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To : Philippe Craninx – Wout Haesebrouck (Moore Corporate Finance)
Concerns: Put Option as part of the Independent Expert Opinion (legal perspective)
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Put Option as part of the Independent Expert Opinion (legal perspective)

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Company : Nyrstar, a limited liability company, organized and existing under the laws of Belgium, with registered office at 2940 Balen, Zinkstraat 1 and registered in the Crossroads Bank of Enterprises under number 0888.728.94.

Company Group : Company and its subsidiaries.

NN1 NN1 Newco Limited, a private limited company incorporated under the laws of England and Wales with registered number 12049737 and having its registered address at Suite 1, 3rd Floor, 11-12 St James's Square, London, SW1Y 4LB. NN1 is a direct subsidiary of the Company.

NN2 : NN2 Newco Limited, a private limited company incorporated under the laws of England and Wales, registered with company number



12052549 with its registered address being Suite 1, 3rd Floor, 11-12 St. James's Square London SW1 Y 4LB, United Kingdom.

Nyrstar Holdings : Nyrstar Holdings Limited, a private limited company incorporated under the laws of Malta, registered with company number C91938 with its registered address being Blue Harbour Business Centre, Level 1, Ta'Xbiex Yacht Marina, Ta'Xbiex XBX 1027, Malta.

Trafigura : Trafigura Pte. Ltd., a company incorporated in the Republic of Singapore and having its registered office at 10 Collyer Quay, #29-00 Ocean Financial Centre, Singapore 049315 and with company number 199601595D.

1. Introduction

We refer to your request in the context of the appointment of Moore Corporate Finance to prepare an independent expert's opinion for the independent directors of the Company in the framework of article 7:97 of the BCCA (old article 524, §2 BCC).


We understand that due to severe financial difficulties of the Company, the Company has implemented a debt restructuring of the Company Group pursuant to a lock-up agreement entered into by the Company and certain stakeholders on April 14, 2019.

As part of the debt restructuring the Company entered into an agreement with Trafigura and Nyrstar Holdings in relation to certain restructuring steps and the terms of the on-going relationship between parties, pursuant to which Trafigura (among other things), becomes the ultimate majority owner of NN2 (hereinafter the **NNV-Trafigura Deed**), with the following obligations:

- (i) procure that the Company becomes the holder of a 2% shareholding in NN2;
- (ii) provide the Company with certain minority rights in respect of its 2% equity stake in NN2 (hereinafter the **Equity Stake**), including certain information rights, tag and drag along rights and a put option in respect of the entirety of its 2% equity stake in NN2 for a price equal to EUR 20 million (adjusted pro rata depending on the Company's NN2's holding from time to time). We assume that no deferred shares were issued; and
- (iii) ensure that financial support, in the form of a committed facility up to a total amount of EUR 13.5 million, is provided under specified conditions to the Company on a limited-recourse basis for a maximum period of 5 years from July 31, 2019 by Trafigura procuring that such agreed financial support is provided by NN2 or a subsidiary of Trafigura, to fund the Company's liabilities incurred in the ordinary course of business and to fund litigation defense costs incurred by the Company and/or NN1 arising from any third party litigation (if any) (hereinafter the **Funding Agreement**).

Simultaneously with the signing of the NNV Trafigura Deed an agreement was concluded between the Company and NN2 for the transfer of the assets of the Company to NN2 (hereinafter the **NNV – NN2 SPA**).

The independent expert's opinion is to advise the Committee of Independent Directors in examining the benefit to the Company, taking all relevant circumstances into account, of the exercise or non-exercise of the Put Option. In the present memorandum we will briefly outline, from a legal point of view, the potential legal impact of exercising the Put Option.



We will also give a concise explanation of the decision of the Extraordinary General Meeting of the Company of 9 December 2019 which voted against the continuation of the business operations.

