

EMEA DC Statement 20 May 2016

Summary

The DC met today to continue to review the potential Deliverable Obligations of Norske Skogindustrier ASA (the **Reference Entity**) and agreed to publish the Initial List. The DC determined that all potential Deliverable Obligations that had been submitted for inclusion on the Initial List were Deliverable Obligations for the purposes of 2014 Transactions, but that the 2019s, 2021s and 2023s (each as defined below) were not Deliverable Obligations for the purposes of Updated 2003 Transactions.

This statement summarises the reasoning of the DC on two key issues that were discussed: (i) whether the Reference Entity's Guarantee constitutes a Qualifying Guarantee, and (ii) whether the 2021s and the 2023s satisfy the Not Subordinated Deliverable Obligation Characteristic.

Definitions

For the purposes of this statement, and with reference to the Initial List:

- (a) **2019s** means Deliverable Obligation Number 2;
- (b) **2021s** means Deliverable Obligation Number 3;
- (c) **2023s** means Deliverable Obligation Number 4; and
- (d) **Guaranteed Bonds** means the 2019s, the 2021s and the 2023s, being the Bonds guaranteed by, *inter alia*, the Reference Entity.

Capitalised Terms otherwise used but not defined in this statement have the meaning given to them in the 2016 Credit Derivatives Determinations Committees Rules (January 20, 2016 version).¹

Qualifying Guarantee

In relation to the Guaranteed Bonds, the DC determined that the Reference Entity's Guarantee in respect thereof was a Qualifying Guarantee for the purposes of 2014 Transactions but not for the purposes of Updated 2003 Transactions.

The Listing Particulars in respect of the Guaranteed Bonds (the **Listing Particulars**)² describe the circumstances in which the Reference Entity's Guarantee in respect thereof may be released.³ These include "as a result of a transaction permitted by the *"Certain Covenants – Merger, Consolidation or Sale of Assets"*" clause.⁴ This provision states that the Reference Entity may only (i) consolidate or merge with or into another person or (ii) sell, assign, transfer, lease, convey or otherwise dispose of all or substantially all of its assets to another person, if, amongst other things, the person formed by or surviving the consolidation or merger (if other than the Reference Entity), or the person to whom the disposition of assets has been made, assumes all the obligations of the Reference Entity under the relevant debt documents. The Listing Particulars state that, in such circumstances, the Reference Entity will be released from its obligations as guarantor upon the assumption of those obligations by the transferee entity.

In light of these release provisions, the payment obligations of the Reference Entity can be discharged other than by payment. Therefore, the DC determined that the Reference Entity's Guarantee in respect of the

¹ Available at http://dc.isda.org/wp-content/files_mf/1453298092DC_Rules_Jan_2016_Update.pdf

² Listing Particulars dated 14 July 2015, available at <http://www.norskeskog.com/Files/Filer/Inv%20Rel/Listing%20Particulars%20-%20Final%20July%202015.pdf>

³ See page 165 of the Listing Particulars in relation to the 2019s and page 225 in relation to the 2021s and 2023s.

⁴ See pages 186-188 of the Listing Particulars in relation to the 2019s and pages 246-247 in relation to the 2021s and 2023s.

Guaranteed Bonds did not constitute a Qualifying Guarantee under Section 2.23 of the Updated 2003 Definitions. However, these transfer provisions constitute a Permitted Transfer under Section 3.25 of the 2014 Definitions; therefore, the release of the guarantor in these circumstances does not prevent the Reference Entity's Guarantee constituting a Qualifying Guarantee thereunder.

Not Subordinated

The DC analysed whether the operation of the Intercreditor Agreement to which the Reference Entity is party, and which governs the terms of the Guaranteed Bonds, impacted on the level of Subordination of the Reference Entity's Guarantee. The Intercreditor Agreement itself is not a public document and was not reviewed by the DC. Accordingly, the DC was only able to consider the summary description of the Intercreditor Agreement set out in the Listing Particulars.

