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The European Federation of Energy Traders
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20 January 2015

Dear Sirs

Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of Collateral Arrangements under the EFET Master Netting Agreement, and the TBMA Cross Product Master Agreement under Spanish Law

A. LIMITATIONS OF OPINIONS/SCOPE OF REVIEW

1. TERMS OF REFERENCE

We have been asked, as legal advisers to the European Federation of Energy Traders ("**EFET**"), to give an opinion in respect of the laws of Spain ("**this jurisdiction**") in relation to a number of issues and questions raised by EFET in respect of:

(i) the EFET Master Netting Agreement (Version 1.0, published June 2010) (the "**MNA**");

(ii) the EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010);

(iii) the EFET CPMA Cross-Product Master Agreement published by The Bond Market Association (TBMA) (Version 1.0, published 16 February 2000);

(iv) the EFET/IECA Commodities Schedule to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (together with the EFET

CPMA Cross-Product Master Agreement, the "**CPMA**" and, together with the MNA, the "**Master Agreements**");

(v) the EFET Cross-Product Credit Support Annex to the EFET CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (the "**2003 CSA**");

(vi) the EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011) (the "**2011 CSA**" and, together with the 2003 CSA, the "**CSAs**"); and

(vii) the EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005).

Terms used in this opinion and not otherwise defined herein shall have the meanings ascribed to them in the Agreements.

2. DEFINED TERMS AND INTERPRETATION

In this Opinion, unless otherwise specified, terms defined in the Master Agreements have the same meaning in this Opinion and for the purposes of this Opinion:

"**Agreement**" means an agreement on the terms of the Master Agreements which, together with the transactions made under it, is governed by Spanish law;

"**Foreign Law Agreement**" means an agreement on the terms of the Master Agreements which, together with the transactions made under it, is governed by a law other than Spanish law;

"**Foreign Party**" means a Party other than a Spanish Party;

"**Insolvency Proceedings**" means any of the procedures identified as such in Section C.I.1.1 herein;

"**Insolvency Representative**" means an *administrador concursal*, *interventor*, *comisario*, *juez* or analogous or equivalent official in this jurisdiction;

"**Insolvent Party**" means a Spanish Party which is or which becomes subject to an Insolvency Proceeding;

this "**Opinion**" means this letter and the opinions expressed therein, as the context requires;

a "**Party**" is a party to an Agreement (or, where relevant, a Foreign Law Agreement);

reference to a "§" or "§§" are to §§ of the Master Agreements and reference to a "**Section**" are to a Section of this opinion (except where the context otherwise requires);

"**Solvent Party**" means, where a Party is an Insolvent Party, the other Party;

"**Spanish Company**" means any of the entities identified in paragraphs (i) to (vi) of Section A.6 herein and duly registered in Spain in accordance with Spanish law; and

a "**Spanish Party**" or "**Party A**" means a Spanish Company which is a Party to an Agreement or, where relevant, a Foreign Law Agreement.

Headings are for ease of reference only and shall not affect its interpretation.

3. SCOPE OF REVIEW

We have been asked to opine on the basis of the following scenarios:

(a) two counterparties enter into a Master Agreement and at least one of the counterparties is incorporated or organised or has its centre of main interest in this jurisdiction ("**Party A**");

(b) Party A is a Spanish Party;

(c) the relevant Master Agreement provides for the inclusion of some or all of the master agreements described in Appendix B (*Types of Netted Agreements and Principal Agreements*) to the Instruction Letter, each such master agreement being a Netted Agreement and/or Principal Agreement;

(d) on the basis of the terms and conditions of the Master Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Agreement, the counterparties over time enter into enter into a number of transactions which include some or all of the transactions described in Appendix C (*Types of transactions*) to the Instruction Letter; and

(e) some of the transactions provide for an exchange of cash by both counterparties and others provide for the physical delivery of shares, bonds or commodities (including emission rights) in exchange for cash.

4. SPANISH LAW AND JURISDICTION

This Opinion relates only to Spanish law as applied by the Spanish courts as at today's date. We express no opinion in this Opinion on the laws of any other jurisdiction, even where, under Spanish law, a foreign law falls to be applied.

In this Opinion legal concepts are described in English terms and not by their original Spanish terms. The concepts concerned may not be exactly identical to the concepts described by the same English terms as they exist under the laws of other jurisdictions. This Opinion may, therefore, only be relied upon the express condition that any issues of interpretation or liability arising hereunder will be governed by Spanish law and be brought before a Spanish court.

5. ASSUMPTIONS AND RESERVATIONS

The opinions given in this Opinion are given on the basis of the assumptions set out in Section B below (*Assumptions*) and are subject to the reservations set out in Section D (*Reservations*) to this Opinion. The opinions given in this Opinion are strictly limited to the matters expressly stated in Section C (*Opinions*) and do not extend to any other matters.

6. POTENTIAL PARTIES

The opinions in this Opinion are given in respect of:

(i) partnerships or companies formed and registered under either the Commercial Code 1885, or the Spanish Royal Legislative Decree 1/2010, dated 2 July, on Limited Liability Companies (*Ley de Sociedades de Capital*) (or one of their predecessors) and having its registered office in Spain which are professional wholesale energy traders, generators and/or suppliers;

(ii) financial institutions (i.e., credit institutions and investment services companies);

(iii) Spanish insurance undertakings;

(iv) Spanish investment fund management companies (*sociedades gestoras de instituciones de inversion colectiva*) acting on behalf of Spanish mutual funds (*instituciones de inversión colectiva*);

(v) publicly-owned companies (*sociedades mercantiles públicas*); and

(vi) quasi-governmental entities (*organismos autónomos* and *entidades públicas empresariales*).

We have not considered the possibility of Spanish municipalities (*ayuntamientos*) or provinces (*provincias*) acting as counterparties as Spanish municipalities and provinces since, as a general rule, they can only enter into derivative transactions for the specific purpose of hedging interest rate risk and exchange rate risk (as per Article 48 of the Revised Text of the Law on Local Finance, approved by Royal Legislative Decree 2/2004, dated 5 March).

As regards publicly-owned companies and quasi-governmental entities, it is worth noting that:

(a) publicly-owned companies (*sociedades mercantiles públicas*) are treated in the same way as ordinary corporations, so that our conclusions in this Opinion would not change if a Spanish Party was a publicly-owned company;

(b) as for quasi-governmental entities (*organismos autónomos* and *entidades públicas empresariales*) please note that, as a matter of Spanish law, they cannot be subject to Insolvency Proceedings and can only be dissolved by means of a law. Therefore, our conclusions in Section C.I.1 would not apply where a quasi-governmental entity is a party to an Agreement or a Foreign Law Agreement. Whilst the obligations of quasi-governmental entities might be affected by a moratorium or standstill, it is not possible to determine the effects of such moratorium on the relevant Agreement or Foreign Law Agreement as such moratorium must be declared or imposed by means of a specific law, which will regulate those effects on a case-by-case basis; and

(c) finally, there are no hard and fast rules on status and authority of publicly-owned companies (*sociedades mercantiles públicas*) and quasi-governmental entities (*organismos autónomos* and *entidades públicas empresariales*).

In principle, publicly-owned companies (*sociedades mercantiles públicas*) are treated in the same way as ordinary corporates. However, it must be noted that most of them are created by means of a Law, such Laws sometimes providing for specific rules on authority.

As for quasi-governmental entity (*organismos autónomos* and *entidades públicas empresariales*), they are always created by means of a Law, its status and authority being specifically tailored in such Laws. There are, however, some general rules, including, *inter alia*, the following ones:

(i) those assets of any quasi-governmental entity (*organismos autónomos* and *entidades públicas empresariales*) which are linked to the provision of public services or public functions together with shareholdings in publicly-owned companies (*sociedades mercantiles públicas*) enjoy immunity from attachment; and

(ii) submission by *organismos autónomos* to foreign law, jurisdiction of foreign courts or arbitration in connection with financial contracts will usually require the relevant agreement to be executed by the Chairman (*Presidente*) of the relevant entity.

B. ASSUMPTIONS

The opinions set out in this Opinion have been made on the following assumptions:

1. That the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA are legally binding and enforceable against both Parties under the laws by which they are expressed to be governed if not the laws of this jurisdiction and that none of the opinions expressed below will be affected by the laws (including, without limitation, the insolvency laws and the public policy) of any jurisdiction outside Spain.

2. That each Party has the capacity, power and authority under all applicable law(s) to enter into the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA; to perform its obligations under the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA; and that each Party has taken all necessary steps to execute, deliver and perform the the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA.

3. That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA and to ensure the legality, validity, enforceability or admissibility in evidence of the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA in this jurisdiction.

4. That each Netted Agreement, Principal Agreement and Uncovered Transaction is capable of being terminated and closed out in the manner envisaged by the Master Agreements and is capable of having a Settlement Amount determined; and that all Settlement Amounts falling to be determined under the Netted Agreements, Principal Agreements and Uncovered Transactions are duly determined in accordance with the relevant provisions thereof.

5. That each Netted Agreement, Principal Agreement and Uncovered Transaction is capable of being amended in the manner envisaged by the Master Agreements.

6. That there is no other agreement, instrument or other arrangement between or affecting the Parties to the Master Agreements which conflicts with, overrides, modifies or supersedes the Master Agreements or any Netted Agreement, Principal Agreement or Uncovered Transaction (save for any such agreement or arrangement in relation to any Netted Agreement, Principal Agreement or Uncovered Transaction which is effected under the terms of the master Agreements).

7. That the Election Sheet to the MNA and the Schedule to the CPMA has been properly completed by both Parties; and that each Close-Out Event specified as applicable pursuant to the elections made under §3 of Part I of the Election Sheet to the MNA or under Division 1, Part II, Section A of the Schedule to the CPMA is an effective and valid Event of Default under the applicable underlying Netted Agreement, Principal Agreement or Uncovered Transaction.

8. That the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA are entered into prior to the formal commencement of any Insolvency Proceedings against either Party, for bona fide commercial reasons and on arms' length terms.

9. That both Parties have all governmental licenses, consents and approvals required by any applicable laws to enter into, and perform its obligations under, the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA and that the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA comply with the relevant sectors legislation and regulations in all relevant jurisdictions.

10. That the Master Agreements, the relevant Netted Agreements and Principal Agreements, any transactions entered into thereunder and the relevant CSA are mutual between the Parties. "Mutuality" generally exists where each Party is personally and solely liable as regards obligations owing by it and is solely entitled

to the benefit of obligations owed to it. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in respect of which a Party has a joint interest (including partnership) or in respect of which a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law.

11. That the "centre of the main interest" (within the meaning in the EC Regulation No. 1346/2000 on insolvency proceedings (the "**EU Insolvency Regulation**") and in the Insolvency Law) of any Spanish Party other than a credit institution or insurance undertaking is located in Spain.

12. That no transfer of Eligible Credit Support is made after the opening of an Insolvency Proceeding.

In accordance with the Instruction Letter, we have made additional assumptions in Sections C.I, C.II.1, C.II.2, C.III, C.V and C.VII below.

