this is different with respect to Czech Branches of EEA banks.

(82) We are not aware of any relevant treaty relating to the recognition of foreign insolvency proceedings. In the absence of such a bilateral or multilateral treaty, the proceedings would only be recognised in the Czech Republic if there was reciprocity between the Czech Republic and Country H. However, we are not aware of this being the case in relation to insolvency proceedings. Further, if the proceedings are recognised in the Czech Republic, the Czech insolvency court delivers to a court in Country H only movable property of the Foreign Counterparty that remained after satisfaction of rights on exclusion from the bankruptcy assets of the Foreign Counterparty in the Czech Republic and rights of secured creditors.

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[36] For instance, it is not applicable to Foreign Banks.

[37] One exception from this rule is if the Foreign Counterparty ceases to exist as a result of winding up proceedings outside the Czech Republic. As a matter of Czech law, corporate existence is considered under the law of the state where the relevant legal entity is incorporated.

(83) Moreover, save as set out below, under Czech law the relevant authorities in the Czech Republic would not be required in such circumstances to defer to the proceedings in Country H.

(84) Should the conditions be satisfied under the Insolvency Act for the initiation of insolvency proceedings in respect of the Foreign Counterparty (not only in respect of the Czech Branch), insolvency proceedings in the Czech Republic could be initiated by the Foreign Counterparty or its creditors with usual place of residence or registered office in the Czech Republic or if a creditor's receivable has arisen in connection with its business activities in question) in the Czech insolvency court.[38] But please see also below.

(85) The insolvency proceedings in the Czech Republic would apply to the Foreign Counterparty's assets located in the Czech Republic as well as to its assets located outside the Czech Republic. It is however uncertain how the inclusion of the assets located outside the Czech Republic would be implemented in practice. This is likely to depend on the legal system of the state where the assets are located and to require the cooperation of the authorities of that state.

Special Regimes applicable to EEA Foreign Banks and EEA Foreign Large Securities Dealers

(86) In relation to an EEA Foreign Bank (i.e., where the Foreign Counterparty has its registered office within the EEA and possesses a single European banking licence) the situation is significantly different given the implementation of the WUCI Directive in the Czech Republic through the Insolvency Act. Following the implementation of the WUCI Directive:

(a) the Insolvency Act does not apply to a Czech Bank unless the Czech Bank's banking licence has been revoked;

(b) the principle of single universal insolvency proceeding across the territory of all EU Member States has been introduced for banks and their branches having a single European banking licence. This means that Czech Branches of foreign banks operating in the Czech Republic on the basis of a single licence regime are also insolvent provided that the collective insolvency proceedings were initiated and held by administrative and judicial institutions of another EEA state with the purpose of a sale of assets under supervision of these institutions, including cases where such proceedings are terminated by discharge of debt or similarly.

(87) When facing the Czech Branch of the Foreign Counterparty where the Foreign Counterparty is not an EEA Foreign Bank, consideration should also be given to the application of the Crisis Resolution Act to the Czech Branch.

(88) The Crisis Resolution Act and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the **BRRD**) are discussed in more detail in part 1.6 in Annex 1 and Annex 3 as they apply to a Czech Bank or a Czech Securities Dealer which is subject to an initial capital requirement of EUR 750,000 with its registered office in the Czech Republic (the **Large Czech Securities Dealer**). Certain terms defined in part 1.6 of Annex 1 and in Annex 3 are used in the discussion that follows.

[38] Although we are not aware of any occasion where this has actually occurred.

(89) The powers under the Crisis Resolution Act can be exercised, subject to certain modifications, by the CNB in respect of a third country institution (a **Third Country Institution**), being broadly an entity the head office of which is established in a country outside the European Union (the **EU**) that would, if it were established within the EU, be a credit institution or an investment firm as defined in the BRRD, in circumstances where a Third Country Institution (or third-country parent undertaking) is subject to resolution action in a state other than an EEA state (a **Third Country Resolution Action**).

(90) Where, pursuant to Section 195 of the Crisis Resolution Act, the CNB chooses to recognise a Third Country Resolution Action, in whole or in part, the CNB may, for the purposes of supporting, or giving full effect to, the Third Country Resolution Action (or its part), exercise, in relation to a Third Country Institution, one or more of crisis resolution measures or tools available to the CNB in relation to a similar entity in the Czech Republic.

(91) Under the Crisis Resolution Act, the crisis resolution measures or tools may generally apply to: (i) assets of the Third Country Institution or its group located in the Czech Republic or governed by Czech law; and (ii) rights or liabilities of the Third Country Institution that are booked by its Czech Branch or governed by Czech law.

(92) It remains to be seen how these powers will be exercised by the CNB. However, the relevant provisions of the Crisis Resolution Act, as discussed above, make it clear that the crisis resolution measures or tools are only available in respect of the Third Country Institution to the extent that they would be available in respect of a similar entity in the Czech Republic. Moreover, the relevant provisions of the Crisis Resolution Act make it clear that such measures and tools are available to the CNB for the specific purpose of supporting or giving effect to the Third Country Resolution Action carried out by the relevant third country resolution authority, and only to the extent necessary to support such Third Country Resolution Action.

(93) Accordingly, please refer to the analysis in Annex 3 below in respect of a Czech Bank and a Large Czech Securities Dealer, on which basis we do not consider that the above described rules or powers would have any adverse impact on the conclusions in this memorandum.

(94) However, it should be noted that, where the CNB recognises a Third Country Resolution Action (or a part of it), in addition to the availability of crisis resolution measures or tools in respect of the Third Country Institution, such Third Country Resolution Action (or part of it) produces the same legal effects in the Czech Republic as it would have produced had it been made (with due authority) under the law of the Czech Republic. Yet, it can be inferred from the text of the Crisis Resolution Act that to qualify as a Third Country Resolution Action, the anticipated results of the third country action must be broadly comparable to the results which could have been anticipated from the exercise of a crisis resolution measure or tool in relation to an entity in the Czech Republic corresponding to the relevant third-country institution or parent undertaking and the objectives of the action must also be broadly comparable to those set out in the Crisis Resolution Act. In any case, the nature and effect of the recognised Third Country Resolution Action is ultimately a question for the relevant foreign law.

(95) Note that above we discuss the position with respect to Third Country Institutions but the Crisis Resolution Act also provides for the recognition of resolution action in respect of third-country parent undertakings.

8.4 *If there were separate proceedings in the Czech Republic with respect to the assets and liabilities of the Czech Branch, would the receiver or liquidator in the Czech Republic and the Czech courts, based on the facts above, include the Foreign Counterparty´s position under the General Agreement, in whole or in part, among the assets of the Czech Branch and, if so, would the receiver or liquidator and the Czech courts recognise the close-out netting provisions of the General Agreement in accordance with their terms? The most significant problem arising would be if a Czech receiver, liquidator or court considering a single General Agreement were to require a counterparty of the Czech Branch of the Foreign Counterparty to pay the mark-to-market value of Individual Contracts entered into with the Czech Branch to the liquidator or receiver of the Czech Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with the Foreign Counterparty under the same General Agreement. Please consider your answer to your question assuming instead that Foreign Counterparty has no branch located in the Czech Republic, but has assets in the Czech Republic.*

(96) Our conclusions in respect of the recognition of close-out netting provisions do not differ from the conclusions set out in our answers to questions 7.8 and 7.14.

(97) If there were secondary insolvency proceedings in respect of the Foreign Counterparty in the Czech Republic, following the carrying out of close-out netting, the insolvency administrator and the Czech courts could, in the above scenario, include the Foreign Counterparty's obligation (if any) corresponding to the Termination Amount among the assets which are subject to the insolvency proceedings in the Czech Republic and regardless of whether the General Agreement was entered into on a multibranch basis or not.

(98) Secondary insolvency proceedings may only be commenced if the assets in the Czech Republic constitute an establishment under Articles 2(10) and 3(2) of the Insolvency Regulation, e.g., a branch. Therefore, if the Foreign Counterparty had no assets in the Czech Republic, we do not consider that secondary insolvency proceedings could be opened in the Czech Republic. In any case, our conclusions are not affected by this alteration.

9. VALIDITY AND ENFORCEABILITY OF FINANCIAL COLLATERAL ARRANGEMENTS UNDER THE CREDIT SUPPORT ANNEXES

9.1 *Under the laws of the Czech Republic, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the Credit Support Annex?*

Transfer of cash

(99) The obligations to transfer cash under the Credit Support Annexes are governed by the law applicable to the Credit Support Annexes. In line with Article 3(1) of the Rome Convention[39] or Rome I Regulation[40], being the applicable law for the determination of a governing law of agreements in civil and commercial matters in the Czech Republic, the governing law is the law chosen by parties to each Credit Support Annex. Given the assumption that the Credit Support Annexes are not governed by the laws of the Czech Republic, Czech law is not applicable for the determination whether obligations under the Credit Support Annex are valid, legal and enforceable.

(100) Czech law would be relevant to the transfer of ownership of cash only if it governed proprietary aspects of such transfer. To determine whether Czech law would govern the

[39] With respect to Credit Support Annexes entered into before 17 December 2009.
[40] With respect to Credit Support Annexes entered into on or after 17 December 2009.

proprietary aspects of the transfer of cash, it is first necessary to establish the legal nature of cash as recognised under Czech law. In line with various Czech laws, including the Financial Collateral Act, cash may constitute:

(a) money credited to an account in the Czech or foreign currency; or

(b) claim for the repayment of money (which is a claim for the repayment of money from an account in the Czech or foreign currency, or a similar claim for the repayment of money).

(101) The above should reflect that cash will likely be considered the latter (i.e., a claim for the repayment of money) as a matter of Czech legal doctrine but may well be viewed as the former (i.e., money credited to an account). Cash credited to an account should in our view be regarded as a payment claim of the account holder against the relevant account bank.

(102) The transfer of cash legally operates as follows. The Transferor's account bank performs its payment obligation vis-à-vis the Transferor and a new payment obligation of the Transferee's account bank owed to the Transferee is created instead. Various other payment obligations may be created to effect the transfer between the bank account of the Transferor to the designated bank account of the Transferee. Such transfer of cash does not involve any actual transfer of ownership in respect of cash.

(103) Whether a payment obligation has been performed or created must be determined pursuant to the relevant bank account agreements. Such assessment goes beyond the scope of this memorandum.

(104) Since the described transfer of cash does not include a transfer of ownership, it does not involve any proprietary aspects that would be subject to Czech law.

Transfer of a bank guarantee or a parent company guarantee

(105) Neither a letter of credit nor a parent company guarantee involves a transfer of ownership. The validity of its transfer must be assessed separately by reviewing its terms under its governing law.

9.2 *Would the laws of the Czech Republic characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?*

(106) Our answer in this part 9.2 is subject to our analysis in part 9.6 below, providing an overview of the regulation of financial collateral arrangements in the Czech Republic.

(107) Under Section 4(1) of the Financial Collateral Act, financial collateral arrangements take the form of either a transfer of title to financial collateral or a pledge (i.e., security interest) over financial collateral, benefitting the collateral taker. We do not believe that there is a risk of re-characterisation of the transfer of cash pursuant to the Credit Support Annexes as creating a security interest.

(108) Firstly, Sections 3(1), 7(1) and 7(3) of each Credit Support Annex are the basis for, and clearly envisage, a transfer of title to Eligible Credit Support. Secondly, under Czech law, a pledge over cash may only be created by pledging receivables from a bank account of a transferor. Accordingly, since the Credit Support Annexes do not intend to create

a pledge over receivables, we believe that there is no risk of re-characterization of the transfer as the creation of a security interest.

9.3 *Assuming that the Czech Entity's counterparty receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in the Czech Republic necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?*

(109) Since Czech law is not applicable to the contractual aspects of the Credit Support Annexes and there are no proprietary aspects of the transfer of collateral governed by Czech law, we confirm that no further actions need to be undertaken to ensure that the Transferee has continuing title in the collateral received.

9.4 *What is the effect, if any, under the laws of the Czech Republic of the right to substitute collateral pursuant to § 6 of the Credit Support Annex? Does the presence or absence of consent to substitution by the counterparty have any bearing on this question?*

(110) Czech law will recognise any substitution of collateral pursuant to § 6 of each Credit Support Annex if it is valid under the law of the jurisdiction which governs the proprietary aspects of the security interest in the collateral.

(111) Even though Czech law does not govern the provision of collateral under the Credit Support Annexes, we note that Section 14 of the Financial Collateral Act enables the collateral provider to substitute financial collateral provided for different financial collateral of a comparable value. In such a case, the substituted collateral is regarded under Czech law as if it had been provided at the same time as the original collateral. This should ensure that the substitution of collateral enjoys the same level of protection in the event that the Czech Entity becomes insolvent as the provision of the original Collateral.

