Ardagh Packaging Finance PLC

Submission to the External Review Panel on behalf of an ISDA Member in support of the 'Yes' position (DC questions 2025100602, 2025102701, 2025102901 and 2025110501)

1. Milbank LLP is making this supplemental submission in respect of the External Review Panel's consideration of the following questions of the Credit Derivatives Determinations Committee ("**DC**") concerning Ardagh Packaging Finance PLC (the "**Reference Entity**"): 2025100602, 2025102701, 2025102901 and 2025110501 (the "**Restructuring Questions**"). These submissions are made on behalf of an ISDA Member that actively uses CDS contracts to hedge and otherwise manage its credit investments. Unless otherwise specified, capitalised terms used in these submissions have the same meaning ascribed to them in the 2014 Credit Derivatives Definitions (the "**2014 Definitions**") or the rules of the DC (the "**DC Rules**").

2. Like other similarly situated market participants, our client is concerned that unless the External Review Panel finds that a Restructuring Credit Event occurred on at least one of the dates addressed in the Restructuring Questions, market participants will not be able to rely on the CDS contract to fulfil its purpose in circumstances where debt obligations are restructured outside of certain court processes.[1] Such a finding would leave prospective credit protection buyers without an appropriate remedy in circumstances that are increasingly common in credit markets. This would materially reduce the demand for such contracts, indirectly hurting prospective credit protection

[1] Debt restructurings in which a court process is relevant, such as a Chapter 11 filing in the United States, or a *Sauvegarde* process in France generally will give rise to a Bankruptcy Credit Event under the CDS contract, which generally allows for settlement by reference to the appropriate securities of the Reference Entity, even if those securities are to be the subject of an agreed restructuring.

sellers as well. Such a result cannot reasonably have been intended by the terms of the CDS contract.

3. However, in our view (and that of many other market participants),[2] the contract does clearly provide, on its face, that a credit protection buyer in respect of the Reference Entity is entitled to receive a payment that reflects the diminution in the value of the debt obligations of the Reference Entity, as crystalized by the recapitalisation transaction (the "**Recapitalisation Transaction**") contemplated by the Transaction Support Agreement entered into by the Reference Entity on 28 July 2025 (the "**TSA**") with other members of the Ardagh group, the shareholder and sponsor of the group, and certain holders of (i) the senior secured notes issued by the Reference Entity ("**SSNs**"); (ii) the senior unsecured notes issued by the Reference Entity ("**SUNs**"), and (iii) the payment in kind notes issued by ARD Finance S.A. ("**PIKs**").

4. Properly interpreted and implemented, the CDS contract at issue here should fulfil its intended purpose of compensating protection buyers by reference to the diminution in value of the debt obligations of the Reference Entity, as measured by the drop in the market value of the SUNs:

   4.1 A Restructuring Credit Event had clearly occurred by 7 October 2025 because the Reference Entity had left no doubt, in announcing the publication of a consent solicitation statement pursuant to the terms of the TSA, that it had entered into an agreement with a sufficient number of holders of the SUNs and

[2] See the discussion between Dan Alderson (9fin), Orlando Gemes (Fourier Asset Management), Clark Nicholls (Aucit Investment Management), Nicholas Pappas (Faros Point Capital), and Mark Rieder (La Mar Assets) on 10 September 2025 (Webinar Replay — No country for old CDS — Altice, Ardagh and the Future of Credit Protection - YouTube). See also 9fin's article of 11 September 2025 (Altice, Ardagh and the future of credit protection: webinar key takeaways).

SSNs to bind all other holders of such instruments to the terms of the Recapitalisation Transaction.

4.2 The SUNs qualified as Deliverable Obligations under a hypothetical physically settled CDS contract for which the Event Determination Date was any of the dates referenced in the Restructuring Questions. This is because, as of any of those dates, the terms of the SUNs would not have been amended to require the equitization process and, as a consequence, the Outstanding Principal Balance of the SUNs would not have been reduced to zero.

4.3 Accordingly, the DC will have the ability, pursuant to Rule 3.2(d) of the DC Rules, to structure the Auction so that a commercially reasonable settlement price can be determined by reference to the exchange consideration for the SUNs, since those obligations constituted Deliverable Obligations and could have been physically delivered under the contract.

(A) The terms of the CDS contract should be interpreted in a manner that is consistent with the commercial purpose of the contract as a whole

5. Before addressing the specific question of whether, and if so, when a Restructuring Credit Event has occurred, we wish to make some initial observations concerning the commercial purpose of the CDS contract and the effect on the market of a determination that a Restructuring Credit Event did *not* occur before the Recapitalisation Transaction closed on 12 November 2025.