C. OPINIONS

On the basis of the foregoing terms of reference and assumptions and subject to the assumptions and reservations respectively set out in Section B and D herein, we are of the following opinion[1].

I. ENFORCEABILITY OF CLOSE-OUT NETTING

For the purposes of this Section C.I, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional factual assumptions:

(i) The relevant Master Agreement is governed by any law (including English or German law or the laws of Spain); and

(ii) After entering into transactions and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the

[1] The content of this Section C follows the order of the questions set out in Section C of the "*Instruction Letter: EFET CPMA/MNA Legal Opinion - Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of Collateral Arrangements under the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement under Spanish Law*" (the "**Instruction Letter**").

insolvency laws of Spain and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") transactions for the insolvent counterparty.

I.1 Winding-up, Insolvency or Attachment

General overview (including set-off)

I.1.1 ***Please provide a short overview of the relevant insolvency proceedings, laws and terminology applicable to Party A and the contract types listed in Appendix C to the Instruction Letter.***

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws or reorganisation procedures to which a Party could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are the following:

(i) *concurso* (bankruptcy proceedings for individuals and legal companies) under Law 22/2003, of 9 July (*Ley 22/2003, de 9 de julio, concursal*, hereinafter, the "**Insolvency Law**"), which came into force on 1 September 2004;

(ii) *homologación judicial de acuerdos de refinanciación* (schemes of arrangements) approved by the relevant courts under the Fourth Additional Provision and related provisions of the Insolvency Law ("**Refinancing Proceedings**");

(iii) *intervención administrativa* (i.e., governmental administration) under: (a) in relation to utilities, Law 54/1997, of 27 November, on the Electric Sector ("**Law 54/1997**") and Law 34/1998, of 7 October, on Hydrocarbon Commodities ("**Law 34/1998**") (b) in relation to credit institutions, Law 10/2014, of 26 June, on Regulation, Supervision and Solvency of Credit Institutions ("**Law 10/2014**"), (c) in relation to investment service firms, Law 24/1988, of 28 July, on the Securities Exchanges ("**Law 24/1988**") (d) in relation to Spanish insurance undertakings, Royal Decree Law 6/2004, of 29 October, which approves the restated version of the Law on Regulation and Supervision of Private Insurance Undertakings ("**RDL 6/2004**") and (e) in relation to Spanish mutual funds, Law 35/2003, 4 November, on Collective Investment Undertakings;

(iv) *liquidación administrativa* (administrative winding-up) of Spanish insurance undertakings under RDL 6/2004; and

(v) recovery and resolution proceedings ("**Reorganisation Measures**") under Law 9/2012, of 14 November ("**Law 9/2012**") which follows closely the provisions in the Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms published by the European Commission on 6 June 2012 (the "**Proposal**"), a number of whose provisions have been materially amended and/or complemented in the final text of the Directive 2014/59/EU of 15 May (the "**Resolution Directive**"), published on 12 June 2014.

The above laws and procedures are together respectively called "**Insolvency Laws**" and "**Insolvency Proceedings**".

It must be noted that the purpose of the Insolvency Proceedings varies to a significant extent in each case:

(i) the purpose of *concurso* is to achieve an agreement for the rescheduling of the liabilities of the Insolvent Party and, failing it, to realise its entire estate in order to seek payment of all its creditors; whilst

(ii) *intervención administrativa* (governmental appointment of directors or administrators) is a proceeding aimed to the replacement of the Board of Directors of the relevant company by new directors appointed by the Government (or, as the case may be, by the regional authorities) or to the appointment by the Government of an official (*interventor*) to supervise and approve the operation of the affected entity. It is worth noting that proceedings under Law 54/1997 and Law 34/1998 will take place only in extreme scenarios where the supply of electricity in the Spanish market is at risk because of, for instance, the insolvency or illiquidity of an utility, irregular management of an utility that may result in an interruption of the electricity supply, etc. Moreover, *intervención administrativa* should not affect *per se* the rights and remedies of the creditors of the Insolvent Party (including any close-out netting or set-off rights).

Finally, it should be noted that as a matter of law Spanish mutual funds cannot be subject to Insolvency Proceedings, as they do not have legal personality.

I.1.2 ***Please discuss and advise on whether the contract types listed in Appendix C to the Instruction Letter are governed by different rules and whether these rules would result in a splitting-up or segregation of the portfolios of transactions under the relevant Netted Agreements or Principal Agreements into multiple "netting pools" of disparate treatment or whether these rules would otherwise limit or render***

wholly or partially unenforceable the early termination and close-out netting rights provided for in the EFET Master Netting Agreement or TBMA Cross Product Master Agreement.

Under the Insolvency Law, there is no special treatment for any of the contract types listed in Appendix C to the Instruction Letter.

Notwithstanding the above, it must be noted that there is no certainty that commodity transactions which are spot trades fall within the concept of commodity derivatives for the purposes of Royal Decree Law 5/2005, of 11 March (the "**RDL 5/2005**", a specific piece of legislation providing for close-out netting recognition in relation to certain netting agreements, and in connection to which we kindly refer you to Section I.1.3 below).

In the event that any transactions (in particular, spot trades) are found not to amount to "commodity derivatives" for the purposes of RDL 5/2005, there may be two scenarios:

(i) that the relevant court excludes those transactions from the netting under the Master Agreements; and

(ii) that the relevant court finds that the inclusion into an Agreement (or Foreign Law Agreement) of transactions outside the scope of RDL 5/2005 jeopardises the ability of such Agreement or Foreign Law Agreement to benefit from RDL 5/2005.

In this respect we believe that, even if the literal wording of RDL 5/2005 allows for the second of the above two scenarios, both the rationality of RDL 5/2005 and good practice considerations play in favour of the first scenario. However, we cannot give a conclusive opinion on this issue, as no cases have been brought before Spanish courts relating to the interpretation of RDL 5/2005 (or former equivalent legal provisions).

A clear way to mitigate this risk would be by means of documenting spot trades under a different Agreement (or Foreign Law Agreement). Another (although riskier) possibility would consist of using only one Agreement or Foreign Law Agreement for both spot[2] and forward trades and including in such Agreement or Foreign Law

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[2] Although there are specific pieces of legislation in our jurisdiction that make a distinction between "spot" trades (*compraventas al contado*) and "forward" trades (*compraventas a plazo*) in relation to certain types of securities, Spanish law fails to provide a general definition of both categories of trades. Notwithstanding the above, we are of the view that "spot trades" should be defined for Spanish law purposes, following Article 38(2)(b) of the Commission Regulation (EC) No. 1287/2006 of 10 August 2006 implementing

Agreement a contractual provision providing for the exclusion from the close-out netting calculations of those transactions which be deemed by the relevant Court to fall outside the scope of RDL 5/2005.

I.1.3 ***Enforceability of close-out netting***

Two different scenarios must be distinguished depending on whether or not the relevant Agreement (or Foreign Law Agreement) falls within the scope of Article 16 of RDL 5/2005. Besides this, Foreign Law Agreements where the Insolvent Party is a Spanish credit institutions merit specific considerations:

(i) Agreements (or Foreign Law Agreements) falling within the scope of RDL 5/2005:

Article 16 of RDL 5/2005 provides that:

> "*The declaration of early termination, rescission, cancellation, enforcement or equivalent effect of the financial transactions entered into under a contractual netting agreement or in relation to it, shall not be limited, restricted or affected in any manner by the opening of bankruptcy proceedings or administrative winding-up proceedings*"; and that
>
> "*In the event that one of the parties of the relevant contractual netting agreement is subject to a bankruptcy proceeding or an administrative liquidation proceeding, only the net sum of the transactions entered into thereunder, calculated in accordance with the provisions of such agreement, will be included, as a claim or, as applicable, as a debt in the estate of such party*".

Moreover, pursuant to the First Additional Provision of Royal Decree-law 11/2014, of 5 September, Refinancing Proceedings shall be deemed to amount to "reorganisation measures" for the purposes of the RDL 5/2005.

Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, as a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods: (a) two trading days; or (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

The above amounts to recognising the validity and enforceability of the acceleration of any payment and/or delivery obligation of either party following the institution of an Insolvency Proceeding (including Refinancing Proceedings) with respect to the other party, without the Insolvency Representatives being entitled to challenge or object such acceleration.

It should be noted that Article 16 only applies to financial transactions entered into under a contractual netting agreement which meets the requirements set forth in Articles 4 and 5 of RDL 5/2005. Such requirements are as follows:

(1) that one of the parties to the relevant contractual netting agreement is either:

- a public authority;

- the European Central Bank, the Bank of Spain, a central bank of any Member State of the European Union, a central bank of any third States, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund and the European Investment Bank;

- a credit institution, an investment firm, an insurance undertaking, an undertaking for collective investment in transferable securities or a management company thereof, a *fondo de titulización de activos* ("non-mortgage securitisation fund) or a *fondo de titulización de hipotecaria* ("mortgage securitisation fund") or a management company thereof, a pension fund, or any other financial institutions as defined in Article 4(5) of Directive 2006/48/EC of the European Parliament and of the Council, of 14 June 2006, relating to the taking up and pursuit of the business of credit institutions; or

- a governing body of a secondary exchange, a governing body of a clearing and settlement system, or a central counterparty, a settlement agent or a clearing house as defined in Law 41/1999, of 12 November, on Payment and Securities Settlement Systems, or a similar institution acting in the futures, options and derivatives markets

(together, the "**Qualifying Parties**");

(2) that the relevant netting agreement "*provides for the creation of one single legal obligation which encompasses all of the financial transactions entered into under such agreement and by virtue of which, where there is an early termination, the parties will only have the right to claim the net sum of the terminated transactions*".

In this regard, we are of the opinion (based on the assumptions made in Sections I and II herein) that the Master Agreements satisfy this requirement.

It is worth noting, however, that some counsels have raised the argument that "cross-bridge" agreements such as the Master Agreements (i.e. an agreement intended to encompass a number of different close-out netting agreements (i.e., the Netted Agreement or the Principal Agreements) cannot amount to a "single legal obligation" on the grounds that the fact that they have been entered into after the execution of the several close-out netting agreements for which each such agreement acts as a bridge (which close-out netting agreements will be usually related to different underlying assets and/or different financial instruments -contracts for differences, repos, stock loans, etc.-) shows the lack of a natural connection among the number of transactions entered into thereunder. Accordingly, the risk that the receivers of a Spanish party may try to persuade the relevant Court that the execution of the Master Agreements is not sufficient for all of the Netted Agreements or Principal Agreements to be treated as a "single legal obligation" cannot be fully discarded. In this regard, whilst there is no case law at all relating to the RDL 5/2005 or to the concept of "single legal obligation", we are of the opinion that such argumentation should not reasonably succeed as: (i) transactions entered into under a sole standard close-out netting agreement (for instance, the ISDA Master Agreement or the EFET Agreement) may also be related to different underlying assets (currency, interest rate, commodities, etc.) and may have been entered into prior to the execution of such close-out netting agreement, and (ii) this circumstance has never been an obstacle for these close-out netting agreements (for instance, the ISDA Master Agreement) satisfying the "single obligation requirement" (as shown by their recognition by the different European banking regulators for the purposes of counterparty risk reduction).