9.5 *The Czech Entity counterparty's right in relation to the transferred collateral upon termination of the relevant general agreement will be governed by § 11 of the General Agreement together with § 11 of the Credit Support Annex. Assuming that § 11 of the General Agreement is valid and enforceable in the Czech Republic insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the General Agreement as "other amounts payable"?*

(112) Section 193(1)(b) of the CMA specifically foresees that close-out netting may cover claims, including appurtenances to those claims, arising from financial collateral arrangements or from similar legal relation under foreign law.

(113) Provided that the counterparty has a claim for the transfer of collateral under a valid financial collateral arrangement (please see part 9.6), that claim may be included in the calculation of the Termination Amount under § 10.3(e) and 11.1 of each General Agreement as "other amounts payable".

9.6 *Are the rights of the Czech Entity's counterparty enforceable in accordance with the terms of the General Agreement and the Credit Support Annex, irrespective of the insolvency of the Czech Entity?*

(114) The mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings against the Czech Entity should, generally, not have any implication on the enforceability or operation of each Credit Support Annex.

(115) As we discuss in our answer to question 9.1, Czech law is not applicable to the transfer of ownership of Eligible Credit Support under the terms of each Credit Support Annex. Therefore, as long as the Credit Support Annex and compliance with its conditions are in line with their governing laws, a Czech court should recognise their validity.

(116) Following the commencement of insolvency proceedings, we must consider whether the transfer of the Eligible Credit Support is exempted from the effects of the Insolvency Act.

(117) The Insolvency Act contains one sweeping protective provision for financial collateral arrangements. Section 366(1)(b) of the Insolvency Act states that the provisions of the Insolvency Act will not affect the exercise of all rights and fulfilment of all obligations arising in relation to a financial collateral arrangement pursuant to the Financial Collateral Act or equivalent foreign law, provided that such financial collateral arrangement has been entered into and come into existence prior to the initiation of insolvency proceedings[41], or later on the same day if the Transferee can prove that it neither knew nor should have known about the initiation of the insolvency proceedings. The mere fact that the opening of the insolvency proceedings has been published in the insolvency register does not in and of itself mean that the Transferee knew or should have known about the initiation of the insolvency proceedings.

(118) It follows that, subject to one caveat discussed below, the Transferee's rights to the Eligible Credit Support would be protected from the effects of the Insolvency Act, and therefore also from any competing claims of other general creditors against the insolvency estate, if the provision of the Eligible Credit Support under the Credit Support Annex qualified as a financial collateral arrangement under the Financial Collateral Act or under equivalent foreign law, as defined in Section 366(1)(b) of the Insolvency Act.

(119) As explicitly mentioned by Section 366(1)(b) of the Insolvency Act, and in line with Article 8 of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (the **Financial Collateral Directive**), Section 366(1)(b) will only protect Financial Collateral Arrangements if the Eligible Credit Support was provided before the information about the commencement of insolvency proceedings concerning the Transferor is published in the insolvency register, or later on the same day if the Transferee can prove that it neither knew nor should have known about the initiation of the insolvency proceedings.

(120) However, Section 366(3) of the Insolvency Act stipulates that, among others, the exemption under Section 366(1)(b)[42] of the Insolvency Act does not apply to those provisions of the Insolvency Act concerning avoidance transfers (please see part 7.14).

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41 This would be the commencement of its effects *vis-à-vis* third persons, i.e., publication of the initiation notice in the insolvency register.

42 Section 366 of the Insolvency Act contains an error in reference following its amendment. Section 366(3) incorrectly refers to Section 366(1)(d), which has been transformed into Section 366(1)(b) due to the amendment. We are of the view that Section 366 cannot be interpreted in a way other than described in this memorandum since Section 366(1)(d) does not exist anymore.

Eligible Credit Support in the form of cash

(121) Since the provision of Eligible Credit Support under the Credit Support Annexes is not governed by the laws of the Czech Republic, the following criteria should be met to increase the likelihood that the provision of Eligible Credit Support is recognised as a financial collateral arrangement which is a "*financial collateral arrangement pursuant to equivalent foreign law*":

(a) The Eligible Credit Support should only be constituted by those types of assets which are classified as "cash" within the meaning of paragraph 1(d) of Article 2 of the Financial Collateral Directive[43].

(b) The provision of Eligible Credit Support should be evidenced in writing or in a legally equivalent manner (see paragraph 2 of Article 3 of the Financial Collateral Directive). Under the Czech law implementation set out in Section 9(2) of the Financial Collateral Act, this requirement applies to the provision of the Eligible Credit Support itself and the evidencing in legally equivalent manner to writing includes records proving a transfer of collateral that ensures unaltered reproduction. We believe that the Czech insolvency court when applying Section 366(1)(b) of the Insolvency Act would qualify this requirement along the lines of the Czech implementation.

(c) The obligations secured under the Credit Support Annex should give a right to a cash settlement and/or delivery of financial instruments.

(d) The Transferee and the Transferor should fall within one of the types of eligible legal entities listed in Annex 2.[44]

(e) Eligible Credit Support is surrendered to the Transferee, i.e., by crediting such Eligible Credit Support to the Transferee's designated account, or provided to it in another way that allows the Transferee or a person acting on its behalf to hold or otherwise legally or factually control such Eligible Credit Support.

(f) The Transferee may enforce the Eligible Credit Support upon the occurrence of an agreed Material Reason in respect of the Transferor or another event, in a timely manner without any restrictions (e.g., a requirement to obtain a court order or another approval for enforcing the security interest in the Eligible Credit Support).

(122) The above conditions should be generally met when receiving the Eligible Credit Support from the Czech Entity in the form of cash. Nevertheless, we recommend observing their compliance on a case-by-case basis.

Eligible Credit Support in the form of a letter of credit or a parent company guarantee

(123) We do not believe that letters of credit and parent company guarantees can amount to eligible financial collateral under Section 5 of the Financial Collateral Act since none of the categories of eligible financial collateral listed therein cover either letters of credit or parent company guarantees.

(124) The category that comes closest to the legal nature of letters of credit and parent company guarantees refers to a "claim for the re-payment of money" (in Czech, *pohledávka na*

[43] Money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits.
[44] It is therefore necessary to determine whether a particular Czech Entity falls within the types of entity listed in Annex 2.

výplatu peněz). While the Czech term *"výplata"* (re-payment) is not entirely unambiguous, the explanatory memorandum to the Financial Collateral Act states that this category was included in the Financial Collateral Act in order to account for the legal nature of cash credited to a bank account, being a claim for the re-payment of money. Consequently, we do not consider that this category was included to enable coverage of other instruments such as letters of credit or parent company guarantees.

(125) For financial collateral arrangements established under foreign law to benefit from the protection in Section 366(1)(b) of the Insolvency Act, they must be recognised as equivalent to the financial collateral arrangements established under the Financial Collateral Act. To the extent that they purport to take advantage of letters of credit and parent company guarantees as eligible financial collateral, we do not believe that financial collateral arrangements established under foreign law will be considered equivalent to financial collateral arrangements established under the Financial Collateral Act and will therefore not benefit from the protection in the Insolvency Act.

(126) As a result, in this memorandum, unless expressly stated otherwise, when referring to Eligible Credit Support, we only refer to cash.

9.7 *Will the Czech Entity (or its receiver or other similar official) be able to recover any transfer of collateral provided to the Czech Entity's counterparty during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?*

(127) Generally, the insolvency administrator can claim that a transfer of Eligible Credit Support was an avoidance transfer. For a full description of avoidance transfers, please see part 7.14.

(128) If the substitute assets are not of greater value than the assets they are replacing, the substitution of financial collateral to the counterparty during the hardening period should not invalidate the transfer as such an action would not be considered to be detrimental to the debtor.[45] Such a transfer should therefore be considered valid, although we are not aware of any court decision which would unambiguously support this conclusion.

(129) Considering the mark-to-market provisions of Credit Support Annex we are of the opinion that a transfer of additional financial collateral would most probably not be considered detrimental to other creditors and would be considered valid.

(130) However, an act by which the debtor provided their property for the financial collateral of the already existing liability could be considered to be an ineffective act.

9.8 *Is the Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to the Czech Entity's counterparty? Are there any other requirements to be observed in the Czech Republic in order to ensure validity of such transfer in each type of Eligible Credit Support created by the Czech Entity under the Credit Support*

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45 In our view, from an economic perspective in its complexity, the position of the creditor is not improved by the substitution of the Eligible Credit Support made mark-to-market. By the same token, the position of other creditors is not deteriorated, even though formally new Eligible Credit Support is provided to a pre-existing liability.

Annex? For example, are there any other requirements such as those mentioned in part 9.3 above?

(131) Each Credit Support Annex should be able to create the intended transfer of ownership in Eligible Credit Support in the form of cash from the Czech Entity to its counterparty under Czech law.

(132) Under Section 9(1) of the Financial Collateral Act, ownership in the financial collateral is transferred to the Transferee at the moment the financial collateral is credited to an account held by the Czech Entity's counterparty or when the financial collateral is provided to the Transferee in such a way that allows the Transferee or a person acting on its account to possess or legally or factually control the financial collateral.

(133) Under Section 8(1) of the Financial Collateral Act, the contract pursuant to which financial collateral arrangements are established is not required to be in written or any other special form. However, under Section 9(2) it must be possible for the fact that a financial collateral arrangement has been established to be evidenced in written form or by a record that allows its reproduction in an unaltered condition.

(134) However, please refer to part 9.6 where we explain that letters of credit and parent company guarantees do not constitute eligible financial collateral.

9.9 *Do you have other specific recommendations on the subject of collateral that EFET and its members need to be aware of? If yes, please provide detailed answer.*

(135) We wish to emphasize that letters of credit and parent company guarantees do not constitute eligible financial collateral under Czech law and financial collateral arrangements established under foreign law are unlikely to benefit from the protection of Section 366(1)(b) of the Insolvency Act to the extent they purport to take advantage of letters of credit and parent company guarantees as eligible financial collateral (please see part 9.6).

(136) We therefore recommend using Eligible Credit Support in the form of cash under the Credit Support Annexes.

10. GENERAL ENFORCEABILITY

10.1 *Are the General Agreements and any of the mentioned Annexes (including the Credit Support Annex) and Appendices enforceable under the laws of the Czech Republic in accordance with its own terms? We would like you to specifically discuss, in a detailed and circumstantiated manner the provisions on (i) non-performance due to Force Majeure (§ 7 of each General Agreement), (ii) remedies for non- performance (§ 8 of each General Agreement) and (iii) limitation of liability (§ of the each General Agreement) and any other provisions which in your opinion need to be commented on according to the law of the Czech Republic, including whether these provisions could and/or need to be further 'expanded' and/or 'strengthened' under the laws of your jurisdiction. We are especially interested in provisions that you may believe, for example infringe upon the order public in the Czech Republic and that may be challenged by the courts in the Czech Republic irrespective of the laws that governs the General Agreement.*

Non-performance due to Force Majeure

(137) To the extent that the General Agreement is governed by Czech law, Force Majeure is recognised as a valid obstacle preventing a party from performing its obligations under

a contract. As such, parties are free to further specify the definition of Force Majeure in their contract and such provisions would generally be enforceable under Czech law, provided that they are not contrary to Czech statutory law. Typically, stipulated Force Majeure events cannot be contrary to good morals (in Czech, *v rozporu s dobrými mravy*) and must be conditioned on objective events devoid and principally absent of the parties' will.[46] Furthermore, the definition of Force Majeure under Czech law contains similar elements to the Force Majeure Clause of the General Agreements.

(138) We note, however, that to the extent the EFET General Agreement is governed by Czech law, a release from obligation (in Czech, *osvobození od povinnosti*) connotes a permanent release from an obligation and not a temporary one. From the wording of § 7.3 of each General Agreement, we understand that the release from obligation is meant to be temporary. It would be preferable to use the term suspension of obligations (in Czech, *odložení plnění*), which connotes a temporary suspension of an obligation until the obstacle (Force Majeure) preventing the party from performing its obligations ceases to exist. The wording of the Force Majeure Clause of the General Agreements is, however, clear enough and should not give rise to any misinterpretation.

(139) To the extent a General Agreement is governed by Czech law, we additionally note that, if the obstacle is of a permanent nature and the performance of a contractual obligation becomes objectively and permanently impossible, the obligation ceases to exist altogether.

Remedies for non-performance

(140) Under Czech law, the parties are free to determine the manner and extent of compensation of damages within the limits of statutory law, e.g., remedies cannot be contrary to good morals. To the extent that a General Agreement is governed by Czech law, the remedy set out in § 8 of each General Agreement is, in our opinion, valid and enforceable.

