MEMORANDUM OF LAW
FOR THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

Collateral Provider Insolvency
Validity and Enforceability under Czech Law of Collateral Arrangements under the ISDA Credit Support Documents including ISDA Documentation Reflecting Margin Requirements

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ALLEN & OVERY

Allen & Overy (Czech Republic) LLP, organizační složka

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VALIDITY AND ENFORCEABILITY UNDER CZECH LAW OF COLLATERAL ARRANGEMENTS UNDER THE ISDA CREDIT SUPPORT DOCUMENTS

This memorandum considers the validity and enforcement under Czech law of collateral arrangements entered into under:

(i) the 1994 Credit Support Annex governed by New York law (the **1994 NY Annex**);

(ii) the 2016 Credit Support Annex for Variation Margin (VM) governed by New York law (the **VM NY Annex**) and the Amendments for Independent Amounts to be included in Paragraph 13 of the New York law 2016 Credit Support Annex for Variation Margin (VM) (the **VM NY Annex IA Amendments**);

(iii) the 2016 Phase One Credit Support Annex for Initial Margin (IM) governed by New York law (the **IM NY Annex**);

(iv) the 1995 Credit Support Deed governed by English law (the **1995 Deed**);

(v) the 2016 Phase One IM Credit Support Deed governed by English law (the **IM Deed**);

(vi) the 1995 Credit Support Annex governed by English law (the **1995 Transfer Annex**);

(vii) the 2016 VM Credit Support Annex governed by English law (the **VM Transfer Annex**) and the Amendments for Independent Amounts to be included in Paragraph 11 of the English law 2016 Credit Support Annex for Variation Margin (VM) (the **VM Transfer Annex IA Amendments**);

(viii) the ISDA Euroclear Security Agreement (the **Euroclear Security Agreement**);

(ix) the ISDA Euroclear Collateral Transfer Agreement (NY Law) (the **Euroclear NY CTA**);

(x) the ISDA Euroclear Collateral Transfer Agreement (Multi-Regime) (the **Euroclear Multi-Regime CTA**);

(xi) the ISDA Clearstream 2016 Security Agreement (the **Clearstream Security Agreement**);

(xii) the ISDA Clearstream 2016 Collateral Transfer Agreement (NY Law) (the **Clearstream NY CTA**); and

(xiii) the ISDA Clearstream 2016 Collateral Transfer Agreement (Multi-Regime) (the **Clearstream Multi-Regime CTA**);

in each case, when entered into in order to provide credit support for transactions (**Transactions**) entered into pursuant to a master agreement (the **Master Agreement**) published by the International Swaps and Derivatives Association, Inc. (**ISDA**)[1]. This memorandum replaces our memorandum of law entitled "Validity and Enforceability under Czech Law of Collateral Arrangements under the ISDA Credit Support Documents" dated 27 March 2015.

For the purposes of this memorandum:

(i) **Annex** means each of the 1994 NY Annex, the VM NY Annex and the IM NY Annex;

[1] The various master agreements published by ISDA include (i) the 1987 Interest Rate Swap Agreement, (ii) the 1987 Interest Rate and Currency Exchange Agreement, (iii) the 1992 ISDA Master Agreement (Multicurrency – Cross Border) (iv) the 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction) and (v) the 2002 ISDA Master Agreement.

(ii) **Deed** means each of the 1995 Deed and the IM Deed;

(iii) **Security Documents** means the Annexes and the Deeds;

(iv) **IM Security Documents** means the IM NY Annex and the IM Deed;

(v) **Non-IM Security Documents** means the 1994 NY Annex, the VM NY Annex and the 1995 Deed;

(vi) **Transfer Annex** means each of the 1995 Transfer Annex and the VM Transfer Annex;

(vii) **Credit Support Documents** means the Security Documents and the Transfer Annexes;

(viii) **Euroclear Documents** means the Euroclear Security Agreement, the Euroclear NY CTA and the Euroclear Multi-Regime CTA; and

(ix) **Clearstream Documents** means the Clearstream Security Agreement, the Clearstream NY CTA and the Clearstream Multi-Regime CTA.

Capitalised terms used and not defined in this memorandum have the meanings ascribed to such terms in the Master Agreement or the relevant Credit Support Document, as applicable. The term **security interest**, when used in this memorandum, unless the context indicates otherwise, is meant to refer to any form of security interest that may be created under a Security Document, although the precise nature of the interest will vary depending upon the circumstances.

Similarly, in this memorandum:

(a) in relation to the Security Documents, the term **Security Collateral Provider** shall refer to the Pledgor (under an Annex) or the Chargor (under a Deed), as context requires; and

(b) **Collateral Provider** means the Security Collateral Provider under a Security Document or the Transferor under a Transfer Annex, according to the context, in relation to which **Collateral Taker** means the Secured Party or the Transferee, as the case may be.

The term **Collateral**, when used in this memorandum, is meant to refer, in the case of each Security Document, to any assets in which a security interest is created by the Security Collateral Provider in favour of the Secured Party and, in the case of each Transfer Annex, to any securities transferred as credit support or cash deposited, in either case, by the Transferor to or with the Transferee, as credit support for the obligations of the Collateral Provider under the relevant Master Agreement.

In this memorandum we consider the enforceability of the Credit Support Documents against each of the following parties to a Credit Support Document incorporated under the laws of the Czech Republic, acting as a Collateral Provider (each a **Czech Entity**):

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

2. Česká národní banka (the **Czech National Bank**);

3. a trading company (in Czech, *obchodní společnost*) incorporated under the Act on Business Companies and Cooperatives (No. 90/2012 Coll., 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*), and having its centre of main interest in the Czech Republic for the purpose of the Council Regulation (EC) No 1346/2000 (each a **Czech Corporate**); or

4. a securities dealer (in Czech, *obchodník s cennými papíry*) incorporated in the form of a limited liability company (in Czech, *společnost s ručením omezeným*) or a joint-stock company (in Czech, *akciová společnost*) licensed under the Act on Undertaking in the Capital Market (No. 256/2004 Coll., as amended, the **Capital Market Act**), which is not a Czech Bank[2] and which, to the extent applicable, has its centre of main interest in the Czech Republic for the purpose of the Council Regulation (EC) No 1346/2000[3] (a **Czech Securities Dealer**).

In this memorandum we also consider the enforceability of the Credit Support Documents against the following additional counterparties (each a **Foreign Entity**):

5. a bank organised and licensed under the laws of a country other than the Czech Republic (a **Foreign Bank**), including a Foreign Bank which has a branch in the Czech Republic;

6. a trading company similar to a Czech Corporate, incorporated and having its centre of main interest outside the Czech Republic for the purpose of the Council Regulation (EC) No 1346/2000 (a **Foreign Corporate**); or

7. a securities dealer similar to a Czech Securities Dealer, incorporated and, to the extent applicable, having its centre of main interest outside the Czech Republic for the purpose of the Council Regulation (EC) No 1346/2000 (a **Foreign Securities Dealer**).

We do not consider other entities whose business activities are regulated by special regulations, in particular insurance companies, pension funds, investment or management companies[4], investment funds, trust funds, credit and savings cooperatives, civic associations, private individuals, the State of the Czech Republic, municipalities, regional governments, statutory corporations, state enterprises, budgetary organisations or funds created by a statute. The application of this memorandum to any of the entities listed above in this paragraph would require additional legal analysis.

To reflect the scope of coverage of this memorandum by reference to the types of counterparty described in Appendix E, the Czech National Bank falls within the category of Central bank, a Czech Bank and a Foreign Bank fall within the category of Bank/Credit Institution, a Czech Corporate and a Foreign Corporate fall within the category of Corporation and a Czech Securities Dealer and a Foreign Securities Dealer both fall within the category of Investment Firm/Broker Dealer.

The name of each Czech Entity (other than the Czech National Bank) must identify the Czech Entity's legal form. The legal form is usually not spelled 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." and a limited partnership (in Czech, *komanditní společnost*) is usually identified by the suffix "k.s.". However, the suffix itself does not allow for a safe distinction between a Czech Bank, Czech Corporate and a Czech Securities Dealer, because their legal form will often overlap. The distinction between these types of Czech Entity is instead based on the type of business licence which they possess.

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[2] A securities dealer's licence may be granted also to a Czech Bank under the Capital Market Act. However, the Czech Bank remains regulated under the Banks Act as far as the issues covered by this memorandum are concerned.

[3] The Regulation does not apply to investment undertakings (called securities dealers in this memorandum) which provide services involving the holding of funds or securities for third parties.

[4] An investment or management company (in Czech, *investiční společnost*) is as a matter of Czech law the form of entity which may, when duly licensed by the Czech National Bank, become a manager of a mutual fund or an investment fund. An investment or management company would thus most likely fall within the category of a Hedge Fund/Proprietary Trader or an Investment Fund as a counterparty type described in Appendix E. In any case, it could not be considered merely a Corporation or an Investment Firm/Broker Dealer as such are described in Appendix E.

Additionally, although the Banks Act does not prescribe the mandatory inclusion of certain words in the name of a Czech Bank, Czech Banks normally include the words "bank", "banka" or "spořitelna" in their name. The Banks Act confirms that names of unlicensed entities must not contain these words unless it is clear from the context that the relevant entity is not a bank in the sense of a credit institution.

Our opinion, as expressed in this memorandum, is limited to the laws of the Czech Republic as presently in force and interpreted in the Czech Republic and we have assumed that no law of a jurisdiction other than the Czech Republic adversely affects the conclusions stated in this memorandum.

Also, the Civil Code (No. 89/2012 Coll., the **Civil Code**), the Corporations Act, International Law Act (No. 91/2012 Coll., as amended, the **International Law Act**) and other laws and regulations adopted in connection with the recodification of civil and private law in the Czech Republic are essential for assessment of the validity and enforceability of the provisions of the Master Agreement and the Credit Support Documents and each Transaction. These new laws and regulations took effect from 1 January 2014, they are voluminous, a number of the new rules are not unequivocal, and the legislative proposals were accompanied with legislative reports that were insufficient in many respects, with a number of the new rules not being given any background explanation at all. Above that, there is no case law or market practice at the time of this memorandum. Therefore, it is not clear how the new and untested laws and regulations will be interpreted in the future and what effect will such interpretation have on the validity and enforceability of certain provisions of the Master Agreement and the Credit Support Documents and each Transaction. Although we believe that the views expressed in this memorandum are correct, we cannot, under present circumstances, exclude the possibility that over time, Czech courts will interpret the new rules differently from our current understanding. Although we express below several specific reservations regarding those uncertainties or issues in the new laws that we are aware of, these reservations are without prejudice to the generality of this reservation.

The issues you have asked us to consider are set out below in italics, followed in each case by our analysis and conclusions. We indicate where relevant any assumptions that you have asked us to make. In addition, we make the following general assumptions:

(1) The obligations of each party under the Master Agreement and the relevant Credit Support Document are legal, valid and binding under the relevant governing laws (including the law governing the proprietary aspects of the relevant security interest in, or transfer of title to, the Collateral, but excluding, of course, when such aspects or transfer are governed by Czech law). There is no relevant bilateral or multilateral international treaty in place and effect that would govern in any private international law (conflict of laws) matter between the parties.

(2) The parties are personally liable as principal for their obligations under the Master Agreement in relation to each Transaction and under the Credit Support Documents and are beneficially entitled to their rights under such Master Agreement in relation to each Transaction and under the Credit Support Documents.

(3) The parties have, where required under the applicable laws, complied with the relevant licensing, customer care and other rules as envisaged, in particular, under the Directive No. 2004/39/EC on markets in financial instruments (the **MiFID**) and the Directive No. 2013/36/EU 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, as implemented in the relevant jurisdictions and Commission Regulation (EC) No. 1287/2006 dated 10 August 2006 implementing the MiFID as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of the MiFID, and have obtained all necessary authorisations, approvals, consents and licenses. Such obligations include in particular mutual record-keeping obligations between contractual parties, obligations resulting from measures adopted to prevent conflict of interests, rules for performing instructions, rules for the protection of the customers' assets

and certain other obligations set out in the relevant implementation of the MiFID and the said regulation.

(4) No member of the statutory, supervisory or other body and no other person who actually acts or is authorised to act for and on behalf of one of the parties to the relevant Master Agreement/Credit Support Document (an **Authorised Person**), no close person (in Czech *osoba blízká*) of any Authorised Person and no person influenced or controlled by any Authorised Person at the same time (i) is any other party to the relevant Master Agreement/Credit Support Document; (ii) is a member of the statutory, supervisory or another body of any other party; or (iii) otherwise acts or is authorised to enter into that Master Agreement/Credit Support Document for and/or on behalf of any other party. No other party to the relevant Master Agreement/Credit Support Document, or any person influenced or controlled by such other party or any person that is an influencing or controlling person in relation to such other party is an influencing or controlling person in relation to the Master Agreement/Credit Support Document. No acts of a member of statutory, supervisory or other body of one of the parties to the relevant Master Agreement/Credit Support Document have in relation to that Master Agreement/Credit Support Document been influenced by acts of or another interaction with an influencing or controlling person which is any other party to the relevant Master Agreement/Credit Support Document, or any person influenced or controlled by such other party or any person that is an influencing or controlling person in relation to such other party[5].

(5) There is no actual or potential conflict between: (i) interests of any member of the statutory, supervisory or other body of any of the parties to the relevant Master Agreement/Credit Support Document on the one hand and interests of that party to the relevant Master Agreement/Credit Support Document itself on the other hand; or (ii) interests of any person who acts or is authorised to act, including as representative or agent on the basis of a power of attorney or otherwise, for and on behalf of any of the parties to the relevant Master Agreement/Credit Support Document on the one hand and interests of that party to the relevant Master Agreement/Credit Support Document itself on the other hand.

(6) The Master Agreement/Credit Support Document and each of the Transactions are 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 to the detriment of the former party's creditors in the event of the former party becoming insolvent.

(7) The Collateral Provider is, at the time it enters into any Master Agreement, Transaction or Credit Support Document and at the time it provides, receives, substitutes or returns any Collateral under a Credit Support Document, not insolvent (in Czech, *v úpadku*) under applicable law and its insolvency does not threaten (in Czech, *hrozící úpadek*)[6], and entering into a Master Agreement, Transaction or Credit Support Document or provision of Collateral will not lead to the insolvency (or threatening insolvency) of the Collateral Provider and no insolvency, crisis prevention measure (in Czech *opatření k předcházení krizi*), crisis management measure (including crisis resolution measure and action or the appointment of a special manager) (in Czech *opatření k řešení krize*) or any similar measure or action, or involuntary administration proceedings in respect of the Collateral Provider are pending.

(8) The Master Agreement/Credit Support Document and each Transaction are entered into and Collateral is provided by each party prior to any action being taken in respect of either party for, or in connection with, the adjudication or commencement of insolvency proceedings, re-organisation, moratorium, debt discharge, dissolution, liquidation, administration, interim injunction, court or

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[5] We make this assumption, and assumption (5) below, 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.

[6] *Hrozící úpadek* is a statutory term and occurs 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.

other involuntary enforcement, public auction proceedings or making of any crisis prevention measure or crisis resolution measure under applicable Czech law.

(9) The Czech National Bank has entered into any Master Agreement, Transaction or Credit Support Document in compliance with the Act on the Czech National Bank (No. 6/1993 Coll., as amended, the **Czech National Bank Act**) and other applicable legislation and regulations and all rights and obligations under any Master Agreement, each Transaction and each Credit Support Document are compatible with the Czech National Bank Act and other applicable legislation and regulation.

(10) A Czech Bank or a Foreign Bank has entered into any Master Agreement, Transaction or Credit Support Document in compliance with the Banks Act, the Act No. 374/2015 Coll., on Framework for the Recovery and Crisis Resolution on the Financial Market (the **Crisis Resolution Act**) and other applicable banking legislation and regulation and all rights and obligations under any Master Agreement, each Transaction and each Credit Support Document are compatible with the Banks Act, the Crisis Resolution Act and other applicable banking legislation and regulation.

(11) A Czech Securities Dealer or a Foreign Securities Dealer has entered into any Master Agreement, Transaction or Credit Support Document in compliance with the Capital Market Act, the Crisis Resolution Act and other legislation and regulations applicable to it and all rights and obligations under any Master Agreement, each Transaction and each Credit Support Document are compatible with the Capital Market Act, the Crisis Resolution Act and other legislation and regulation applicable to it.

(12) Each party has the relevant power and capacity and is duly authorised to enter into and perform its obligations under the Master Agreement/Credit Support Document and each of the Transactions. The persons who signed and/or entered into the Master Agreement/Credit Support Document and each of the Transactions (including as representatives or agents on the basis of the power of attorney or otherwise) for and on behalf of each Czech Entity had at the time of signing or other relevant act full legal capacity, were competent and duly authorised and had the relevant power to sign and make such act. The Collateral or Eligible Credit Support is not encumbered (other than by a lien routinely imposed on all securities in a relevant clearing or settlement system) and the Collateral Provider has acquired and retains proper legal title to the Collateral or Eligible Credit Support and is entitled to provide and/or transfer the Collateral or Eligible Credit Support under the Credit Support Documents.[7]

(13) Any investment instruments' records (in Czech, *evidence investičních nástrojů*) maintained in the Czech Republic in which Collateral in the form of securities is recorded are maintained in compliance with all applicable laws and regulations.

(14) The parties to the Master Agreement/Credit Support Document and each Transaction have complied with the 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**) and 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**) including any regulatory technical standards or other rules adopted and published in relation to either of the SFTR or the EMIR.

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[7] This assumption means that, among other things, in relation to the Collateral provided and/or transferred no prohibition to encumber or dispose of the Collateral 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 Collateral under Section 97(1)(e) of the Capital Market Act), 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 Collateral 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.

(15) The parties to the Master Agreement/Credit Support Document and each Transaction have further complied with the Act on the Register of Contracts (Act No. 340/2015 Coll., on the Register of Contracts, the **Register of Contracts Act**), if and to the extent that act applies to the parties[8].

(16) No security interest in the Collateral or Eligible Credit Support is or will be registered in the Register of Pledges or in a public register (in Czech, *veřejný seznam*).[9]

FACT PATTERNS

You have asked us to distinguish between the following three fact patterns when responding to each question:

I. The Location of the Collateral Provider is in the Czech Republic and the Location of the Collateral is outside the Czech Republic.

II. The Location of the Collateral Provider is in the Czech Republic and the Location of the Collateral is in the Czech Republic.

III. The Location of the Collateral Provider is outside the Czech Republic and the Location of the Collateral is in the Czech Republic.

For the foregoing purposes:

(a) the **Location** of the Collateral Provider is in the Czech Republic if it is incorporated or otherwise organised in the Czech Republic and/or if it has a branch or other place of business in the Czech Republic; and

(b) the **Location** of Collateral is the place where an asset of that type is located under the private international law rules of the Czech Republic or, if different, the place the laws of which govern the proprietary aspects of a security interest in, or transfer of title to, such asset, as determined under the private international law rules of the Czech Republic.

(c) **Located** when used below in relation to a Collateral Provider or any Collateral should be construed accordingly.

Although we do not expressly refer to each of the fact patterns in our answer to each question, we have taken them into consideration in developing our analysis. It should generally be clear from the context which of the fact patterns is being discussed in each case. For example, the fact that an answer relates to a Czech Entity clearly excludes fact pattern III. In addition, it should generally be clear from the terms of the question whether the Collateral is to be considered as located in the Czech Republic or in another jurisdiction, and where it is not clear, we make such distinction explicitly.

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[8] The Register of Contracts Act took effect on 1 July 2016 and requires that contracts concluded with certain public sector entities (the **Relevant Entities**) are, subject to exemptions, concluded in writing and published in an on-line register 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 corporates 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. The act explicitly states that it applies regardless of the governing law of the contract. From 1 July 2017, a contract that is subject to the requirement of publication in the register 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 and published in the register has applied already from 1 July 2016.

[9] We make this assumption because with respect to certain assets the security interest created by the registration in the Register of Pledges or in a public register (in Czech, *veřejný seznam*) may be prioritized over the security interest created under the Master Agreement. For details please refer to our description and analysis of changes brought about by the recodification of private law in the Czech Republic on pages 7 - 9 of this memorandum as well as our answer to questions 16 and 23 below.

As a general rule, neither the location nor the form of organisation of the Collateral Taker is relevant to the consideration of the enforceability of a collateral arrangement against a Collateral Provider in the event that insolvency proceedings in the Czech Republic are brought against the Collateral Provider.

LEGAL BACKGROUND

Before we turn to your specific questions we would like to bring to your attention relevant developments relating to the implementation of the Directive 2002/47/EC on financial collateral arrangements (the **Financial Collateral Directive**) into Czech law. The original implementation was made with effect from 29 September 2005[10] and some of the relevant substantive rules were subsequently amended with effect from 1 March 2008[11]. Another significant change occurred in connection with the implementation of the Directive 2009/44/EC (the **Amending Directive**) which amends the Financial Collateral Directive. While Czech legislators had to implement the Amending Directive they decided to go beyond a mere implementation and to also revamp the previously existing substantive rules, which had been scattered across a number of pieces of legislation, and to gather them into a single act.

The result is that all substantive rules implementing the Financial Collateral Directive, as amended by the Amending Directive, are as of 1 January 2011 set out in a standalone Financial Collateral Act (No. 408/2010 Coll., as amended, the **Financial Collateral Act**) which replaced the rules originally contained in the Commercial Code (No. 513/1991 Coll., as amended., the **Commercial Code**) (the **Czech Financial Collateral Rules**). Another related Act (No. 409/2010 Coll., on the Amendment of Laws in Connection with the Adoption of the Act on Financial Collateral Arrangements) amended a number of other laws, such as the Act on Insolvency (No. 182/2006, as amended, the **Insolvency Act**) and laws regulating the business of various financial institutions, and introduced a slightly amended statutory definition of close-out netting.

The Czech Financial Collateral Rules do not apply to all security arrangements but only to those that qualify as "financial collateral arrangements". These financial collateral arrangements generally benefit from an increased level of flexibility introduced by the Financial Collateral Directive and are also exempted from certain strict rules which would otherwise apply to traditional security arrangements. However, no published case law is available yet and it therefore remains to be seen how the Czech Financial Collateral Rules will be interpreted by Czech courts.

As part of the recodification of private law in the Czech Republic, with effect from 1 January 2014 there were, among others, adopted several significant amendments to the legislation governing security interests and security arrangements in general. In Sections 2010 to 2017, the Civil Code sets out a general regulation of security arrangements, which will apply not only to the creation of a security interest as one of the ways to provide a security or secure a debt, but also to a security transfer of a right under Section 2040 *et seq.* of the Civil Code and to other ways of providing a security or securing a debt.

Section 2016 of the Civil Code contains a rule that is new in Czech law and whose application essentially means the priority (higher ranking) of even a subsequent security arrangement created as a right *in rem* registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges over any prior security arrangement (even if created as a right *in rem*) not registered in a public register or the Register of Pledges, if created in respect of the same asset. Therefore, under the rule of Section 2016 of the Civil Code, if a security interest is created as a right *in rem* registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges, such right *in rem* always provides the relevant secured party with priority (higher ranking) over other parties' rights *in rem* or contractual rights to Collateral which are not registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges, irrespective of the moment of their creation. Similar rule

[10] Act No. 377/2005 Coll., on supplementary supervision of banks, savings and credit cooperatives, institutions of electronic money, insurance companies and securities brokers in financial conglomerates and on change of certain other acts (act on financial conglomerates), as amended.

[11] Act No. 344/2007 Coll., which amends the Act No. 513/1991 Coll., the commercial code, as amended, and the Act No. 200/1990 Coll., on infringements, as amended. Certain other minor amendments affecting specific aspects of the treatment of financial collateral arrangements under Czech law were also made in the meantime.

is further contained in Section 1371 *et seq.* of the Civil Code specifically with respect to competing security interests constituted by pledges only.

Another important change from this point of view is that from 1 January 2014 neither the Civil Code nor any other law or regulation prohibits to validly create a multiple of rankings of security interests or other security arrangements, whether created as rights *in rem* or not, over securities or book-entry securities.

The above could suggest that, if the rule set out in Section 2016 of the Civil Code were applied also to financial collateral arrangements pursuant to the Czech Financial Collateral Rules, a security interest or other security arrangement created to Collateral by a right *in rem* in favour of a third party, albeit created later in the future (i.e. only after the creation of security interest to Collateral under a Security Document by the Security Collateral Provider in favour of the Secured Party, or after the transfer of Collateral (in the case of securities) or other provision of Collateral (in the case of cash deposit) by the Transferor to or with the Transferee as credit support), could give that third party priority (higher ranking) and preferential satisfaction from the Collateral over any earlier Secured Party's security interest to the same Collateral created under a Security Document or Transferee's right to the same securities transferred to the Transferee as credit support or the same cash deposited with the Transferee, provided that the third party's right *in rem* were registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges.

Taking a step back and as also described in our answer to question 3 further in this memorandum, under the Czech Financial Collateral Rules, a financial collateral arrangement has the character of either a pledge over financial collateral or a transfer of financial collateral to the collateral taker. The Czech Financial Collateral Rules stipulate further that financial collateral is transferred usually under an agreement on the return of the financial collateral after the obligation has been performed. Where it is permitted by the nature of the financial collateral and where it is in accordance with the agreement of the parties, the title to the financial collateral is transferred to the collateral taker. Even though the explanatory report to the relevant provisions of the Czech Financial Collateral Rules emphasizes that a transfer of financial collateral does not have to take the form of a security transfer of a right (which is with effect from 1 January 2014 regulated in Section 2040 *et seq.* of the Civil Code) and so purports to clearly distinguish between the two, one of plausible interpretations of applicable rules is that not only a security transfer of financial collateral but also an outright title transfer of financial collateral could be considered one of the means of providing a security or securing a debt.

As a result of this interpretation, if Sections 2010 to 2017 of the Civil Code applied also to financial collateral arrangements pursuant to the Czech Financial Collateral Rules, they could apply not only to a pledge over financial collateral but also to a transfer of financial collateral. However, in particular with regard to the fact that the Civil Code and all other laws and regulations adopted in connection with the recodification of civil and private law in the Czech Republic became effective only on 1 January 2014 (which means that there is no relevant case law or practical experience with it), it is unclear how the respective provisions of the Civil Code and other new and untested laws and regulations will be interpreted in the future.

In any case, the relevant interpretation and conclusions will be different depending on whether we refer to:

1. A pledge over financial collateral (as security interest created to Collateral by the Security Collateral Provider in favour of the Secured Party pursuant to each Security Document) or

2. A transfer of financial collateral to the collateral taker (as an outright title transfer of Collateral or other provision of Collateral as credit support by the Transferor to or with the Transferee pursuant to a Transfer Annex).

Similarly, the relevant interpretation and conclusions will also differ depending on the various forms of Collateral or Eligible Collateral involved. In other words, substantial distinctions may be drawn between

where Collateral or Eligible Collateral consists of various types of securities or book-entry securities and where cash Collateral is concerned.

We discuss these distinctions and provide our interpretation and conclusions in light of the respective provisions of the Civil Code in our answer to questions 16 and 23 below.

