# EEM Label GDPR Compliance Considerations

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## Executive Summary

At the heart of the Energy Efficient Mortgage Label (EEML)[1] is the Harmonised Disclosure Template (HDT)[2], which is intended to facilitate and improve access to relevant, consistent and comparable data on energy efficient mortgages within and between jurisdictions for investors, regulators and other market participants for due diligence purposes. During the course of discussions with lending institutions in preparation for the launch and development of the EEML, questions were raised about potential General Data Protection Regulation (GDPR) compliance concerns with regard to completion and disclosure of the Harmonised Disclosure Template (HDT). Against this background, the Energy Efficient Mortgage Initiative (EEMI)[3] instructed the law firm, Rutgers & Posch, to conduct an analysis of the compliance of the EEM Label and its HDT with GDPR requirements and draft guidance as necessary further to the analysis to address any obstacles. The analysis considers data collection and processing from the perspective of: (1) lending institutions (Direct Option) and (2) a data repository (Repository Option) from which lending institutions could extract data they require. In order to make the analysis as concrete and relevant as possible, the EEM National Hub in the Netherlands (EEM NL Hub) and the Dutch data protection framework, which is based on the EU-wide GDPR, was used as a 'test case'.

The first memorandum examines the extent to which certain EU regulations - with a focus on the focusing on the Taxonomy Regulation, the Non-Financial Reporting Directive (NFRD) and the (proposed) Corporate Sustainability Reporting Directive (CSRD), the Sustainable Finance Disclosure Regulation (SFRD), the Prospectus Regulation, the Securitisation Regulation and the proposed European Green Bond Regulation - may impose legal obligations or give rise to legitimate interests which would permit the collection and processing of 'Green Data' pursuant to GDPR by mortgage originators which are members of the EEMI or by any local repository such as the proposed Dutch Sustainability Data Repository. The memorandum concludes that while there is a clear trend within EU financial regulation to encourage, and indeed to mandate, increased disclosure with respect to sustainability of market players and products available on the financial markets, the current regulations do not necessarily impose legal disclosure obligations on members of EEMI. The entity-level disclosure requirements pursuant to the Taxonomy Regulation constitute the most likely source of legal obligations in this respect. However, the precise scope of these obligations will vary per entity type and are subject to detailed rules. A detailed analysis of the extent to which the disclosures to be made by any member of the EEMI (dependent on its entity type and the nature of its exposures to green assets) would need to be made in order to establish the exact scope of these

[1] www.energy-efficient-mortgage-label.org.
[2] www.energy-efficient-mortgage-label.org/hdt.
[3] www.energyefficientmortgages.eu.

obligations and also the extent to which it may be necessary for such entity to collect Green Data in order to make the necessary calculations of its own KPI's.

The second memorandum identifies Green Data as potentially personal data under the GDPR and therefore indicates that both the Direct Option and the operations of the Repository under the Repository Option relating to the collection and processing of Green Data would require a legal basis pursuant to GDPR in order to comply with applicable data protection laws in the Netherlands (and almost certainly beyond). This legal basis must be determined and communicated to the data subjects in advance. The memorandum highlights the following bases as being eligible for such purposes, subject to specific limitations and caveats set out later in this Report and which may vary depending on the type of financial institution of the relevant lending institution:

- Borrower consent/mortgage loan agreement;
- Legal obligation (Taxonomy Regulation);
- Legitimate interest (Taxonomy Regulation); and
- Legitimate interest (market demand).

For the legitimate interest options, the memorandum notes that it must be demonstrated that the legitimate interest of the lending institution (or the Repository on behalf of the lending institutions) outweighs the privacy interest of the individual data subjects, a test which is more easily met if the processing is based on legal interests pursuant to legislation than on the economic interest of market demand.

The memorandum suggests that it can be argued that both the Direct Option and the Repository Option can, depending on the relevant facts and circumstances and especially further depending on the manner of structuring, comply with the GDPR. However, as a result of specific shortcomings of each legal basis which are referred to above, the memorandum advises lobbying for a statutory basis to collect, store and process Green Data in connection with both the Direct Option and the Repository Option, for instance, in the proposal for the recast Energy Performance of Buildings Directive (EPBD). At the time of writing, the European Mortgage Federation-European Covered Bond Council (EMF-ECBC) and the EEMI recently delivered proposals for amendment of the EPBD recast[4] to the European Commission, with the support of Rutgers & Posch, with a view to securing this statutory basis.

The third and final memorandum considers the potential liability risks for the EEM NL Hub and for a potential Dutch Repository from a Dutch civil law perspective and presents a series of recommendations to mitigate these risks where possible. Specifically, the memorandum considers:

[4] https://hypo.org/app/uploads/sites/3/2022/03/EMF-ECBC-Proposal-for-an-Amendment-to-EPBD-recast-31.03.22.pdf.

(1) the relationship between the Repository and the EEM NL Hub members, (2) the relationship between the Repository and investors, (3) the relationship between the Repository and Third Party Sources, exclusion of liability and finally (4) the relationship between the EEM NL Hub and its members. This analysis focuses specifically on the case of the Netherlands but can serve also as a starting point for overall liability risk investigation across other jurisdictions and EEM Hubs.

# 1. Introduction

The collection, processing and disclosure of energy efficiency and loan data at aggregate level is at the heart of the Energy Efficient Mortgage Label and raises a number of questions from a data protection and privacy perspective, which naturally extend to the completion and disclosure of the EEML's Harmonised Disclosure Template (HDT). To recall, the EEM Label is intended as a quality and transparency benchmark to promote trust in and secure regulatory recognition of the energy efficient mortgage asset class. The HDT is an excel-based form that lending institutions which have been granted the EEM Label use to disclose information on their energy efficient mortgage products, with the primary aim of facilitating and therefore improving access to relevant, consistent and comparable data on energy efficient mortgages within and between jurisdictions for investors, regulators and other market participants for due diligence purposes.

With a view to understanding the legal basis for the collection, processing and disclosure of this data data, giving legal certainty to lending institutions and understanding how to mitigate liability risks, the EEMI instructed the law firm Rutgers & Posch to deliver analysis and guidance in this area, using the EEMI national hub in the Netherlands as a 'test case'. This analysis gave rise to the three legal opinions presented in this paper focussed on: the legal bases for the collection and processing of 'Green Data' pursuant to the GDPR, with a detailed analysis of the extent to which EU regulation gives rise to legal obligations or legitimate interests in this respect, and an examination of the potential liability risks under Dutch civil law associated with a data repository and recommendations to mitigate these risks where possible. It is intended that these legal opinions can be used by lending institutions to stress test their own arrangements internally to ensure GDPR compliance and make any necessary adjustments.

# 2. Legal Memorandum

## 2.1 Overview of European green data disclosure obligations

**1. Introduction**

1.1. This memorandum is prepared in connection with Section 5 of the GDPR Memo and examines the extent to which certain EU regulations may impose legal obligations or give rise to legitimate interests which would permit the collection and processing of Green Data (as defined hereafter) pursuant to GDPR by mortgage originators which are members of EEMI and/or the EEM NL Hub (the **Direct Option**) or by any local repository such as the proposed Dutch Sustainability Data Repository (the **Repository**).

1.2. For the purposes of this memo, the term "Green Data" specifically means data collected in connection with the Direct Option or the Repository Option from:

(a) private and/or publicly accessible (and verifiable) sources, such as the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*) (**RvO**) and the land registry (**Kadaster**), the *Hypotheken Data Network* (**HDN**); and

(b) potentially also from servicers of mortgaged assets (either extracted from the above sources or as provided by consumers directly) with respect to the environmental performance of mortgage loans secured on energy efficient properties (**Green Assets**).

1.3. The EU regulations considered in this memorandum are as follows:

(a) the Taxonomy Regulation[i].

(b) the Non-Financial Reporting Directive (**NFRD**) [ii] and the (proposed) Corporate Sustainability Reporting Directive (**CSRD**)[iii];

(c) the Sustainable Finance Disclosure Regulation (**SFRD**)[iv]; and

(d) the Prospectus Regulation[v];

(e) the Securitisation Regulation[vi]; and

(f) the proposed European Green Bond Regulation (proposal)[vii].

1.4. We were informed by the RVO that Directive (EU) 2018/844 also known as the Energy Performance of Housing Directive III contains obligations relevant for RVO to establish its own legal position from a data protection perspective in connection with the collection, storage

and processing of Green Data. The RVO establishes and publishes energy performance certificates in the Netherlands. Moreover, a recast directive is proposed in this regard, also known as the Energy Performance of Housing Directive IV. An analysis of this directive and the proposal for the recast directive is not yet included in this memorandum, but is also relevant for the overview set out in this memorandum and is very relevant for the analysis contained in the GDPR memo.

1.5. Section 2 contains an executive summary of our key findings of the various EU regulations and the relevant statutory legal obligations which may be relevant for the analysis contained in the GDPR Memo. The following sections 3 up to section 8 set out in detail the analysis in respect of each EU regulation included in paragraph 1.3(a) through 1.3(e) above.

## 2. Executive Summary

2.1. In conclusion, there is a clear trend within EU financial regulation to encourage, and indeed to mandate, increased disclosure with respect to sustainability of market players and products available on the financial markets. Specifically, environmental sustainability has been prioritised in recent regulatory interventions. However, the current regulations, as discussed in this memo, do not necessarily impose legal disclosure obligations on all members of EEMI or the EEM NL Hub. The entity-level disclosure requirements pursuant to the Taxonomy Regulation constitute the most likely source of legal obligations in this respect. However, the precise scope of these obligations will vary per entity type and are subject to detailed rules. A detailed analysis of the extent to which the disclosures to be made by any member of EEMI or the EEM NL Hub (dependent on its entity type and the nature of its exposures to green assets) would need to be made in order to establish the exact scope of these obligations and also the extent to which it may be necessary for such entity to collect Green Data in order to make the necessary calculations of its own KPI's.

2.2. The **Taxonomy** will, when fully in force, require the disclosure of certain additional information: (i) with respect to certain financial products, which is referred to in this memo as 'product-level disclosure'; and (ii) by certain legal entities (namely, those within the scope of the NFRD), which is referred to in this memo as 'entity-level disclosure'.

2.3. With respect to product-level disclosure, due to the narrow definition of 'financial product', there is no hard legal obligation which enables collection of Green Data at this time.

2.4. With respect to entity-level disclosure, those entities that fall within scope of the provisions will be obliged to disclose certain information with regard to the extent to which their activities are Taxonomy-aligned. The information to be disclosed takes the form of key performance indicators (**KPI**'s) and the precise content of those disclosure obligations, which varies per entity type, is further worked out in a Disclosure Delegated Act.

2.5. In short, entities that are obliged to make entity-level disclosure pursuant to the Taxonomy Regulation will have to calculate KPI's based on detailed rules set out in the Disclosure Delegated Act. In certain cases, those rules will mean that certain Green Data is not relevant to calculating KPI's. For example, loans by a credit institution to finance the construction of new buildings are currently not required to be included in the KPI that a credit institution must disclose (which KPI is referred to as the Green Asset Ratio or GAR).

2.6. To the extent that the calculation of a KPI does require certain Green Data to be taken into account, we refer to the analysis contained in paragraphs of the GDPR memo as to the extent to which an obligation to include certain Green Data in the calculation of a KPI may be sufficient to allow data collection and processing by the members of EEMI, the EEM NL Hub, another hub of EEMI or the Repository for GDPR purposes.

2.7. The **NFRD** requires certain large entities as defined under NFRD to disclose non-financial information on an annual basis. These obligations may be expanded to other entities if the CSRD is adopted, however this remains a proposal at the present time. In any case, it seems unlikely that the obligations under these regulations would necessitate the collection of the Green Data.

2.8. The **SFRD** will require the disclosure of certain information by Financial Market Participants and Financial Advisors. Furthermore, it will require the disclosure of information in relation to Financial Products. It appears unlikely that such obligations will constitute a legal obligation or create a legitimate interest in collecting the Green Data at this time however – specifically because of the limited definition of Financial Products.