Limitation of liability

(141) Czech law differentiates between two categories of damages that can be claimed, namely actual damages and lost profits.

(142) Actual damages comprise, in principle, a decrease in the financial value of the injured party's assets which occurred in causal connection with a loss, and include all costs incurred by the injured party in causal connection with the wrongdoer's unlawful acts and damage caused to a thing.

(143) Lost profits mean harm incurred due to the fact that the injured party's assets are prevented from increasing in value despite the fact that such an increase could have reasonably been expected in the regular course of things. Lost profits are a loss of anticipated benefits, a realistic profit the injured party has lost. Compensation is determined as the difference between the anticipated profit and costs which have been incurred in order to achieve such profit. Under Czech case law, the amount of lost profits is determined on the basis of an amount which the injured party would have gained under normal circumstances through its activities if the loss had not occurred, while taking into account costs the injured party would have to pay to achieve such earnings. These principles apply to the determination of the lost profits amount in general.

[46] However, we believe that this provision is not part of the *ordre public* of the Czech Republic.

(144) Czech law does not generally recognise concepts such as goodwill, business opportunity, anticipated savings and indirect or consequential damages. As a result, it is uncertain how Czech courts, to the extent they have jurisdiction, would ascertain such types of damages.

(145) Under Czech law, liability cannot be excluded for damages caused by wilful misconduct (in Czech, *úmyslně*) or gross negligence (in Czech, *z hrubé nedbalosti*), and any stipulations to the contrary are disregarded.

(146) The duty to mitigate losses under § 12.5 of each General Agreement is also stipulated in Czech statutory law, specifically in Sections 2900 *et seq.* of the Civil Code.

(147) The provisions set out in § 12 of each General Agreement should be valid and enforceable under Czech law, provided that § 12.4 incorporates the exception to the limitation of liability with respect to gross negligence.[47]

10.2 *Is there a risk that a notice, declaration or other communication given in accordance with the E-Notice Agreement may not be recognised as valid? Could the deemed receipt of a notice be challenged? Who bears the burden of proof that the document attached to the e-mail is not falsified?*

(148) Please refer to part 7.7 above.

10.3 *Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be made aware of regarding the general enforceability, from a legal stand point, of the General Agreement and its Credit Support Annex.*

(149) We have no further recommendations.

11. CONFIRMATION PRACTICES

Binding Individual Contract

11.1 *Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization) under the laws of your jurisdiction?*

(150) No. Under Czech law, Individual Contracts do not require to be in written form and no formal acts are required for them to become legally binding and enforceable.

11.2 *At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction?*

(151) An Individual Contract agreed orally becomes legally binding and enforceable under Czech law when all parties agree all essential requirements of such a contract.

11.3 *Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of your jurisdiction? If so, is there a relevant time period per the laws of your jurisdiction that could potentially override the governing law of the General Agreement, and permit the parties to object still?*

(152) Under Czech law, if a confirmation following the conclusion of an oral contract is sent to the other party, and the confirmation does not substantially vary from the actually

[47] However, we do not consider this rule to be an international cogent norm.

stipulated contents of the oral contract, the contract is conclusively presumed to have been concluded under the terms specified in the confirmation. However, to the extent that General Agreement is governed by Czech law, we note that Section 1740 (3) of the Civil Code which stipulates this rule can be excluded from application.

(153) The above-mentioned presumption only applies if the variations are of such a nature that a reasonable entrepreneur would still have approved them, and if the other party does not reject these variations. Generally, the omission of a rejection or a tacit consent does not constitute approval. The other party, however, should react to such an incorrect confirmation and make its objections known without undue delay or else it risks being bound by the revised terms.

(154) We note that even if the confirmation varies substantially from the actually stipulated contents of an oral contract, it is advisable for the other party to still react and reject such a confirmation as it is difficult to predict what would and would not constitute a substantial variation due to a lack of relevant case law.

11.4 *Is the reference to the relevant General Agreement made in the relevant written confirmation exchanged (post trade) between the parties sufficient for the inclusion of the Individual Contract in the General Agreement?*

(155) In our view, if all parties were aware that the Individual Contract is included in the relevant General Agreement at the time the Individual Contract is concluded, then a reference to the relevant General Agreement made in the relevant written confirmation suffices for the Individual Contract to be a part of the General Agreement.

Means of Evidence

11.5 *Assuming that there is a dispute with respect to the existence or the terms and conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in front of a court in the Czech Republic: a (i) taped recording, (ii) witness' statement, (iii) e-mail or other electronic message or transaction entry system, and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?*

(156) Under Czech law, any of the forms of evidence listed above are admissible in civil court proceedings. Czech courts will assess each piece of evidence in accordance with the principle of free evaluation of evidence, and it is up to the courts to decide which evidence shall prevail.

(157) Taped recordings are eligible to serve as evidence if they were acquired in accordance with statutory law. Czech courts may, however, take into account the right to privacy of the recorded persons when assessing the admissibility of such evidence. A disclaimer at the beginning of telephone conversations informing the other party about the recording would greatly increase the admissibility of such recordings before Czech courts.

(158) Witness statements, emails and facsimiles are standard categories of evidence and are all eligible to provide proof of the agreed upon terms of the Individual Contract.

(159) Please note that all evidence is assessed on a case-by-case basis in accordance with the above-mentioned principle of free evaluation of evidence, and it cannot be predicted with absolute certainty how the courts will proceed in assessing the evidence.

12. CORE PROVISIONS

12.1 *Would any of the selections contemplated by the General Agreement or any of the mentioned Annexes (including the Credit Support Annex) and Appendices change the substance of your conclusions reached under parts 7 and 8 above? As far as the Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.*

(160) The elections contemplated by the General Agreements or any of the mentioned Annexes including the Credit Support Annexes would not change the substance of our conclusions in parts 7 and 8 above as to the enforceability of close-out netting. The relevant provisions should be valid and enforceable under Czech law.

(161) As far as substitution with or without consent of the pledgee is concerned, please see part 9.4 above.

12.2 *Considering your conclusions reached under part 7 or 8 above, what are the provisions of the General Agreements that you regard as so essential that a material alteration thereof could affect the conclusions reached in that part 7 or 8 (each such provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained Annex 1 to the General Agreement.*

(162) Please refer to assumption 3(b) above. Additionally, please note assumption 3(c).

(163) Apart from the Core Provisions (as defined in question 12.2), we consider that § 10.3(c) of each General Agreement constitutes a Core Provision (as defined in assumption 3(b) above), since it contains the time and manner of the calculation of the Settlement Amount, and thereby satisfies one of the requirements for close-out netting under Section 193(2) of the CMA.

(164) We do not recommend deviating from these Core Provisions (as defined in assumption 3(b) above), as it may adversely affect the conclusions of this memorandum as to the validity and enforceability of the close-out netting arrangements.

12.3 *Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of your conclusions reached under Part C.I or C.II?*

(165) Assuming that the Core Provisions as defined in assumption 3(b) above have not been changed, the inclusion of the General Agreements in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) would not change the substance of our conclusions reached under parts 7 or 8.

13. GOVERNING LAW, ARBITRATION AND JURISDICTION

13.1 *Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the General Agreement) be upheld in the Czech Republic, and what would be the consequences if it were not?*

Choice of law

(166) As already discussed above in parts 7.4 and 9.1, the choice of foreign law will be recognised in the Czech Republic, although the choice of law is subject to certain exceptions.

(167) The most notable exceptions under the Rome Convention are the following:

(a) if all the other elements relevant to the General Agreement at the time of the choice were connected with one country only, the fact that the parties have chosen English, German or other law would not prejudice the application of any mandatory rules under the laws of that other country which cannot be derogated from by contract;

(b) the chosen law will not restrict the application of any rules of Czech law in a situation where they are mandatory, irrespective of the law otherwise applicable to the relevant General Agreement. Unless mentioned otherwise in this memorandum, we consider it unlikely that any such rules would adversely affect our analysis;

(c) effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the General Agreement. In considering whether to give effect to these mandatory rules, regard would be to their nature and purpose and to the consequences of their application or non-application; and

(d) the chosen law may not be applied if its application would be incompatible with Czech public order. We are not aware of any public order rule that would prevent the parties from complying with their duties under the General Agreement.

(168) The most notable exceptions under the Rome I Regulation are the following:

(a) if all other elements relevant to the situation at the time of the choice were located in a country other than the country whose law has been chosen, the choice will not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement;

(b) in case of a General Agreement governed by the laws of a non-EU Member State, if all other elements relevant to the situation at the time of the choice were located in one or more EU Member States, the choice of law would not prejudice the application of provisions of EU law, where appropriate as implemented in the Czech Republic, which cannot be derogated from by agreement. We are currently not aware of any such provision;

(c) the chosen law will not restrict the application of overriding mandatory provisions of Czech law. Unless mentioned otherwise in this memorandum, we consider it unlikely that any such provisions would adversely affect our analysis;

(d) effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the General Agreement have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the General Agreement unlawful. In considering whether to give effect to those provisions, regard would be to their nature and purpose and to the consequences of their application or non-application; and

(e) the provisions of chosen law may not be applied if their application would be manifestly incompatible with Czech public order. We are not aware of any public order rule that would prevent the parties from complying with their duties under the General Agreement.

Choice of forum

<u>Submission to the jurisdiction of German courts</u>[48]

(169) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the **Brussels Regulation (recast)**) applies to all legal proceedings instituted on or after 10 January 2015, whilst Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which had been repealed, would continue to apply to judgments given in proceedings instituted before 10 January 2015. Under the Brussels Regulation (recast), submission by the parties to the jurisdiction of the German courts, as applicable, would generally be upheld. However, please note that:

(a) Czech courts would have jurisdiction over all matters relating to the constitution and existence of the Czech Entity. Czech courts would also always have jurisdiction in respect of the insolvency of a Czech Entity and in respect of the enforcement of a claim in the Czech Republic; and

(b) a Czech court would have jurisdiction if the defendant enters an appearance before the Czech court, except where the appearance was entered in order to contest the jurisdiction of the Czech court.

(170) A judgment given by a German court, as applicable, would be, subject to the exemptions provided for by the Brussels Regulation (recast), generally recognised in the Czech Republic without a review by the Czech court as to its substance.

(171) A judgment obtained in Germany, as applicable, would be enforceable in the Czech Republic provided that the conditions set out in the Brussels Regulation (recast) are complied with. These conditions include, most notably, the following:

(a) the judgment being enforceable in Germany, as applicable;

(b) an application by the party seeking enforcement complying with certain formalities set out in the Brussels Regulation (recast); and

(c) the judgment not being manifestly contrary to Czech public policy.

<u>Submission to the jurisdiction of English courts</u>

(172) The United Kingdom (the **UK**) decided to accede to the Hague Convention on Choice of Court Agreements (the **Hague Convention**) with effect from 1 January 2021. The Hague Convention therefore applies to all exclusive choice of court agreements granting

48 Our conclusions in paras (169) to (171) with respect to Germany apply to other EU Member States as well.

jurisdiction to English courts which satisfy the requirements set out in the Hague Convention, provided that such agreements are concluded on or after 1 January 2021.

(173) While the Hague Convention has been in force in the UK since 1 October 2015 by virtue of the EU's accession to the Hague Convention, there is doubt as to whether the Hague Convention also applies to exclusive choice of court agreements granting jurisdiction to English courts concluded during the period between 1 October 2015 and 1 January 2021.

(174) Therefore, it is not certain whether the Czech courts will apply the Hague Convention provisions regarding exclusive choice of court agreement concluded between 1 October 2015 and 1 January 2021. If the Czech courts refused to apply the Hague Convention in respect of the UK and this period, the parties to such agreement may need to consider re-stating the exclusive choice of court agreement to avoid the application of the rules under the Private International Law Act.

(175) Subject to the above-described uncertainty, a Czech court will recognise and enforce a judgment of an English court if the conditions set out in the Hague Convention are complied with and provided that there are no grounds for refusal of recognition or enforcement of the judgment.

(176) The main conditions for recognition and enforcement are that the judgment has effect and is enforceable in the jurisdiction in which it was issued (i.e., England and Wales). The grounds for refusal of recognition or enforcement include, among others, the following:

(a) the agreement was null and void under English law, unless the chosen court has determined that the agreement is valid;

(b) a party lacked the capacity to conclude the agreement under Czech law;

(c) the judgment was obtained by fraud in connection with a matter of procedure; or

(d) recognition or enforcement would be manifestly incompatible with Czech public policy, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of the Czech Republic.

