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**To: European Federation of Energy Traders (EFET)**

Date: June 18, 2019

**Re: Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of Collateral Arrangements, and Other Related Issues, under the EFET General Agreement Concerning the Delivery and Acceptance of Electricity**

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# I. Introduction

## A. Subject Matter of the Opinion

Reference is made to the July 2nd, 2018 instruction letter sent by EFET (the **Instructions**), by which EFET has asked us to provide an opinion on the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (the "**EFET General Agreement**"), the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement (the "**EFET Credit Support Annex**") and other related issues as outlined below.

## B. Scope of the Opinion – Local Counterparties

This Opinion covers legal entities as listed in Appendix A which are either organised in Greece ("**Greek Entities**") or foreign legal entities ("**Foreign Entities**"), which may be subject to Greek law insolvency proceedings in Greece, as defined below.

In particular, when referring to a **Greek Entity**, we mean, in the case of a credit institution (a bank), an insurance undertaking[1] or an investment firm that provides services involving the holding of funds or securities for third parties, a party that has been authorised to conduct its respective credit, insurance or investment business by the competent regulatory authority of the Hellenic Republic as its "**Home Country**". In all other cases, namely, in the case of a corporate which is not a credit institution or an insurance undertaking or an investment firm that provides services involving the holding of funds or securities for third parties or a natural person, we mean an entity the center of main interests of which is located in Greece in the meaning of Council Regulation (EC) No 2015/848 on insolvency proceedings (the Recast Insolvency Regulation).

When referring to a **Foreign Entity**, we mean, in the case of credit institutions, insurance undertakings or investment firms that provide services involving the holding of funds or securities for third parties, a party that has obtained the relevant license and operates under the laws of a non-EU jurisdiction, or, in the case of a corporate, a party that maintains the centre of their main interests outside Greece.

For the purposes of this opinion a Greek Entity may be any of the following:

i. corporates incorporated in accordance with either Greek law 4548/2018[2] on sociétés anonymes, as currently applicable (A.E., in Greek), or Greek law 3190/1955, as currently applicable, on companies of limited liability (Ε.Π.Ε., in Greek), or Greek law 4072/2012, as currently applicable, on private companies (I.K.E., in Greek);

ii. partnerships incorporated in accordance with articles 249-270 and 271-284 of Greek law 4072/2012, as general or limited partnerships (O.E. and E.E., respectively, in Greek);

iii. credit institutions/banks, as defined in Greek law 4261/2014, which incorporated into Greek law Directive 2013/36/EU, as currently applicable[3] (the **Banking Law** and the **CRD IV**, respectively);

iv. Greek investment services firms, in which brokers and securities dealers are included, as defined in Greek law 4514/2018, which incorporated into Greek law Directive 2014/65/EU on the markets in financial instruments, as amended and currently applicable (the **MiFID II Law** and the **MiFID II**, respectively)[4];

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[1] Insurance undertakings include insurance and re-insurance undertakings.
[2] Greek law 4548/2018 replaced codified law 2190/1920 on sociétés anonymes with effect from 01.01.2019 onwards.
[3] According to article 8 of Greek law 4261/2014, Greek credit institutions may be formed either as Greek sociétés anonymes or Greek banking cooperatives or as an SE, as defined in Council Regulation (EC) No 2157/2001 or an SCE, as defined in Council Regulation (EC) No 1435/2003.
[4] According to Greek law 4514/2018, Greek investment services firms may be formed only as sociétés anonymes.

v. Greek insurance undertakings and reinsurance undertakings as defined in Greek law 4364/2016 ("**insurance undertakings**"). According to Greek law 4364/2016, which has transposed into Greek law Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (the **Solvency II Directive**), the (re)insurance services in Greece can be provided by sociétés anonymes (point (i) herein above) or an SE, as defined in Council Regulation (EC) No 2157/2001, or in case of non-life insurance undertakings and reinsurance undertakings by mutual insurance cooperatives[5];

vi. Greek mutual funds and their management companies which may be any of the following: (i) a Greek law mutual fund and its Greek management company (Α.Ε.Δ.Α.Κ., in Greek) as defined in Greek law 4099/2012[6] which transposed into Greek law Directive 2009/65/EC on UCITS or (ii) a company of varied capital in the form of a société anonyme, as defined in Greek law 4099/2012 (together, (i) and (ii) the **Greek UCITS**) or (iii) any of the Greek sociétés anonymes listed in Greek law 4209/2013 which transposed into Greek law Directive 2011/61/EU on alternative investment fund managers (the **AIFMs**) as falling within its scope of application, *i.e.* a Greek alternative investment fund manager[7], portfolio investment companies governed by Greek law 3371/2005, real estate investment companies and real estate mutual funds management companies governed by Greek law 2778/1999, as currently applicable, the management companies of venture capital mutual funds governed by Greek law 2992/2002 and the management companies of venture capital companies governed by Greek law 2367/1995, as currently applicable;

vii. Greek public law entities, such as the Greek State (which alone according to Greek law is a Greek public law entity), local authorities / municipalities (O.T.A., in Greek), Greek public law pension funds and publicly owned corporations, *i.e.* Greek companies (wholly or partially) owned or controlled by the Greek State[8]; and

viii. the Greek central bank, *i.e.* Bank of Greece (the **BoG**), whose initial Articles of Association were ratified by Greek law 3424/1927.

*Individual Contracts*

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[5] Thus, whenever reference is made herein to insurance undertakings, such reference shall also include the mutual insurance cooperatives, except the sections referring to insolvency proceedings and the respective rules applicable to (re)insurance undertakings.

[6] Greek law 4099/2012 replaced the relevant provisions of Greek law 3283/2004 which transposed Directive 2001/107/EC in Greek legislation.

[7] Namely, any Greek société anonyme licensed by the Hellenic Capital Market Commission under the provisions of Greek law 4209/2013, as currently applicable.

[8] Under Greek law, there are Greek corporates which are controlled by the Greek State but are organised in accordance with Greek private law (the **Greek Public Enterprises**), as well as Greek private law corporates partially owned by the Greek State (the **Greek Mixed Enterprises**). Specifically, Greek Public Enterprises are Greek corporates wholly owned by the Greek State or a governmental body and formed as a commercial corporation and are *sui generis* entities, in the sense that (i) operationally and typically they are formed as Greek sociétés anonymes; but (ii) they are governed, with respect to certain aspects, by Greek public/administrative law. For example, Greek Public Enterprises may operate under a constitutional document drafted almost identically to that of a société anonyme; such constitutional document and possible amendments thereto, however, are issued and performed by Greek administrative acts, for example, laws, ministerial decisions or presidential decrees and not by private law acts, as it is the case in all other ordinary Greek law commercial corporations. In cases of Greek Public Enterprises, only the Greek State, or other public law entities and/or other Greek local authorities are permitted to participate as shareholders in the said enterprises; private (natural or legal) persons are not permitted to participate in such entities. According to the respective Greek legal writing, such entities should be considered as Greek Public Law Entities (as defined herein above).
Notwithstanding the above, there are also enterprises which are partially owned by the Greek State or other Greek public law entities and/or other Greek local authorities, to which the participation of private law entities and natural persons is permitted (the so called **Greek Enterprises of Mixed Economy**, **Greek Mixed Enterprises**); depending upon the percentage of the participation of the Greek State or of any other Greek Public Law Entity in such enterprise's share capital/assets (if such participation extensively exceeds the public's participation or permits the public law entity or the Greek State to appoint the management of such entity) such enterprise should be considered as a Greek Public Law Entity; if the aforementioned instances do not apply, then the enterprise should be considered as a commercial corporation, and the participation of the Greek State or any other Greek public law entity must be considered solely as a means for serving specific public interest.

The Opinion does not relate to any specific Individual Contract (as defined in the EFET General Agreement).

*Spot Contracts*

The conclusions of the Opinion apply both to spot and derivatives contracts (as the latter are described in Appendix B), unless explicitly stated otherwise in paragraph C of the Opinion. In particular, spot contracts are not considered to constitute derivatives or financial contracts and, therefore, paragraphs related only to regulation of derivatives and/or financial contracts do not apply to spot contracts.

It should be noted in the above context that Greek law does not provide for a definition of a "spot" trade. Derivatives are generally understood as defined in the MiFID II. Where deviations are contemplated, such deviations are explicitly stated in the relevant Greek laws.

*Emission Allowances*

The provisions regarding emissions allowances and their trading are contained in Joint Ministerial Decision 54409/2632, which was published in the Official Government Gazette on 27.12.2004, as amended and codified by Joint Ministerial Decision 181478/965, which was published in the Official Government Gazette on 26.10.2017. The relevant legislation does not specify the legal nature of the allowances and there is no case law or legal writing on this matter. However, based on the contents of the allowances and the right to dispose of them, one may conclude that they are sui generis administrative law rights, of a property nature. The latter attribute is noteworthy because for this reason and in accordance with article 17 of the Constitution as well as the first protocol of the European Human Rights Convention they are protected and, therefore, cannot be revoked (subject only to revocation in accordance with their terms) or expropriated, without payment of compensation. There is no official guidance or legal writing as regards the combined application of the above-mentioned provisions that refer to the issuance of CO2 emission allowances and the new provisions on the trading of CO2 emission allowances from 2019 onwards.

Under the MiFID II Law, emission allowances, consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC, as well as derivative contracts relating to such emission allowances are considered financial instruments for the purposes of the MiFID II and the MiFID II Law. This is also confirmed in par. (d) of article 5 of Greek law 4425/2016, as amended by Greek law 4512/2018, relating to the energy exchange market, where reference is made to cases 5 to 11 of Section C of Annex I to MiFID II law for the purpose of defining the financial instruments that qualify as energy financial instruments[9].In view of the above, emission allowances are considered as financial instruments, therefore, the EFET General Agreement can validly be used to govern Transactions in CO2 emission allowances.

## C. Definitions

Terms defined in the EFET General Agreement have the same meaning in the Opinion, unless otherwise defined.