2.9. The **Prospectus Regulation** currently does not contain a specific duty to disclose Green Data or specific details on the environmental performance of assets, activities, or entities. However, parties subject to disclosure obligations such as issuers of securities under the Prospectus Regulation are obliged to disclose information which is material to an investor for making an informed assessment. Further, the European Commission has announced an intention to consider whether minimum requirements are required with respect to 'ESG securities' in order to ensure the comparability, transparency and harmonisation of information. As a result, there exists a realistic possibility that a legal obligation to disclose certain Green Data may be introduced in the near future. It is likely that such obligation would be imposed on the 'issuer' of securities (where 'issuer' and 'securities' are defined within the Prospectus Regulation). However the scope of any such obligation is currently unclear.

2.10. The **Securitisation Regulation** currently contains an obligation for information to be made available at pricing and on a quarterly basis by the special purpose vehicle, the originator, the sponsor or the original lender concerning the environmental performance of residential mortgage loans with respect to certain STS securitisations, but only to the extent that such

information is 'available'. It remains to be seen how this requirement will be interpreted over time. Furthermore, there are a number of indications that the regulatory framework around securitisations with respect to environmental disclosures is likely to be enhanced in the near to mid future.

2.11. The proposed **European Green Bond Regulation** may provide additional sources of legal obligation to disclose information. However, this is in principle difficult to envisage on the basis of the draft since a voluntary disclosure regime is envisaged. As the draft progresses however, we recommend further analysis.

## 3. Taxonomy Regulation

3.1. The Taxonomy Regulation introduces a classification system, establishing a list of economic activities that are recognized as '**environmentally sustainable**'. Furthermore, the Taxonomy Regulation imposes a number of obligations.

3.2. With respect to the Taxonomy Regulation we note the following:

3.2.1. An economic activity is 'environmentally sustainable' if it:

(a) contributes to climate change mitigation; climate change adaptation; the sustainable use and protection of water and marine resources; the transition to a circular economy; pollution prevention and control; or the protection and restoration of biodiversity and ecosystems (each '**environmental objective**' is further worked out in the Taxonomy and related secondary legislation);

(b) does not significantly harm any of the objectives set out at (a) above;

(c) is carried out in compliance with certain 'minimum safeguards' (relating for example to principles and conventions on human rights aspects);

(d) complies with technical screening criteria (established under secondary legislation).

3.3. The Climate Delegated Act[viii] adopted pursuant to the Taxonomy Regulation sets out further detail on 'environmentally sustainable' economic activities. Technical screening criteria in respect of economic activities contributing to climate mitigation are set out in Annex I under 9 sector headings. Technical screening criteria in respect of economic activities contributing to climate adaptation are set out in Annex II under 8 sector headings. By way of example, covered sectors include forestry, energy and construction and real estate activities.

3.4. In terms of disclosure obligations, the Taxonomy Regulation mandates as follows:

(a) *Product-Level Disclosures:* pursuant to articles 5 and 6, where a 'financial product' (i) promotes 'environmental or social characteristics' or (ii) has 'sustainable investment' as its objective pursuant to the SFRD, additional pre-contractual and periodic disclosures will be required. Such disclosures relate, for example, to the 'environmental objective' to which the product contributes (see paragraph 3.2.1(a) above for the list of six 'environmental objectives') and the extent the investments underlying the financial product are in economic activities that qualify as 'environmentally sustainable' (as to which, see paragraph 3.2.1 above); and

(b) *Entity-Level Disclosures:* pursuant to Article 8, that any entity obliged to publish annual non-financial information pursuant to the NFRD (see paragraph 4.2) must also include in such statements information on how and to what extent its activities are associated with economic activities that qualify as 'environmentally sustainable' under the Taxonomy (for the purposes of this memo "**Article 8 Disclosure**").

3.5. With respect to the product-level disclosure referred to in paragraph 3.3(a), we note that the definition of 'financial product' is identical to that used in the SFRD. As such, the same analysis as provided in paragraph 5.3.2 applies – prima facie, neither a securitisation note issued by an SPV nor a covered bond issued by a credit institution is 'financial products' pursuant to the Taxonomy and, as a result, the additional product-level disclosure obligations introduced under the Taxonomy will not apply to such instruments.

3.6. With respect to the entity-level disclosure referred to in paragraph 3.3(b), we note that the nature of the disclosure required varies per entity type. The exact nature of the disclosure is specified in further detail in the Disclosure Delegated Act[ix] adopted pursuant to the Taxonomy Regulation. The purpose of the Disclosure Delegated Act is to allow "*companies to translate the technical screening criteria of the Climate Delegated Act… into quantitative economic performance indicators - the KPIs - which will be publicly disclosed".* [x]

3.7. Consequently, any analysis of relevant disclosure obligations must be made: (i) on an entity-by-entity basis and (ii) taking into account the type of economic activities pursued by such entity and the extent to which those activities fall within the technical screening criteria specified in the Climate Delegated Act. In this respect, and by way of example, we note that:

(a) a credit institution that is obliged to provide a non-financial statement under the NFRD will be subject to entity-level disclosure under article 8 of the Taxonomy Regulation (see paragraph 3.3(b));

(b) the Disclosure Delegated Act specifies the key performance indicators (**KPIs**) that a credit institution is required to disclose. In brief, a credit institution must disclose its Green Asset Ratio (**GAR**). The GAR is intended to reflect the proportion of Taxonomy-aligned exposures

compared to the total assets of the credit institutions and relates to the credit institutions' main lending and investment business, including loans, advances and debt securities, and to their equity holdings;

(c) the Disclosure Delegated Act sets out detailed rules with respect to calculation of the GAR. For example, those rules note that "*GAR for retail exposures to residential real estate or house renovation loans shall be calculated as a proportion of loans to households collateralised by residential immovable property or granted for house renovation purposes that is taxonomy-aligned in accordance with the technical screening criteria for buildings, namely renovation and acquisition and ownership in accordance with points 7.2, 7.3, 7.4, 7.5, 7.6, and 7.7 respectively, of Annex I to Climate Delegated Act, compared to total loans to households collateralised by residential immovable property or granted for house renovation purposes...*". For information, this section of the Delegated Disclosure Act has been set out in more detail in the Annex to this memorandum. With respect to this rule, we note that:

(i) the Climate Delegated Act, adopted pursuant to the Taxonomy Regulation, sets out further detail on those activities to be regarded as 'environmentally sustainable'. In particular, it sets out the technical screening criteria in respect of economic activities contributing to climate mitigation or climate adaptation.

(ii) *Sections 7.2., 7.3., 7.4., 7.5, 7.6. and 7.7.* of the Climate Delegated Act provide the technical screening criteria with respect to the following economic activities: **Renovation of existing buildings;** Installation, maintenance and repair of energy efficiency equipment; Installation, maintenance and repair of charging stations for electric vehicles in buildings (and parking spaces attached to buildings); Installation, maintenance and repair of instruments and devices for measuring, regulation and controlling energy performance of buildings; Installation, maintenance and repair of renewable energy technologies; Acquisition and ownership of buildings. Essentially, the technical criteria detail the extent to which these activities can be viewed as climate mitigating and the relevant conditions applicable to any such conclusion;

(iii) *Section 7.1.*1 of the Climate Delegated Act is not referenced. Section 7.1 relates to '**Construction of new buildings**'. We note that since it is not referred to in the description of the GAR as per the Delegated Disclosure Act, any loans by a credit institution to finance such activities (even if Taxonomy aligned) are *not* required to be taken into account under the GAR;

(d) to the extent that the information collected and processed by a mortgage originator which is a credit institution or the Repository on behalf of a credit institution is required in order for the credit institution to make the disclosures required under the Taxonomy

Regulation, this may provide a basis for such collection and processing pursuant to the GDPR. However, as per the example above there is currently no legal obligation for a credit institution to disclose (or incorporate with the GAR) information with respect to the financing of the construction of new buildings which are aligned with the Taxonomy Regulation and specifically with section 7.1 of the Climate Delegated Act. As a result, there is no legal obligation under the Taxonomy Regulation for the collection and processing of related data by the relevant credit institution or a third party on its behalf in respect of the construction of new buildings;

(e) any data to be collected and processed by the mortgage originator or the Repository would need to be aligned with the data necessary for the calculation of the GAR (or any other disclosure obligations under the Taxonomy as that legislation continues to evolve) and any disclosure-obligation analysis would consequently differ per entity type and per economic activity type. We note that we have not analysed every possible variable in this respect. For example, we note that a credit institution subject to entity-level disclosure under the Taxonomy would also have to include exposure with respect to certain debt securities in its GAR. Such entity may therefore require certain information on the extent of Taxonomy-alignment of those debt securities which are held. This may be problematic for the entity obliged to make such disclosures in relation to the assets that it holds to the extent that an issuer of debt securities is *not* obliged to publish Taxonomy-alignment data however. This could be the case for example where such issuer is not a 'Financial Market Participant' and therefore is not obliged to make disclosures regarding the assets it issues under the Taxonomy Regulation).

3.8. The first obligations under the Taxonomy Regulation entered into force on 1 January 2022. The Disclosure Delegated Act is intended to apply in a phase-in manner and the relevant provision (article 11) is set out at Annex.

3.9. In summary the Taxonomy Regulation imposes a number of obligations with respect to the Taxonomy alignment of Financial Products and economic activities of those entities that fall under the entity-level disclosure obligations. It is important to review the provisions of the Taxonomy carefully with respect to the type of entity that must disclose and the nature of the disclosure such entity must provide. It is not possible to conclude that all Green Data is required in order to calculate the GAR for credit institutions, for example. In this respect, we have explained above that any loans by a credit institution to finance the construction of new buildings (even if Taxonomy aligned) are not required to be taken into account under the GAR. Careful consideration must therefore be given to (i) the content of the relevant KPI per hub member and (ii) the extent to which Green Data is required in order to make the relevant calculations. To the extent that Green Data is required in order to make such calculations, we refer you to the GDPR memo with respect to the GDPR position.

## 4. Non-Financial Reporting Directive (NFRD)

4.1. The NFRD lays down the rules on disclosure of non-financial and diversity information by certain large companies. Relevant information must be disclosed in a management report, which is published on an annual basis.

4.2. Broadly, these reporting rules currently apply to 'large undertakings' which are 'public-interest entities' (**PIE**s) and exceed an average number of 500 employees during the relevant financial year. PIEs include large listed companies, banks, insurance companies and other companies designated by national authorities as public-interest entities

4.3. Entities that fall within scope must publish information related to environmental matters, social matters and treatment of employees, respect for human rights, anti-corruption and bribery and diversity on company boards (in terms of age, gender, educational and professional background).

4.4. The NFRD was adopted in 2014 and in scope entities have been obliged to report since 2018. It would appear difficult to base an argument that collection of data by mortgage originators or the Repository is necessary pursuant to this Directive.

4.5. The current CSRD proposal would amend a number of underlying reporting rules. The CSRD would extend the scope of the reporting requirements to additional companies (in particular to all large companies and listed companies), require the audit of sustainability information to specify in more detail the information that companies should report, mandate reporting in line with EU sustainability reporting standards (e.g. those definitions used in the SFRD and the Taxonomy), and to ensure that all disclosed information is in a digital, machine-readable format.

4.6. Again however, these requirements largely relate to annual information statements and do not provide a basis for the collection of data by mortgage originators or the Repository.

## 5. Sustainable Finance Disclosure Regulation (SFRD)

5.1. The SFRD mandates sustainability-related disclosures in the financial services sector. Information to be disclosed relates to:

(a) how in-scope parties integrate sustainability risks and how they consider adverse sustainability impacts in their processes ('entity level requirements'); and

(b) certain sustainability-related information which must be provided with respect to financial products ('product-level requirements').

5.2. The regulation applies to financial market participants (**FMPs**) and financial advisors (**Financial Advisors**) and applies in relation to financial products (**Financial Products**). All of these terms have a specific meaning and are defined in the SFRD. Since the definitions are fairly technical, a simplified version is set out at the Annex to this memo.

*Entity-level requirements*

5.2.1. The SFRD places disclosure obligations on FMPs and on Financial Advisors. For example, such parties must provide on their websites information on: (i) the integration of sustainability risks into their investment decisions/advice; (ii) how remuneration policies are consistent with the integration of sustainability risks and (iii) whether the principal adverse impacts of investment decisions or investment advice (as applicable) on sustainability factors are considered.

5.2.2. Further, FMPs & Financial Advisors must disclose in their own 'pre-contractual disclosures': (i) the manner in which sustainability risks are integrated into their investment decisions/advice or (as applicable) why they are not; and (ii) the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available/advise on.