“Subordination” is defined in Section 3.13(b)(i)(B) of the 2014 Definitions, which provides that any security arrangements shall not be taken into account. The DC was therefore concerned only with any contractual, trust or similar arrangements providing that either (i) upon the liquidation, dissolution, reorganisation or winding-up of the Reference Entity, claims in respect of one of its obligations are to be satisfied prior to claims in respect of another, or (ii) the holders in respect of one of its obligations will not be able to receive or retain payments of principal in respect of their claims at any time the Reference Entity is in payment arrears or any kind of default on another of its obligation, in each case without taking into account the proceeds of the enforcement of any security. However, provisions that make the obligation to pay conditional on prior-ranking bonds having been paid first must be taken into account. If, in effect, the 2021s and the 2023s cannot be paid by the Reference Entity unless the 2019s have already been paid in full, the 2021s and 2023s would fail the Not Subordinated Deliverable Obligation Characteristic.

The “Ranking and Priority – Priority of Debts” section of the Listing Particulars⁵ describes each of the 2019s (which are secured) and the 2021s and 2023s (which are unsecured) as ranking “*pari passu* and without any preference amongst them”. Conversely, the “Ranking and Priority – Priority of Security” section of the Listing Particulars⁶ describes the 2019s as ranking ahead of the 2021s and 2023s but, as mentioned above, the priority of the 2019s with respect to the application of security proceeds must not be taken into account. Considering these two “ranking and priority” sections of the Listing Particulars, the 2021s and the 2023s would therefore satisfy the Not Subordinated Deliverable Obligation Characteristic.

However, holders of the 2021s and 2023s are required, after insolvency or acceleration, to direct any distributions from the Reference Entity to be paid to the Security Agent (or turnover any amounts received in contravention of this) and the summary in the Listing Particulars of the relevant waterfalls under the Intercreditor Agreement suggests that it is not only the proceeds of the security that are applied to the 2019s on a preferential basis. For example, the waterfall described in the “Order of Application” section⁷ states that all amounts received or recovered by the Security Agent pursuant to the terms of any Debt Document *or* in connection with enforcement of the Transaction Security shall be applied in accordance therewith. This suggests that the waterfall may not just deal with the order in which the proceeds of the security are applied, and gives rise to the possibility that all proceeds of the Reference Entity are paid in accordance with this waterfall, which subordinates payments under the 2021s and 2023s to payments under the 2019s. In this case, the 2021s and 2023s would be subordinated to the 2019s under the 2014 Definitions, and consequently subordinated to the other Deliverable Obligations on the Final List (which are *pari passu* with the 2019s).

Based on the information available to the DC, the DC was unable to reconcile the statements in the Listing Particulars describing the rankings of the Guaranteed Bonds as being *pari passu* with the summary of the waterfall, given that the Listing Particulars reviewed by the DC only provided a limited summary of the Intercreditor Agreement. On a balanced view of the Listing Particulars as a whole, the DC took the view that the intention of the draftsmen was that each of the Guaranteed Bonds would rank equally with respect to the

⁵ See page 140 of the Listing Particulars.

⁶ See page 140 of the Listing Particulars.

⁷ See page 160 of the Listing Particulars.

Reference Entity, subject to the priority of the 2019s *exclusively* with respect to the application of the relevant security proceeds, and the DC resolved that absent further information providing clarity on the statements in the Listing Particulars in relation to the rankings of the Guaranteed Bonds, the 2021s and the 2023s should be included on the Initial List.

Supplemental List and challenges

In accordance with Section 3.3(c) (*Adding Obligations*) of the DC Rules, any Eligible Market Participant may propose to the DC Secretary any potential Deliverable Obligations not on the Initial List by 5:00 p.m. (London time) on Monday 23 May 2016. The Supplemental List will then be published at 7:00 p.m. on Monday 23 May 2016. In accordance with Section 3.3(d) (*Challenging Potential Deliverable Obligations*), any Eligible Market Participant may then challenge the inclusion of an obligation on the Supplemental List, subject to the conditions set out in this section of the DC Rules.