6. In essence, the purpose of the CDS contract is to allow a credit protection buyer to enter into a contract that will provide for compensation in the event that any qualifying

obligation (referred to as the "Deliverable Obligation") of the reference entity becomes impaired due to the occurrence of a Credit Event, including a Restructuring.[3]

7. After a Credit Event occurs, the CDS contract calculates the quantum of compensation for a protection buyer by reference to the drop in value of any Deliverable Obligation selected by the protection buyer. Market participants trade the product on the basis of this expectation. To use a stylized example:

    7.1 Assume a Reference Entity has two major classes of debt outstanding: unsecured bonds and a broadly syndicated secured loan. As it experiences distress, market participants trade its debt at a discount, with secured debt trading at less of a discount than unsecured debt, for example, 60% of face value for the bond and 75% of face value for the loan. In such a situation, CDS contracts would trade with an implied payout of 40% (the difference between par and the market price of the bonds), probability weighted for the likelihood that a Credit Event would actually occur.

    7.2 Assume then that the Reference Entity agrees a restructuring of its debt with a portion of its creditors sufficient to "cram down" a restructuring on the rest and files to have the plan approved by a relevant court in an insolvency related procedure. This would constitute a Bankruptcy Credit Event and an Auction would be arranged.

[3] See Simon Firth on Derivatives Law and Practice (release 66), §1.045 ("*....the greatest application of derivatives transactions is in reducing risk....Another example would be the use of credit derivatives by a company to reduce the credit risk involved in its trading relationships, the derivative counterparty making a payment to the company if a third party becomes bankrupt or defaults on a significant proportion of its debt obligations.*").

7.3 Assume further that the agreed restructuring plan calls for the forced exchange of the unsecured bonds for equities, among other changes to the credit structure. The list of Deliverable Obligations eligible to be traded in the Auction would include the unsecured bonds, and the Auction would likely settle at a price that reflects the expected value of the consideration into which the unsecured bonds will be exchanged.[4]

8. Because the settlement value of the CDS contract is determined by reference to the value of the Deliverable Obligations selected by the protection buyer, market participants expect CDS contracts to settle by reference to the least expensive (i.e., least valuable) qualifying obligation. In the case of the Reference Entity, these were the SUNs. As a result, if protection buyers are to receive the compensation they have bargained for, the settlement price for the CDS contract will need to be calculated based on the value of the SUNs at the time of settlement.

9. Fortunately, the terms of the CDS contract do provide for an appropriate outcome in this situation because the contract provides for a Credit Event, meaning a triggering event for the determination of the CDS payout, upon the occurrence of a Restructuring.

10. For the reasons expanded on in the sections that follow, and applying the English principles of contractual interpretation (as to which see §§14 to 15 below), we believe

[4] In fact, the CDS market has experienced several examples of these sorts of processes (see, e.g. Isolex, Atos, Talen, Neiman Marcus, and Frontier Communications: Credit Derivatives Determinations Committee » Grupo Isolux Corsan Finance B.V.; Credit Derivatives Determinations Committee » Atos SE. Credit Derivatives Determinations Committee » Talen Energy Supply, LLC; Credit Derivatives Determinations Committee » THE NEIMAN MARCUS GROUP LLC; and Credit Derivatives Determinations Committee » Frontier Communications Corporation). In these cases, the obligations scheduled to be exchanged for equity were still available at the time of the Auction to allow for appropriate price discovery.

that the existing terms of the CDS contract support – indeed require – the following three conclusions:

10.1 A Restructuring is found to have occurred prior to 12 November 2025;

10.2 The SUNs would have qualified as Deliverable Obligations at the time immediately after the Event Determination Date; and

10.3 The DC must publish Auction Settlement Terms that would allow the Final Price to be determined by reference to the exchange consideration received by holders of the SUNs.

11. This application of the terms of the CDS contract is also fully aligned with the commercial purpose of CDS contracts.

12. However, if the terms of the CDS contract are interpreted in such a way that there is no gap in time between the moment when holders of the SUNs knew they could not avoid equitization of their notes, on the one hand, and the moment when the equitization actually occurred, on the other, then the SUNs – or the assets received by holders of the SUNs in the Recapitalisation Transaction – would not qualify for the purpose of determining the settlement payout, and protection buyers would not receive appropriate compensation following the Credit Event. An interpretation which leads to that outcome would plainly be inconsistent with business common sense (and would make the CDS contract unmarketable, harming both prospective buyers and sellers of credit protection).

