EMEA DC Meeting Statement 6 November 2015

The DC met today to continue its discussions regarding whether a Bankruptcy Credit Event occurred with respect to ONO Finance II Public Limited Company (**ONO** or the **Reference Entity**) as a result of the special resolution[1] passed by the ONO shareholders on 22 October 2015 for the voluntary wind-up and appointment of a liquidator in respect of ONO (the **Special Resolution**). The DC Resolved that a Bankruptcy Credit Event has NOT occurred with respect to the Reference Entity.

The DC's discussions focused on whether the adoption of the Special Resolution constituted the Bankruptcy Credit Event described in Section 4.2(e) of the 2014 ISDA Credit Derivatives Definitions (the **2014 Definitions**) and Section 4.2(e) of the 2003 ISDA Credit Derivatives Definitions as supplemented by the 2009 ISDA Credit Derivatives Determinations Committees, Auction Settlement and Restructuring Supplement (the **Updated 2003 Definitions**).

Section 4.2(e) of the 2014 Definitions/Updated 2003 Definitions provides that a Bankruptcy Credit Event occurs with respect to the Reference Entity if the Reference Entity "*has a resolution passed for its winding up[, official management]*[2] *or liquidation (other than pursuant to a consolidation, amalgamation or merger)*".

The DC was of the view that the Special Resolution satisfied the first part of Section 4.2(e), namely that a resolution has been passed for the winding up of the Reference Entity, and so the focus of the discussion turned to whether such Special Resolution fell within the carve-out contained in Section 4.2(e). That is, if the Special Resolution was passed *pursuant to a consolidation, amalgamation or merger*, a Bankruptcy Credit Event would not be constituted.

The DC noted that following the acquisition announcement by Vodafone in March 2014[3], Vodafone Group Plc successfully acquired 100% of the share capital of Grupo Corporativo Ono, S.A. in July 2014[4] (the **Acquisition**). Therefore, whilst there had unquestionably been a combination of two different enterprises, the DC was of the view that the following two issues required further consideration before it would be in a position to determine whether or not the Special Resolution was passed pursuant to a consolidation, amalgamation or merger:

1. Should the carve-out language (the **Carve-Out**) contained in Section 4.2(e) (and Section 4.2(a))[5] be interpreted narrowly (i.e. did a consolidation, amalgamation or merger occur with respect to ONO) or broadly (i.e. did a consolidation, amalgamation or merger occur with respect to the ONO group[6])?

2. Assuming a broad interpretation of the Carve-Out is appropriate, is there sufficient connection between the Acquisition and the Special Resolution, especially in light of the timing gap between the successful completion of the Acquisition (July 2014) and the ONO shareholders resolving the Special Resolution (October 2015)?

Interpretation of the Carve-Out

It was noted that this issue[7] had been considered by this DC in relation to the Bankruptcy Credit Event questions with respect to NTC[8] and ABB International Finance Limited[9], certain facts of which are similar to those relevant in the present case.

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[1] The details of the special resolution are available on the Irish Companies Registration Office website: https://www.cro.ie/en-ie/
[2] This wording only appears in Section 4.2(e) of the Updated 2003 Definitions but, in any event, is not pertinent for present purposes.
[3] http://www.vodafone.com/content/index/media/vodafone-group-releases/2014/ono.html
[4] http://otp.investis.com/clients/uk/vodafone3/rns/regulatory-story.aspx?cid=221&newsid=434412
[5] Section 4.2(a) of the 2014 Definitions and the Updated 2003 Definitions contains exactly the same carve-out language as Section 4.2(e).
[6] Please see paragraph below which addresses the DC's consideration of the fact that ONO is a stand-alone special purpose vehicle and whether there is sufficient nexus between it and the wider ONO group.

In NTC, the DC considered how the Carve-Out would be interpreted in the context of the Bankruptcy Credit Event definition versus how the same carve-out (identical drafting) would be interpreted in the context of the corresponding limb of the Bankruptcy Event of Default definition in Section 5(a)(vii) of the 1992/2002 ISDA Master Agreement (on the basis that both definitions of "Bankruptcy" are very similar in their drafting).