2. The Put Option

Pursuant to the NNV-Trafigura Deed, the Company and Trafigura agreed that Nyrstar Holdings would grant to the Company an option to require Nyrstar Holdings (or, at Nyrstar Holdings election, any other member of the Trafigura group which may lawfully make any relevant purchase) to purchase the Company's entire Equity Stake. The terms of this option are set out in a separate deed dated June 25, 2019 between the Company, Trafigura and Nyrstar Holdings (hereinafter the **Put Option Deed**). Under the terms of the Put Option Deed, the Company has the right to sell the entire Equity Stake at Nyrstar Holdings at a price equal to EUR 20 million.

2.1. Exercise of the Put Option

2.1.1. Option Period

The Put Option can be exercised from February 1, 2020 until July 31, 2022 or earlier in the event that a Successful Takeover Bid takes place *i.e.* any public takeover bid under Belgian takeover law by any member of the Trafigura Group for the Company that has been accepted by the majority of the Company's shareholders not acting in concert with a member of the Trafigura group (as that term is defined in Article 3 of the Belgian Law on Public Takeover Bids of April 1, 2007, as amended), at a price that values the Company's entire issued share capital at at least 20,000,000 EUR (in total) (hereinafter the **Option Period**). The decision to exercise the Put Option is a decision of the board of directors of the Company. Decisions of the directors should always be in accordance with the corporate interest of the Company *i.e.* a decision that cannot be considered manifestly unreasonable, with the knowledge that the directors had or could reasonably have had at that time, without taking into account elements that only emerged after the decision was taken.

In addition, there are a number of limited triggers allowing an earlier termination of the Put Option before 31 July 2022 such as the early termination of the Put Option pursuant to the exercise of tag and drag along rights.

In this way, it has been determined under article 7 of the NNV-Trafigura Deed that if Nyrstar Holdings (or the relevant Trafigura entity which holds NN2) proposes at any time a transfer of any right or interest to a third party purchaser (on arms' length terms, for cash or non-cash consideration), that would result in the Trafigura group holding 50% or less of the shares in NN2, then Nyrstar Holdings (or the relevant Trafigura entity which holds NN2) will have the right to oblige the Company to transfer (hereinafter the **Drag Right**), and the Company will have an equivalent right to participate in such transfer (hereinafter the **Tag Right**), of its entire 2% Equity Stake in NN2 on the same terms and for the same consideration per share as the Trafigura transfer.

2.1.2. Option Price

The Put Option is to be exercised at a price of 20,000,000 EUR for the entire Equity Stake. The Option Price will be adjusted pro rata depending on the Companies participation from time to time.

2.1.3. Modalities for exercising the Put Option

If the Company wishes to exercise the Put Option, the Company must send a **written notice** as attached in Schedule 1 to the put Option Deed to Nyrstar Holdings during the Option Period (the **Put Option Notice**). The Company shall set out in the Put Option Notice details of any applicable **mandatory conditions**, *i.e.* any necessary approvals required in connection with the sale and purchase of the Equity Stake by or under applicable law. We understand that the Company currently does not expect any such mandatory conditions to apply.

If the Company exercises the Put Option in response to a proposal by NN2 or its board to issue new shares or other equity securities, or any option or right in respect thereof, the Company shall give notice accordingly to Nyrstar Holdings within 7 business days of NN2 giving written notice to the Company of such proposal.

The **completion of the sale and purchase of the Equity Stake** shall take place on the tenth business day after the mandatory conditions are fulfilled.

At completion of the sale and purchase of the Equity Stake, Trafigura (or, at Trafigura's election, any other member of the Trafigura group which may lawfully make any relevant purchase) shall cause the Option Price to be **paid by electronic funds** transfer to the Company's bank account at the same time of which the Company shall deliver, or procure that there is delivered to Nyrstar Holdings a transfer in respect of the Equity Stake in favor of Trafigura (or, at Nyrstar Holdings election, any other member of the Trafigura group which may lawfully make any relevant purchase) together with the share certificates relating to the Equity Stake.

The Company has no right to assign or transfer its rights under the Put Option Deed without the prior written consent of Trafigura.