Subject to conclusions set out in our answer to questions 16 and 23 below, we strongly believe that the only correct interpretation of the Czech Financial Collateral Rules is that Sections 2010 to 2017 of the Civil Code should not at all apply to financial collateral arrangements if and to the extent they qualify as financial collateral arrangements under the Financial Collateral Act or under an equivalent foreign legal regulation. In our view, this primarily follows from the sense and purpose of the regulation of financial collateral arrangements as such are implemented from the Financial Collateral Directive into the Czech Financial Collateral Rules and explicitly expressed in various provisions scattered in the Financial Collateral Act. It can further be inferred from the rules contained in particular in Sections 3, 18 and 22 of the Financial Collateral Act that, among other things, the right of a collateral taker to satisfaction from financial collateral is not subject to the restrictions otherwise resulting from the general regulation of the security interests and the transfer of assets, rights and other property values in favour of a creditor and that the legal effects of the transfer of financial collateral are governed by the provisions of the Financial Collateral Act and its provisions on financial collateral arrangements, irrespective of the general regulation of the security interests and the transfer of assets, rights and other property values in favour of a creditor. In addition, although the relevant provisions of the Financial Collateral Act are on their grammatical reading not absolutely straightforward on this point, it could be argued that the provisions of the Financial Collateral Act constitute *lex specialis* in relation to the various general provisions of the Civil Code which should in turn result in Sections 2010 to 2017 of the Civil Code, including the problematic Section 2016, not applying to financial collateral arrangements if and to the extent they qualify as financial collateral arrangements under the Financial Collateral Act or under an equivalent foreign legal regulation.

All of the above goes without reiterating that, as also described below, Czech law and any Civil Code rules and regulations would not be relevant unless Czech law was the law governing the proprietary aspects of the security interest in or the transfer of the Eligible Collateral (including Eligible Collateral (IM) and Eligible Collateral (VM)) or Eligible Credit Support (including Eligible Credit Support (IM) and Eligible Credit Support (VM)).

A Credit Support Document which failed to qualify as a financial collateral arrangement would expose the Collateral Taker to a bulk of Czech law adverse to its rights. For example:

1. Regardless of the location of Collateral comprised of securities or book-entry securities, it would be doubtful whether the Value of the Credit Support Balance under the 1995 Transfer Annex or the Value of the Credit Support Balance (VM) under the VM Transfer Annex could be included in close-out netting under the Master Agreement.

2. Transfers of Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic under the Transfer Annex could be characterised as transfers by way of security (as opposed to outright transfers of ownership). In published judgments, prior to the entry into force of the Civil Code and other laws and regulations adopted in connection with the recodification of civil and private law in the Czech Republic, the Supreme Court of the Czech Republic had sought to apply rules governing security interests by analogy also to transfers by way of security. However, it remains to be seen if this practice will continue to be followed by the Supreme Court of the Czech Republic also following the entry into force of the Civil Code, which, among other things, newly regulates a security transfer of a right in its Section 2040 *et seq*.

3. A security interest over Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic could be enforced only with respect to debts (including debts to make an interest payment) which have not been paid fully or in part when due

and, if Collateral comprised of securities or book-entry securities, only in a way that is explicitly permitted by the applicable provisions of the Civil Code.

4. As of the moment of commencement of insolvency proceedings, rights of individual creditors to enforce their security (other than a financial collateral arrangement) are suspended and collateral may be realised only by the insolvency administrator. From the proceeds of the realisation will be deducted the reward of the insolvency administrator and, unless the insolvency court rules otherwise, the cost of administration and realisation of the collateral (up to an aggregate limit of 9%).

Therefore, unless indicated otherwise in this memorandum, we will only examine the collateral arrangements under the Credit Support Documents to the extent they would qualify as such under the Czech Financial Collateral Act or the Financial Collateral Directive, as amended by the Amending Directive (as applicable).

We are not aware of any pending developments that would adversely affect the conclusions in this memorandum.

PART 1: SECURITY INTEREST APPROACH PURSUANT TO THE SECURITY DOCUMENTS

In this Part 1 of our memorandum, we consider the validity and enforcement under Czech law of collateral arrangements entered into under the Security Documents. For this purpose we make the following assumptions:

(a) The Security Collateral Provider has entered into a Master Agreement and a Security Document with a Secured Party. The parties have entered into either (i) a Master Agreement governed by New York law, or (ii) a Master Agreement governed by English law.

(b) The parties have entered into (i) the 1994 NY Annex and/or the VM NY Annex in connection with a New York law governed Master Agreement; and (ii) the 1995 Deed in connection with an English law governed Master Agreement.

(c) The parties have entered into each IM Security Document either with a New York law or English law governed Master Agreement and may be subject to a different governing law than the relevant Master Agreement. Unless revised by the parties, the IM NY Annex is subject to the same governing law as the relevant Master Agreement. In respect of an IM NY Annex entered into in connection with an English law governed Master Agreement, the parties will provide in paragraph 13 of the IM NY Annex that the Annex is governed and construed in accordance with New York law.

(d) Although each of the Non-IM Security Documents is a bilateral form in that it contemplates that either party may be required to post Collateral to the other depending on movements in exposure under the relevant Security Document, we assume, for the sake of simplicity, that the same party is the Security Collateral Provider at all relevant times under the applicable Security Document. Under the IM Security Documents, although both parties will be required to post Collateral to the other (either under the same IM Security Document or under separate IM Security Documents) in an amount that depends on the IM calculation provisions, we have only considered the Collateral posting leg of one party whilst any issues relating to the insolvency of the Collateral Taker are considered in our Memorandum of Law for the International Swaps and Derivatives Association, Inc. entitled "Collateral Taker Insolvency – Validity and Enforceability under Czech Law of Collateral Arrangements under the ISDA IM Security Documents including ISDA Documentation Reflecting Margin Requirements" dated [31 January] 2017 (the **Collateral Taker Insolvency Memorandum**).

(e) The Security Collateral Provider is a Czech Entity or a Foreign Entity.

(f) Each Master Agreement and each Security Document is enforceable under the laws of New York or England, as the case may be, and each party has duly authorised, executed and delivered, and has the the relevant power and capacity to enter into, each document.

(g) No provision of the Master Agreement or relevant Security Document has been altered in any material respect. The making of standard elections in Paragraph 13 of either Security Document and the specification of standard variables (consistent with the other assumptions in this memorandum) would not in our view constitute material alterations, except where expressly indicated 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 Master Agreement or relevant Security Document nor any matters of fact that may affect the conclusions set out in this memorandum[12].

(h) Pursuant to the relevant Security Documents, the counterparties agree that Eligible Collateral will include cash credited to an account (as opposed to physical notes and coins) and certain types of securities or book-entry securities (as further described below) that are located or deemed located either (i) in the Czech Republic, or (ii) outside the Czech Republic.

(i) Any securities provided as Eligible Collateral qualify as investment securities, securities for collective investment or money-market instruments[13], and such securities are denominated in either the currency of your jurisdiction or any freely convertible currency and consist of (1) corporate debt securities whether or not the issuer is organised or located in the Czech Republic; (2) debt securities issued by the government of the Czech Republic; and (3) debt securities issued by the government of a member of the "G-10" group of countries; and (4) corporate equity securities whether or not the issuer is organized or located in the Czech Republic, and in the case of the 1994 NY Annex, the VM NY Annex and the 1995 Deed is held in one of the following forms:

(i) directly held bearer securities: by this we mean securities issued in certificated form, in bearer form (meaning that ownership is transferrable by delivery of possession of the certificate) and, when held by a Secured Party as Collateral under a Security Document, held directly in this form by the Secured Party (that is, not held by the Secured Party indirectly with an Intermediary (as defined below))[14];

(ii) directly held registered securities: by this we mean securities issued in registered form and, when held by a Secured Party as Collateral under a Security Document, held directly in this form by the Secured Party so that the Secured Party is shown as the relevant holder in the register for such securities (that is, not held by the Secured Party indirectly with an Intermediary);

(iii) directly held dematerialised securities: by this we mean securities issued in dematerialised form and, when held by a Secured Party as Collateral under a Security Document, held directly in this form by the Secured Party so that the Secured Party is shown as the relevant holder in the electronic register for such securities (that is, not held by the Secured Party indirectly with an Intermediary); or

(iv) intermediated securities: by this we mean a form of interest in securities recorded in fungible book-entry form in an account maintained by a financial intermediary (which could be a central securities depository (**CSD**) or a custodian, nominee or other form of financial

[12] This assumption means, among other things, that neither party has entered with the other party to the Master Agreement or Security Document or with any third person into any agreement, contract or arrangement under which it would for instance be possible to pledge Collateral as an asset of a third party or otherwise provide that Collateral as a security in favour of a third person after its transfer to the collateral taker.

[13] Investment securities, securities for collective investment or money-market instruments are all included in the definition of investment instruments as set out in Appendix B. Also, the full definition of investment securities is set out in Appendix B.

[14] Please note that, if issued under Czech law (that is, as Czech law governed securities), certificated bonds cannot be issued in bearer form and can only be issued in registered form.

intermediary, in each case an **Intermediary**) in the name of the Secured Party where such interest has been credited to the account of the Secured Party in connection with a transfer of Collateral by the Security Collateral Provider to the Secured Party under a Security Document.

The precise nature of the rights of the Secured Party in relation to its interest in intermediated securities and as against its Intermediary is unclear under Czech law. Please refer to further discussion in question 2 below.

The Secured Party's Intermediary may itself hold its interest in the relevant securities indirectly with another Intermediary or directly in one of the three forms mentioned in (i), (ii) and (iii). In practice, there is likely to be a number of tiers of Intermediaries between the Secured Party and the issuer of such securities, at least one of which will be an Intermediary that is a national or international CSD.

Our understanding is that the Secured Party will normally hold securities in the form of intermediated securities rather than directly in one of the three forms mentioned in (i), (ii) and (iii).

(j) Cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Secured Party.

The assumptions made in paragraphs (i) and (j) will be subject to modification as discussed below in paragraph (n) in respect of the IM Security Documents and paragraph (o) in respect of Collateral held in a central securities depository.

(k) Pursuant to the terms and conditions of the Master Agreement, the Security Collateral Provider enters into a number of Transactions with the Secured Party. Such Transactions include any or all of the transactions described in Appendix A.

(l) In the case of questions 12 to 15 below, after entering into the Transactions and prior to the maturity thereof, the rights of the Security Collateral Taker under paragraph 8 of the relevant Annex or Deed (as applicable) have become exercisable following the occurrence of any of the relevant pre-conditions specified in the Annex or Deed (which shall comprise solely of the events listed in Paragraph 8 or as an election in the pro-forma Paragraph 13) which are then continuing, but that an insolvency proceeding has not been instituted).

(m) In the case of questions 16 to 18 below, an Event of Default under Section 5(a)(vii) of the Master Agreement with respect to the Security Collateral Provider has occurred and a formal bankruptcy, insolvency, liquidation, reorganization, administration or comparable proceeding (collectively, the **insolvency**) has been instituted by or against the Security Collateral Provider.

(n) In respect of IM Security Documents, the Collateral provided under the IM Security Document is held in an account (which may hold cash (in a freely convertible currency) and securities[15],) (a **Custodial Account**), which is not a current account, with a third-party custodian (**Custodian**), with the following characteristics: (x) the Custodian holds the Collateral in the Collateral Provider's name pursuant to a custodial agreement between the Collateral Provider and custodian; (y) the Custodial Account is used exclusively for the Collateral provided by the Collateral Provider to the relevant Collateral Taker; and (z) the Collateral Provider, the Collateral Taker and the Custodian have entered into an agreement (which may be a separate control agreement or may be part of the custodial agreement) under which the Collateral Taker can take control of the margin under certain circumstances.

[15] Provided that such securities qualify as investment securities, securities for collective investment or money-market instruments, which are all included in the definition of investment instruments as set out in Appendix B. Also, the full definition of investment securities is set out in Appendix B.

(o) When "initial margin" Collateral (which may be only cash (in freely convertible currency) and securities[16]) is held at a CSD, the parties will not enter into an IM Security Document. In this case (w) the Collateral is held in an account within Euroclear or Clearstream (*i.e.* outside the Czech Republic); (x) the parties have entered into the Euroclear Documents or the Clearstream Documents (as applicable) and other relevant documentation with Euroclear or Clearstream, which collectively establish collateral arrangements within Euroclear or Clearstream (as applicable) and set forth (i) the manner in which the Collateral is held in Euroclear or Clearstream and (ii) the manner in which the automated transfers of Collateral by Euroclear or Clearstream will be effected (*i.e.,* upon receipt of matching instructions from the Collateral Provider and Collateral Taker as to the overall amount of initial margin Collateral that is required in respect of such Collateral Provider's posting obligation, Euroclear or Clearstream, as applicable, will calculate any excess or deficit and make the relevant transfers accordingly on behalf of the parties in discharge of their obligations to one another); and (y) the Euroclear Documents or the Clearstream Documents and the other documents referred to in (x) (as applicable) are enforceable in accordance with their terms under applicable law (including if such law is not Czech law).

In the case of:

(i) Euroclear, the Collateral is held in a "Pledged Securities Account" and a "Pledged Cash Account" opened in the Euroclear System in the name of Euroclear acting in its own name but for the account of the Collateral Taker (as pledgee under the pledge granted under the Euroclear Security Agreement) and to be operated in accordance with the relevant Euroclear documents referred to at (x) above; and

(ii) Clearstream, the Collateral is held in a "Collateral Account" opened in the Clearstream system in the name of the Collateral Provider and pledged to the Collateral Taker pursuant to the Clearstream Security Agreement and to be operated in accordance with the relevant Clearstream documents referred to at (x) above.

(p) The parties may enter into more than one Credit Support Document, including multiple Credit Support Documents each subject to different governing laws, and/or may also enter into Euroclear Documents and/or Clearstream Documents.

(q) The parties to the IM Securities Documents are only entities which are subject to regulatory requirements to post or collect initial margin with respect to derivatives or swaps.

(r) If the Custodian has its registered office in the European Union (the **EU**) it has an authorisation for safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management as specified in the MiFID.

Validity of Security Interests

In relation to Non-IM Security Documents, it may be useful to mention at the outset that, on the basis of and subject to our analysis set out below in this memorandum, save for the Collateral in the form of certificated securities, it is preferable to use the Transfer Annex if the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, because there is a serious risk that a Czech court would not recognise the security interest purported to be created under the Non-IM Security Documents in such circumstances.

[16] As required by the relevant (draft) regulatory technical standard to the EMIR, and provided that such securities qualify as investment securities, securities for collective investment or money-market instruments, which are all included in the definition of investment instruments as set out in Appendix B. Also, the full definition of investment securities is set out in Appendix B.

In relation to the IM Security Documents, on the basis of and subject to our analysis set out below in this memorandum, save for the Collateral in the form of certificated or dematerialised securities, if the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, a very similar risk exists that a Czech court would not recognise the security interest purported to be created under the IM Security Documents in such circumstances.

1. *Under the laws of your jurisdiction, what law governs the contractual aspects of a security interest in the various forms of Eligible Collateral deliverable under the Security Documents? Would the courts of your jurisdiction recognise the validity of a security interest created under each Security Document, assuming it is valid under the governing law of such Security Document (taking into account assumptions (b) and (c) above)?*

   Assuming that there is no relevant bilateral or multilateral international treaty in place and effect that would govern in any private international law (conflict of laws) matter between the parties, the law governing the contractual aspects of a security interest in the various forms of Eligible Collateral is the law governing the relevant Security Document as determined under the Convention on the Law Applicable to Contractual Obligations (1980) (the **Rome Convention**)[17] or the Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the **Rome I Regulation**)[18]. The relevant criteria and limitations set out in the Rome Convention and Rome I Regulation are further discussed in question 19.

   Under Czech law, a distinction can be drawn between the contractual and proprietary aspects of a security interest but the security interest comes into existence only when both its contractual and proprietary aspects have been validly created.

   It follows that a Czech court would recognise the validity of a security interest created under each Security Document if that security interest was valid both under the governing law of the relevant Security Document **and** the law governing the proprietary aspects of the security interest.

   We further confirm that, if the parties chose to have an IM Security Document subject to a different governing law than the relevant Master Agreement, this should not adversely affect another choice of governing law in either of the IM Security Documents or the Master Agreement nor the validity of a security interest (if such security interest has been validly created in accordance with applicable law), provided that each such choice of governing law is sufficiently clear. If the choice of law would be assessed by a Czech court, the split of governing laws should not have any adverse impact on the validity of each Security Document.

2. *Under the laws of your jurisdiction, what law governs the proprietary aspects of a security interest (that is, the formalities required to protect a security interest in Collateral against competing claims) granted by the Security Collateral Provider under each Security Document (for example, the law of the jurisdiction of incorporation or organization of the Security Collateral Provider, the jurisdiction where the Collateral is located, or the jurisdiction of location of the Secured Party's Intermediary in relation to Collateral in the form of intermediated securities)? What factors would be relevant to this question? Where the location (or deemed location) of the Collateral is the determining factor, please briefly describe the principles governing such determination under the law of your jurisdiction with respect to the different types of Collateral. In particular, please describe how the laws of your jurisdiction apply to each form in which securities Collateral may be held under (x) the Non-IM Security Documents pursuant to assumption (i) above; (y) the IM Security Documents pursuant to assumption (n) above and (z) the arrangements described in assumption (o) above.*

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[17] The Rome Convention came into effect in the Czech Republic on 1 July 2006 and applies to contracts concluded on or after 1 July 2006 but before 17 December 2009.

[18] The Rome I Regulation came into effect on 17 December 2009 and applies to contracts concluded on or after 17 December 2009.

The rules for determining which law governs the proprietary aspects of a security interest are set out primarily in the International Law Act.

Not even the leading Czech commentaries on conflict of laws have ever expressed a clear and definite view as to where exactly the boundary between contractual and proprietary aspects of a security interest lies. Based on the view which these commentaries take with respect to rights in rem generally[19], we think that the following aspects of a security interest would be considered proprietary under Czech law:

(i) how the security interest in the collateral is validly created (for example, by delivering the collateral, affixing a security instrument with a pledge endorsement or making a registration in a securities account);

(ii) the effect of the security interest in the collateral vis-à-vis third parties; and

(iii) the possible methods of enforcing the collateral and the procedures which must be observed upon such enforcement.

However, due to a lack of proper guidelines, it is possible that a court would find the scope of the proprietary aspects of a security interest to be wider. For example, the secured party's obligations associated with holding the collateral could be found to be proprietary for reasons described in our response to question 9 below.

The governing law of the proprietary aspects of a security interest in each form of Eligible Collateral (including, for the avoidance of any doubt, Eligible Collateral (IM) and Eligible Collateral (VM)) would be determined as follows:

(A) Certificated securities in bearer or registered form

Under Section 83(2) of the International Law Act, the law governing the proprietary aspects of a security interest in certificated securities in bearer and registered form would be the law of the place of habitual residence or statutory seat of the Secured Party in the decisive period of time, unless the parties have chosen a different law. More specifically, the proprietary aspects of the creation, continuation and extinction of the security interest would be governed by the law of the place of habitual residence or statutory seat of the Secured Party at the time when the relevant event affecting the security interest occurred, unless the parties have chosen a different law. Although not expressly stated in Section 83(2) of the International Law Act, the choice of law must be explicit or result unequivocally from the relevant Security Document or the circumstances and, in addition, must explicitly refer to the proprietary aspects of the security interest. Otherwise the choice of law may be deemed to apply to the contractual undertaking only.

Section 83(2) of the International Law Act expressly excludes *renvoi*. Accordingly, if the choice of law clause or the relevant fallback conflict of laws rule pursuant to Section 83(2) of the International Law Act refer to the law of a foreign jurisdiction the conflict of laws rules of which refer back to Czech law or to the law of a different jurisdiction (*renvoi*), *it is not possible* to accept such *renvoi*.

(B) Dematerialised securities

Given the scope of this memorandum[20], the law governing the proprietary aspects of a security interest in dematerialised securities would always be the law of the location of the securities account

[19] Kučera, Z., Tichý, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář*., 1989, Prague, p. 82. Pauknerová, M., Rozehnalová, N., Zavadilová M. & co-authors, *Zákon o mezinárodním právu soukromém. Komentář*., 2013, Prague, p. 449. Bříza, P. Břicháček, T., Fišerová, Z., Horák, P., Ptáček, L., Svoboda, J. *Zákon o mezinárodním právu soukromém. Komentář*., 2014, Prague, p. 348 *et seq*.

[20] See in particular assumption made under letter 4(i) above.

in which the proprietary title to the relevant securities is recorded (this is also known as the "place of the relevant intermediary" or "PRIMA" rule). The PRIMA rule is contained in Section 83(5) of the International Law Act, specifically with respect to provision as financial collateral of:

(iii) book-entry investment securities, securities for collective investment or money-market instruments[21], the ownership of which or other right in rem to which is evidenced by an entry being made in an account; or

(iv) rights arising from an entry of investment securities, securities for collective investment or money-market instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course [22].

The law of the country in which the relevant account is maintained governs:

I. the legal nature and proprietary effects of the financial collateral;

II. the requirements for the creation of a financial collateral arrangement over the financial collateral, the requirements for the provision of the financial collateral and other requirements for the validity and effectiveness of the financial collateral arrangement over the financial collateral vis-à-vis third parties;

III. the ranking of ownership and other rights in rem to the financial collateral and the circumstances in which a right to such financial collateral can be acquired from a person other than its owner; and

IV. the requirements for, and the manner of, enforcing the financial collateral following the occurrence of an enforcement event (as such an event is described in the Financial Collateral Act).

The possibility of choosing a governing law other than as described above and *renvoi* are expressly excluded under Section 83(7) of the International Law Act. In the context of this memorandum, the most relevant category of investment securities, securities for collective investment or money-market instruments (or any rights arising from an entry thereof in a register) seem to be corporate shares, regardless of the place of incorporation or organization of the issuer, bonds and similar securities representing a right to repayment of an owed amount which are tradable in the capital market[23]. The full definitions of investment instruments and investment securities under Czech law are set out in Appendix B.

Czech law generally recognises a two-tier structure within which an entry into an account gives holders of book-entry securities (which may or may not qualify as investment instruments) a proprietary title (that is, a title which qualifies as a right in rem) to such book-entry securities[24]. This generally means that where the relevant account is located in the Czech Republic, a proprietary title will be recognised for a holder whose account is either with a CSD or other intermediary in direct relationship with the issuer of the book-entry security (together a **first-tier intermediary**) or with an intermediary having a nominee account directly with such first-tier intermediary[25].

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21 Investment securities, securities for collective investment or money-market instruments are all included in the definition of investment instruments as set out in Appendix B. Also, the full definition of investment securities is set out in Appendix B.

22 The possibility to provide these rights as financial collateral has been expressly anchored in Section 5(1)(c) of the Financial Collateral Act.

23 Section 3(2) of the Capital Market Act.

24 Sections 525 *et seq.* of the Civil Code and sections 91 *et seq.* of the Capital Market Act.

25 It has become customary in the international literature on intermediated securities to apply a vertical metaphor to these holding patterns, so that "upper-tier" intermediaries are considered to be closer to the intermediary or other person in a direct relationship with the issuer of the relevant security while "lower-tier" intermediaries are closer to the intermediary with a direct relationship with the ultimate holder of the interest. We use this convention in this memorandum both with respect to intermediated securities and the Czech two-tier structure of registries of dematerialised securities.

As at the date of this memorandum, the two-tier structure applies in practice in relation to the central registry of book-entry securities[26], which comprises the registry of short-term debt securities maintained by the Czech National Bank (in Czech, *Systém krátkodobých dluhopisů or* ***SKD***), and to certain other registries (referred to as the independent registries of investment instruments) in which book-entry collective investment securities, immobilised investment instruments, foreign investment instruments held by a securities broker for the purpose of the provision of an investment service and other investment instruments the nature of which enables it, are held.

As also follows from the immediately above, Czech law recognises two basic types of registries: (1) the central registry of book-entry securities (in Czech, *centrální evidence zaknihovaných cenných papírů*) (including SKD); and (2) the independent registry of investment instruments (in Czech, *samostatná evidence investičních nástrojů*), which both can be maintained in the two-tier structure.

It would depend on the precise features of a particular security and the type of registry involved whether a proprietary title could be recognised for holders having accounts with intermediaries further down the structure (i.e., further "lower-tier" intermediaries). Czech law expressly endorses such holding pattern (i.e., holders with accounts kept by further "lower-tier" intermediaries) in the case of holders having accounts with intermediaries further down the structure in the independent registry of investment instruments, provided that these holders are Foreign Securities Dealers, Foreign Banks or other foreign persons entitled to maintain registries of investment instruments in their respective jurisdictions. In the case of other registries (most notably, the central registry of book-entry securities), on the other hand, it is doubtful whether a proprietary title would be recognised for holders having accounts with intermediaries further down the structure. It can be argued that as a matter of Czech law they merely have a contractual claim (or right) vis-à-vis the relevant intermediary (i.e., their interest is contractual in nature). In any case, the nature of the interest in intermediated securities recorded in accounts with such "lower-tier" intermediaries (i.e., outside the two-tier structure) is not specifically regulated under Czech law, whether in respect of the independent registry of investment instruments or the central registry of book-entry securities.

The Czech Financial Collateral Rules[27] recognize as financial collateral *inter alia* rights arising from an entry of financial instruments[28] in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course.

We believe that book-entry securities registered within the two-tier structure would fall within the category of dematerialised securities for the purpose of this memorandum even though they may in practice be held through an intermediary.

As the above discussion shows, the precise nature of a particular book-entry security will depend on all relevant facts. We recommend seeking specific advice as to whether the book-entry securities in question are directly held dematerialised securities or intermediated securities from the Czech law point of view.

(C) Intermediated securities

Czech law has no substantive rules directly applicable to intermediated securities. As far as we are aware, no authoritative legal writer has expressed a view as to the nature under Czech law of the

[26] The central registry of book-entry securities can be maintained by the central depository or the foreign central depository in accordance with the rules set out in the Capital Market Act and the Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 (CSDR). In the Czech Republic, the Central Depository of Securities (in Czech, *Centrální depozitář cenných papírů*) took over the files of the Securities Centre (in Czech, *Středisko cenných papírů*) and started its operations as of 1 July 2010.

[27] Section 5(1)(c) of the Financial Collateral Act.

[28] The Czech Financial Collateral Rules define financial instruments in accordance with their definition contained in Article 2(1)(e) of the Financial Collateral Directive. Section 2(c) of the Financial Collateral Act stipulates that financial instruments are investment securities, securities for collective investment or money-market instruments. Investment securities, securities for collective investment or money-market instruments are comprised in the definition of investment instruments as set out in Appendix B. Also, the full definition of investment securities is set out in Appendix B.

interest in such securities. Those who have touched on the subject merely hint that from a legal point of view, dealing in intermediated securities could be problematic or even practically impossible[29]. Therefore, it may not be always entirely clear which conflict of laws rules should be applied.

The Czech Financial Collateral Rules[30] explicitly allow for provision as financial collateral of not only financial instruments[31] but also, *inter alia,* rights arising from an entry of financial instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course. This is also reflected in the conflict of laws provision of Section 83(5) of the International Law Act, which implements the PRIMA rule of the Financial Collateral Directive[32], and which applies also with respect to provision as financial collateral of rights arising from an entry of investment securities, securities for collective investment or money-market instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course.

Although the scope of rights in rem may no longer be strictly limited under Czech law (a *numerus clausus*) and may potentially be widened other than by statute[33], there are still some serious doubts about the nature of an interest in intermediated securities and whether it is not merely contractual. However, it seems plausible to argue that the PRIMA rule should apply. However, this presupposes that the entitlement to intermediated securities qualifies as rights arising from an entry of investment securities, securities for collective investment or money-market instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course which remains to be tested in each individual case in practice.

Consequently, we are unable to state with certainty what conflict of laws rules should be applied to intermediated securities. Specific advice should be sought in each individual case.