(B) <u>A Restructuring Credit Event occurred well before the final mechanical steps of the Recapitalisation Transaction were implemented</u>

13. A Restructuring Credit Event in respect of the Reference Entity occurred by 7 October 2025 and, in any event, by 27 October 2025, well before the Recapitalisation Transaction closed on 12 November 2025. The Restructuring Questions should be answered in the affirmative.

14. Pursuant to Section 4.6(e) of the DC Rules, the Restructuring Questions are to be interpreted as a matter of English law, the principles of which are well-settled and will be familiar to the External Review Panel. A pithy summary of the key principles was set out in the decision of the Supreme Court in <u>Sara & Hossein Asset Holdings Ltd v. Blacks Outdoor Retail Ltd</u> [2023] UKSC 2 at §29:

> "*(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
>
> *(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.*
>
> *(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.*"[5]

15. Where there are two or more plausible readings of a provision, the construction most consistent with business common sense is preferred, the presumption being that the parties would not have intended an uncommercial result.[6]

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[5] See too <u>Rainy Sky SA v. Kookmin Bank</u> [2011] 1 WLR 2900; <u>Wood v. Capita Insurance Services Ltd</u> [2017] 2 WLR 1095; and the cases cited therein, including <u>Investors Compensation Scheme Ltd v. West Bromwich Building Society (No 1)</u> [1998] 1 WLR 896; <u>Chartbrook Ltd v. Persimmon Homes Ltd</u> [2009] 1 AC 1101; <u>Re Sigma Finance Corp</u> [2010] 1 All ER 571; <u>Arnold v. Britton</u> [2015] AC 1619.

[6] *Ibid*, <u>Rainy Sky SA</u>; <u>Wood v. Capita</u>.

16. Applying those principles: a "*Credit Event*" is defined under section 4.1 of the 2014 Definitions as meaning "*with respect to a Credit Derivative Transaction, one or more of….Restructuring*". Section 4.7(a) defines a "*Restructuring*" as meaning:

> "…*with respect to one or more Obligations and in relation to an aggregate amount of not less than the Default Requirement, any one or more of the following events* ***<u>occurs</u>*** *in a form that binds all holders of such Obligation, is* ***<u>agreed</u>*** *between the Reference Entity or a Governmental Authority and a sufficient number of holders of such Obligation to bind all holders of the Obligation* ***<u>or</u>*** *is* ***<u>announced</u>*** *(or otherwise decreed) by the Reference Entity or a Governmental Authority in a form that binds all holders of such Obligation*…"
>
> (emphasis added)

17. The relevant event at issue concerning the indentures held by the SUN noteholders is set out in section 4.7(a)(ii), namely "*a reduction in the amount of principal or premium payable at redemption (including by way of redenomination)*".

18. There are, in effect, three ways in which a Restructuring can arise: (a) by the relevant event <u>occurring</u> in a form that binds all noteholders; (b) by the relevant event being <u>agreed</u> between the Reference Entity and a sufficient number of noteholders to bind all other noteholders; or (c) upon an <u>announcement</u> of the relevant event by the Reference Entity in a form that binds all noteholders. Those are three distinct alternatives, clearly separated by an "*or*" before the third option in (c). There is plainly no requirement that the relevant event, in this case being the reduction in the amount of principal or premium payable at redemption, should actually have happened before a Restructuring Credit Event can be determined. The clauses beginning with "*agreed*" and "*announced*" would serve no purpose in those circumstances. Indeed, had the drafters of the 2014 Definitions intended that to be the case, they would have dispensed with all the words after "***<u>occurs</u>*** *in a form that binds all holders of such Obligation*" until the statement in parenthesis concerning Bonds. That would have

made for a much simpler definition (as was done, for example, in section 4.8: "*Government Intervention means…any one of more of the following events occurs as a result of action taken or an announcement made by a Governmental Authority…*").

19. However, in choosing to include the "*agreed*" and "*announced*" options, and separate them with a conjunction, it is difficult to see how a reasonable person with all the background knowledge available at the time would have understood section 4.7(a) as requiring the relevant event to have actually occurred before a Restructuring Credit Event could be triggered. Rather the natural and ordinary reading of the definition as a whole is that it presents three alternative formulations, any one of which can trigger a Restructuring Credit Event.