In any case, it is essential for the CPMA to satisfy this requirement that the parties have elected to apply Section 10.6 (*Single Agreement*) in the

EFET/IECA Commodities Schedule to the CPMA and that, by amending the CPMA in the manner provided for in the last paragraph of Division 1, Part I, Section C of the Schedule (*Global Close-Out*) or otherwise, the Close-Out (whether automatic or otherwise) of any Principal Agreement and/or Uncovered Transaction results in the Close-Out (whether automatic or otherwise) of all the Principal Agreements and Uncovered Transactions.

(3) that each of the transactions entered into under the relevant netting agreement is a transaction of one of the following types (the "**Qualifying Transactions**"):

- securities loans;
- those financial instruments contemplated in paragraphs 2 to 8 of article 2 of Law 24/1988, including spot FX transactions, any commodity derivatives (including bullion) and allowance derivatives and any combination of the foregoing, irrespective whether they are cash-settled or physically-settled (including, therefore, forward physical gas and electricity transactions);
- repurchase transactions and buy and sell back transactions.

In light of the above, <u>we are of the opinion that discretionary termination rights, close-out netting and the calculation and payment of a Final Net Settlement Amount under §§ 4, 7 and 8 of the MNA and Sections 2 to 4 of the CPMA, will be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment where the relevant Agreement (or Foreign Law Agreement) meets the requirements set forth in Articles 4 and 5 of RDL 5/2005 (subject to our qualifications in Section D.1.4-5 below).</u>

(ii) Agreements (or Foreign Law Agreements) falling outside the scope of RDL 5/2005:

Where an Agreement (or Foreign Law Agreement) falls outside the scope of RDL 5/2005, the exercise of termination rights by the Solvent Party is subject to the general provisions set forth in the Insolvency Law.

Pursuant to Article 61.2 of the Insolvency Law, bilateral agreements which are yet to be performed, in whole or in part, by both parties cannot be terminated by the Solvent Party upon the insolvency of the other party, it being for the receivers of the Insolvent Party (and not for the Solvent Party) to decide on the termination or continuation of such agreements.

Pursuant to Article 61.3 of the Insolvency Law those contractual provisions providing for the automatic termination of a contract or for the right of the solvent party to terminate a contract upon the insolvency of the other party will be null and void (which nullity will affect, however, only the Automatic Termination provision).

Furthermore, close-out netting provisions are not generally enforceable in Spain, since such netting is regarded as an infringement of the general principle of equal treatment of creditors (the background for this being the fact that, pursuant to the Spanish contract law, set-off is regarded as a specific type of payment). This is why Article 58 of the Insolvency Law provides that no set-off can take place in relation to claims owed to and by an insolvent party unless the requirements in order for set-off to operate have been meet prior to the adjudication of the bankruptcy. Accordingly, as a general rule, no creditor of a Spanish Party is entitled to exercise any rights of set-off once that such Spanish Party has become bankrupt.

In light of the above, we are of the opinion that discretionary termination rights, close-out netting and the calculation and payment of a Final Net Settlement Amount under §§ 4, 7 and 8 of the MNA and Sections 2 to 4 of the CPMA, will not be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment where the relevant Agreement (or Foreign Law Agreement) fails to meet the requirements set forth in Articles 4 and 5 of RDL 5/2005.

(iii) Foreign Law Agreements entered into by a Spanish credit institution:

Pursuant to Article 8.1.e) of Law 6/2005 of 22 April ("**Law 6/2005**") which implements the provisions of the Directive 2001/24/EC of 4 April on the Reorganisation and Winding Up of Credit Institutions (the "**Banks Winding-Up Directive**") the effects of an Insolvency Proceeding on a netting agreement (*acuerdo de compensación contractual*) entered into by a Spanish credit institution shall be determined in accordance with the law applicable to that agreement.

It is worth noting that Law 6/2005 does not define the term "netting agreement" (*acuerdo de compensación contractual*). In this regard, we are of the opinion that:

(a) the relevant definition can, however, be found in Article 5 of RDL 5/2005, which implements the provisions of the Directive 2002/47/EC of 6 June 2002 on Financial Collateral Arrangements, pursuant to which a "netting agreement" is defined as "any agreement which provides for the creation of a single legal relationship comprising all transactions entered into thereunder and by virtue of which, upon the occurrence of a termination event the parties will only have the right to claim the net sum arising from the acceleration or termination of those terminated transactions"; and

(b) any Foreign Law Agreement is, therefore, a netting agreement for the purposes of Law 6/2005.

In light of the above, it may well be argued that close-out rights under a Foreign Law Agreement must be enforceable upon the insolvency of the Spanish credit institution to the extent that they are enforceable under the foreign law governing such agreement and irrespective of whether the relevant Foreign law Agreement fall or not within the scope of RDL 5/2005.

It must be however noted that there may be also room to argue that Article 8.1.e) of Law 6/2005 shall only apply to those netting agreements relating to those instruments referred to in section C of Annex I to Directive 2004/39/EC, no cases having yet been brought before the European Court of Justice or the Spanish courts in relation to questions of interpretation of, respectively, the Banks Winding-Up Directive or Article 8.1.e) of Law 6/2005.

I.1.4 ***When rendering your opinion on the enforceability of close-out netting in the context of an insolvency proceeding, you should discuss whether the termination of the Netted Agreements or Principal Agreements or the transactions entered into thereunder, the calculation of the Settlements Amounts, the aggregation and offsetting of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment is voidable, challengeable or in any way capable of being invalidated, deleted, frozen, stayed or otherwise retroactively impacted by a liquidator, receiver, other third party or the court.***

The effectiveness of the close-out netting may be affected where the Master Agreements or any transaction thereunder constitutes a transaction "detrimental to the insolvency estate" and can be avoided under Article 15.5 of RDL 5/2005 in connection with Article 71.1 of the Insolvency Law or could otherwise be rescinded under the Civil Code:

(i) Suspect Period

Under Article 15.5 of RDL 5/2005 in connection with Article 71.1 of the Insolvency Law, the courts can set aside any acts (including payments) made by the Insolvent Party within the two-year period preceding the adjudication of the bankruptcy (the "**Suspect Period**") if the Insolvency Representatives can prove that such transaction was "detrimental to creditors".

In this regard, it should be noted that:

- the Spanish legislation does not provide for a concept of "detrimental" to this effect nor have the Spanish Supreme Court formulated yet a test for this purpose. However, it is clear that both transactions at an undervalue and transactions intended to constitute a preference fall within the scope of Article 15.5 of RDL 5/2005 in connection with Article 71 of the Insolvency Law; and
- conversely, Article 71.5 of the Insolvency Law prevents the insolvency courts from setting aside any transactions entered into by the Insolvent Party within the Suspect Period in the ordinary course of it business and on normal conditions.

(ii) Rescission under the Civil Code

Pursuant to Articles 1,111, 1,291 and 1,297 of the Spanish Civil Code, the courts may, on the application of any creditor of a company (even if the company is *not* subject to an Insolvency Proceeding), set aside a fraudulent transaction entered into by the company within the 4 year period preceding the application. Transactions entered into on arm's length terms and at the then prevailing market rates are unlikely to constitute fraudulent transactions. However, the matters referred to in the last sentence are questions of fact in each case.

Finally, notwithstanding the above, it should be noted in connection with Foreign Law Agreements that pursuant to Article 13 of the EU Insolvency Regulation and Article 208 of the Insolvency Law, and Article 8.1 of Law 6/2005 in connection with credit entities, no act governed by a foreign law can be set aside pursuant to the abovementioned Spanish legal provisions where the beneficiary of that act proves that such foreign law does not allow any means of challenging that act in the case in point.

I.1.5 ***In particular, please clarify whether or not there is a distinction in time with respect to a creditor's rights between: (a) the filing of proceedings seeking a judgment of***

insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected.

It is immaterial whether the Solvent Party exercises its termination rights at any of the above times (provided that such rights are enforceable in accordance with RDL 5/2005, in which regard we kindly refer you to our considerations in Section C.I.1.3 above).

I.1.6 ***We are also interested in whether the insolvency law provides for a "safe harbor" for certain derivatives or other categories of transactions and whether the contract types listed in Appendix C would benefit from such provision(s).***

Please see Section C.I.1.3 above.

I.1.7 ***We would also like to know whether there is publicly available information that would confirm any of the procedural steps mentioned above under (a) through (d) in Section C.I.1.5 above or other solvency related facts (e.g., financial statements, corporate actions, etc).***

In case of a Spanish Party or the Spanish branch of a Foreign Party being declared bankrupt, bankruptcy will be published:

(i) in the Spanish Official Gazette (*Boletín Oficial del Estado*); and

(ii) in the Public Registry on Bankruptcy (*Registro Público de Resoluciones Concursales*, which can be accessed on-line at www.publicidadconcursal.es).

In addition, in retrieving an extract from the Mercantile Registry one could then see such declaration of bankruptcy once it has been registered.

I.1.8 **Set-off**

I.1.8.1 **Set-off in an insolvency scenario**

(a) *Set-off of claims between Parties arising under the General Agreement*:

Without prejudice to the enforceability of the close-out netting agreements meeting the requirements set forth in Articles 4 and 5 of RDL 5/2005, Article 58 of the Insolvency Law provides that no set-off can take place in relation to claims owed to and by an insolvent party unless the requirements in order for set-off to operate have been met prior to the adjudication of the bankruptcy (subject to Article 6 of the EC Regulation No. 1346/2000 on insolvency proceedings (the "**EU Insolvency Regulation**"), Article 205 of the Insolvency Law, Article 8.1 of Law 6/2005, Article 23 of the Banks Winding-Up Directive, Article 80.4.5° of RDL 6/2004, and Article 22 of Directive 2001/17/EC of 19 March 2001 on the Reorganisation and Winding Up of Insurance Undertakings (the "**Insurance Winding-Up Directive**")). Article 6 of the EU Insolvency Regulation, Article 205 of the Insolvency Law, Article 8.1 of Law 6/2005, Article 23 of the Banks Winding-Up Directive, Article 80.4.5° of RDL 6/2004, and Article 22 of the Insurance Winding-Up Directive shall be jointly referred to as the "**Legal Set-Off Provisions**", regarding which we kindly refer you to our considerations in Section C.I.1.9 below.

Pursuant to the Spanish Civil Code, the requirements in order for two claims to be set-off against each other "by operation of law" (*compensación legal*) are as follows:

(i) both claims must be mutual;

(ii) both claims must be *homogeneous*;

This means that both debts must be either cash claims or claims for the redelivery of the same type of fungible assets;

(iii) both claims must be *due and payable* (i.e., matured); and

(iv) both claims must be *liquid* (*líquidas*).