The Company, Trafigura and Nyrstar Holdings shall not execute the Put Option Deed in the United Kingdom and shall not, save in the circumstances set out in clause 6.3 at any time cause or permit executed originals (including original counterparts) of the Put Option Deed (an Original Document) to be brought into the United Kingdom. Any party who does cause or permit any Original Document to be brought into the United Kingdom, save in the circumstances set out in clause 6.3, shall be responsible for the cost of all United Kingdom stamp duty and related interest, penalties and fees and shall comply with all filing obligations arising from such breach.

2.2. Cost of exercising the Put Option

Each party shall be responsible for its own costs and charges incurred in connection with the transactions contemplated to be carried out pursuant to the Put Option Deed.

Subject to clause 6.3 of the NNV-Trafigura Deed, Trafigura shall bear all stamp duty, stamp duty reserve tax or other documentary, transfer or registration duties or taxes (including in each case any related interest or penalties) arising as a result of the entry into or implementation of this Deed.

2.3. Consequences of exercising the Put Option

2.3.1. The exercise of the Put Option triggers the mandatory prepayment of the limited recourse loan facility under the Funding Agreement

The Company entered into a committed Funding Agreement of EUR 13.5 million provided to it by NN2 in its capacity as lender. The Funding Agreement is made available in two separate tranches under well-defined conditions as agreed in the Funding Agreement :

- (i) up to EUR 8.5 million for the purpose of the ongoing ordinary business operations of the Company (hereinafter **Facility A**); and
- (ii) up to EUR 5 million intended for the payment of certain litigation defense costs (hereinafter **Facility B**).


No security, collateral or guarantees have been provided with respect to the Company's obligations under the Funding Agreement.

The Funding Agreement includes mandatory prepayment provisions:

- (i) Immediately upon receipt of any disposal proceeds as defined in Article 6.3 of the Funding Agreement (hereinafter the **Disposal Proceeds**), amongst other the net proceeds resulting from the exercise of the Put Option, the Company shall procure that these proceeds shall be applied first to prepay any amount outstanding under Facility B, and secondly, if (i) any Disposal Proceeds remain after any required prepayment of Facility B, and (ii) the aggregate amount of all amounts outstanding under Facility A exceeds EUR 5 million, to prepay such Facility A amounts to or towards an aggregate amount of EUR 5 million, and
- (ii) The occurrence of the exercise of the Put Option (or any other disposal of the Company Equity Stake) also entitles NN2 to cancel the whole or any part of the commitments still available under Funding Agreement. Consequently, not only would this result in a termination of withdrawals under the Funding Agreement, but certain funds drawn under the Limited Recourse Loan Facility would need to be repaid with the Disposal Proceeds.

However, the Facility A and B are only repayable if the Company has sufficient Net Assets. Net Assets means the assets of the Company (other than assets held or received on trust for a person which is not a member of the Group) having satisfied or provided for the Company's Liabilities (except for Liabilities of the Company under the Finance Documents which shall be disregarded for this purpose). For this purpose, assets includes present and future properties, revenues and rights of every description.

In case the Company's Net Assets are insufficient to discharge the obligations of the Company under the Funding Agreement and any other document designated as such by NN2 and the Company, such obligations shall be deemed to be limited to the amount of the Net Assets. NN2 shall not be entitled to make a claim and shall have no further recourse against the Company and the Company shall have no Liability to pay or otherwise. Consequently, it is important that the Company continues to monitor the development of Net Assets until the exercise of the Put Option (and throughout the liquidation process) in order to determine whether a repayment of the Funding Agreement should be made.



This limitation on the recourse of NN2 will not apply to the extent that the value of the Net Assets is impaired or NN2 suffers loss as a consequence of the Company breaching any provision in under the Funding Agreement and any other document designated as such by NN2 and the Company (other than the representations and warranties made or deemed to be repeated by the Company and the provisions requiring payment of interest and fees or repayment or prepayment of principal).