20. Moreover, the interpretation of section 4.7(a) must be understood in the context of the commercial purpose and function of a CDS contract, which as noted above is to allow a protection buyer to be paid compensation in the event that an Obligation becomes impaired due to the occurrence of a Credit Event. Interpreting section 4.7(a) to require the terms of the Obligation to have actually been changed before a Restructuring Credit Event can be triggered would utterly frustrate the purpose of the contract in any circumstance in which the principal of the relevant Obligation is completely written down, as that Obligation would no longer be available to be used to determine the Final Price. Objectively, that cannot have been what the parties intended when they entered into the CDS contract.

21. Accordingly, the Panel need only find that an **<u>agreement</u>** was reached between the Reference Entity and a sufficient number of noteholders to bind all of them, and not that the write down of the entire Recapitalisation Transaction had actually occurred.

In our view, a Restructuring Credit Event was triggered as soon as a controlling portion of the noteholders agreed that the consent solicitations would proceed. That happened on 29 September 2025. We say this for the following reasons:

21.1 The TSA bound the parties to complete the restructuring, but left the precise nature of the Recapitalisation Transaction, and the method by which it would be implemented to be agreed. For example:

(a) The Term Sheet attached to the TSA provided that the Recapitalisation Transaction could be implemented by way of an English scheme of arrangement overseen by the courts if the 90% threshold of support was not met in respect of all classes of noteholders (subject to meeting a consent threshold of 75%).

(b) Section 17 of the TSA also provided that the implementation of the Recapitalisation Transaction would be subject to certain conditions precedent being met. This included, for example, the execution of each of the Definitive Documents (as defined therein) which were to be "*in form and substance*" consistent with both the Term Sheet and TSA, but to the extent not addressed in either of those documents, on terms acceptable to the parties.

21.2 The fact that the TSA did not fully commit the parties to the Recapitalisation Transaction is also evident from the fact that the parties had rights to terminate the TSA under certain conditions (section 16). This included, for example, where the 90% threshold of support was not met in respect of each class of noteholder within 10 Business Days of the effective date of the TSA (see section 16.1(d) and 16.2(d)).

21.3 This is why the EMEA DC, in response to a DC Question posed on 14 August 2025, determined that no Restructuring Credit Event had occurred at that stage. In reaching that conclusion, the EMEA DC considered a number of features of the TSA, including the fact that it was open to the Reference Entity to implement the Recapitalisation Transaction by way of a scheme of arrangement, that the noteholders had an ability to terminate where the 90% threshold was not met within 10 Business Days of the effective date, and that the implementation was contingent on satisfying certain conditions precedent in the TSA. By 29 September 2025, those matters had all been resolved: the Recapitalisation Transaction was to be implemented by way of consent solicitations, the terms of which had been agreed by more than 90% of the SUN and SSN noteholders without the TSA being terminated.

21.4 But all of these contingencies and agreements to be agreed were resolved once the Reference Entity finalised and published the definitive terms of the consent solicitation. By way of a press announcement on 29 September 2025, the Reference Entity confirmed that the 90% threshold had been met in respect of the SUNs and SSNs[7] and that the Recapitalisation Transaction would be implemented by means of a consent solicitation, with the relevant amendments to the indentures taking the form of supplemental indentures. The Reference Entity also noted that the consenting noteholders would continue to be subject

[7] The Reference Entity had obtained the consent of 96.3% of the SSNs, 97.9% of the SUNs and 81.8% of the PIKs.

to the commitments made in the TSA to support the Recapitalisation Transaction.[8]

21.5 It was clear from that announcement that the TSA had not been terminated by the noteholders in accordance with clause 16, despite the 90% threshold having not been met in relation to the PIK holders. It was therefore at this point that Publicly Available Information proved that a firm agreement had been reached between the Reference Entity and a sufficient number of SUN and SSN noteholders (i.e., more than 90%) to bind all holders of the SUNs and SSNs to the Recapitalisation Transaction by way of the consent solicitations. In plain commercial terms, there was by this point no way for a market participant holding the SUNs to avoid its holding being forcibly exchanged into equity, whether or not such holder had consented to the Recapitalisation Transaction. This is precisely the sort of Restructuring event the CDS contract is designed to hedge against.