This means that the amount of both claims must be certain. The Spanish Civil Code does not specify what are the requirements for the amount of a claim being deemed to be certain, i.e., whether the calculations made by the relevant creditor are sufficient or whether obtaining a prior judgement from a court is required. However, according to the Spanish Civil Proceedings Act, the determination made by a creditor is not sufficient for the amount claimed by it being deemed to be liquid and certain unless such amount is clearly established in the relevant agreement (e.g., the principal of a loan) or can be calculated pursuant to a simple mathematical operation in accordance with the provisions of the relevant agreement (e.g., the fixed-rate interest accrued under a loan); otherwise, a debt judgement must be previously obtained from a court or, if Article 572 of the Spanish Civil Proceedings Act applies, a notarial certificate of the accuracy of the calculations made by the creditor must be obtained from a Spanish Notary. In order for Article 572 to apply, the following requirements must be satisfied:

- the secured obligations must arise from an agreement executed before to a Spanish Notary Public;
- the secured creditor must have been served prior notice of the amount claimed by the secured creditor; and
- the parties must expressly provide for the application of Article 572 in the relevant agreement.

Notwithstanding the above, parties may freely agree to contractual provisions waiving any of the requirements provided for in the Spanish Civil Code in order for set-off by operation of law to apply. In such a case, the relevant requirements for the purposes of the application of Article 58 of the Insolvency Law are likely to be only those agreed by the parties (to the extent that such parties have provided for contractual set-off to operate automatically or, otherwise, a set-off notice has been served prior to the opening of the relevant Insolvency Proceeding).

(b) *Set-off of claims between Parties arising outside the General Agreement*:

Again, we are of the opinion that set-off of claims arising outside the General Agreement will only be enforceable in an insolvency scenario if either:

(i) in accordance with Article 58 of the Insolvency Law, the requirements in order for set-off to operate have been met prior to the adjudication of the bankruptcy (in which regard we kindly refer you to our considerations in Section C.I.1.8(1)(a) above); or

(ii) the conditions for Article 8.1 of Law 6/2005, Article 80.4.5º of RDL 6/2004 or Article 6.1 of the EU Insolvency Regulation and Article 205 of the Insolvency Law to apply are met, i.e., where such set-off is permitted by the law applicable to the Insolvent Party's claim.

(c) *Set-off between Affiliates or Credit Support Providers*:

We are of the opinion that any contractual provision whereby the amount payable to the Insolvent Party can be reduced by its set-off against any amounts payable to the Solvent Party or any Affiliate or Credit Support

Provider of the Solvent Party by the Insolvent Party or any Affiliate or Credit Support Provider of the Insolvent Party will not be enforceable in Spain in an insolvency scenario.

I.1.8.2 **Set-off in a non-insolvency scenario**

(a) *Set-off of claims between Parties arising under the General Agreement:*

The provisions in an Agreement (or Foreign Law Agreement) providing for set-off between Parties of claims arising out of such Agreement (or Foreign Law Agreement) will be valid and enforceable in a non-insolvency scenario.

(b) *Set-off of claims between Parties arising outside the General Agreement:*

The provisions in an Agreement (or Foreign Law Agreement) providing for set-off between Parties of claims arising outside such Agreement (or Foreign Law Agreement) will be valid and enforceable in a non-insolvency scenario.

(c) *Set-off between Affiliates or Credit Support Providers:*

We are of the opinion that any contractual provision whereby the amount payable by one of the parties (the "**Payer**") to the other party (the "**Payee**") can be reduced by its set-off against any amounts payable to the Payer by any Affiliate or Credit Support Provider of the Payee will be enforceable in Spain in a non-insolvency scenario.

Conversely, any contractual provision whereby the amount payable to the Payee under the Agreement (or Foreign Law Agreement) can be reduced by its set-off against any amounts payable by the Payee to any Affiliate or Credit Support Provider of the Payer will be valid and enforceable in a non-insolvency scenario only to the extent that the relevant Affiliates and/or Credit Support Providers have given their consent to such provision.

I.1.9 ***Whether the laws of your jurisdiction consider set-off and close-out netting as separate or similar rights.***

Whilst from a scholar standpoint it can be debated whether set-off and close-out netting are similar rights, the laws of this jurisdiction make a distinction between the concepts of set-off and close-out netting, close-out netting encompassing two different phases: (i) termination of the relevant transactions (close-out) and (ii) set-off of the market values of the terminated transactions. Moreover, Law 6/2005 deals with set-off and close-out netting in different provisions.

In addition, it should be noted that whilst pursuant to Article 4.2(e) of the EU Insolvency Regulation, the law of the State of the opening of the proceedings shall determine "*the effects of insolvency proceedings on current contracts to which the debtor is a party*", Article 6.1 of the EU Insolvency Regulation provides that "*the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim*" and has been implemented by Article 205 of the Insolvency Law, which language is the same than that of Article 6.1.

It has been largely debated whether or not the set-off protection in Article 6 of the EU Insolvency Regulation (and, accordingly, in Article 205 of the Insolvency Law) can be interpreted to encompass close-out netting.

We are of the view that, unless the European Court of Justice were to find that Article 6 of the EU Insolvency Regulation encompass close-out netting, the Spanish courts are likely to interpret that Article 205 of the Insolvency Law does not cover close-out netting as the term set-off (*compensación*) does not encompass the first phase of the full process of close-out netting, i.e., the termination of the relevant agreement.

Finally, attention must be paid that, in those cases where the Close-out Netting Provisions are not enforceable in Spain because of the Foreign Law Agreement failing to meet the requirements set out in Article 4 and 5 of RDL 5/2005, the aggregation and set-off of amounts of terminated Transactions may be implemented under the Legal Set-Off Provisions. Thus, where the Master Agreements is governed by a foreign law (references to such foreign law being references to its insolvency laws) which permits set-off of unmatured debts, the claims relating to the price payable in relation of property transferred before the commencement of the Insolvency Proceeding could be set-off against each other after the commencement of the Insolvency Proceedings.

I.1.10 ***Assuming the Parties have not specified that Automatic Termination (as defined in § 6.3 of the EFET Master Netting Agreement or Part II.B of the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) applies, are the provisions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement permitting the other Party (the "Terminating Party" or "Closing-Out Party") to terminate the Netted Agreements or Principal Agreements including all transactions upon the occurrence of a Close-Out Event enforceable under the laws of Spain or is there a risk that (i) the entering into the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, (ii) the entering into Netted Agreements or Principal Agreements or transactions thereunder or (iii) the early termination by notice described in § 5.1 of the EFET Master Netting Agreement or***

Section 2.2 of the Cross-Product Master Agreement itself could be challenged by a liquidator, administrator, receiver or third party?

Where the Parties have not specified that Automatic Termination applies, the provisions of the Master Agreements permitting the Terminating Party to terminate the Agreement (or Foreign Law Agreement) (including all Transactions) upon the occurrence of a Close-Out Event would be enforceable under the laws of this jurisdiction where the relevant Agreement (or Foreign Law Agreement) meets the requirements set forth in RDL 5/2005.

I.1.11 ***Assuming the Parties have elected Automatic Termination to apply, are the provisions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement terminating the Netted Agreements or Principal Agreements including all transactions upon the occurrence of a Close-Out Event described in § 6.3 of the EFET Master Netting Agreement or Part II.B of the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement enforceable under the laws of Spain or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?***

Our considerations in Section C.I.1.10 above will also apply under an Automatic Termination scenario, since (as discussed above) pursuant to Article 61.3 of the Insolvency Law those contractual provisions providing for the automatic termination of a contract upon the insolvency of either of the parties are null and void (which nullity will, however, affect only the Automatic Termination provision).

Accordingly, two scenarios shall be distinguished:

(a) where the relevant Agreement (or Foreign Law Agreement) falls within the scope of RDL 5/2005 (in which regard we kindly refer you to Section C.I.1.3 above), it is not necessary for the Parties to agree to an automatic, rather than an optional, termination. Therefore, if Automatic Termination is not specified as applying to a Party in the Schedule to the Master Agreements, the Solvent Party would still be able to terminate all outstanding Transactions between the Parties upon the insolvency of its counterparty and such termination would be enforceable under the laws of this jurisdiction.

    If Automatic Termination is, however, specified as applying to a Party in the Schedule to the Master Agreements, such termination would be enforceable under the laws of this jurisdiction; and

(b) where the relevant Agreement (or Foreign Law Agreement) does not fall within the scope of RDL 5/2005, the election of Automatic Termination will be found by a Spanish insolvency court to be null and void pursuant to Article 61.3 of the Insolvency Law.

I.1.12 ***Would you recommend to elect Automatic Termination to apply upon a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(iii) of the EFET Master Netting Agreement) or similar event? If yes, please specify such event or events and indicate whether it would be necessary or advisable to specify, or to refrain from specifying, a certain grace period to provide for optimal timing of such termination under local law? If you are recommending that a grace period be made applicable, what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of your jurisdiction to have that proceeding dismissed or otherwise terminated? If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event, please supply specific recommended language for purposes of customizing the Automatic Termination provisions to implement such optimal termination timing.***

We would not recommend to elect Automatic Termination to apply. As stated in Section C.I.1.10 above:

(a) where the relevant Agreement (or Foreign Law Agreement) falls within the scope of RDL 5/2005, it is not necessary for the Parties to agree to an automatic, rather than an optional, termination; and

(b) where the relevant Agreement (or Foreign Law Agreement) does not fall within the scope of RDL 5/2005, early termination rights will be not enforceable upon the opening of an Insolvency Proceeding, whether by automatic or active termination.

I.1.13 ***Are the provisions in § 8 of the EFET Master Netting Agreement and Section 4 of the Cross-Product Master Agreement providing for the offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount enforceable under the laws of Spain or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?***

Please see Section C.I.1.4 above.

I.1.14 ***Do the laws of Spain recognize that the Close-Out applies to all transactions? Would we need the single agreement concept (as provided for in § 2.3 of the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, in the Cross-Product Master Agreement) in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some but not all Netted Agreements or Principal Agreements and some and not all transactions thereunder might impact termination and close out rights generally, as well as subsequent rights to terminate transactions remaining under the General Agreement following a previous Partial Close-Out.***

As discussed in Section C.I.1.3 above, discretionary termination rights and close-out netting will be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment only where the relevant Agreement (or Foreign Law Agreement) falls to meet the requirements set forth in Articles 4 and 5 of RDL 5/2005, one of those requirements being precisely that the relevant netting agreement provides for the creation of "*one single legal obligation*". Accordingly, the single agreement concept (as provided for in §2.3 of the MNA and, if so selected, in Section 10.6 (*Single Agreement*) of the EFET/IECA Commodities Schedule to the CPMA) is required in order to preserve the enforceability of discretionary termination rights and close-out netting under Article 16 of RDL 5/2005.

Since neither Spanish law defines the concept of "single legal obligation" nor have the courts formulated any test to this effect, we are of the view that it is uncertain whether transactions can be severed from the Master Agreements and still preserve the single agreement concept.