(D) Cash

In order to determine which conflict of law rules should apply to cash, it is first necessary to establish the legal nature of cash under Czech law. The Czech Financial Collateral Act provides in accordance with the Financial Collateral Directive that, *inter alia*, the following may constitute financial collateral:

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

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

The above should reflect that cash will likely be considered the latter (i.e., the 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. From the strict Czech law perspective, a security interest in cash is not created by transfer but rather taken by way of a pledge over the relevant payment claim which the pledgor has against an account bank (whether the same as or different from the pledgee).

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29 See, for example, Hart, J. and Pihera, V., *Nová právní úprava kapitálového trhu*, in *Právní rozhledy*, 11/2004, p. 415, or Elek, Š., *Cenné papíry držené skrze prostředníky*, in *Právní rozhledy*, 21/2005, p.776.

30 Section 5(1)(c) of the Financial Collateral Act.

31 Section 2(c) of the Financial Collateral Act stipulates that financial instruments are investment securities, securities for collective investment or money-market instruments. Investment securities, securities for collective investment or money-market instruments are comprised in the definition of investment instruments as set out in Appendix B. Also, the full definition of investment securities is set out in Appendix B.

32 Article 9 of the Financial Collateral Directive provides that the legal nature and proprietary effects of book entry securities financial collateral are to be governed by the law of the country in which the relevant account is maintained.

33 Section 1761 of the Civil Code.

Since cash credited to an account should in our view be regarded as a payment claim of the account holder against the relevant account bank, we believe that the proprietary aspects (if any) of a security interest in cash should be governed by the law that applies to the relevant contract under the Rome I Regulation. The relevant conflict of laws rule is contained in Article 14(1) of the Rome I Regulation[34], which, by virtue of Article 14(3) of the Rome I Regulation, also applies to pledges and other security rights over claims. Yet, the law governing the contract under which the payment claim arose should still be relevant in light of Article 14(2) of the Rome I Regulation[35]. This view is based upon the fact that, although the Rome I Regulation primarily applies to contractual obligations in civil and commercial matters[36], in certain discrete areas the application of its rules extends also to property aspects[37]. While it is not absolutely clear whether the issues to which the conflict of laws rules contained in Article 14 of the Rome I Regulation apply should be classified as contractual or proprietary aspects of a security interest, the said conflict of laws rules seem sufficiently clear and as such should be applied by the Czech courts.

In contrast, transfers of cash legally operate by satisfying and creating various payment claims, which should not involve any proprietary aspects.

3. *Would the courts of your jurisdiction recognise a security interest in each type of Eligible Collateral created under each Security Document? In answering this question, please bear in mind the different forms in which securities Collateral may be held, as described in assumption (i) above with respect to Non-IM Security Documents, in assumption (n) above with respect to IM Security Documents and in assumption (o). Please indicate, in relation to cash Collateral, if your answer depends on the location of the account in which the relevant deposit obligations are recorded and/or upon the currency of those obligations.*

Czech courts would recognise a security interest created under a Security Document in any type of Eligible Collateral if the security interest was valid under the law governing its proprietary aspects (as to which please see our response to question 2 above).

Where Czech law governs the proprietary aspects of the security interest in Eligible Collateral, its validity will be assessed under the Czech Financial Collateral Rules. Because of their mandatory nature, the Czech Financial Collateral Rules cannot be derogated from by contract, to the extent that they apply. As mentioned earlier, a security interest comes into existence from the Czech law point of view only when both its contractual and proprietary aspects have been validly created.

(A) Characterisation and validity of the security interest under Czech law

For reasons explained above, the security interest created under the relevant Security Document must qualify as a financial collateral arrangement. Under the Czech Financial Collateral Rules, a financial collateral arrangement has the character of either:

(i) pledge over financial collateral (the **Pledge over Collateral**); or

(ii) transfer of financial collateral to the collateral taker, including repurchase trades, whereby the ownership right to the collateral passes to the collateral taker if permitted by the nature of the collateral and agreed between the parties (the **Transfer of Collateral**).

[34] Article 14(1) of the Rome I Regulation sets out that the relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

[35] Article 14(2) of the Rome I Regulation sets out that the law governing an assigned claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

[36] Article 1(1) of the Rome I Regulation.

[37] See recital (38) of the Rome I Regulation.

Under the Czech Financial Collateral Rules, a financial collateral arrangement may secure solely a **claim of financial nature** (including appurtenances to this claim) regardless of whether it is a claim against the collateral provider or a third party. A claim of financial nature is defined in the Czech Financial Collateral Rules[38] as "a claim of the contractual parties from contracts, the subject-matter of which are cash, investment instruments[39], emissions allowances or commodities, as well as rights and claims related to those contracts". Further, a financial collateral arrangement, as expressly stipulated in Section 6(2) of the Financial Collateral Act, may also secure claims of financial nature which are conditional or which will arise in the future. Also, under the Czech Financial Collateral Rules[40], only the following assets may be provided as financial collateral under the financial collateral arrangement, and could constitute Eligible Collateral:

(a) Financial instruments[41];

(b) Individually transferrable rights otherwise connected with a financial instrument;

(c) Rights arising from an entry of financial instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course;

(d) Monies credited to an account in Czech or foreign currency;

(e) Claims for the repayment of money; or

(f) Credit claims (under certain conditions provided in the Czech Financial Collateral Rules).

Any of the above may constitute financial collateral even if ownership or any other right of the collateral provider relating to the respective asset will only arise in the future. It is further possible to provide as financial collateral a fluctuating pool of assets, which are listed immediately above (such as a whole securities account), provided that those assets are identifiable at any given time.

In the context of this memorandum, the most relevant categories of financial collateral seem to be cash (which would likely qualify as claims for the repayment of money as a matter of Czech law), financial instruments (which comprise investment securities, securities for collective investment or money-market instruments, e.g., corporate shares, regardless of the place of incorporation or organization of the issuer, bonds and similar securities representing a right to repayment of an owed amount which are tradable in the capital market) and, subject to what is stated in our response to question 2 above, rights arising from an entry of financial instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course. However, based on our conclusions reached in response to question 2 above, where we further in this memorandum refer to financial instruments we also refer to any rights arising from an entry thereof in a register (as per (c) immediately above). Therefore, to the extent necessary, we distinguish in this memorandum between the following forms of Pledge over Collateral: (i) pledge over financial instruments[42] (the **Pledge over Financial Instruments**); and (ii) pledge over cash (the **Pledge over Cash**).

To properly apply the Czech Financial Collateral Rules to the security interest which the parties intend to create under a Security Document, a Czech court would first have to attempt to establish which of the Pledge over Collateral or Transfer of Collateral best corresponds to the parties' intention. To this end, the Czech court would look at how the intention of the parties expressed in the

38 Section 2(a) of the Financial Collateral Act.

39 The full definition of investment instruments is set out in Appendix B

40 Section 5(1) of the Financial Collateral Act.

41 As defined in Section 2(c) of the Financial Collateral Act.

42 Including rights arising from an entry of financial instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course.

relevant Security Document would be interpreted under the governing law of that Security Document.

Paragraph 2(b) of the 1995 Deed states that "[…] the Chargor, as security […] (i) mortgages, charges and pledges […] in favour of the Secured Party by way of a first fixed legal mortgage all Posted Collateral (other than Posted Collateral in the form of cash), (ii) […] charges […] in favour of the Secured Party by way of first fixed charge all Posted Collateral in the form of cash […][43]."

Paragraph 2(b) of the IM Deed states that "[…] the Chargor, as security […] (1) charges and agrees to charge […] in favour of the Secured Party by way of a first fixed charge (A) all Posted Credit Support (IM) (present and future); and (B) each Segregated Account, […][44]."

Paragraph 2 of the 1994 NY Annex states that "[…] the Pledgor […] pledges […] and grants to the Secured Party a first priority continuing security interest in, lien on and right of Set-off against all Posted Collateral […]".

Paragraph 2 of the IM NY Annex states that "[…] the Pledgor […] pledges […] and grants to the Secured Party a first priority continuing security interest in, lien on and right of Set-off against each Segregated Account and all Posted Collateral (IM) […]".

Paragraph 2 of the VM NY Annex states that "[…] the Pledgor […] pledges […] and grants to the Secured Party a first priority continuing security interest in, lien on and right of Set-off against all Posted Collateral (VM) […]".

We have assumed that both under English law and New York law respectively, the above expressions would be interpreted as aiming to create a security interest in Eligible Collateral or Eligible Credit Support (including Eligible Credit Support (IM) and Eligible Credit Support (VM)) in favour of the Secured Party where the Eligible Collateral or Eligible Credit Support (including Eligible Credit Support (IM) and Eligible Credit Support (VM))_ remains the property of the Security Collateral Provider. Specifically with respect to the 1995 Deed, this is explicitly confirmed in its Paragraph 6(c), although this can be inferred from relevant provisions of all other Security Documents (including the IM Security Documents).

On the basis of the above, it is in our view most likely that the Czech court would characterise the security interest purported to be created under the Security Documents in Eligible Collateral or Eligible Credit Support (including Eligible Credit Support (IM) and Eligible Credit Support (VM)) in respect of which the proprietary aspects of the security interest are governed by the laws of Czech Republic as a Pledge over Collateral. For reasons described below, this characterisation gives rise to a risk that a security interest purported to be created under the Security Documents in some forms of Eligible Collateral or Eligible Credit Support (including Eligible Credit Support (IM) and Eligible Credit Support (VM)) in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic would not be recognised.

Certain requirements must be met under Czech law to ensure that a valid pledge is created over the Eligible Collateral or Eligible Credit Support provided under a Pledge over Collateral. The Czech Financial Collateral Rules generally state that for a financial collateral arrangement to be created, Collateral must be delivered to the Secured Party, credited to the relevant account of the Secured Party or provided in another manner enabling the Secured Party or its agent to hold or otherwise in

[43] We have not considered the assignment of the Assigned Rights in this memorandum as the Assigned Rights are not part of the Eligible Collateral.

[44] We have not considered the assignment of the Assigned Rights in this memorandum as the Assigned Rights are not part of the Eligible Collateral.

legal or factual way control the Collateral, or a Pledge over Collateral must be registered in favour of the Secured Party in the investment instruments' records.[45]

Based on laws governing pledges in general, both practice and jurisprudence have interpreted the above so that the steps set out below must be taken into account in relation to the various forms of Collateral to ensure that a valid security interest is created[46]:

I. Certificated securities

Certificated securities must typically be delivered to the pledgee (or a custodian acting to its order). In addition, a pledge endorsement must be affixed to the back of the registered certificated securities. Quite distinct steps would, nevertheless, need to be taken if certificated securities are held in custody at the moment of creation of the pledge. In that case, the pledge over certificated securities would be created upon notification having been delivered to the relevant custodian from the pledgor or the pledgee attaching the executed pledge agreement and, in the case of the registered certificated securities only, a pledge endorsement would have to be affixed as well.

In accordance with sections 1319(1) and 1328(3) of the Civil Code, in the case of certificated bearer securities only, parties may agree that a pledge over such securities be created by registration in the Register of Pledges. Such agreement of the parties would have to take the form of a public instrument (i.e., a notarial deed).

According to the prevailing interpretations as of the date of this memorandum[47], a pledge over securities or book-entry securities (including dematerialised or intermediated securities as referred to in this memorandum) cannot be created by registration in the Register of Pledges other than in the case of:

(i) a pledge over such securities or book-entry securities which are part of or accrete to an enterprise (in Czech, *závod*) or another collective asset (in Czech, *věc hromadná*) where pledge over those securities or book-entry securities is being created as a part of pledge of that enterprise or collective asset, or

(ii) a pledge over certificated bearer securities, provided that parties have so agreed in the form of a public instrument (i.e., a notarial deed), whereby such securities must be delivered to and kept with the notary public that registers the pledge in the Register of Pledges for the entire duration of the pledge.

We have therefore assumed for the purposes of this memorandum that no security interest in the Collateral is or will be registered in the Register of Pledges or in a public register (in Czech, *veřejný seznam*). This is also because Collateral may not be subject to registration in any public register since neither the Register of Pledges nor any of the investment instruments' records (in Czech, *evidence investičních nástrojů*) maintained in the Czech Republic is a public register pursuant to Czech law[48].

II. Dematerialised Securities

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45 Section 9(1) of the Financial Collateral Act.

46 See, for example, Pihera, V., *Finanční zajištění*, in *Právní rozhledy*, 24/2005, p. 903, or Plíva, S., *Finanční zajištění*, in *Právní fórum* 4/2006, p. 127.

47 See, for example, Marek R., Ježek V., *Cenné papíry v novém občanském zákoníku. Komentář*. 1. vydání. Praha: C. H. Beck, 2013, pp. 194, 195, 199, 205 and 232, and Spáčil, J. a kol., *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, pp. 1080, 1082, 1088, and 1108 *et seq.*

48 See, for example, Marek R., Ježek V. *Cenné papíry v novém občanském zákoníku. Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 191, and Spáčil, J. a kol. *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 9 *et seq.*

A pledge over dematerialised securities held in any of the registries under the two-tier structure[49] is created and perfected by registration in the pledgor's account (which may be held either directly with the Central Depository of Securities (being the CSD in the Czech Republic) or another first-tier intermediary or with an intermediary having a nominee account directly with the Central Depository of Securities or another first-tier intermediary).

A pledge over short-term bonds registered in the SKD is created and perfected upon its registration in the pledgor's account (which may be held either directly with the Czech National Bank or with an intermediary having a nominee account directly with the Czech National Bank)[50].

Moreover, Czech law[51] expressly allows for a pledge over a whole dematerialised securities account (the **Pledge over Account**) to be created. The Pledge over Account is created and perfected upon its registration in the pledgor's account maintained in any of the registries. As follows from the above, the Pledge over Account may thus be registered either directly with the Central Depository of Securities or another first-tier intermediary or with an intermediary having a nominee account directly with the Central Depository of Securities or another first-tier intermediary. A validly created and perfected Pledge over Account creates an automatic pledge over all dematerialised securities: (a) held in the account as at the moment of the creation and perfection of the Pledge over Account; and (b) transferred to the pledged account during the lifespan of the Pledge over Account. Equally, a pledge over a dematerialised security created as part of the Pledge over Account will automatically extinguish upon the transfer of a security from the pledged account with the prior consent of the pledgee. Other general provisions of Czech law regulating the traditional pledge over securities apply to the Pledge over Account and securities held in the pledged account *mutatis mutandis*.

In line with the prevailing interpretations as of the date of this memorandum[52], we take a view that a pledge over dematerialised (or book-entry or similar) securities may not be created in accordance with Section 1319(1) of the Civil Code by registration in the Register of Pledges, unless a pledge over such dematerialised (or book-entry or similar) securities which are part of or accrete to an enterprise (in Czech, *závod*) or another collective asset (in Czech, *věc hromadná*) is being created as a part of pledge of that enterprise or collective asset. We have therefore assumed for the purposes of this memorandum that no security interest in the Collateral is or will be registered in the Register of Pledges or in a public register (in Czech, *veřejný seznam*). This is also because Collateral may not be subject to registration in any public register since neither the Register of Pledges nor any of the investment instruments' records (in Czech, *evidence investičních nástrojů*) maintained in the Czech Republic is a public register pursuant to Czech law[53].

III. Intermediated securities

As mentioned earlier, the Czech Financial Collateral Rules explicitly allow for provision as financial collateral of not only financial instruments but also, *inter alia*, rights arising from an entry of financial instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course. Hence, even though Czech law has no substantive rules directly applicable to intermediated

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49 Once again, such a two-tier structure is discussed in our answer to question 2.

50 The SKD is a two-tier registry governed by Czech law, as described in more detail in our answer to question 2.

51 Sections 1333 and 1334 of the Civil Code.

52 See, for example, Marek R., Ježek V., *Cenné papíry v novém občanském zákoníku. Komentář*. 1. vydání. Praha: C. H. Beck, 2013, pp. 194, 195, 199, 205 and 232, and Spáčil, J. a kol., *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, pp. 1080, 1082, 1088, and 1108 *et seq.*

53 See, for example, Marek R., Ježek V. *Cenné papíry v novém občanském zákoníku. Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 191, and Spáčil, J. a kol. *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 9 *et seq.*

securities and their legal nature thus remains unclear, it could be argued that a pledge over intermediated securities (i.e., Pledge over Financial Instruments) can be created by way of analogy to a pledge over dematerialised securities (as described under II. immediately above). However, this remains to be tested in practice, given the lack of recognition of this concept in other laws and practice generally. Consequently, we are unable to state with certainty that a pledge over intermediated securities can always be validly created and recommend that specific advice is sought in each individual case as to how, if at all, a security interest could be created in such securities.

Same as in the case of dematerialised (or book-entry or similar) securities, we take a view that a pledge over intermediated securities may not be created in accordance with Section 1319(1) of the Civil Code by registration in the Register of Pledges, unless a pledge over such intermediated securities which are part of or accrete to an enterprise (in Czech, *závod*) or another collective asset (in Czech, *věc hromadná*) is being created as a part of pledge of that enterprise or collective asset. We have therefore assumed for the purposes of this memorandum that no security interest in the Collateral is or will be registered in the Register of Pledges or in a public register (in Czech, *veřejný seznam*). This is also because Collateral may not be subject to registration in any public register since neither the Register of Pledges nor any of the investment instruments' records (in Czech, *evidence investičních nástrojů*) maintained in the Czech Republic is a public register pursuant to Czech law.

IV. Cash

Unless a later moment has been agreed between the parties, a pledge over cash is created upon the relevant pledge agreement coming into effect and becomes effective vis-à-vis the account bank (being the debtor of the relevant payment claim) when the existence of the pledge is notified to the account bank by the pledgor or proven by the pledgee. Although the Security Documents do not stipulate so, if the parties nonetheless agreed that the pledge will be registered in the Register of Pledges, the pledge over cash would only become effective upon such registration[54].

Non-IM Security Documents

Czech law would recognise a security interest in Collateral the proprietary aspects of which are governed by the laws of the Czech Republic as a financial collateral arrangement if it was created in compliance with the above listed requirements.

However, the above discussion shows that, of the steps set out in I to IV above, only those pertaining to Collateral in the form of certificated securities comply with the manner of provision of Collateral contemplated by the Non-IM Security Documents. The Non-IM Security Documents contemplate that all securities (and not just the certificated ones) are transferred to the Secured Party[55], whilst under Czech law they remain in the Security Collateral Provider's account in which the pledge is merely registered[56]. Similarly, the Non-IM Security Documents contemplate that cash is paid or delivered to the Secured Party[57], whilst under Czech law the pledge is created over a payment claim and perfected in one of the ways described in IV above. This dichotomy gives rise to several possible interpretations.

It could be argued that Section 9(1) of the Financial Collateral Act regarding steps that must be taken for financial collateral arrangement to be created, when interpreted in conformity with the Financial

54 However, we have assumed that this would not be agreed and that no security interest in the Collateral is or will be registered in the Register of Pledges or in a public register.

55 Paragraph 4(b) of the 1995 Deed, Paragraph 12, definition of "Transfer", of the 1994 NY Annex.

56 Be it the case of the traditional pledge over securities (i.e., the Pledge over Collateral) or the Pledge over Account.

57 Paragraph 4(b) of the 1995 Deed, Paragraph 12, definition of "Transfer", of the 1994 NY Annex.

Collateral Directive, should override the principles governing pledges in general. In other words, a Pledge over Collateral would be created by a transfer of the Collateral to the pledgee (in accordance with the Non-IM Security Documents) rather than in accordance with the traditional rules of Czech law described above. Such interpretation would be grammatically possible but it seems unlikely that it would be upheld by a court[58].

It could also be argued that the transfers of Collateral in accordance with the relevant provisions of the Non-IM Security Documents should result in a Transfer of Collateral rather than a Pledge over Collateral. Whilst such interpretation is not unconceivable from the Czech law point of view, it is at the same time not entirely in conformity with the intention of the parties expressed in Paragraph 2 of each Security Document as we understand that they would be interpreted under their respective governing laws. Moreover, it is in direct contradiction with Paragraph 6(c) of the 1995 Deed.

Therefore, there is a serious risk that a Czech court would not recognise the security interest purported to be created under the Non-IM Security Documents in dematerialised securities, intermediated securities and cash, in each case if the proprietary aspects of such security interest are governed by the laws of the Czech Republic. Unless the court accepted one of the alternative interpretations outlined above, it would likely take the view that the parties' intention was aimed at creating a Pledge over Collateral, but that the parties failed to take the steps required under Czech law to create and perfect such Pledge over Collateral. This line of thought would necessarily lead the court to the conclusion that no security interest was created under Czech law at all.

Consequently, we do not recommend using the Non-IM Security Documents with Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic in the form of dematerialised securities, intermediated securities or cash, without amending the Non-IM Security Documents to comply with Czech law. Unless so amended, the Non-IM Security Documents should be used only with Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic or, if governed by the laws of the Czech Republic, only with Collateral in the form of certificated securities.

With a view to the above, it is important to keep in mind that our answers to the below apply only to the extent that the relevant security interest is recognised as valid under Czech law.

IM Security Documents

Again, Czech law would recognise a security interest in Collateral the proprietary aspects of which are governed by the laws of the Czech Republic as a financial collateral arrangement if it was created in compliance with the above listed requirements.

However, the above discussion shows that, of the steps set out in I to IV above, only those pertaining to Collateral in the form of certificated securities and dematerialised securities comply with the manner of provision of Collateral contemplated by the IM Security Documents.

The IM Security Documents contemplate that all securities (including the certificated and dematerialised ones) are transferred to a Custodial Account with a Custodian, whilst the Custodian holds such Collateral in the Security Collateral Provider's name pursuant to a custodial agreement between the Security Collateral Provider and custodian, the Custodial Account is used exclusively for the Collateral provided by the Security Collateral Provider to the relevant Secured Party and under a separate control agreement or the custodial agreement (entered into by the Security Collateral Provider, the Secured Party and the Custodian) the Secured Party can take control of such Collateral under certain circumstances.

[58] By way of example, both Pihera, V. (*Finanční zajištění*, in *Právní rozhledy*, 24/2005, p. 903) and Plíva, S. (*Finanční zajištění*, in *Právní fórum* 4/2006, p. 127) suggest that the traditional rules of Czech law should apply.

We further understand that each Custodial Account (as the relevant Segregated Account) and all Eligible Collateral (IM) and Eligible Credit Support (IM) transferred to such Custodial Account is charged or pledged in favour of the Secured Party under each IM Security Document.

We read assumption (n) above and the relevant provisions of the IM Security Documents so that, although transferred to the Custodial Account, securities would in line with applicable Czech law remain in the Security Collateral Provider's account in which the pledge is registered or, in the case of certificated securities only, they would be delivered to a custodian acting, under certain circumstances, to the order of the Secured Party[59]. Therefore, the manner of provision of Eligible Collateral (IM) and Eligible Credit Support (IM) contemplated by the IM Security Documents, if provided in the form of either certificated or dematerialised securities, seems to be in line with the steps set out in I and II above.

In respect of cash, the IM Security Documents again contemplate that cash is paid or transferred to a Custodial Account with a Custodian, whilst the Custodian holds such Collateral in the Security Collateral Provider's name pursuant to a custodial agreement between the Security Collateral Provider and custodian, the Custodial Account is used exclusively for the Collateral provided by the Security Collateral Provider to the relevant Secured Party and under a separate control agreement or the custodial agreement (entered into by the Security Collateral Provider, the Secured Party and the Custodian) the Secured Party can take control of such Collateral under certain circumstances. However, as also argued in respect of the Non-IM Documents, under Czech law the pledge is created over a payment claim and perfected in one of the ways described in IV above.

Again, as with the Non-IM Security Documents, similar dichotomy arises which leads to several possible interpretations.

It could be argued that Section 9(1) of the Financial Collateral Act regarding steps that must be taken for financial collateral arrangement to be created, when interpreted in conformity with the Financial Collateral Directive, should override the principles governing pledges in general. In other words, a Pledge over Collateral would be created by a transfer of the Collateral to the Custodial Account (in accordance with the IM Security Documents) rather than in accordance with the traditional rules of Czech law described above. Yet again, such interpretation would be grammatically possible but it seems unlikely that it would be upheld by a court[60]. It could also be argued that the transfers of Collateral in accordance with the relevant provisions of the IM Security Documents should result in a Transfer of Collateral rather than a Pledge over Collateral. Whilst such interpretation is not unconceivable from the Czech law point of view, it is at the same time not entirely in conformity with the intention of the parties expressed in Paragraph 2 of each IM Security Document as we understand that they would be interpreted under their respective governing laws.

Therefore, the creation of security interest in Collateral under the IM Security Documents in the form of cash and, given the uncertainty as to their actual status in Czech law described in III above, intermediated securities faces very similar issues of Czech law as discussed in respect of the Non-IM Security Documents. There is a serious risk that a Czech court would not recognise the security interest purported to be created under the IM Security Documents in cash and intermediated securities, in each case if the proprietary aspects of such security interest are governed by the laws of the Czech Republic. Unless the court accepted one of the alternative interpretations outlined above, it would likely take the view that the parties' intention was aimed at creating a Pledge over Collateral, but that the parties failed to take the steps required under Czech law to create and perfect such Pledge over Collateral. This line of thought would necessarily lead the court to the conclusion that no security interest was created under Czech law at all.

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[59] Be it the case of the traditional pledge over securities (i.e., the Pledge over Collateral) or the Pledge over Account.

[60] By way of example, both Pihera, V. (*Finanční zajištění*, in *Právní rozhledy*, 24/2005, p. 903) and Plíva, S. (*Finanční zajištění*, in *Právní fórum* 4/2006, p. 127) suggest that the traditional rules of Czech law should apply.

Consequently, we do not recommend using the IM Security Documents with Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic in the form of cash or intermediated securities, without amending the IM Security Documents to comply with Czech law. Unless so amended, the IM Security Documents should be used only with Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic or, if governed by the laws of the Czech Republic, only with Collateral in the form of certificated or dematerialised securities.

With a view to the above, it is important to keep in mind that our answers to the below apply only to the extent that the relevant security interest is recognised as valid under Czech law.

Provision of "initial margin" Collateral under Clearstream Documents or Euroclear Documents without entering into IM Security Documents

Same as with the Security Documents, which we discussed above, Czech law would recognise a security interest in Collateral the proprietary aspects of which are governed by the laws of the Czech Republic as a financial collateral arrangement if it was created in compliance with the above listed requirements.

However, since the Collateral is to be held in an account with Clearstream or Euroclear (and therefore such Collateral will be located in Luxembourg or Belgium), the proprietary aspects of security interest in such Collateral will in accordance with our analysis and conclusions in response to question 2 above not be governed by the laws of the Czech Republic but by the relevant foreign law governing the proprietary aspects of such security interest. Therefore, if the security interest purported to be created under Clearstream Documents or Euroclear Documents is validly created under foreign laws governing its proprietary aspects, Czech courts would recognize such security interest created under Clearstream Documents or Euroclear Documents in any type of Eligible Collateral (as to which please see our response to question 2 above).

For the sake of completeness, if the proprietary aspects of a security interest established under Clearstream Documents or Euroclear Documents would be governed by laws of the Czech Republic, then the creation of security interest in "initial margin" Collateral under Clearstream Documents or Euroclear Documents in the form of cash, dematerialised and intermediated securities would face very similar issues of Czech law as discussed in respect of the Non-IM Security Documents above. That is, there would be a serious risk that a Czech court would not recognise the security interest purported to be created under the IM Security Documents in cash, dematerialised and intermediated securities, in each case if the proprietary aspects of such security interest are governed by the laws of the Czech Republic. That is because the court would likely take the view that the parties' intention was aimed at creating a Pledge over Collateral, but that the parties failed to take the steps required under Czech law to create and perfect such Pledge over Collateral. This line of thought would necessarily lead the court to the conclusion that no security interest was created under Czech law at all. On the other hand, in the case of provision of "initial margin" Collateral in the form of certificated securities under Clearstream Documents or Euroclear Documents without entering into an IM Security Document, if the proprietary aspects of a security interest were governed by the laws of the Czech Republic, the legal conditions for valid creation of a security interest would be fulfilled. In this case, in line with steps as set out in I to IV above, we would argue that delivery of such certificated securities to Clearstream or Euroclear was effectively a delivery of secured assets to a custodian acting to the order of the Secured Party.