2.3.2. The exercise of the Put Option triggers an early termination of the Ongoing Services

Furthermore, as agreed in the NNV – NN2 SPA, NN2 provides certain ongoing operational and administrative services to the Company as described in Schedule 5 of the NNV – NN2 SPA (free of charge), for a period of three years from the restructuring effective date of 31 July 2019 (or less subject to agreed early termination triggers) SPA (hereinafter the **Ongoing Services**). The provision of the Ongoing Services to the Company is intended to reduce the Company's operating costs in the period following July 31, 2019. The exercise of the Put Option or any other disposal of the Equity Stake is an early termination trigger of such Ongoing Services. However, on July 31, 2022, the Ongoing Services period expires automatically, regardless the exercise of the Put Option. The effect of an early termination resulting from exercising the Put Option would therefore be limited.

3. Decision not to continue the business of the Company

We would like to point out that in accordance with a Belgian legal obligation to convene an (Extraordinary) General Meeting when the net assets of a company decrease below a certain threshold as a result of incurred losses (the so-called '*alarm bell procedure*'), an Extraordinary General Meeting was convened on December 9, 2019.


In this regard, the Extraordinary General Meeting of the Company had to take a decision on the dissolution of the Company or on other measures to maintain the continuity of the Company. Although the Company's Board of Directors proposed the continuation of the Company's business operations, the shareholders voted against the continuation which implies that the vote in favor of dissolution was taken.

Given the legal reporting requirement in the context of a voluntary dissolution, the Company's Board of Directors had to convene a new general meeting of shareholders as soon as practically and legally possible to approve the dissolution. A formal decision to dissolve a company can only be made to the extent that the reports were prepared in accordance with article 181 BCC (current article 2:71 BCCA).

Since non-compliance with the timely convening and legal formalities under the alarm bell procedure by the Board of Directors may give rise to major personal liabilities for the directors, the Company's Board of Directors had to convene a new General Meeting of shareholders as soon as practically and legally possible to approve the resolution to dissolve.

The Board of Directors sought to convene such additional Extraordinary General Meeting to consider a proposal for dissolution. The Extraordinary General Meeting was initially scheduled to be held on March 25, 2020, but had to be postponed due to the Covid-19 outbreak and the corresponding restrictions that had been implemented in Europe.

The Company reconvened that Extraordinary General Meeting on April 30, 2020 for June



2, 2020 and, if the required attendance quorum was not met, for June 30, 2020.

However, certain shareholders initiated interlocutory proceedings before the President of the Enterprise Court of Antwerp to request the court to order that, following the Extraordinary General Meeting of December 9, 2019, the decision on the dissolution of the Company be postponed:

- (i) until three months after a final report has been issued by a college of experts whose appointment has been requested in separate proceedings before the court; or, alternatively
- (ii) until three months after a final decision has been made in the proceedings on the appointment of a college of experts.

On June 26, 2020, the President rejected the minority shareholders' claim for the postponement until three months after a final report is obtained. However, the President did grant their claim for the postponement of the decision to dissolve the Company until three months after there is a final decision on the appointment of a college of experts.

In view of the decision of 26 June 2020, the convening of an Extraordinary (or Special) General Meeting by the Board of Directors will not be possible until at least the beginning of 2023, since a decision by the Court of Appeal shall not be rendered before (end of) October 2022. The formal decision to dissolve the Company will therefore only take place after the decision to exercise the put option has already been taken.

4. Conclusion

We understand from a review of the transaction documentation that the Put Option is exercisable between February 1, 2020 and July 31, 2022, unless under well-defined circumstances that favor the earlier termination of the Option Period. The exercise of the Put Option is subject to formalities as set out above. The exercise does entail important consequences in the context of NNV – NN2 SPA and the Funding Agreement, which must be taken into account.

The formal decision to dissolve the company by the Extraordinary General Meeting will be made after the ending of the Option Period. Consequently, the decision already taken by the shareholders with the intention of dissolving the Company will only have a minimal impact on the exercise of the Put Option.

Please do not hesitate to contact me with any questions.

Tom Vanraes
Attorney - Partner