I.1.15 ***Is the insolvent counterparty's obligation to pay the Final Net Settlement Amount in Euro, USD or GBP (as agreed between the Parties in the Election Sheet or EFET/IECA Commodities Schedule) enforceable under the laws of Spain or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?***

Pursuant to Article 16 of RDL 5/2005, the Final Net Settlement Amount determined by the Solvent Party will be recognised in a Spanish Insolvency Proceeding to the extent that it has been calculated in accordance with the provisions of the Master Agreements (subject to our reservations in Section D.1.4-5 below). Furthermore, in accordance with Article 1,170.1 of the Spanish Civil Code, a debtor is bound to pay in the agreed currency unless this is legally or factually impossible, in which case it may discharge its obligation by tendering the equivalent amount in the Spanish legal currency.

The above notwithstanding, Insolvency Proceedings must be conducted in Euro, as Article 88.1 of the Insolvency Law provides that all claims will be converted into Euros at the official exchange rate on the date of adjudication of bankruptcy *"for the sole purposes of quantifying the liabilities, without such process resulting in a conversion or modification of the claim"* of the Insolvent Party. In this regard, we are of the opinion that:

(a) Article 88.1 will not affect the choice by the Solvent Party of a reasonable rate for the conversion of obligations into the relevant currency in order to calculate the Final Net Settlement Amount;

(b) the Final Net Settlement Amount will have further to be converted into Euro in order for it to be included in the relevant Insolvency Proceeding but only for the purposes of quantification of the liabilities of the Insolvent Party; and

(c) therefore, the Final Net Settlement Amount will have to be paid by Insolvency Representatives, in accordance with the legal order of priority of payments, in the currency originally specified by the Solvent Party.

In this regard, please note that there is no case-law as to the way in which Article 88.1 must be interpreted. Therefore, we cannot fully discard the risk that Spanish courts may not uphold our interpretation of Article 88.1 (even if supported by scholars) and find that the Final Net Settlement Amount must be paid in Euro (by using the official exchange rate on the date of adjudication of bankruptcy).

I.1.16 ***Please specify, if and as applicable, the degree to which termination and close-out rights in insolvency in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?***

Please see our considerations in Section C.I.1.3(ii) above.

I.2 NON-INSOLVENCY RELATED MATERIAL REASONS

I.2.1 In the absence of an Insolvency Proceeding:

Discretionary termination rights, close-out netting and the calculation and payment of a Final Net Settlement Amount under §§ 4, 7 and 8 of the MNA and Sections 2 to 4 of the CPMA will be generally enforceable following a valid Early Termination for non-insolvency related Material Reasons, subject to the following considerations:

(i) with respect to Non-Performance, Spanish courts have ruled that a party to a contract is not entitled to terminate it upon default by the other party of obligations, covenants or undertakings which are merely accessory or ancillary to the main payment and/or delivery obligations under the relevant contract; and

(ii) with respect to Breach of Representation or Warranty, Spanish courts enjoy a discretionary power in order to evaluate whether an incorrect or misleading representation or warranty shall entail, on the basis of its significance, the early termination of an agreement.

I.2.2 After the opening of an Insolvency Proceeding

Discretionary termination rights, close-out netting and the calculation and payment of a Settlement Amount under §§ 4, 7 and 8 of the MNA and Sections 2 to 4 of the CPMA will be generally enforceable in Spain following a valid Termination Event for non-insolvency related Material Reasons, subject to:

(i) those considerations made in Section C.I.2.1 above;

(ii) our qualifications in Section D.1.4-5 below, and

(iii) the fact that pursuant to Article 62.3 of the Insolvency Law, the bankruptcy court may, attending to the interest of the bankruptcy, rule that the agreement must continue in its terms, amounts owing by the bankruptcy estate being classified as "*créditos contra la masa*"[3].

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[3] The Insolvency Law classifies claims in insolvency in five categories, which according to their payment priority are as follows: (1) credits not subject to the insolvency proceeding (*créditos contra la masa*), (2) secured claims (*créditos con privilegio especial*), (3) claims benefiting from general priority (*créditos con privilegio general*), (4) ordinary claims (*créditos ordinarios*) and (5) subordinated claims (*créditos subordinados*). Please note, however, that the relationship between categories (1) and (2) is not properly that of ranking, as those assets securing secured claims (category (2)) cannot be realised by the Insolvency Representatives in order to discharge *créditos contra la masa* (category (1)).

I.2.3 ***Please discuss and advise on the issues outlined above under C.I.1.14, C.I.1.15 and C.I.1.16 in the context of non-insolvency related Material Reasons***

Our conclusions in Sections C.I.1.14, C.I.1.15 and C.I.1.16 will remain unchanged.

I.2.4 ***Are the rights of the Terminating Party or Closing-Out Party to terminate and Close-Out the Netted Agreements or Principal Agreements including all transactions enforceable in accordance with the terms of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, irrespective of the insolvency of Party A?***

Please see our considerations in Section C.I.2.1 above.

II. MULTIBRANCH PARTIES

In this Section II we deal with the issues raised in part C.II of the Instruction Letter, where you asked us to distinguish between:

(i) a Multibranch Party incorporated, organized or having its centre of main interest in Spain; and

(ii) a Multibranch Party incorporated, organized or having its centre of main interest outside Spain, but operating through one or more branches in Spain.

II.1 Spanish Multibranch Party

For the purposes of this Section C.II.1, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (Assumptions), the following additional factual assumptions:

(i) Party A has entered into transactions under Netted Agreements or Principal Agreements through offices in Spain as well as through one or more branches located abroad. After entering into these transactions and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Spain.

II.1.1 ***Would there be any change in your conclusions reached under C.I.1 or C.I.2 above based upon the fact that Party A has conducted business under some or all of the Netted Agreements or Principal Agreements on a multibranch basis prior to its insolvency?***

There would be no change in our conclusions reached under Sections C.I.1 or C.I.2, subject to our considerations in Section C.II.1.2 below.

II.1.2 ***Would the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, the Cross-Product Master Agreement be treated as a single unified agreement by the Spanish receiver under the laws of Spain, regardless of the treatment of the EFET Master Netting Agreement or Cross-Product Master Agreement or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?***

As a general rule, Spanish Insolvency Representatives would be required to defer to the jurisdiction of the insolvency officer appointed in another country in certain circumstances the claims of the Insolvent Party against the Solvent Party where the centre of main interests of the Solvent Party is in another country and there are secondary proceedings under the EU Insolvency Regulation or the Insolvency Law in respect of the Insolvent Party in that third country, as those claims would be deemed under the EU Insolvency Regulation and the Insolvency Law to be situated outside the jurisdiction of the Spanish Insolvency Representatives.

It is not certain, however, the way such general rule must be applied in relation to close-out netting agreements. Whilst we are of the view that, on balance, Spanish Insolvency Representatives will treat any close-out netting agreement as a single agreement and will defer to the jurisdiction of the insolvency official of such third party only the net amount owing to the Spanish Party (if any), no conclusive opinion can be provided on this issue.

II.2 ***Foreign Multibranch party***

For the purposes of this Section C.II.2, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional factual assumptions:

(i) A corporation, a bank, an investment services provider, an insurance undertaking, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than Spain has entered under the Master Agreements into Transactions both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Spain (the "**Spanish Branch**").

(ii) After entering into these Transactions and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

II.2.1 ***Would there be separate proceedings in Spain with respect to the assets and liabilities of the Spanish Branch upon the start of the insolvency proceeding for Party F in Country H? Or would the relevant authorities in Spain defer to the proceedings in Country H, so that the assets and liabilities of the Spanish Branch would be handled as part of the proceedings for Party F in Country H? Could local creditors of the Spanish Branch initiate separate proceedings in Spain even if the relevant authorities in Spain did not do so?***

In this regard, a distinction must be drawn between EEA credit institutions and insurance undertakings and any other corporates.

II.2.2 **Spanish branches of foreign corporates other than EEA credit institutions or insurance undertakings**

There can be Insolvency Proceedings in this jurisdiction with respect to any Party (other than an EEA credit institution or EEA insurance undertaking) whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of that Party.

Pursuant to Article 10.3 of the Insolvency Law, any such Insolvency Proceeding will be a secondary proceeding (*procedimiento territorial*), the scope of which will be limited to those assets located in Spain (including any claims of Party F against the Spanish Party).

In this regard, it is worth noting that:

(i) no legal provision provides for the effects of such secondary proceedings being limited to the liabilities of the relevant establishment (the Spanish branch of Party F); and

(ii) there is no legal, judicial or scholar guidance as to the way in which Article 10.3 must be applied in connection with transactions entered into by the Spanish branch of a foreign party under a master agreement. Therefore, no conclusive opinion can be provided on this matter, although we believe that the better view is that the Insolvency Representatives should refer this issue to the courts of the jurisdiction of the "*centre of the main interests*" (within the meaning in the EU Insolvency Regulation and the Insolvency Law) of Part F.

II.2.2 **Spanish branches of EEA credit institutions or insurance undertakings**

Pursuant to Law 6/2005, which has implemented the Banks Winding-Up Directive, and RDL 6/2004, which has implemented the Insurance Winding-Up Directive, no

Insolvency Proceedings can be instituted in Spain against any credit institution or insurance undertaking authorised in another EEA State (irrespective whether or not such a credit institution or insurance undertaking has a branch in Spain), the administrative or judicial authorities of such other EEA State having exclusive jurisdiction for the opening of such insolvency proceedings.

II.2.3 ***If there were separate proceedings in Spain with respect to the assets and liabilities of the Spanish Branch, would the receiver or liquidator in Spain and the Spanish courts, based on the facts above, include Party F's position under the Netted Agreements or Principal Agreements, in whole or in part, among the assets of Spain and, if so, would the receiver or liquidator and the Spanish courts recognize the close-out netting provisions of the EFET Master Netting Agreement or Cross-Product Master Agreement in accordance with their terms? The most significant problem arising would be if a Spanish receiver, liquidator or court considering a single EFET Master Netting Agreement or Cross-Product Master Agreement were to require a counterparty of the Spanish Branch of Party F to pay the mark-to-market value of transactions entered into with the Spanish Branch to the liquidator or receiver of the Spanish Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other transactions with Party F under the same EFET Master Netting Agreement or Cross-Product Master Agreement. In considering this issue, please assume that close-out netting under the EFET Master Netting Agreement or Cross-Product Master Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.***

Please see our responses in Section C.II.2.1 above.

II.2.4 ***Please consider your answer to your question assuming instead that Party F has no branch located in Spain, but has assets in Spain.***

No Insolvency Proceedings may be conducted in Spain in relation to a Party which does not have an establishment in Spain.

III. COLLATERAL

For the purposes of this Section C.III, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional assumptions:

(i) that the Spanish Party is at all times Transferor under the CSA and the collateral is owned by the Spanish Party A or the Spanish Party is authorized and empowered to transfer ownership in the collateral; and

(ii) that Eligible Credit Support will only include Cash and Letters of Credit. Cash will be denominated in a freely convertible currency and will be held in an account under the control of the non-Spanish Party maintained in the jurisdiction of the relevant currency.

III.1 ***Under the laws of Spain, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Cross Product Credit Support Annex?***

Transfer of ownership will be governed by the law of the place in which the Eligible Credit Support is deemed to be located (*lex situs*).

III.2 ***Would the laws of Spain characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?***

As a general rule, Spanish law does not recognise the enforceability of transfer of title by way of security.