Similarly to the recognition of judgment under the Brussels Regulation (recast), there is no special procedure required. The judgment will not be reviewed by the relevant Czech court as to its substance and the procedure as such will be governed by the Civil Procedure Code. Furthermore, in case of inconsistency between the Hague Convention and the Civil Procedure Code or other legislation, the Hague Convention will prevail and the Czech rule will not be applied.

Submission to the jurisdiction of non-EU and non-English courts

(177) If the parties to the General Agreement choose the jurisdiction of non-EU and non-English courts, the rules set out in the Private International Law Act will apply.

(178) The courts of the Czech Republic will generally respect the provision in the General Agreement under which the Czech Entity submits to the jurisdiction of the non-EU and non-English courts.

(179) However, the Czech courts would in general take jurisdiction in relation to provisional or protective matters even if the courts of the jurisdiction designated by the parties have jurisdiction as to the substance of the dispute.

(180) Under Section 15 of the Private International Law Act, a judgment obtained in non-EU and non-English courts in respect of a General Agreement would not be recognised and enforced in the Czech Republic if:

(a) the matter falls under the exclusive jurisdiction of the Czech courts, or unless, were the provisions of the Private International Law Act on the jurisdiction of the Czech courts applied to determine the jurisdiction of the foreign body, according to those provisions the proceeding could not be conducted before any body of a foreign state, unless the party to the proceeding against whom the foreign decision is directed voluntarily submitted to the jurisdiction of the foreign body;

(b) a proceeding relating to the same legal relationship is pending before a Czech court and was initiated earlier than the proceeding abroad in which the decision proposed to be recognised was issued;

(c) a Czech court issued a final and enforceable decision on the same legal relationship, or unless a final and enforceable decision of a third country body has already been recognised in the Czech Republic;

(d) through action on the part of a foreign body, the party to the proceeding against whom the decision is to be recognised was deprived of the possibility to take due part in the proceeding, in particular if summons or motion for initiation of proceedings have not been delivered to the party;

(e) the recognition would obviously be contrary to public policy; or

(f) there is no guarantee of reciprocity (reciprocity is not required if the foreign decision is not directed against a Czech national or a Czech legal entity).

Submission to the jurisdiction of an arbitral tribunal

(181) The Czech Republic is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **NY Arbitration Convention**). As long as an arbitral award is issued in line with the terms of the NY Arbitration Convention, it is recognisable and enforceable in the Czech Republic

14. REGULATORY REGIME

14.1 *Are there any exchange control laws or license requirements (under, e.g., any banking, securities trading or energy law) that may affect the enforceability of the relevant General Agreement or the Individual Contracts?*

(182) In practical terms, we do not think that there are any exchange control laws that would affect the enforceability of the General Agreements or Individual Contracts.

(183) There are no generally applicable exchange control laws in the Czech Republic. However, in extraordinary circumstances, the Act on the Security of the Czech Republic gives the Czech government the power to declare a state of emergency and take certain measures pursuant to the Crisis Act to restrict, suspend or prohibit, for example, the

exchange of foreign currencies for CZK or payments abroad for the duration of such emergency (not to exceed thirty days at any one time). To our knowledge, no state of emergency during which exchange control restrictions were imposed has ever been declared by the Czech government.

(184) In certain circumstances, financial institutions (e.g., banks) may be subject to the measures set out in Annex 3.

(185) For a person to be able to trade in natural gas and electricity on the Czech market, a licence granted by the Energy Regulatory Authority (in Czech, *Energetický regulační úřad*) is required. The applicant must submit all the necessary documents with the application, a list of which is available on the Energy Regulatory Authority's website. The granting of a licence is also subject to a fee. Additionally, a foreign person needs to have a branch registered in the Commercial Register (in Czech, *odštěpný závod*) to be able to apply for such a licence.

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Petr Vybíral
Partner
on behalf of **Allen & Overy (Czech Republic) LLP, organizační složka**

ANNEX 1

CZECH INSOLVENCY LAW

1.1 General description of Czech insolvency proceedings and exemption applicable to close-out netting arrangements

For your background information, in the Czech Republic, since 1 January 2008 the insolvency proceedings available to assist a debtor in the situation of insolvency or threatened insolvency have been governed by the Insolvency Act and by Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings that governs cross-border insolvency within the EU excluding Denmark.

The purpose of insolvency proceedings is to resolve the debtor's insolvency or threatened insolvency through the appropriate insolvency/restructuring proceedings, in order to: (i) arrange the debtor's proprietary relations to persons affected by the debtor's insolvency or threatened insolvency; and (ii) satisfy the debtor's creditors generally on a *pro rata* basis and to the greatest extent possible.

A debtor is insolvent if it has more than one creditor and unpaid debts which are more than 30 days overdue and is unable to pay these debts. The debtor is presumed to be unable to pay its debts if: (i) it has ceased to make payments in relation to a substantial part of its debts; (ii) its debts are more than three months overdue; (iii) it is impossible to satisfy any of the debtor's due debts through court enforcement or execution; or (iv) the insolvency court has requested that the debtor provides a list of its assets, liabilities and employees and the debtor fails to comply with this request.

Since 1 July 2017, a debtor who is an entrepreneur and keeps financial accounts is deemed able to pay its debts if (i) the difference between the amount of the Debtor's due financial liabilities and the amount of available funds (the coverage gap, in Czech, *mezera krytí*) represents less than 10% of the Debtor's due financial liabilities, or if (ii) the Debtor's liquidity forecast certifies that such difference will decrease below 10% in the given forecast period, in each case provided that this is based on a report of the state of liquidity or a liquidity forecast prepared by an authorised person.

A corporate debtor is also insolvent if it is over-indebted. A debtor is over-indebted if it has more than one creditor and its debts are greater than its assets (whilst estimating the value of the assets, the further operation of the business have to be taken into account). The debtor is threatened by insolvency if it is justified to assume, given all of the circumstances of the case, that the debtor will be unable to satisfy a substantial part of its debts when they become due.

The concept of single insolvency proceedings applies in the Czech Republic. There is a single entry system with a uniform initial stage of proceedings in which the insolvency court examines whether the debtor is indeed insolvent or, where applicable, at least threatened by insolvency. If the insolvency court reaches a positive decision on that issue, it will then decide on the method by which the debtor's insolvency should be resolved. It will generally follow the decision of the debtor's creditors (where such choice is possible). The insolvency proceedings will take the form of either bankruptcy, reorganisation or discharge from debts (only applicable to non-entrepreneurs).

In its decision declaring the debtor insolvent, the insolvency court will appoint an insolvency administrator (in Czech, *insolvenční správce*) who holds the power to deal with the insolvency estate to the extent that the debtor is prohibited by law or a decision of the insolvency court from dealing with its estate. The insolvency administrator will also ascertain, examine, list and collect the debtor's assets and scrutinise filed claims. The insolvency administrator's remaining tasks will depend on whether the debtor's insolvency will be resolved by bankruptcy or reorganisation. Furthermore, before declaring the debtor insolvent, the insolvency court may appoint a preliminary administrator (in Czech, *předběžný správce*). A preliminary administrator is likely to be appointed in circumstances where the insolvency estate is large, if the insolvency court approved a moratorium, or for other reasons specified in the Insolvency Act.

Bankruptcy proceedings qualify as main proceedings under the Insolvency Act. It is a stage which follows the initial examination of the debtor's insolvency and the insolvency court's decision on the method to be used in order to resolve the debtor's insolvency. Unlike reorganisation, bankruptcy may be used to resolve the insolvency of any type of debtor. When the insolvency court declares the debtor insolvent it will also place it into bankruptcy proceedings if no other method of resolving the debtor's insolvency is available. In bankruptcy, the debtor's insolvency is resolved generally by a *pro rata* satisfaction of the ascertained creditors' claims out of the proceeds from the liquidated insolvency estate. As a rule, the (in whole or in part) unsatisfied claims are not discharged. However, an exception to this rule includes corporate debtors that are wound up as a result of the termination of the bankruptcy proceedings.

The aim of reorganisation proceedings is the eventual satisfaction of creditors' claims while the debtor's business continues in operation. This is achieved by measures intended to revitalise the economic operation of the debtor's business in accordance with a reorganisation plan approved by the insolvency court. The performance of the reorganisation plan is continuously monitored by creditors. Reorganisation is generally available only to companies with total net turnover in the last accounting period of at least CZK 50,000,000 (approximately EUR 2,000,000), or with at least 50 employees. With the creditors' consent, however, reorganisation is also available to smaller debtors, subject to further procedural conditions. Reorganisation may not be used, among others, by companies in liquidation.

It is possible for an interested party to search for the existence of insolvency proceedings against a particular company in the insolvency register. The insolvency register (which is held in the Czech language) is publicly accessible online on the website of the Ministry of Justice of the Czech Republic, www.justice.cz. The register contains all information that has been published regarding all insolvency proceedings initiated by Czech courts and information on insolvency proceedings commenced by non-Czech EU courts that have been published at the relevant insolvency administrator's request pursuant to Art. 28(1) of the Insolvency Regulation. It also contains a list of debtors. The insolvency proceedings are initiated on the day of delivery of the insolvency petition to the relevant insolvency court (Section 97(1) of the Insolvency Act). Generally, the insolvency courts must publish the notice of initiation of insolvency proceedings in the insolvency register within two hours after it has received the insolvency petition. This time period will be extended by up to two hours after the insolvency court has opened its business if the insolvency petition is delivered to the court either outside its regular hours of operation or less than two hours prior to the end of its regular hours of operation.

Furthermore, if the creditors intend to initiate insolvency proceedings and file an insolvency petition, the Insolvency court must first conduct a preliminary assessment as to whether there exist "good grounds to doubt the legitimacy" of such insolvency petition (i.e., whether the insolvency court could dismiss the insolvency petition for being apparently groundless). This measure was enacted to serve as a protection of potential debtors against frivolous petitions filed by creditors. In general, insolvency petitions are considered to be frivolous if they, in fact, pursue a goal other than that of resolving the debtor's insolvency. According to Section 128a(4) of the Insolvency Act, an insolvency petition is groundless, in particular, where: (i) the creditor proves its entitlement to file the insolvency petition using a receivable which may not be considered for the purposes of a decision on insolvency, (ii) it is a repeat filing and the insolvency petitioner fails to prove that it has fulfilled obligations imposed on it by a previous decision of the insolvency court, (iii) by filing the insolvency petition, the creditor clearly intends to abuse its rights to the debtor's detriment, or (iv) the deposit for the costs of the insolvency proceedings, which was payable simultaneously with the filing of the insolvency petition, was not paid in a due and timely manner. If the insolvency court concludes that there are, indeed, "good grounds to doubt the legitimacy" of the insolvency petition submitted by creditors, it must decide no later than by the end of the business day following the receipt of the insolvency petition that neither the insolvency petition nor other underlying documentation will be published in the insolvency register. Following this decision, the insolvency court has seven days to either (i) dismiss the insolvency petition as clearly groundless, or (ii) to publish a notice of initiation of insolvency proceedings in the insolvency register (if it, ultimately, concludes that there are no grounds for dismissing the insolvency petition).

Finally, the effects of the initiation of insolvency proceedings are only triggered upon the publication of the notice of initiation of insolvency proceedings in the insolvency register (Section 109(4) of the Insolvency Act).

The Insolvency Act states in Section 366(2) that its provisions do not affect close-out netting arrangements, which are defined in Section 193 of the CMA (see part 7.8), provided that such close-out netting arrangement has been entered into prior to the initiation of insolvency proceedings. In light of this provision, the decisive moment for an Individual Contract to be eligible for close-out netting as contemplated by the CMA (see part 7.8) is the moment of the initiation of insolvency proceedings.

Although we have assumed that the General Agreement and each Individual Contract are entered into by each party prior to any action being taken in respect of either party for, or in connection with, among other things, the commencement of insolvency proceedings, we provide our analysis of what may constitute the decisive moment of the initiation of insolvency proceedings. The Insolvency Act uses two very similar terms and each of them may be considered the "initiation of insolvency proceedings" within the meaning of Section 366(2) of the Insolvency Act. Firstly, pursuant to Section 97(1) of the Insolvency Act, insolvency proceedings are "commenced" on the day of delivery of the insolvency petition to the relevant insolvency court. Secondly, based on Section 109(4) of the Insolvency Act, "the effects of the initiation of insolvency proceedings" are only invoked upon the publication of the notice of the initiation of insolvency proceedings in the insolvency register. The moment of publication in the insolvency register means the day, hour, and minute of publication (Section 71(2) of the Insolvency Act).

Both these moments (i.e., the day of delivery of the insolvency petition to the insolvency court, and the moment of publication of the notice in the insolvency register) may be interpreted as the initiation of insolvency proceedings for the purposes of Section 366(2) of the Insolvency Act and correct determination of this moment is crucial for ascertaining the eligibility of an Individual Contract for close-out netting (as discussed in part 7.8).