With a view to the above, it is important to keep in mind that our answers to the below apply only to the extent that the relevant security interest is recognised as valid under Czech law.

(B) Requirements for the security interest in Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic to qualify as a financial collateral arrangement

Since the validity of a security interest under a Security Document in Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic, if purported to be created under the Non-IM Security Documents, in any form other than certificated securities or, if purported to be created under the IM Security Documents, in any form other than certificated or dematerialised securities is doubtful, the discussion below is limited to a Pledge over Financial Instruments created with respect to certificated securities and dematerialised securities.

It follows from the Czech Financial Collateral Rules that the relevant certificated or dematerialised securities must qualify as financial instruments [61] . The most relevant category of financial instruments in the context of this memorandum seem to be corporate shares, regardless of the place of incorporation or organization of the issuer, bonds and similar securities representing a right to repayment of an owed amount which are tradable in the capital market[62].

Czech law does not require a formal written agreement for a valid creation of a financial collateral arrangement[63] (such as the Pledge over Collateral or Transfer of Collateral), but it must be possible to evidence the creation of the financial collateral arrangement in writing or alternatively by a record that allows its reproduction in an unaltered condition. If these requirements are not complied with, the relevant arrangement will not qualify as a financial collateral arrangement under Czech law.

Czech law also 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[64]. 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 purpose of this memorandum:

I. a bank;

II. other credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 as well as persons listed in Annex I Sections 2 – 12 of the Directive 2013/36EU;

III. an insurance company, reinsurance company, investment firm, management company, investment company or pension fund;

IV. a central counterparty, settlement agent or clearing house pursuant to a special law regulating payment services;

V. a savings and credit co-operative;

VI. a foreign entity with the similar scope of business or activity as any of the persons listed above;

VII. a state or a member state of a federation;

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61 Sections 5(1)(a) of the Financial Collateral Act.

62 Section 2(c) of the Financial Collateral Act stipulates that financial instruments are investment securities, securities for collective investment or money-market instruments. Investment securities, securities for collective investment or money-market instruments are comprised in the definition of investment instruments as set out in Appendix B. Also, the full definition of investment securities is set out in Appendix B.

63 Unless the Collateral Provider is a natural person providing the Collateral other than in connection with its business activity.

64 Section 7 of the Financial Collateral Act.

VIII. a municipality or region or an analogous foreign entity;

IX. a central bank; or

X. 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 I to IX above.

It follows from points I, III, IX, and X above that each type of Czech Entity is generally eligible to enter into financial collateral arrangements, although a Czech Corporate may only do so with certain counterparties, as specified in X above.

The claims secured under a financial collateral arrangement can only be claims from contracts, the subject-matter of which is cash, investment instruments, emissions allowances or commodities, as well as rights and claims related to those contracts. These secured claims may include present and future, conditional and unconditional claims, including claims arising from a framework or similar contract, claims of a certain class or type arising on a case-by-case basis and claims against persons other than the collateral provider.

Even after the implementation of the MiFID, certain Transactions listed in Appendix A would not constitute investment instruments[65] if structured in particular ways and, therefore, would not be eligible to be secured under a financial collateral arrangement. A detailed discussion relating to such non-qualifying Transactions is set out in Appendix C.

4. What is the effect, if any, under the laws of your jurisdiction of the fact that the amount secured or the amount of Eligible Collateral subject to the security interest will fluctuate under the Master Agreement and the relevant Security Document (including as a result of entering into additional Transactions under the Master Agreement from time to time)? In particular:

(a) would the security interest be valid in relation to future obligations of the Security Collateral Provider?

It is understood that the security interest in any specific Collateral would only be relevant in relation to future obligations, if ever, at the time such future obligations arise and then only in relation to Collateral held at that time. This question concerns whether it would be necessary for either party to perform any action at such time in order to ensure the effectiveness of the security interest as security for such obligations or whether the security interest would take effect in relation to those future obligations without further action by either party.

The validity of a security interest purported to be created in: (i) dematerialised securities, intermediated securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law. Our answer therefore applies only (i) to Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic in any form, (ii) to Collateral in the form of certificated securities in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic and (iii) to Collateral in the form of dematerialised securities (provided that the security interest is purported to be created under an IM Security Document) in respect of which the proprietary aspect are governed by the laws of the Czech Republic.

[65] The full definition of investment instruments is set out in Appendix B.

As long as the security interest was valid under the laws of the jurisdiction which governs the proprietary aspects of the security interest in the Collateral, it would be recognised by Czech law.

If the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, it is important that the security interest qualifies as a valid financial collateral arrangement (please see question 3 above). On that assumption, the security interest would be valid in relation to future obligations of the Security Collateral Provider without any further action on its part or the part of the Secured Party. The claims which can be secured under a financial collateral arrangement can comprise present or future, conditional or unconditional claims, including claims arising under a framework or similar agreement, or claims of a certain class or type occasionally arising to the Secured Party during a certain period of time, and regardless of whether they are claims against the collateral provider or a third party[66]. This is a very broad definition and does not explicitly require that claims secured under a financial collateral arrangement be limited as to their amount[67]. In the case of claims arising under a framework or similar agreement (such as the Master Agreement), this definition does not even require that such claims, if secured under a financial collateral arrangement, be limited as to their lifespan or amount.

Recent judgment handed down by the Supreme Court of the Czech Republic:

In a case[68] concerning, among other things, bank guarantees issued under a secured credit facility, the Supreme Court of the Czech Republic recently ruled that a Czech law governed pledge securing future and contingent debts will not withstand the opening of insolvency proceedings. The case concerned the no longer effective insolvency rules, but it appears that the court's reasoning would apply equally under the Insolvency Act.

Although Czech law explicitly allows future and contingent debts to be secured by a pledge, the Supreme Court of the Czech Republic held on several occasions in the past that such security, even if perfected, comes into existence only when the future or contingent debt comes into existence, although priority is then determined retrospectively as of the moment of the perfection of the pledge. The Supreme Court of the Czech Republic has now applied this doctrine in insolvency proceedings and concluded that, where the future or contingent secured debt arises or becomes unconditional after the opening of insolvency proceedings, it will be treated as unsecured because insolvency law does not allow for the creation of new security after the opening of insolvency proceedings.

Whilst the case concerned pledges, it is quite likely that the Supreme Court of the Czech Republic would decide the same in relation to transfers by way of security.

It should be noted, however, that the case turned on the court's interpretation of the relevant substantive, rather than insolvency, rules. It therefore remains to be seen how the court would decide if the security were governed by foreign law, where foreign law was the law governing not only contractual but also proprietary aspects of the security interest in the Eligible Collateral.

Although the practical implications of the case for validity and enforceability of financial collateral arrangements entered into under the Security Documents in accordance with the Czech Financial Collateral Rules may prove to be limited, we believe that there is a serious risk that a Czech court would apply the same doctrine and decide similarly also in the case of a security interest purported to be created under the Security Documents to the extent

66 Section 6(2) and (3) of the Financial Collateral Act.
67 The same is also confirmed in the reasoning report to the Financial Collateral Act.
68 Cf. No. 29 Cdo 4340/2011, dated 26 August 2014.

such security interest would be governed by Czech law and should secure future or contingent obligations.

The primary reason why such risk may at all exist is the wording of the protective provision for financial collateral arrangements contained in Section 366(1)(b) of the Insolvency Act, which (as also articulated in our answer to question 16 below) provides that the provisions of the Insolvency Act shall not affect the right to security provided by the debtor if the security is a financial collateral arrangement pursuant to the Financial Collateral Act or an equivalent foreign legal regulation, provided that such financial collateral arrangement *has been entered into and come into existence prior to the initiation of insolvency proceedings*[69], or later on the same day if the Secured Party can prove that it neither knew and nor should have known about the initiation of the insolvency proceedings.

In light of the doctrine developed by the Supreme Court of the Czech Republic and applied in the case discussed immediately above, however, the security interest purported to be created as a financial collateral arrangement under the Security Document, to the extent such security interest should secure future or contingent obligations, even if perfected, would come into existence only when the future or contingent debt arises or becomes unconditional, although priority would then be determined retrospectively as of the moment of the perfection of the pledge.

As a result, the Secured Party's security interest in the Eligible Collateral, to the extent it should secure future or contingent debts after the opening of insolvency proceedings and to the extent the future or contingent secured debt arises or becomes unconditional after the opening of insolvency proceedings, would not be protected from the effects of the Insolvency Act, which does not allow for the creation of new security after the opening of insolvency proceedings.

Despite the potential relevance of the risk described above, we strongly believe that the doctrine developed by the Supreme Court of the Czech Republic and applied in the discussed case should not at all apply to financial collateral arrangements if and to the extent they qualify as financial collateral arrangements under the Financial Collateral Act or under an equivalent foreign legal regulation. In our view, this conclusion primarily follows from the sense and purpose of the regulation of financial collateral arrangements as such are implemented from the Financial Collateral Directive into the Czech Financial Collateral Rules and explicitly expressed in various provisions scattered in the Financial Collateral Act. On the other hand, it is fair to emphasize that, unlike in the case of the transfer of the Eligible Credit Support or Eligible Credit Support (VM) under the relevant Transfer Annex (for which Section 22 of the Financial Collateral Act provides an express caveat)[70], neither the Financial Collateral Act nor any other law or regulation provide for any explicit rule based on which we could conclude that the doctrine developed by the Supreme Court of the Czech Republic and applied in the discussed case would not apply also to financial collateral arrangements entered into under the Security Documents in order to create a security interest.

Although we have made the appropriate assumptions[71] for the purposes of our answers to this and other questions in this memorandum, including, in particular, that the Master Agreement/Credit Support Document and each Transaction are entered into and Collateral is provided by each party prior to any action being taken in respect of either party for, or in

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

[70] Section 22 of the Financial Collateral Act provides that the legal effects of the transfer of financial collateral are governed by the provisions of the Financial Collateral Act and its provisions on financial collateral arrangements, irrespective of the general regulation of the security interests and the transfer of assets, rights and other property values in favour of a creditor.

[71] Please refer to our general assumptions in (7) and (8) above.

connection with, the adjudication or commencement of insolvency proceedings, for our answers to questions 16 to 18 specifically the additional assumption in (l) above will also apply. Let us therefore reiterate that the Secured Party's security interest in the Eligible Collateral, to the extent it should secure future or contingent debts after the opening of insolvency proceedings and to the extent the future or contingent secured debt arises or becomes unconditional after the opening of insolvency proceedings, would not come into existence and could not be validly created, if Czech courts adopted and applied the doctrine developed by the Supreme Court of the Czech Republic also to financial collateral arrangements entered into under the Security Documents in order to create a security interest, which risk, as we have argued above, cannot be excluded.

For the sake of completeness, let us further reiterate that the claims can only be claims from contracts, the subject-matter of which is cash, investment instruments, emissions allowances or commodities, as well as rights and claims related to those contracts.

(b) would the security interest be valid in relation to future Collateral (that is, Eligible Collateral not yet delivered to the Secured Party at the time of entry into the relevant Security Document)?

It is understood that the security interest in Collateral to be delivered at some point in the future after the time of entry into the relevant Security Document would not take effect in relation to such Collateral until the Collateral had been delivered to the Secured Party in accordance with the Security Document. This question concerns whether it would be necessary for either party to perform any action at such time in order to ensure the effectiveness of the security interest in relation to such Collateral or whether the security interest would take effect in relation to such Collateral without further action (other than the delivery) by either party.

The validity of a security interest purported to be created under a Security Document in: (i) dematerialised securities, intermediated debt securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law. Our answer therefore applies only (i) to Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic in any form, and (ii) to Collateral in the form of certificated securities in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic and (iii) to Collateral in the form of dematerialised securities (provided that the security interest is purported to be created under an IM Security Document) in respect of which the proprietary aspect are governed by the laws of the Czech Republic.

As long as the security interest was valid under the laws of the jurisdiction which governs the proprietary aspects of the security interest in the Collateral, it would be recognised by Czech law.

Although an asset may constitute Collateral even if ownership or any other right of the Security Collateral Provider relating to that asset will only arise in the future, if the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, all the steps and formalities described in our answer to question 3 above for financial collateral arrangement to be created need to be considered each time future Collateral is provided, in order for a valid security interest in that future Collateral to be created. The applicable rule under Czech law is that the security interest in future Collateral will come into existence only after the ownership right to that Collateral has been acquired

by the Security Collateral Provider in accordance with Czech law. This conclusion is also confirmed by the wording of Section 1341 of the Civil Code that stipulates conditions for creation of a „future pledge" and a traditional pledge created based on that future pledge.

(c) *is there any difficulty with the concept of creating a security interest over a fluctuating pool of assets, for example, by reason of the impossibility of identifying in the Security Documents the specific assets transferred by way of security?*

You may assume that each specific delivery to the Secured Party and return by the Secured Party of Collateral under the Security Document from time to time would be properly recorded by the Secured Party, so that, while the pool of Collateral would change from time to time, at any specific time the composition of the pool of Collateral could be clearly identified by the Secured Party.

Czech law will recognise a security interest over a fluctuating pool of assets in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic if that security interest is recognised by the law of the jurisdiction which governs the proprietary aspects of the security interest in that fluctuating pool of assets.

The Czech Financial Collateral Rules expressly allow for provision as financial collateral of a fluctuating pool of assets[72], provided that those assets are identifiable at any given time. Also, claims which can be secured under a financial collateral arrangement can comprise even claims arising under a framework or similar agreement, or claims of a certain class or type occasionally arising to the Secured Party during a certain period of time[73]. And Czech law regulates the Pledge over Account[74]. All this should have facilitated provision of a security interest in the form of *"pooling"*, whereby a certain pool of claims is secured by a pool of assets without any individual relationship between a specific claim and specific asset securing it. Yet, although Czech law generally approves provision of a security interest over a fluctuating pool of assets, the validity of a security interest purported to be created under a Security Document in: (i) dematerialised securities, intermediated debt securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law. The discussion below relating to Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic therefore applies only to certificated securities dematerialised securities (provided that the security interest is purported to be created under an IM Security Document).

If the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, all steps and formalities described in our answer to question 3 above for financial collateral arrangement to be created must be considered at the time each individual certificated security instrument is delivered as Collateral. The applicable rule under Czech law is that the security interest in future Collateral will come into existence only after the ownership right to that Collateral has been acquired by the Security Collateral Provider in accordance with Czech law. This conclusion is also confirmed by the wording of Section 1341 of the Civil Code that stipulates conditions for creation of a „future pledge" and a traditional pledge created based on that future pledge. There will then be no difficulty with Czech law recognising the security interest in such Collateral, even though the overall pool of Collateral held by the Secured Party may change from time to time.

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72 Section 5(3) of the Financial Collateral Act.

73 Section 6(3) of the Financial Collateral Act.

74 Sections 1333 and 1334 of the Civil Code. See our answer to question 3 above for more details.

(d) *is it necessary under the laws of your jurisdiction for the amount secured by each Security Document to be a fixed amount or subject to a fixed maximum amount?*

No.[75]

(e) *is it permissible under the laws of your jurisdiction for the Secured Party as Secured Party to hold Collateral in excess of its actual exposure to the Security Collateral Provider under the related Master Agreement?*

Yes.

5. *Assuming that the courts of your jurisdiction would recognise the security interest in each type of Eligible Collateral created under each Security Document, is any action (filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required in your jurisdiction to perfect that security interest? If so, please indicate what actions must be taken and how such actions may differ depending upon the type of Eligible Collateral in question.*

There is generally no such requirement arising under Czech law.

However, if certificated securities are held in custody at the moment of creation of the pledge, the pledge over certificated securities would be created upon notification having been delivered to the relevant custodian from the pledgor or the pledgee attaching the executed pledge agreement and, in the case of the registered certificated securities only, a pledge endorsement would have to be affixed as well.

Also, only if Eligible Collateral comprised certificated bearer securities or cash, and if the parties agreed that the pledge would be registered in the Register of Pledges, the pledge over such securities or cash would have to be created or would only become effective upon such registration. Such agreement of the parties would have to take the form of a public instrument (i.e., a notarial deed).

Since the Security Documents do not envisage any registrations in the Register of Pledges, we have assumed for the purposes of this memorandum that no security interest in the Collateral is or will be registered in the Register of Pledges or in a public register (in Czech, *veřejný seznam*). This is also because Collateral may not be subject to registration in any public register since neither the Register of Pledges nor any of the investment instruments' records (in Czech, *evidence investičních nástrojů*) maintained in the Czech Republic is a public register pursuant to Czech law[76].

6. *If there are any other requirements to ensure the validity or perfection of a security interest in each type of Eligible Collateral created by the Security Collateral Provider under each Security Document, please indicate the nature of such requirements. For example, is it necessary as a matter of formal validity that the Security Document be expressly governed by the law of your jurisdiction or translated into any other language or for the Security Document to include any specific wording? Are there any other documentary formalities that must be observed in order for a security interest created under each Security Document to be recognised as valid and perfected in your jurisdiction?*

We are not aware of any such requirement in order for a security interest created under a Security Document to be recognised as valid and perfected in the Czech Republic. However, if a Security

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[75] Historically, this used to be the case only if the Security Document qualified as a financial collateral arrangement because of the Czech law requirement (applicable to traditional security arrangements but not to financial collateral arrangements) that future secured obligations be limited by a maximum aggregate amount and a period of time, during which they will come into existence. However, despite some uncertainty as to how to interpret the new rules of Section 1311(2) in light of Section 1312(1) of the Civil Code, which remains to be confirmed, we believe that this requirement should no longer apply even to traditional security arrangements created under the Civil Code.

[76] See, for example, Marek R., Ježek V. *Cenné papíry v novém občanském zákoníku. Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 191, and Spáčil, J. a kol. *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 9 *et seq*.

Document were to be enforced in a Czech court, the court may request a translation of that Security Document prepared by a translator under oath.

7. *Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements set forth in your responses to questions 1 to 6 above, as applicable, will the Secured Party or the Security Collateral Provider need to take any action thereafter to ensure that the security interest in the Eligible Collateral continues and/or remains perfected, particularly with respect to additional Collateral transferred by way of security from time to time whenever the Credit Support Amount (or the amount of Collateral required to be delivered under the relevant Security Document, as applicable) exceeds the Value of the Collateral held by the Secured Party?*

We have assumed that Eligible Collateral in the form of securities has not been modified, replaced or otherwise affected as a result of any action on the part of its issuer. On that assumption, no action is required under Czech law with respect to Eligible Collateral which has already been provided, as described in question 3 above.

8. *Assuming that (a) pursuant to the laws of your jurisdiction, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral transferred by way of security pursuant to each Security Document (for example, because such Collateral is located or deemed to be located outside your jurisdiction) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, will the Secured Party have a valid security interest in the Collateral so far as the laws of your jurisdiction are concerned? Is any action (filing, registration, notification, stamping or notarization or any other action or the obtaining or any governmental, judicial, regulatory or other order, consent or approval) required under the laws of your jurisdiction to establish, perfect, continue or enforce this security interest? Are there any other requirements of the type referred to in question 6 above?*

Czech law would generally recognise a security interest in Collateral created and existing pursuant to a foreign law and would not require any specific action. The security interest would not however be recognised in the unlikely event that it is contrary to the public order in the Czech Republic. The public order exemption is discussed in our answer to question 19 below.

9. *Are there any particular duties, obligations or limitations imposed on the Secured Party in relation to the care of the Eligible Collateral held by it pursuant to each Security Document?*

The validity of a security interest purported to be created under a Security Document in: (i) dematerialised securities, intermediated debt securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law. Our answer therefore applies only (i) to Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic in any form, and (ii) to Collateral in the form of certificated securities in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic and (iii) to Collateral in the form of dematerialised securities (provided that the security interest is purported to be created under an IM Security Document) in respect of which the proprietary aspect are governed by the laws of the Czech Republic.

Although we are not aware of any case law or literature directly on the point, it is possible that the duties, obligations and limitations which the Secured Party has to observe, in relation to the care of the Eligible Collateral that the Secured Party holds pursuant to a Security Document, would fall within the scope of the proprietary aspects of the relevant security interest. Consequently, the law

governing the proprietary aspects of the security interest in the Eligible Collateral would determine these duties, obligations and limitations.

The reason for such a view is that, under Czech law, the owner of a pledged asset has a duty to refrain from anything that would lead to the deterioration of the pledged asset to the detriment of the pledgee. This duty applies not only to the original pledgor but also to any subsequent owner of the pledged asset. As such, it seems to attach to the pledged asset, which is one of the basic features of rights in rem[77].

The Czech Financial Collateral Rules do not themselves provide for any duties, obligations and limitations to be imposed on the Secured Party with respect to care of Eligible Collateral held by it in the Czech Republic, except that under a Pledge over Collateral, the Secured Party may only dispose of assets (other than credit claims) provided to it as Collateral, including transferring the pledged assets, further pledging them and using them or enabling their use to a third party, if agreed with the Security Collateral Provider.

The Czech Financial Collateral Rules imply that they are special rules governing financial collateral arrangements. At the same time, however, the Czech Financial Collateral Rules imply that they only govern certain aspects of security interests which qualify as financial collateral arrangements under Czech law. Therefore, to the extent that the Czech Financial Collateral Rules contain no special rules applicable to a certain matter, or no special rules expressly disapplying general provisions of Czech law governing pledges, the provisions of the Civil Code, which govern pledges in general, would apply. As a consequence, a Secured Party that holds securities delivered to it as Collateral in the Czech Republic has also a duty to exercise a standard of care of a prudent businessperson with respect to the Collateral. This includes, in particular, tending for it and protecting it from damage, loss or destruction[78]. What constitutes a standard of care of a prudent businessperson will be determined by reference to the current practice in the market, rather than by reference to the standard of care that the Secured Party exercises with respect to its own property. In this sense, where the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, Czech law would possibly override the relevant part of Paragraph 6(a) of each Non-IM Security Document.

If Eligible Credit Support (IM) provided under the relevant IM Security Document is held by a Custodian, the Secured Party will not have any special duties of care in respect of that Eligible Credit Support (IM) as a matter of Czech law.

10. If, however, a custodial agreement contemplated by the IM Security Documents or as described in assumptions (n) or (o) above were governed by Czech law, the Custodian would have additional duties of reasonable care relative to the form of Eligible Credit Support (IM) including the duty to prevent any damage from that Eligible Credit Support (IM). *Please note that pursuant to the terms of each Deed and the IM NY Annex, the Secured Party is not permitted to use any Collateral securities it holds. This is because, (a) at the time that the 1995 Deed was published, it was thought, as a matter of English law, that any such use is or may be incompatible with the limited nature of the interest that the Secured Party has in the Collateral and (b) the rules promulgated by various regulators prohibit the use of any Collateral securities held by the Secured Party due to the Collateral being "initial margin". On the other hand, unless otherwise agreed to by the parties, Paragraph 6(c) of the 1994 NY Annex and the VM NY Annex grants the Secured Party broad rights with respect to the use of Collateral, provided that it returns equivalent Collateral when the Pledgor*

[77] The duty of course falls away if the pledge ceases to exist as a result of enforcement or an action taken by the pledgee pursuant to its right of use (in the case of financial collateral arrangements).

[78] Authoritative commentaries do not give any practical examples of what these duties could extend to with respect to the types of Collateral dealt with in this memorandum, except possibly that a pledgee must protect the pledged asset from climatic influences. It is common sense that a Secured Party, holding certificated securities pursuant to a Security Document, would have to put in place appropriate security measures to protect the securities from theft and physical destruction. On the other hand, we do not think that it would be obliged to insure the securities. That said, it is possible, in the absence of authoritative guidance, that a court would take a different view.

is entitled to the return of Collateral pursuant to the terms of the 1994 NY Annex or the VM NY Annex, as applicable. Such use might include pledging or rehypothecating the securities, disposing of the securities under a securities repurchase (repo) agreement or simply selling the securities. Do the laws of your jurisdiction recognise the right of the Secured Party so to use such Collateral pursuant to an agreement with the Pledgor? In particular, how does such use of the Collateral affect, if at all, the validity, continuity, perfection or priority of a security interest otherwise validly created and perfected prior to such use? Are there any other obligations, duties or limitations imposed on the Secured Party with respect to its use of the Collateral under the laws of your jurisdiction?

The validity of a security interest purported to be created under a Security Document in: (i) dematerialised securities, intermediated debt securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law. Our answer therefore applies only (i) to Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic in any form, and (ii) to Collateral in the form of certificated securities in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic and (iii) to Collateral in the form of dematerialised securities (provided that the security interest is purported to be created under an IM Security Document) in respect of which the proprietary aspect are governed by the laws of the Czech Republic.

The law of the jurisdiction which governs the proprietary aspects of the security interest in the Collateral will determine the extent and consequences, if any, of the Secured Party's right to use the Collateral and the effects of any use of the Collateral on the validity, continuity, perfection or priority of the security interest.

If the proprietary aspects of the security interest in the Collateral in the form of securities are governed by the laws of the Czech Republic, the Secured Party can, as long as it is agreed and in accordance with the agreed conditions, dispose of the pledged securities, in particular, transfer the pledged securities, further pledge them, use them in any other way described in your question or enable such use to a third party, or appropriate any increases or gains.

Where the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, a security interest in securities pledged under a Pledge over Financial Instruments ceases to exist as a result of any actual use of those securities. The Czech Financial Collateral Rules provide no clear answer as to whether exercising the rights connected with the pledged securities falls under the term "use". It seems reasonable, however, to interpret them so that exercising of those rights does not fall under the term "use". If the Secured Party rehypothecates the pledged securities, it will become their owner at the moment the new pledge is created. If the Secured Party sells the pledged securities, the third party purchaser will become the new owner of those securities when it acquires the ownership right to them.

A Secured Party that used the pledged securities will be obliged to replace the "used" securities at the latest on the day the secured claim becomes payable. The "used" Collateral must be replaced with: (a) securities issued by the same issuer, of the same type, form, currency, issue/class, nominal value (if there is one) and rights (with respect to securities); or (b) other assets specified by the collateral provider and the collateral taker in the 1994 NY Annex or the VM NY Annex provided that it is stipulated by the collateral provider and the collateral taker that such assets will be provided if an event specified in the 1994 NY Annex or the VM NY Annex occurs which relates to securities provided as Collateral or influencing such securities, and provided that such other assets can be provided as financial collateral under the Czech Financial Collateral Rules (please see our answer to question 3). Alternatively, the Secured Party may, again if agreed between the parties in the 1994

NY Annex and the VM NY Annex, instead of replacing the "used" Collateral, set-off its secured claim that has become due against the value of the provided financial collateral. The Secured Party may do so even within the framework of the close-out netting mechanism as contemplated by the Capital Market Act. Unless the claims of the Secured Party and Security Collateral Provider are claims of the same type, the Secured Party may only set-off its secured claim that has become due against the value of the provided financial collateral, provided that such mutual claims of the Secured Party and Security Collateral Provider are valued and then pursuant to their valuation modified into corresponding new monetary claims in the same currency and amount. This applies both in a non-enforcement scenario and an enforcement scenario.