5.2.3. With respect to these entity-level disclosure obligations, we note that the obligations only apply to entities falling within the definition of FMP or Financial Advisor and that the analysis therefore must be made on an entity-by-entity basis. We note, for example that:

(a) FMP includes a 'credit institutions *which provides portfolio management'* and Financial Advisor includes 'a credit institution *which provides investment advice*'

(b) FMP does not cover special purpose vehicles (which would typically be the issuing entity with respect to a securitisation notes); and

*5.3.* FMP does include Alternative Investment Fund Managers, and therefore to the extent that exposure on mortgage loans was arranged through the use of an AIF, the AIFM would be within scope.

*'Product-level requirements'*

5.3.1. The SFRD also places disclosure obligations on FMPs with regard to **financial products** which (i) promote 'environmental or social characteristics' or (ii) have 'sustainable investment' as their objective. Where disclosures are required, the mandated information must be made available in pre-contractual disclosures, periodic reports and on websites.

5.3.2. With respect to the applicability of these 'product-level requirements' however, we note that neither a mortgage, a securitisation note nor a covered bond would currently typically fall within the definition of Financial Product (see definitions in annex 1). As such, the 'product

level requirements' would not apply. The main exception to this conclusion would be if investors were to obtain exposure to underlying green mortgages by purchasing a participation in an alternative investment fund (AIF). An AIFM is an FMP and an AIF is a 'financial product'. However, we assume that such structure would not be used and have therefore not set out in this memorandum any further details of the relevant product-level information that would need to be disclosed in such case.

## 6. The Prospectus Regulation

6.1. The Prospectus Regulation lays down requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.

6.2. For such purposes, *securities* include shares, bonds and securitized debt[xi].

6.3. The relevant issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market and/or guarantor bear the responsibility for the information provided in a prospectus (the **Responsible Parties**). Such parties must declare that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.[xii]

6.4. Although the Prospectus Regulation creates no direct obligations for any Responsible Party to disclose information to potential investors with regard to environmental sustainability, it contains a general obligation that a prospectus shall "*contain the necessary information which is material to an investor for making an informed assessment of: (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor; (b) the rights attaching to the securities; and (c) the reasons for the issuance and its impact on the issuer*"[xiii].

6.5. To the extent that securities are marketed on the basis of certain 'green' features therefore it is arguable that information regarding Green Assets is 'material'. In this case, an obligation for Responsible Parties to disclose certain Green Data, whether in summary and/or anonymised form or otherwise could be established. However, the scope of such 'obligation' is currently vague and would likely be difficult to enforce at this time.

6.6. Indeed, regulatory intervention may be required in order to clarify the extent of any duty to disclose Green Data. In this respect, it should be noted that the European Commission announced in July 2021 that it may consider making adjustments to the Prospectus Regulation '*to create minimum requirements for the comparability, transparency and harmonisation of information available for all ESG securities*'[xiv].

6.7. In summary, the Prospectus Regulation currently does not contain a specific duty to disclose Green Data or specific details on the environmental performance of assets, activities, or entities. However, parties subject to disclosure obligations under the Prospectus Regulation (e.g. of securities) are obliged to disclose information which is material to an investor for making an informed assessment. Further, the European Commission has undertaken to consider the need for minimum requirements for the comparability, transparency and harmonisation of information available for those instruments it refers to as 'ESG securities'. As a result, there exists a realistic possibility that a legal obligation to disclose certain Green Data may be introduced in the near future. However the scope of any such obligation is currently unclear.

## 7. The Securitisation Regulation

7.1. The Securitisation Regulation lays down a range of obligations with regard to the issuance of securitisations including requirements related to due-diligence, risk-retention and transparency. It also creates a specific framework for simple, transparent and standardised (**STS**) securitisation.

7.2. The Securitisation Regulation creates obligations for a range of parties including institutional investors, originators, sponsors, original lenders and securitisation special purpose entities (**SSPEs**).

*7.3.* The originator, sponsor and SSPE of a securitisation are obliged to make a range of information available to: (i) holders of a securitisation position, (ii) to the competent authorities; and (iii) upon request, potential investors.

*7.4.* In the event that the issuance relates to either: (i) a non-ABCP traditional securitisation; or (ii) asynthetic securitisation which the relevant transaction parties wish to designate as an STS securitisation, the following additional transparency obligations apply:

(a) in the case of a securitisation where the underlying exposures are residential loans or auto loans or leases, the originator and sponsor must make available before pricing and also publish on an on-going quarterly basis "*the available information related to the environmental performance of the assets financed by such residential loans or auto loans or leases*"[xv]; provided that,

(b) by way of derogation from the above, originators may, from 1 June 2021, decide to publish '*the available information related to the principal adverse impacts of the assets financed by underlying exposures on sustainability factors*'[xvi].

*7.5.* The originator and the sponsor are responsible for compliance with the above obligations.[xvii]

7.6. We note however that there is, at the date of this memo and to our knowledge, limited guidance on the meaning of 'available information' and that in practice, this may limit the scope of the obligations that arise pursuant to these provisions of the Securitisation Regulation.

7.7. We note also that further clarity is anticipated with respect to the content, methodologies and presentation of the information referred to in paragraph 4.4(b) above since the relevant European Supervisory Authorities (**ESAs**) have been tasked with developing draft regulatory technical standards (**RTS**) on these matters. The anticipated RTS are intended to relate to '*the sustainability indicators in relation to adverse impacts on the climate and other environmental, social and governance-related adverse impacts*'. The Commission has been delegated the power to adopt such RTS. Although the draft RTS were due on 10 July 2021, we are not aware of their publication at this time[xviii].

7.8. Finally*, the Securitisation Regulation specifies a number of further steps as follows:*

(a) the ESAs have been tasked with publishing '*a report on developing a specific sustainable securitisation framework for the purpose of integrating sustainability related transparency requirements into [the Securitisation] Regulation*'[xix]. This report, due 1 November 2021, is however delayed; and

(b) the Commission is tasked with reviewing the implementation of the requirements set out at paragraph 4.4(a) above in Articles 22(4) and 26d(4) and with considering whether those requirements *'may be extended to securitisation where the underlying exposures are not residential loans or auto loans or leases, with a view to mainstreaming environmental, social and governance disclosure';*

7.8.2. In summary, the Securitisation Regulation currently contains an obligation for information to be made available at pricing and on a quarterly basis concerning the environmental performance of residential mortgage loans with respect to certain STS securitisations, but only to the extent that such information is 'available'. It remains to be seen how this requirement will be interpreted over time. Furthermore, there are a number of indications that the regulatory framework around securitisations with respect to environmental disclosures is likely to be enhanced in the near to mid future.

7.9. The obligations described in this section 6 are due to enter into force on 10 March 2022.

## 8. European Green Bond Regulation (proposal)

8.1. There is currently a proposal for a European Green Bond Regulation. The proposal notes that "The framework is also intended to be usable for issuers of covered bonds as well as securitisations, the securities of which are issued by a special purpose vehicle". Important also

to note is that this Regulation is currently drafted as voluntary – this means that issuers may choose to adhere to the obligations set out in the regulation to the extent that they wish to market their product as a 'European green bond' or 'EuGB'.

8.2. Since the regulation is only a proposal, it is not possible to extract any legal obligations to collect Green Data on the basis of this instrument. For a detailed analysis regarding GDPR on this specific item, we refer to 5.13 through 5.17 of the GDPR memo.

## 9. Miscellaneous

9.1. We note that this memorandum has been prepared at high level and that certain findings may lend themselves to further analysis dependent on particular fact patterns. In this respect, we particularly draw your attention to the fact that whether a legal obligation arises under one of more of the EU regulations considered here will invariably depend on (i) the identity of the party in question (for example, fund, credit institution, SPV, other) and (ii) the type of activity undertaken by such party. Furthermore, the regulations examined each employ specific terminology - for example, the Prospectus Regulation applies to 'issuers'; the SFRD to Financial Market Participants, Financial Advisors and Financial Products. Similarly, the Prospectus Regulation applies to 'securities' and the Taxonomy to 'financial products'. We have noted such differences also in our analysis above.

9.2. Our analysis (i) does not purport to provide a comprehensive overview of all possible regulatory requirements regarding legal obligations or legitimate interests in collecting and/or disclosing Green Data and does not purport to be conclusive or complete, (ii) does not constitute a legal opinion or advice and (iii) is limited to Dutch law.

9.3. This memorandum is rendered as at its date. We do not assume any obligation to advise you of facts, circumstances, events or changes in Dutch law that may subsequently arise or be brought to our attention and that may alter, affect or modify this memorandum.

9.4. This memorandum is addressed to, and may be relied upon by, you personally in connection with the general set-up of the Direct Option and the Repository. It may not be relied upon by, or be disclosed to, any other person, firm, company or institution or for any other purpose (including any transaction in which you and/or the Repository are involved) without our prior written consent.

* * *

[i] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance) PE/20/2020/INIT here

[ii] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups here Note that this is not a stand-alone Directive but actually an amendment to the Accounting Directive 2013/34/EU.

[iii] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM/2021/189 final, published April 2021 here

[iv] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector here

[v] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30.6.2017 here

[vi] Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 here

[vii] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European green bonds COM/2021/391 final here

viii Commission Delegated Regulation (EU) (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, published in the Official Journal on 9 December 2021 here

[ix] Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation, published in the Official Journal on 10 December 2021 here

[x] Note that this statement is found in the Explanatory Memorandum to the Delegated Disclosure Act

xi See Prospectus Regulation, Article 1 definition, which cross refers to the definition of 'transferable securities' under MIFID II (Directive 2014/65/EU), Article 4(1)(44). The Regulation does not apply to: (a) units issued by collective investment undertakings other than the closed-end type; (b) non-equity securities issued by a Member State or by one of a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States; (c) shares in the capital of central banks of the Member States; (d) securities unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities; (e) securities issued by associations with legal status or non-profitmaking bodies, recognised by a Member State, for the purposes of obtaining the funding necessary to achieve their non-profitmaking objectives; (f) non-fungible shares of capital whose main purpose is to provide the holder with a right to occupy an apartment, or other form of immovable property or a part thereof and where the shares cannot be sold on without that right being given up.

[xii] Article 11(1). Note that Member States are tasked with ensuring that responsibility attaches to such parties.

[xiii] Article 6(1) Prospectus Regulation

[xiv] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy for Financing the Transition to a Sustainable Economy COM(2021) 390 final, Strasbourg, 6.7.2021

[xv] Securitisation Regulation Articles 22(4) and 26d(4), in each case juncto Article 7(1)(a) with respect to quarterly reports.

[xvi] Securitisation Regulation Articles 22(4) and 26d(4), sub paragraph 2 in each case. Note that 'sustainability factors' are defined pursuant to Article 2(30) of the Securitisation Regulation to mean *'sustainability factors as defined in point (24) of Article 2 of Regulation (EU) 2019/2088 of the European Parliament and of the Council'.*

[xvii] Securitisation Regulation Articles 22(5) and 26d(5),

[xviii] In this respect, an online search has been made at EUR-Lex in this respect, in particular of all documents mentioning or based on the Securitisation Regulation, as well as implementing acts, delegated acts and legislative procedures based on the Securitisation Regulation.