The insolvency court is obliged to publish the notice of initiation of insolvency proceedings in the insolvency register within two hours after it has received the insolvency petition. However, if an insolvency petition is delivered to the insolvency court either less than two hours prior to the end of or outside its regular hours of operation, this two-hour time period may be extended by up to two hours after the insolvency court has again opened its office on the next business day. As a result, if an insolvency petition is delivered on a day when the insolvency court does not operate or shortly (i.e., less than two hours) prior to the end of its hours of operation, the initiation of insolvency proceedings within the meaning of Section 97(1) of the Insolvency Act could be interpreted to have occurred on that day. At the same time, however, the effects of initiation of insolvency proceedings as stated in Section 109(4) of the Insolvency Act would only be triggered on the following business day (or even lately if the insolvency court have doubts whether the insolvency petition is groundless). The discussed timing is subject to the fact that the publication of the notice of initiation of insolvency proceedings may be postponed due to existing of "good grounds to doubt the legitimacy" of the insolvency petition as discussed above.

Since the new wording of Section 366(2) came into effect only relatively recently (as of 1 January 2011), there is no official guidance or commentary available on this issue nor has it been tested in Czech courts.

Despite this ambiguity in the Insolvency Act, we are inclined to take a view that the moment of the initiation of insolvency proceedings within the meaning of Section 366(2) must be associated with the commencement of its effects *vis-à-vis* third persons, i.e., as of publication of the notice in the insolvency register. Even though the insolvency proceedings are formally commenced on the day of delivery of the insolvency petition to the insolvency court, they remain without any effects envisaged by the Insolvency Act until the moment of publication of the notice of initiation of insolvency proceedings. In other words, the Insolvency Act does not relate any of its effects to the moment of delivery of the insolvency petition to the relevant insolvency court. Moreover, the explanatory memorandum to Section 366(2) expressly states that this wording is aimed at the protection of close-out netting arrangements against *effects* of the insolvency proceedings.

However, Section 366(3) stipulates that, among others, Section 366(2) of the Insolvency Act does not apply to those provisions of the Insolvency Act concerning the invalidity of legal acts, and the ineffectiveness of legal acts at undervalue, preferential legal acts, fraudulent legal acts and legal acts performed by the debtor contrary to restrictions connected with the initiation of insolvency proceedings.

1.2 Insolvency of a Czech Insurance Company

A Czech Insurance Company is a financial institution as defined under Section 2(k) of the Insolvency Act and as such benefits from a temporary exemption from the application of the Insolvency Act. Under Section 6(2)(a) of the Insolvency Act, the Insolvency Act does not apply to a Czech Insurance Company unless and until its authorisation to carry out insurance business has been revoked. Should such a situation arise, the Insolvency Act contains special rules applicable to insolvency proceedings with respect to a Czech Insurance Company. Such rules, for instance, specifically exclude the application of provisions of the Insolvency Act on reorganisation.

It is worth mentioning that the practical recoverability in the insolvency proceedings of the net termination amount payable by a Czech Insurance Company to its counterparty under a General Agreement will be influenced by the fact that receivables arising from insurance contracts will be satisfied prior to most other claims in the course of the distribution of the proceeds from the insolvency estate.

1.3 Insolvency of a Czech Investment Fund

The Insolvency Act applies both to a Czech Investment Company and a Self-Managed Investment Fund. Generally, no prior consent or approval of the CNB or revocation of the investment licence is required for the filing of the insolvency petition.[49]

The insolvency administrator shall, under Section 379(1) of the MCIFA, ensure that upon the decision on insolvency (in Czech, *rozhodnutí o úpadku*) of the manager of the Mutual Fund or Sub-fund (i.e., typically a Czech Investment Company), the management of the Mutual Fund or Sub-fund in question is transferred to a third-party manager or that the assets of the investors in the Mutual Fund or Sub-fund are liquidated and the Mutual Fund or Sub-fund is dissolved.

Under Czech law, the assets of a Czech Investment Company on the one hand and of the managed Mutual Fund or Sub-fund on the other must be properly segregated from each other. Accordingly, upon the insolvency of a Czech Investment Company, the assets in the managed Mutual Fund or Sub-fund should not form part of the insolvency estate of the Czech Investment Company.

As a general rule, since they possess the requisite legal capacity, only natural and legal persons may become subject to insolvency proceedings. Externally-Managed Funds (i.e., Mutual Funds and Sub-funds) do not possess such legal capacity. However, as of 1 May 2020, Section 388a *et seq.* of the Insolvency Act provide that, for the purposes of insolvency proceedings, Externally-Managed Funds do have procedural legal capacity, and may therefore become subject to insolvency proceedings.

[49] Section 565(1)(b) of the MCIFA provides for an exception to this rule by requiring the involuntary administrator to obtain a prior consent of the CNB before filing the insolvency petition.

Externally-Managed Funds' insolvency may be resolved only by way of bankruptcy (in Czech, *konkurz*). The Czech Investment Company managing the Mutual Fund and the Czech SICAV that founded a Sub-fund act as participants in the insolvency proceedings on behalf of the Mutual Fund and the Sub-fund, respectively.

Creditors may only submit receivables corresponding to debts owed by the Externally-Managed Fund. The insolvency estate comprises the property of the Externally-Managed Fund, not of the Czech Investment Company or the Czech SICAV.

1.4 Procedural effects of insolvency

Filing an insolvency petition has a number of procedural effects on the part of both the debtor and the creditor, regardless of whether or not the debtor is actually insolvent. These effects are of two types:

(A) protection of the debtor from creditors (automatic moratorium); and

(B) restriction of the debtor's right to dispose of its assets and liabilities, aimed at protecting the creditor against impairment of the debtor's assets.[50]

The effects of an insolvency petition remain in existence until the insolvency court issues a decision on the method of resolving the insolvency, dismisses or refuses the insolvency petition, or terminates the insolvency proceedings.

Below, we set out how insolvency proceedings with respect to a Czech debtor affect the rights of its in ways that may be relevant for the purposes of this memorandum. The summary below is not intended to amount to a full analysis.

Protection from creditors

Once insolvency proceedings have been commenced:

(i) creditors may only assert their claims relating to the debtor's estate by means of a claims submission made within the insolvency proceedings (no separate statement of claim can be submitted and no other means of debt recovery is possible);

(ii) creditors may only enforce their security or gain security rights within the framework of the Insolvency Act; and

(iii) although it is possible to order the enforcement of a judgment or distress with respect to the debtor's assets or the assets comprising the estate, such enforcement or distress cannot be executed.

Restriction of the debtor's right to dispose of assets, discharge of obligations

Unless the Czech insolvency court decides otherwise, once the judicial notice on the commencement of insolvency proceedings is published in the insolvency register, the debtor must refrain from the following:

(i) disposing of its assets, provided that, as a result of such disposal, the structure, use or purpose of the assets would change materially or the debtors assets would be diminished to a significant extent; and

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50 However, even after an insolvency petition is filed, the debtor or its management remains the party exercising the right to dispose of its assets and liabilities.

(ii) repaying debts, save where such debts are discharged under the terms and conditions set out by the Insolvency Act.

The above restrictions do not apply to the disposal of assets or debt repayment within the ordinary course of business, the fulfilment of statutory obligations or averting imminent damage. Nevertheless, additional restrictions may ensue from (i) a preliminary injunction which can be ordered by the insolvency court even without a previous motion; or (ii) from the appointment of a preliminary administrator by the Czech insolvency court. The preliminary administrator may be entrusted with the right to dispose of all or a part of the assets of the debtor. If the debtor does not abide by the restrictions, his/her legal acts will be ineffective and the debtor will be held liable for damage arising therefrom *vis-à-vis* his/her creditors.

Moratorium

A debtor who is an entrepreneur may file a petition with the insolvency court for the declaration of a moratorium. Such petition may be filed prior to the commencement of the insolvency proceedings, within seven days of the submission of an insolvency petition, or within 15 days, if the insolvency petition is filed by a creditor.

During the moratorium, the insolvency ruling may not be issued. The debtor is entitled to pay its debts directly associated with maintaining its business, provided that such debts arose during the moratorium or in the 30 days preceding the declaration of the moratorium. The debtor may discharge those priority debts prior to debts that were due earlier.

During the moratorium, the debtor's counterparty to an agreement for the supply of (i) energy and raw materials; or (ii) goods and services, provided that the latter had lasted for a period of at least three months prior to the declaration of the moratorium, may not terminate or withdraw from such agreements due to the default of the debtor in payment for goods or services that occurred before the declaration of the moratorium. The debtor benefits from that protection if it fulfilled at least the above-mentioned priority debts.

A moratorium is effective from the date the decision declaring it is published in the insolvency register and may last for a maximum period of three months. A Czech insolvency court may extend the moratorium upon the debtor's request by a maximum period of 30 days.

Set-off

Under Czech law, if parties owe each other a financial obligation, each of them may declare with respect to the other party that it sets off its claim against the claim of the other party. A claim may be unilaterally set off once a party becomes entitled to demand satisfaction of its own claim and perform its own debt.

Claims eligible for a unilateral set-off are only those which can be asserted in court. An uncertain or indeterminate claim is not eligible for set-off. Parties may however agree in a contract to set off even claims which would not otherwise be eligible for set-off.

The Insolvency Act does not prohibit set-off in general. There are, however, some exceptions. Set-off against claims that form a part of the insolvency estate is excluded during reorganization, moratorium and where the insolvency court issued an injunction prohibiting such set-offs. Section 140 of the Insolvency Act stipulates further requirements for set-off occurring after the debtor was declared insolvent:

"[…]*(2) Set-off of the mutual receivables of the debtor and the creditor is admissible after the decision on the insolvency, provided that the statutory conditions of such set-off had been met before the decision on the method of resolution of the insolvency, unless it is further stipulated otherwise.*

(3) Set-off under Subsection 2 is not permissible, if the debtor's creditor

(a) failed to become a registered creditor in relation to its receivables eligible for offsetting, or

(b) gained a receivable eligible for offsetting by an ineffective legal act, or

(c) at the time of the acquisition of the receivable eligible for offsetting, knew about the debtor's insolvency, or

(d) has not yet paid the mature receivable of the debtor to the extent to which it exceeds the receivable eligible for offsetting of such creditor.

(4) The set-off referred to in Subsection 2 is also not permissible in the cases provided for by this Act or by a preliminary measure of the insolvency court."

Pursuant to Section 82(3) of the Insolvency Act, the court may issue a preliminary measure under which it allows or prohibits a set-off of claims:

"[...]*Unless it is contrary to the common interest of the creditors, the insolvency court may, for reasons worthy of special consideration, through a preliminary measure also*

(a) grant consent to the set-off of the mutual receivables of the debtor and the creditor during the moratorium, or

(b) grant consent to the set-off of the mutual receivables of the debtor and the creditor even after the publication of the petition for the restructuring permit in the Insolvency Register, or

(c) prohibit the set-off of the mutual receivables of the debtor and the creditor for certain cases or for a set period of time."

Pursuant to Section 369(2)(c) and Section 381(2)(c) of the Insolvency Act, the insolvency proceedings of financial institutions (i.e., Czech Banks, Czech Security Dealers, Czech Insurance Companies and their local branches) do not affect the right of creditors to request a set-off against a receivable of the debtor, where such set-off is permitted by the law that governs the receivable of the debtor.

1.5 Changes in Czech insolvency law caused by the Covid-19 pandemic

As a result of the Covid-19 pandemic, Act No. 191/2020 Coll., on Certain Measures to Alleviate the Impact of the SARS CoV-2 Coronavirus on Persons Participating in Court Proceedings, Injured Parties, Crime Victims and Legal Persons and on Change to the Insolvency Act and the Code of Civil Procedure, as amended (the **Covid-19 Act**) was adopted. The Covid-19 Act has created a new regime for Czech debtors[51] enabling them to apply for an extraordinary moratorium.

An extraordinary moratorium was passed in the form of Section 127a of the Insolvency Act, as opposed to being contained in a stand-alone law referencing the Insolvency Act indirectly. As such, it falls within the close-out netting exception set out in Section 366(2) of the Insolvency Act. The extraordinary moratorium therefore does not affect the ability of a counterparty under the General Agreement to perform close-out netting in respect of all relevant Individual Contracts entered thereunder, provided that the conditions set out in part 7.8 for an eligible close-out netting arrangement under the CMA are met. Under Section 366(1)(b), financial collateral arrangements are equally protected, provided that the conditions set out in part 9.6 for a valid and enforceable financial collateral arrangement under the Financial Collateral Act are met.