## D. Addressees

The Opinion is addressed exclusively to EFET and for the sole benefit of EFET and its Legal Committee members and any other subscribing entities. It may not be relied upon by, or disclosed to, any other person or legal entity without EFET's or our prior written approval.

[9] We note that pursuant to Greek law 4425/2016, as amended by Greek law 4512/2018, energy financial instruments will be traded on the Greek Energy Exchange, which is currently in the process of establishment, following a spin-off of the respective activities from LAGIE, the current Operator of Electricity Market in Greece.

It may, though, be made available by EFET members to the appropriate regulatory authorities.

## II. Executive Summary

Defined terms used in this legal opinion shall have the same meaning when used in this executive summary, unless otherwise explicitly mentioned.

*Summary of Conclusions*

Subject to the general and additional assumptions listed herein below, the main conclusions of this legal opinion are the following:

*i. Enforceability Of Close-Out Netting Provisions*

(a) The insolvency of the Local Counterparty is validly agreed as termination grounds and is enforceable irrespective of the initiation of insolvency proceedings against the Local Counterparty, to the extent that the Transactions under the EFET General Agreement are considered as "*financial contracts*" under the Greek Bankruptcy Code or, to the extent applicable, subject to the restrictions that the BRR Law provides with respect to the exercise of termination rights.

(b) The Automatic Termination provisions of the EFET General Agreement (assuming that the Parties have so elected) would be enforceable under Greek law, in the case of Insolvency against the Local Counterparty, to the extent that the Transactions under the EFET General Agreement are considered as "financial contracts" under the Greek Bankruptcy Code or, to the extent applicable, subject to the restrictions that the BRR Law provides with respect to the exercise of termination rights and the operation of certain relevant contractual provisions in case of initiation of Insolvency Proceedings.

(c) Pursuant to the law applicable to the EFET General Agreement, the Single Agreement concept applies. This concept is not necessary to establish the right to terminate but to set-off the claims terminated thereunder. Such concept is not harmed by severing / partially terminating certain Transactions and/ or Individual Contracts under the EFET General Agreement, as it is possible under Greek law to partially terminate an agreement.

(d) It would be advisable that the date certification process of the Bond Loan Law be followed where:

either (a) the Local Counterparty is a natural person;

or (b) (i) the Local Counterparty is a Greek Corporate (namely, it is not a credit institution or an investment firm or an insurance undertaking) that cannot benefit from the provisions of the Insolvency Regulation;

(ii) no financial collateral, as defined in the Collateral Law has been agreed to be provided or has been provided under the EFET General Agreement or any collateral provided thereunder does not constitute a financial collateral pursuant to the Collateral Law or the Collateral Directive, as the case may be; and

(iii.a.) the Parties have agreed on a law governing the EFET General Agreement that is not the law of an EU member state or (b)(iii.b.) article 3 par. 3 of the Rome I Regulation applies.

ii. *Multi-Branch Entities*

The entering into the Transactions under the EFET General Agreement on a multi-branch basis does not materially affect the conclusions reached in this legal opinion with respect to the validity and enforceability of the close-out netting provisions of and the financial collateral arrangements under the EFET General Agreement.

iii. *Provision of Collateral*

Financial collateral arrangements entered into as a part of the EFET General Agreement would be enforceable under Greek law in accordance with their contractually agreed terms, irrespective of the initiation of Insolvency Proceedings against the Local Counterparty, provided that the relevant arrangements fall within the scope of application of the Collateral Law and, to the extent applicable, subject to the relevant restrictions provided for by the BRR Law.

iv. *General Enforceability*

Pursuant to Greek conflict of law rules, an agreement shall be governed by the law chosen by its parties, subject to the following exceptions:

– the rights *in rem* over the Collateral (such rights will be governed by the law of the location of the assets (*lex rei sitae*) or the law indicated by the Place of the Relevant Intermediary Approach (PRIMA), as the case may be;

– the application of the relevant contractual clauses should not be contrary to Greek public policy (article 21 of the Rome I Regulation);

– the application of the contractual clauses must not contravene Greek overriding mandatory provisions (article 9 paragraph 3 of the Rome I Regulation);

– matters which are outside the scope of the conflict of laws rules regarding contracts (for example, representation authority of the signatory on behalf of a counterparty);

– the application of provisions which cannot be derogated from by agreement of the laws of a country (other than the country whose law has been chosen) with which all other elements relevant to the situation at the time of the choice are located (article 3 paragraph 3 of the Rome I Regulation);

– matters referring to the existence and validity of the consent of the parties as to the choice of the applicable law, formal validity of the relevant contract and capacity of the contracting parties to enter into the relevant contract.

Further to the above, the Parties' agreement on a foreign jurisdiction will be also upheld by the Greek courts under the provisions of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation) (and specifically, its article 25 on prorogation of jurisdiction) and article 42 of the Greek Code of Civil Procedure on parties' agreement on jurisdiction prorogation or (where applicable) the 2005 Hague Convention of Choice of Court Agreements, in case of an EU member state jurisdiction choice and a third country jurisdiction choice, respectively. The same as above applies in case the Parties agree to subject any dispute to arbitration.

v. *Licensing Requirements*

From a regulatory perspective, emission rights and commodity derivatives are explicitly classified as financial instruments within the meaning of Section C of Annex I to MiFID II and MiFID II Law, therefore, trading in emission rights and commodity derivatives is considered as provision of investment services and triggers the regulatory and licensing requirements set out by MiFID II. Without prejudice to the exemptions provided in article 3 paras. 1(i)(aa) and par. 1(i)(bb) of MiFID II law, entities trading on the above mentioned commodity derivatives listed in the MiFID II Law having such activity as their regular occupation or business will be considered under Greek law as investments services firms which have the right to provide investment services in Greece either on a cross border basis or through a secondary establishment (if such entity is an EU/EEA entity) (articles 34 and 35 of MiFID II law) or mandatorily through a branch and after obtaining the respective license by the HCMC (if such entity is a non-EU/EEA entity) (article 39 of MiFID II law and article 46 of MiFIR).

Further licensing requirements arising from the supply and trading of electricity in the Greek territory are provided by Greek law 4001/2011. The Trading and/or the Supply License is granted by RAE in accordance with the terms and conditions of Greek law 4001/2011 and the Supply and Trading License Regulation and following the process provided for by the Supply and Trading License Regulation.

*vi. Capital Controls Restrictions*

There are certain restrictions applicable to capital transfers from accounts held in Greece to accounts held abroad referring to both securities and cash transfers. The aforementioned restrictions do not apply where such transfers are made from a cash / securities account held outside Greece irrespective of the nationality or residency of the holder / beneficiary of such an account.

In view of the application of the capital controls restrictions in Greece, it would be advisable to include in the EFET General Agreement and the Individual Contracts a representation of the Local Counterparty reading substantially as follows: "*We confirm that all payments made with respect to Transactions under this Agreement, comply or will comply with all currently applicable Greek law capital control restrictions. This, inter alia, means that, where relevant, we hold or will hold all necessary approvals required under Greek law to make the payments to you.*"

**The above summary is provided for convenience only and does not form part of the Opinion.**

## III. Opinions

### A. Documents Reviewed

For the purposes of providing the opinions below, we have reviewed the following documents:

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007),[10]

[10] As per the Instructions, the EFET General Agreement constitutes a bilateral master agreement governing all Individual Contracts the Parties may enter into for the purchase, sale and acceptance of electricity. The EFET General Agreement provides that all Individual Contracts and the General Agreement form a single Agreement (§ 1.1 of the General Agreement), which upon the occurrence of a Material Reason, including a winding-up, insolvency or attachment, may be terminated as a whole only (§ 10.3(a) of the EFET General Agreement). Except as specifically provided (e.g. in the case of termination of only the Individual Contracts for emissions trades under an EFET General Agreement supplemented by an Emissions Allowances Appendix without termination of the Individual Contracts under that same agreements concerning the trade of Power), the termination and close-out under the EFET General Agreement of only certain Individual Contracts, absent the termination of all outstanding Individual Contracts, is not permitted. Following the termination of the Agreement a Termination Amount is to be calculated based on all positive and negative Settlement Amounts as determined in compliance with § 11 of the EFET General Agreement. The EFET General Agreement may be governed by any jurisdiction so agreed by the Parties in the Election Sheet (§ 22.1 of the EFET General Agreement) but is generally either subject to English or German law.

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000),

(together, the **EFET General Agreement**),

- EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010)[11] (the **EFET Credit Support Annex**),
- EFET Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published 3 April 2012),
- EFET Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published 28 February 2018),
- EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005),
- EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2004),
- GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a), published 21 September 2007) (Version 1.0, published 11 September 2009),
- EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013),
- EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013).
- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16 December 2013)
- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015)

For purposes of Part C.V (Confirmation Practices) only:

- EFET Electronic Confirmation Agreement (published 28 June 2005),
- Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2)) to the Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 3 April 2012),

(together, the **Confirmation Practices**)

[11] As per the Instructions, the EFET Credit Support Annex provides for the transfer of full ownership in the collateral to the Secured Party that acquires the right of complete and unrestricted use of the collateral. Upon termination of the EFET General Agreement, any collateral provided but not yet re-transferred by the Parties is to be valued and included in the close-out amount to be determined pursuant to § 11 of the EFET General Agreement (§ 11 of the EFET Credit Support Annex). One special feature of the EFET Credit Support Annex is the definition of "Exposure", which includes all sums due and payable, and the Value of all the commodity delivered, but for which payment has not been received. Another particularity is the inclusion of Letter of Credits.

For purposes of Part C.VI (Core Provision) only:

- EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005),
- EFET Master Netting Agreement (Version 1.0, published June 2010),
- CPMA Cross-Product Master Agreement (Version February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003),
- EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003),
- EFET Credit Support Annex to the Master Netting Agreement (Version 1.0, published February 2011).

(all together, the **Documents**).

