

ANNEX III

CUSTODY AGREEMENT

This Custody Agreement (the “**Agreement**”) is entered into by and between:

- (1) the contracting States signatories to the Joint Procurement Agreement for the allowances to be auctioned by the common auction platform,

Bulgaria, Croatia, Czechia, Estonia, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia, as beneficiary Member States of the Modernisation Fund established pursuant to Article 10d of the EU ETS Directive for the allowances to be auctioned by the common auction platform for the Modernisation Fund,

The European Commission for the allowances to be auctioned by the common auction platform for the Innovation Fund, established pursuant to Article 10a(8) of the EU ETS Directive,

each a “**Custodian Lender**” and together referred to as the “**Custodian Lenders**”,

collectively represented under this Agreement by the European Commission (hereinafter referred to as the “**Commission**” or the “**Representative**”), on the one part,

and

- (2) European Commodity Clearing AG, established at Augustusplatz 9, 04109 Leipzig, Germany, registration number HRB 22362, VAT registration number: DE 248 156 757, a Central Counterparty authorized in accordance with EMIR (hereinafter referred to as “**ECC**” or the “**Custodian**”, as the context may require), on the other part,

each a “**Party**”, and together referred to as the “**Parties**”.

WHEREAS

- (A) The following EU Member States and EEA-EFTA States are signatories to the Joint Procurement Agreement and are contracting States to the Service Contract for the third common auction platform, which is to auction their allowances: Belgium, Bulgaria, Czechia, Denmark, Estonia, Ireland, Spain, France, Finland, Greece, Italy, Cyprus, Croatia, Latvia, Lithuania, Luxembourg, Hungary, Malta, The Netherlands, Austria, Portugal, Romania, Slovenia, Slovakia, Sweden, Iceland, Liechtenstein, Norway (the “**Contracting States**”). These States are the Custodian Lenders under this Agreement for their allowances to be auctioned at the third common auction platform.
- (B) Article 10d of the EU ETS Directive establishes the Modernisation Fund, which must operate under the responsibility of the beneficiary Member States. The allowances for the Modernisation Fund are to be auctioned in accordance with the principles and modalities laid down in Article 10(4) of EU ETS Directive (set in the Auctioning Regulation) at the common auction platform. The following EU Member States are beneficiaries of the Modernisation Fund: Bulgaria, Croatia, Czechia, Estonia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia.
- (C) With the exception of Poland, all beneficiary Member States of the Modernisation Fund, are Contracting States. Pursuant to Article 4(2)(a) of the Joint Procurement Agreement they have authorised the Commission to sign the escrow and custody agreements on their behalf. An amendment to Annex III of the Joint Procurement Agreement was adopted on 12 November 2020 to allow non-participating Member States to become observers to the Joint Procurement Steering

Committee for the purposes of the auctioning of allowances for the Modernisation Fund and the Innovation Fund.