[xix] Securitisation Regulation, Article 45a (*Development of a sustainable securitisation framework*)

## Annex

### I. Selected Definitions pursuant to the SFDR

***'financial product'*** includes the following, pursuant to Article 2(12) SFDR:
(a) an alternative investment fund (AIF);
(b) an insurance-based investment product (IBIP);
(c) a pension product;
(d) a pension scheme;
(e) a UCITS; or
(f) a pan-European personal pension product (PEPP)

**'financial market participant**' or '**FMP**' includes the following, pursuant to Article 2(1) SFDR:
(a) an insurance undertaking which makes available an insurance-based investment product (IBIP);
(b) an investment firm which provides portfolio management;
(c) an institution for occupational retirement provision (IORP);
(d) a manufacturer of a pension product;
(e) an alternative investment fund manager (AIFM);
(f) a pan-European personal pension product (PEPP) provider;
(g) a manager of a qualifying venture capital fund registered in accordance with Article 14 of Regulation (EU) No 345/2013;
(h) a manager of a qualifying social entrepreneurship fund registered in accordance with Article 15 of Regulation (EU) No 346/2013;
(i) a management company of an undertaking for collective investment in transferable securities (UCITS management company); or
(j) A credit institution which provides portfolio management;

**'financial advisor'** includes the following pursuant to Article 2(11) SFDR:
(a) an insurance intermediary which provides insurance advice with regard to IBIPs;
(b) an insurance undertaking which provides insurance advice with regard to IBIPs;
(c) a credit institution which provides investment advice;
(d) an investment firm which provides investment advice;
(e) an AIFM which provides investment advice in accordance with point (b)(i) of Article 6(4) of Directive 2011/61/EU; or
(f) a UCITS management company which provides investment advice in accordance with point (b)(i) of Article 6(3) of Directive 2009/65/EC;

**II. Disclosure Delegated Act, adopted pursuant to the Taxonomy - Article 11**

"Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

2. From 1 January 2022 until 31 December 2022, non-financial undertakings shall only disclose the proportion of Taxonomy-eligible and Taxonomy non-eligible economic activities in their total turnover, capital and operational expenditure and the qualitative information referred to in Section 1.2 of Annex I relevant for this disclosure.

3. From 1 January 2022 until 31 December 2023, financial undertakings shall only disclose:
(a) the proportion in their total assets of exposures to Taxonomy non-eligible and Taxonomy-eligible economic activities;
(b) the proportion in their total assets of the exposures referred to in Article 7, paragraphs 1 and 2;
(c) the proportion in their total assets of the exposures referred to in Article 7(3);

(d) the qualitative information referred to in Annex XI.

Credit institutions shall also disclose the proportion of their trading portfolio and on demand inter-bank loans in their total assets. Insurance and reinsurance undertakings shall also disclose the proportion of Taxonomy-eligible and Taxonomy non-eligible non-life insurance economic activities.

4. The key performance indicators of non-financial undertakings, including any accompanying information to be disclosed pursuant to Annexes I and II to this Regulation, shall be disclosed from 1 January 2023.

5. The key performance indicators of financial undertakings, including any accompanying information to be disclosed pursuant to Annexes III, V, VII, IX, XI to this Regulation, shall be disclosed from 1 January 2024.

Sections 1.2.3 and 1.2.4 of Annex V shall apply from 1 January 2026.

**III. Disclosure Delegated Act, Annex V, KPIs of Credit Institutions**

1.2.1.3. Green asset ratio for retail exposures

GAR for retail exposures to residential real estate or house renovation loans shall be calculated as a proportion of loans to households collateralised by residential immovable property or granted for house renovation purposes that is taxonomy aligned in accordance with the technical screening criteria for buildings, namely renovation and acquisition and ownership in accordance with points 7.2, 7.3, 7.4, 7.5, 7.6, and 7.7 respectively, of Annex I to Climate Delegated Act, compared to total loans to households collateralised by residential immovable property or granted for house renovation purposes. This GAR shall include disclosures of transitional activities, and disclosures of stock and flow. This GAR shall apply only to investments relevant for climate change mitigation.

GAR for retail exposures to credit consumption loans for car loans shall be calculated as the proportion of loans financing cars complying with the technical screening criteria as laid down in Section 6.5 of Annex I to Climate Delegated Act. This GAR shall include disclosures of transitional activities, and disclosures of stock of loans only for loans granted after [the date of application of this Regulation] and flow of loans. This GAR shall apply only to investments relevant for climate change mitigation.

KPIs on retail exposures financing taxonomy-aligned economic activities shall only apply for the objective of climate change mitigation.

(i) Residential real estate lending

Credit institutions' KPI disclosure shall cover the retail lending portfolio, in particular the mortgage lending portfolio. This KPI shall be disclosed by taking into account compliance with the technical screening criteria for buildings as laid down in Sections 7.2, 7.3, 7.4, 7.5, 7.6 and 7.7 of Annex I to Climate Delegated Act.

Credit institutions shall disclose the KPI for their residential real estate lending portfolio as a proportion of loans to households collateralised by residential immovable property contributing to the environmental objective of climate change mitigation as laid down Sections 7.2, 7.3, 7.4, 7.5, 7.6 and 7.7 of Annex I to Climate Delegated Act, compared to total loans to households collateralised by residential immovable property.

Credit institutions shall disclose information for the stock of loans as of the disclosure reference date, and information on the flows of new lending during the disclosure period.

The numerator of the ratio shall include the gross carrying amount of residential real estate loans compliant with the technical screening criteria in Section 7.7 of Annex I to Climate Delegated Act.

In the numerator of the ratio credit institutions shall also consider those loans granted for the renovation of a building or of a house in accordance with the technical screening criteria for buildings in accordance with Section 7.2, 7.3, 7.4, 7.5 and 7.6 of Annex I to Climate Delegated Act.

The denominator shall include the total gross carrying amount of loans to households collateralised by residential property plus the total gross carrying amount of house renovation loans to households, avoiding double counting of loans in case that the latter are collateralised loans.

## 2.2 GDPR analysis

**1. Introduction**

1.1. EEMI developed the harmonised disclosure template, a form that mortgage originators that have been granted the Energy Efficient Mortgage Label use to collect and disclose information on their energy efficient mortgage loan products (**HDT**).

1.2. We understand that in the Netherlands, the EEM NL Hub, which was set up as a local presence of EEMI in the Netherlands, is exploring a similar approach: the collection and processing of specific property energy performance data (**Green Data**) by each individual member of the EEM NL Hub on the basis of agreed methodology proposed by the EEM NL Hub (the **Direct Option**). Under the Direct Option the originator, or a third-party servicer on its behalf, would extract Green Data and combine that Green Data with its own mortgage loan and borrower data to determine whether a mortgage loan qualifies as an energy efficient mortgage loan. The energy efficient mortgage loan classification can be for reporting purposes or for underwriting purposes.

1.3. As an alternative option (the **Repository Option**), the EEM NL Hub is considering to establish a national sustainability data repository (the **Repository**) that would collect, process and maintain the Green Data. The Repository would function as a repository of property and energy performance data centrally collected in accordance with the methodology underlying the Direct Option. The main difference with the Direct Option is that in respect of the Repository Option, the Green Data would not be combined with mortgage loan and borrower data in the Repository. It is considered that the Repository would hold the Green Data of not only for a certain specific number or type of properties, but for all properties in the Netherlands. Originators, or third-party servicers on their behalf, would extract the Green Data from the Repository only for those properties that they require, similar to the Direct Option, for reporting or for underwriting purposes.

1.4. To the extent that EEMI also receives access to data from mortgage originators when assigning the Energy Efficient Mortgage Label, it would also function as a repository of data and as a result, the analysis in relation to the Repository Option also applies to EEMI.

1.5. Furthermore it is envisaged that both under the Direct Option and the Repository Option energy performance data in relation to the underlying properties would be collected from publicly accessible sources, such as, in the Netherlands:

(i) the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*) (**RvO**) which maintains a public database on energy efficiency and real estate data, including the energy label data base;

(ii) the land registry (**Kadaster**);

(iii) the Mortgage Data Network (*Hypotheken Data Netwerk*) (**HDN**); and/or

(iv) potentially also from servicers of mortgaged assets (either extracted from the above sources or as provided by consumers directly) (such sources collectively the **Third Party Sources**).

1.6. This memo analyses whether:

(a) the Direct Option and/or the Repository Option can be compliant with applicable data protection laws; and

(b) if, in view of data protection law restrictions, the Direct Option would be preferable over the Repository Option.

1.7. For practical purposes, this memo takes the EEM NL Hub approach of the Repository Option and Direct Option as a starting point. This means the analyses is made under Dutch data protection law.

1.8. The Dutch data protection framework however, mainly consists of the GDPR, an EU regulation with direct effect in all EU Member States. The provisions of the GDPR are explained in guidelines issued by the European Data Protection Board, an advisory body designated by the GDPR to promote a uniform interpretation of the GDPR. However, as the GDPR is applied by local data protection authorities in each country, the practical application per country may vary, especially on subjects where guidance of the European Data Protection Board (**EDPB**) has not yet been published. As a result, even though the analysis of this memorandum is predominantly European law directly applicable throughout the European Union, we advise EEMI to verify the analysis of this memorandum in each relevant member state.

1.9. Section 2 contains the executive summary and key findings of this memo. Section 3 sets out to what data protection rules in the Netherlands and GDPR apply. Section 4 explains to whom data protection rules apply. Section 5 analyses how personal data can be processed lawfully. Section 6 expands on Section 4 and contains an analysis in respect of personal data from third party sources. Section 7 briefly describes other relevant requirements under GDPR: the right to object and transparency requirements. Section 8 contains further considerations which are relevant when setting up a Repository. Lastly, Section 9 contains some relevant considerations which are important for every reader of this memorandum.

## 2. Executive summary

2.1. As set out below, Green Data can qualify as personal data under GDPR. As such, both the Direct Option and the operations of the Repository under the Repository Option, constituting the collection and processing of Green Data, requires a legal basis pursuant to GDPR in order to comply with applicable data protection laws in the Netherlands. This legal basis must be determined and communicated to the data subjects in advance.

2.2. The following bases are eligible for such purposes, subject to specific limitations and caveats[1] as set out below and may vary depending on the type of financial institution of the relevant mortgage originator:

(a) **Borrower consent/mortgage loan agreement**: for mortgage loans expressly marketed as 'green', the legal basis as provided in GDPR could be the consent of the borrower. Furthermore, the legal basis could be that the processing of personal data is necessary in order for the originator to grant green mortgage loans (i.e. necessary in order to perform the contract). This would permit individual originators (under the Direct Option) or the EEM NL Hub to operate the Repository (as a data processor) under the Repository Option on behalf of the banks that originate the loans, to collect, store and process the Green Data but would not provide a solution for (i) previously originated loans or (ii) properties sold after the date of the loan agreement or a change of residents in the relevant property.

(b) **Legal obligation (Taxonomy Regulation)**: depending on the regulatory nature of the relevant mortgage originator, it can be argued that the originator will be required itself to collect, store and process the Green Data (or alternatively through setting up the Repository) in order to comply with a legal obligation pursuant to the draft Disclosure Delegated Act, if and when effective. However, the scope of those disclosure obligations is not yet fully clear. For a more detailed analysis in this regard please see the taxonomy memorandum included in **Annex I** (the **Taxonomy Memorandum**)**,** paragraph 3.6 through 3.9. We note that for each type of financial institution (e.g. credit institutions, insurers, etc.) this analysis varies and the relevant obligation will need to be assessed on an individual case by case basis. This exemption only applies if it is not reasonably possible to comply with the draft Disclosure Delegated Act without collecting, storing and processing the Green Data by the originator itself or by means of setting up the structure of the Repository. The originator itself or the Repository should furthermore be restricted to the personal data strictly necessary for the economic activities set out in the draft Disclosure Delegated Act. In addition, the Repository should be set up by the EEM NL Hub

[1] In particular, we stress that we are missing certain specific information from RvO to complete our analysis. Please see 2.5 below.

as a processor on behalf of the entities specified in the draft Disclosure Delegated Act (as set out in the Taxonomy Memorandum).

(c) **Legitimate interest** (**Taxonomy Regulation**) to the extent that the need for collecting, storing or processing by the originator itself or through setting up the Repository is not based on paragraph 2.2(a) or 2.2(b) above, the originator or Repository could be permitted to collect, store and process the Green Data based on the legitimate interests of the mortgage originators to comply with obligations pursuant to the Disclosure Delegated Act, if and when effective.

Again we note that for each type of financial institution (e.g. credit institutions, insurers, etc.) the compliance rules pursuant to the Disclosure Delegated Act vary and will need to be established on a case by case basis. In this case, the originator or the Repository should restrict its operations to Green Data only strictly necessary for reporting required under the draft Disclosure Delegated Act. Furthermore, any Green Data included in the Repository is only permitted to be disclosed to the mortgage originator requiring such Green Data based on the draft Disclosure Delegated Act. In this scenario, the Repository can be set up by the EEM NL Hub as a data controller and does not require data processor relations. Based on current case law and the relevant facts and circumstances as we understand these this legal basis appears to be stronger in nature than the legal obligation basis under paragraph 2.2(b) above.