In the ISDA Master Agreement context, it seems clear that the carve-out should be construed narrowly. That is, a party to an ISDA Master Agreement would need to assess whether a consolidation, amalgamation or merger had occurred *with respect to its counterparty* for the purposes of determining whether or not a Bankruptcy Event of Default had in fact occurred in respect thereof. This narrow reading ties in with the drafting and operation/scope of the Credit Event upon Merger Termination Event (Section 5(b)(iv)/(v)), the Merger Without Assumption Event of Default (Section 5(a)(viii)) and the transfer provisions (Section 7) of the ISDA Master Agreement, all of which refer to a consolidation, amalgamation or merger of the specific counterparty.

On the other hand, whilst the drafting of the Carve-Outs in Section 4.2 is identical to that contained in the equivalent limbs of Section 5(a)(vii) of the ISDA Master Agreement, in NTC the DC concluded that the same narrow reading should not apply. The DC was of the view that the Carve-Out had to be read in context. With respect to CDS contracts, that context is the purchase by Buyer of credit protection from Seller with respect to a third party Reference Entity and therefore such contract, specifically Section 4.2, is generally speaking only intended to trigger where there has been some form of credit impairment with respect to the Reference Entity. Although it was acknowledged by the DC that headings are not determinative for interpretation purposes, the fact that the Section 4.2 is entitled "Bankruptcy" is nevertheless a useful indicator as to how relevant words should be construed. Accordingly, when construing the Carve-Out, the construction should favour a reading which reduces the circumstances where the Bankruptcy Credit Event could be triggered in the absence of any credit impairment. As such, the Carve-Out should be read broadly and on a holistic basis such that if a Reference Entity is wound up or dissolved as part of a group consolidation process following a merger or takeover event at the group level or further to an intra-group reorganisation, then the winding-up or dissolution should not constitute a Bankruptcy Credit Event. This broad interpretation of the Carve-Out was adopted in NTC and as a result the DC concluded that a Bankruptcy Credit Event had not occurred with respect to NTC as its dissolution was part of a planned reorganisation of the NTC group's corporate structure.

The DC also noted that it had taken the same broad approach to the Carve-Out in its deliberations in relation to the Bankruptcy Credit Event question with respect to ABB[10]. However, in the case of ABB there was in fact no corporate event such as a takeover/merger or any intra-group reorganisation of its debt. Rather, it was simply just the case that once all of the debt issued by ABB International Finance Limited had run off at its scheduled maturity date, there was no longer a requirement for such entity to exist within the broader ABB borrowing structure and so it was dissolved. As a consequence, however broadly the Carve-Out was interpreted, there were no events which could fall within its scope.

Consistent with the approach taken in NTC and ABB, the DC concluded that the Carve-Out should be interpreted broadly for purposes of determining whether a Bankruptcy Credit Event has occurred with respect to ONO and therefore the Acquisition (which occurred at the group level, rather than at the ONO level) should be capable of falling within the Carve-Out contained in Section 4.2(e).

Sufficient connection between the Acquisition/consolidation process and the Special Resolution

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[7] The DC was of the view that even though the discussions and analysis in NTC and ABB related to the Carve-Out contained in Section 4.2(a), those discussions and analysis would apply equally with respect to the Carve-Out contained in Section 4.2(e) on the basis that the two carve-outs are drafted exactly the same.

[8] http://dc.isda.org/cds/ntc-s-a-formerly-angel-lux-common-s-a/

[9] http://dc.isda.org/cds/abb-international-finance-limited/

[10] As noted above, the DC was of the view that even though the discussions and analysis in ABB related to the Carve-Out contained in Section 4.2(a), they would apply equally to the Carve-Out contained in Section 4.2(e).