- (D) Poland signed the amended Annex III of the Joint Procurement Agreement and became an observer for the purposes of the auctioning of allowances for the Modernisation Fund. Thereby, Poland is bound by Article 4 of that Agreement on the authority given to the Commission to act on its behalf and by the provisions on non-contractual liability as per Article 45 in conjunction with Article 38 of that Agreement.
- (E) Article 10a(8) of the EU ETS Directive establishes the Innovation Fund. In accordance with Article 20 of the Innovation Fund Regulation, the European Commission ensures that the allowances destined for the Innovation Fund are auctioned in accordance with the principles and modalities laid down in Article 10(4) of EU ETS Directive (set in the Auctioning Regulation). Article 19(3) of the Innovation Fund Regulation states that the revenues of the Innovation Fund constitute external assigned revenues within the meaning of Article 21 of the Financial Regulation. Those revenues are to be channelled through the Union Budget.
- (F) Article 22 of the Auctioning Regulation requires each Member State to appoint an auctioneer and establishes the rules for the appointment of auctioneers by the Member States for the auctioning of their allowances. In accordance with Article 24 of the Auctioning Regulation, the European Investment Bank (“**EIB**”) is the auctioneer for the allowances to be auctioned from 2021 for the Modernisation Fund and for the Innovation Fund.
- (G) Pursuant to the EU ETS Directive and the Registry Regulation, a Union Registry is established, in which accounts can be opened to hold allowances created for the purposes of the European Union Emissions Trading System (“**EU ETS**”).
- (H) Article 36 of the Registry Regulation provides that an allowance is a fungible, dematerialised instrument. The dematerialized nature of allowances implies that the record of the Union Registry constitutes prima facie and sufficient evidence of title over an allowance, and of any other matter which is directed or authorised to be recorded in the Union Registry by the Registry Regulation. The fungibility of allowances implies that any recovery or restitution obligations that may arise under national law in respect of an allowance only apply to the allowance in kind. Thus, allowances may be kept in “book-entry” form in the Union Registry either (i) on an individual account opened in the name of the owner, or (ii) on an omnibus account opened in the name of a custodian.
- (I) Following the entry into force of MiFID II, all emission allowances auctioned on an auction platform (including two-day spot contracts and five-day futures) should be treated as financial instruments pursuant to Section C (11) of Annex I of MiFID II.
- (J) The Custodian Lenders are to be regarded as professional clients within the meaning of Article 4(1)(10) MiFID II.
- (K) Pursuant to Article 13 of the Registry Regulation, a clearing system or a settlement system that is connected to an auction platform appointed pursuant to the Auctioning Regulation may submit to a national administrator a request for the opening of an Auction Collateral Delivery Account in the Union Registry.
- (L) ECC operates a clearing system within the meaning of the Settlement Finality Directive and ECC is connected to the European Energy Exchange AG (“**EEX**”) (the third common auction platform appointed in accordance with Article 26(1) of the Auctioning Regulation).
- (M) Pursuant to Article 54 of the Registry Regulation *juncto* Article 46 of the Auctioning Regulation, allowances to be auctioned by an auction platform must be transferred in the Union Registry, prior to the opening of a bidding window, from the EU (Aviation) Auction Account into an (omnibus) Auction Collateral Delivery Account and are “held in escrow by a clearing system or settlement system acting as custodian”, until their delivery to the successful bidders or their successors in title, pursuant to the results of the auction, after payment of the auction proceeds has been effected.

CAP3 - Template Custody Agreement – Final version of 10 November 2020

- (N) ECC holds an Auction Collateral Delivery Account in the Union Registry, on an omnibus basis, and keeps segregated Custody Accounts on its own books and records for each Contracting State under the Service Contract, for the Modernisation Fund and for the Innovation Fund on which the allowances are credited.
- (O) Pursuant to Article 35 of the Registry Regulation juncto Article 47(2) of the Auctioning Regulation, upon payment of the sum due pursuant to Article 44(1) of the Auctioning Regulation, each successful bidder must be delivered the allowances allocated to that bidder by transferring the allowances from the Auction Collateral Delivery Account held by ECC, in whole or in part into one or more accounts in the Union Registry held by (i) either the successful bidder directly or (ii) held in escrow by a clearing system or settlement system acting as custodian for the successful bidder.
- (P) ECC shall proceed to deliver any auctioned allowances to the successful bidder(s) in accordance with Article 47 of the Auctioning Regulation by:
 - (i) Debiting them from the Custody Account(s) held in its books and crediting them to the accounts of the successful bidder(s) held in its books; and
 - (ii) Without delay, confirming the transfers of the relevant allowances from its Auction Collateral Delivery Account held in the Union Registry to its trading account in the Union Registry.
- (Q) The Parties now desire that ECC is appointed as custodian, with reference to Articles 46 and 47 of the Auctioning Regulation which have direct effect in Germany and in all other jurisdictions of the Custodian Lenders.
- (R) Parties want to ensure at all times that the Custodial Allowances held on the Custody Accounts are exclusively held in custody by ECC as custodian for the sole benefit of the respective Custodian Lenders.
- (S) Finally, prior to the opening of the bidding window for the auctioning of two-day spot contracts or five-day futures, the Custodian Lenders (acting through their Auctioneer) must, in accordance with Article 50 of the Auctioning Regulation, give allowances as collateral to be “held in escrow by the clearing system or settlement system acting as custodian”. The Parties will therefore enter into a separate escrow agreement appointing the Custodian as escrow agent pursuant to Article 50 (1) and (3) of the Auctioning Regulation (the “**Escrow Agreement**”).

IN CONSIDERATION OF THE FOREGOING, THE PARTIES HAVE AGREED AS FOLLOWS:

ARTICLE 1. DEFINITIONS AND INTERPRETATION

Article 1.1 Definitions

“**Auction Collateral Delivery Account**” shall have the meaning given to it in Article 5.1 of this Agreement.

“**Auctioneer**” means any public or private entity appointed in accordance with Articles 3(1)(20) and Article 24(1) of in the Auctioning Regulation.