(d) **Legitimate interest (market demand)**: it can also be argued that the processing of Green Data can be based on the legitimate interest of the relevant mortgage originator to respond to market demands for green investments. This would require a further substantiation as to why the mortgage originators require the Green Data. If such substantiation is present, the interest of the mortgage originators to respond to those market demands can provide a basis for the operations of the Repository or the collection of the Green Data by the originator itself (under the Direct Option). However, in view of the strict approach followed by the relevant Dutch data protection regulator (**DPA**), in respect of the legitimate interest standard, this position may be more difficult to defend in the Netherlands. Considering the controversy in connection with the approach taken by the DPA and further considering recent case law by the Dutch Courts, the originators themselves (under the Direct Option) or the EEM NL Hub and the originators (under the Repository Option) could consider taking a calculated risk and, if necessary, challenge the DPA's position in court. An alternative option would be to set up the Repository in another EU country.

(e) **Balancing of interests**: for both legitimate interest options set out above which may enable the lawful processing of personal data, it must be demonstrated that the legitimate interest of the originator (or the Repository on behalf of the originators) outweighs the

privacy interest of the individual data subjects. This test is more easily met if the processing is based on legal interests pursuant to legislation than when it is based on the economic interest of market demand. Furthermore, measures should be taken to safeguard the privacy interests of the data subjects to the largest extent possible.

2.3. Consequently, it can be argued that both the Direct Option and the Repository Option can, depending on the relevant facts and circumstances and especially further depending on the manner of structuring, comply with the GDPR. Nonetheless each legal basis has its own specific shortcomings which are referred to above. Therefore, on a European level, we advise EEMI and the EEM NL Hub to consider lobbying for a statutory basis to collect, store and process Green Data in connection with both the Direct Option and the Repository Option. Such statutory basis could for instance be included in the proposal for the recast Energy Performance of Buildings Directive which is currently still in draft form. Importantly, a resolution on a European level will prevent the need for local data protection analyses in each EU member state and would propel EEMI local hubs forward.

2.4. A Repository can be set up by a local hub acting as i) a data processor on behalf of the mortgage originators or ii) a data controller. If the Repository acts as a data controller, the legitimate interest basis is the only available basis available to the Repository. When evaluating the possibility of acting as a data processor, the EEM NL Hub must consider whether the joint coordination of instructions by the members of the EEM NL Hub can work from a practicable point of view.

2.5. Collecting personal data from Third Party Sources by mortgage originators in connection with the Direct Option or for the purpose of the operations of the Repository under the Repository Option also requires a legal basis. Therefore, the same analysis applies as set out above. In addition, the collection from Third Party Sources must be consistent with the purposes for which the personal data was originally collected. To evaluate this, it is important to know which purposes and legal bases were determined by the relevant source at the time of collection and furthermore what was communicated to the data subjects in this regard.

2.6. Each EEMI local hub should perform this assessment locally in each relevant EU member state to assess whether local third party sources of the required data can be lawfully collected, stored and processed.

2.7. Netherlands specific: we understand that an analysis was made by the RvO in this respect. This memorandum does not cover the RVO analysis at present. We are involved in discussions on this topic with RVO and we will include this analysis provided we receive a clear instruction to do so.

2.8. To the extent that the operations of the mortgage originators in relation to the Direct Option or the Repository Option cannot be considered consistent with these purposes, personal data from these sources may only be used with the consent of the individual data subject or based on a legal obligation as set out above.

2.9. Furthermore, the data subjects will have to be informed about, amongst others, the purposes, and legal bases of the Direct Option and the Repository Option and their rights in respect of their personal data. This includes the right to object against inclusion of the personal data by the mortgage originator or in the Repository to the extent that inclusion of that personal data is based on a legitimate interest. This information should be included in a privacy policy drawn up and provided to data subjects in accordance with the requirements of the GDPR.

2.10. Lastly, the mortgage originator in relation to the Direct Option and mortgage originator and the Repository under the Repository Option will need to comply with other requirements, and may require a Data Protection impact assessment and prior consultation of the DPA.

2.11. The analysis set out in this Section 2 for the most part equally applies to the Direct Option and the Repository Option. It may be argued that the test to balance the interests of the EEM NL Hub and the individual data subjects can be satisfied more easily for the Direct Option, considering that in this scenario there would be fewer data processing activities. However, the contrary could also be argued as a single data base (such as the Repository) subject to uniform restrictions on access and use would be less sensitive to security incidents and more transparent for data subjects than a variety of databases set up according to different (and possibly lesser) standards. Compliance with transparency and other requirements can also be easier under the Repository Option considering that in this scenario there will be a single privacy policy and presumably more uniform communication by one party (the Repository) as opposed to communication by each separate mortgage originator. Also, there would be a single point of contact for data subjects to exercise their rights.

## 3. To what does GDPR apply?

Applicable sources of law

3.1. The most important source of law relevant for the analysis in this memorandum is the GDPR. The GDPR is explained in its considerations, in guidelines issued by the EDPB, opinions published by the predecessor of the EDPB, the Article 29 Working Party (**WP29**), and court decisions by the European Court of Justice (**ECJ**).

3.2. These sources of European law apply directly throughout the EU. However, some subjects of the GDPR are dealt with in national implementing laws. Furthermore, the GDPR is explained and applied by national supervisory authorities and courts. As the EEM NL Hub is established in the Netherlands, to the extent relevant, this memorandum also discusses the Dutch implementing legislation (the Execution Law GDPR (*Uitvoeringswet AVG*)), guidelines and decisions by the DPA and decisions by Dutch courts.

3.3. As the implementing laws and the national application and interpretation of the GDPR may vary by country, we recommend having this memorandum reviewed by a national GDPR specialist before using it as a basis for implementation of a data base like the Repository in European countries other than the Netherlands.

Applicability GDPR: personal data

3.4. According to the GDPR, personal data is defined as "any information relating to an identified or identifiable natural person ('data subject'). An identifiable natural person is one who can be identified, directly or indirectly, by reference to an identifier such as a name, identification number, location data, an online identifier or one or more other characteristics. The relevant test to determine whether a person is identifiable is whether a person may reasonably be identified without disproportional effort. In this respect, it is not only relevant whether data subjects can be identified by the controller of the data, but also whether identification is reasonably possible by any other party.

3.5. It is contemplated that the Repository (and the relevant mortgage originators, also under the Direct Option) will contain addresses of data subjects together with certain information on the sustainability performance of properties.[2] Even though the Repository will not contain names of data subjects, it is relatively easy to ascertain who owns the property by consulting the Kadaster. Also, information on the proprietors or residents of a property may be known by a mortgage originator that has access to the Repository and can match information to its client database. Finally, a recipient may be living in the vicinity of the property for which Green Data was extracted or may otherwise be familiar with the names of its residents.

GDPR applies to the processing of personal data

3.6. *Processing* of personal data under the GDPR means 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or

[2] It is of importance to know exactly which data will be included in the REPOSITORY. If for instance, financial data is included, data will be more sensitive and the GDPR rules will be applied more strictly.

alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'.

3.7. Within these definitions, the collection of Green Data, storing and structuring it in a database, combining the data from several sources, and disclosing these data to the mortgage originator, will each constitute a processing of personal data to which the GDPR is applicable.

## 4. To whom does GDPR apply?

4.1. The provisions of the GDPR apply to the 'controller'. According to the GDPR, the controller is the 'natural or legal person […] which, alone or jointly with others, determines the purposes and means of the processing of personal data'.

4.2. Considering that the Repository in the envisaged set-up determines the purposes and means of the Repository, the data controller would be the Repository. Under the Direct Option no data processing is at all performed by the EEM NL Hub, each mortgage originator that would extract the data directly from the Third Party Sources would be a controller for its own processing of data in accordance with the script as provided by the EEM NL Hub.

4.3. The GDPR also contains provisions for 'processors' of personal data. Processors are parties who process personal data on behalf of the controller. Processors may only process personal data pursuant to instructions of the controller. Pursuant to the GDPR, detailed written agreements must be entered into between processors and controllers, containing mandatory provisions on amongst others the processing instructions, security measures and sub-processors.

4.4. The Repository could be set up in such a way that the mortgage originator would be the controllers and the Repository a processor acting on their behalf. The mortgage originators would then jointly have to determine the purposes and means of the data base (data to be included, sources, purpose, IT providers, storage periods, response to rights of the individual) and the EEM NL Hub would have to act pursuant to their instructions in this respect. This would require a complex set of joint controller and data processor agreements. When evaluating this possibility, the EEM NL Hub must consider whether the joint coordination of instructions by the mortgage originators would work in practice.

## 5. GDPR compliant processing of personal data

5.1. According to the GDPR, the processing of personal data must comply with certain principles. The most important principle is that the data is processed lawfully, fairly and in a transparent manner. Pursuant to article 6 of the GDPR, each of the following are legal bases for the lawful processing of personal data:

(a) the data subject has given consent to the processing.

(b) the processing is necessary for a contract to which the data subject is a party.

(c) the processing is necessary to comply with a legal obligation applicable to the controller of the data processing.

(d) the processing is necessary for the legitimate interests of the controller or a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

(A) consent of data subject

5.2. In practice it is difficult to request the consent of all data subjects involved, particularly in respect of the Green Data under consideration. Consent furthermore must be 'freely given' which means the data subject will be free to refuse it or withdraw it afterwards at any time. As a result, consent can only be used as a basis for the data processing relating to the (probably small percentage of) data subjects that are willing to provide their consent.

5.3. In this respect the question whether consent can lawfully be required under the GDPR as a condition to a loan is relevant. Arguably, the data subject is free to accept or refuse that consent provided through that relevant mortgage loan. In this respect article 7 of the GDPR is of relevance, which provides that in assessing whether consent is 'freely given', utmost account shall be taken of whether the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract. Considering this article, it can be argued that the Repository is necessary to grant mortgage loans that are expressly labeled as 'green mortgages' or determine if an existing mortgage meets the requirements of a 'green' mortgage (hereafter **Green Mortgages**) and therefore consent can lawfully be required under the GDPR. However, the processing of Green Data is only permitted to the extent that it is necessary for the originator to grant the loan under certain beneficial conditions or if the existing mortgage loan meets the criteria of a green mortgage loan and qualifies for such beneficial conditions. This test is more easily met by the relevant mortgage originator under the Direct Option than under the Repository Option. This deficiency to the Repository Option can be healed by setting up the Repository structure as a processor by the EEM NL Hub on behalf of the originators as controllers (see para 4.3 above). Please be advised that other mortgage originators are not allowed to benefit from the data included in the Repository on this basis.

5.4. In this scenario, separate consent would need to be obtained from already existing borrowers of mortgage loans, in order to provide a sufficient legal basis for processing of Green Data by the Repository in respect of loans that were granted in the past. It is arguable whether in

practice consent can lawfully be required under the GDPR as a condition to already existing green loan agreements.

5.5. Also, in the event that the residents or owners of a property linked to a Green Mortgage change, consent no longer applies to the processing of the Green Data contained in the Repository.

(B) necessary for a contract

5.6. Another legal basis for the lawful processing of personal data, is for the processing of personal data to be necessary for the performance of a contract to which the data subject is a party.

5.7. It could be argued that, if an obligation to provide Green Data to the Repository is added to the Green Mortgage, the processing would be necessary to carry out the Green Mortgage. However, the WP29 stated in its opinion that a controller is not allowed to unilaterally impose a processing obligation if such processing is not necessary for the 'rationale' of the relevant agreement[3]. The EDBP clarified this opinion by adding that the rationale of a contract must be determined objectively and cannot be determined freely by a contracting party. According to the EDPB, the rationale depends on several factors, such as the nature of the contracted service and the expectations of the average counterparty[4].

5.8. As a result, it can be argued that an agreement to grant a Green Mortgage requires the processing of personal data regarding the sustainability of the relevant property. However, this line of reasoning does not apply to mortgages that are not expressly labelled as 'Green', because the processing of Green Data is not necessary to perform the contract.

5.9. We note that this line of reasoning enables a legal basis for the data processing by the originator granting the loan in the event of the Direct Option, but it does not provide a legal basis for the Repository Option or for processing of personal data by other mortgage originators. Similar to the analysis above regarding consent as a legal basis, this basis cannot be used for personal data relating to mortgage loans that were granted in the past.

5.10. Equally similar, if the residents or owners of the property change, the underlying contract (i.e. the Green Mortgage) no longer applies to the processing of the personal data of the new owners or residents that are contained in the Repository.