## B. General Assumptions

a) Two counterparties enter into the EFET General Agreement and/or any of the Documents (the **Parties**) and at least one of them is a Greek Entity or a Foreign Entity (**Party A**).

b) None of the Parties is an individual.

c) Party A is a corporation, financial institution or other entity as listed in Appendix A and further described in Section I.B. of this Opinion.

d) The Documents are governed by a law other than the laws of Greece (including English or German law). Any of the Documents governed by such foreign law is valid and binding in accordance with any law applicable to it, including the law applicable to its substance, its form, to the insolvency of Party A's counterparty and its legal capacity.

e) Each EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) is enforceable under the laws of any relevant jurisdiction (other than the laws of Greece) and each counterparty has duly authorised, executed and delivered, and has the capacity to enter into, each document.

f) On the basis of the terms and conditions of the EFET General Agreement, any of the Documents entered into by the parties and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the Parties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B.

g) The Individual Contracts provide for the physical delivery of commodities, certificates or emission rights in exchange for cash, however, some of them may also provide for cash settlement or, in the event that offsetting physical delivery obligations are entered at different times, may be settled by agreement through the combination of, as applicable, a partial or total cancellation of otherwise offsetting physical delivery obligations, coupled with a net financial payment.

h) None of the Parties is entering into any of them being in a state of cessation of payments or acting fraudulently or to the detriment of the creditors of Party A.

i) All of the representations and warranties given by any of the Parties (other than representations and warranties as to such matters of Greek law on which we opine) were, are, and will be, when made or repeated or when deemed to be repeated, true and accurate.

j) Each Party is, and will continue to be, a validly existing legal entity with capacity, power and authority under the applicable laws of all relevant jurisdictions to enter into and perform its obligations (i) under the Documents and (ii) any Individual Contracts that may be entered into by the Parties pursuant to the EFET General Agreement.

k) The persons representing (as legal representatives or attorneys in fact) each of the Parties in entering into the EFET General Agreement, or any of the Documents, including each Individual Contract, are properly authorised under the laws of each competent jurisdiction and such authorisation has not been terminated or revoked.

l) Each of the Parties will obtain, comply with the terms of, and maintain all authorisations, approvals, licences and consents required to enable it to lawfully enter into and perform its obligations under the EFET General Agreement and any of the Documents and to ensure the legality, validity, enforceability or admissibility in evidence of the EFET General Agreement, and any of the Documents in all relevant jurisdictions.

Additional assumptions are included below with respect to certain opinions expressed below in section C.

## C. Opinions

### I. Enforceability of Close-out Netting

1. Winding-up, Insolvency or Attachment

*i. General Overview of Greek law Insolvency Proceedings*

The only bankruptcy, composition, rehabilitation (e.g. administration, receivership or voluntary arrangement) or other insolvency proceedings to which Party A would be subject in Greece, pursuant to the relevant Greek laws, including Greek law 3588/2007 (the Bankruptcy Code)[12], are the following:

- the **Bankruptcy Proceedings or Bankruptcy** (as defined herein below in paragraph C.I.1.i.1);
- the **Special Liquidation Proceedings** (as defined herein below in paragraph C.I.1.i.2);
- the **Reorganisation Proceedings** (as defined herein below in paragraph C.I.1.i.3);
- the **Extrajudicial Debt Settlement Mechanism** (as defined herein below in paragraph C.I.1.i.4).

[12] The Bankruptcy Code entered into force from September 16, 2007, to apply to proceedings commencing after that date (articles 180 and 182 of the Bankruptcy Code).

### C.I.1.i.1 Bankruptcy Proceedings or Bankruptcy[13]

Bankruptcy proceedings apply under articles 1-98 and 107-177 of the Bankruptcy Code[14]. Bankruptcy Proceedings apply to all corporate entities, investment firms and insurance undertakings and partnerships, including companies of varied capital regulated pursuant to Greek law 4099/2012 (which has transposed into Greek law Directive 2009/65/EC) and the management companies mentioned in Greek law 4099/2012 and in Greek law 4209/2013, Greek Public Enterprises and Greek Mixed Enterprises[15].

Greek Public Law Entities, including the Greek State, are not subject to Insolvency Proceedings, according to par. 2 of article 2 of the Bankruptcy Code. They are, nevertheless, covered by this Opinion, unless otherwise indicated.

Please note that, according to article 145 of the Banking Law, Bankruptcy Proceedings (as defined herein above) do not apply to Greek credit institutions.

The objective pre-condition for a debtor to be declared bankrupt is being in a state of cessation of payments. According to article 3 of the Bankruptcy Code[16], the cessation of payments is either actual or constructive. An actual cessation of payments is deemed to exist, if the debtor fails to pay due to an inability of a permanent nature all or a significant proportion of its due and payable monetary obligations that derive from its commercial business. A constructive cessation of payments exists if the debtor continues to make payments "*through destructive means*", *i.e.* through a distress sale of assets, through borrowing at exorbitant rates etc.

Upon commencement of Bankruptcy Proceedings, the following apply with respect to the contractual obligations of the insolvent Greek entity:

- article 29 of the Bankruptcy Code provides for the "*cherry picking*" right of the bankruptcy official in charge of the insolvent entity ("*σύνδικος*", in Greek) as to which pending contracts will be performed by the insolvent entity. Such right, however, does not apply with respect to rights and obligations under a single contract.

Under the cherry picking right of the bankruptcy representative, the latter has the option to fulfil or not any mutual obligations contracts, which are outstanding at the time of declaration of bankruptcy, assuming that such contracts have not been terminated by the counterparty of the bankrupt entity. In case the bankruptcy representative opts not to fulfil the contract, the counterparty will be entitled to compensation for breach of contract. Outstanding obligations for the purposes of the above, are mutual obligations under contracts, in which neither of the parties have fulfilled its obligations. If one of the parties has fulfilled its obligations prior to the declaration of bankruptcy the above rule does not apply.[17] If the bankrupt party has fulfilled its obligations, the bankruptcy representative has

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[13] Please note that the composition between a company and the 60% majority of its creditors in accordance with article 44 of Greek law 1892/1990, the appointment of a supervisor in accordance with article 45 of Greek law 1892/1990, the special liquidation in accordance with articles 46, 46a or 46b of Greek Law 1892/1990, the placing of a company under the administration of its creditors or subjecting it to special liquidation in accordance with legislative decree 3562/1956, have been abolished according to article 181 of the Bankruptcy Code, whereas article 4a of Greek Law 1806/1988 (on stock exchanges and brokerage companies) was abolished according to article 85 of Greek law 3606/2007 (which has been replaced by MiFID II law) and mandatory law 1665/1951 (on banking supervision) was abolished by Greek law 3601/2007 (which has been replaced in its entirety by the Banking Law).

[14] These provisions have replaced the provisions of articles 525-707 of the previously applicable Greek Commercial Law. Articles 525 - 707 of the Greek Commercial Law were expressly abolished by article 181 of the Bankruptcy Code.

[15] A Greek Public Enterprise or a Greek Mixed Enterprise may be subject to Bankruptcy Proceedings to the extent the relevant entity is not considered a Greek Public Law Entity. According to certain Greek legal writing (A. Tachou, Notes on the problem of bankruptcy of public enterprises, Review of Commercial Law (ΕπισκΕΔ, in Greek), 1997, p. 545, para. 25), Greek Public Enterprises should be considered as Greek Public Law Entities and thus, they may not be subjected to Greek law insolvency proceedings. However, the prevailing opinion of the respective Greek legal writing (L. Kotsiris, Bankruptcy Law, 8th ed., 2011, p. 127; S. Psichomanis, Bankruptcy Law, E' Ed., 2012, p. 41) seems to suggest that the Greek Public Enterprises shall be subject to Greek law insolvency proceedings.

[16] Article 3 of the Bankruptcy Code repeated the existing definition given to the cessation of payments by the previous law as interpreted by Greek case law and legal writing.

[17] See Kotsiris, op. cit., p. 316-317.

the right to demand the consideration from the counterparty, whereas if the counterparty of the bankrupt party has fulfilled its obligations prior to the declaration of bankruptcy it will have to submit its claims to the bankruptcy procedure.

In case of electricity contracts there is a continuing obligation of the Seller to deliver electricity and of the Buyer to pay each month the purchase price for the electricity so delivered during the preceding month. In case the Buyer is declared bankrupt on day "x", the Seller will always have fulfilled its obligation in respect to those delivery obligations that fell due between the Trade Date and the said day "x" or to the day on which the Buyer fails to pay the purchase price. The individual contract, however, may not be split to the part that it has been fully discharged by both parties or by the Seller, so that the bankruptcy representative may elect the performance or not of the rest of the agreement, as the Single Agreement concept applies. In this case, if the bankruptcy representative opts to terminate the agreement, termination will operate *ex nunc*. Thus, performances having taken place in the past are not affected by termination;

- the bankrupt entity loses the right to administer its assets, which are thereafter managed by the bankruptcy representative.

In particular, any physically settled and any cash settled derivatives electricity transactions entered into with the bankrupt Party A represented by its statutory representatives after Bankruptcy has taken effect has no effect and is not binding on the bankrupt entity, unless the bankruptcy representative consents to such transaction, according to par. 1 of article 17 of the Bankruptcy Code, even if the counterparty of the bankrupt entity was not aware of the declaration of Bankruptcy, as the only person who has by operation of law the capacity to represent the bankrupt entity is the bankruptcy representative.