“**Auctioning Regulation**” means Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and the Council establishing a system for greenhouse gas emission allowances trading within the Union, OJ L 302, 18.11.2010, p. 1–41.

“**Authorised Person**” means any person from time to time authorised in writing by the Representative.

“**Business Day**” means a TARGET2 business day.

“**Custodial Allowances**” shall have the meaning given to it in Article 2 of this Agreement.

“**Custody Accounts**” shall have the meaning given to it in Article 3.1 of this Agreement.

“**Description**” means type, issue, trading period, and term.

“**Escrow Agreement**” means the separate escrow agreement entered into by and between the Parties to this Custody Agreement.

“**EU (Aviation) Auction Account**” means both the EU Auction Account and the EU Aviation Auction Account within the meaning of the Registry Regulation.

“**EU ETS**” means the EU emissions trading system, established by the ETS Directive.

“**EU ETS Directive**” means Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, OJ L 275 25.10.2003, p. 32.

“**Financial Regulation**” means Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018 p. 1.

“**Force Majeure Loss**” shall have the meaning given to it in Article 7.3 of this Agreement.

“**Innovation Fund Regulation**” means Commission Delegated Regulation (EU) 2019/856 of 26 February 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council with regard to the operation of the Innovation Fund, OJ L 140, 28.5.2019, p. 6.

“**Insolvency Event**” shall have the meaning given to it in Article 8.13 of this Agreement.

“**Joint Procurement Agreement**” means Joint Procurement Agreement to Procure Common Auction Platforms entered into force on 9 November 2011.

“**Loss**” shall have the meaning given to it in Article 7.1 of this Agreement.

“**Lost Allowance(s)**” shall have the meaning given to it in Article 7.1 of this Agreement.

“**MiFID II**” means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

“**Negative Holding**” shall have the meaning given to it in Article 5.4 of this Agreement.

“**Proper Instructions**” means a written request, transmission, direction, instruction or certification initiated by the Representative or one or more Authorised Persons which may relate to specific transactions or to types or classes of transactions on the Custody Accounts, and may be in the form of standing instructions.

“**Registry Regulation**” means Commission Delegated Regulation (EU) 2019/1122 of 12 March 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry, OJ L 177, 2.7.2019, p. 3–62.

“**Remaining Allowance(s)**” shall have the meaning given to it in Article 7.1 of this Agreement.

“**Replacement Allowance(s)**” shall have the meaning given to it in Article 7.2 of this Agreement.

“**Service Contract**” means the contract No 340201/2020/835568/SER/CLIMA.B1 for the services of the third common auction platform entered into between the European Commission and the States signatories to the Joint Procurement Agreement on one hand, and EEX and ECC on 4 November 2020.

“**Settlement Finality Directive**” or “**SFD**” means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45–50.

“**Transfer Order(s)**” shall have the meaning given to it in Article 2 (i) of the Settlement Finality Directive.

“**Union Registry**” means the register established pursuant to Article 19 of the EU ETS Directive.

Article 1.2 Interpretation

The headings in this Agreement are only for convenience and do not affect its meaning. Any reference to any provision of statute, enactment, order, regulation or other legislation refers to the provision as it is amended or re-enacted from time to time.

This Agreement is to be construed together with the rules of the system of ECC (the “**Clearing Conditions**”), the Service Contract and the Escrow Agreement.

In case of discrepancies and/or conflicts between this Custody Agreement and the Clearing Conditions, this Custody Agreement shall prevail.

Unless otherwise defined herein, capitalized terms used herein shall have the meanings assigned to such terms in the Escrow Agreement.

Any definition of “custodian”, “clearing system” or “settlement system” under any national law of the Contracting States that contradicts, limits their meaning or prevents their practical effectiveness (“*effet utile*”) as used in the Auctioning Regulation, and as construed in accordance with EU legislation

including the Registry Regulation, does not apply to this Custody Agreement nor to its implementation and enforcement.

ARTICLE 2. APPOINTMENT AS CUSTODIAN

The Custodian Lenders hereby appoint ECC with effect from the date of this Agreement as custodian of general allowances and aviation allowances (the “**Custodial Allowances**”) and deposited by them for safekeeping in accordance with and subject to the terms of this Agreement.

The Custodian hereby accepts such appointment and agrees to act in accordance with and subject to such terms.