22. In these circumstances, the answer to Restructuring Question 2025100602 is clearly 'Yes'.

23. But even if it could be said that there was no binding agreement as at 29 September 2025 (which, for the reasons set out above, our clients do not accept), the following events put beyond doubt that a Restructuring Credit Event occurred before the Recapitalisation Transaction closed on 12 November 2025:

8 Ardagh announces launch of consent solicitations to amend its existing indentures and mandatorily transfer certain of its existing notes in consideration for new securities | Ardagh Group S.A.

23.1 An announcement by the Reference Entity on 27 October 2025 of the occurrence of "*Expiration Time*" in respect of each existing indenture pursuant to the consent solicitations.[9] The Reference Entity confirmed that consents pursuant to the consent solicitations had been received from noteholders representing not less than a majority in aggregate principal amount of the respective existing notes issued under each existing indenture. The effect of this was that noteholders of the SSNs or SUNs who had already given their support to the consent solicitations could no longer withdraw their consent (see the 'Withdrawal and Revocation Rights' in the Term Sheet). In other words, those noteholders were bound to proceed with the Recapitalisation Transaction.[10]

23.2 The following day, the Reference Entity announced the consent solicitation results, confirming that the Expiration Time had occurred at 5pm (New York time) on 27 October 2025 and that the necessary number of consents had been obtained to implement the Recapitalisation Transaction in respect of the SSNs and SUNs on a consensual basis. The press release confirmed that the 90% threshold had been exceeded in respect of both classes of noteholders.[11]

23.3 Despite the 90% thresholds being met in respect of the SSN and SUN noteholders, the Reference Entity announced on 28 October 2025 the re-opening

[9] The press release referred to "*Effective Time*" which is not a defined term under the TSA. "*Expiration Time*" is defined in the Term Sheet as being 11.59pm New York time on the date falling 20 U.S. Business Days after the Launch Date (being a date prior to 31 December 2025), unless extended by the relevant Issuer.

[10] Ardagh announces Effective Time in respect of Consent Solicitations | Ardagh Group S.A.

[11] Announcement of Consent Solicitation Results and Partial Re-Opening of Consent Solicitations | Ardagh Group S.A.

of the SSN and SUN consent solicitations, extending the Expiration Time for those classes of notes to 5pm (New York time) on 3 November 2025.[12]

23.4 On 4 November 2025, the Reference Entity announced the consent solicitation results confirming that the Expiration Time in respect of SSN and SUN consent solicitations had occurred and that more than 90% of the SUN and SSN noteholders had agreed to the consent solicitations. The Reference Entity re-confirmed "*As previously announced on October 28, 2025*" that it had obtained the consents needed to implement the Recapitalisation Transaction.[13]

24. It is therefore clear that, even on the basis of the consent solicitation itself without regard to the TSA, by 27 October 2025, an agreement had been reached between the Reference Entity and a sufficient number of holders to bind all other holders, and there was no basis to expect that the SUNs would not be fully exchanged for equity as provided in the consent solicitation.

25. In fact, though, these announcements confirm that it would be unreasonable to ignore the binding terms of the TSA, as implemented by the consent solicitation, since more than 90% of the noteholders of the SUNs and SSNs had, in the TSA, already entered into a binding agreement to sign on to the consent solicitation document. With publication of the consent solicitation statement on 29 September 2025, it was clear that every detail of the Recapitalisation Transaction had been agreed to by the Reference Entity and a sufficient number of holders to bind the rest.

[12] The PIK notes consent solicitations were not re-opened and since the 90% threshold had not been met in respect of that class of notes (only 82% in value consented), the Reference Entity confirmed that it would not implement the amendments to the PIK notes.

[13] Announcement of Consent Solicitation Results | Ardagh Group S.A.

(C) **<u>As of any date prior to the final settlement of the Recapitalisation Transaction, the SUNs qualified as Deliverable Obligations</u>**

26. Assuming that the External Review Panel determines correctly that a Restructuring Credit Event occurred prior to the final settlement of the Recapitalisation Transaction, the other relevant terms of the CDS contract will (or should if they are correctly interpreted) result in a settlement price for the contract that is calculated by reference to the value of the SUNs (or, as noted in Section (D) below, the value of the consideration received by holders of the SUNs after the settlement of the Recapitalisation Transaction). The first such relevant determination is whether the Outstanding Principal Balance ("**OPB**") of the SUNs should be considered to have been greater than zero on the day the Restructuring Credit Event was determined to have occurred. As long as the OPB is greater than zero on the relevant date of determination, the SUNs should qualify as Deliverable Obligations.[14]

27. In relevant part, Section 3.8 of the 2014 Definitions establishes that the OPB is calculated by deducting from the principal amount of any relevant Obligation any portion of that principal amount which, **<u>pursuant to the terms of the obligation</u>**, may be reduced "*as a result of the effluxion of time or the occurrence or non-occurrence of an event or circumstances*" (i.e., a contingency).