Notwithstanding this, the laws of Spain will characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred (and there will be no risk that such transfers would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under the CSA) to the extent that those transfers of Eligible Credit Support meet the requirements set forth in the RDL 5/2005, which implements the Directive 2002/47/EC of the European Parliament and of the Counsel, of 6 June 2002, on Financial Collateral Arrangements.

Those requirements are as follows:

(a) that one of the parties to the relevant CSA is a Qualifying Party (in which regard we kindly refer you to Section C.I.1.3 above);

(b) that Eligible Credit Support consists only of:

  (i) cash; and /or

  (ii) securities ("*valores negociables*") and other financial instruments, as defined in Law 24/1988 (together, the "**Qualifying Collateral**").

In this regard, we assume that a Letter of Credit which is to be used as Eligible Credit Support will be issued directly to the Transferee as opposed to being issued to the Transferor and then transferred or pledged to the Transferee. Therefore, there is no need to address a "transfer" of a Letter of Credit and, accordingly, the term "Eligible Credit Support" as used in this Opinion is limited to Cash.

Furthermore, the inclusion into a collateral arrangements of collateral provided by third parties and falling outside the scope of RDL 5/2005 does not jeopardise the ability of Qualifying Collateral provided under such arrangements to benefit from RDL 5/2005.

(c) that the relevant CSA is evidenced in writing;

(d) that Eligible Credit Support is provided in connection with a close-out netting agreement (the "**Underlying Netting Agreement**") which "*provides for the creation of one single legal obligation which encompasses all of the financial transactions entered into under such agreement and by virtue of which, where there is an early termination, the parties will only have the right to claim the net sum of the terminated transactions*" (in which regard we kindly refer you to Section C.I.1.3 above).

(e) that each of the transactions entered into under the relevant Underlying Netting Agreement is a Qualifying Transaction (in which regard we kindly refer you to Section C.I.1.3 above).

Notwithstanding the above, it must be noted that:

(i) pursuant to Article 5.1 of the EU Insolvency Regulation (or, as applicable, Article 8.2.a) of Law 6/2005 in respect of credit institutions and Article 20 of the Directive 2001/17/EC of 19 March on the Reorganisation and Winding Up of Insurance Undertakings in respect of insurance undertakings) the adjudication of bankruptcy of a Spanish debtor shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the Spanish debtor which are situated within the territory of other EU Member State other than Denmark (or other EEA Member State in respect of credit institutions and insurance undertakings).

Pursuant to Article 5.2 of the EU Insolvency Regulation, the *in rem* rights referred to in Article 5.1 shall comprise:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; and

(d) a right *in rem* to the beneficial use of assets.

Whilst we duly note that any Cash is provided on a "title of transfer" basis, we believe that, in the absence of case-law of the EU Court of Justice to the contrary, the courts of this jurisdiction are likely to regard any Cash provided as Eligible Credit Support by the transferor as an asset of the transferor for the purposes of the application of the abovementioned legal provisions.

(ii) Pursuant to Article 201 of the Insolvency Law the effects of the adjudication of bankruptcy of a Spanish debtor on the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the Spanish debtor which are situated within the territory of Denmark or a non-EU Member State (or, in respect of credit institutions and insurance undertakings, within the territory of a non-EEA Member State) at the time of the adjudication of the bankruptcy shall be solely governed by the laws of such other state. In this regards, it may well happen that, where Cash has been transferred by the Spanish Insolvent Party to a foreign account in any such states in the name of a foreign Solvent Party, the Spanish court conducting the relevant Insolvency Proceeding may apply the relevant foreign law to decide this issue, irrespective whether the relevant Agreement or Foreign Law Agreement falls or not within the scope of RDL 5/2005.

Moreover, pursuant to the Insolvency Law, where a company incorporated in this jurisdiction has an establishment (within the meaning in the Insolvency Law) in any jurisdiction other than any EU Member State other than Denmark (the "**foreign jurisdiction**"): (i) the opening of secondary proceedings by such foreign jurisdiction limited to the assets of the Counterparty situated or deemed to be situated in that foreign jurisdiction will be recognized in Spain provided that the requirements established in Article 220 of the Insolvency Law are met; and (ii) in such a case, such secondary proceedings will be governed by the laws of the relevant foreign jurisdiction.

III.3 ***Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Spain necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?***

On the assumption that the relevant CSA meets the requirements set forth in order for RDL 5/2005 to apply (in which we kindly refer you to our opinions in Section C.III.1 above), we are of the opinion that:

(a) there is no need to take any subsequent action to ensure that its title in the Eligible Credit Support continues, except that any transfer of Cash as Credit Eligible Support under the CSA must be evidenced in writing (or by electronic means); and

(b) there are no requirements in Spain necessary (including any filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval together with any procedures) that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce or continue such ownership interest; and

Moreover as discussed in Section C.III.1 above, it may well happen that, where cash Collateral has been transferred by the Spanish Insolvent Party to a foreign account in the name of a foreign Solvent Party, the Spanish court conducting the relevant Insolvency Proceeding may apply the relevant foreign law to decide this issue, irrespective whether the relevant Agreement or Foreign Law Agreement falls or not within the scope of RDL 5/2005.

III.4 ***What is the effect, if any, under the laws of Spain of the right to substitute collateral pursuant to § 6 of the EFET Cross Product Credit Support Annex? Does the***

presence or absence of consent to substitution by Party B have any bearing on this question?

Substitution of Eligible Credit Support under §6 of the CSA will be valid and enforceable in Spain to the extent that meets the requirements in order for RDL 5/2005 to apply (in which we kindly refer you to our opinions in Section C.III.1above).

Please note that consent from the Transferee will be always required as provided by §6 of the CSA.

III.5 ***Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by Section 4 of the Cross-Product Master Agreement together with §11 of the EFET Cross Product Credit Support Annex. Assuming that Section 4 of the Cross-Product Master Agreement is valid and enforceable in Spain insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, is § 11 of the EFET Cross Product Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of the Final Net Settlement Amount under Section 4 of the Cross-Product Master Agreement?***

Yes, to the extent that the CSA falls within the scope of RDL 5/2005. Please note that § 11 of the CSA to a Foreign Law Agreement could be enforceable pursuant to the Legal Set-off Provisions (even if outside the scope of RDL 5/2005).

III.6 ***Are the rights of Party B enforceable in accordance with the terms of the Cross-Product Master Agreement and the EFET Cross Product Credit Support Annex, irrespective of the insolvency of Party A?***

Yes, to the extent that the CSA falls within the scope of RDL 5/2005.

III.7 ***Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Cross Product Credit Support Annex during the suspect period subject to avoidance,***

either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

Pursuant to Article 15.5 of RDL 5/2005 in connection with Article 71.1 of the Insolvency Law, the courts of Spain can set aside any financial collateral arrangement (including transfers of collateral thereunder) made by the insolvent party within the Suspect Period if the Insolvency Representatives can prove that such acts were "fraudulent" (*en fraude de acreedores*).

The question whether any transfers of Eligible Credit Support made by the Spanish Party within the Suspect Period can be recovered by the Insolvency Representatives under Article 15.5 of RDL 5/2005 in connection with Article 71 of the Insolvency Law must be analysed by distinguishing two different scenarios:

(a) where the CSA has been entered into and the first transfer of Eligible Credit Support has been made on a date prior to the commencement of the Suspect Period:

Pursuant to Article 10 of RDL 5/2005, the transfer of additional collateral shall be deemed to have been made on the date on which the first transfer of collateral was made where such additional collateral has been posted in order to take account of changes in the value of the collateral or in the amount of the secured obligations.

Accordingly, in this scenario no transfers of Eligible Credit Support made by the Spanish Party within the Suspect Period in accordance with the provisions of the CSA can be recovered by the Insolvency Representative on the grounds of Article 15.5 of RDL 5/2005 in connection with 71.1 of the Insolvency Law (as pursuant to Article 10 of RDL 5/2005, those transfers will be deemed for these purposes to have been made prior to the Suspect Period); and

(b) where the CSA has been entered into within the Suspect Period:

In this scenario, transfers of Eligible Credit Support (including the transfer of Eligible Credit Support representing the Independent Amount) made within the Suspect Period can be recovered by the Insolvency Representative on the grounds of Article 15.5 of RDL 5/2005 in connection with 71.1 of the Insolvency Law only if the Insolvency Representative can prove that such transfers were "fraudulent" (*en fraude de acreedores*).

In this regards, where the CSA has been entered after the execution of the first Transaction under the relevant Master Agreement, there is a risk that any transfers are challenged by the Insolvency Representatives by arguing that the execution of relevant CSA amounted to a "fraudulent preference" as it was intended to relate to pre-existing obligations. Whilst this argumentation is very likely to prevail where no further Transactions were entered into after the execution of the relevant CSA, it is uncertain whether it will be upheld by the courts in the event that a number of Transactions were entered into by the parties after or simultaneously to the execution of the relevant CSA, so that it can be legitimately argued by the Receiving Party that the execution of the relevant CSA was not intended to put him in a better position than that of other creditors but it was a requirement in order for new Transactions being capable of being entered into by the Parties. The assessment whether this counter-argumentation will succeed can only be made on a case-by-case basis, as this issue depends on all particular evidences of the true intention of the Parties available to the courts (for instance but without limitation, whether the Receiving Party can prove that execution of the relevant CSA was required by its internal credit policy, whether the Insolvency Representatives can prove that the Receiving Party was aware of the pre-insolvency situation of the Providing Party, or whether the exposure under the pre-existing Transactions at the time of execution of the CSA is below the relevant Threshold).

Finally, notwithstanding the above, pursuant to Article 13 of the EU Insolvency Regulation and Article 208 of the Insolvency Law, and Article 8.1 of Law 6/2005 in connection with credit entities, no act governed by a foreign law can be set aside pursuant to the abovementioned Spanish legal provisions where the beneficiary of that act proves that such foreign law does not allow any means of challenging that act in the case in point.

III.8 ***Is the EFET Cross Product Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Spain in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Cross Product Credit Support Annex? For example, are there any other requirements such as those mentioned under o) above?***

Please see our considerations in Section C.III.1 above.

III.9 ***Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?***

Except as stated herein, there are no other material local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support provided by a Spanish Party.

IV. GENERAL ENFORCEABILITY

IV.1 ***Are the EFET Master Netting Agreement and the Cross-Product Master Agreement and the EFET Cross-Product Credit Support Annex enforceable under the laws of Spain in accordance with its own terms? We are especially interested in provisions that you may believe infringe upon the ordre public in Spain and that may be challenged by the courts in Spain irrespective of the law that governs the Agreement.***

Subject to the assumptions, qualifications and other comments of this opinion, the MNA, the CPMA and the CSA would be legal, valid, binding and enforceable under the laws of this jurisdiction.

IV.2 ***Do you have other recommendations going to the topic of general legal enforceability that you would like EFET members to consider?***

There are no other material issues relevant to the questions on the subject of collateral addressed in this opinion which we wish to draw to your attention.