The Secured Party and the Security Collateral Provider may agree, however, that the Secured Party is entitled to keep the provided Collateral even after fulfilment of obligations corresponding to the secured claim for the purposes of securing further claims of financial nature. Such agreement of the Secured Party and Security Collateral Provider may also stipulate that, during the period for which it is entitled to keep the provided Collateral, the Secured Party will not be obliged to replace the "used" Collateral.

As described above, the Secured Party has the opportunity to apply the value of the financial collateral in discharge of its secured claim that has become due.

The Czech Financial Collateral Rules do not impose any additional duties with respect to the use of the Collateral by the Secured Party.

11. *What is the effect, if any, under the laws of your jurisdiction on the validity, continuity, perfection or priority of a security interest in Eligible Collateral under each Security Document of the right of the Pledgor to substitute Collateral pursuant to Paragraph 4(d) (or in the case of the IM Deed, Paragraph 4(e)) of each Annex and Deed? How does the presence or absence of consent to substitution by the Secured Party affect your response to this question? Please comment specifically on whether the Pledgor and the Secured Party are able validly to agree in the Security Document that the Pledgor may substitute Collateral without specific consent of the Secured Party and whether and, if so, how this may affect the nature of the security interest or otherwise affect your conclusions regarding the validity or enforceability of the security interest. Note that the parties may also give upfront consent in the IM Security Documents to any substitution made by the Security Collateral Provider and/or the Custodian in accordance with the terms of the agreement described in assumption (n)(z).*

The validity of a security interest purported to be created under a Security Document in: (i) dematerialised securities, intermediated debt securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law. Our answer therefore applies only (i) to Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic in any form, and (ii) to Collateral in the form of certificated securities in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic and (iii) to Collateral in the form of dematerialised securities (provided that the security interest is purported to be created under an IM Security Document) in respect of which the proprietary aspect are governed by the laws of the Czech Republic.

Czech law will recognise any substitution of Collateral pursuant to Paragraph 4(d) of each Annex and the 1995 Deed or pursuant to Paragraph 4(e) of the IM Deed if it is valid under the law of the jurisdiction which governs the proprietary aspects of the security interest in the Collateral.

Where the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, Czech law only requires that the possibility to substitute the Collateral during the lifespan of the financial collateral arrangement is explicitly provided for by an agreement of the parties and that the substitute Collateral is of comparable value as the original Collateral. Then, Czech law does not require a specific consent each time the Collateral is substituted. 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 Security Collateral Provider becomes insolvent, as the provision of the original Collateral.

Unless an election is made in Paragraph 13 of each Annex that an ad hoc consent of the Pledgor is required, the presence or absence of an ad hoc consent to the substitution of Collateral does not have any bearing on the analysis above.

For additional points and analysis with respect to competing security interests over the same piece of Collateral and with respect to how priority rankings of security interests operate in Czech law, please refer to our description and analysis of changes brought about by the recodification of private law in the Czech Republic on pages 7 – 9 of this memorandum as well as our answer to question 16 below.

Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding

Note the additional assumption in (l) above which applies to questions 12 to 15 below.

12. Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements set forth in your responses to questions 1 to 6 above, as applicable, what are the formalities (including the necessity to obtain a court order or conduct an auction), notification requirements (to the Security Collateral Provider or any other person) or other procedures, if any, that the Secured Party must observe or undertake in exercising its rights as a Secured Party under each Security Document, such as the right to liquidate Collateral? For example, is it free to sell the Collateral (including to itself) and apply the proceeds to satisfy the Security Collateral Provider's outstanding obligations under the Master Agreement? Do such formalities or procedures differ depending on the type of Collateral involved?

With a view to question 13 below, we take this question to refer to a scenario where the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic at the time of the enforcement of the Secured Party's rights under the Security Document. Since the validity of a security interest purported to be created under a Security Document in: (i) dematerialised securities, intermediated debt securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful (unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law), our answer applies only to Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic in the form of certificated securities and in the form of dematerialised securities (provided that the security interest is purported to be created under an IM Security Document).

Under the Czech Financial Collateral Rules, if an event of default with respect to payment of the secured debt, or any other event as agreed between the parties in the financial collateral arrangement or within the framework of the close-out netting mechanism (as contemplated by the Capital Market

Act)[79], occurs, the Secured Party may realise the Collateral in a way agreed with the Security Collateral Provider.

If the way of realising the Collateral was not agreed between the Secured Party and the Security Collateral Provider, the Secured Party may realise the Collateral, taking account of the legal nature of the financial collateral arrangement, in either of the following ways:

(i) sell the certificated or dematerialised securities and satisfy the secured claim from the proceeds of sale. The Secured Party must sell the certificated securities in a way agreed with the Security Collateral Provider or, in the absence of such agreement, in a way that is customary in the financial markets; or

(ii) apply (i.e., set-off) the value of the Collateral in discharge of its secured claim against the Security Collateral Provider, whereby it may do so even within the framework of the close-out netting mechanism (as contemplated by the Capital Market Act).

However, the Secured Party may only appropriate the certificated or dematerialised securities and set-off their value against the secured claim, provided that appropriation was agreed with the Security Collateral Provider and this agreement also includes the price for appropriation or the method for determination of that price, which has to correspond to the practice customary in the financial market.

The 1995 Deed does not provide for the possibility to appropriate Collateral in the form of securities[80]. On the other hand, the IM Deed contemplates the possibility to appropriate "all or any part of […] financial collateral in or towards the satisfaction of the Obligations in such order the Secured Party sees fit"[81]. Each Annex then broadly provides that the Secured Party has "the right to Set-off […] against any Posted Collateral [(always including Posted Collateral (IM) and Posted Collateral (VM) as appropriate] or the Cash equivalent of any Posted Collateral […]"[82] and that "[…] all calculations, valuations and determinations […] will be made in good faith and in a commercially reasonable manner"[83]. There is a respectable argument that this should amount to an agreement on the possibility to appropriate Collateral and on a method of valuing that Collateral. However, a Czech court could interpret any contractual provisions relating to appropriation too restrictively because appropriation of pledged assets had traditionally been prohibited under Czech law, and was generally[84] only made possible with effects from 1 January 2014 by virtue of much more relaxed rules on enforcement of security interests contained in the Civil Code. These new rules, however, require that an objective valuation takes place in the event of an enforcement of security interest, including in the event of appropriation. Consequently, appropriation of Collateral in the form of certificated or dematerialised securities might not be upheld by a Czech court unless each Annex was amended to explicitly state that the Secured Party may appropriate the Posted Collateral and to provide for an objective method for valuing the certificated or dematerialised securities in the event that they are appropriated. By the same token, it is doubtful whether the appropriation under the IM Deed would be upheld by a Czech court unless that IM Deed is amended to explicitly include an objective method of valuation of the certificated or dematerialised securities in the event that they are appropriated[85].

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79 For more details, please refer to our Memorandum of Law for ISDA dated [31 January 2017] and entitled "Enforceability under Czech Law of Close-out Netting of Privately Negotiated Derivatives Transactions under the 1992 ISDA Master Agreements and the 2002 ISDA Master Agreement".

80 Paragraph 8(a)(i) of the 1995 Deed.

81 Paragraph 8 (a)(ii)(c) of the IM Deed.

82 Paragraph 8(a)(iii) of each Annex.

83 Paragraph 11(d) of each Annex.

84 That is including in respect of traditional security arrangements.

85 Paragraph 11(d) of the IM Deed.

Unless agreed otherwise, the Czech Financial Collateral Rules release the Secured Party from any additional formalities, notification requirements and other procedures which are otherwise required in connection with the liquidation of pledged Collateral in the form of securities, as long as the provision of Collateral under the Security Document qualifies as a financial collateral arrangement under Czech law.

In particular, the Secured Party is not obliged to:

I. notify the Security Collateral Provider of its intention to enforce/realise its security interest over pledged Collateral (including the sale of pledged Collateral);

II. obtain an approval of the enforcement/realisation of security interest over pledged Collateral (including the sale of pledged Collateral) from a court, other public authority or any other person;

III. sell the pledged Collateral in any specific way, such as through a public auction; or

IV. let a certain period of time lapse before it sells or otherwise enforces/realises the pledged Collateral.

13. *Assuming that (a) pursuant to the laws of your jurisdiction, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral transferred by way of security pursuant to each Security Document (for example, because such Collateral is located or deemed located outside your jurisdiction) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, are there any formalities, notification requirements or other procedures, if any, that the Secured Party must observe or undertake in your jurisdiction in exercising its rights as a Secured Party under each Security Document?*

The law governing the proprietary aspects of the security interest in the Eligible Collateral will determine what formalities, notification requirements or other procedures, if any, the Secured Party will need to observe.

14. *Are there any laws of regulations in your jurisdiction that would limit or distinguish a creditor's enforcement rights with respect to Collateral depending on (a) the type of transaction underlying the creditor's exposure, (b) the type of Collateral, or (c) the nature of the creditor or the debtor? For example, are there any types of "statutory liens" that would be deemed to take precedence over a creditor's security interest in the Collateral?*

These issues will be determined in accordance with the law governing the proprietary aspects of the security interest in the Collateral.

To the extent that the proprietary aspects of the security interest in the Collateral are governed by the laws of the Czech Republic, there are no specific laws or regulations which depend on the factors listed in your question under (a), (b) and (c) and directly address the Secured Party's enforcement rights. Nevertheless, let us reiterate that a security interest created under a Security Document would not be classified as a "financial collateral arrangement" under the Czech Financial Collateral Rules with respect to those Transactions, the subject matter of which is not cash, investment instruments[86], emissions allowances or commodities[87].

[86] The full definition of investment instruments is set out in Appendix B

[87] The adverse consequences of the security interest not being classified as a "financial collateral arrangement" are discussed in the introductory part of this memorandum under the heading "legal background".

For additional points and analysis with respect to competing security interests over the same piece of Collateral and with respect to how priority rankings of security interests operate in Czech law, please refer to our description and analysis of changes brought about by the recodification of private law in the Czech Republic on pages 7 – 9 of this memorandum as well as our answer to question 16 below.

15. *How would your response to questions 12 to 14 change, if at all, assuming that an Event of Default exists with respect to the Secured Party rather than or in addition to the Security Collateral Provider (for example, would this affect this ability of the Secured Party to exercise its enforcement rights with respect to the Collateral)?*

Our responses would generally not change. Depending on all the relevant facts of a particular case, a Czech court could tend to take the view that the enforcement of the Secured Party's rights in the circumstances described in your question would conflict with the general principles of security under Czech law. However, we do not think that any specific statutory rule could be invoked in support of such view.

Enforcement of Rights Under the Security Documents by the Secured Party after the Commencement of an Insolvency Proceeding

Note the additional assumption in (m) above which applies to questions 16 to 18 below. In addition, we assume for the purpose of the same questions that if the Security Collateral Provider is subject to insolvency proceedings in the Czech Republic, it is at the same time not subject to secondary insolvency proceedings (as this term is defined in the Council Regulation (EC) No 1346/2000 on insolvency proceedings, as amended (the **Insolvency Regulation**)) in another member state of the European Union. We make this assumption in order to keep our answers as concise as possible.

Furthermore, our answers to question 16 to 18 below are based on the assumption that the insolvency proceedings with respect to the Security Collateral Provider will be conducted pursuant to the Insolvency Act, except that we also discuss the Crisis Resolution Act in our answer to question 16. This will clearly be the case if the Collateral Provider is a Czech Entity. We set out below the conditions under which insolvency proceedings can be opened under the Insolvency Act with respect to a Foreign Bank, a Foreign Corporate or a Foreign Securities dealer having assets in the Czech Republic (as envisaged in fact pattern III).

Insolvency proceedings under the Insolvency Act can be opened against a Foreign Bank or a Foreign Securities Dealer which have their head office outside of the European Economic Area (the **EEA**) for the purpose of the Directive 2001/24/EC on the reorganisation and winding up of credit institutions (the **WUCI Directive**). Insolvency proceedings with respect to a Foreign Bank or a Foreign Securities Dealer, having their head office in an EEA member state and operating in the Czech Republic under the single licence regime[88], would be conducted pursuant to the insolvency laws of its home member state[89], save for certain exempted matters as set out in the WUCI Directive. On top of that, the insolvency regime of a Foreign Securities Dealer depends on the scope of services it provides[90], although a Foreign Securities Dealer, which provides services involving the holding of funds or securities for third parties, would be exempted from the applicability of the Insolvency Regulation and insolvency proceedings could, at least in theory, be opened against it under the Insolvency Act regardless of its place of incorporation or centre of main interests.

Insolvency proceedings with respect to a Foreign Corporate can be opened under the Insolvency Act in various circumstances. They can be opened with respect to a Foreign Corporate having its centre of main interests outside of the European Union or in Denmark. They can also be opened with respect to a Foreign Corporate having its centre of main interests in a member state of the European Union (other than Denmark), but only as the so-called secondary or territorial proceedings pursuant to the Insolvency Regulation. Such

88 Pursuant to the Directive 2013/36/EU 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.

89 Section 112(3) and 112(4) of the International Law Act.

90 Article 1(2) of the Insolvency Regulation.

secondary or territorial proceedings can be opened only if the Foreign Corporate has an establishment in the Czech Republic and would be limited to assets located in the Czech Republic.

Insolvency proceedings with respect to a Foreign Corporate, having its centre of main interests in a member state of the European Union (other than Denmark) but not having an establishment in the Czech Republic, would be governed by the insolvency laws of such member state[91], save for certain exempted matters as set out in the Insolvency Regulation.

The Insolvency Act contains no provisions which would specify limits of its territorial applicability. Authoritative legal writers have expressed the view that the Insolvency Act extends to all assets of the debtor no matter where in the world they are located[92]. That having been said, it is uncertain from the practical point of view to what extent would the effects of the Insolvency Act and the powers of the insolvency administrator be recognised in countries not covered by the Insolvency Regulation or the WUCI Directive.

Finally, note that the validity of a security interest purported to be created under a Security Document in: (i) dematerialised securities, intermediated debt securities or cash under a Non-IM Security Document, and (ii) intermediated securities or cash under an IM Security Document, in respect of which the proprietary aspects of the security interest are in each case governed by the laws of the Czech Republic, is doubtful unless each Non-IM Security Document and IM Security Document is amended to comply with Czech law. Our answers to questions 16 to 18 below therefore only apply (i) to Collateral in respect of which the proprietary aspects of the security interest are not governed by the laws of the Czech Republic in any form, and (ii) to Collateral in the form of certificated securities in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic and (iii) to Collateral in the form of dematerialised securities (provided that the security interest is purported to be created under an IM Security Document) in respect of which the proprietary aspect are governed by the laws of the Czech Republic.

16. *How are competing priorities between creditors determined in your jurisdiction? What conditions must be satisfied if the Secured Party's security interest is to have priority over all other claims (secured or unsecured) of an interest in the Eligible Collateral?*

In light of the assumptions you have asked us to make, we understand this question to be concerned with the priorities between creditors in the context of insolvency. You have asked us to first describe relevant insolvency proceedings under Czech law. We therefore set out a brief overview of these below before answering your specific question.

Insolvency proceedings in the Czech Republic are regulated by the Insolvency Act which came into force on 1 January 2008. The Insolvency Regulation is also fully effective in the Czech Republic. Insolvency proceedings are commenced when the insolvency petition is received by the competent court. The court will publish information about the commencement of the insolvency proceedings in the insolvency register, which is accessible via the internet, within two hours from the delivery of the petition, subject to some exceptions. If the insolvency petition is delivered to the relevant insolvency court (i) less than two hours before the end of office hours; (ii) out of office hours or (iii) other than on a business day, the deadline for the publication is extended until the expiry of the first two office hours on the next business day.

In either case, the effects of the commencement of the insolvency proceedings will apply as of the moment of the publication in the insolvency register and generally include a stay on individual creditor action and on taking and enforcing security (however, see the discussion below with respect to financial collateral arrangements).

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91 Article 4 of the Insolvency Regulation and Section 426(1) of the Insolvency Act.

92 For example, Richter, T., *Insolvenční právo*, 2008, Prague, p. 280, or Kozák, J., Budín, P., Dadam, A., Pachl, L., *Insolvenční zákon a předpisy související. Nařízení Rady (ES) o úpadkovém řízení. Komentář.*, 2008, Prague, p. 264.

As a general rule, insolvency proceedings consist of two stages. In the first stage, the insolvency court decides whether to declare the debtor insolvent. In the second stage, the method of resolving the debtor's insolvency is selected. Under certain conditions, the two decisions may be merged. The Insolvency Act recognises two methods of resolving the debtor's insolvency which are applicable to the types of Security Collateral Provider dealt with in this memorandum: bankruptcy and reorganisation. However, reorganisation is not available to a bank. In bankruptcy proceedings, creditors are satisfied from the proceeds of liquidation of the insolvent debtor's assets and the insolvent debtor is subsequently wound up. Reorganisation proceedings provide a framework for restructuring of the debtor and/or its debt so that it may emerge as a going concern. However, as the discussion below will show, the distinction between the various types of insolvency proceedings is not practically significant as regards the treatment of financial collateral arrangements.

(A) The Crisis Resolution Act

The Insolvency Act does not apply to banks for as long as they possess their banking licence. In practice, before the banking licence of a Czech Bank was revoked, the relevant bank would most likely become subject to widely publicised regulatory measures imposed by the Czech National Bank. The Czech National Bank specifically cannot become insolvent at all under the Insolvency Act.However, our conclusions in this memorandum in respect of a Czech Bank and a Czech Securities Dealer (as well as branches of certain Foreign Banks and certain Foreign Securities Dealers located in and subject to the laws of the Czech Republic (the **Czech Branch** or **Czech Branches**)) are, to the extent described below, subject to the Crisis Resolution Act, which came into effect on 1 January 2016. The Crisis Resolution Act implements in Czech law the European Bank Recovery and Resolution Directive (the **BRRD**)[93] and introduced significant changes to the law relating to Czech Banks and Czech Securities Dealers (as well as Czech Branches of certain Foreign Banks and certain Foreign Securities Dealers), as described in more detail in the paragraphs that follow.

We note that, whilst the Crisis Resolution Act applies to all Czech Banks and, to the extent described in the Crisis Resolution Act, Czech Branches of non EEA Foreign Banks, it only applies to systemically important Czech Securities Dealers and, subject to the below, Czech Branches of certain similarly important non EEA Foreign Securities Dealers. Under Sections 2(1)(b) and 3 of the Crisis Resolution Act, a Czech Securities Dealer will be within the scope of the Crisis Resolution Act if it is an investment firm for the purposes of the Capital Requirements Regulation[94] excluding any investment firm that is not subject to an initial capital requirement of EUR730,000 (each a **Large Securities Dealer**)[95]. Therefore, subject to certain modifications none of which are relevant to our conclusions, our below analysis and conclusions in respect of a Czech Bank apply also to a Large Securities Dealer.

The Crisis Resolution Act provides for a special resolution regime applicable to Czech Banks (and Large Securities Dealers) 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, however, these have no relevance to the issues considered in this memorandum.

In any event, we refer to our Memorandum of Law for the International Swaps and Derivatives Association, Inc. entitled "Enforceability under Czech Law of Close-out Netting of Privately Negotiated Derivatives Transactions under the 1992 ISDA Master Agreements and the 2002 ISDA

93 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.

94 Regulation (EU) No 575/2013 of the European Parliament and Council.

95 On top of that, the Crisis Resolution Act further applies to financial institutions, financial holding companies, mixed financial holding companies and mixed activity holding companies as such are defined in the Capital Requirements Regulation.

Master Agreement" dated [31 January] 2017 (the **Netting Memorandum**) for a more detailed discussion and analysis of the Crisis Resolution Act and the BRRD regimes.

We assume in relation to any exercise of crisis prevention measures or crisis management measures that the Czech National Bank (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 (or the Large Securities Dealer).

(B) 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, Large Securities Dealers and other entities subject to the Crisis Resolution Act. The primary effect of temporary administration is that a temporary administrator with adequate qualification and capabilities is appointed by the Czech National Bank to help manage and run the affected Czech bank. The powers of the temporary administrator under the Crisis Resolution Act range from various investigatory and management consultation powers to powers of the temporary administrator to grant prior approvals to decisions of a Czech Bank's senior management and executive board members or powers to actually manage the affected Czech Bank whereby the exercise of the powers by a Czech Bank's senior management and executive board members (but not the general or shareholders' meeting) is suspended (fully or in part) and the temporary administrator, appointed by the Czech National Bank, takes over.

Although there is no provision in Czech law, let alone in the Crisis Resolution Act itself, that would expressly state that the provisions of the Crisis Resolution Act governing the temporary administration or any other crisis prevention measures do not affect the validity and enforceability of financial collateral arrangements, we are of the view that the commencement of temporary administration or the exercise of any other crisis prevention measures would not have an adverse effect on the validity and enforceability of financial collateral arrangements entered into under the Credit Support Documents as a matter of Czech law (even if entered into on or after the commencement of temporary administration or the exercise of any other crisis prevention measures). This is because the restrictions imposed by the law in relation to temporary administration and other crisis prevention measures in respect of Czech Banks are all restrictions on the debtor (i.e. the Czech Bank) and the focus of the law here is on ensuring that the debtor and its decision-making bodies are not able to act in a way that would be detrimental to the bank's customers or the bank itself.

Nothing here controls what a third party may or may not do vis-à-vis the debtor and so we believe the onset of temporary administration or the exercise of any other crisis prevention measures will not affect the validity and enforceability of financial collateral arrangements under Czech law.[96]

(C) 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.

In the case of special management for crisis resolution, either the Czech National Bank through one or more of its employees directly or a special manager (or administrator) appointed by the Czech

[96] 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 Czech National Bank 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. This capital reduction measure must be made in accordance with the principles and procedures specified in Sections 59 to 74 of the Crisis Resolution Act. The capital instruments subject to these provisions are 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 Capital Requirements Regulation. Accordingly, we confirm that the Transactions under the Master Agreement would not be directly affected by these provisions.

National Bank takes over and the authority of a Czech Bank's statutory bodies (senior management and executive board members) and supreme body (general or shareholders' meeting) is automatically fully suspended. Like this, the relevant bodies of a Czech Bank (and their powers) are replaced with the Czech National Bank or the special manager for crisis resolution.[97]

Although there is no provision in Czech law, let alone in the Crisis Resolution Act itself, that would expressly state that the provisions of the Crisis Resolution Act governing the special management for crisis resolution (whether exercised by the Czech National Bank directly or by the appointed special manager) do not affect the validity and enforceability of financial collateral arrangements, we are of the view that the appointment of the special manager or the commencement of special management for crisis resolution would not have an adverse effect on the validity and enforceability of financial collateral arrangements entered into under the Credit Support Documents as a matter of Czech law (even if entered into on or after the commencement of special management for crisis resolution).

In particular, the Crisis Resolution Act does not contain any provisions allowing the Czech National Bank or the appointed special manager to terminate or not to follow contracts of the affected Czech Bank concluded before the commencement of special management for crisis resolution. Nothing here controls what a third party may or may not do vis-à-vis the debtor and so we believe the onset of special management or the exercise of powers by the Czech National Bank or the special manager will not affect the validity and enforceability of financial collateral arrangements under Czech law.

(D) 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 a Czech Bank (or a Large Securities Dealer) could affect the validity and enforceability of financial collateral arrangements entered into under the Credit Support Documents as a matter of Czech law against a Czech Bank (or a Large Securities Dealer) and consequently our conclusions in this memorandum.

The crisis resolution measures and tools are achieved through the exercise of one or more "crisis resolution powers" detailed in the Crisis Resolution Act, which enable share transfers, property transfers, bail-in of capital instruments and eligible liabilities and recognition of the effect of a third country special resolution action taken under the laws of a country outside the EEA[98]. We also refer to a more detailed discussion of the individual crisis resolution measures and tools and the conditions to their exercise contained in the Netting Memorandum.

I. Exercise of share transfers and full property transfers

The share transfers can be used by the Czech National Bank (or, in certain circumstances, the Ministry of Finance of the Czech Republic) when making any of the transfer of business[99], the transfer to a bridge institution[100], the transfer to an asset management entity[101] or the transfer to temporary public ownership (nationalisation)[102] measures.

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97 The special management for crisis resolution may last for up to 12 months, unless extended by the CNB.

98 Pursuant to Section 194 *et seq.* of the Crisis Resolution Act.

99 I.e., a transfer to a private sector purchaser of all or part of the business of a Czech Bank or a Large Securities Dealer or another relevant entity.

100 I.e., a transfer of all or part of the business of a Czech Bank or a Large Securities Dealer or another relevant entity to a bridge institution that is wholly or partially owned (directly or indirectly) by and controlled by the state of the Czech Republic.

101 I.e., a transfer of all or part of the business of a Czech Bank or a Large Securities Dealer or another relevant entity to an asset management entity owned (directly or indirectly) by and controlled by the state of the Czech Republic. This measure can only be used in conjunction with one of the other crisis resolution measures or tools.

102 I.e., a temporary stabilisation tool comprising a transfer to temporary public ownership (nationalisation) of all or part of a Czech Bank or a Large Securities Dealer or another relevant entity.

We confirm that the exercise of the share transfers by the Czech National Bank (or the Ministry of Finance of the Czech Republic) in respect of a Czech Bank that is a party to the Master Agreement and the Credit Support Document would not, as a matter of Czech law, affect the validity and enforceability of financial collateral arrangements entered into under the Credit Support Documents as a matter of Czech law against a Czech Bank (or a Large Securities Dealer), 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 a Large Securities Dealer) or for the transfer of some, but not all, of the property, rights or liabilities of a Czech Bank (or a Large Securities Dealer). In the latter case, the transfer would be a "partial property transfer". In respect of any transfers of "foreign property" and rights and liabilities under foreign law[103], we assume that such transfers would be effective as to that foreign property.

The transfer of all of the property, rights and liabilities of a Czech Bank (or a Large Securities Dealer) to a private sector purchaser, a bridge institution or asset management entity would necessarily include any Master Agreement and Credit Support Document entered into by the relevant entity with another market participant, including all Transactions under that Master Agreement.

From the point of view of the other market participant, the identity of its contracting party would change, however the validity and enforceability of financial collateral arrangements entered into under the Credit Support Document, as a matter of Czech law, would be unaffected.

II. Exercise of partial property transfers

In relation to a partial property transfer, which again could be used by the Czech National Bank 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 Czech National Bank could use such power to "cherry-pick" Transactions (or parts of such Transactions) covered by the Master Agreement and Credit Support Document or otherwise disrupt the mutuality of rights and obligations under those arrangements.

Accordingly, the Crisis Resolution Act provides for various protections from the effect of partial property transfers. Section 171(1) of the Crisis Resolution Act provides that a transfer or passage of property, rights and liabilities under legal arrangements or relationships pursuant to Section 173(2)(b) to (d), which qualify as "protected rights and liabilities", may not provide for the transfer or passage of some, but not all, of such "protected rights and liabilities" from legal arrangements or relationships pursuant to Section 173(2)(b) to (d)[104]. The "protected rights and liabilities" under legal arrangements or relationships pursuant to Section 173(2) comprise, irrespective of number of parties or their governing law and no matter if the reason for their creation and continuation is contractual or statutory, among other things: (a) secured claims or debts and (b) financial collateral arrangements that have the character of transfer of financial collateral[105]. 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. The Crisis Resolution Act further specifies

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103 Please also refer to Section 167 of the Crisis Resolution Act specifically in respect of foreign property located outside the EEA and rights and liabilities under foreign law other than law of an EEA country.

104 In this and other provisions of Sections 171 and 172, a transfer or passage means any transfer or passage of rights and liabilities of a Czech Bank or another affected entity to another person.