- according to par. 1 of article 31 of the Bankruptcy Code (as amended by Greek law 4336/2015), contracts of indefinite term remain in force notwithstanding Bankruptcy, unless otherwise provided for by law[18]. By way of exception, the same paragraph provides that in case of financial contracts, the agreement may be terminated or amended according to its provisions if one of the counterparties becomes bankrupt. The provision that bankruptcy is validly agreed by the contracting parties as a termination event, which used to be included in article 32 of the Bankruptcy Code, was abolished by Greek law 4336/2015. The Explanatory Report on Greek law 4336/2015 (as posted on the website of the Greek Parliament) states that the amendments of articles 31 and 32 of the Bankruptcy Code mentioned above aim to abolish legal provisions that provided for the automatic termination of indefinite term contracts on grounds of bankruptcy pursuant to relevant contractual clauses (*"ipso facto"* clauses), excluding, though, financial contracts, namely contracts that have as their object the provision of banking, credit, investment, insurance services. The report further states that the above amendments comply with international practice and targets to preserve the value of the assets of the defaulted entity[19]. Currently, article 32 of the Bankruptcy Code only provides that article 31 of the Bankruptcy Code is without prejudice to termination rights provided for by law or contract. It is our considered opinion that the Transactions of Appendix B should be considered as financial contracts when considered as derivatives under the terms of the MiFID II and the MiFID II Law. With respect to spot contracts, par. 2 of article 7 of Commission Delegated Regulation (EU) 2017/565 and article 38 of Regulation (EC) No 1287/2006 defines a *"spot contract"* 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; (b) the period generally accepted in the

[18] The previous version of this provision ended as follows: "*(…) unless otherwise provided for by law or by contract*" (emphasis added). The words "*… or by contract …*" were deleted by Greek law 4336/2015.
[19] Please refer herein below to sub-section "*The Safeguards of the BRR Law*" in Section C.I.1.i.3 herein below.

market for that commodity, asset or right as the standard delivery period. Based on the above provisions, spot contracts may not qualify as "derivative contracts".

For contracts which are not financial contracts, other termination grounds (e.g. non-performance) survive as termination grounds notwithstanding the declaration of bankruptcy, but bankruptcy itself does not constitute such a ground. Another interpretation could be that for non-financial contracts the declaration of bankruptcy cannot be ground for automatic termination, but can be ground for termination by notice. Please note, however, that as Greek law 4336/2015 is very recent there is no case law or legal writing on this point;

- according to par. 1 of article 36 of the Bankruptcy Code, the declaration of Bankruptcy does not affect the creditor's right to set-off its claim against the claims of the bankrupt debtor, provided that the pre-conditions for a valid and enforceable set-off claim existed before the bankruptcy declaration. Under Greek law, specifically, (in case Greek law applies), article 440 of the Greek Civil Code provides that only reciprocal, due and payable obligations/claims can be set-off. Paras. 2 and 3 of article 36 of the Bankruptcy Code explicitly provide (as opposed to the abolished provisions of the Greek Commercial Law) that the set-off of claims deriving from OTC derivatives transactions or in accordance with close-out netting provisions under financial collateral arrangements will be regulated by the applicable special legislation, as in force (*please refer to our answer to question C.I.1.i. for the Greek law provisions securing the enforceability of the close-out netting provisions, namely the provisions of Greek law 3301/2004 that has transposed into Greek law Directive 2002/47/EC on financial collateral arrangements (the* ***Collateral Law*** *and the* ***Collateral Directive****, respectively), article 16 of Greek law 3156/2003 on bond loans (the* ***Bond Loan Law****), article 9 of the Recast Insolvency Regulation, as well as the provisions of Greek law 3458/2006 and articles 220 et seq. of Greek law 4364/2016 on insurance undertakings, which have transposed Directive 2001/24/EC on the reorganisation and winding up of credit institutions (the* ***Credit Institution Insolvency Directive****) and Solvency II Directive, respectively, and the impact of the provisions of Greek law 4335/2015, which has transposed into Greek law Directive 2014/59/EU on establishing a framework for the recovery and resolution of credit institutions and investment firms (the* ***BRR Law*** *and the* ***BRRD****, respectively) to the pertinent provisions of the Collateral Law and of Greek law 3458/2006*;
- articles 41 and 42(b) and (d) of the Bankruptcy Code provide, among other things, for the obligatory revocation of (i) the payment of claims which are not yet due and payable (ii) and the provision of collateral, in order for the insolvent entity to secure pre-existing claims for which the insolvent entity had not assumed such obligation *ab initio* or in order to secure new claims assumed by the insolvent entity in replacement of those pre-existing claims, in both cases, where the payment, or the provision of the collateral, respectively, were performed within the suspect period[20] (the suspect period commences on the date of cessation of payments, which is defined by the court order declaring bankruptcy and ends on the date on which the entity is declared bankrupt). Such payment and/or provision of collateral are deemed by law to be to the detriment of the insolvent entity's creditors.

Moreover, article 43 of the Bankruptcy Code provides for the potential revocation of an agreement entailing obligations for all parties thereto or of payments of due and payable debts, in both cases effected within the suspect period (after the cessation of payments of the insolvent entity and before the declaration of bankruptcy), in case the counterparty of Party A knew when taking part in the legal act in question that the latter was in a state of

[20] According to article 7 of the Bankruptcy Code, the duration of the suspect period is defined by the court order declaring bankruptcy. Such period shall not exceed 2 years from the date on which the entity is declared bankrupt. The said article reiterates the respective provisions applicable under the previous regime.

cessation of payments and such act was to the detriment of the creditors of the Greek insolvent entity. In the case of the Transactions listed in Appendix B, as physically settled and derivatives electricity transactions are mutual obligations contracts (*i.e.* contracts in which both parties undertake obligations and in which the obligations of each party are dependent upon the obligations of the other, in the sense that the obligations of each party constitute the consideration of the obligations of the other party[21]), any such Transactions having taken place during the suspect period are not automatically void but may only be declared void by a court decision upon application of the bankruptcy representative, if the latter can prove that the counterparty of the insolvent entity knew of the cessation of payments[22] and that the transaction in question was to the detriment of the creditors of the insolvent entity (par. 1 of article 43 of the Bankruptcy Code).

Furthermore, article 44 of the Bankruptcy Code provides that acts of the insolvent debtor entered into within five (5) years prior to the declaration of bankruptcy with the intention to harm other creditors may be revoked if the other contracting party knew the fraudulent intention of the insolvent debtor.

However, according to article 45 of the Bankruptcy Code, acts of the insolvent creditor that are explicitly exempted by law from the aforementioned absolute prohibition are not recalled and remain valid and enforceable. Furthermore, article 45 of the Bankruptcy Code exempts *inter alia*: (a) ordinary acts of the professional or business activity of the bankrupt entity taking place under normal circumstances and within the limits of its usual transactions and (b) a performance of an obligation by the bankrupt entity for which the counterparty paid immediately an equivalent consideration in cash.

- according to par. 1 of article 24 of the Bankruptcy Code the interest accrual relating to unsecured claims is discontinued.

### C.I.1.i.2 Special Liquidation Proceedings

Special liquidation proceedings shall apply in accordance with the provisions of any of:

- **articles 235 *et seq.* of Greek law 4364/2016** (on insurance and reinsurance undertakings);
- **articles 145 *et seq.* of the Banking Law** (on liquidation of credit institutions which constitutes the only winding up proceeding applicable to credit institutions) and Decision 180/3/2016 of the Credit and Insurance Committee of the Bank of Greece (**BoG**), as amended and currently applicable;
- **article 90 of the MiFID II Law** (on special liquidation of investment firms);
- **articles 68 et seq. of Greek law 4307/2014** on emergency special administration procedure (*έκτακτη διαδικασία ειδικής διαχείρισης*, in Greek)[23] applicable to any individual or legal person who may be subject to bankruptcy proceedings located in Greece and being in a state of cessation of payments. In case of acceptance of the relevant petition filed with the competent court, a special administrator proposed by the debtor is appointed by the court. The latter is assigned with the management of the company, and, inter alia, conducts a public tender for the sale of the assets of the business under emergency special administration or individual business sectors or their assets which do not constitute per se sectors.

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[21] See Lambros Kotsiris, Bankruptcy Law (in Greek), 7th ed., Athens-Thessaloniki 2010, p. 316-317.

[22] Actual knowledge is required – it is not sufficient for the counterparty of the bankrupt entity to have been unaware of its cessation of payments due to negligence, even gross negligence.

[23] The special liquidation procedure of former article 106(ια) of the Bankruptcy Code has been abolished by virtue of law 4446/2016.

According to article 72 paragraph 3 of Greek law 4307/2014, the entry of a business into the above-mentioned emergency special administration procedure does not constitute a ground for the termination of pending contracts, nor may it constitute a ground for revocation of administrative licenses. The following also apply in the context of emergency special administration procedure: (a) article 70 of Greek law 4307/2014 provides for the possibility of the chairman of the competent court to order, upon petition of any person having legitimate interest, until the issuance of a decision on the application for entry into emergency special administration procedure, the measures referred to under article 10 of the Bankruptcy Code applicable thereto by way of analogy. The suspension entails automatically the suspension of the same claims towards the other co-debtors as well as the prohibition of the disposal of the immovable property and the equipment of the debtor's business and the other co-debtors thereof. and (b) pursuant to article 71 of said law 4307/2014, the approval of the petition for the entry into emergency special administration procedure leads to the automatic suspension of all individual prosecution measures against the undertaking / business as long as the emergency special administration procedure remains in effect, including the measure of administrative enforcement against the State and social security organizations as well as the measures of safeguarding of a debt towards the State in accordance with relevant provisions of the Code on Tax Procedure (i.e. article 46 of law 4174/2013). The term "individual prosecution measures" does not encompass and should not be construed as to encompass the exercise of termination right of existing agreements and the right to set-off as provided for by the EFET General Agreement;

(all the above are together called **Special Liquidation Proceedings**).

In case of the various forms of Special Liquidation Proceedings (as the latter are defined above), similarly to the case of Bankruptcy Proceedings, the statutory representatives of the insolvent entity lose the power to represent it. The entity in question is henceforth represented by the liquidator[24]. Therefore, any transactions entered by such representatives after the submission of the insolvent entity to special liquidation is null and void, even if the counterparty is in good faith[25]. Please note, however, that there is no regulation of any suspect period prior to a Special Liquidation Proceeding. Finally, Special Liquidation Proceedings do not provide the liquidator with a "cherry-picking" right similar to the Bankruptcy Proceedings[26].