V. CONFIRMATION PRACTICES

For the purposes of this Section C.V, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional assumptions:

(i) As far as the Confirmation practice is concerned, when entering into a Transaction, the counterparties in each case (i) make oral reference to the Master Agreements when concluding the relevant Transaction over the phone or (ii) refer to the Master Agreements when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Transactions (in whichever form, including telex, fax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission).

(ii) Parties may or may not use matching systems (like EFET eCM, MarkitWire or DTTC DS Match) to electronically match and exchange confirmations.

V.1 ***Does the formation of a legally binding and enforceable transaction require any formal act (e.g., execution in writing, signature, registration or notarization)?***

There is no formal requirement for a signature, registration or notarisation in order to create a binding Transaction under the laws of this jurisdiction. However, a signature (electronic or otherwise) may help to demonstrate the authenticity and integrity of a Confirmation in respect of an Transaction and it is admissible in evidence in this respect (without prejudice to any other evidences available to the relevant court).

V.2 ***At what point in time does an transaction agreed upon orally become legally binding or enforceable?***

Transactions agreed upon over the telephone will be fully binding on the Parties and enforceable against them as from the time at which a verbal agreement was reached.

V.3 ***Does failure to object to incorrect terms in a received confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?***

In principle, failure to object to incorrect terms in a received confirmation will not constitute acceptance of those terms. However, this matter will always be assessed by the courts on a case-by-case basis in light of all relevant circumstances, there being neither hard and fast rules on this nor a specific time period.

V.4 ***Is the reference to a Netted Agreement and/or Principal Agreement sufficient for the inclusion of the transaction in the Agreement?***

In our view, a Transaction concluded orally which the Parties intend to be included in the Master Agreements would be so included. Moreover, a Transaction entered into through a electronic trading or matching system would be also included in the Master Agreements to the extent that (i) such inclusion is not inconsistent with the regulations and operational procedures of the relevant system and (ii) a bilateral contract has been validly entered into between both Parties.

V.5 **Means of Evidence**

Assuming there is a dispute with respect to the existence or the terms or conditions of an transaction, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the transaction in court: (i) taped recording; (ii) witness' statement; (iii) e-mail or other electronic

message or transaction entry system; and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

Taped Recording

The questions raised above in connection with telephone conversation recordings shall be analysed from two different perspectives:

(a) *Secrecy of communications*

Article 18 of the Spanish Constitutional Law (*Constitución española*) provides that secrecy of communications and, in particular, of postal, telegraphic and telephone communications, shall be guaranteed unless otherwise provided by means of a judicial resolution.

Notwithstanding the above, no Spanish provision prevents a party from recording a telephone conversation without the consent of the counterparty provided that the recording entity is a party to the relevant telephone conversation. Investment firms and credit institutions must, however, let their clients know that that their conversations (if related to trading) are being recorded (pursuant to article 33 of Spanish Royal Decree 217/2008, dated 3 May).

(b) *Data Protection*

Spanish data protection rules only apply to personal data. In this regard, it should be noted that the name and title/position of an individual provided in the course of a telephone conversation does not amount to personal data.

(c) *Witness Statement*

Witness statement will be admissible as evidence before the Spanish courts.

(d) *E-mail or other electronic message or transaction entry system*

Pursuant to Article 24 of Law 34/2002 dated 11 July on Services of the Information Society and E-Commerce (*Ley de Servicios de la Sociedad de la Información y Comercio Electrónico*) agreements entered into by electronic means will be admissible as evidence before the Spanish courts for the purpose of determining the existence and/or terms of the relevant agreement (without prejudice to any other evidence available to the relevant court).

It is worth noting that the Directive on electronic signatures (1999/93/EC) has been implemented in Spain by means of Law 59/2003, dated 19 December, on electronic signature.

(e) ***Facsimile***

Facsimile will be admissible as evidence before the Spanish courts for the purpose of determining the existence and/or terms of the relevant agreement (without prejudice to any other evidence available to the relevant court).

VI. CORE PROVISIONS

VI.1 ***Would any of the elections contemplated by the EFET Master Netting Agreement or the Cross-Product Master Agreement or the EFET Cross-Product Credit Support Annex change the substance of your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting)? As far as the EFET Cross-Product Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.***

Regarding the MNA, it is essential that the parties have not elected to disapply § 4.2 (*Global Nature of Close-Out*) of the MNA in the Election Sheet.

Regarding the CPMA, it is essential that the parties have elected to apply Section 10.6 (*Single Agreement*) in the EFET/IECA Commodities Schedule to the CPMA in order for the CPMA to satisfy the "single agreement" requirement (in which regard we kindly refer you to Section C.I.1.3 above). Moreover, Section 2.2(c) of the CPMA should be amended by making the Global Close-Out election specified in the last paragraph of Division 1, Part I, Section C of the EFET/IECA Commodities Schedule.

As regards the effect of electing in the CSA to allow substitution with or without consent, it should be noted that Spanish law provides that substitution shall be expressly provided for in the agreement. Whilst it could be argued that no right has been provided for where exercise of such right is subject to consent by the other party, we are of the view that such argument is not right and that accordingly there is no difference between electing to allow substitution with or without consent.

VI.2 ***Considering your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting), what are the provisions of the EFET Master Netting Agreement or the Cross-Product Master Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "Core Provision")***

In this regard and to the extent that the "single agreement" concept is relevant (in which we kindly refer you to our conclusions in Section C.I and C.II herein), we believe the following provisions to be regarded as so essential that a material alteration thereof could affect the conclusions reached in Sections C.I and C.II: § 2.3 and 4.2 of the MNA and Section 10.6 (*Single Agreement*) in the EFET/IECA Commodities Schedule to the CPMA.

In any case, it is essential for the CPMA to satisfy this requirement that the parties have elected to apply Section 10.6 (*Single Agreement*). Moreover, Section 2.2(c) of the CPMA should be amended by making the Global Close-Out election specified in the last paragraph of Division 1, Part I, Section C of the EFET/IECA Commodities Schedule.

VII. GOVERNING LAW, ARBITRATION AND JURISDICTION

For the purposes of this Section C.VII, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional assumptions:

That the Master Agreements will be governed by the substantive law of the Federal Republic of Germany, by the law of England or by the law of any other jurisdiction other than Spain.

VII.1 *Would the Parties' agreement to the governing law, submission to arbitration or jurisdiction (§12 of the EFET Master Netting Agreement and Section 6 of the Cross-Product Master Agreement be upheld in Spain, and what would the consequences be if it were not?*

We are of the opinion that the choice of the substantive law of the Federal Republic of Germany, of the law of England or of the law of any other jurisdiction other than Spain to govern the Master Agreements will be recognised in this jurisdiction subject to, and in accordance with, Regulation (EC) NO 593/2008 of the European Parliament and the Council, dated 17 June 2008 on the law applicable to contractual obligations ("**Rome I**").

When applying the substantive law of the Federal Republic of Germany, the law of England or the law of any other jurisdiction other than Spain as the law governing the Master Agreements, the courts of competent jurisdiction of Spain, if any, by virtue of Rome I:

(a) may give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the Master Agreements have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the Master Agreements unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application;

(b) will apply the overriding mandatory provisions of the law of Spain. Provisions of Spanish laws and regulations on the electric sector indicated in Section VIII as well as those relating to Insolvency Proceedings shall be considered as mandatory rules irrespective of the law otherwise applicable to the Master Agreements;

(c) may refuse to apply English, German law or the law of any other jurisdiction other than Spain in relation to the Master Agreements if such application is manifestly incompatible with the public policy (*orden público*) of Spain. In this regard, we are of the view that none of the provisions set out in the Master Agreements is *prima facie* manifestly incompatible with the Spanish public policy, except for:

(i) those provisions in the Agreement (or Foreign Law Agreement) (if any) to the effect that any unilateral calculation, determination or certification will be conclusive and binding;

(ii) those provisions in the Agreement (or Foreign Law Agreement) (if any) which require any defaulting party thereto to pay any penalty which does not constitute a genuine and reasonable pre-estimate of the damage likely to be suffered by the other party as a result of the default in question;

(iii) any indemnity in the Agreement (or Foreign Law Agreement) for legal costs incurred by an unsuccessful litigant;

(iv) those provisions in the Agreement (or Foreign Law Agreement) (if any) which provide that, in the event of any invalidity, illegality or unenforceability of any provision of such Agreement, the remaining provisions thereof shall not be affected or impaired;

(v) any provision of the Agreement (or Foreign Law Agreement) which allows any party to terminate such Agreement as a result of technical defaults which do not materially affect the interests of such party or which violates Article 61 of the Spanish Insolvency Law (in which we kindly refer you to Section C.I.1.3 above); and

(vi) any provision in the Agreement (or Foreign Law Agreement) stating that any representation or communication shall be deemed to have been made or delivered.

(d) shall have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance.

Finally, Spanish courts may require evidence of the English or, as applicable, German law in accordance with Article 281 of the Spanish Civil Proceedings Act dated 7 January 2000 (*Ley de Enjuiciamiento Civil de 7 de enero de 2000*).

Finally, we are also of the opinion that the arbitration provisions of § 12.4.(B) and (C) of the MNA will be recognised in this jurisdiction.

VIII. OTHER PROVISIONS

If you have other recommendations that you would like EFET member companies to consider (for example to fully optimize the General Agreement for a specific purpose such as to support limited trading between two entities both organized and doing business solely in your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter.

We do not have any other recommendations other than those arising from the other Sections of this opinion.

IX. EMIR

When rendering your opinion, please also advise on whether and how has the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR) been reflected/implemented in the legislation of Spain, in particular the financial/capital markets and insolvency laws, or other laws relevant for purposes of rendering the present legal opinion. Please advise whether EMIR or relevant national legislation impact, or alter the legal qualification of any transactions under Netted Agreements or Principal Agreements as listed in Appendix C below.

Please note that EMIR, as any other EU Regulation, is directly applicable in all Member States without the need for any implementation thereof.

Article 12.1 of EMIR provides however that Member States shall lay down the rules on penalties applicable to infringements of the rules under Title II of EMIR and shall take all measures necessary to ensure that they are implemented. This mandate has been implemented by Spain by means of the enactment of Law 10/2014, of 26 June (amending Law 24/1988), pursuant to which infringements of those rules can amount, depending on the circumstances, to either a very serious offence (*infracción muy grave*), a serious offence (*infracción grave*) or a minor offence (*infracción leve*) for the purposes of Law 24/1988.

Finally, Article 12(3) of EMIR provides that any infringement of the rules under Title II of EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract". Therefore any failure by a Party to comply with those rules should not make the Master Agreements invalid or unenforceable.

D. RESERVATIONS

The opinions set out in this Opinion are subject to the following reservations:

1. INSOLVENCY LAWS

1.1 The validity and enforceability of the obligations of the Parties under the Master Agreements are subject to the laws governing insolvency or liquidation proceedings and to other laws of general application relating to or affecting the enforcement of creditors' rights and remedies.