105 The "protected rights and liabilities" under legal arrangements or relationships pursuant to Section 173(2) further comprise: set-off arrangements under which two or more mutual claims of an obligor and a counterparty may be set off against each other; 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; covered bonds; and structured finance arrangements, including securitisations and instruments used for hedging which form an integral part of the cover pool and which are secured in a way similar to the covered bonds; this includes the granting and accepting of security by a party to the arrangement or a trustee, agent or nominee.

that only those claims or debts that are capable of contractual set-off are subject to the safeguard set out in Section 171(1).

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 such are referred to in Section 173(2)(a)), although it does explicitly cover financial collateral arrangements that have the character of transfer of financial collateral (i.e., all financial collateral arrangements entered into under the Transfer Annexes), Section 171(3) contains a further separate safeguard in respect of secured claims or debts. The restriction on partial property transfers of secured claims requires that the Czech National Bank 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. This means that secured liability (i.e., a secured debt), the assets securing that liability and the benefit of that security may not be divided as a result of a partial property transfer. The secured liability, security assets and benefit of the security must be transferred together or not at all. This safeguard will therefore protect the operation of the Security Documents from any disruptions upon the effectiveness of a partial property transfer.

Although we read the relevant provisions of the Crisis Resolution Act so that secured for their purposes means secured against property or rights, or otherwise covered by collateral arrangements (which would extend to financial collateral arrangement that has the character of transfer of financial collateral, i.e., a title transfer collateral arrangement), our conclusion with respect to financial collateral arrangements entered into under the Transfer Annexes is further supported by the explicit reference to financial collateral arrangements that have the character of transfer of financial collateral in Section 173(2)(b), which so expressly makes such financial collateral arrangements "protected rights and liabilities" within the scope of safeguard set out in Section 171(1) of the Crisis Resolution Act (referred to above). Also, since the Transfer Annexes rely for their effectiveness on the operation of the early termination and close-out netting provisions of Section 6 of the Master Agreement, the Transfer Annexes would, in our view, be also protected from disruption as a result of the exercise of a partial property transfer by virtue of each Master Agreement together with any Transfer Annex qualifying as a "set-off arrangement" or a "netting arrangement" as referred to in Section 173(2)(c) and (d). This is despite somewhat unfortunate wording of Section 173(2)(d) that refers to "set-off of mutual claims including close-out netting" and, in our view, a Master Agreement together with any Transfer Annex 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 a Master Agreement and any Transfer Annex, including in relation to Transactions falling within the scope of Appendix A, between a Czech Bank (or a Large Securities Dealer) and a 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 Master Agreement and as such comply with the requirement that they are claims that are capable of contractual set-off[106].

The relevant safeguards contained in the Crisis Resolution Act clearly provide that a partial property transfer may not provide for the transfer of some, but not all, of the "protected rights and liabilities" between a Czech Bank (or a Large Securities Dealer) and a particular person. 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 Czech National Bank of a partial property transfer in relation to a Czech Bank (or a Large Securities Dealer) would not affect the validity and enforceability of financial collateral arrangements entered into under the Credit Support Documents as a matter of Czech law against a Czech Bank (or a Large Securities Dealer), and therefore have no impact on our conclusions in this memorandum.

[106] While a Master Agreement with one Transaction 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.

III. Ancillary powers under Section 164 of the Crisis Resolution Act

The Czech National Bank 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 exercise of crisis resolution powers by the Czech National Bank pursuant to Section 164(d) 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 Czech National Bank must not take 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 if the result of that action were the extinguishment of the secured claim.

On the basis of the above, we do not envisage that exercise by the Czech National Bank of ancillary resolution powers pursuant to Section 164 of the Crisis Resolution Act could affect the validity and enforceability of financial collateral arrangements entered into under the Credit Support Document as a matter of Czech law against a Czech Bank (or a Large Securities Dealer), and therefore has no impact on our conclusions in this memorandum.

IV. The bail-in tool

The bail-in tool[107] represents another crisis resolution measure under the Crisis Resolution Act[108]. It is exercised by the Czech National Bank through a write down of certain claims of unsecured creditors of the Czech Bank (or a Large Securities Dealer) or another relevant entity and/or conversion of certain unsecured debt claims (eligible liabilities) to equity, which equity (i.e., capital instruments[109]) could also be subject to any future write-down. The Crisis Resolution Act stipulates certain specific conditions to exercise of the bail-in tool, which the Czech National Bank will be obliged to observe when making this crisis resolution measure[110]. We discuss some of these conditions (including, in particular, which of the Czech Bank's (or a Large Securities Dealer's) liabilities constitute eligible liabilities), to the extent that they are relevant to our conclusions in this memorandum, further below.

As also discussed in the Netting Memorandum, the scope of eligible liabilities (which can be subject to the bail-in tool) includes all liabilities of a Czech Bank (or a Large Securities Dealer) or another relevant entity, unless such liabilities are explicitly excluded[111].

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 in relation to the Security Documents is primarily that the bail-in tool could apply so as to reduce or eliminate the amount owed by the Czech Bank or (Large Securities Dealer) under a Transaction with the effect that the security interest is undermined.

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107 I.e.,. 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, which equity could also be subject to any future write-down.

108 In line with the BRRD, the "bail-in" is a process of internal recapitalisation that is triggered when a Czech Bank or another relevant institution reaches the point of non-viability. In this process, losses are imposed on some of the Czech Bank's direct stakeholders by either 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 to a stable footing and can be further restructured as necessary. This should ensure that there is no immediate need for a split of a Czech Bank's business or use of public funds to resolve that Czech Bank.

109 These capital instruments may take 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 Capital Requirements Regulation.

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

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

In relation to the Transfer Annexes, similarly, the concern is that the bail-in tool could apply so as to reduce or eliminate the amount owed by the Czech Bank under Transactions under the Master Agreement (excluding any Transactions constituted by a Transfer Annex) with the effect that the ability of the other contracting party to net the Value of the Credit Support Balance (including the Value of the Credit Support Balance (VM) under the VM Transfer Annex) against liabilities due to it under such Transactions as part of the net amount payable under Section 6(e) of the Master Agreement, pursuant to Paragraph 6 of the Transfer Annex, is commensurately reduced or eliminated.

However, 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. As already argued above, we read these provisions so that secured for this purpose means secured against property or rights, or otherwise covered by collateral arrangements (which would extend to financial collateral arrangement that has the character of transfer of financial collateral, i.e., a title transfer collateral arrangement entered into under a Transfer Annex).

Therefore, in respect of a Master Agreement collateralised by a Transfer Annex, the collateral is applied as an Unpaid Amount as part of close-out and the Crisis Resolution Act would prohibit the bail-in of liabilities in respect of Transactions prior to the conversion into a net debt (including the application of the Unpaid Amount in respect of collateral transferred by the Czech Bank).

The position is different with respect to the Security Documents where the Transactions would first be converted into a net debt (which is required by Section 142 of the Crisis Resolution Act[112]) and the value of the collateral then applied to that net debt. It is only portion of the net debt that exceeds the value of the collateral that would be subject to bail in[113].

In any event, we have concluded that, where the Master Agreement is collateralised by the Czech Bank (or the Large Securities Dealer) pursuant to one of the Credit Support Documents described above, the bail-in tool should not apply to Transactions under the Master Agreement notwithstanding the existence of one or more Transactions that do not fall within the definition of "derivative". We note that most of the Transactions described in Appendix A will satisfy the definitions of either "derivative" or "secured debts". It is conceivable, however, that certain Transactions described in Appendix A may fall outside the scope of these definitions. However, as 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 as the collateralisation under any of the Credit Support Documents described above is performed on a net basis, we would argue that all liabilities under the Master Agreement would need to be converted into a net debt in accordance with the close-out netting provisions, against which the security interest under the Security Documents would be applied or which would include the Unpaid Amount in respect of the Transfer Annex (as applicable), before any net debt that exceeds the value of the collateral could be considered for bail-in.

On the basis of the Crisis Resolution Act and subject to the above discussion, we conclude that the exercise by the Czech National Bank of the bail-in tool in relation to a Czech Bank or a Large Securities Dealer would not affect the validity and enforceability of financial collateral arrangements

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[112] Section 142 of the Crisis Resolution Act, which implements Article 49 of the BRRD, provides that the Czech National Bank, 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 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.

[113] 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.

entered into under the Credit Support Documents as a matter of Czech law against a Czech Bank (or a Large Securities Dealer).

Please note that although we have concluded that, subject to the above discussion, the Crisis Resolution Act preserves the operation of the Credit Support Documents, any net sum owed by the Czech Bank (or the Large Securities Dealer) as a result of the operation of the Master Agreement together with the relevant Credit Support Document would itself be at risk of being reduced or eliminated by the making of the bail-in tool. Also note that, as follows from the above discussion and analysis, the Crisis Resolution Act does not prevent the bail-in tool from being made to convert a liability under a derivative into a net sum.

V. Overrides and stays

Sections 168 and 169 of the Crisis Resolution Act, which fully implement Article 68 of the BRRD, 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 right to acquire or enforce collateral, accrues) applies in respect of the Czech Bank (or Large Securities Dealer) or a member of the same group as that Czech Bank (or Large Securities Dealer) 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 Large Securities Dealer) or a member of the same group as that Czech Bank (or a Large Securities Dealer) in the case of a cross-default provision; and

- the occurrence of any event directly linked to the application of such a measure.

The above overrides apply where a contract or other agreement is entered into by a Czech Bank (or a Large Securities Dealer) 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.

Section 168(3), (4) and (5) of the Crisis Resolution Act further specifies certain other situations in which provisions of law or an agreement will be disregarded, on the basis of which crisis prevention measures or crisis management measures or events directly linked to the application of such measures would otherwise serve as a ground for exercise of termination, modification, enforcement (including enforcement of collateral) or other similar contractual rights, provided that the Czech Bank (or the Large Securities Dealer) continues to perform its substantive contractual obligations, including payment obligations and provision of collateral. Section 169(3) of the Crisis Resolution Act provides that the above described overrides constitute imperative provisions of Czech law meaning that a Czech court, if competent, would always have to apply them regardless of the governing law of the relevant agreement or contract.

In the present context, the effect of these provisions of the Crisis Resolution Act is that the right of the Secured Party to enforce the security interest in the Collateral pursuant to the Security Documents or, in relation to the Transfer Annex (as also discussed in the Netting Memorandum), the right of the Transferee to terminate and close-out Transactions in accordance with the Master Agreement (and Paragraph 6 of the Transfer Annex) would be ineffective in certain circumstances including where such rights arise as a result of 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. However, such rights based on the existence or occurrence of other events or circumstances

should not be affected. Therefore we do not consider that these provisions of the Crisis Resolution Act have an impact on the conclusions in this memorandum.

We do not think that the scope of Sections 168 and 169 of the Crisis Resolution Act is wide enough to include Section 2(a)(iii) of the ISDA Master Agreement such that a party to a Master Agreement with a Czech Bank (or a Large Securities Dealer) may not rely on Section 2(a)(iii) to withhold its performance in circumstances where that Section is rendered applicable by a crisis prevention measure or crisis management measure taken in relation to the Czech Bank (or the Large Securities Dealer) or member of its group.

Under Section 83 of the Crisis Resolution Act, the Czech National Bank may suspend obligations to make a payment or delivery under a contract where one of the parties to the contract is a Czech Bank (or a Large Securities Dealer). Under Section 84 of the Crisis Resolution Act, the Czech National Bank may also suspend rights of creditors' of a Czech Bank (or a Large Securities Dealer) to enforce collateral provided by that Czech Bank (or Large Securities Dealer). In both instances, the period of suspension commences as of the publication of the decision on the Czech National Bank's website and must end no later than midnight at the end of the first business day following the day of the publication.

Section 83(1) makes it clear that, subject to certain very specific caveats, all the obligations of the parties to the relevant contract will be suspended. In accordance with Section 83(2) of the Crisis Resolution Act, any payments or deliveries 'due' under the Master 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 Master Agreement) and, if an Early Termination Date is designated under the Master Agreement and such amounts remain outstanding as at such Early Termination Date, will constitute Unpaid Amounts under such agreement. Therefore such stayed payment or delivery obligations will still be taken into account for the purposes of Section 6(e) of the Master Agreement if a Czech Bank should become subject to formal insolvency proceedings or otherwise.

Similarly, pursuant to Section 85 of the Crisis Resolution Act, the Czech National Bank may suspend the termination rights (which includes a right of withdrawal, settlement, set-off or netting of obligations, or a right which will or may result in acceleration of an obligation or close-out netting, or any similar right that will or may result in 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 (or a Large Securities Dealer) assuming that all the substantive obligations under the contract, including obligations to make payments or deliveries or provide collateral, continue to be performed. The Czech National Bank can also suspend the termination rights of any party to a contract with the Czech Bank's (or the Large Securities Dealer's) subsidiary, where such subsidiary's obligations are secured by the Czech Bank (or the Large Securities Dealer) and the relevant termination rights would be based solely on insolvency or financial conditions of the Czech Bank (or the Large Securities Dealer) in question.

Again, all of the above described suspensions commence as of the publication of the decision on the Czech National Bank's website and must end no later than midnight at the end of the first business day following the day the day of the publication. The reason for these suspensions is to give the Czech National Bank time to take measures without any interference of effects from 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 (or the Large Securities Dealer) under the Master Agreement upon expiration of the stay, we do not consider that such powers have an impact on our conclusions herein regarding the validity and enforceability of financial collateral arrangements entered into under the Credit Support Documents.

(E) Involuntary Administration of the Czech Securities Dealer

In addition, involuntary administration under the Capital Market Act can be imposed on a Czech Securities Dealer which is not a Czech Bank or a Large Securities Dealer for not adhering to applicable regulations[114]. However, Section 138(3) of the Capital Market Act expressly states that the provisions of the Capital Market Act governing the involuntary administration do not affect performance of rights and fulfilment of obligations arising from financial collateral arrangements under the Financial Collateral Act or comparable conditions of a foreign legal regulation, provided that it has been entered into and come into existence prior to the commencement of involuntary administration, or later on the same day if the Secured Party can prove that it neither knew and nor should have known about the commencement of involuntary administration. In any case, it is unlikely that the imposition of involuntary administration on a Security Collateral Provider which is a Czech Securities Dealer which is not a Czech Bank and a Large Securities Dealer would adversely affect a Secured Party's rights under a financial collateral arrangement with respect to Collateral provided to it prior to the imposition of the involuntary administration.

(F) Third Country Resolution Action

When facing a Czech Branch of a Foreign Bank, which is not an EEA bank or credit institution, or a Czech Branch of a Foreign Securities Dealer, which is not an EEA investment firm, consideration should also be given to the application of the Crisis Resolution Act to the Czech Branch.

The Crisis Resolution Act and the BRRD are discussed in more detail in points A to D above as they apply to the Czech Bank or the Large Securities Dealer. Certain terms defined in those points are used in the discussion that follows.

The powers under the Crisis Resolution Act can be exercised, subject to certain modifications, by the Czech National Bank 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 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**).

Where, pursuant to Section 195 of the Crisis Resolution Act, the Czech National Bank chooses to recognise a Third Country Resolution Action, in whole or in part, the Czech National Bank 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 Czech National Bank in relation to a similar entity in the Czech Republic.

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.

It remains to be seen how these powers will be exercised by the Czech National Bank. 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 Czech National Bank for the specific purpose of supporting or giving effect to the

[114] For example, if it repeatedly or significantly violates the Capital Market Act or directly applicable European Union law, or an enforceable decision, or if the interests of persons to whom its services are provided are jeopardised and there is a risk of delay.

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.

Accordingly, please refer to the analysis in points A to D above in respect of a Czech Bank and a Large 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

However, it should be noted that, where the Czech National Bank 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.

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.

(G) The Insolvency Act

The Insolvency Act contains one sweeping protective provision for financial collateral arrangements. Under Section 366(1)(b) of the Insolvency Act, the provisions of the Insolvency Act shall not affect the right to security provided by the debtor if the security is a financial collateral arrangement pursuant to the Financial Collateral Act or an equivalent foreign legal regulation, provided that such financial collateral arrangement has been entered into and come into existence prior to the initiation of insolvency proceedings[115], or later on the same day if the Secured Party can prove that it neither knew and 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 itself mean that the Secured Party knew or should have known about the initiation of the insolvency proceedings.

It follows that, subject to one caveat discussed below, the Secured Party's security interest in the Eligible Collateral 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 Collateral under the relevant Security Document qualified as a financial collateral arrangement under the Financial Collateral Act or under an equivalent foreign legal regulation, as defined in Section 366(1)(b) of the Insolvency Act (together **Financial Collateral Arrangements**). As explicitly mentioned by Section 366(1)(b) of the Insolvency Act, and in line with Article 8 of the Financial Collateral Directive, Section 366(1)(b) will only protect Financial Collateral Arrangements if the Eligible Collateral was provided before the information about the commencement of insolvency proceedings concerning the Security Collateral is published in the insolvency register, or later on the same day if the Secured Party can prove that it neither knew and nor should have known about the initiation of the insolvency proceedings.

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

However, Section 366(3) of the Insolvency Act stipulates that, *inter alia*, the exemption under Section 366(1)(b)[116] 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.

Please refer to question 3 above for an overview of conditions which must be fulfilled in order for the provision of Collateral under a Security Document to qualify as a valid Financial Collateral Arrangement under Czech law if the proprietary aspects of the security interest in Eligible Collateral are governed by the laws of the Czech Republic.

If the proprietary aspects of the security interest in the Collateral are not governed by the laws of the Czech Republic, the following criteria should be met to increase the likelihood that the provision of Eligible Collateral is recognised as a Financial Collateral Arrangement which is a "financial collateral arrangement pursuant to an equivalent foreign regulation":

(i) The Eligible Collateral should only be constituted by those types of assets which are classified either as "cash" within the meaning of paragraph 1(d) of Article 2 of the Financial Collateral Directive[117], as "financial instruments" within the meaning of paragraph 1(e) of Article 2 of the Financial Collateral Directive[118], as book entry securities collateral within the meaning of paragraph 1(g) of Article 2 of the Financial Collateral Directive.

(ii) The provision of each Eligible Collateral should be evidenced in writing or in a legally equivalent manner (see paragraph 2 of Article 3 of the Financial Collateral Directive).

(iii) The obligations secured under the Security Document should give a right to a cash settlement and/or delivery of financial instruments (see the definition of the "relevant financial obligations" in paragraph 1(f) of Article 2 of the Financial Collateral Directive).

(iv) The Secured Party and the Security Collateral Provider should fall within one of the types of eligible legal entities listed in our answer to question 3 above (or Section 7 of the Financial Collateral Act).

Apart from Financial Collateral Arrangements, the Insolvency Act of course recognises standard pledges and certain other types of security under Czech and foreign law. Besides security governed by Czech law, the Insolvency Act explicitly recognises security governed by foreign law. A security taker under foreign law governed security which failed to qualify as a Financial Collateral Arrangement could still be considered as a secured creditor. However, the security taker would in this case not enjoy the same level of protection and flexibility as the collateral taker under a Financial Collateral Arrangement. In particular, a security which is not a Financial Collateral Arrangement would not be protected from the various effects (such as stays) of the commencement of insolvency proceedings and, as the case may be, a decision on insolvency (in Czech, *rozhodnutí o úpadku*), a declaration of bankruptcy (in Czech, *prohlášení konkurzu*) or an approval of reorganisation (in Czech, *povolení reorganizace*) under the Insolvency Act[119].

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116 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 Opinion since Section 366(1)(d) does not exist anymore.

117 Money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits.

118 Shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing.

119 Other adverse consequences of a security interest failing to qualify as a "financial collateral arrangement" are discussed in the introductory part of this memorandum under the heading "legal background".

However, please refer to our answer to question 4(a) above for analysis of potential implications of the recent judgment of the Supreme Court of the Czech Republic[120] on validity and enforceability of Financial Collateral Arrangements entered into under the Security Documents in accordance with the Czech Financial Collateral Rules, if such financial collateral arrangements purported to secure future or contingent debts after the commencement of insolvency proceedings and if such future or contingent secured debt arises or becomes unconditional only after the commencement of insolvency proceedings. If Czech courts applied the bespoke doctrine developed by the Supreme Court of the Czech Republic also to Financial Collateral Arrangements entered into under the Security Documents in accordance with the Czech Financial Collateral Rules, which risk, absent any express caveats as we have argued in our answer to question 4(a) above, cannot be entirely excluded, the Secured Party's security interest in Collateral would not come into existence and would not be validly created, even if previously perfected, and so would not be protected from the adverse effects of the Insolvency Act, if and to the extent such security interest should secure future or contingent debts after the commencement of insolvency proceedings.

We have also considered whether two secured creditors could have competing security interests over one piece of Collateral. This would be determined by the law governing the proprietary aspects of such security interests.

If Czech law was the governing law, as a general rule, the Security Collateral Provider would be able to grant security interest over the Collateral to more than one party. In addition, a Czech tax authority may issue a decision creating a pledge over the Security Collateral Provider's assets in order to secure the payment by it of taxes.

Competing security interests generally rank in the same order in which they arose. However, Section 2016 of the Civil Code contains a rule that is new in Czech law and whose application essentially means the priority (higher ranking) of even a subsequent security interest created as a right *in rem* registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges over any prior security interest (even if created as a right *in rem*) not registered in a public register or the Register of Pledges, if created in respect of the same asset. Therefore, under the rule of Section 2016 of the Civil Code, if a security interest is created as a right *in rem* registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges, such right *in rem* always provides the relevant secured party with priority (higher ranking) over other parties' rights *in rem* or contractual rights to Collateral which are not registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges, irrespective of the moment of their creation. Similar rule is further contained in Section 1371 *et seq.* of the Civil Code specifically with respect to competing security interests constituted by pledges only.

It is doubtful whether the rule of Section 2016 as well as other rules contained in Section 1371 *et seq.* and sections 2010 to 2017 of the Civil Code should at all apply to Financial Collateral Arrangements entered into under the Security Documents in accordance with the Czech Financial Collateral Rules. In any case, if the rule of Section 2016 of the Civil Code applied, a security interest or other security arrangement created to Collateral by a right *in rem* in favour of a third party, albeit created later in the future (i.e. only after the creation of security interest to Collateral under a Security Document by the Security Collateral Provider in favour of the Secured Party), could give that third party priority (higher ranking) and preferential satisfaction from the Collateral over any earlier Secured Party's security interest to the same Collateral created under a Security Document, provided that the third party's right *in rem* were registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges.

In the case of pledge over financial collateral, which would be the means of creating a security interest to Collateral by the Security Collateral Provider in favour of the Secured Party pursuant to

[120] Cf. No. 29 Cdo 4340/2011, dated 26 August 2014.

a Security Document, provided that Czech law would be the law governing the proprietary aspects of such security interest, according to the prevailing interpretations as of the date of this memorandum[121], a pledge over securities or book-entry securities (including dematerialised or intermediated securities as referred to in this memorandum) cannot be created by registration in the Register of Pledges other than in the case of:

(i) a pledge over such securities or book-entry securities which are part of or accrete to an enterprise (in Czech, *závod*) or another collective asset (in Czech, *věc hromadná*) where pledge over those securities or book-entry securities is being created as a part of pledge of that enterprise or collective asset, or

(ii) a pledge over certificated bearer securities, provided that parties have so agreed in the form of a public instrument (i.e., a notarial deed), whereby such securities must be delivered to and kept with the notary public that registers the pledge in the Register of Pledges for the entire duration of the pledge.

Also, it is important to emphasize that Collateral may not be subject to registration in any public register since neither the Register of Pledges nor any of the investment instruments' records (in Czech, *evidence investičních nástrojů*) maintained in the Czech Republic is a public register pursuant to Czech law[122].

Therefore the practical implications of application of this rule would be limited only to Collateral that comprised certificated bearer securities or cash.

Since the Security Documents do not envisage any registrations in the Register of Pledges, we have assumed for the purposes of this memorandum that no security interest in the Collateral is or will be registered in the Register of Pledges or in a public register (in Czech, *veřejný seznam*).

Yet, although we strongly believe that there are some plausible arguments why Section 1371 *et seq.* and sections 2010 to 2017 of the Civil Code should not at all apply to Financial Collateral Arrangements entered into under the Security Documents in accordance with the Czech Financial Collateral Rules, which arguments we have set out on page 9 of this memorandum, absent any express caveats to this effect, the risk of their application cannot be entirely excluded. Therefore, in the case of Collateral comprising certificated bearer securities or cash, a security interest or other security arrangement created to Collateral by a right *in rem* registered in the Register of Pledges in favour of a third party, albeit created after the creation of security interest to Collateral under a Security Document by the Security Collateral Provider in favour of the Secured Party, could give that third party priority (higher ranking) and preferential satisfaction from the Collateral over any earlier Secured Party's security interest to the same Collateral created under a Security Document.

17. Would the Secured Party's rights under each Security Document, such as the right to liquidate the Collateral, be subject to any stay or freeze or otherwise be affected by commencement of the insolvency (that is, how does the institution of an insolvency proceeding change your responses to questions 12 and 13 above, if at all)?

The Secured Party's rights would be protected from any stay or freeze or other similar effect upon commencement of insolvency, if the following conditions were met:

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121 See, for example, Marek R., Ježek V., *Cenné papíry v novém občanském zákoníku. Komentář*. 1. vydání. Praha: C. H. Beck, 2013, pp. 194, 195, 199, 205 and 232, and Spáčil, J. a kol., *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, pp. 1080, 1082, 1088, and 1108 *et seq.*

122 See, for example, Marek R., Ježek V. *Cenné papíry v novém občanském zákoníku. Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 191, and Spáčil, J. a kol. *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 9 *et seq.*

(i) the provision of Collateral under the Security Document qualified as a Financial Collateral Arrangement and the Collateral was provided prior to the publication of the information about commencement of insolvency proceedings in respect of the Security Collateral Provider in the insolvency register, or later on the same day if the Secured Party could prove that it neither knew and nor should have known about the commencement of insolvency proceedings;

(ii) the exercise of the Secured Party's rights stayed within the scope of actions permissible under a Financial Collateral Arrangement under the relevant governing law (please see question 12 with respect to actions permissible under Czech law); and

(iii) if the Collateral was located outside the Czech Republic, the exercise of the Secured Party's rights stayed within the scope of actions permissible under the Financial Collateral Directive.

18. *Will the Security Collateral Provider (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Collateral made to the Secured Party during a certain "suspect period" preceding the date of the insolvency as a result of such a transfer constituting a "preference" (however called and whether or not fraudulent) in favour of the Secured Party or on any other basis? If so, how long before the insolvency does this suspect period begins? If such a period exists, would the substitution of Collateral by a counterparty during this period invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing? Would the posting of additional Collateral pursuant to the mark-to-market provisions (or the IM calculation provisions in the case of the IM Security Documents) of the Security Documents during the suspect period be subject to avoidance, either because the Collateral was considered to relate to an antecedent or pre-existing obligation or for some other reason?*

Under Section 366(3) of the Insolvency Act, Section 366(1)(b) 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.

Transactions made in certain suspect periods prior to the opening of insolvency proceedings, through which the debtor has reduced the sums available for the satisfaction of its creditors or has favoured certain creditors at the expense of others, can be set aside as ineffective legal acts. The ineffectiveness of a legal act is established by a decision of the insolvency court on an action filed by the insolvency administrator against the debtor's counterparty. Only the insolvency administrator can file the action although he will be obliged to do so if requested by the creditors' committee. Individual creditors cannot challenge legal acts as ineffective. The insolvency administrator must file within one year from the date of the decision on the debtor's insolvency or the right to challenge the transaction expires. Also, except for fraudulent transfers, the insolvency administrator must prove that the debtor was insolvent when the challenged transaction was made or that the challenged transaction has led to the debtor's insolvency (as the administrator is the claimant here). However, the debtor is presumed to have been insolvent if the transaction was carried out in favour of a close person or a group company[123]. It is not clear whether this presumption is rebuttable or not. If the insolvency court declares a legal act ineffective, the debtor's counterparty must return any consideration received from the debtor or pay the owed amount or an appropriate sum in compensation, to the insolvent estate.