28. Central to the determination of the OPB of the SUNs is the date on which the OPB question is assessed and the terms of the Obligation in effect on that date. If the "*terms of the obligation*" as they exist on the relevant date already provide for the mandatory equitization of the SUNs, then the OPB will be determined to be zero and the SUNs

[14] We have assumed here, because the issues are not in dispute, that the SUNs satisfy the Deliverable Obligation Characteristics in respect of Standard European Corporate CDS contracts.

will not qualify as Deliverable Obligations. On the other hand, if the determination of the OPB question is made on any date prior to the actual amendment of the Obligation's terms, then the SUNs would qualify as Deliverable Obligations.

29. Section 3.8(a)(ii) and (A) of the 2014 Definitions provides that an assessment of the OPB should be undertaken "*in accordance with the terms of the obligation in effect on either (I) the NOPS Effective Date (or if the terms of the obligation are amended after such date but on or prior to the Delivery Date, the Delivery Date) or (II) the Valuation Date, as applicable*". Applying English principles of contractual construction, the words "*pursuant to the terms of the obligation*" should be interpreted as meaning the terms of the indenture as at the relevant date, rather than the terms of the indenture as eventually amended by the Recapitalisation Transaction:

29.1 As already noted, the Recapitalisation Transaction involves a mandatory transfer, whereby the debt obligation is replaced with equity, giving the holder of the released debt new rights as a shareholder. At that point, there is no longer an "*obligation*" and therefore no longer "*terms of the obligation*" which could be considered when assessing the OPB.

29.2 A mandatory exchange of debt for equity that is governed by the terms of a consent solicitation or arrangement cannot be said to be an exchange "*pursuant to the terms of the obligation*". Rather, it is an exchange pursuant to separate terms under a separate document.

29.3 Firth on *Derivatives Law and Practice* makes a similar point in the context of the deduction for a Prohibited Action: "*In each case, a deduction is required only where the counterclaim, defence or right of set-off arises* ***pursuant to the***

terms of the obligation whose Outstanding Principal Balance is being assessed. If, for example, a right of set-off exists under a separate agreement, or in equity, this test would not be satisfied*, even if, on a delivery of the obligation, the Seller would take the obligation subject to that right.*" (§17.141, emphasis added).

29.4 Further, section 3.8(a)(A) of the 2014 Definitions makes clear that the OPB assessment is determined in accordance with the terms of the obligation "*in effect*" on either the NOPS Effective Date (or Delivery Date if applicable), or the Valuation Date. This is in contrast to the definition of "*Not Contingent*" in the 2003 Definitions, which required an assessment "*as of the Delivery Date* ***and all times thereafter****....*". Had the drafters of the 2014 Definitions intended for the OPB assessment to take into account the terms of the Obligation as they stood both at the NOPS Effective Date (or Valuation Date, as the case may be) and "*all times thereafter*", that would no doubt have been made clear. Instead, the 2014 Definitions plainly intend for the OPB assessment to be referrable to the indenture terms in effect as at the specific dates identified in section 3.8(a)(A).

29.5 This is further born out when one considers that the introduction of the OPB definition in the 2014 Definitions seems to attribute a narrower meaning to contingency than had previously been understood from the 2003 ISDA Credit Derivatives definitions (the "**2003 Definitions**"). Specifically, the definition of "*Deliverable Obligation Characteristic*" in the 2003 Definitions included the following concept of "*Not Contingent*":

"*any obligation having as of the Delivery Date and all times thereafter an outstanding principal balancer, or in the case of obligations that are not Borrowed Money, a Due and Payable Amount, that pursuant to the terms of such obligation may not be reduced as a result of the occurrence or non-occurrence of an event or circumstance…*".

29.6 That "*Not Contingent*" definition was deleted in the 2014 Definitions and, instead, the concept of disregarding anything that is contingent other than a Permitted Contingency was incorporated into the calculation of the OPB. The effect of that change is that whilst, under the 2003 Definitions, an instrument that was the subject of a Restructuring may not have qualified as a Deliverable Obligation (because the words "*and all times thereafter*" might have been read to have been applicable to the words "*the occurrence or non-occurrence of an event*"), the same cannot be said of the 2014 Definitions. In other words, the mere fact that the SUNs notes were subject to a Restructuring does not prevent them from being Deliverable Obligations.