1.2 In an Insolvency Proceeding under the laws of this jurisdiction, any dispositions of the Insolvent Party's property made after the opening of Insolvency Proceeding can be avoided under Article 40 of the Insolvency Law unless it has been approved or authorised by the Insolvency Representatives. Transactions validly entered into after the opening of an Insolvency Proceeding will be capable of inclusion in the netting calculations under the Close-out Netting Provisions (to the extent that the Close-out Netting Provisions are enforceable in this jurisdiction as to which we kindly refer you to Section C.I.1.3 above). Conversely, transactions entered into after the opening of the Insolvency Proceeding without the consent or approval of the Insolvency Representatives can be avoided and, accordingly, might not be capable of inclusion in the netting calculations under the Close-out Netting Provisions but this would not impair the effectiveness of the Close-out Netting Provisions in respect of transactions entered into before the opening of such Insolvency Proceedings or otherwise authorised and approved by the Insolvency representatives.

1.3 The Spanish Insolvency Representatives would be required to defer to the jurisdiction of the insolvency officer appointed in another state in certain circumstances, because the claims of the Solvent Party against the Insolvent Party arising under the Agreement (or Foreign Law Agreement) would be deemed under the EU Insolvency Regulation and the Insolvency Law to be situated outside the jurisdiction of the Spanish Insolvency Representatives. The circumstances referred to are where:

(a) the centre of main interests of the Insolvent Party is in Spain, the centre of main interests of the Solvent Party is in another country, and there are secondary proceedings under the EU Insolvency Regulation or the Insolvency Law in respect of the Insolvent Party in that third country; or

(b) the centre of main interests of the Insolvent Party is in a third country, and the centre of main interests of the Solvent Party is not in Spain.

1.4 Law 9/2012: no close-out rights upon resolution

Law 9/2012 contains various provisions which might affect the effectiveness of the exercise of close-out netting rights under the relevant Agreement (or Foreign law Agreement).

In particular and without limitation:

(i) pursuant to Article 67.1 of Law 9/2012 (broadly following Article 77.1 of the Proposal), the application of a resolution tool or the exercise of a resolution power shall not in itself permit anyone to exercise any right to terminate, accelerate or declare a default under any financial contract (this term comprising commodity derivatives) unless the relevant financial contract is not finally transferred to the bridge institution or a third entity (i.e., rights and liabilities covered by the financial contract remain with the institution under resolution); and

(ii) pursuant to Article 70.3 of Law 9/2012 (which follows Article 63 of the Proposal), the Spanish resolution authorities have the powers to suspend the termination rights of any counterparty under a financial contract with a failing institution that arise by reason of any resolution action, any recovery action or any early intervention action from the publication of the exercise of the power until no later than 5 pm on the business day following that publication; provided that on the expiry of the period of suspension, if the rights and liabilities covered by the financial contract have been transferred to another entity, the counterparty may not exercise termination rights (Article 70.3); and further provided that the counterparty may exercise termination rights in accordance with the terms of the relevant financial contract on the occurrence of any default arising prior or after the transfer which is unrelated to the transfer.

1.5 Law 9/2012: suspension of enforcement of security interest

Article 70.2 of Law 9/2012 (which follows Article 62 of the Proposal) grants the Spanish resolution authorities the power to restrict secured creditors of a credit institution under resolution from enforcing security interests in relation to any assets of that institution for the limited period that the resolution authorities determines necessary to achieve the resolution objectives.

In this regards, the wording of Law 9/2012 is not fully precise, it being uncertain whether such Article 70.2: (i) is intended to apply also to financial collateral arrangements satisfying the requirements set forth in RDL 5/2005, and (ii) if so, whether it is intended to apply only to "security financial collateral" or, conversely, also to "title transfer collateral".

Finally, Law 9/2012 provides for various remedies for a failing credit institution, which include the ability of the Spanish resolution authorities to cause the transfer of property of a credit institution, to another person. A transfer may apply to only part of a credit institution's assets and liabilities (such a transfer being referred to as a "**partial property transfer**"). This may be the case because the property transfer expressly applies to only part of the credit institution's business or because it is ineffective in relation to foreign property, so as to cause the transfer of some, but not all, of the property, rights and/or liabilities of the Spanish Party in relation to the Agreement and/or the collateral associated with such Agreement, with the result that the netting arrangements under the Agreement would be impaired. Notwithstanding this, Article 67.2 of Law 9/2012 addresses the risk that a partial property transfer may have the effect of disassociating secured obligations from security (e.g. transferring the one but not the other), by requiring that liabilities owed to or by the credit institution and security relating to them may not be separated pursuant to the transfer.

1.6 Insurance undertakings

Pursuant to Article 59.1 of RDL 6/2004, "*the claims of the insured, beneficiaries and third parties referred to in Article 73 of Law 50/1980, of 8 October, on Insurance Contract, will have absolute priority over any other claims against the insurance undertaking with respect to the assets which, representing technical provisions, are incorporated into the investment registry*".

While there is a wide consensus among Spanish scholars that such priority right should not prevail over the close-out netting right foreseen in RDL 5/2005, no full certainty can be provided on this issue as there is no case-law in this regard.

2. PROCEDURAL LAW

2.1 In accordance with general principles of Spanish procedural law, the rules of evidence in any judicial proceeding cannot be modified by agreement of the parties, and consequently any provisions of an Agreement (or Foreign Law Agreement) in which determinations made by the Parties are to be deemed conclusive in the absence of manifest error, may not be upheld by Spanish courts.

2.2 Spanish courts may stay proceedings if concurrent proceedings are being brought elsewhere.

3. ENFORCEABILITY OF CLAIMS

3.1 In this Opinion "**enforceable**" means that an obligation is of a type which the Spanish courts enforce. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the relevant Agreement (or Foreign Law Agreement). In particular:

(a) enforcement of the obligations under an Agreement (or Foreign Law Agreement) may be limited by the general principle of good faith. Courts may not grant enforcement in the event they take the view that a right has not been exercised in good faith or that it has been exercised in such a manner as to constitute an abuse of rights *(abuso de derecho)*;

(b) the power of a Spanish court to order specific performance of an obligation or other equitable remedy is discretionary and accordingly, a Spanish court might make an award of damages where specific performance of an obligation is sought;

(c) enforcement may be limited by the provisions of Spanish law applicable to agreements held to have been frustrated by events happening after their execution; and

(d) claims may become barred under statutory limitations or may be or become subject to a defence of set-off or counterclaim.

3.2 A party to a contract may be able to avoid its obligations under that contract (and may have other remedies) where it has been induced to enter into that contract by a misrepresentation and the Spanish courts will generally not enforce an obligation if there has been fraud.

3.3 The counterparty (i.e. *adherente*) of the party proposing a standardised agreement (i.e. *predisponente*) is protected by Law 7/1998, dated 13 April, on *Condiciones Generales de la Contratación* (i.e. Standard Terms Act), even if the counterparty is not a consumer. Pursuant to such Law 7/1998, any lack of clarity in the standard form shall be interpreted in favour of the counterparty; contradictions amongst general and particular conditions shall be solved by making prevail the most favourable for the counterparty, and stipulations contrary to mandatory provisions shall be void. Notwithstanding this, Law 7/1998 shall only apply where one of the parties was prevented *de facto* (due to its weak bargaining position) from negotiating the terms and conditions of the Master Agreements.

3.4 Under the laws of this jurisdiction, where any Party is vested with a discretion or may determine a matter, the laws of this jurisdiction may require that such discretion is exercised or determination made reasonably. Any provision in the Master Agreements providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any Party thereto. The courts of this jurisdiction may regard any calculation, determination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified.

3.5 Under the laws of this jurisdiction, a party to an agreement is not entitled to terminate it upon default by the other party of obligations or covenants which are merely accessory or complementary to the main payment and/or delivery obligations or upon the occurrence in respect of the other party of any event other than an event which may adversely and materially affect the creditworthiness of such other party or its ability to comply with its obligations under the relevant agreement.

4. DEFAULT INTEREST AND INDEMNITIES BETWEEN PARTIES

4.1 There is some possibility that a Spanish court would hold that a judgment on an Agreement (or Foreign Law Agreement) would supersede such Agreement (or Foreign Law Agreement) so that any obligations relating to the payment of interest after judgment would not be held to survive judgment.

4.2 Under Spanish law, interest imposed upon a Party by an Agreement (or Foreign Law Agreement) might be held to be irrecoverable to the extent that it accrues on an unsecured debt after the commencement of an Insolvency Proceeding in respect of the Party liable to pay such interest.

4.3 Any provision of an Agreement (or any communication issued pursuant thereto) purporting to require a Party to indemnify another person against the costs or expenses of proceedings in the Spanish courts is subject to the discretion of the court to decide whether and to what extent a party to such proceedings should be awarded the costs or expenses incurred by it in connection therewith.

5. COLLATERAL TRANSFERRED BY PUBLIC ADMINISTRATIONS

Pursuant to the second paragraph of Article 135.1 of the Spanish Constitution, payment of interest and principal of "public debt of the Administrations" will enjoy absolute priority (hereinafter, the holders of any such public debt will be referred to as "**Priority Creditors**").

Whilst there is not full consensus as to the meaning of the term "public debt" for these purposes, it is likely that it does not comprise claims under the Agreement, so that the Solvent Party would not be regarded as a Priority Creditor. Should the Solvent Party not be treated as a Priority Creditor, the transfer of Cash as Eligible Credit Support would be contrary to Article 135 of the Spanish Constitution, it being unclear whether it would be either fully null and void or, conversely, merely unenforceable against any Priority Creditors. Moreover, even if the Solvent Party were to be treated as a Priority Creditor, it is debatable whether Article 135 of the Spanish Constitution is intended or not to provide for a *pari passu* rule among all of the Priority Creditors, there being theoretical arguments to support both positions.

Please note that Article 135 of the Spanish Constitution does not apply to all Public Authorities but only to those which are within the scope of the term "*Administraciones Públicas*". Such term comprises:

(i) the Kingdom of Spain;

(ii) the Spanish Regional Governments (*Comunidades Autónomas*);

(iii) any Spanish municipalities (*ayuntamientos*) and provinces (*provincias*); and

(iv) quasi-governmental entities (*organismos autónomos* and *entidades públicas empresariales*) legally incorporated by any of the foregoing as a public body under Public Law within the scope of Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts.

6. OTHER QUALIFICATIONS

6.1 We express no opinion as to matters of fact.

6.2 We express no opinion as to the validity and enforceability of any provisions of the Master Agreements other than those to which express reference is made in this opinion.

6.3 If a Party to a Master Agreement is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Union or Spanish sanctions implemented or effective in Spain, or is otherwise the target of any such sanctions, then the obligations of the other Party to that Party under the relevant Master Agreement may be unenforceable or void.

6.4 This letter expresses and describes certain Spanish legal concepts in English and not in their original Spanish terms; therefore, this opinion is issued and may be only relied upon on the express condition that it shall be governed by, and that all words and expressions used herein shall be construed and interpreted in accordance with, the laws of Spain.

This opinion is addressed exclusively to EFET, the members of EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions, is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other persons without EFET's and Clifford Chance's prior written approval.

Yours faithfully,

Clifford Chance, S.L.