### C.I.1.i.3 Reorganisation Proceedings

Reorganisation Proceedings shall apply in accordance with the provisions of any of:

- **articles 99-106(f) of the Bankruptcy Code** (as currently in force as last amended by Greek law 4446/2016), which provide for the reorganisation measures applicable to all corporate entities, partnerships and natural persons, including Greek Public Enterprises and Greek Mixed Enterprises[27] (the "**General Reorganisation Measures"**)[28]. The debtor and its creditors may reach an agreement[29] on the

[24] See Kotsiris/ Hatzinikolaou-Aggelidou, op. cit., nr. 95, 115 and 151; George Michalopoulos, Set-off in Bankruptcy (in Greek), Athens 2001, p. 114.
[25] See Mazis, op. cit., p. 132
[26] See Mazis, op. cit., p. 141.
[27] A Greek Public Enterprise or a Greek Mixed Enterprise may be subject to Reorganisation Proceedings to the extent that the relevant entity is not considered a Greek Public Law Entity.
[28] The General Reorganisation Measures have been included, subject to certain exceptions, in Annex A to Recast Insolvency Regulation.
[29] For such agreement a majority of 60% of the claims of the creditors participating in the relevant meeting, including at least 40% of the existing secured claims is required.

restructuring of the assets and liabilities of the former (the "**Reorganization Agreement"**) which is further ratified by the bankruptcy court and becomes binding on all creditors of the insolvent entity[30]. A Reorganization Agreement between the creditors alone can be ratified, provided that the debtor is in cessation of payments at the time of entering into the agreement.

- articles 136-138 of the Banking Law provide for certain reorganisation measures which may be imposed on credit institutions by the BoG for the protection of the financial stability and the enhancement of the public's confidence in the financial system (the "**Credit Institution Reorganisation Measures**"), which are the following: a) the appointment of an administrator; (b) the extension of the maturity of the credit institution's obligations; and (c) a mandatory share capital increase.
- Furthermore, pursuant to article 2 of BRR Law, the BoG or the SRB (in the case of credit institutions operating in Greece)[31] or the HCMC (in the case of investment firms operating in Greece which are licensed to hold monies or securities on behalf of their clients), may apply certain measures to credit institutions or investment firms, respectively, as well as to certain other Greek entities that are members of the same group of such credit institution or investment firm provided certain conditions are met (the "**BRR Reorganisation Measures**").

Based on the above, the **BRR Reorganisation Measures** include the following:

**(A)** **Early intervention measures**: Certain early intervention measures are introduced by articles 27, 28, 29 of BRR Law and article 137 of the Banking Law, as amended. Note that unlike other BRR Reorganisation Measures, early intervention measures are imposed by the competent Banking Supervisory Authority (*i.e.* Bank of Greece or ECB, as the case may be) and not by the competent resolution authority (as provided in article 4 of Council Regulation (EU) No 1024/2013).

- Early intervention measures of article 27 of the BRR Law are "soft" intervention measures which may be imposed by the Banking Supervisory Authority where an institution infringes or, due to rapid deterioration of its financial condition, is likely to infringe certain licensing, operational and regulatory requirements, as provided by the Banking Law and Regulation (EU) No 575/2013.
- Based on the provisions of article 28 of the BRR Law, if the measures taken in accordance with article 27 of the BRR Law are not sufficient, the Banking Supervisory Authority may require the removal of the senior management or management body of the institution, in its entirety or with regard to individuals.
- Furthermore, in accordance with article 29 of BRR Law and article 137 of the Banking Law, as amended, the competent Banking Supervisory Authority may under certain circumstances, appoint one or more temporary administrators to the institutions in principle for a one-year period. Based on what is

[30] The Reorganisation Plan may provide for any kind of restructuring including in particular the following: (i) amendment of the terms of the debtor's obligations (e.g. change of duration, change of payable interest rate, replacement of security rights etc.); (ii) debt to equity swaps; (iii) modification of inter-creditor relationships following execution of the agreement, in their capacity either as creditors or as potential shareholders of the debtor. In particular, the Reorganisation Plan may provide that a class of creditors is not entitled to payment of its claims before another class of creditors has been fully satisfied; (iv) haircuts; (v) disposal of debtor's assets; (vi) outsourcing of the debtor's management to a third party; (vii) full or partial transfer of the debtor's business to a third party; (viii) suspension of individual creditors' enforcement rights following execution of the Reorganisation Plan. In case of dissenting creditors such suspension can be only imposed for a period which does not exceed three months; (ix) appointment of a person acting as observer in order to safeguard the implementation of the terms of the Reorganisation Plan; (x) payment of additional amounts in repayment of outstanding claims in case the debtor's financial status improves. The Reorganization Plan is mandatorily supplemented by a business plan covering the term of the Reorganisation plan, which is approved by the parties to the latter.

[31] At this point, it should be noted that Regulation (EU) No 806/2014 on establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (the **SRM Regulation**) (pursuant to which competence for imposition of insolvency measures will change) is applicable from 01.01.2016.

proportionate in the circumstances, the temporary administrator may either be appointed in order to replace the management body of the institution temporarily or to work temporarily with the management body of the institution. The powers of the temporary administrator are specified by the Banking Supervisory Authority at the time of its appointment and may include some or all of the powers of the management body of the institution. According to par. 6 of article 137 of the Banking Law, the appointment of a temporary administrator does not *per se* entail the annulment, termination or amendment of contracts, or the acceleration of any claim against the credit institution in question or the suspension of individual enforcement measures against the same;

**(B)** **Resolution tools:** The following resolution tools are introduced by BRR Law (the "BRR Resolution Tools") and may apply when (i) the BoG or the SRB[32] in its capacity as the "Resolution Authority" and in cooperation with the Banking Supervisory Authority considers that the relevant institution is insolvent or is likely to become insolvent; (ii) there is no reasonable prospect that any alternative private sector measures would prevent the insolvency of the institution within a reasonable timeframe; and (iii) a resolution action is necessary in the public interest (article 32 of BRR Law) and is proportionate to the achievement of such objectives, whereas if the usual credit institution liquidation procedures were to be followed, those resolution objectives could not be achieved:

**(i)** **Sale of business tool, as provided for by articles 38 and 39 of BRR Law**: The Resolution Authority may resolve to transfer to a purchaser that is not a bridge institution: (i) shares or other instruments of ownership issued by the institution under resolution; (ii) all or any assets, rights or liabilities, as well as contractual relationships, of the institution under resolution.

Without prejudice to the safeguards of articles 73 to 80 of the BRR Law (the "**Safeguards**"), the shareholders or creditors whose assets are not transferred shall not have any rights over or in relation to the transferred assets. The transfer shall be effected without obtaining the consent of the shareholders of the institution under resolution or any third party other than the purchaser, without notification to third parties and without complying with any procedural requirements under company or securities law as well as with any requirements under Greek law 3401/2005 (the **Prospectus Law**) and Greek law 3461/2006 (the **Takeover Law**) other than the procedural requirements under the of the BRR Law.

**(ii)** **Bridge institution tool of articles 40 and 41 of the BRR Law**: The Resolution Authority may resolve to transfer to a bridge institution: (i) shares or other instruments of ownership issued by one or more institutions under resolution; (ii) all or any assets, rights or liabilities, as well as contractual relationships, of one or more institutions under resolution. Without prejudice to the safeguards of articles 73 to 80 of the BRR Law, the shareholders or creditors of the institution under resolution or any third parties whose assets are not transferred to the bridge institution shall not have any rights directly or indirectly over or in relation to the assets transferred to the bridge institution, its management body or senior management. The transfer shall be effected without obtaining the consent of the shareholders of the institution under resolution or any third party other than the bridge institution, without notification to third parties and without complying with any procedural requirements under company or securities law as well as with any requirements under the Prospectus Law and the Takeover Law.

[32] Please refer to footnote 35.

**(iii) Asset separation tool of article 42 of the BRR Law**: The Resolution Authority may resolve to transfer assets, rights or liabilities of an institution under resolution or a bridge institution, to one or more asset management vehicles that shall manage the transferred assets with a view to maximising their value through eventual sale or orderly wind down. It should be noted that the asset separation tool may only be applied together with another resolution tool. Where the asset separation tool is applied together with the bridge institution tool, the asset management vehicle may acquire assets, rights, liabilities or contractual relationships not only from the institution under resolution, but also directly from the bridge institution. Without prejudice to the safeguards of articles 73 to 80 of the BRR Law, the shareholders and creditors whose assets are not transferred shall not have any rights over or in relation to the assets, rights, liabilities and contractual relationships transferred to the asset management vehicle or its management body or senior management. The transfer shall be effected without obtaining the consent of the shareholders of the institution under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law.

**(iv) Bail-in tools of articles 43 and 44 of the BRR Law:** The Resolution Authority may resolve to apply the bail-in tool (including in relation to derivatives) in order to (a) recapitalise an institution that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorisation and to continue to carry out the activities for which it is authorised, and to sustain sufficient market confidence in the institution or entity; (b) to convert to equity or reduce the principal amount of claims or debt instruments that are transferred: (i) to a bridge institution with a view to providing capital for that bridge institution; or (ii) under the sale of business tool or the asset separation tool. The bail-in tools may be applied to all liabilities of an institution that are not excluded from the scope of the tool pursuant to paras. 2 and 3 of article 44 of the BRR Law. Furthermore, par. 5 of article 44 of the BRR Law provides for the right of the competent Resolution Authority to further exclude liabilities from the application of the bail-in tool, only in exceptional circumstances and only subject to certain criteria being met.

**(C) Write down of capital instruments:** in accordance with articles 59 and 60 of the BRR Law, the Resolution Authority may exercise the power to write down or convert capital instruments either independently of a resolution action or in combination with a resolution action. Write down or conversion is exercised in accordance with the priority of claims under normal insolvency procedures as further analysed in article 60 of the BRR Law.