[123] This is not relevant in the context of this memorandum as we have assumed under (4) and (5) on page 3 of this memorandum that no transaction is carried out in favour of a close person or a group company.

As a matter of Czech law, preference 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. In general terms, preferences include for example acts through which the debtor: (a) satisfied its debt before its due date, amended an agreement to its detriment or waived or otherwise enabled the expiry or non-performance of its claim; or (b) granted security for obligations incurred in the past. The granting of security by the debtor for its own existing obligation, provided that the debtor obtained reasonable consideration in return, for instance, is explicitly stated not to be preference.

Hence, in line with the Financial Collateral Directive, the Security Collateral Provider or its insolvency administrator could recover any Collateral provided under a Security Document during a suspect period if the provision of Collateral under the Security Document qualified as a transfer constituting a "preference", even if it constituted a valid Financial Collateral Arrangement and the Collateral was provided prior to the publication of the information about commencement of insolvency proceedings in respect of the Security Collateral Provider in the insolvency register, or later on the same day if the Secured Party could prove that it neither knew nor should have known about the commencement of insolvency proceedings. This would only be possible, however, based on a decision of the insolvency court on an action filed by the insolvency administrator against the Secured Party, provided that, in particular: (i) the insolvency administrator files within one year from the date of the decision on the Security Collateral Provider's insolvency; (ii) the insolvency administrator can prove, and proves, that the Security Collateral Provider was insolvent when the Collateral was provided or that the provision of Collateral has led to the Security Collateral Provider's insolvency; and (iii) Collateral was provided within the suspect period.

Under the Insolvency Act, a transfer at undervalue or a preference may be challenged only if entered into in a period of three years prior to the opening of insolvency proceedings in favour of a connected person or one year prior to the opening of the insolvency proceedings in favour of a third party. A fraudulent transfer may be challenged if made in a period of five years prior to the opening of insolvency proceedings.

Similarly, although neither the substitution of Collateral by a counterparty (if the substitute Collateral was of no greater value than the assets it is replacing) nor the posting of additional Collateral pursuant to the mark-to-market provisions of the Security Documents during the suspect period would *per se* constitute a transfer constituting a "preference", even if the provision of Collateral under the Security Document qualified as a valid Financial Collateral Arrangement and the Collateral was provided prior to the publication of the information about commencement of insolvency proceedings in respect of the Security Collateral Provider in the insolvency register, or later on the same day if the Secured Party could prove that it neither knew and nor should have known about the commencement of insolvency proceedings, the Security Collateral Provider or its insolvency administrator could recover any Collateral provided under a Security Document during a suspect period under the conditions set out immediately above. Yet, we are of the view that the mere substitution of Collateral would not invalidate an otherwise valid pledge.

Miscellaneous

19. Would the parties' agreement on governing law of each Security Document and submission to jurisdiction be upheld in your jurisdiction, and what would be the consequences if they were not?

(A) Governing law of the Security Document

Assuming that there is no relevant bilateral or multilateral international treaty in place and effect that would govern in any private international law (conflict of laws) matter between the parties, the choice of the governing law of each Security Document would be upheld as a valid choice of law by Czech courts subject to certain exceptions as set out in the Rome Convention (with respect to

Security Documents entered into before 17 December 2009) or the Rome I Regulation (with respect to Security Documents entered into on or after 17 December 2009).

The most notable exceptions under the Rome Convention are the following:

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

(ii) 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 Security Document. Save as set out elsewhere in this memorandum, we consider it unlikely that any such rules would adversely affect our analysis;

(iii) 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 Credit Support Document. In considering whether to give effect to these mandatory rules, regard would be had to their nature and purpose and to the consequences of their application or non-application; and

(iv) the chosen law may not be applied if its application would be incompatible with Czech public order.

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

I. 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 shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement;

II. in case of each Annex, if all other elements relevant to the situation at the time of the choice were located in one or more member states of the European Union, the choice of New York law would not prejudice the application of provisions of Community law, where appropriate as implemented in the Czech Republic, which cannot be derogated from by agreement;

III. the chosen law will not restrict the application of overriding mandatory provisions of Czech law. Save as set out elsewhere in this memorandum, we consider it unlikely that any such provisions would adversely affect our analysis;

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

V. the provisions of chosen law may not be applied if their application would be manifestly incompatible with Czech public order.

It is important to bear in mind that the proprietary aspects of a security interest will, under the International Law Act, be governed by the law of the place of habitual residence or statutory seat of the Secured Party in the decisive period of time, unless the parties have chosen a different law, and that *renvoi* is specifically excluded in this context.

(B) Submission to jurisdiction - English courts

The 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)**) would apply to all legal proceedings instituted on or after 10 January 2015, whilst the 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 English courts would generally be upheld.

However, please note that:

(i) Czech courts would have jurisdiction over all matters relating to the constitution and to the 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

(ii) 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.

A judgment given by an English court would be, subject to the exemptions provided for by the Brussels Regulation, generally recognised in the Czech Republic without a review by the Czech court as to its substance.

A judgment obtained in England would be enforceable in the Czech Republic provided that the conditions set out in the Brussels Regulation are complied with. These conditions include, most notably, the following:

I. the judgment being enforceable in England;

II. an application by the party seeking enforcement complying with certain formalities set out in the Brussels Regulation; and

III. the judgment not being manifestly contrary to Czech public policy.

(C) Submission to jurisdiction - courts of the state of New York

The International Law Act would apply. Although, technically speaking, the submission to the jurisdiction of the courts of the state of New York would be recognised under Czech law, there is a serious risk, for reasons described below, that a judgment given by the courts of New York would not be recognised or enforceable in the Czech Republic. Moreover, as the jurisdiction of the New York courts is, under the Master Agreement, non-exclusive, there is nothing which could prevent a Czech court from claiming jurisdiction in a particular case. In addition, regardless of the parties' submission to jurisdiction, all matters relating to the constitution and to the existence of the Czech Entity would always be under the exclusive jurisdiction of the courts of the Czech Republic. The 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.

The recognition and enforceability of a judgment obtained in New York would also be governed by the International Law Act. There is a significant risk, based on Section 15 of the International Law Act, that a judgment handed down by a New York court would not be recognised in the Czech Republic. Section 15(1)(f) states that a foreign judgment cannot be recognised or enforced unless the

reciprocal enforcement of judgements given by the Czech courts of the Czech Republic is ensured in the relevant foreign country. No such practice of reciprocal enforcement of judgements has, to our knowledge, so far been established between the United States and the Czech Republic[124].

The IM NY Annex forms part of and is subject to the Master Agreement. Where the relevant Master Agreement is governed by English law, but the parties will provide in paragraph 13 of the IM NY Annex that the Annex is governed by and construed in accordance with New York law, the governing law of the Master Agreement will accordingly be split (i.e., dépeçage) - English law will govern the pre-printed Master Agreement, the Schedule and the Transactions but New York law will govern the IM NY Annex. The English jurisdiction provision of the Master Agreement would apply to the entire agreement including the IM NY Annex. Would the split governing law affect your answer above?

No. This should not have any impact as a matter of Czech law, which generally enables the parties to choose different governing laws for different parts of an agreement, provided that such laws are not chosen to govern the same subject-matter.

20. We confirm that, from pure Czech law perspective, the IM Security Documents may be entered into in connection with either an English law governed Master Agreement or a New York law governed Master Agreement. Any differences in governing law between the relevant Master Agreement and the IM Security Document will not affect our answer above. *Are there any other local law considerations that you would recommend the Secured Party to consider in connection with taking and realizing upon the Eligible Collateral from the Security Collateral Provider?*

Although not strictly required from the legal point of view, a cautious Secured Party may wish to insert the following wording into the Security Documents to increase the likelihood that a Security Document is readily recognised as a Financial Collateral Arrangement, given the lack of practical experience with financial collateral arrangements on the part of the Czech courts and insolvency administrators:

(i) In the case of the Deed: "This Deed and the provision of Eligible Collateral, Posted Collateral or Interest Amount hereunder are intended to constitute a financial collateral arrangement pursuant to an equivalent foreign regulation as recognised by Czech law."

(ii) In the case of the Annex: "This Annex and the provision of Eligible Collateral, Posted Collateral or Interest Amount hereunder are intended to constitute a financial collateral arrangement pursuant to an equivalent foreign regulation as recognised by Czech law."

Furthermore, under the Czech Act no. 240/2000 Coll., the Crisis Management Act, as amended, the Czech Government may declare a state of emergency (in Czech: *nouzový stav*) prohibiting the Collateral Provider to provide Collateral abroad unless specifically allowed by the Czech National Bank. We do not describe the relevant procedure in detail as the prohibition cannot affect the validity of the already provided security interest, serves statistical purposes only and is primarily aimed at the Collateral Provider. However any transfers of cash or securities abroad contrary to the prohibition,

[124] Should a practice of reciprocal enforcement of judgments be established between the United States and the Czech Republic in the future, the following further exemptions listed under Section 15 of the International Law Act would still be applicable: (i) the matter is one within the exclusive competence of the courts of the Czech Republic pursuant to its laws, or is one beyond the competence of any judicial proceedings, as determined by the laws of the Czech Republic, unless the party, against whom the decision is directed, submits to foreign jurisdiction voluntarily; (ii) prior to the commencement of the proceedings in a foreign country, in which a decision proposed for recognition was issued, proceedings in the same matter has been initiated in the Czech Republic; (iii) a final decision in the same matter has previously been reached by a court or authority in the Czech Republic or a final decision of an authority or court of a third state in the same matter has previously been recognised in the Czech Republic; (iv) the party against whom such judgement is sought to be enforced has been deprived of an opportunity to participate in the foreign proceedings, especially if the summons or notice of the commencement of the foreign proceedings has not been delivered properly; or (v) recognition of the foreign judgement would be contrary to the public order of the Czech Republic.

would be invalid.[125] A state of emergency can last for a maximum of 30 days unless extended by the Government with a prior consent of the Chamber of Deputies of the Czech Republic (the lower chamber of the Czech Parliament).

Consequently, parties using the 1992 version of the Master Agreement may wish to include the following wording into its Schedule as an Additional Termination Event: "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 (which will be the Affected Party) to perform any contingent or other obligation which that party has under any Credit Support Document."

We do not think that any such additional wording would be required for the 2002 version of the Master Agreement. Inability of the Security Collateral Provider to provide Collateral due to a state of emergency would in our view trigger the Termination Event under Section 5(b)(i)(2) (Illegality).

Although this goes beyond the scope of this memorandum, it should be noted that Czech law (by virtue of, in particular, the Capital Market Act) implements the Transparency Directive (2004/109/EC), as amended by Directive 2013/50/EU, and implementing Commission Directive 2007/14/EC, which set out the framework for substantial shareholding disclosure rules across the EU.

On the basis of the rules contained in the Capital Market Act, either party to the Master Agreement and the Credit Support Document may have substantial shareholding disclosure obligations in respect of any corporate shares or other corporate equity securities of Czech Republic or non-Czech Republic incorporated issuers (whose home Member State is the Czech Republic) and whose shares are admitted to trading on an European Economic Area (EEA) regulated market, if such shares or other corporate equity securities are provided as Collateral under any of the Credit Support Documents.

In any case, however, any breach of the substantial shareholding disclosure rules will not affect the validity or enforceability of financial collateral arrangements under any of the Credit Support Documents.

Finally, a Czech court could regard some or all of the waivers in Paragraphs 2(e)(i) to 2(e)(iv) of the 1995 Deed and Paragraphs 2(f)(i) to 2(f)(iv) of the IM Deed as relating to proprietary aspects of the security interest created under a Deed. The waivers would then be governed by the law governing the proprietary aspects of the security interest. Under Czech law, the general rule is that a pledge is rather accessory to the secured debts[126]. Therefore, where Czech law fell to be the governing law of the proprietary aspects of the security interest created under a Deed, any act, omission or circumstance extinguishing the secured debt would probably (subject to certain exceptions) extinguish also the security interest and any waiver to the contrary might be unenforceable[127]. Note that the boundary between proprietary and contractual aspects of a security interest is not clearly distinguishable under Czech law and not even the leading Czech commentaries on conflict of laws have expressed a view as to where exactly it lies.

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125 The rules on state of emergency are mandatory rules, which a Czech court would apply regardless of the governing law of the Security Document, pursuant to Article 7(2) of the Rome Convention. See also Kučera, Z., *Mezinárodní právo soukromé. 6 opravené a doplněné vydání*., 2004, Brno, p. 233 – 239.

126 Traditional Czech law on security and pledges and other security interests provides for a wide range of exemptions from the general rule that a pledge or other security interest is accessory to the secured debts. See also Spáčil, J. a kol., *Občanský zákoník III. Věcná práva (§ 976 – 1474). Komentář*. 1. vydání. Praha: C. H. Beck, 2013, p. 1130. One of the exemptions is provided for also in the Czech Financial Collateral Rules, whereby the Secured Party and the Security Collateral Provider may agree that the Secured Party is entitled to keep the provided Collateral even after fulfilment of obligations corresponding to the secured debt for the purposes of securing further claims of financial nature. Such agreement of the Secured Party and Security Collateral Provider may also stipulate that, during the period for which it is entitled to keep the provided Collateral, the Secured Party will not be obliged to replace the "used" Collateral.

127 Of course, if the secured obligation was extinguished upon enforcement by set-off against the value of appropriated Collateral (under the conditions discussed in our answer to question 12), the Secured Party would not be obliged to return the Collateral (other than excess Collateral) to the Security Collateral Provider.

21. Are there any other circumstances you can foresee that might affect the Secured Party's ability to enforce its security interest in your jurisdiction?

To the extent Czech law applies (for example, because it governs the proprietary aspects of a security interest), any acts of the Secured Party which represent evident misuse of law would not be upheld by a Czech court[128]. We do not envisage that acts of the Secured Party consistent with the Security Documents would represent evident misuse of law. That having been said, the Security Documents are yet to be tested in Czech courts.

We further note that our responses to questions 1 through 21 above would not be different as a result of inclusion of the VM NY Annex, as amended by the VM NY Annex IA Amendments.

PART 2: TITLE TRANSFER APPROACH PURSUANT TO THE TRANSFER ANNEX

In this Part 2 of our memorandum, we consider issues relating to each Transfer Annex. For this purpose we assume the same facts as set forth in Part 1, but on the assumption that the parties have entered into a Transfer Annex in connection with a Master Agreement rather than a Security Document. For this purpose, assumptions (a) to (m) and (p) to (r) should be read as modified by the following: references to the Security Document(s) should be deemed to be references to the Transfer Annex; references to the Security Collateral Provider and Secured Party should be deemed to be references to the Transferor and Transferee, respectively; and references to Eligible Collateral should be deemed to be references to Eligible Credit Support or Eligible Credit Support (VM). Assumptions (n) and (o) in Part 1 will not apply to this Part 2.

We also make the following additional assumptions:

(1) The Transferor has entered into a Master Agreement governed by English law and a Transfer Annex with the Transferee[129]. Pursuant to the terms of each Transfer Annex, and as a matter of English law, transfers of Eligible Credit Support (including Eligible Credit Support (VM)) involve an outright transfer of title, free and clear of any liens, claims, charges or encumbrances or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance system)[130]. If an Event of Default exists with respect to either party, an amount equal to the Value of the Credit Support Balance or the Value of the Credit Support Balance (VM) is deemed to be an Unpaid Amount under the Master Agreement and therefore is taken into account for purposes of determining the amount due upon close-out of the Transaction pursuant to Section 6(e) of the Master Agreement.

(2) Transfers under each Transfer Annex would not be recharacterised as creating a form of security interest by an English court, provided that the relevant Transfer Annex was not amended in any material way and provided further that the parties by their conduct did not otherwise clearly evidence an intention to create a security interest in the transferred Collateral.

Questions relating to each Transfer Annex

22. Would the laws of your jurisdiction characterise each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be recharacterised as creating a security interest? If so, is there any way to minimise such risk? What would be the specific consequences of such a recharacterisation (referring back to

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128 Section 8 of the Civil Code.

129 Either the 1992 or the 2002 version of the Master Agreement.

130 This assumption means that, among other things, in relation to the Eligible Credit Support 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 Collateral under Section 97(1)(e) of the Capital Market Act), 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 or in a public register (in Czech, *veřejný seznam*). This assumption further means that, among other things, the Eligible Credit Support transferred is not a part of enterprise or other collective asset that is subject to a pledge of enterprise or that other collective asset.

issues related to perfection, priority and formal requirements for establishing both as discussed with regard to the Security Documents in Part 1 above).

The law governing the proprietary aspects of the transfer of the Eligible Credit Support would determine whether it would be characterised as an unconditional transfer of ownership in the assets transferred.

According to section 83(1) of the International Law Act, the transfer of Eligible Credit Support in the form of certificated securities is governed by the law of the place where the securities are located at the time of their transfer, unless the law provides otherwise. The law governing the transfer of Eligible Credit Support in the form of book-entry securities is determined in accordance with the rules contained in section 83(5) of the International Law Act[131].

There are no grounds on which Czech law could recharacterise a transfer of Eligible Credit Support, the proprietary aspects of which are governed by a foreign law. On the other hand, if a foreign law governing the proprietary aspects of a transfer of Eligible Credit Support recharacterised that transfer, Czech law would also treat that transfer as recharacterised. For example, if the proprietary aspects of a transfer of Eligible Credit Support were governed by the laws of Country X pursuant to the applicable Czech conflict of laws rules, and the laws of Country X recharacterised that transfer as a security interest, then Czech law would also treat that transfer as a security interest[132].

Where Czech law governed the proprietary aspects of the transfer of the Eligible Credit Support, it would not recharacterise such transfer if each Transfer Annex and the transfers of Eligible Credit Support qualified as a financial collateral arrangement. To that end, the following conditions must be fulfilled:

(i) The Eligible Credit Support should only comprise those assets which may be provided as financial collateral under the Czech Financial Collateral Rules, including cash and financial instruments[133]. The most relevant category of financial instruments in the context of this memorandum seem to be corporate shares, regardless of the place of incorporation or organization of the issuer, bonds and similar securities representing a right to repayment of an owed amount which are tradable in the capital market.

(ii) The creation of the financial collateral arrangement must be evidenced in writing or alternatively by a record that enables its reproduction in an unaltered condition[134].

(iii) The exclusive subject-matter of the Transactions for which each Transfer Annex provides credit support should be cash, investment instruments [135], emissions allowances or commodities[136]. Even after the implementation of the MiFID, certain Transactions listed in Appendix A would not constitute investment instruments if structured in particular ways. A detailed discussion relating to such non-qualifying Transactions is set out in Appendix C.

(iv) The Transferor and the Transferee should fall within one of the categories of eligible parties listed in our answer to question 3 above[137]. Each type of Czech Entity would qualify as such eligible party, although a Czech Corporate only with certain specified counterparties.

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131 See our answer to question 2.

132 From the practical point of view, this would be particularly relevant for the purpose of the treatment of such transfer of Eligible Credit Support in case of the Transferor's insolvency.

133 Section 5 of the Financial Collateral Act.

134 Section 9(2) of the Financial Collateral Act.

135 The full definition of investment instruments is set out in Appendix B

136 Section 2(a) of the Financial Collateral Act.

137 Section 7 of the Financial Collateral Act.

Note that the Eligible Credit Support should be transferred to the Transferee each time in line with the laws of the country which governs the proprietary aspects of the transfer. It is likely that Czech law would conclude that a certain piece of Eligible Credit Support has been provided not at the time when the Eligible Credit Support was transferred, as this term is defined in Paragraph 3(a) of each Transfer Annex, but at the time when the Eligible Credit Support was transferred under the law governing the proprietary aspects of the transfer. Where the proprietary aspects of the transfer of the Eligible Credit Support are governed by the laws of the Czech Republic, the various forms of Eligible Credit Support would be transferred as follows:

I. Certificated securities

Certificated securities must be delivered to the Transferee. In addition, a transfer endorsement must be affixed to the back of registered certificated securities.

II. Dematerialised Securities[138]

Dematerialised securities recorded in any of the registries under the two-tier structure would be transferred upon being credited to the Transferee's account, if that account was held directly with the Central Depository of Securities or another first-tier intermediary or another intermediary keeping both the Transferor's and Transferee's accounts, or, if the Transferee's account was with an intermediary different from the one keeping the Transferor's account, to the nominee account of such intermediary[139].

Short-term bonds registered in the SKD would be transferred upon being credited to the Transferee's account, if that account was held directly with the Czech National Bank or another intermediary keeping both the Transferor's and Transferee's accounts, or, if the Transferee's account was with an intermediary different from the one keeping the Transferor's account, to the nominee account of such intermediary[140].

III. Intermediated securities

As mentioned earlier, the Czech Financial Collateral Rules explicitly allow for provision as financial collateral of not only financial instruments but also, inter alia, rights arising from an entry of financial instruments in a register enabling the entitled person to directly or indirectly deal with the financial instrument in a way similar to a possessor in due course. Hence, even though Czech law has no substantive rules directly applicable to intermediated securities and their legal nature thus remains unclear, it could be argued that intermediated securities can be transferred by way of analogy to a transfer of dematerialised securities (as described under II. immediately above). However, this remains to be tested in practice, given the lack of recognition of this concept in other laws and practice generally. Consequently, we are unable to state with certainty that intermediated securities can always be validly transferred and recommend seeking specific advice in each individual case as to how, if at all, the intermediated securities could be transferred under a financial collateral arrangement.

IV. Cash

Cash would be transferred upon being credited to the account designated by the Transferee.

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138 The legal nature of the various registers of dematerialised securities is discussed in our answer to question 2.

139 The subsequent crediting of the Transferee's account by the intermediary would be only evidential – see Section 1104 of the Civil Code and Section 96(1) of the Capital Market Act.

140 The subsequent crediting of the Transferee's account by the intermediary would be only evidential – see Section 1104 of the Civil Code and Section 96(1) of the Capital Market Act.

23. Assuming that the Transferee receives an absolute ownership interest in the Eligible Credit Support, will it need to take any action thereafter to ensure that its title therein continues? Are there any filing or perfection requirements necessary or advisable, including taking any of the actions referred to in question 5? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained to establish, enforce, or continue such ownership interest?

No.

However, it is important to explicitly note here that Section 2016 of the Civil Code contains a rule that is new in Czech law and whose application essentially means the priority (higher ranking) of even a subsequent security interest created as a right *in rem* registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges over any prior security interest (even if created as a right *in rem*) not registered in a public register or the Register of Pledges, if created in respect of the same asset. Therefore, under the rule of Section 2016 of the Civil Code, if a security interest is created as a right *in rem* registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges, such right *in rem* always provides the relevant secured party with priority (higher ranking) over other parties' rights *in rem* or contractual rights to Eligible Credit Support which are not registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges, irrespective of the moment of their creation.

It remains not completely settled point in Czech law whether the rule of Section 2016 as well as other rules contained in sections 2010 to 2017 of the Civil Code should at all apply to Financial Collateral Arrangements entered into under each Transfer Annex in accordance with the Czech Financial Collateral Rules[141]. In any case, if the rule of Section 2016 of the Civil Code applied, a security interest or other security arrangement created to Eligible Credit Support by a right *in rem* in favour of a third party, albeit created later in the future (i.e. only after the transfer or other provision of Eligible Credit Support under each Transfer Annex by the Transferor to the Transferee), could give that third party priority (higher ranking) and preferential satisfaction from the Eligible Credit Support over any earlier Transferee's right to the same Eligible Credit Support created under a Transfer Annex, provided that the third party's right *in rem* were registered in a public register (in Czech, *veřejný seznam*) or the Register of Pledges. Yet, for the exact same reasons as outlined in our answer to question 16 above, the practical implications of application of this rule would be limited only to Eligible Credit Support that comprised certificated bearer securities[142].

In any case, we strongly believe that the only correct interpretation of the Czech Financial Collateral Rules is that sections 2010 to 2017 of the Civil Code should not at all apply to Financial Collateral Arrangements entered into under each Transfer Annex in accordance with the Czech Financial Collateral Rules. Please also refer to pages 7 – 9 of this memorandum for additional points and analysis with respect to competing security interests over the same piece of Eligible Credit Support and with respect to how priority rankings of security interests operate in Czech law in light of changes brought about by the recodification of private law in the Czech Republic. Some of the other important arguments for this interpretation, which we have not expressed on pages 7 – 9 of this memorandum, are further that:

(i) The Transferor cannot without the consent of the Transferee subsequently validly transfer to a third party Eligible Credit Support (in accordance with the Czech Financial Collateral Rules) that has already been validly transferred under each Transfer Annex to the Transferee,

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[141] Even though the explanatory report to the relevant provisions of the Czech Financial Collateral Rules emphasizes that a transfer of financial collateral does not have to take the form of a security transfer of a right (which is with effect from 1 January 2014 regulated in Section 2040 et seq. of the Civil Code) and so purports to clearly distinguish between the two, one of plausible interpretations of applicable rules is that not only a security transfer of financial collateral but also an outright title transfer of financial collateral could be considered one of the means of providing a security or securing a debt.

[142] Since cash would be transferred upon being credited to the account designated by the Transferee (by satisfying and creating various payment claims), such cash transfer would bear no proprietary aspects whatsoever.

or subsequently create a security interest or any other right *in rem* over such Eligible Credit Support in favour of a third party; and

(ii) The applicable Czech law remains to be largely based on the traditional principle according to which no one can transfer more rights to another than one himself has (in Latin: *nemo plus iuris ad alium transferre potest quam ipse habet*).

24. Therefore, and also since neither the Security Documents nor Transfer Annex envisage any registrations in the Register of Pledges, we have assumed for the purposes of this memorandum that no security interest in the Collateral is or will be registered in the Register of Pledges or in a public register (in Czech, *veřejný seznam*). *What is the effect, if any, under the laws of your jurisdiction of the right of the Transferor to exchange Eligible Credit Support pursuant to Paragraph 3(c) of each Transfer Annex? Does the presence or absence of consent to exchange by the Transferee have any bearing on this question? Please comment specifically on whether the Transferor and the Transferee are able validly to agree in each Transfer Annex that the Transferee may exchange Eligible Credit Support without specific consent of the Transferee and whether and, if so, how this may affect your conclusions regarding the validity or enforceability of each Transfer Annex.*

The laws of the Czech Republic would not affect the right of the Transferor to exchange Eligible Credit Support pursuant to Paragraph 3(c) of each Transfer Annex.

Where the Eligible Credit Support is located in the Czech Republic and the substitute Eligible Credit Support is of comparable value as the original Eligible Credit Support, it will be regarded under Czech law as if it had been provided at the same time as the original Eligible Credit Support without specific consent being required each time the Collateral is exchanged.

25. *The Transferee's rights in relation to the transferred Eligible Credit Support upon the occurrence of an Event of Default will be governed by Section 6 of the Master Agreement. Assuming that Section 6 of the Master Agreement is valid and enforceable in your jurisdiction insofar as it relates to the determination of a net amount payable by either party on the termination of the Transactions, could you please confirm that Paragraph 6 of each Transfer Annex would also be valid to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of the net amount payable under Section 6(e) of the Master Agreement.*

If a Transfer Annex and the transfers of Eligible Credit Support qualify as a Financial Collateral Arrangement, Paragraph 6 of each Transfer Annex would be valid as a matter of Czech law to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of the net amount payable under Section 6(e) of the Master Agreement.