[51] That is, debtors with their COMI in the Czech Republic.

Additionally, under the Covid-19 Act, any insolvency petitions filed by creditors of a Czech debtor until 31 August 2020 are to be disregarded.[52] Lastly, when a debtor's insolvency (in Czech, *úpadek*) is caused by Covid-19 extraordinary measures, the Covid-19 Act suspends the obligation of Czech debtors (and their directors) to file for insolvency when normally required by law.[53] This suspension will last until the end of a six-month period starting from cancellation of the Covid-19 extraordinary measures, but not extending beyond 30 June 2021.

1.6 Regulation of resolutions of Czech banks and large Czech securities dealers

Chapter 1 of Part IV of Title 2 of the Insolvency Act addresses insolvency proceedings of a Czech Bank or Czech Securities Dealer operating in the Czech Republic and providing services in the Czech Republic. From 1 January 2016 it also addresses financial institutions, financial holding companies, mixed financial holding companies and mixed activity holding companies, as defined in the CRR, with their registered office in the Czech Republic. Chapter 1 of the Insolvency Act has implemented Directive 2001/24/EC of the European Parliament and Council of 4 April 2001 on the reorganisation and winding up of credit institutions as well as Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing framework for the recovery and resolution of credit institutions and investment firms, as published in the Official Journal of the EU on 12 June 2014, the BRRD, and will apply to proceedings of:

(i) banks and savings and credit cooperatives after their licence or permission granted to them has terminated (i.e., Czech Banks);

(ii) foreign banks operating in the Czech Republic on the basis of a single European banking licence in line with the Banks Act (i.e., Foreign Banks from the EU having their licence passported into the Czech Republic);

(iii) branches of foreign banks other than those mentioned under point (ii) above (i.e., Czech Branches of non-EU Foreign Banks providing their services in the Czech Republic in line with the Banks Act);

(iv) securities dealers (i.e., Czech Securities Dealers);

(v) foreign securities dealers providing investment services in the Czech Republic on the basis of a single European licence in line with the CMA (i.e., Foreign Securities Dealers);

(vi) branches of foreign securities dealers other than those mentioned under point ((v)) above (i.e., Czech Branches of non-EU Foreign Securities Dealers providing their services in the Czech Republic in line with the CMA); and

(vii) financial institutions, financial holding companies, mixed financial holding companies and mixed activity holding companies as defined in the CRR.

The insolvency petition in respect of persons mentioned under points (i), (iii), (iv) and (vi) will be filed by the authority supervising the activities of such persons. Only the authority of the home Member State (of the EU or the EEA) that granted the licence or permission on the basis of which this person operates in the Czech Republic may act[54] against persons mentioned under points (ii) and (v) above.

52 Section 13 of the Covid-19 Act.
53 Section 12 of the Covid-19 Act.
54 Pursuant to Section 367(2) of the Insolvency Act, a foreign bank operating in the Czech Republic on the basis of a single licence pursuant to the Banks Act will be subject to insolvency proceedings if the following proceedings are carried out: (i) collective proceedings opened and monitored by the administrative or judicial authorities of a Member State of the European Union or other state of the European Economic Area with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a discharge from debts or other similar measure, (ii) reorganisation measures which are

The insolvency of a Czech Bank, the insolvency of a Czech Branch of a Foreign Bank defined in point (iii), and the insolvency of persons mentioned in points (iv), (vi) and (vii) above, if a crisis resolution measure pursuant the Crisis Resolution Act was imposed on them, may be resolved only by means of bankruptcy. A special regime applies to a Czech Securities Dealer which is subject to an initial capital requirement of EUR 750,000 (a **Large Czech Securities Dealer**) with its registered office in the Czech Republic and persons under point (vii) above.[55]

Our conclusions in this memorandum in respect of Parties which are either a Czech Bank, a Large Czech Securities Dealer or a Czech Branch of a non-EEA Large Securities Dealer[56] are, to the extent described below, subject to the Crisis Resolution Act.

Subject to certain modifications, none of which are relevant to our conclusions provided below, the Crisis Resolution Acts applies similarly to all entities presented above. The Crisis Resolution Act implements BRRD in Czech law. BRRD seeks to establish a common framework for the orderly resolution of failing credit institutions and investment firms within the European Union (as well as entities within their group if deemed relevant). Member States, including the Czech Republic, had an obligation to transpose and implement BRRD into national law by 31 December 2014 and to apply the majority of its provisions from 1 January 2015 (Article 130(1) of BRRD allows for Member States to apply provisions relating to the 'bail-in tool' from 1 January 2016 at the latest).

Responsibility for operation of the Crisis Resolution Act rests almost exclusively with the CNB whilst the Ministry of Finance of the Czech Republic has some joint powers together with the CNB in adopting and applying the government stabilisation tools (including the temporary public ownership (nationalisation) of all or part of a Czech Bank or a Large Czech Securities Dealer).

The Crisis Resolution Act provides for a special resolution regime applicable to Czech Banks and Large Czech Securities Dealers and distinguishes between two basic sets of measures. These measures are crisis prevention measures and crisis management measures (including crisis resolution measures and actions and the appointment of a special manager). The Crisis Resolution Act also deals with certain other matters (e.g., recognition of the effect of a third-country special resolution action under the laws of a country outside the EEA), however, these have no direct relevance to the issues considered in this memorandum or are not governed by Czech laws.

A more detailed description of recovery and crisis resolution measures and tools process is enclosed to this memorandum as Annex 3.

intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims.

55 Sections 368a *et seq.* of the Insolvency Act continue to refer to a Czech Securities Dealer that is subject to an initial capital requirement of EUR 730,000,i.e., the previously applicable threshold. However, we believe that that is an error and the correct capital requirement threshold is EUR 750,000, as set out in the Crisis Resolution Act.

56 On top of that, the Crisis Resolution Act also applies to financial institutions, financial holding companies, mixed financial holding companies and mixed activity holding companies as such are defined in the CRR.

ANNEX 2

ELIGIBLE LEGAL ENTITIES TO THE FINANCIAL COLLATERAL ARRANGEMENTS

Czech law limits the types of parties which are eligible to enter into a Financial Collateral Arrangement if conditions set out in special laws are complied with[57]. The types of parties correspond to those listed in Article 1(2) of the Financial Collateral Directive. We list below only those we believe are most relevant for the purposes of this memorandum:

(a) a bank;

(b) other credit institution as defined in point (1) of Article 4(1) of the CRR as well as persons listed in Annex I Sections 2 – 12 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;

(c) an insurance company, reinsurance company, investment firm, management company, investment company or pension fund;

(d) a central counterparty, settlement agent or clearing house pursuant to a special law regulating payment services;

(e) a savings and credit co-operative;

(f) **a legal person that trades on its own account with investment instruments for hedging purposes in respect of trades with investment instruments, that are not financial instruments within the meaning of the Financial Collateral Act[58], and such activity is one of its principal activities;**

(g) **a legal person that trades on its own account with commodities or investment instruments, that are not financial instruments within the meaning of the Financial Collateral Act[59], and such activity is one of its principal activities;**

(h) a foreign entity with a similar scope of business or activity as any of the persons listed above;

(i) a state or a member state of a federation;

(j) a municipality or region or an analogous foreign entity;

(k) a central bank; or

(l) any other legal entity or a foreign person other than a natural person (including a corporate/company) as long as the other party qualifies as one of the entities envisaged in points (a) to (k) above.

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57 Section 7 of the Financial Collateral Act.
58 Section 2(c) of the Financial Collateral Act.
59 Section 2(c) of the Financial Collateral Act.

ANNEX 3

APPLICABLE RESOLUTION REGIMES IN RESPECT OF CZECH BANKS AND LARGE CZECH SECURITIES DEALERS

Moratorium preceding crisis management

Following the implementation of 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 (**BRRD II**) in Czech law via Act No. 298/2021 Coll., Sections 81a *et seq.* of the Crisis Resolution Act confer on the CNB the power to suspend certain obligations arising from the Czech Bank's agreements, including each Agreement, prior to taking steps to resolve a crisis of a Czech Bank (the **moratorium preceding crisis management**).

Pursuant to Section 81a(1) of the Crisis Resolution Act, the CNB may apply the moratorium preceding crisis management for a period no longer than necessary to achieve the purpose of the suspension, but no longer than from the time of publication of the suspension to the end of the nearest following business day if (i) it finds that the Czech Bank is failing; (ii) taking into account all the circumstances, it cannot be reasonably assumed that a private sector measure would avert its failure within a reasonable time; (iii) the suspension of the performance obligations is necessary to prevent further deterioration of the financial situation of the Czech Bank; and (iv) the suspension of the performance obligations is necessary to determine whether resolution is in the public interest, to select appropriate resolution measures or to ensure their effective implementation. The moratorium preceding crisis management should therefore be as short as possible and should enable the CNB, in particular, to evaluate the factors listed in points (ii) to (iv) above.

During the moratorium preceding crisis management, the CNB may, pursuant to Section 81b(1) and (2) of the Crisis Resolution Act, suspend (i) the exercise of the right of the Czech Bank's creditors to satisfaction from collateral provided by the Czech Bank; (ii) the exercise of the counterparty's right to withdrawal, settlement or set-off; (iii) the exercise of a right the exercise of which will or may result in a debt becoming due or in a close-out netting; or (iv) the exercise of a right which may give rise to, alter, suspend or terminate other rights and obligations of the parties, if such a right is stipulated in the agreement with the Czech Bank or in other law and is related to the agreement or to an otherwise determined legal fact, if, in the case of points (ii) to (iv), there continues the fulfilment of obligations which form the substance and purpose of the agreement, including payment obligations and the provision of collateral.

In accordance with Section 81a(3) of the Crisis Resolution Act, if any payments or deliveries become due under a General Agreement during the period for which they were suspended, even if neither party makes them, they will become due at the end of the period (in accordance with the terms of the General Agreement). If, according to the General Agreement, an Early Termination Date is set, and these amounts remain unpaid on the set Early Termination Date, the relevant party will be in arrears only after the expiration of the period for which the performance obligation was suspended.

Pursuant to Section 81a(5) of the Crisis Resolution Act, the moratorium preceding crisis management does not affect the obligations of the Czech Bank towards payment and settlement systems with irrevocable settlement and the operators of these systems, central counterparties and recognised central counterparties within the meaning of EMIR, and central banks.

As the restrictions pursuant to Section 81a and Section 81b of the Crisis Resolution Act will not adversely affect the party in a situation where it wishes to exercise its rights against the Czech Bank under the General Agreement after expiration of the moratorium preceding crisis management, we do not believe that these powers will have any impact on our conclusions in this memorandum regarding the enforceability of the close-out netting provisions.

Resolution of Czech Banks

The Crisis Resolution Act provides for a special resolution regime applicable to Czech Banks and distinguishes between two basic sets of measures. These measures are crisis prevention measures (in Czech, *opatření k předcházení krizí*) and crisis management measures (including crisis resolution measures and actions and the appointment of a special manager) (in Czech, *opatření k řešení krize*). The Crisis Resolution Act also deals with certain other matters (e.g., recognition of the effect of a third country special resolution action under the laws of a country outside the EEA), however, these have no direct relevance to the issues considered in this memorandum or are not governed by Czech laws.

We assume in relation to any exercise of crisis prevention measures or crisis management measures that the CNB (or, if relevant, the Ministry of Finance) has decided that the relevant conditions to the exercise of those measures are satisfied in relation to the Czech Bank.

Crisis Prevention Measures

The crisis prevention measures represent, for the most part, early intervention measures and as such can be described as pre-resolution measures or tools. Their main goal is to prevent the spread of financial problems among Czech Banks.

Accordingly, if a situation arises whereby shortcomings in a Czech Bank's activities, including by virtue of breaches or a series of breaches of the Crisis Resolution Act, the BRRD or the Banks Act (including various deficiencies or impediments to recoverability of the Czech Bank), endanger the stability of the banking or financial system, the CNB may, among other things, gradually: (i) impose specific administration measures on the Czech Bank in order to remedy the shortcomings or breaches and/or address or remove deficiencies or impediments to recoverability[60], (ii) remove the Czech Bank's senior management and executive board members and make the appointment of new senior management and executive board members conditional upon the CNB's prior consent, or (iii) impose temporary administration by virtue of the appointment of a temporary administrator.[61]

It is important for the purposes of this memorandum that nothing under the crisis prevention measures controls what a third party may or may not do *vis-à-vis* the Czech Bank as a debtor and so we believe that neither the onset of temporary administration nor the exercise of any other crisis prevention measures will affect the enforceability of close-out netting or validity and enforceability of financial collateral arrangements under Czech law.