**The Safeguards of the BRR Law**

Pursuant to articles 73 *et seq*. of the BRR Law, where one or more BRR Reorganisation Measures have been applied, the following Safeguards shall apply:

i. shareholders bear losses first and creditors bear losses after shareholders, provided that no shareholder and creditor incurs greater losses than they would have incurred if the institution had been wound up under normal insolvency proceedings, in accordance with the no creditor worse off principle (the **NCWOP**). For the purpose of assessing this treatment, a valuation is carried out by an independent person as soon as possible after the resolution action or actions have been effected. If the valuation shows that any shareholder or creditor has incurred greater losses than it would have incurred in a winding up under normal insolvency proceedings, then it is entitled to the payment of the difference from the Hellenic Deposit and Investment Guarantee Fund (the "**Resolution Fund**") or the Single Resolution Fund;

ii. security arrangements, financial collateral agreements with transfer of securities, set-off arrangements, netting arrangements, covered bonds and structured finance agreements, are all appropriately safeguarded in case of partial transfers of assets of an institution in the context of application of the BRR Reorganisation Measures. More specifically, articles 76 *et seq*. of the BRR Law, *inter alia,* provide that in case the mandatory transfer includes title transfer financial collateral arrangements, set-off and netting arrangements, then such agreements are mandatorily transferred **<u>in their entirety</u>** (e.g. the transfer of assets against which the liability is secured may not be transferred, unless that liability and benefit of security are also transferred).

iii. pursuant to par. 1 of article 63 of BRR Law and article 49 of BRR Law, when the resolution authority exercises write down and conversion powers in case of liabilities arising from derivatives, such powers are exercised solely on the obligation that derives upon or following the performance of the closing out of the derivative. This means any write down or conversion power can only be performed on the net amount deriving from the application of the close-out netting provisions of the relevant derivative agreement. For this purpose, the Resolution Authority is empowered (at the initiation of the resolution proceedings) either to terminate the derivative contract(s) or apply the close-out netting provisions of each derivative contract. In the above context, the value of the obligation that derives from the derivative contract(s) is determined (pursuant to article 36 of the BRR Law on the evaluation of the liabilities of the credit institution under resolution proceedings) after the close-out netting (as provided for in the relevant contractual arrangement(s)) has taken place.

Please note that the term "*derivative*" is defined for the purposes of the BRR Law in point 74 of par. 1 of article 2 of the BRR Law by cross referring to point 5 of article 2 of Regulation (EU) No 648/2012, namely as the financial instruments set out in points (4) to (10) of Section C of Annex I to MiFID II,[33] as implemented by Commission Delegated Regulation (EU) 2017/565 and Commission Regulation (EC) No 1287/2006. On the basis that the BRR Law opted for the wide definition of derivatives for the purposes of the BRR Law, subject to the special terms agreed by the parties to an EFET General Agreement and the relevant Individual Contracts, all of the Transactions listed in Appendix B should be covered by the

[33] Regulation (EU) No 648/2012 makes reference to Directive 2004/39/EC, transposing in Greek legislation Greek law 3606/2007. Directive 2004/39/EC was repealed by MiFID II, which has been transposed into Greek legislation by Greek law 4514/2018. Thus, references to Directive 2004/39/EC and Greek law 3606/2007, should be construed as references to MiFID II and MiFID II law, respectively.
Points (4) to (10) of Section C of Annex I to the MiFID II provide as follows:
"*… (4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;*
*(5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;*
*(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;*
*(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;*
*(8) Derivative instruments for the transfer of credit risk;*
*(9) Financial contracts for differences;*
*(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF or an MTF…*"
The MiFID II Law has repeated verbatim the above points.

aforementioned definition to the extent that they qualify as derivatives under points 5, 6, 7 and 10 of Section C of Annex I to MiFID II and the MiFID II Law. In this context, we note that pursuant to point (6) of Section C of Annex I to MiFID II and MiFID II Law, wholesale energy products as defined in point (4) of Article 2 of Regulation (EU) No 1227/2011 traded on an OTF that must be physically settled should not be considered as financial instruments under MiFID II and MiFID II Law.

Similarly, based on the relevant provisions of article 38 of Commission Regulation (EC) No 1287/2006, spot contracts may not qualify as "derivative contracts".

iv. according to paras. 2 and 3 of article 44 of the BRR Law, secured obligations, including covered bonds, are, among others, liabilities exempted from the application of the bail-in tool, to the extent covered by the security provided. Title transfer arrangements such as the EFET Credit Support are covered by this safeguard, as title transfer arrangements are explicitly mentioned in the definition of "secured obligations" in point 26 of par. 1 of article 2 of the BRR Law[34].

On the basis of the last two points, (iii) and (iv), the Transactions listed in Appendix B should all benefit from the BRR Law Safeguards, as "*derivatives*", as the latter are defined in point 74 of par. 1 of article 2 of the BRR Law, to the extent they qualify as "derivatives" under the MiFID II and the MiFID II Law, and/or "*secured obligations*", as the latter are defined in point 26 of par. 1 of article 2 of the BRR Law, to the extent that they qualify as "secured obligations". It should be noted that obligations under the EFET General Agreement secured by Letters of Credit or Guarantees will not be considered as "*secured obligations*" under the BRR Law and they will not be excluded from a bail-in tool application.

- pursuant to article 68 of the BRR Law (which transposed article 68 of the BRRD) the application of certain contractual terms (e.g. regarding termination, suspension, modification etc.) is excluded during the implementation of Early Intervention Measures and BRR Resolution Tools. In particular, the implementation of the latter cannot *per se* be considered as an enforcement event (as defined in the Collateral Law) and where substantive contractual obligations (including payment and delivery obligations) as well as the obligation to provide collateral are met, such implementation does not entitle the counterparty to exercise any termination, suspension, amendment, close-out netting, right or any right to take possession, exercise control or impose the provision of collateral or affect any other right of the institution under the BRR Reorganisation Measures. Article 68 of the BRR Law is a Greek law overriding mandatory provision in accordance with Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the "**Rome I Regulation**").

**Special Powers of the Resolution Authority[35]**

The following special powers are available to the Resolution Authority in the context of the Resolution Tools under the BRR Law:

(a) general and ancillary powers analysed in articles 63 *et seq*. of the BRR Law, including among others, the power to suspend certain obligations pursuant to any contract to which an institution under resolution is a party **from the publication of a notice of the suspension until midnight at the end of the business day following such imposition**, the power to restrict the enforcement of security interests until midnight on the business day immediately following publication of the suspension decision and the power to temporarily suspend termination rights, *i.e.* until midnight on the

[34] Furthermore, par. 5 of article 44 of the BRR Law provides for the right of the competent Resolution Authority to further exclude liabilities from the application of the bail-in tool, only in exceptional circumstances and only subject to certain criteria being met.

[35] These powers are the ancillary powers conferred by law to the competent Resolution Authority so that the latter is able to perform and serve the purpose of the resolution measures provided for in the BRR Law.

business day immediately following publication of the suspension decision, provided that the credit institution in resolution continues to meet its payment and delivery obligations;

(b) the power to appoint a special manager to replace the management body of the institution under resolution. The special manager may have all the powers of the shareholders and the management body of the institution. However, the special manager may only exercise such powers under the control of the Resolution Authority.

Please also refer to the sub-section "*The Safeguards of the BRR Law*" herein above with respect to other special powers conferred to the competent Resolution Authority by the BRR Law, and, in particular, articles 49, 63 and 68 of the BRR Law.

**The HFSF Bail-In Measures**

Apart from the BRR Law bail-in tool, bail-in measures are also provided for by par. 1 to (and including) 4 of article 6(a) of Greek law 3864/2010 on establishing the Hellenic Financial Stability Fund, as amended and currently applicable (the "**HFSF Bail-In measures**"). The aforementioned measures applicable to credit institutions constitute, for the recapitalisation purposes of Greek law 3864/2010, resolution measures as defined in article 2 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions, which has been transposed into Greek law by Greek law 3458/2006.

The bail-in measures include (i) the absorption of losses by the existing shareholders in order to ensure that the equity of the institution becomes equal to zero, where appropriate, by means of decreasing the nominal value of its ordinary shares following a decision of the competent body of the credit institution; (ii) the decrease of the nominal value of preference shares and other CET1 instruments and then, if needed, of the nominal value of Additional Tier 1 instruments and then, if needed, of the nominal value of Tier 2 instruments and other subordinated liabilities and then, if needed, of the nominal value of unsecured senior liabilities not preferred by mandatory provisions of law in order to ensure that the net asset value of the credit institution is equal to zero; or (iii) if the net asset value of the credit institution is above zero, the conversion into shares of other CET1 liabilities and then, if needed, of Additional Tier 1 instruments and then, if needed, of Tier 2 instruments, and then, if needed, of other subordinated liabilities and then, if needed, of unsecured senior liabilities not preferred by mandatory provisions of law in order to restore the capital adequacy ratio of the credit institution to the level required by the Bank of Greece.

The HFSF Bail-In Measures may also concern any liabilities undertaken through the provision of guarantees granted by the credit institution with regard to debt or equity instruments issued by legal entities included in the consolidated financial statements of such credit institution; and any claims against the credit institution under credit arrangements between the credit institution and the abovementioned entities.

Though there is no explicit definition in Greek law 3864/2010 as to what constitutes an unsecured senior liability not preferred by mandatory provisions of law, on the basis that par. 1 (i) of article 145A of the Banking Law provides for the preferential treatment of unsubordinated claims such as claims from loans, credit arrangements, derivatives, in case of special liquidation proceedings against a credit institution, the HFSF Bail-In Measures should not affect the obligations under an EFET General Agreement, therefore, such obligations should not be considered as falling within the scope of the application of the HFSF Bail-In Measures.

- **articles 222-234 of Greek law 4364/2016** on insurance undertakings (the "**Insurance Undertaking Reorganisation Measures**");

(the "**Reorganisation Proceedings**").