(C) legal obligation

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[3] WP 06/2014.

[4] EDPB 02/2019.

5.11. Another option for the lawful processing of personal data by the mortgage originator or the Repository is if the processing of personal data is necessary to comply with a legal obligation.

5.12. According to consideration 41 of the GDPR, the legal obligation must be 'clear and precise and its application foreseeable' to persons subject to it. Pursuant to article 6 subsection c of the GDPR, the legal obligation furthermore must be 'applicable to the controller'. Furthermore, according to the Dutch Legislative history in respect of the implementation of the GDPR, the proper performance of the legal obligation should 'reasonably not be possible without the processing'.

5.13. The legal obligation can be existing laws and regulations, but EEMI and the EEM NL Hub can also consider lobbying for a specific new statutory basis to process Green Data to mitigate GDPR compliance issues.

(C) legal obligation: clear, precise and foreseeable

5.14. The Taxonomy Memorandum contains an overview of the current and expected laws and regulations with disclosure obligations which require certain Green Data in order to be complied with and the sustainability of investments.

5.15. We refer to paragraphs 3.6 through 3.9 of the Taxonomy Memo, which discuss the framework of disclosure obligations in the draft Disclosure Delegated Act, to be adopted in connection with the Taxonomy Regulation (the **Disclosure Delegated Act**). These regulations may potentially contain clear and precise obligations to disclose certain information which necessitates the processing of Green Data. However, the scope of these disclosure obligations is not yet clear and is limited as they only apply to the parties and economic activities specifically mentioned in the Disclosure Delegated Act (see paragraph 3.6 through 3.9 of the Taxonomy Memo).

5.16. The Taxonomy Memo also investigates whether other European regulations contain a legal obligation which enable to lawful processing of personal data. As follows from this overview, such obligations may be found in the Prospectus Regulation, the Securitisation Regulation, the Non-Financial Reporting Directive and the Sustainable Finance Disclosure Regulation. However, none of these laws and regulations can be considered very precise, clear and foreseeable as to which personal data should be processed to comply with these requirements.

(C) legal obligation: applicable to the controller

5.17. Furthermore, the GDPR provides that the legal obligation must be 'applicable to the controller of the processing'. There is currently no legal obligation applicable to the Hub.

5.18. To circumvent this obstacle, the Repository could be set up in such a way that the mortgage originators would be the controllers and the EEM NL Hub a processor acting on their behalf (see paragraph 4.3 above). As set out above, the EEM NL Hub should however consider whether the joint coordination of instructions by the mortgage originators would work in practice.

(D) an alternative: legitimate interest

5.19. The last alternative would be to base the lawful processing of personal data by the mortgage originator or the Repository (and consequently the originators) on a "legitimate interest". This legal basis may relate to the legitimate interests of the controller and/or third parties. Therefore, unlike the other bases which enable lawful processing of personal data, the legitimate interest option can provide a legal basis for the EEM NL Hub acting on behalf of the mortgage originators without having to structure a controller-processor relationship.

5.20. To determine whether the processing of personal data is necessary for legitimate interests, a balancing of interests must be made between the interests of the controller and/or third party and the interests of the relevant data subjects.

5.21. This balancing consists of three steps:

(a) there must be a legitimate interest

(b) the processing of personal data must be necessary for this interest

(c) the privacy interests of the data subjects do not prevail

(D) Legitimate interest: explanation by supervisory authorities

5.22. The concept of legitimate interest is not defined in the GDPR.

5.23. The EDPB states in its Guidelines of July 2019: "Legitimate interests pursued by a controller or a third party can be legal, economic or non-material interests (…)[5]."

5.24. The EDPB refers to the opinion 06/2014 of WP29 on the concept 'legitimate interest" in article 7 of the Data Protection Directive 95/46/EG. In respect of the question when an interest is legitimate, the WP29 states the following criteria must be met:

(a) It must be lawful (i.e. in accordance with applicable EU and national law)

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[5] Guidelines 03/2019.

(b) It must be sufficiently clearly articulated to allow the balancing test to be carried out against the interests and fundamental rights of the data subject (i.e. sufficiently specific);

(c) It must represent a real and present interest (i.e. not be speculative).

5.25. In its standard explanation 'Legitimate interest basis' (*normuitleg Grondslag gerechtvaardigd belang*) the DPA follows a more restrictive approach. According to the DPA, interests may only qualify as legitimate if they are mentioned as a legal interest in legislation or otherwise in the law. This strict interpretation of the legitimate interest basis has met a lot of criticism in legal literature and was not followed by the Dutch District Court in its decision of November 20, 2020 (Voetbal-tv, UTR20/2315). According to the District Court, a legitimate interest does not require a legal basis (positive test) but interests can be legitimate as long as they are not contrary to the law (negative test). The DPA has filed an appeal and in the meantime continues to apply its strict interpretation in other cases. The EDPD announced it will publish new guidelines on the legitimate interest basis. In the intermittent period, it is uncertain whether at a European level the WP29 standard will continue to apply or whether a more strict interpretation may apply going forward.

<u>(D) Legitimate interest of the mortgage originator or the EEM NL Hub</u>

5.26. We understand that the interest of the mortgage originator and the EEM NL Hub would be "to enable the EEM NL Hub members (i.e. mortgage originators and investors) to comply with regulatory requirements" and "to respond to market demands".

<u>(D) Interest: to comply with regulatory requirements</u>

5.27. As set out in the Taxonomy Memo, the bulk of potential EU regulations which are relevant do not at present provide specific legal bases for the lawful processing of personal data. The Disclosure Delegated Act does contain some regulations that can be considered sufficiently specific, but they only apply to the parties and economic activities specified in the Taxonomy Regulation. For a further explanation, we refer to paragraph 3.3 through 3.9 of the Taxonomy Memo.

5.28. Therefore, the legitimate interest legal basis for lawful processing of personal data is likely only to apply to the extent that the Repository contains only personal data necessary to comply with the Disclosure Delegated Act. Furthermore, the personal data will only be available to mortgage originators which require such data on the basis of these regulations. The same would apply to the Direct Option.

5.29. Green Data is required to determine the Green Asset Ratio which credit institutions are required to disclose pursuant to the Disclosure Delegated Act. Similar obligations apply to

other types of financial institutions under the Disclosure Delegated Act. Therefore, the GDPR analysis may vary for mortgage originators depending on their type of institution.

5.30. We advise the relevant mortgage originators and the EEM NL Hub in respect of the Repository to restrict the processing of Green Data constituting personal data to Green Data which is required to comply with the obligations under the Disclosure Delegated Act (e.g. to data which is required to determine the Green Asset Ratio in respect of mortgage originators which qualify as credit institutions or any other applicable disclosure obligations applicable to mortgage originators which qualify as a different type of financial institution).

(D) Interest: To respond to market demands

5.31. Another interest of the mortgage originators and the EEM NL Hub on behalf of its participants would be the need to respond to market demands for green investments. It is reasonable to argue that with a view to the sustainability trend in society there is an increasing demand for green investments which also requires reliable and consistent reporting in relation to such green investments. This reasoning is defendable in view of the EDPB/WP29 interpretation of legitimate interest, but requires further objective substantiation to make this interest sufficiently specific (see above 5.6) for the purpose of the operations of the Repository.

5.32. When considering the Green Action Plan of the EU, the Glasgow Treaty and various other initiatives by various countries and multilateral organization such as the UN, in addition to the initiatives of the Dutch government regarding the transition to a green economy, there is a solid basis for arguing that mortgage originators have a legitimate interest to respond to market demand shifting towards a green offering of mortgage loans.

5.33. If defendable under the interpretation of “legitimate interest” as set out by the EDPB/29 WP, we note that this line of reasoning is more difficult to defend in view of the strict explanation that is applied by the DPA. Considering the controversy regarding this approach and the Voetbal-TV decision, the EEM NL Hub can consider to take this risk and to challenge the DPA approach in court. Alternatively, the EEM NL Hub can consider setting up the Repository in another EU country first.

(D) Necessary

5.34. Not only is a legitimate interest required to process personal data, the processing of that personal data is also required to be necessary for this legitimate interest[6].

5.35. This entails that no more personal data should be processed than is required to safeguard that legitimate interest. Further, it must not be possible to safeguard that interest in any other way that is less detrimental to the data subject. In practice this means that only the data necessary for the Disclosure Delegated Act is permitted to be processed on behalf of the mortgage originators which are required to report the Green Asset Ratio to discharge its legal obligations and/or safeguard its interest to respond to market demands for green investments.

(D) Privacy interests of the data subjects

5.36. Lastly, the interests of the mortgage originators must be balanced against the privacy interests of the data subjects. More compelling legitimate interests in society, increase the likelihood that the controller may invade the privacy interests of the individual data subject to safeguard its legitimate interest. In this regard, further substantiation of consistent reporting as set out in my comment above is of utmost importance. The Direct Option and the Repository Option are more likely to pass this balancing test if legal obligations provide for the legitimate interest as opposed to relying on a "market demand" interest.

5.37. Measures should be taken to protect the privacy interests of the data subjects to the greatest extent possible. This can for instance be done by contractually binding the participants to use data from the Repository for specified purposes only, by limiting access rights and storage periods, by ensuring data is at all times kept accurate and up to date and by providing sufficient security.

5.38. It may be argued that the Direct Option is less invasive for privacy purposes considering that there are fewer data processing activities in this scenario. However, the contrary could also be argued as a single data base subject to uniform restrictions on access and use would be less sensitive to security incidents and more transparent for data subjects than a variety of databases set up according to different (and possibly lesser) standards. Also, it would be more beneficial for data subjects to have single point of contact to exercise her or his rights under the GDPR.

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6 WP29 06/2014).

## 6. Lawful processing of personal data continued: third party sources

6.1. The collection of Green Data from third party sources equally requires a legal basis to enable the lawful processing of personal data. In this respect the same considerations apply as set out above in Section 5. Data protection rules apply regardless of whether any part of the source is already publicly disclosed.

Consistent use

6.2. In addition, collecting the data from the Third Party Sources mentioned above, must be 'consistent with the purpose for which the data were originally collected'. In this respect, the controller must consider:

(a) Any link between both purposes.

(b) The context in which the personal data have been collected, in particular the relationship between data subjects and the controller.

(c) The nature of the personal data

(d) The possible consequences of the further processing

(e) The existence of appropriate safeguards

6.3. To evaluate the criteria under 6.2. a) and 6.2. b) it is crucial to know which purposes and legal bases were determined by the relevant source at the time of collection and what was communicated to the data subjects in this respect. We understand that an analysis in this respect was made by the RvO but to date we have not yet been able to retrieve this. Without this information, it is not possible to make an accurate evaluation. Therefore, we will add this part as soon as we have more clarity in this respect.

Exceptions

6.4. The requirement stipulating that processing of personal data must be consistent with the original purpose of the collection of that personal data does not apply to the extent that the personal data is processed based on data subject consent or in connection with a legal obligation. As regards the route where consent from the data subject is obtained, the same considerations apply as set out above (5.2).

## 7. Transparency and right to object

7.1. The GDPR provides that data subjects must be informed about, among others, categories of data that is collected, the purposes of the processing of personal data, the legal basis that

applies to each part of the processing of personal data, third parties that have access to the personal data, the rights of the data subjects in respect of that personal data and the way in which these rights can be exercised by the data subjects (articles 13 and 14 GDPR). In this respect it is of importance to note that data subjects have the right to object against the use of their personal data in the event that the processing is based on the legitimate interests of the controller.

7.2. If personal data is obtained from the data subject itself, the information set out above under 7.1 can be provided through a privacy policy at the time of collection of the personal data. If personal data is not obtained from the data subject itself, the information must be provided as soon as possible after the data is collected. The relevant information can be provided by postal mail to the addresses of the relevant properties and its owners or residents. In order to procure that new residents and new owners are properly informed, the postal mail should be repeated periodically. In addition, we recommend to publish the privacy policy on the EEM NL Hub website (if the Repository Option is implemented), in order for that information to be available for inspection by data subjects at any time.

7.3. Complying with transparency requirements may be easier when utilising the Repository structure as opposed to the Direct Option considering that the Repository would require only one privacy policy from a single source.