ARTICLE 3. CUSTODY ACCOUNTS

Article 3.1 Establishment of Custody Accounts

The Custodian shall open and maintain in its books and records for each Contracting State for their allowances and separately for the Modernisation Fund and for the Innovation Fund, one or more individually segregated securities accounts for the custody and safekeeping of any Custodial Allowances deposited with the Custodian (each a “**Custody Account**”). The Custody Accounts shall be opened in the name of the Contracting States for their allowances, and of the Modernisation Fund and the Innovation Fund for the allowances to be auctioned for those funds.

The Custodial Allowances are deemed to be deposited with and accepted by the Custodian in the sense of the first paragraph of this Article when the transfer of the allowances is effected in the Union Registry from the EU (Aviation) Auction Account to the Auction Collateral Delivery Account, pursuant to Article 54 of the Registry Regulation.

Article 3.2 Location of Custody Accounts

All Custody Accounts shall be located and maintained for all purposes at the registered office of the Custodian in Germany and shall be governed solely by German law.

Article 3.3 Crediting of the Custodial Allowances to the Custody Accounts

The Custodial Allowances shall be credited to the relevant Custody Accounts in accordance with the applicable auction table referred to in Article 52 of the Registry Regulation.

Title on the Custodial Allowances shall be established by booking the allowances on the Custody Accounts. Acquisitions and dispositions of the Custodial Allowances shall be effected by book entry through crediting and debiting of the Custodial Allowances on the relevant Custody Accounts and no other steps or conditions shall be required to render an acquisition or disposition effective between the Custodian Lenders and the Custodian and against third parties.

Article 3.4 Proper Instructions

The Custodian shall be entitled to rely on Proper Instructions actually received by the Custodian and reasonably believed by the Custodian to be from an Authorised Person.

Proper Instructions and notices or other communication required or which may be given hereunder shall be given in accordance with Article 1.8 of the Service Contract.

Article 3.5 Record keeping

The Custodian shall maintain proper and adequate records of the identity, status and title over the Custodial Allowances and shall keep the Custodian Lenders fully informed as to all actions taken or done by the Custodian in relation to the Custodial Allowances which could directly or indirectly affect the rights and obligations of the Custodian Lenders under this Agreement, the Escrow Agreement or the Service Contract.

The Custodian agrees that its independent accountant, the Representative (including any entity designated by the Representative), or any representative of an appropriate regulatory body, shall be entitled to examine on the Custodian's premises, the Custodian's books and records and tax receipts relating to the Custodial Allowances and to report findings to the Custodian Lenders, upon receipt of a notification for such examination from the Representative.

Article 3.6 Evidence of entitlements

The Custodian's books and records (regardless of the media in or upon which they are maintained) shall constitute sufficient evidence of the Custodian Lenders' entitlements in relation to the Custodial Allowances, and all such books and records (including printed statements, e-mails and faxes received) irrespective of the form in which they are maintained, shall have the same value in evidence as a handwritten document.

ARTICLE 4. SAFEKEEPING OF CUSTODIAL ALLOWANCES

Article 4.1 Exclusion from insolvency estate of the Custodian

The Parties hereby agree that in case of an Insolvency Event (as defined in Article 8.1. below) involving the Custodian, this Agreement, the Custody Accounts and the Custodial Allowances do not form part of the insolvency estate of the Custodian and are shielded and exempt from such Insolvency Event. To this effect, Parties want to ensure at all times that the Custody Accounts and the Custodial Allowances are exclusively held by the Custodian for the sole benefit of the respective Custodian Lenders.

Article 4.2 Segregation

The Custodial Allowances held on the Custody Accounts shall at all times be segregated on the Custodian's books and records from (i) the Custodian's own property and (ii) from the property of other clients of the Custodian. The Custodian will identify the Custodial Allowances credited to the Custody Accounts, as being held in custody respectively for the Contracting States for their allowances and for the Modernisation Fund and the Innovation Fund for the allowances to be auctioned for those funds.

For the avoidance of doubt, the Custodian Lenders do not transfer any rights *in rem* over the Custodial Allowances to the Custodian.

Article 4.3 Regulatory duties

The Custodian has a duty to observe and comply with all laws, regulations and rules (including but not limited to those pertaining to anti-money laundering) applicable to the Custodian in Germany, including secondary legislation or regulations of any competent authority and any other applicable laws and regulations for the time being in force.

Article 4.4 Adequate organization

Custodian shall ensure that adequate measures are in place to protect the property rights over the Custodial Allowances by introducing adequate organizational arrangements to minimize the risk of

Loss of the Custodial Allowances, as a result of misuse of the Custodial Allowances, fraud, poor administration, inadequate record-keeping or negligence.