Please refer to question 22 above for an overview of conditions which must be fulfilled in order for each Transfer Annex and the transfers of Eligible Credit Support to qualify as a valid Financial Collateral Arrangement under Czech law in case the Eligible Credit Support is located in the Czech Republic.

If the proprietary aspects of the transfer of the Eligible Credit Support are not governed by the laws of the Czech Republic, the following criteria should be met to increase the likelihood that each Transfer Annex and the transfers of Eligible Credit Support are recognised as a Financial Collateral Arrangement which is a "financial collateral arrangement pursuant to an equivalent foreign regulation":

(i) The Eligible Credit Support should only be constituted by those types of assets which are classified either as "cash" within the meaning of paragraph 1(d) of Article 2 of the Financial

Collateral Directive[143], as "financial instruments" within the meaning of paragraph 1(e) of Article 2 of the Financial Collateral Directive[144], as book entry securities collateral within the meaning of paragraph 1(g) of Article 2 of the Financial Collateral Directive.

(ii) Each provision of Eligible Credit Support should be evidenced in writing or recorded by electronic means or any other durable medium[145]. For this purpose, it will be sufficient if the parties can prove that the Eligible Credit Support has been credited to, or forms a credit in, the Transferee's account to which it has been transferred[146]. In case of certificated securities transferred by physical delivery, it is advisable to evidence each delivery by a confirmation in writing or recorded by electronic means or any other durable medium.

(iii) The Obligations secured under the Security Document should give a right to a cash settlement and/or delivery of financial instruments (see the definition of the "relevant financial obligations" in paragraph 1(f) of Article 2 of the Financial Collateral Directive).

(iv) The Secured Party and the Security Collateral Provider should fall within one of the types of eligible legal entities listed in our answer to question 3 above (or Section 7 of the Financial Collateral Act).

In relation to the enforceability of close-out netting under the Master Agreement in the Czech Republic, please refer to the Netting Memorandum.

26. Would the rights of the Transferee be enforceable in accordance with the terms of the Master Agreement and each Transfer Annex, irrespective of the insolvency of the Transferor?

We take this question to refer to rights of the Transferee under the Master Agreement and each Transfer Annex relating to financial collateral and close-out netting issues.

As regards the enforceability of the Transferee's rights under the Master Agreement, we refer to the Czech Netting Opinion.

The Transferee's rights under each Transfer Annex would be enforceable in accordance with the terms of a Transfer Annex, irrespective of the insolvency of the Transferor, if a Transfer Annex and the provision of Eligible Credit Support qualified as a Financial Collateral Arrangement.

Please also see our response to question 16 which deals with certain related matters of interest, including some additional points and analysis with respect to competing security interests over the same piece of Eligible Credit Support and with respect to how priority rankings of security interests operate in Czech law in light of changes brought about by the recodification of private law in the Czech Republic.

Please also refer to our answer to question 4(a) above for analysis of potential implications of the recent judgment of the Supreme Court of the Czech Republic[147] on validity and enforceability of Financial Collateral Arrangements entered into under each Transfer Annex in accordance with the Czech Financial Collateral Rules, if such financial collateral arrangements purported to secure future or contingent debts after the commencement of insolvency proceedings and if such future or contingent secured debt arises or becomes unconditional only after the commencement of insolvency

143 Money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits.

144 Shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing.

145 Article 3(2) read in conjunction with Article 2(2) of the Financial Collateral Directive.

146 Article 1(5) of the Financial Collateral Directive.

147 Cf. No. 29 Cdo 4340/2011, dated 26 August 2014.

proceedings. However, based on an express caveat contained in Section 22 of the Financial Collateral Act, we are convinced that Czech courts should not apply the bespoke doctrine developed by the Supreme Court of the Czech Republic also to Financial Collateral Arrangements entered into under each Transfer Annex in accordance with the Czech Financial Collateral Rules, even if such Financial Collateral Arrangements entered into under each Transfer Annex secured future or contingent debts after the commencement of insolvency proceedings. Such Financial Collateral Arrangements should therefore be protected from the adverse effects of the Insolvency Act.

27. *Will the Transferor (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Eligible Credit Support made to the Transferee during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does this suspect period begin? If such a period exists, would the substitution of Eligible Credit Support by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the asset they are replacing? Would the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each Transfer Annex during the suspect period be subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?*

Please see our answer to question 18 above which applies mutatis mutandis.

28. *Would the parties' agreement on governing law of each Transfer Annex and submission to jurisdiction be upheld in your jurisdiction, and what would be the consequences if it were not?*

Please see our answer to question 19 above which applies mutatis mutandis.

29. *Is each Transfer Annex in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee? If there are any other requirements to ensure the validity of such transfer in each type of Eligible Credit Support by the Transferor under a Transfer Annex, please indicate the nature of such requirements. For example, are there any requirements of the type referred to in question 6?*

Although not strictly required from the legal point of view, a cautious Collateral Taker may wish to insert the following wording into each Transfer Annex to increase the likelihood that a Transfer Annex is readily recognised as a Financial Collateral Arrangement, given the lack of practical experience with financial collateral arrangements on the part of Czech courts and insolvency administrators:

"This Annex and the transfers of Eligible Credit Support, Equivalent Credit Support or Equivalent Distributions hereunder are intended to constitute a financial collateral arrangement pursuant to an equivalent foreign regulation as recognised by Czech law."

Otherwise, a Transfer Annex is in appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee.

In addition, please see also the discussion of state of emergency in our answer to question 20 and our answer to question 21, both of which apply mutatis mutandis also with respect to each Transfer Annex.

Finally, we note that our responses to questions 22 through 29 above would not be different as a result of inclusion of the VM Transfer Annex, as amended by the VM Transfer Annex IA Amendments

PART 3: CLOSE-OUT AMOUNT PROTOCOL

In this Part 3 of our memorandum, we consider the impact of the Close-out Amount Protocol published by ISDA on 27 February 2009 (the **Protocol**) on the conclusions reached in this memorandum. ISDA has published the Protocol to enable parties to the Covered Master Agreements (as defined in the Protocol) to amend the terms of each Covered Master Agreement to reflect certain provisions of the 2002 Master Agreement, in particular to replace Market Quotation and (subject to the election made in the Protocol to preserve Loss provisions) Loss with Close-out Amount.

Our conclusion in this Part 3 is subject to the same qualifications as set out in this memorandum and for this purpose we have made the same assumptions as set forth above. Moreover, whenever the assumptions above or the qualifications contained in this memorandum refer to a Master Agreement, for the purposes of this Part 3, the reference is to be taken as referring also to the Covered Master Agreement and the Protocol. In addition, for the purpose of this Part 3, we have assumed the following:

(a) The obligations of each party under the Protocol, the Covered Master Agreement and each Credit Support Document, as amended by the Protocol, are legal, valid and binding under the relevant governing law.

(b) The amendment of the Covered Master Agreement through the Protocol constitutes legal, valid and binding contractual arrangement amending the Covered Master Agreement under the relevant governing law.

We confirm that the changes made by the Protocol would not materially affect our conclusions reached elsewhere in this memorandum.

As to assumption (g) above (that no provision of the Master Agreement or relevant Credit Support Document that is necessary for the giving of this opinion has been altered in any material respect), no change to the Covered Master Agreement or a Credit Support Document contemplated by the Protocol and no selection contemplated by and made in the Protocol would be considered a material alteration for this purpose.

We do not give any opinion on the validity or enforceability under Czech law of the Protocol itself.

PART 4: COLLATERAL AGREEMENT NEGATIVE INTEREST PROTOCOL

In this Part 4 of our memorandum, we consider the impact of the ISDA 2014 Collateral Agreement Negative Interest Protocol published on 12 May 2014 (the **Negative Interest Protocol**) on the conclusions reached in this memorandum. ISDA has published the Negative Interest Protocol to allow adherent parties to address the uncertainty created by negative interest rates by allowing them to modify provisions in the Protocol Collateral Covered Agreements (as defined in the Negative Interest Rate Protocol) such that if an interest amount for an interest period is negative, the party pledging cash collateral pays the absolute value of that interest amount to the collateral receiver for that interest period.

Our conclusion in this Part 4 is subject to the same qualifications as set out in this memorandum and for this purpose we have made the same assumptions as set forth above. Moreover, whenever the assumptions above or the qualifications contained in this memorandum refer to a Master Agreement, for the purposes of this Part 4, the reference is to be taken as referring also to the Protocol Collateral Covered Agreement and the Negative Interest Protocol. In addition, for the purpose of this Part 4, we have assumed the following:

(a) The obligations of each party under the Negative Interest Protocol, the Protocol Collateral Covered Agreement and each Credit Support Document as amended by the Negative Interest Protocol, are legal, valid and binding under the relevant governing law.

(b) The amendment of the Protocol Collateral Covered Agreement through the Negative Interest Protocol constitutes legal, valid and binding contractual arrangement amending the Protocol Collateral Covered Agreement under the relevant governing law.

We confirm that the changes made by the Negative Interest Protocol would not materially affect our conclusions reached elsewhere in this memorandum.

As to assumption (g) above (that no provision of the Master Agreement or relevant Credit Support Document that is necessary for the giving of this opinion has been altered in any material respect), no change to the Protocol Collateral Covered Agreement or a Credit Support Document contemplated by the Negative Interest Protocol and no selection contemplated by and made in the Negative Interest Protocol would be considered a material alteration for this purpose.

We do not give any opinion on the validity or enforceability under Czech law of the Negative Interest Protocol itself.

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This memorandum of law is rendered solely to ISDA for the benefit and use of its members. This memorandum of law may not be relied upon by any other person or used, circulated, quoted or otherwise referred to or relied upon for any other purpose without our prior written consent. This memorandum may, however, be shown by an ISDA member to a competent regulatory authority or professional advisor for such ISDA member for the purposes of information only, on the basis that we assume no responsibility to such authority, professional advisor or any person as a result, or otherwise.

Václav Valvoda
on behalf of **Allen & Overy (Czech Republic) LLP, organizační složka**

APPENDIX A

CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Bond 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 amount of a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Bullion 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 number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example, Gold-COMEX on the COMEX Division of the New York Mercantile Exchange) or another method specified by the parties. Bullion swaps include cap, collar or floor transactions in respect of Bullion.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis or on a specified future date. A Bullion Trade may be settled by physical delivery of Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and in the case of silver, platinum and palladium, a troy ounce (or in the case of reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security (or in some cases an equivalent security) to the other party (in consideration for the original cash payment plus a premium).

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the

case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate, floating index or floating commodity price payer on the cap and the other party is the floating rate, floating index or floating commodity price payer on the floor.

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. A Commodity Forward may be settled by the physical delivery of the commodity in exchange for the specified price or may be cash settled based on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index based on the price of one or more commodities.

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, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

Credit Default Swap 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 enter into a Credit Default Swap.

Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or more) of Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency 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 amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Emissions Allowance Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity and shares to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Equity Index 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 receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity 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 number of shares of an issuer or a basket of shares of several issuers at a specified strike price. The share option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed or floating rate and the other party pays periodic amounts of the same currency or a different

currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A deliverable or non-deliverable transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a "Fund Interest"), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement occurs based on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

Fund Swap Transaction: A transaction a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency based on the redemption value of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

Interest Rate 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 receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified

floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

Longevity/Mortality Transaction. (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality- contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

Property Index Derivative Transaction. A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional or national area.

Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities (or in some cases equivalent securities) from such other party at a future date.

Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower's obligation to replace the securities at a defined date with identical securities.

Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

APPENDIX B

INVESTMENT INSTRUMENTS

(1) **Investment instruments** are defined in Section 3(1) of the Capital Market Act as:

(a) investment securities;

(b) securities for collective investment;

(c) money-market instruments;

(d) options, futures, swaps, forwards and other instruments, the value of which relates to a rate or a value of the securities, currency rates, interest rate or interest yield, as well as other derivatives, financial indices or financial indicators expressed quantitatively, which carry the right to cash or physical settlement;

(e) instruments enabling the transfer of credit risk;

(f) financial contracts for differences;

(g) 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 exercise of this right depends on insolvency or other similar factor rendering performance impossible;

(h) 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 regulated market with its seat in an EU Member State or on a multilateral trading facility operated by a person/entity with its seat in an EU Member State;

(i) 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 letter (h), not being for commercial purposes and which have the characteristics of other derivative financial instruments; in particular those, which are cleared and settled through a settlement system or which are subject to security supplementation call;

(j) options, futures, swaps, forwards and other instruments, the value of which relates to climatic indicators, freight rates, emission allowances or inflation rates or other economic indicators published by the official statistic department and which carry the right to cash settlement or the right of at least one of the parties to choose whether it wishes cash settlement, unless the exercise of this right depends on insolvency or other similar factor rendering performance impossible; and

(k) instruments, the value of which relates to asset values, rights, obligations, indices or quantitatively expressed indicators, which are not set out in letter (j), and which have the characteristics of other derivative investment instruments; in particular those which are traded on a regulated market with its seat in an EU Member State or on a multilateral trading facility operated by a person/entity with its seat in an EU Member State, are cleared and settled through a settlement system or subject to a security supplementation call.

(2) **Investment securities** are defined in Section 3(2) of the Capital Market Act as securities which are tradable in the capital market, in particular the following:

(a) shares or similar securities representing a share in a company or other legal entity;

(b) bonds or similar securities representing the right to repayment of an owed amount;

(c) securities replacing the securities listed under (a) and (b);

(d) securities entitling to acquire or dispose of the securities listed under (a) and (b); and

(e) securities which carry the right to cash settlement and the value of which is determined on the basis of the value of investment securities, currency exchange rates, interest rates, interest yields, commodities, or financial indices or other quantitative measures.

APPENDIX C

NON-QUALIFYING TRANSACTIONS

If structured in particular ways, certain Transactions may fall outside the scope of the definition of investment instruments set out in paragraph (1) of Appendix B (the **Definition**). The Definition is based on the definition of financial instruments contained in Section C of Annex I to the MiFID. Although certain Transactions will not be eligible to be secured under financial collateral arrangements by virtue of falling within the scope of the Definition, they may be eligible to be secured under financial collateral arrangements for other reasons (i.e., they may qualify as claims of financial nature because their subject-matter are cash, emissions allowances or commodities). That said, if structured in particular ways, certain Transactions may still be eligible to be secured under financial collateral arrangements.

What follows is a list of those Transactions that may not be eligible to be secured under financial collateral arrangements, unless certain steps are taken to ensure they are structured to fall within the scope of the Definition or are otherwise eligible. These Transactions can be split into the following sub-categories:

1. Repurchase Transaction, Buy/Sell Back Transaction and Securities Lending Transaction

   Repurchase Transactions, Buy/Sell Back Transactions and Securities Lending Transactions do not qualify as investment instruments but will nevertheless be eligible to be secured under financial collateral arrangements, provided that only investment securities, securities for collective investment or instruments which are regularly traded in the money market (money market instruments) are the subject of the Repurchase Transaction, Buy/Sell Back Transaction or Securities Lending Transaction.

2. Cap Transaction, Collar Transaction, Economic Statistic Transaction, Floor Transaction, Fund Forward Transaction, Fund Option Transaction, Fund Swap Transaction and Longevity/Mortality Transaction

   Each of these classes of Transaction will normally fall within the scope of the Definition, although there will be certain limited exceptions dependent on the exact nature of the relevant underlying. These exceptions are discussed below.

   To the extent these Transactions do not qualify as investment instruments under paragraphs (d) – (j) of the Definition, they will need to satisfy the criteria set out in the catch-all paragraph (k) of the Definition in order to be eligible to be secured under financial collateral arrangements.

   The Transactions related to the following underlying assets must satisfy the criteria set out in paragraph (k) of the Definition in order to be eligible to be secured under financial collateral arrangements: Cap Transaction, Collar Transaction, Economic Statistic Transaction or Floor Transaction, each relating to a rate or index, if that rate or index is not a financial index, quantitatively expressed financial indicator, inflation rate or an economic indicator published by the official statistic department; Longevity/Mortality Transaction valued according to expected variation in a reference index or observed demographic trend, if that reference index or observed demographic trend is not a financial index, quantitatively expressed financial indicator or an economic indicator published by the official statistic department; and Fund Option Transaction, Fund Forward Transaction and Fund Swap Transaction, if the relevant underlying Fund Interest is not a security, financial index or quantitatively expressed financial indicator.

   Amongst other things, paragraph (k) of the Definition requires that the instrument in question "has the characteristics of other derivative financial instruments". Under Section 3(5) of the Capital Market Act, the circumstances, in which such an investment instrument is not for commercial

purposes and has the characteristics of other derivative financial instruments, are specified by Articles 38 and 39 of the Commission Regulation (EC) No. 1287/2006, which implements the MiFID (the **MiFID Regulation**).

The MiFID Regulation sets out in Articles 38(3) and (4) and 39 circumstances, under which a contract of the type listed in paragraph (k) of the Definition will be considered as not having the characteristics of other derivative financial instruments.

Most importantly, the Transactions covered by paragraph (k) of the Definition would be eligible to be secured under financial collateral arrangements, unless a particular Transaction was entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it was necessary to keep in balance the supplies and uses of energy at a given time (paragraph 4 of Article 38 of the MiFID Regulation).

This conclusion is also supported by one of the technical advice papers issued by CESR[148].

[148] CESR/CEBS's technical advice to the European Commission on the review of commodities business dated 15 October 2008 (Ref. CESR/08-752), page 43.

APPENDIX D

SUMMARY OF RECOMMENDED AMENDMENTS

This appendix summarises the various amendments to the Credit Support Documents and/or the Master Agreement recommended in this memorandum. The reasons for making these amendments and circumstances in which they are recommendable are discussed above in this memorandum. This appendix should therefore be read in conjunction with the rest of this memorandum.

(1) In our answer to question 12, we state that appropriation of Collateral in respect of which the proprietary aspects of the security interest are governed by the laws of the Czech Republic might not be upheld by a Czech court unless the each Annex and the IM Deed was amended to explicitly state that the Secured Party may appropriate the Posted Collateral (including the Posted Collateral (IM) and Posted Collateral (VM)) and to provide for an objective method for valuing the certificated securities in the event that they are appropriated.

(2) In our answer to question 20, we state that a cautious Secured Party may wish to insert the following wording into the Security Documents to increase the likelihood that a Security Document is readily recognised as a Financial Collateral Arrangement:

(a) In the case of each Deed:

"This Deed and the provision of Eligible Collateral, Posted Collateral or Interest Amount hereunder are intended to constitute a financial collateral arrangement pursuant to an equivalent foreign regulation as recognised by Czech law."

(b) In the case of the each Annex:

"This Annex and the provision of Eligible Collateral, Posted Collateral or Interest Amount hereunder are intended to constitute a financial collateral arrangement pursuant to an equivalent foreign regulation as recognised by Czech law."

(3) In our answer to question 20, we further discuss the state of emergency which may be declared by the Czech government in certain very limited circumstances and may limit the ability of a Czech entity to provide Collateral. To address this possibility, parties using the 1992 version of the Master Agreement may wish to include the following wording into its Schedule as an Additional Termination Event:

"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 (which will be the Affected Party) to perform any contingent or other obligation which that party has under any Credit Support Document."

(4) In our answer to question 29, we state that a cautious Collateral Taker may wish to insert the following wording into each Transfer Annex to increase the likelihood that the Transfer Annex is readily recognised as a Financial Collateral Arrangement:

"This Annex and the transfers of Eligible Credit Support, Equivalent Credit Support or Equivalent Distributions hereunder are intended to constitute a financial collateral arrangement pursuant to an equivalent foreign regulation as recognised by Czech law."

APPENDIX E

CERTAIN COUNTERPARTY TYPES[149]

Description	**Covered by opinion**	**Legal form(s)**[150]
Bank/Credit Institution. A legal entity, which may be organized as a corporation, partnership or in some other form, that conducts commercial banking activities, that is, whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) making loans to private individual and/or corporate borrowers. This type of entity is sometimes referred to as a "commercial bank" or, if its business also includes investment banking and trading activities, a "universal bank". (If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm/Broker Dealer" category below.) This type of entity is referred to as a "credit institution" in European Community (**EC**) legislation. This category may include specialised types of bank, such as a mortgage savings bank (provided that the relevant entity accepts deposits and makes loans), or such an entity may be considered in the local jurisdiction to constitute a separate category of legal entity (as in the case of a building society in the United Kingdom (**UK**)).	YES *A Czech Bank and a Foreign Bank fall within this category.*	A Czech Bank is a bank incorporated in the form of a joint-stock company (in Czech, *akciová společnost*) in the Czech Republic licensed under the Banks Act, including Česká exportní banka, a.s. whose activities are, in addition, governed by the Act on Export Insurance and Finance (No. 58/1995 Coll., as amended). A Foreign Bank is a bank organised and licensed under the laws of a country other than the Czech Republic and having a branch in the Czech Republic. The Banks Act does not prescribe the mandatory inclusion of certain words in the name of a Czech Bank, but Czech Banks normally include the words "bank", "banka" or "spořitelna" in their name.
Central Bank. A legal entity that performs the function of a central bank for a Sovereign or for an area of monetary union (as in the case of the European Central Bank in respect of the euro zone).	YES *The Czech National Bank falls within this category.*	Česká národní banka

[149] In these definitions, the term "legal entity" means an entity with legal personality other than a private individual.

[150] If appropriate, please indicate, as discussed in the instruction letter, any naming convention or rule that would help a reader of the opinion to identify and classify the entity.

Description	**Covered by opinion**	**Legal form(s)**[150]
Corporation. A legal entity that is organized as a corporation or company rather than a partnership, is engaged in industrial and/or commercial activities and does not fall within one of the other categories in this Appendix B.	YES *A Czech Corporate and Foreign Corporate fall within this category.*	A trading company (in Czech, *obchodní společnost*) incorporated under the Corporations Act either in the form of • a limited liability company (in Czech, *společnost s ručením omezeným*) – *the business name must include a designation "společnost s ručením omezeným" or its abbreviated form "spol. s r. o." or "s. r. o.",* • a joint-stock company (in Czech, *akciová společnost*) – *the business name must include a designation "akciová společnost" or its abbreviated form "akc. spol." or "a. s.",* • a general commercial partnership (in Czech, *veřejná obchodní společnost*) – *the business name must include a designation "veřejná obchodní společnost", or its abbreviated form "veř. obch. spol." or "v. o. s.", or, provided that the business name include the name of at least one of the partners, it is sufficient to add "a spol." at the end,* or • a limited partnership (in Czech, *komanditní společnost*) – *the*

Description	Covered by opinion	Legal form(s)[150]
		business name must include a designation "komanditní společnost" or its abbreviated form "kom. spol." or "k. s.", and each of the above corporations is an "entrepreneur" (in Czech, *podnikatel*) under Czech law.
Hedge Fund/Proprietary Trader. A legal entity, which may be organized as a corporation, partnership or in some other legal form, the principal business of which is to deal in and/or manage securities and/or other financial instruments and/or otherwise to carry on an investment business predominantly or exclusively as principal for its own account.	NO *Not separately covered by this memorandum as there is no such category of legal entity under Czech law. Depending on the circumstances and its legal form, a Hedge Fund/Proprietary Trader could be a Czech Corporate or Foreign Corporate.*	
Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for example, a friendly society or industrial & provident society in the UK), that is licensed to carry on insurance business, and is typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.	NO *Not covered by this memorandum as that would require additional legal analysis.*	
International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and Development (the World Bank), regional development banks and	NO *Not covered by this memorandum as we are not aware of*	

Description	Covered by opinion	Legal form(s)[150]
similar organizations established by treaty.	*any significant international organisation with its seat in the Czech Republic.*	
Investment Firm/Broker Dealer. A legal entity, which may be organized as a corporation, partnership or in some other form, that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal (but if it does so exclusively as principal, then it most likely falls within the "Hedge Fund/Proprietary Trader" category above.) Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in US legislation and as an "investment firm" in EC legislation.	YES *Czech Securities Dealer and Foreign Securities Dealer fall within this category.*	A securities dealer (in Czech, *obchodník s cennými papíry*), other than Czech Bank, 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 Czech National Bank under the Capital Market Act.
Investment Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income. This type of entity or arrangement is referred to as a "collective investment scheme" in EC legislation. It may be regulated or unregulated. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by general law and/or, typically in the case of regulated Investment Funds, financial services legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Investment Fund (for example, a trustee of a unit trust) contract on behalf of the Investment Fund, are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	NO *Not covered by this memorandum as that would require additional legal analysis.*	

Description	**Covered by opinion**	**Legal form(s)**[150]
Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a Federal Sovereign, for example, a city, county, borough or similar area.	NO *Not covered by this memorandum as that would require additional legal analysis.*	
Partnership. A legal entity or form of arrangement without legal personality that is (a) organised as a general, limited or some other form of partnership and (b) does not fall within one of the other categories in this Appendix B. If it does not have legal personality, it may nonetheless be treated as though it were a legal person for certain purposes (for example, for insolvency purposes) and not for other purposes (for example, tax or personal liability).	*A partnership with legal personality incorporated in the Czech Republic in the form of a general commercial partnership (in Czech* veřejná obchodní společnost*) is treated as a Czech Corporate in this memorandum. Other types of partnership, in particular a partnership without legal personality, are not covered by this memorandum.*	

Description	**Covered by opinion**	**Legal form(s)**[150]
Pension Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide pension benefits to a specific class of beneficiaries, normally sponsored by an employer or group of employers. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by pensions legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Pension Fund (for example, a trustee of a pension scheme in the form of a common law trust) contract on behalf of the Pension Fund and are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	NO *Not covered by this memorandum as that would require additional legal analysis.*	
Sovereign. A sovereign nation state recognized internationally as such, typically acting through a direct agency or instrumentality of the central government without separate legal personality, for example, the ministry of finance, treasury or national debt office. This category does not include a State of a Federal Sovereign or other political sub-division of a sovereign nation state if the sub-division has separate legal personality (for example, a Local Authority) and it does not include any legal entity owned by a sovereign nation state (see "Sovereign-owned Entity").	NO *Not covered by this memorandum as that would require additional legal analysis.*	
Sovereign Wealth Fund. A legal entity, often created by a special statute and normally wholly owned by a Sovereign, established to manage assets of or on behalf of the Sovereign, which may or may not hold those assets in its own name. Such an entity is often referred to as an "investment authority". For certain Sovereigns, this function is performed by the Central Bank, however for purposes of this Appendix B the term "Sovereign Wealth Fund" excludes a Central Bank.	NO *Not covered by this memorandum. We are not aware of any sovereign wealth fund established in the Czech Republic.*	
Sovereign-Owned Entity. A legal entity wholly or majority-owned by a Sovereign, other than a	NO	

Description	**Covered by opinion**	**Legal form(s)**[150]
Central Bank, or by a State of a Federal Sovereign, which may or may not benefit from any immunity enjoyed by the Sovereign or State of a Federal Sovereign from legal proceedings or execution against its assets. This category may include entities active entirely in the private sector without any specific public duties or public sector mission as well as statutory bodies with public duties (for example, a statutory body charged with regulatory responsibility over a sector of the domestic economy). This category does not include local governmental authorities (see "Local Authority").	*Not covered by this memorandum as it would not be practical to cover this type of entity in general. Depending on the circumstances and its legal form, a Sovereign-Owned Entity could be a Czech Corporate of a Foreign Corporate.*	
State of a Federal Sovereign. The principal political sub-division of a federal Sovereign, such as Australia (for example, Queensland), Canada (for example, Ontario), Germany (for example, Nordrhein-Westfalen) or the United States of America (for example, Pennsylvania). This category does not include a Local Authority.	NO *Not covered by this memorandum as this type of entity does not exist in the Czech Republic.*	

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