**C.I.1.i.4 Extrajudicial Debt Settlement Mechanism**

In the context of the Extrajudicial Debt Settlement Mechanism, a debtor that is tax resident in Greece and meets certain criteria provided by Greek law 4469/2017 can benefit from an extrajudicial procedure for settling debts, generated before 01.12.2017, towards any creditor, which derive from the debtor's business activity or other cause, provided that the settlement of those debts is considered vital by the participants in order to secure the debtor's business viability. The relevant application is submitted electronically by 31.12.2018 on a dedicated platform of the Special Private Debt Management Secretariat and the extrajudicial procedure is concluded by the execution of a debt restructuring agreement between the debtor and the consenting creditors, that is ratified by the court. The ratification decision covers all the debtor's claims, irrespective of their participation in the extra-judicial procedure, subject to certain exceptions provided by the law (the **Extrajudicial Debt Settlement Mechanism**);

(the Bankruptcy Proceedings, the Special Liquidation Proceedings, the Reorganisation Proceedings and the Extrajudicial Debt Settlement Mechanism collectively referred to as the **Insolvency Proceedings** or **Insolvency**).

***Insolvency Proceedings with respect to Greek law mutual funds***

Greek law mutual funds, as defined by article 4 of Greek law 4099/2012 on mutual funds, are groups of assets, such assets consisting of securities, financial instruments and cash and belonging to more than one unit-holder in co-ownership, constituted pursuant to the respective permission issued by the Hellenic Capital Market Commission (the "**HCMC**"). Greek mutual funds are managed by a specially regulated type of Société Anonyme in Greece called **AEDAK**, *i.e.* Société Anonyme of Mutual Funds Management, whose registered seat and central management is located in Greece and whose sole object as a corporate is to manage mutual fund(s). Greek mutual funds are not *per se* legal entities and, as such, they cannot be declared bankrupt.

An AEDAK may enter into transactions on behalf of a specific mutual fund and can also provide assets of this mutual fund as collateral for these transactions entered into on behalf of this specific mutual fund. Given that an AEDAK may manage more than one mutual fund, it is imperative to clarify on whose behalf each transaction is being entered into, preferably by executing a separate EFET General Agreement in respect of each individual mutual fund managed by an AEDAK. The mutual fund that the relevant EFET General Agreement relates to should be clearly stated.

Greek law 4099/2012 does not provide for the implications on the Greek law mutual fund's assets, in case the AEDAK (managing the specific fund) becomes insolvent. However, as the mutual fund is a distinct group of assets from the assets owned by the AEDAK entity, if the AEDAK becomes bankrupt, the group of assets of which the mutual fund is consisted, shall not be regarded as liable for the AEDAK's debts/obligations according to the Bankruptcy Code, and vice versa; the AEDAK shall not be regarded as liable with its own assets for obligations undertaken on behalf of the mutual fund it manages. It is, further, expressly stated in Greek case law that the bankruptcy of the AEDAK managing the mutual fund/s (or even the bankruptcy of the custodian of the mutual fund/s) has no effect on the group of assets of which the mutual fund/s is/are consisted, as they are not included in the "bankruptcy assets", according to the Bankruptcy Code.

The bankruptcy of the AEDAK should not *per se* be regarded as a reason for the liquidation of the mutual fund (unless the regulation of the mutual fund expressly provides AEDAK's bankruptcy as a liquidation event for the mutual fund). According to par. 1(f) of article 9 of Greek law 4099/2012, in case the AEDAK managing a mutual fund becomes bankrupt, the

HCMC has the right to liquidate such mutual fund, only if it is not possible for the HCMC to appoint a new AEDAK.

The plain language of the definition of Bankruptcy in an EFET General Agreement covers the Insolvency of an AEDAK or the liquidation of a Greek mutual fund. It would be advisable, where the AEDAK is entering into the EFET General Agreement on behalf of a mutual fund, to include a separate reason for termination in respect of the liquidation of the assets that make up the mutual fund.

***Insolvency Proceedings with respect to Public Law Entities and the Bank of Greece Public Law Entities***

According to par. 2 of article 2 of the Bankruptcy Code Greek public law entities, local authorities and public organisations cannot be declared bankrupt. Thus, the abovementioned entities cannot be subject to Insolvency Proceedings, as defined in the Opinion, apart from Greek Public Enterprises and Greek Mixed Enterprises to the extent that they are not considered Greek Public Law Entities (as discussed above).

***The Bank of Greece (central bank of Greece)***

According to article 1 of the Articles of Association of the Bank of Greece, the Bank of Greece is established as a société anonyme[36]. However, it is explicitly provided in article 72 of its Articles of Association that the provisions applicable to sociétés anonymes shall not apply to the Bank of Greece, to the extent that they are contrary to what is provided in its Articles of Association. According to article 74 of the Articles of Association of the Bank of Greece, the latter will be dissolved, only if the privilege attributed to it to issue bank notes is revoked. According to the wording of the aforementioned article, the Bank of Greece cannot become bankrupt, as this would also entail its dissolution, for as long as it is the central bank of Greece. Please note, in this context, that revocation of such privilege by a Greek law would probably be contrary to the independence attributed to the Bank of Greece as the national central bank of Greece, a member of the Euro system.

In light of the above, please note that the bankruptcy of the Bank of Greece is a rather theoretical question.

***Administrative Receivership in accordance with article 1034 of the Code of Civil Procedure***

In accordance article 1034 of the Greek Code of Civil Procedure the court may impose the compulsory administration of the real estate or business of a debtor, in order to satisfy a creditor. This is a measure of individual enforcement, not a collective one and as such should not in principle be considered in the context of collective enforcement measures.

The imposition of administrative receivership proceedings in accordance with articles 1034 *et seq.* of the Greek Code of Civil Procedure has the effect that the obligor loses the management of the business being subjected to the compulsory administration, which is assumed by the administrator. This takes place upon the service to the obligor of the decision to impose compulsory administration (though the obligor performs temporarily the management until such time as the administrator assumes his duties).

None of the restrictions discussed in the context of Insolvency Proceedings (as these are defined for the purposes of the Opinion) apply in case of 1034 GCCP proceedings. As such, no disruption (such as the ones discussed in the context of bankruptcy, insolvency, for example, claw back risk, restrictions to exercise of termination right or of the set off right) to the operation of the close-out netting provisions of the EFET General Agreement can occur. Even if the appointed administrator seeks to terminate the EFET General Agreement,

[36] Please note that Bank of Greece is an entity of dual nature; it is established as a société anonyme but it has competences attributed to a public authority.

he would have to respect the relevant contractual arrangements as having been agreed by the parties and as interpreted by the relevant foreign governing law.

Whether Reorganisation Proceedings qualify as a Winding-up, lnsolvency or Attachment as defined in the EFET General Agreement is a matter of the governing law of the EFET General Agreement to determine. The plain language used in the EFET General Agreement to define the Winding-up, lnsolvency or Attachment adequately cover the Bankruptcy Proceedings, the Special Liquidation Proceedings, the Reorganisation Proceedings, the Extrajudicial Debt Settlement Mechanism and the Administrative Receivership of article 1034 of the Greek Code of Civil Procedure.

***Adaptation in Greece of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law in 1997***

The 1997 UNCITRAL Model Law on Cross-Border Insolvency has been implemented in Greece by Greek law 3858/2010. The provisions of Greek law 3858/2010 are drafted generally in line with the provisions of the 1997 UNCITRAL Model Law on Cross-Border Insolvency (though the provisions of the latter are not *verbatim* reiterated in Greek law 3858/2010).

Greek law 3858/2010 mainly provides for (a) recognition of foreign bankruptcy proceedings in Greece, in which case the foreign bankruptcy representative may have direct access to Greek courts and the right to ask for the initiation of concurrent bankruptcy proceedings in Greece, in cases where assets of the insolvent debtor are located in Greece; (b) the equal treatment of Greek and foreign creditors; such equality shall not be extended to the matter of the ranking of the claims of Greek and foreign creditors (*i.e.* if as a matter of law in the particular circumstances specific Greek creditors rank higher than specific foreign creditors, such fact will not be disturbed by the aforementioned provision– for example, if all the foreign creditors of a particular insolvent entity are unsecured whereas some or all the Greek creditors have taken security, then the Greek creditors will continue to rank senior to the foreign creditors).

Under article 28 of the Greek Model Law on Cross-Border Insolvency, separate proceedings may be initiated in Greece, only after the recognition of the main insolvency proceedings and only in case where the insolvent debtor has assets in Greece. This means that if there is a Greek branch with no assets in Greece, there will be no grounds to initiate separate insolvency proceedings under the Greek Model Law on Cross-Border Insolvency. The results of such separate proceedings shall be restricted only to the assets located in Greece, and to the extent necessary, according to the provisions of Greek law 3858/2010, to other assets as well.

*<u>Additional Assumptions</u>*

For the purposes of questions (a) to (g) of this section C.I. we additionally assume the following:

- The relevant EFET General Agreement is governed either by a foreign law (including English or German law) or the laws of Greece.
- After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Greece and, subsequently to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") Individual Contracts for the insolvent counterparty.

a) Assuming the Parties have <u>not</u> specified that Automatic Termination (as defined in § 10.4 of the EFET General Agreement) applies, are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of Greece or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the early termination by notice itself could be challenged by a liquidator, administrator, receiver or third party?

Under Greek law, there are two effects of the close-out netting provisions of the EFET General Agreement: (a) all Transactions are terminated and (b) all claims deriving from such Transactions are valued as of the date agreed by the Parties in the EFET General Agreement and the parties' obligations are set-off/netted against each other, so that only one net claim remains.