30. In this case, the 29 September 2025 press announcement[15] states that the amendments would be implemented by the issue of supplemental indentures on the Settlement Date of the Recapitalisation Transaction, which was 12 November 2025. Therefore, on all days prior to the Settlement Date, the **terms of the obligation** did not provide that the SUNs would eventually be equitized.[16]

[15] Ardagh announces launch of consent solicitations to amend its existing indentures and mandatorily transfer certain of its existing notes in consideration for new securities | Ardagh Group S.A. ("…*in order to facilitate the SUN Mandatory Transfer, the SUN Proposed Amendments will be implemented on the Settlement Date to amend such Existing SUN Indenture and Existing SUNs in accordance with the terms of the Consent Solicitation Statement and in the form of a supplemental indenture*").

[16] Section 9.03 of the Indenture under which the SUNs were issued describes the specific act that causes the terms of the notes to be amended: "*Upon the execution of any supplemental indenture under this Article Nine, this Indenture shall be modified in accordance therewith, and such supplemental indenture shall form a part of this Indenture for all purposes; and every Holder of Notes theretofore or thereafter authenticated and delivered hereunder shall be bound thereby.*"

31. Accordingly, because a protection buyer could have delivered a Notice of Physical Settlement in respect of the SUNs at any point after the Restructuring Credit Event but before the mandatory transfer, a protection buyer under a physically settled CDS contract could have delivered the SUNs as Deliverable Obligations in exchange for the amount of the OPB.

32. On the other hand, a determination that there was no Restructuring Credit Event before the settlement date of the Recapitalisation Transaction (i.e., if all of the Restructuring Questions are answered with a 'No'), would foreclose the ability to calculate the settlement price of the contract by reference to the SUNs. This would lead to the commercially absurd result that a protection buyer cannot receive appropriate compensation under the relevant CDS contract because the SUNs would have had a zero OPB balance, and, in the absence of any other Deliverable Obligation, settlement would occur at par. In those circumstances, the CDS contract would provide no protection to the buyer, contrary to its purpose.

(D) <u>If the SUNs would have qualified as Deliverable Obligations, the Auction Settlement Terms should provide for delivery in the Auction of the consideration received by the holders of the SUNs</u>

33. Now that the SUNs have been equitized, the Credit Derivatives Auction Settlement Terms (the "**Auction Settlement Terms**") need to be amended pursuant to DC Rule 3.2(d) in order to allow the exchange consideration to be deliverable into the Auction. Doing so would, consistent with the DC Rules, give protection buyers the same economic outcome they would have achieved had Physical Settlement applied and would avoid protection buyers being prejudiced from the Auction taking place after the Deliverable Obligations have been replaced with equity of the Reference Entity.

34. The EMEA DC will be familiar with the need to amend the Auction Settlement Terms in these circumstances. On 13 September 2019, the EMEA DC published an Explanatory Statement summarising the approach taken in the draft 2019 Steinhoff Europe AG Credit Derivatives Auction Settlement Terms, which were said to be necessary to "*ensure efficient operation of the Auction in light of the debt restructuring of Steinhoff Europe AG*".[17] In Steinhoff, the EMEA DC noted (*inter alia*) how one of the guiding principles behind the move from Physical Settlement to Auction Settlement was that, so far as possible, market participants should not be prejudiced by the change. The DC gave an example of how a market participant could be unfairly prejudiced: "*it would be unfair if there are good Deliverable Obligations that survive the occurrence of the relevant Credit Event – and so the CDS trade could have been immediately physically settled – but these obligations have disappeared by the time the Auction takes place. So* ***the DC may seek to avoid this prejudice*** *by expediting the Auction so that Auction Covered Transactions may be settled whilst the relevant Deliverable Obligations are still available, or* ***by making appropriate amendments to the Auction Settlement Terms. This approach is anticipated in Section 3.2(d) of the DC Rules. 3.4***" (§3.3, emphasis added).