Exceptions

7.4. No information is required to be provided to the relevant data subjects in the event that those data subjects are already aware of that information. This could for instance be the case if the data subjects were already informed about the Repository Option or the Direct Option by any of the third-party sources from which the data is obtained.

7.5. If it is impossible to provide the relevant information or in the event that providing such information would result in a disproportional effort an exception also applies. According to Dutch legislative history this exception is mainly relevant in relation to archives and scientific research and statistics. Cost aspects cannot be considered as a factor to determine proportionality of the effort.

## 8. Other considerations

8.1. Please note other requirements apply to the processing of personal data, including purpose limitation (storage periods), security, the obligation to keep data accurate and up to date and the requirement to perform a data protection impact assessment (DPIA) in respect of high-risk processing. These requirements are of material importance when setting up and maintaining the Repository. Given the current stage of the evaluation of GDPR compliancy,

we will not elaborate on these requirements for now. Should you require a further analysis in this regard, please let us know.

## 9. Miscellaneous

9.1. Our analysis (i) does not purport to provide a comprehensive overview of all possible regulatory requirements regarding legal obligations or legitimate interests in collecting and/or disclosing Green Data and does not purport to be conclusive or complete, (ii) does not constitute a legal opinion or advice and (iii) is limited to Dutch law.

9.2. This memorandum is rendered as at its date. We do not assume any obligation to advise you of facts, circumstances, events or changes in Dutch law that may subsequently arise or be brought to our attention and that may alter, affect or modify this memorandum.

9.3. This memorandum is addressed to, and may be relied upon by, you personally in connection with the general set-up of the Direct Option and the Repository. It may not be relied upon by, or be disclosed to, any other person, firm, company or institution or for any other purpose (including any transaction in which you and/or the Repository are involved) without our prior written consent.

## 2.3 EEM NL Hub liability risks under Dutch civil law

### 1. Introduction

1.1. EEMI developed the harmonised disclosure template, a form that mortgage originators that have been granted the Energy Efficient Mortgage Label use to collect and disclose information on their energy efficient mortgage loan products (**HDT**).

1.2. We understand that in the Netherlands, the EEM NL Hub, which was set up as a local presence of EEMI in the Netherlands, is exploring a similar approach: the collection and processing of specific property energy performance data (**Green Data**) by each individual member of the EEM NL Hub on the basis of agreed methodology proposed by the EEM NL Hub (the **Direct Option**). Under the Direct Option the originator, or a third-party servicer on its behalf, would extract Green Data and combine that Green Data with its own mortgage loan and borrower data to determine whether a mortgage loan qualifies as an energy efficient mortgage loan. The energy efficient mortgage loan classification can be for reporting purposes or for underwriting purposes. The exact structure of the Direct Option remains to be confirmed. As such, this memorandum does not set out a liability analysis in respect of this scenario yet.

1.3. As an alternative option (the **Repository Option**), the EEM NL Hub is considering to establish a national sustainability data repository (the **Repository**) that would collect, process and maintain the Green Data. The Repository would function as a repository of property and energy performance data centrally collected in accordance with the methodology underlying the Direct Option. The main difference with the Direct Option is that in respect of the Repository Option, the Green Data would not be combined with mortgage loan and borrower data in the Repository. It is considered that the Repository would hold the Green Data of not only for a certain specific number or type of properties, but for all properties in the Netherlands. Originators, or third-party servicers on their behalf, would extract the Green Data from the Repository only for those properties that they require, similar to the Direct Option, for reporting or for underwriting purposes.

1.4. EEMI requests us to investigate potential liability risks in connection with the Repository Option. Furthermore, the EEM NL Hub requests us to analyse liability risks in respect of the EEM NL Hub and the Repository from a Dutch civil law perspective and to recommend measures to mitigate these risks where possible. This individual country specific analysis can serve as a starting point for the overall liability risk investigation. In this memorandum, we do not address potential liability risks for the EEM NL Hub's members towards investors. To the extent that the local hubs of EEMI set up a separate local repository similar to the Repository, the analysis of this memorandum is also relevant for these local hubs of EEMI. However, even

though Section 3 (*Applicable Law*) is European law directly applicable in the European Union, various parts of the analysis made in this memorandum are local Dutch law items and should be verified in each individual European Union member state taking into consideration the local law framework of that individual European Union member state.

1.5. In particular, it is envisaged that Repository would:

(a) collect certain data with respect to environmental performance of properties from:

(i) the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*) (**RvO**) which maintains a public database on energy efficiency and real estate, such as the energy label data base;

(ii) the land registry (**Kadaster**);

(iii) the Hypotheken Data Network (*Hypotheken Data Netwerk*) (**HDN**); and/or

(iv) potentially also from servicers of mortgaged assets, either extracted from the sources referred above or as provided by consumers directly (such sources collectively the **Third Party Sources**).

(b) deliver the short- and long-term data required to assist its members in meeting their regulatory requirements;

(c) enable originators and other stakeholders in the Dutch market to provide consistent reporting and disclosure and to comply with regulatory requirements, including the Regulation (EU) 2020/852 (**Taxonomy Regulation**); and

(d) at the same time meets all regulatory requirements in respect of the General Data Protection Regulation (**GDPR**).[1]

1.6. For purposes of our memorandum, we have assumed that the EEM NL Hub and the Repository will be structured as two separate legal entities.

1.7. We have prepared this memorandum for further discussion. You will see that we have also included some footnotes for further discussion. We note that any new or additional information may impact our advice.

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (**General Data Protection Regulation** or **GDPR**).

## 2. Executive summary

2.1. In the Repository Option scenario, there are several potential liability risks for the EEM NL Hub and for the Repository from a Dutch civil law perspective. In this executive summary, we have summarized these risks and our recommendations for measures to mitigate these risks where possible.

*i. Relationship Repository and the EEM NL Hub's members*

2.2. Assuming the contractual relationship between the Repository and the EEM NL Hub's members will be governed by Dutch law, the question to what extent the members will be able to claim damages from the EEM NL Hub based on breach of contract for the provision of incorrect data will depend on the contents of the agreement between the Repository and the EEM NL Hub's members, in particular the scope of the services to be provided by the Repository and any limitation or exclusion of liability.

2.3. Against this background, we recommend to carefully consider the description of the scope of the services to be provided by the Repository and the exclusion of any liability for the Repository for the correctness of the data obtained from the Third Party Sources, and to indicate in the agreement that the use of the outcome of the business rule, which is applied on the basis of the agreed methodology to determine the degree as to which underlying properties are deemed 'green', is at the EEM NL Hub's members own risk.

*ii. Relationship Repository and investors*

2.4. As there will not be a contractual relationship between an investor and the Repository, from a Dutch civil law perspective, an investor would only be able to hold the Repository liable for damages if it can be construed that these damages have been suffered by the investor as a result of a tort by the Repository and the other requirements for liability on that basis have been met. We deem it highly unlikely that an investor will be able to successfully claim damages from the Repository, solely on the basis that certain information included therein (and which it has been obtained by the Third Party Sources) is incorrect, unless the Repository has altered or manipulated data.

2.5. In order to mitigate the risks of any liability claims from investors, we would propose that issuers in respect of the green covered bond transactions should include a disclaimer, as well as to require the EEM NL Hub members to also include a disclaimer. Further mitigation measures which can be considered is lobbying for a statutory limitation of liability for the EEM NL Hub, as well as requiring EEM NL Hub members to include in the responsibility statement in the prospectus that the EEM NL Hub member does not seek to shift its liability from the EEM NL Hub member to the EEM NL Hub in respect of the Green Data content disclosed in and related to the securities offering (if practicable and commercially feasible is uncertain).

*iii. Relationship Repository and Third Party Sources, exclusion of liability*

2.6. The responsibility of the Third Party Sources for the correctness of the data (as obtained from the property owners) it makes available will mainly depend on the agreement between the Third Party Sources and its users. Whether the Third Party Sources are public sources or non-public (paid) sources is (less) relevant in this respect.

2.7. As the Dutch land registry has excluded any liability towards its users for incorrect data provided by the property owners, it will in principle not be possible to hold the land registry accountable for any inaccuracies in data provided by the property owners.

2.8. As the Dutch land registry has excluded any liability towards its users for incorrect data provided by the property owners, it will in principle not be possible to hold the land registry accountable for any inaccuracies in data provided by the property owners.

*iv. Relationship EEM NL Hub and its members*

2.9. As the EEM NL Hub is a Dutch association (*vereniging*), the management board has certain fiduciary duties towards its Members, and a breach of these requirements by the management board of EEM NL Hub may give rise to court action, such as a claim for damages.

2.10. Only the association itself is liable for its obligations towards third parties due to the legal entity status of the EEM NL Hub.

## 3. Applicable law

3.1. For the purpose of this memorandum, we have only assessed potential liability claims subject to the laws of the Netherlands. To assess whether a claim for damages is governed by Dutch law, a distinction should be made between claims based on breach of contract and claims based on tort.

(a) Breach of contract: according to Regulation (EC) No 593/2008 (**Rome I Regulation**), which is directly applicable in the EU, a damages claim based on breach of contract is governed by the law applicable to the relevant contract. We assume there will be a contractual relationship between the Repository and the EEM NL Hub's members governed by Dutch law. If this assumption is correct, any damages claim based on a breach of the contract by the EEM NL Hub's members against the Repository will also be governed by Dutch law. On the basis of the Repository structure as we understand it, there will be no contractual relationship between the EEM NL Hub / Repository and investors.

(b) Tort: according to Regulation (EC) No 864/2007 (**Rome II Regulation**), which is directly applicable in the EU, a damages claim based on tort is in principle governed by the law of the country where the damage occurs. However, where the parties have their habitual residence in the same country when the damage occurs, the law of that country applies,

and, finally, where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country, the law of that other country applies. Assuming the Repository and (most of) its members will be based in the Netherlands, it is likely that any damages claim based on tort against the EEM NL Hub by its members will be governed by Dutch law. In light of the above mentioned criteria, whether any damages claim by investors against the Repository will be governed by Dutch law will depend on the location where the damage occurs, the habitual residence of the investors and all other relevant facts and circumstances.

## 4. Potential liability risks for the EEM NL Hub and the Repository

Relationship Repository and the EEM NL Hub's members, potential liability risks and mitigation measures

4.1. We understand that the Repository will provide its services to members of the EEM NL Hub only and no third parties will have access thereto.

4.2. Assuming the Repository will be established as a legal entity, separate from the EEM NL Hub, the EEM NL Hub's members should enter into an agreement with the Repository. We propose that such contractual relationship will be governed by Dutch law (as the EEM NL Hub and (most of) its Members are Dutch parties). In this agreement, parties can agree on (inter alia): (i) the scope of the services to be provided by the Repository for the benefit of the members of the EEM NL Hub, (ii) the Repository's liability for any breach of contract in respect of the agreement pursuant to which the Repository provides its services.

4.3. Under Dutch law, to successfully claim damages on the basis of breach of contract, amongst others, a failure in the performance of a contractual obligation must be established. Subject to certain limitations, a party's liability can be (contractually) limited or excluded.

4.4. A court may declare a liability exemption clause (partly or entirely) null and void if liabilities for the consequences of willful intent (*opzet*) or gross negligence (*grove schuld*) are not explicitly excluded from the exemption clause. A clause limiting or excluding liability in standard terms (i.e. contract clauses that are drafted and reproduced so as to be included in a large number of contracts, i.e. boiler plate provisions) may be voidable if it is unreasonably onerous to the other party. Lastly, an exemption clause may also be voided through a court ruling to the extent that such invocation is inadmissible from a reasonableness and fairness perspective.

4.5. The question to what extent the members will be able to claim damages from the EEM NL Hub based on breach of contract for the provision of incorrect data will therefore depend on the contents of the agreement between the Repository and the EEM NL Hub's members, in particular the scope of the services to be provided by the Repository and any limitation or exclusion of liability.

4.6. Against this background, we recommend (i) to carefully consider the description of the scope of the services to be provided by the Repository, (ii) to indicate that the use of the outcome of the business rule, which is applied on the basis of the agreed methodology to determine the degree as to which underlying properties are deemed 'green', is at the EEM NL Hub's members own risk and (iii) to explicitly exclude any liability for the Repository for the correctness of the data obtained from the Third Party Sources.