Article 4.5 Sub-custody

Subject to what is set forth under Article 5 below, the Custodian shall not be allowed to hold the Custodial Allowances at any sub-custodian or depository without the prior written approval of the Representative acting on behalf of the Custodian Lenders.

Article 4.6 Use of Custodial Allowances

The Custodian may not and shall not use the Custodial Allowances for its own account or for the account of another person.

Article 4.7 Waiver

The Custodian hereby explicitly waives any lien, pledge or other security interest (statutory or otherwise) over, or right of set-off or retention and sale in respect of, Custodial Allowances credited to the Custody Accounts other than as a beneficiary of the security interest created in accordance with Article 4.1 of the Escrow Agreement.

Moreover, the Custodian hereby agrees not to seek recourse, reimbursement, payment or satisfaction for any claim against the Custodial Allowances held in custody on the Custody Accounts and/or in or to the Custody Accounts for any reason whatsoever other than as a beneficiary of the security interest created in accordance with Article 4.1 of the Escrow Agreement.

Article 4.8 Statements and reports

The Custodian shall make available to the Custodian Lenders, on a periodic basis as agreed from time to time between the Parties, but not less than on a quarterly basis, a detailed statement on a durable medium in relation to the Custodial Allowances on the Custody Accounts and all transfers to or from the Custody Accounts.

Article 4.9 Information duties

The Custodian hereby confirms that he will provide the Representative in a durable medium with the information specified in Articles 49 to 51 (as applicable) of Commission Delegated Regulation (EU) 2017/565 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

ARTICLE 5. HOLDING THE CUSTODIAL ALLOWANCES IN THE UNION REGISTRY

Article 5.1 The Auction Collateral Delivery Account in the Union Registry

The Custodian shall hold the Custodial Allowances for the Contracting States, for the Modernisation Fund and for the Innovation Fund in a segregated (omnibus) Auction Collateral Delivery Account opened in the name of ECC in the Union Registry, in accordance with Article 13 of the Registry Regulation (the “**Auction Collateral Delivery Account**”).

The appearance of the Custodian as holding the Custodial Allowances in the Union Registry, shall not mean, shall not be understood and shall not be construed as the basis for any title or rights of the Custodian in its own capacity in relation to the Custodial Allowances other than the limited rights set forth in this Agreement.

The Custodial Allowances held in the Auction Collateral Delivery Account shall not form part of the Custodian's estate, and shall not be available for distribution among or realisation for the benefit of the creditors of the Custodian.

Article 5.2 Segregation of the Custodial Allowances in the Union Registry

The Custodian shall ensure that the Custodial Allowances held in the Auction Collateral Delivery Account are at all times segregated from (i) any allowances that the Custodian may hold in the Union Registry in its own capacity and (ii) from the allowances that the Custodian may hold in the Union Registry for other account holders.

The Custodian shall hold all the Custodial Allowances on a segregated Auction Collateral Delivery Account in the Union Registry, and shall ensure that at all times all the allowances held in such segregated Auction Collateral Delivery Account in the Union Registry are Custodial Allowances held as set forth in Article 4.2 of this Agreement.

Article 5.3 Reconciliations

The Custodian shall ensure that the sum of the Custodial Allowances credited to the Custody Accounts is at all times, in number and in Description, equal to the Custodial Allowances that it holds in the Auction Collateral Delivery Account.

Article 5.4 Negative Holdings

In case the Custodial Allowances held in the Auction Collateral Delivery Account are less in number than the Custodial Allowances of the same Description credited on the Custody Accounts (a “**Negative Holding**”), the Custodian shall immediately inform the Representative thereof and rectify the Negative Holding by:

- (i) Reversing any erroneous credits or debits (accounting error); and/or
- (ii) Increasing the number of Custodial Allowances it holds as a custodian in its Auction Collateral Delivery Account for the account of the Contracting States for their allowances and separately for the Modernisation Fund and for the Innovation Fund, ensuring that this amount and Description is equal to the amount and Description of Custodial Allowances transferred from the EU (Aviation) Auction Account to the Auction Collateral Delivery Account (in accordance Article 46 of the Registry Regulation).

If these measures are not possible or sufficient and the Custodian suspects that (i) the Negative Holding results from a Loss or (ii) the rectification of a Negative Holding would result in a Loss, he will immediately inform the Representative thereof and apply the provisions set forth in Article 7 (Loss of Custodial Allowances).