35. Having concluded that the delay to settlement risked prejudicing protection buyers (when compared to the situation that would have prevailed had Physical Settlement applied), the DC resolved to apply the principle set out in DC Rule 3.2(d) of the DC Rules. The Explanatory Statement helpfully summarises the effect of DC Rule 3.2(d), namely that "*if (i) the DC determines that the Credit Derivatives Auction Settlement Terms and Final List are not broadly reflective of the Deliverable Obligations and*

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ability to settle which would have been available if Physical Settlement had been the applicable Settlement Method, and (ii) that this would cause prejudice to either Buyer or Seller under a Relevant Transaction, the relevant DC may make amendments to the Credit Derivatives Auction Settlement Terms and/or Final List as applicable in an attempt to avoid or mitigate against such prejudice" (§3.5).

36. Thus, if the External Review Panel concludes that a Restructuring took place on one of these earlier dates, the CDS contract can still be resolved in a manner that would meet the commercial expectations of the parties. The DC should easily determine that this is a situation equivalent to Steinhoff: had Physical Settlement been available, a protection buyer holding the SUNs could have delivered such debt in settlement of a CDS transaction (see section (C) above). The delay to settlement as a result of the decision to hold the Auction only once the Reference Entity had fully implemented the Recapitalisation Transaction prejudices this because – adopting the DC's own words in Steinhoff – the "*original Deliverable Obligation(s) that a protection buyer could have delivered no longer exist, and have been replaced by* [other assets] *that would not constitute Deliverable Obligations in respect of the Reference Entity*" (§3.4).[18]

37. Adjusting the Auction Settlement Terms to achieve an outcome equivalent to the relevant Deliverable Obligation being freely traded and settled in the Auction would

[18] We note that, although certain trading restrictions would have applied to the vast majority of the beneficial interests in the SUNs because their holders had acceded to the TSA, the Reference Entity's announcements regarding the adherence levels of the SUNs showed that there were still at least $11.2 million face amount of SUNs outstanding in the hands of market participants who had not signed up to the TSA or the consent solicitation. Because of the multi-day physical settlement period applicable to CDS contracts, this would have been more than enough supply to allow settlement of physically settled contracts with aggregate physical settlement amounts many times greater than this principal amount. The same would have been true if an Auction had been held at the relevant time.

also be consistent with the treatment of certain other recent Credit Events addressed by the DC. In the case of Altice France, the DC allowed the exchange consideration to be delivered in circumstances where the transactions formed in the Auction did not settle before the exchange of the debt obligations occurred.[19] In both Isolux and Atos, at the time when a Bankruptcy Credit Event occurred, the Reference Entity and its creditors were party to binding, fully-agreed restructuring proposals that would result in the equitization of senior unsecured debt upon the approval of the plan by the relevant court, but those instruments were (correctly, in our view) deemed deliverable in the Auction.[20]

(E) Conclusion

38. In sum, we believe the viability of the corporate CDS contract depends upon the External Review Panel and the DC reaching the conclusions outlined above, specifically:

    38.1 The definition of Restructuring allows for the existence of a gap in time between the creation of an agreement binding on all holders and the final implementation of that agreement;

[19] Credit Derivatives Determinations Committee » Altice France S.A.

[20] Credit Derivatives Determinations Committee » Grupo Isolux Corsan Finance B.V.; and Credit Derivatives Determinations Committee » Atos SE. The Americas DC has also never excluded a Deliverable Obligation because of an impending equitization, even in situations where the reference entity filed for Chapter 11 bankruptcy with a fully-baked restructuring agreement that provided for equitization of senior unsecured debt (see, e.g. Talen Energy Supply, Neiman Marcus and Frontier Communications Corporation, where in all cases the senior unsecured debt was equitized on the terms set forth in the restructuring agreement in place at the time of filing: Credit Derivatives Determinations Committee » Talen Energy Supply, LLC.; Credit Derivatives Determinations Committee » THE NEIMAN MARCUS GROUP LLC; and Credit Derivatives Determinations Committee » Frontier Communications Corporation).

38.2 The fact that a binding agreement exists to cause an obligation to be converted to equity does not immediately cause its OPB to be reduced to zero; and

38.3 Where necessary, the Auction Settlement Terms will be written to allow for delivery of the consideration given to holders of a restructured obligation.

39. The equitization of unsecured debt is not a rare occurrence in corporate restructuring transactions, and treating those instruments as contingent, and therefore non-deliverable, would dramatically impact CDS recovery in Restructuring Credit Events. Even the spectre of this possibility would dramatically impact CDS in advance of the Credit Event, as CDS recovery and pricing would differ significantly based on expectations of which instrument will ultimately be the cheapest-to-deliver. It would be difficult to defend the utility of CDS protection if it can be made to vanish in a relatively common restructuring scenario such as this.

Milbank LLP

2 December 2025