In addition, in this context, we note that, pursuant to Sections 59 to 74 of the Crisis Resolution Act (which is also technically a pre-resolution measure or tool), the CNB must, prior to or simultaneously with exercising of certain crisis resolution measures pursuant to the Crisis Resolution Act (i.e., a transfer to a private sector purchaser, a transfer to a bridge institution, a transfer to an asset management entity or write down or conversion of eligible liabilities ('bail-in tool')), make a measure for the write-down or conversion of capital instruments and intragroup eligible liabilities of the Czech Bank in accordance with the principles and procedures specified in Sections 59 to 74 of the Crisis Resolution Act. The CNB does not have this obligation if, with regard to the valuation or preliminary estimate of the value of the Czech Bank's assets, it believes that, as a result of the resolution measures under the Crisis Resolution Act, creditors will not incur a loss and their receivables will not be converted.

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60 Such specific measures broadly correspond to those set out in Article 27 of the BRRD as implemented in the Crisis Resolution Act.

61 The temporary administrator is appointed by the CNB in order to facilitate the functions of a Czech Bank's senior management and executive directors. The temporary administration may last for up to 12 months, unless extended by the CNB.

The capital instruments subject to the above provisions are Common Equity Tier 1 instruments, Additional Tier 1 instruments and Tier 2 instruments as defined in the CRR. Accordingly, we confirm that the Individual Contracts under either General Agreement would not be directly affected by these provisions. Intragroup eligible liabilities to which the above provisions apply are liabilities that meet the conditions set out in Section 130 of the Crisis Resolution Act and the relevant conditions in Articles 72a *et seq.* of the CRR.[62] The CRR excludes from eligible liabilities, among others, secured liabilities and liabilities from derivatives.

Crisis Management Measures

The crisis management measures under the Crisis Resolution Act comprise crisis resolution measures (or tools or actions) and the appointment of a special manager for crisis resolution.

The general conditions to the exercise of crisis management measures (including crisis resolution measures or actions) set out in the Crisis Resolution Act broadly require that the Czech Bank is failing or is likely to fail[63] and it is beyond the reach of less drastic remedial action to prevent such failing than the application of crisis resolution measures. Such measure or action must also be necessary having regard to the public interest in the advancement of the resolution objectives and one or more of the resolution objectives would not be met to the same extent by the winding up or insolvency proceedings in respect of the Czech Bank.[64]

In case of a special management for crisis resolution, either the CNB nominates one or more of its employees directly or appoints a special manager (or administrator) replacing and automatically fully suspending the authority of the Czech Bank's statutory bodies (senior management and executive board members) and supreme body (general or shareholders' meeting).

Although the Crisis Resolution Act does not expressly state that the appointment of a special manager does not affect the performance of close-out netting or enforceability of financial collateral arrangements, we are of the view that it would not have an adverse effect on the enforceability of the relevant termination and close-out netting provisions of the General Agreement as long as they are validly entered into (even if entered into on or after the commencement of special management for crisis resolution). This is because all restrictions on the failing debtor (i.e., the Czech Bank) and the focus of the law in question is on ensuring that the failing debtor and its bodies are not able to act in a way that would be detrimental to the bank's customers or the bank itself. This is particularly confirmed by the fact that the Crisis Resolution Act does not contain any provisions allowing the CNB or the appointed special manager to terminate or to breach contracts of the affected Czech Bank concluded before the commencement of special management for crisis resolution.

Crisis Resolution Measures

It is not the purpose of this memorandum to describe the scope of all crisis resolution measures and tools available under the Crisis Resolution Act. We consider here whether the application of any of the resolution powers set out in the Crisis Resolution Act in relation to the Czech Bank could affect the enforceability of the relevant termination and close-out netting provisions of the General Agreement as a matter of Czech law against the Czech Bank and consequently our conclusions in this memorandum.

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62 See Section 2(2)(n) of the Crisis Resolution Act.

63 Under the Crisis Resolution Act, an affected entity is deemed to be failing, for example, if: (i) it meets conditions for withdrawal of its licence to operate due to a loss that causes or may cause a significant decrease in the amount of its capital, (ii) its liabilities exceed the value of its assets or (iii) it is unable to pay its debts as they fall due.

64 Under Section 80 of the Crisis Resolution Act, the exercise of a crisis resolution measure is deemed to be in the public interest if it is necessary and adequate in the advancement of one or more crisis resolution objectives which would not be met to the same extent by the winding up or insolvency proceedings in respect of the relevant affected entity.

The Crisis Resolution Act provides for, in particular, the following crisis resolution measures and tools:

- a transfer to a private sector purchaser of all or part of the business of the Czech Bank (a **transfer of business measure**);
- a transfer of all or part of the business of the Czech Bank to a bridge institution that is wholly or partially owned (directly or indirectly) by and controlled by the state of the Czech Republic (a **transfer to a bridge institution measure**);
- a transfer of all or part of the business of the Czech Bank to an asset management entity owned (directly or indirectly) by and controlled by the state of the Czech Republic (a **transfer to an asset management entity measure**)[65];
- a write down of certain claims of unsecured creditors of the relevant entity and/or conversion of certain unsecured debt claims (eligible liabilities) to equity, (the **bail-in tool**), which equity could also be subject to any future write-down; and
- a temporary stabilisation tool comprising a transfer to temporary public ownership (**nationalisation**) of all or part of the Czech Bank.

Please note that certain "reverse" and "onward" transfers are also possible where one of the transfer measures has been exercised.

The CNB has certain wide-ranging powers pursuant to Section 164 of the Crisis Resolution Act including, in certain circumstances, powers to unilaterally cancel a contract or modify contractual arrangements or transfer all rights and obligations under a contract. To this end, Sections 171 and 173 of the Crisis Resolution Act contain specific safeguards in respect of the "protected rights and liabilities". Their primary effect is that the exercise of crisis resolution powers by the CNB pursuant to Section 164(d) of the Crisis Resolution Act by virtue of cancellation or modification of contractual arrangements or transfer of all rights and obligations under a contract cannot result in the "protected rights and liabilities" having been changed or become extinguished. Also, in relation to a secured claim, the CNB must not take a crisis resolution action in the form of cancellation or modification of contractual arrangements or transfer of all rights and obligations under a contract or certain other crisis resolution actions under Section 164 of the Crisis Resolution Act if the result of that action were the extinguishment of the secured claim.

The CNB also has additional powers under Section 164a of the Crisis Resolution Act, under which it may defer the maturity of depreciable equity instruments issued by the Czech Bank or depreciable liabilities of the Czech Bank, or change the amount of related interest if necessary to apply crisis resolution measures and instruments consisting of a transfer of business, a transfer to a bridge institution, a transfer to an asset manager or a bail-in tool.[66] Pursuant to Section 164a of the Crisis Resolution Act, the CNB may, even repeatedly, postpone the maturity of the above instruments and liabilities by 18 months. However, the exercise of this power will not affect the continued existence of these instruments and liabilities.

On the basis of the above, we do not envisage that the exercise by the CNB of ancillary resolution powers pursuant to Section 164 and Section 164a of the Crisis Resolution Act could affect the enforceability of the relevant termination and close-out netting provisions of the General Agreement as a matter of Czech law against the Czech Bank and consequently our conclusions in this memorandum.

65 This measure can only be used in conjunction with one of the other crisis resolution measures or tools.

66 This power replaces the existing power provided for in Section 82a of the Crisis Resolution Act, while its regulation is corrected to meet the restrictions arising from the implemented Article 63(1) of the BRRD.

Exercise of share transfers and property transfers

The share transfers can be used by the CNB (or, in certain circumstances, the Ministry of Finance of the Czech Republic) when making any of the transfer of business, the transfer to a bridge institution, the transfer to an asset management entity or the transfer to temporary public ownership (nationalisation) measures.

We confirm that the exercise of the share transfers by the CNB (or the Ministry of Finance of the Czech Republic) in respect of a Czech Bank that is a party to the General Agreement would not, as a matter of Czech law, affect the enforceability of the relevant termination and close-out netting provisions of the General Agreement against a Czech Bank, and therefore have no impact on our conclusions in this memorandum.

The exercise of the property transfers may in turn provide for the transfer of all property, rights and liabilities of a Czech Bank or for the transfer of some, but not all, of the property, rights or liabilities of a Czech Bank. In the latter case, the transfer would be a "partial property transfer"[67].

The transfer of all of the property, rights and liabilities of a Czech Bank to a private sector purchaser, a bridge institution or asset management entity would necessarily include any General Agreement entered into by the relevant entity with another market participant, including all Individual Contracts under that General Agreement. From the point of view of the other market participant, the identity of its contracting party would change, however the enforceability of the relevant termination and close-out netting provisions of the General Agreement against a Czech Bank and in respect of Individual Contracts would be unaffected.

In relation to a partial property transfer, which again could be used by the CNB in applying any of the transfer of business, the transfer to a bridge institution or the transfer to an asset management entity measures, the concern is that the CNB could use such power to "cherry-pick" Individual Contracts (or parts of such Individual Contracts) covered by the General Agreement or otherwise disrupt the mutuality of rights and obligations under that arrangement.

Sections 171(1) and 173(2)(c) and (d) of the Crisis Resolution Act seek to protect from any adverse effects of a partial property transfer set-off arrangements under which two or more mutual claims of an obligor and a counterparty may be set off against each other and set-off of mutual claims based on which there will occur the settlement or clearing of claims resulting in a single claim of one party and the corresponding liability of the other party to pay the resulting amount, including close-out netting.

Since the safeguard set out in Section 171(1) of the Crisis Resolution Act does not cover a transfer or passage of property, rights and liabilities under a secured claim or debt (as they are referred to in Section 173(2)(a)), Section 171(3) contains a separate safeguard in respect of secured claims or debts. The restriction on partial property transfers of secured claims requires that the CNB must not (a) decide on the transfer or passage of a security without the simultaneous passage of the secured claim or debt and the benefit of the security, (b) decide on the transfer or passage of a secured claim or debt without the simultaneous passage of the benefit of the security, and (c) transfer the benefit of the security without the simultaneous transfer of the subject-matter of the secured claim or debt. It is clear that, in relation to a partial property transfer within the scope of the applicable rules, the secured property, the security interest and the secured liabilities move together or not at all.

Similarly, in relation to unsecured liabilities, despite the somewhat unfortunate, and in certain technical respects deficient, wording of Section 173(2)(d) of the Crisis Resolution Act that refers to "set-off of mutual claims on the basis of which mutual claims are settled or netted so that the result is only one

67 Note that Section 170 of the Crisis Resolution Act protects any transfers of property, rights and liabilities pursuant to the Crisis Resolution Act from any adverse effect of rules in respect on invalidity or ineffectiveness of legal acts due to preferential treatment of some creditors under laws governing liquidation and insolvency.

claim of one contractual party and a corresponding obligation of the other party to pay the resulting amount, including close-out netting", there cannot be any doubt that the scope of the protected rights and liabilities as set out in the Crisis Resolution Act purports to cover any rights and liabilities arising under a "set-off" arrangement" or a "netting arrangement". In our view, a General Agreement would be such a "set-off" arrangement" or a "netting arrangement" as referred to in Section 173(2)(c) and (d), and all rights and obligations under the General Agreement, including in relation to Individual Contracts, between the Czech Bank and the other party would be "protected rights and liabilities" within the scope of Sections 171 and 173 of the Crisis Resolution Act if they are subject to set-off or netting under the General Agreement and as such comply with the requirement that they are claims that are capable of contractual set-off[68].

Therefore, on the basis of Sections 171 and 173 of the Crisis Resolution Act and subject to the above analysis, we conclude that the exercise by the CNB of a partial property transfer in relation to a Czech Bank would not negatively affect the enforceability of the relevant termination and close-out netting provisions of the General Agreement as a matter of Czech law against a Czech Bank and consequently our conclusions in this memorandum.

We further believe that the inclusion under a General Agreement of any rights or obligations that are not derivatives (as defined in the Crisis Resolution Act and EMIR) and are not protected rights and obligations within the scope of Sections 171 and 173 of the Crisis Resolution Act would not affect the enforceability of the relevant termination and close-out netting provisions of the General Agreement in relation to any Individual Contracts. In other words, the relevant provisions of the Crisis Resolution Act would protect a netting arrangement, such as an agreement in the form of the General Agreement, in relation to all protected rights and liabilities within its scope, notwithstanding the inclusion within the scope of the netting arrangement of one or more rights or liabilities that are not protected.