ARTICLE 6. DELIVERY OR RETURN OF CUSTODIAL ALLOWANCES

Article 6.1 Obligation of result

Subject to Article 6.3 below, the Representative acting on behalf of the Custodian Lenders may request the Custodian at any time to deliver or return the Custodial Allowances credited to the relevant Custody Account and the Custodian is under an absolute obligation of result to deliver or cause to deliver the Custodial Allowances in accordance with Article 6.2 below.

Article 6.2 Delivery method

Notwithstanding any specific provisions in the Escrow Agreement, the Custodian shall promptly release and deliver or cause to deliver the Custodial Allowances as follows:

- (i) Delivery following a general Proper Instruction

The Custodian shall comply with its obligation to return the Custodial Allowances by transferring the Custodial Allowances specified in the relevant Proper Instruction in the manner set forth in the Proper Instruction.

- (ii) Delivery following a Loss of Custodial Allowances

In the event of a Loss of Custodial Allowances (determined in accordance with Article 7 below), the Custodian must immediately and without prior request from the Representative transfer, or cause to be transferred, any Replacement Allowances and/or Remaining Allowances to the relevant EU (Aviation) Auction Account.

- (iii) Delivery following an Insolvency Event

In the event of an Insolvency Event (determined in accordance with Article 8 below), the Custodian must immediately and without prior request from the Representative transfer, or cause to be transferred, any (available) Custodial Allowances to the relevant EU (Aviation) Auction Account.

Article 6.3 Cancellation of auctions

In case of return of Custodial Allowances, Replacement Allowances and/or Remaining Allowances, the Custodian shall immediately notify EEX and request the cancellation of the auctions covered by the Custodial Allowances concerned without delay, provided however that such cancellation does not result in the revocation of any Transfer Orders after the moment that such Transfer Orders became irrevocable in accordance with the provisions of the Settlement Finality Directive.

ARTICLE 7. LOSS OF CUSTODIAL ALLOWANCES

Article 7.1 Losses

The loss of a Custodial Allowance of a particular Description held on the Custody Accounts shall be deemed to have taken place (a “**Loss**” or “**Loss of Custodial Allowances**”) if any of the following conditions is met:

- (i) A stated right of a Custodian Lender over a Custodial Allowance is demonstrated not to be valid because it either ceased to exist (e.g. it has disappeared following an accounting error that cannot be corrected) or never existed (e.g. because it was registered on the basis of falsified documents);
- (ii) A Custodian Lender has been definitively deprived of its rights over the Custodial Allowance (e.g. because such Custodial Allowance is nationalised, expropriated, seized, or if as a result of an insolvency such Custodial Allowance cannot be recovered);
- (iii) A Custodian Lender is definitively unable to directly or indirectly dispose of the Custodial Allowance (e.g. if for any reason such Custodial Allowance is not freely transferable or deliverable without encumbrance).

The Custodian shall immediately inform the Representative of any Negative Holding or of any other suspicion or indication of a potential Loss and of any steps taken to assess whether such Negative Holding, suspicion or indication results in a Loss of Custodial Allowances.

Any Custodial Allowances subject to a Loss shall be referred to as a “**Lost Allowance(s)**” and any remaining Custodial Allowances on the Custody Account after a Loss occurred shall be referred to as “**Remaining Allowance(s)**”.

Article 7.2 Liability of the Custodian for Losses

In case of a Loss of Custodial Allowances held in custody, the Custodian shall without delay:

- (i) Return allowances of the same amount and the same Description as the Lost Allowances (“**Replacement Allowances**”), in accordance with Article 6 (Delivery or return of Custodial Allowances); or
- (ii) Where the delivery or return is not reasonably feasible, pay a corresponding amount on the bank account of the auctioneer of the Custodian Lenders. Such corresponding amount shall be determined by the market price of allowances of the same Description as the Lost Allowances on the secondary market that is the most liquid, at the opening of the business day on which the Loss occurred, or the last auction price, whichever is higher.

Article 7.3 Discharge of liability

The Custodian shall not be liable in accordance with Article 7.2 above only if it can prove that the Loss arose as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary (a “**Force Majeure Loss**”).