The DC noted that immediately following the successful completion of the Acquisition, Vodafone commenced a tender offer (on 30 July 2014) to repurchase the outstanding bonds that had been issued by the Reference Entity and Nara Cable Funding Limited (which is another entity in the ONO group)[11]. Such tender offer was required pursuant to the change of control provisions contained in the terms and conditions of the relevant bonds. The tender offer was only partially successful and therefore only a portion of the Reference Entity's outstanding bonds were tendered for repurchase[12]. Nevertheless, it is clear that the balance of ONO's bonds that were not tendered for repurchase were subsequently redeemed by ONO[13] on 15 January 2015 (presumably pursuant to the issuer call contained in the terms and conditions of such bonds[14]). Such early redemption is also consistent with the declaration of solvency filed by the ONO shareholders with the Irish Companies Registration Office on 2 October 2015[15] which states that the liabilities of ONO were €47,927 as of 30 June 2015[16]. Based on the facts presented, the DC was of the view that there seemed to be a very deliberate attempt by Vodafone/ONO to redeem all of the ONO debt. Further, there was no evidence to suggest that such redemptions were not linked to the Acquisition and the subsequent consolidation process of the two enterprises (following which ONO would be wound up). The DC noted that the present fact pattern could be distinguished from the ABB fact pattern: in ABB not only had there been no corporate event such as a takeover/merger or any intra-group reorganisation of ABB's debt but also as far the DC was aware there had been no deliberate attempt to buy back or move ABB's outstanding debt before it was dissolved.

In further support of the fact that the DC believed that the Special Resolution was pursuant to the consolidation process of the two enterprises following the Acquisition (and as such there was sufficient connection between the Acquisition and the Special Resolution), the DC noted that there has been other consolidation activity within the ONO group: (i) ONO Midco, S.A.U which was one of the guarantors of ONO's bond obligations has been dissolved[17]; and (ii) Nara Cable Funding Limited and Nara Cable Funding II Limited which were the issuers of the ONO group's secured debt have also had similar special resolutions passed for the voluntary wind-up and appointment of liquidators in respect of such companies[18].

In the interests of completeness, the DC also considered the fact that ONO is a stand-alone special purpose vehicle and so whether there was a sufficient nexus between it and the wider ONO group. In this regard, the DC noted that ONO was a financing vehicle for the ONO group and that ONO's bond obligations were guaranteed by two entities within the ONO group: ONO Midco, S.A.U. and Cableuropa, S.A.U. As such, the DC was of the view that ONO was part of the broader ONO group enterprise.

Based on the above analysis, the DC was of the view that the Special Resolution was passed *pursuant to a consolidation, amalgamation or merger* and as such a Bankruptcy Credit Event has not occurred with respect to ONO Finance II Public Limited Company.

For the sake of completeness, the DC also considered whether the appointment of a liquidator[19] in respect of ONO constituted the Bankruptcy Credit Event described in Section 4.2(f) of the 2014 Definitions/Updated 2003 Definitions. The DC concluded that Section 4.2(f) is not relevant in the present circumstances because Section 4.2(f) refers to a "provisional liquidator" (as opposed to a liquidator) and as a whole refers to types of officials who might intervene in an insolvency context rather than a solvent winding-up (as is the case here).

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11 http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/12035035.html

12 http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/12067733.html

13 http://cbonds.com/emissions/issue/88271 and http://cbonds.com/emissions/issue/93551 / http://www.boerse-berlin.com/index.php/Bonds?isin=XS0584389448

14 See Offering Memorandum dated 2 February 2011 with respect to such bonds which has been published separately on the ONO credit event webpage.

15 The declaration of solvency is available on the Irish Companies Registration Office website: https://www.cro.ie/en-ie/

16 The declaration of solvency also states that the assets of ONO was €63,625 as of 30 June 2015 which means that the loan ONO advance to Cableuropa, S.A.U using the proceeds of the ONO bond issuances has also been repaid.

17 http://cincodias.com/cincodias/2015/04/30/empresas/1430418647_510506.html

18 The details of the special resolutions are available on the Irish Companies Registration Office website: https://www.cro.ie/en-ie/

19 The details of such appointment are available on the Irish Companies Registration Office website: https://www.cro.ie/en-ie/