We also recommend (iv) to explicitly indicate in the exemption clause that, to the extent any damage is directly caused by the willful default or gross negligence of the EEM NL Hub, liability for such damages is not excluded. We deem it unlikely that a court would render such a limitation or exclusion of liability clause (as described in this paragraph) null and void, unreasonably onerous or its application inadmissible (*ontoelaatbaar*) from a Dutch law principle of reasonableness and fairness perspective. This exemption clause can also be used against the Members in case the EEM NL Hub's members base a damages claim on tort.

Relationship Repository and investors, potential liability risks and mitigation measures

4.7. Parties with access to the repository information will use such information in the context of assessing green covered bond transactions (in order to assess whether a portfolio can be considered green).

4.8. We would propose that issuers in respect of the green covered bond transactions should – in order to mitigate the risks of any liability claims from investors – include a disclaimer that the information on which the assessment whether the assets in the transaction can be labelled as green (or not green) have been based on information obtained from Third Party Sources and the issuer is not responsible for the correctness of such data.

4.9. The foregoing does not mean that the Repository would be liable towards investors if it were to be established that information included in the Repository is incorrect. As there will not be a contractual relationship between an investor and the Repository, an investor would (from a Dutch law perspective) only be able to hold the Repository liable for damages if it can be construed that these damages have been suffered by the investor as a result of a tort by the Repository and the other requirements for liability on that basis have been met (see Annex I). Even though no contractual relationship exists between the investors and the Repository, we would advise the Repository to require the EEM NL Hub members to also include a disclaimer similar to the disclaimer proposed in respect of the issuers set out above under paragraph 4.8.

4.10. We deem it highly unlikely that an investor will be able to successfully claim damages from the Repository, solely on the basis that certain information included therein (and which it has been obtained by the Third Party Sources) is incorrect. The Repository is only a collector and processor of information and – as we understand it – is not able to verify the correctness of the information. Hence it would be rather difficult for an investor to construct that the

Repository has violated a right of that investor, violated a duty of care (*zorgplicht*) or a statutory duty which is aimed at the protection of the interests of that investor (such statutory duty does not exist). This may only be different if the Repository has altered or manipulated data and thus has provided information of which the Repository knew (or should have known) that this information was incorrect.

4.11. Further mitigation measures which can be considered is lobbying for a statutory limitation of liability for the EEM NL Hub similar to the statutory limitation of liability of the Dutch financial markets authority (AFM) and the Dutch central bank (DNB).[2]

4.12. Lastly, what can be considered is requiring EEM NL Hub members to include in the responsibility statement in the prospectus that the EEM NL Hub member does not seek to shift its liability from the EEM NL Hub member to the EEM NL Hub in respect of the Green Data content disclosed in and related to the securities offering. Whether this is practicable and commercially feasible is uncertain.

Relationship Repository and Third Party Sources, exclusion of liability

4.13. The responsibility of the Third Party Sources for the correctness of the data (as obtained from the property owners) it makes available will mainly depend on the agreement between the Third Party Sources and its users. Whether the Third Party Sources are public sources or non-public (paid) sources is (less) relevant in this respect.

*Exclusion of liability of the Dutch land registry*

4.14. The Dutch land registry has excluded any liability towards its users for incorrect data provided by the property owners on its website and its general terms of delivery (please see Annex II to this memorandum for the full text of these clauses). This exclusion of liability is in principle valid. Assuming any errors in the data provided by the land registry are caused by the supply of incorrect data by the property owners, we deem it unlikely that a court would render the limitation of liability by the land registry towards its users null and void, except in the theoretical event that it concerns a violation by the land registry caused by willful conduct or gross negligence, or when, depending on the circumstances of the case, such clauses are considered to be unreasonably onerous or contrary to reasonableness and fairness (which we consider highly unlikely in practice). The foregoing means that it will not be possible to hold the land registry accountable for any inaccuracies in data provided by the property owners.

Relationship EEM NL Hub and its members

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[2] Article 1:25d of the Dutch financial supervision act (*Wet op het financieel toezicht*).

4.15. The EEM NL Hub has been incorporated as a Dutch association (*vereniging*) on 22 September 2021. The EEM NL Hub's articles of association are included in the deed of incorporation. The EEM NL Hub's members are mortgage providers.

4.16. Dutch associations (such as the EEM NL Hub) have a management board that is entrusted with the management of the association and its day-to-day business. The EEM NL Hub's management board is appointed and dismissed by the general meeting of members.

4.17. The relationship between the management board and the general meeting of members of the EEM NL Hub is governed by the Dutch law principle of reasonableness and fairness. Furthermore, the directors of the EEM NL Hub are required to act in the best interests of the association and its stakeholders, including its Members. A breach of these requirements by the management board of EEM NL Hub may give rise to court action, such as a claim for damages.

4.18. A Dutch association qualifies as a legal entity, separate and distinct from its members, its directors or any other persons related to it. Hence, in principle, only the association itself is liable for its obligations.

Relationship EEM NL Hub and Repository

4.19. We understand that it is the intention that the Repository will collect Green Data with respect to environmental performance of underlying properties from Third Party Sources and will apply a business rule on the basis of an agreed methodology in order to assess the extent to which of the properties can be qualified as 'green.' The outcome of that assessment will be delivered to the EEM NL Hub's members in order for the EEM NL Hub's members to assist them in meeting their regulatory requirements and to adequately meet the market's demand for green investments.

4.20. The EEM NL Hub and the Repository could be structured as one single legal entity (*rechtspersoon*) or two separate legal entities. A reason to opt for two separate legal entities is that, as a separate legal entity, the Repository will also have a separate management board and such separate management board cannot be dismissed by the general meeting of members of the EEM NL Hub. Another reason from a Dutch civil law perspective to opt for such a two entity-structure is to protect the EEM NL Hub against liability for services performed by the Repository. For these reasons, we have assumed that the EEM NL Hub and the Repository will be structured as two separate legal entities for the purposes of our memorandum.[3]

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[3] **Note**: Please confirm whether the Hub and the Repository will be structured as two separate legal entities or whether you require further legal advice on this.

## 5. Miscellaneous

5.1. This memorandum is rendered as at its date. We do not assume any obligation to advise you of facts, circumstances, events or changes in Dutch law that may subsequently arise or be brought to our attention and that may alter, affect or modify this memorandum.

5.2. This memorandum is addressed to, and may be relied upon by, you personally in connection with the general set-up of the Repository. It may not be relied upon by, or be disclosed to, any other person, firm, company or institution or for any other purpose (including any transaction in which you and/or the Repository are involved) without our prior written consent.

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**ANNEX I**

**Key grounds for liability claims under Dutch civil law**

1.1 Under Dutch law, a claims for damages may be based on breach of contract (*toerekenbare tekortkoming*)[4] or on general tort (*onrechtmatige daad*)[5], or both of these grounds. A contractual relationship does not preclude a damages claim based on tort: a party may also institute a general tort claim against its contracting party during the term of the contract. In the absence of a contractual relationship, any third party can only base their damages claim on tort. The relevant requirements to claim damages based on breach of contract and the general tort provision are set out below. Any party claiming damages will in principle bear the burden of proving these requirements are met.[6]

Breach of contract

1.2 To successfully claim damages on the basis of breach of contract, the following requirements must be established:[7]

1. failure in the performance of a contractual obligation;
2. attributability (*toerekening*); the failure in the performance of a contractual obligation must be attributable to such party against whom an action is brought on the basis of fault (schuld), a statutory provision (*wet*), a juridical act (*rechtshandeling*), or generally accepted principles (*in het verkeer geldende opvattingen*);[8] [9]
3. damages (*schade*): financial loss and other detriment;
4. causal link between the damages and failure in the performance of the relevant contractual obligation. This requirement has been met if the damages had not occurred without the attributable breach of contract (the so-called *condicio-sine-qua-non* test).

General tort

1.3 To successfully claim damages on the basis of the general tort provision, the following conditions must be met:

- unlawful act or omission (*onrechtmatig handelen of nalaten*): except where there are grounds for justification, unlawful behaviour may be based on (i) the violation of a right;

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4 Article 6:74 DCC.
5 Article 6:162 DCC.
6 Article 150 Dutch Code of Civil Procedure (**DCCP**).
7 Article 6:74(1) DCC.
8 Article 6:75 DCC .
9 An example of a failure in performance that would be attributable to the Hub on the basis of the contract is a breach of a contractual representation or warranty.

(ii) the breach of a statutory duty; or (iii) the breach of an unwritten rule pertaining to proper social conduct; [10]

- attributability (*toerekening*); the unlawful act or omission must be attributable to such party against whom an action is brought on the basis of fault (schuld), a statutory provision (*wet*), a juridical act (*rechtshandeling*), or generally accepted principles (*in het verkeer geldende opvattingen*); [11]
- damages (*schade*): financial loss and other detriment;
- causality (*causaliteit*): a causal link between the unlawful behaviour and the damages;
- relativity (*relativiteit*): only the breach of a written or unwritten rule that aims to protect the claimant's interest can serve as a basis for a claim for unlawful conduct. [12]

Exclusion or limitation of liability

*Disclaimer in contract / statements*

1.4 Under Dutch law, a party's liability may be limited or excluded, for example contractually or in statements by such party such as on its website. Under the following circumstances, however, a court may declare an exemption clause (partly or entirely) null and void or invalid under the circumstances:

- Contrary to good morals*:* An exemption clause may be declared (partly or entirely) null and void if liabilities for the consequences of willful intent (*opzet*) or gross negligence (*grove schuld*) are not explicitly excluded from the exemption clause. The reason for this is that a limitation or exclusion of liability for damage caused by the willful intent or gross negligence of the EEM NL Hub is in principle contrary to public morals (*goede zeden*).[13]

- Unreasonably onerous: A clause limiting or excluding liability in standard terms (i.e. contract clauses that are drafted to be included in a number of contracts) may be voidable if it is unreasonably onerous to the other party, taking into consideration the contract's nature and the further content, the manner in which the conditions have arisen, the parties' mutually apparent interest, and the other circumstances of the case.[14]

- Contrary to reasonableness and fairness: Invoking an exemption clause may also be contrary to the Dutch law principle of reasonableness and fairness. Whether this is the case will depend on the circumstances of the case. Relevant circumstances may include the gravity of the fault, the nature and the importance of the interests involved, the contract's nature and object, how the exemption clause was formed, the (dis)proportion

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10 Article 6:162 (2) DCC.
11 Article 6:162 (3) DCC.
12 Article 6:163 DCC.
13 Article 3:40(1) DCC.
14 Article 6:233 (a) DCC.

between the exemption and the damage suffered, and the parties' degree of professionalization and the relations between them. Invoking an exemption clause will, for example, generally be contrary to reasonableness and fairness if the party invoking the exemption clause has committed a willful intent or gross negligence.

**ANNEX II**

**Liability Third Party Sources (the Dutch land registry and RvO)**

Dutch land registry

Clause 4 (7) of the general terms of delivery of the Dutch land registry states "*Kadaster is not liable for any kind of damage caused by relying on incorrect and/or incomplete information provided by the customer. The customer will indemnify Kadaster against third party claims*."

The website of the Dutch land registry contains a disclaimer in Dutch, which informally translates as follows:

> *"The land registry accepts no liability whatsoever for any losses of any nature connected with using the Land Registry Website(s), or with any temporary inability to consult the land registry Website(s). Nor is the land registry liable for any loss arising from the use of information obtained through the land registry Website(s).*
>
> *The land registry also accepts no liability for the content of websites referred to on the land registry website(s), or for the content of websites referring to the land registry website(s)."*[15]

[15] https://www.kadaster.nl/disclaimer.

## 3. Conclusion

The memoranda presented above provide detailed and comprehensive analysis of the key issues at stake in relation to the collection and processing of 'Green Data' pursuant to the GDPR from the perspective of lending institutions (Direct Option) and a data repository (Repository Option), as well as valuable insights and recommendations with regard to legal bases and the mitigation of liability risks. As indicated in the introduction to this Report, the EEM NL Hub has been used as a 'test case' for the purposes of this analysis which has been conducted against the background of the Dutch data protection framework. Notwithstanding the importance of understanding local application of the GDPR on which the Dutch legislation is based, it is anticipated that the analysis and recommendations delivered here can provide important indications for other jurisdictions and EEM National Hubs and serve as a robust basis against which lending institutions can assess their own activities, seek further guidance and consider any adjustments.