For the purpose of the previous paragraph, an event shall be deemed ‘external’ and ‘beyond the reasonable control of the Custodian’ where the following conditions are cumulatively met:

- (i) It is not resulting from an act or omission of the Custodian and/or any other entity used for the performance of the Service Contract or this Agreement; and
- (ii) There is nothing that the Custodian, and/or any other entity used for the performance of the Service Contract or this Agreement, could have reasonably done to prevent the Loss, despite adopting all precautions incumbent on a diligent custodian as reflected in common industry practice.

External events beyond the reasonable control of the Custodian include but are not limited to:

- (i) Natural events beyond human control or influence;
- (ii) The adoption of any law, decree, regulation, decision or order by any government or governmental body, including any court or tribunal, which impacts the Custodial Allowances held in custody;
- (iii) War, riots or other major upheavals.

Article 7.3 Force Majeure Loss

In case of a Force Majeure Loss, the Custodian shall use its best efforts to prevent further losses and to recover the Lost Allowances.

If the Force Majeure Loss of Custodial Allowances was only partial and if the Lost Allowances could not be recovered, the remaining Custodial Allowances of the same Description shall be allocated to the affected Contracting States, the Modernisation Fund or the Innovation Fund, on a pro rata basis as follows:

- The reduction in the amount of Custodial Allowances of a given Description on the Custody Accounts shall be shared by the Contracting States, the Modernisation Fund and/or the Innovation Fund for whom such Custodial Allowances were held in their Custody Accounts at the opening of the Business Day on which the Force Majeure Loss occurred; and

- The sharing shall be proportionate to the amount of Custodial Allowances of such Description held in the relevant Custody Accounts at the time of the Loss and shall be done by way of debiting that Custody Accounts.

ARTICLE 8. INSOLVENCY OF THE CUSTODIAN

Article 8.1 Insolvency Event

For the purpose of this Agreement, an insolvency event shall be deemed to be opened against the Custodian if the Custodian is subject to any collective measure provided for in the law of Germany, or a third country, either to wind up the Custodian or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers of securities or payments (an “**Insolvency Event**”). The moment of the Insolvency Event shall mean the day on which the Custodian was aware of should have been aware of the occurrence of the Insolvency Event.

Article 8.2 Effectiveness of acquisitions and dispositions

The Custodian shall ensure that acquisitions and dispositions of Custodial Allowances that have become effective pursuant to Article 3.3 of this Agreement shall equally be effective against the insolvency administrator and the creditors of the Custodian in case of an Insolvency Event.

The Custodian shall promptly inform the Representative in case it cannot ensure the effectiveness referred to in the previous paragraph.

8.3 Restitution of the Custodial Allowances

The Custodial Allowances shall be unavailable for distribution or realisation for the benefit of the creditors of the Custodian, even in the event of an Insolvency Event.

The Custodial Allowances shall be returned immediately in accordance with Article 6 (Delivery or return of Custodial Allowances) on the day of the commencement of the Insolvency Event.

Article 8.4 Shortfalls

If on the day of the commencement of the Insolvency Event the allowances available in the Auction Collateral Delivery Account are not sufficient to ensure the full restitution of the Custodial Allowances, the available allowances shall be allocated proportionally between the Contracting States, the Modernisation Fund or the Innovation Fund.

In such case, if the Custodian itself owns a number of allowances of the same Description, these allowances shall be added to the aggregate amount of Custodial Allowances of the same Description to be allocated pursuant to the previous paragraph and the Custodian shall keep only the number of allowances remaining after the total number of allowances of the same Description, held by it for the Contracting States, the Modernisation Fund or the Innovation Fund, has been returned to them.

ARTICLE 9. BONA FIDE ACQUISITION

Pursuant to Article 36(4) of the Registry Regulation, unless a Custodian Lender knew or should have known at the time of the crediting of Custodial Allowances to its Custody Account that that crediting should not have been made because that crediting violates the rights of another person that has an interest in the allowances or because the allowances were subject to an earlier defective entry (“**Bona Fide Acquirer**”), such Custodian Lender is protected against the reversal of that transaction and cannot be held liable for such transaction or defective entry.

ARTICLE 10. INDEMNITY

The Custodian shall at all times indemnify and keep indemnified and hold harmless the Custodian Lenders against all losses, costs, claims, expenses, proceedings, damages, demands, actions, compensation, settlements, awards and liabilities of any nature arising from or relating to:

- (i) the Custodian's failure to comply with this Agreement;
- (ii) the Custodian's use or misuse of the Custodial Allowances;
- (iii) any other violation of the rights of the Custodian Lenders or the Representative; and
- (iv) any actions or omissions which are attributable to the Custodian;
- (v) the Custodian's failure to comply with applicable laws or regulations; or
- (vi) any failure to release, return, or cause to deliver Custodial Allowances in accordance with Article 6 or any delay in releasing, returning or causing to deliver Custodial Allowances pursuant to Article 6;
- (vii) the Custodian's failure to immediately return Replacement Allowances or the corresponding amount in case of a Loss of Custodial Allowances that is not a Force Majeure Loss.