<u>The bail-in tool</u>

The bail-in tool represents another crisis resolution measure under the Crisis Resolution Act[69]. It is exercised by the CNB through a write down of certain claims of unsecured creditors of a Czech Bank and/or conversion of certain unsecured debt claims (eligible liabilities) to equity, which equity (i.e., capital instruments[70]) could also be subject to any future write-down. The Crisis Resolution Act stipulates certain specific conditions to the exercise of the bail-in tool, which the CNB will be obliged to observe when making this crisis resolution measure[71]. We discuss some of these conditions (including, in particular, which of the Czech Bank's liabilities constitute eligible liabilities), to the extent that they are relevant to our conclusions in this memorandum, further below.

The effect of the exercise of the bail-in tool is broadly that (i) the nominal value or the amount of principal of an eligible liability owed by a Czech Bank is permanently decreased as a result of the partial write-down or partial conversion to equity; or (ii) an eligible liability owed by a Czech Bank is cancelled altogether as a result of the full write-down or cancelled and modified as a result of full conversion to equity.

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68 While a General Agreement with one Individual Contract entered into thereunder may be capable of satisfying these definitions, rights and liabilities are only protected for the purposes of these safeguards if a party is entitled to set off or net them under the relevant arrangement.

69 In line with the BRRD, the "bail-in" is a process of internal recapitalisation that is triggered when a Czech Bank reaches the point of non-viability. In this process, losses are imposed on some of the Czech Bank's direct stakeholders by either a write-down of their claims or by their conversion to equity. The purpose of the bail-in tool is to recapitalise all or a part of the Czech Bank or its successor entity so that it is put on a stable footing and can be further restructured as necessary. This should ensure that there is no immediate need for a split of the Czech Bank's business or use of public funds to resolve the Czech Bank.

70 These capital instruments may take the form of Common Equity Tier 1 instruments, Additional Tier 1 instruments and Tier 2 instruments as such are referred to in the Crisis Resolution Act and defined in the CRR.

71 See, in particular, Sections 120 to 148 of the Crisis Resolution Act.

The scope of eligible liabilities (which can be subject to the bail-in tool) includes all liabilities of the Czech Bank or another relevant entity, unless such liabilities are explicitly excluded[72].

Although the rules explicitly exclude from the scope of eligible liabilities, among other things, any secured debt up to the value of the security provided, the concern for the close-out netting provisions under the General Agreement is primarily that the bail-in tool could apply so as to reduce or eliminate the amount owed by the Czech Bank or under an Individual Contract with the effect that the ability of the other party to net amounts due in respect of those liabilities against liabilities owed by such party is commensurately reduced or eliminated.

First of all, the bail-in tool may not be exercised so as to affect any excluded liability which includes any liability so far as it is secured (or any secured debt up to the value of the security provided). For the purposes of the Crisis Resolution Act, secured debt is defined as any debt if a security has been provided to its creditor or for its creditor's benefit to secure its repayment by the debtor. We read these provisions so that secured for this purpose means secured against property or rights, or otherwise covered by collateral arrangements. However, an unsecured liability outstanding under an Individual Contract entered into under the General Agreement may constitute eligible liability and as such may be subject to the bail-in tool.

The most important rule for the present purposes is Section 142 of the Crisis Resolution Act. It provides that the CNB, when applying the bail-in tool by virtue of a write-down or conversion to equity of eligible liabilities arising from a "derivative", applies the bail-in tool so that it terminates such a "derivative" and performs a set-off of mutual claims of contractual parties in accordance with a "close-out netting arrangement" or in a similar manner so that the relevant eligible liabilities result in one claim of one contractual party and a corresponding debt of the other contractual party to pay the resulting (close-out) amount. In the Crisis Resolution Act a "derivative" means a derivative as defined in Article 2(5) of EMIR.

Based on the above, we can conclude that, to the extent the Individual Contracts under the General Agreement are constituted by "derivatives" as defined in the Crisis Resolution Act, the operation of the close-out netting provisions of the General Agreement would be effectively protected against any adverse effects of the bail-in tool[73]. Please note that these protections would apply only to unsecured liabilities in so far as those liabilities relate to Individual Contracts that are derivatives.

On top of that, as articulated above, where the General Agreement is collateralised by the Czech Bank, the bail-in tool should not apply to Individual Contracts under the General Agreement notwithstanding the existence of one or more Individual Contracts that do not fall within the definition of a derivative. This is because, as also mentioned above, a liability may not be subject to bail-in so far as it is secured and, in light of the single agreement concept and provided that the collateralisation is performed on a net basis, we would argue that all liabilities under the General Agreement would need to be converted into a net debt in accordance with the close-out netting provisions before any net debt that exceeds the value of the collateral could be considered for a bail-in.

Subject to the above discussion, we have concluded that the Crisis Resolution Act preserves the envisaged effects of the close-out netting provisions under the General Agreement, although any net sum owed by the Czech Bank as a result of the operation of such provisions would itself be at risk of being reduced or eliminated by the making of the bail-in tool.

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72 The list of excluded liabilities is set out in Section 122 (and to some extent Section 123) of the Crisis Resolution Act.

73 This conclusion is further supported by certain other provisions of the Crisis Resolution Act such as Section 136 regarding valuation of an eligible liability under a derivative or Sections 129 and 135 setting out conditions for inclusion of an eligible liability under a derivative in the minimum requirement for own funds and eligible liabilities.

Overrides and stays

Sections 168 and 169 of the Crisis Resolution Act, which fully implement Article 68 of the BRRD, as amended by BRRD II, provide that the following are to be disregarded in determining whether a termination event or event of default (including an insolvency or similar event) has occurred and whether a corresponding provision (which includes any provision of an agreement that has the effect that, if a specified event occurs or situation arises, the agreement or any rights or duties thereunder are terminated or a sum becomes payable or other right, including the right to acquire or enforce collateral, accrues) applies in respect of the Czech Bank or a member of the same group as that Czech Bank in the case of a cross-default provision (as defined in Section 168(2) of the Crisis Resolution Act):

- a crisis prevention measure or crisis management measure taken in relation to the Czech Bank or a member of the same group as that Czech Bank in the case of a cross-default provision;
- the occurrence of any event directly linked to the application of such a measure; and
- the moratorium preceding crisis management.

The above overrides apply where a contract or other agreement is entered into by a Czech Bank but only if the substantive obligations provided for in the contract or agreement, including payment obligations and provision of collateral, continue to be performed. These restrictions on termination rights could also be engaged in certain cross-border scenarios.

In the present context, the effect of these provisions of the Crisis Resolution Act is that the right to terminate and close out Individual Contracts in accordance with the close-out netting provisions would be ineffective in certain circumstances including where such rights arise as a result of application of the moratorium preceding crisis management or the exercise of crisis prevention or crisis resolution measures (or events directly linked to the application of such measures) in relation to the Czech Bank. The same effect arises in respect of enforcement of security or collateral. In any event, the parties to the General Agreement should not seek to interpret § 10 as allowing them to terminate the General Agreement or any related Individual Contract on the sole basis that the CNB applied the moratorium preceding crisis management or made a crisis prevention measure or a crisis management measure pursuant to the Crisis Resolution Act in respect of the Czech Bank, if the substantive obligations provided for in the contract or agreement, including payment obligations and provision of collateral, continue to be performed.

However, if such termination or other above described right arise based on the existence or occurrence of other events or circumstances set out in § 10 of each General Agreement, they should not be affected. Therefore we believe that these provisions of the Crisis Resolution Act have no impact on the conclusions in this memorandum.

Under Section 83 of the Crisis Resolution Act, the CNB may suspend, subject to certain very specific caveats, obligations to make a payment or delivery under a contract where one of the parties to the contract is a Czech Bank. Suspension of these obligations, however, is not applicable to debts of a Czech Bank owed to, among others, the CNB or other central banks. Similarly Section 84 of the Crisis Resolution Act, that is relevant for any transfers of financial collateral, allows the CNB to temporarily restrict the enforcement of security interest regardless its form. Again, the CNB and other central banks are exempted from this restriction.

In accordance with Section 83(2) of the Crisis Resolution Act, any payments or deliveries that become due under the General Agreement during the stay period, while not being made by either party, will instead become due and payable at the end of such period (subject to the terms of the General Agreement) and, if an Early Termination Date is designated under the General Agreement and such amounts remain outstanding as at such Early Termination Date, the affected party will be in default as of the moment the suspension ends.

The CNB may suspend the termination rights (which includes a right to withdrawal, settlement, set-off or netting of obligations, or a right which will or may result in the acceleration of an obligation or close-out netting, or any similar right that will or may result in the creation, modification, suspension or termination of other rights or obligations of parties to the contract) of any party to a contract with a Czech Bank assuming that all the substantive obligations under the contract, including obligations to make payments or deliveries or provide collateral, continue to be performed. Similarly, the CNB can also suspend the termination rights of any party to a contract with the Czech Bank's subsidiary, where such subsidiary's obligations are secured by the Czech Bank and the relevant termination rights would be based solely on insolvency or financial conditions of the Czech Bank in question. Neither of these suspensions is applicable to termination rights of the CNB and another central bank that is a counterparty of the affected Czech Bank. On top of the powers mentioned above, the CNB may impose an obligation to keep detailed records about financial contracts to which a Czech bank is a party.

All of the above described suspensions commence as of the publication of the decision on the CNB's website and must end no later than at midnight at the end of the first business day following the day of the publication. The reason for these suspensions is to give the CNB time to take measures without any interference of effects from the exercise of various termination or other rights of parties to a contract.

Noting that the restrictions under Sections 83 to 85 of the Crisis Resolution Act will not prejudice a party in seeking to enforce its rights against the Czech Bank under the General Agreement upon expiration of the stay, we believe that such powers have no impact on our conclusions herein regarding the enforceability of the close-out netting provisions.

ANNEX 4

INDIVIDUAL CONTRACTS ENTERED INTO UNDER THE GENERAL AGREEMENTS

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a Commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the Commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.

For the purposes of this Annex 4, Commodity means electricity, natural gas, emissions allowances, (green) certificates or capacity rights.

ANNEX 5

ARTICLES 7 AND 8 OF THE MIFID II REGULATION[74]

Article 7

Other derivative financial instruments

(Article 4(1)(2) of Directive 2014/65/EU)

1. For the purposes of Section C(7) of Annex I to Directive 2014/65/EU, a contract which is not a spot contract in accordance with paragraph 2 and which is not for commercial purposes as laid down in paragraph 4 shall be considered as having the characteristics of other derivative financial instruments where it satisfies the following conditions:

   (a) it meets one of the following criteria:

      (i) it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF;

      (ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue;

      (iii) it is equivalent to a contract traded on a regulated market, MTF, an OTF or such a third country trading venue, with regards to the price, the lot, the delivery date and other contractual terms;

   (b) it is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

2. A spot contract for the purposes of paragraph 1 shall be a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:

   (a) 2 trading days;

   (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

   A contract shall not be considered a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period referred to in paragraph 2.

3. For the purposes of Section C(10) of Annex I to Directive 2004/39/EC of the European Parliament and of the Council[75], a derivative contract relating to an underlying referred to in that Section or in Article 8 of this Regulation shall be considered to have the characteristics of other derivative financial instruments where one of the following conditions is satisfied:

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74 Note that Section C(7) of Annex I MiFID II was implemented into Section 3(1)(i) of the CMA and Section C(10) of Annex I to MiFID II was implemented into Sections 3(1)(j) and 3(1)(k) of the CMA.

75 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

(a) it is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event;

(b) it is traded on a regulated market, an MTF, an OTF, or a third country trading venue that performs a similar function to a regulated market, MTF or an OTF;

(c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.

4. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2014/65/EU, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, where the following conditions are both met:

(a) it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network,

(b) it is necessary to keep in balance the supplies and uses of energy at a given time, including the case when the reserve capacity contracted by an electricity transmission system operator as defined in Article 2(4) of Directive 2009/72/EC is being transferred from one prequalified balancing service provider to another prequalified balancing service provider with the consent of the relevant transmission system operator.

Article 8

Derivatives under Section C(10) of Annex I to Directive 2014/65/EU

(Article 4(1)(2) of Directive 2014/65/EU)

In addition to derivative contracts expressly referred to in Section C(10) of Annex I to Directive 2014/65/EU, a derivative contract shall be subject to the provisions in that Section where it meets the criteria set out in that Section and in Article 7(3) of this Regulation and it relates to any of the following:

(a) telecommunications bandwidth;

(b) commodity storage capacity;

(c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means with the exception of transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on their behalf and in order to allocate the transmission capacity;

(d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources, except where the contract is already within the scope of Section C of Annex I to Directive 2014/65/EU;

(e) a geological, environmental or other physical variable, except if the contract is relating to any units recognised for compliance with the requirements of Directive 2003/87/EC of the European Parliament and of the Council[76];

(f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;

[76] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

(g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation;

(h) an index or measure based on actuarial statistics.