ARTICLE 11. ACTION, SUIT OR OTHER PROCEEDING

The Custodian shall without delay notify the Representative in writing after the receipt by Custodian of notice of any demand or claim or the commencement of any action, suit or proceeding, which in any way, directly or indirectly, arises out of or relates to (i) this Agreement, (ii) the services of Custodian hereunder, or (iii) the Custodial Allowances held by it hereunder.

Upon the receipt of such notice, Custodian shall at the request of the Representative provide all reasonable assistance to determine ownership or disposition of the Custodial Allowances or deposit the Custodial Allowances with the clerk of any appropriate court or retain the Custodial Allowances pending receipt of a final, non-appealable order of a court having jurisdiction over all of the parties hereto directing to whom and under what circumstances the Custodial Allowances are to be disbursed and delivered or returned.

The provisions of this Article shall survive in the event Custodian resigns or is discharged pursuant to Article 12 below.

ARTICLE 12. TERM AND TERMINATION OF THIS AGREEMENT

12.1 Term

This Agreement is entered into and applies as from the date on which the last party has signed the Agreement (the "**Effective Date**").

Each Custodian Lender shall continue to be a Party to this Agreement and this Agreement shall continue to be in full force in relation to each such Custodian Lender as from the Effective Date until return or delivery by ECC of all the Custodial Allowances deposited by that Custodian Lender, it being understood that in such case this Agreement shall continue to be in full force in relation to the other Custodian Lenders.

Article 12.2 Termination

Without prejudice to Article 11, this Custody Agreement shall automatically terminate when any of the following occurs:

- (i) In case of termination of the Service Contract; or
- (ii) In case of replacement of the Custodian following an amendment of the Service Contract; and
- (iii) After release and delivery and/or return of all the Custodial Allowances deposited before the termination of the Service Contract.

ARTICLE 13. MISCELLANEOUS

Article 13.1 Governing law

This Agreement shall for all purposes be deemed to be made under and shall be construed in accordance with the laws of Germany. Each of the Parties hereby agrees that any action, proceeding or claim against it arising out of or relating in any way to this Agreement shall be brought and enforced in the courts of Germany, and irrevocably submits to such jurisdiction, which jurisdiction shall be exclusive. Each of the Parties hereby waives any objection to such exclusive jurisdiction and that such courts represent an inconvenient forum.

Article 13.2. Entire Agreement

This Agreement, supplemented by the Escrow Agreement, the Services Contract, the Clearing Conditions, contains the entire agreement of the Parties hereto with respect to the subject matter hereof.

Article 13.3. Notices

Any notice or other communication required or which may be given hereunder shall take place in accordance with Article I.8 to the Service Contract.

Article 13.4 Amendments, Written form

This Agreement may not be limited, amended or terminated or repealed, in whole or in part, except by an agreement in writing by the Parties. This shall also apply to changes to this article stipulating the written form.

Article 13.5 Severability clause

If any of the provisions of this Agreement becomes or is held to be invalid, illegal or unenforceable, all other provisions of this Agreement remain in full force and effect.

The invalid, illegal or unenforceable provision is deemed to be amended and replaced by a valid, legal or enforceable provision that legally and economically accomplishes as far as legally possible the economic purpose and the actual intent of the Parties concerning the invalid, illegal or unenforceable provision.

The same applies should any omission or gaps in the Agreement become apparent or evident; such an omission or gap shall, without affecting or impairing the validity, legality and enforceability of the remaining provisions hereof, be deemed to be filled with such provision as comes as close as possible to the original intent of the Parties.

SIGNATURES

**For the Custodian,
European Commodity Clearing AG**

Peter Reitz,
Chief Executive Officer

Signature:  _____

Done at Leipzig on 08.12.2020

**For the Custodian Lenders,
as represented by the Commission**


Mr Mauro Petriccione,
Director-General DG Climate Action

Signature: _____

Done at Brussels, on _____

and

Dr. Götz Dittrich, Chief Operating Officer

Signature:  _____

Done at Leipzig on 08.12.2020