As discussed above, the termination of financial contracts is explicitly provided for by articles 31 and 32 of the Bankruptcy Code. We note that even prior to the amended (by Greek law 4336/2015) article 32 coming into force, parties to an agreement were able to agree that the insolvency of one party will either (1) have the effect of automatically terminating such agreement, or (2) give to the other party the right to unilaterally terminate such agreement. The valuation of the obligations of the parties (which is also an integral part of the close-out netting provisions) was also never in question.

In contrast, before the entry into force of Greek law 3156/2003 (the **Bond Loan Law**), Greek law 3301/2004, which has transposed into Greek law Directive 2002/47/EC on financial collateral arrangements (the **Collateral Law**) and the Bankruptcy Code (as reformed), there was uncertainty as to the second effect of the close-out netting provisions, *i.e.* as to the enforceability of a provision setting-off of the Parties' obligations, and different opinions were expressed as to the enforceability of set-off provisions as a matter of Greek law where a party was subject to Insolvency Proceedings[37]. The relevant case law dealt only with similar but not identical matters and lacked clarity.

The uncertainty as to whether the set-off (including within the context of netting) of reciprocal claims of counterparties would take effect in the case of Insolvency Proceedings brought against either of the counterparties is now resolved by article 36 of the Bankruptcy Code. Par. 1 of article 36 of the Bankruptcy Code explicitly provides that the creditor may exercise its right to set-off its claims against its counterparty's reciprocal claims irrespective of the declaration of Insolvency Proceedings against such counterparty, provided, however, that the conditions for set-off to be enforceable have been fulfilled prior to the declaration of Insolvency. Article 440 of the Greek Civil Code provides that the conditions for set-off to be enforceable are that the claims to be set-off against each other must be (i) reciprocal, (ii) of the same kind and (iii) due and payable.

Paras. 2 and 3 of article 36 of the Bankruptcy Code, provides that the set-off of claims under OTC derivatives transactions or in accordance with close-out netting provisions under financial collateral arrangements will be regulated by the relevant special legislation (as described below, namely the Bond Loan Law and the Collateral Law). On this basis, certain legal commentators have concluded that netting is not enforceable under the generally applicable provisions (*i.e.* in cases where the Bond Loan Law, the Collateral Law and the European insolvency laws do not apply) following the insolvency of a party, on the basis that the conditions of set-off only come into existence upon termination of the relevant transactions, which occurs after bankruptcy. In the same context, the agreement on the application of an automatic early termination could be seen as a circumvention of the relevant restrictions of the Bankruptcy Code.

Significant arguments can be produced against this view.

[37] Netting (as contemplated in the EFET General Agreement) could be considered under Greek law implying the performance (even as an accounting and not an actual act) of a set-off between claims owed.

Firstly, the basis of the claims, which are to be set-off under the terms of the applicable EFET General Agreement, would have been established at the time the relevant Transactions were entered into and therefore before the declaration of bankruptcy. At the time bankruptcy is declared, such Transactions have a value (positive or negative) for each party, on the basis of market prices or other applicable calculations. The termination of the various Transactions merely crystallises their value– it does not create it. Correspondingly, any exercise of a discretionary termination right is, from a financial point of view, no different to the unilateral set-off of due and payable claims, which is held to be valid, and therefore should be treated the same way.

We note that a further argument can be derived from the single agreement concept. This is similar (though not identical) to the function of mutual obligations accounts (*αλληλόχρεοι λογαριασμοί,* in Greek) under Greek law. When two parties enter into a mutual obligation account agreement they agree to enter various claims into a mutual obligations account. By virtue of such agreement the claims entered into the mutual obligations account lose their individuality and can no longer be disposed of separately. When the mutual account is terminated all claims entered into it are netted and a single claim derives from such account. According to the unanimous opinion in the Greek legal writing, under Greek law the declaration of bankruptcy not only does not stop the termination of the mutual account (and the resulting netting), but constitutes grounds for an automatic termination of the mutual obligations account. While the EFET General Agreement does not constitute a mutual obligations account agreement, it serves a similar function. Therefore, there appears to be no reason to treat it in a different manner. Even if the Parties characterised the EFET General Agreement as a mutual obligations account, Greek courts would not be bound by the characterisation of the agreement by the counterparties and would still review its operation to result to its treatment under Greek law bankruptcy laws.

The analogy, however, with the concept of a mutual obligations account renders it highly advisable to maintain the concept of a single agreement, in order to maintain this argument in favour of the enforceability of netting.

Despite the aforementioned analysis, one cannot assess whether the competent Greek court, in case such case is brought before a Greek court, will rule based on the above, taking into consideration that such Greek court would rule on the type and operation of the EFET General Agreement by applying foreign law under the Rome I Regulation and that there is a possibility that such arrangement may be considered by the Greek court as an effort to circumvent the relevant Greek Bankruptcy Proceedings rules.

The discretion and flexibility given to the non-defaulting party under clause 10.3 of the EFET General Agreement do not affect the validity of the close-out netting provisions of the EFET General Agreement. However, one could opt for their automatic operation, in order to ascertain that termination has become effective immediately prior to the declaration of bankruptcy and thus, the claims have surely become due and payable prior to the declaration of bankruptcy, in accordance with article 36 of the Bankruptcy Code.

In light of the above, despite the fact that the Bankruptcy Code clearly states that set-off is enforceable in case of Insolvency Proceedings and that there are agreements under Greek law operating similarly to the EFET General Agreement, special provisions ensuring the enforceability of the set-off under specific circumstances are still necessary[38] to achieve legal certainty. Thus, the relevant provisions of the Bond Loan Law, the Collateral Law and other EU insolvency laws (as having been transposed, where required, into Greek law)

[38] Such provisions are explicitly (but not specifically, *i.e.* not by name or by number) mentioned in the Bankruptcy Code; according to par. 2 of article 36 of the Bankruptcy Code, setting-off of claims arising from OTC derivatives transactions are regulated according to the legislation in force, while setting-off of claims under close-out netting arrangements in the context of financial collateral agreements is performed according to the special relevant provisions.

address for the circumstances falling within their scope of application the uncertainty as to the enforceability of a set-off claim in case of Insolvency Proceedings.

**A) Article 16 of the Bond Loan Law provides as follows:**

"*Set-off and OTC derivative products*

*In the case of insolvency or other collective measures or procedures, which have the effect of prohibiting or restricting the disposal [of assets], the set-off of reciprocal claims, including multilateral set-off and close-out netting, which derives from transactions of any kind, as well as [including] set-off of claims deriving from transactions, in OTC derivatives between parties, one at least of which is the State or an institution in the sense of par. 5 of article 2 of law 2396/1996*[39] *(Official Government Gazette, Issue A 73), is valid and enforceable and may be opposed against all creditors provided that it is governed by a contract between the creditors of the claims being set-off concluded through a document of certain date, [which is] prior to the declaration of insolvency or the commencement of the collective measure or procedure*"[40].

The text was amended during the deliberations in Parliament and consequently there are some problems in the quality of its drafting, which, however, do not affect its meaning.

In particular, the comma placed after the words "deriving from transactions" should have been placed after the words "in OTC derivatives". This error, however, cannot lead to confusion, as there is only one plausible interpretation. Also, the words "as well as [including] set-off of claims deriving from transactions in OTC derivatives" are redundant, since their contents are clearly covered by "transactions of any kind"[41]. Again, this should not lead to confusion, since the use of the words "as well as" make it clear that the provision also covers claims other than those deriving from OTC derivatives and therefore the use of these words does not restrict the application of the provision[42]. In other words, the Bond Loan Law applies to any transaction "of any kind" and therefore, all Transactions included in Appendix B are covered by the provision of the Bond Loan Law.

The provision of article 16 of the Bond Loan Law above makes it absolutely clear that set-off is valid and, therefore, the close-out netting provisions are enforceable, even after insolvency, provided the following three conditions are met:

- the claims being set-off derive from transactions between parties, one at least of which is an institution in the sense of par. 5 of article 2 of law 2396/1996 or the State;
- set-off is governed by an agreement; and

[39] Articles 1 to 31 of Greek law 2396/1996 were abolished by Greek law 3606/2007. According to the abolished article 2 of Greek law 2396/1996 and for the purposes thereof, an institution meant either an investment firm or a credit institution and, in our view, the Greek courts would interpret the specific references based on the previously applicable provision. The same approach was adopted by par. 1(3) of article 4 of Regulation (EU) No 575/2013.

[40] We have added words in brackets in the English translation, whenever the *verbatim* translation does not properly convey the meaning of the Greek original.

[41] This interpretation is supported by legislative history. The original draft provision (as published on the website of the competent Ministry) contained two alternative bases of application, one on the basis of the parties transacting (*i.e.* institutions in the sense of par. 5 article 2 of Greek law 2396/1996 or the State) and one on the basis of the nature of the transaction (*i.e.* transactions in OTC derivatives). This was also the reason for which the article was headed "Set-off and OTC derivative products". It was, however, felt that the term "OTC derivatives" was too ill-defined to provide a basis for the application of the provision and therefore the final draft excluded the second alternative basis but retained the reference to OTC derivatives to ensure that they would not for some reason be excluded from its scope. One cannot assume that the intention was for the two conditions (the one referring to the parties and the one referring to the nature of the transaction) to be applied cumulatively, because of the use of the words "transactions of any kind". Moreover, any other interpretation would render the text repetitive as the words "the set-off of reciprocal claims (…) which derives from transactions of any kind" and "set-off of claims deriving from transactions" have the same meaning and therefore the inclusion of the latter would make no sense.

[42] Please note that there are few commentators (George Pergamalis, Directive 2002/47/EC on financial collateral agreements, DEE 10 (2004), p. 33 *et. seq.*, 44, Chrysa Papathanasiou, The law on derivatives settlement, 2008, Sakkoulas publications, p. 41) supporting that the respective provision intends to cover only claims deriving from OTC derivatives transactions. Since this opinion is not supported by any convincing arguments or by many commentators and runs against the clear letter of the law, it should not carry much weight.

- the agreement has a certain date (*i.e.* a date, which is established in accordance with one of the formal procedures recognised under Greek law to establish a "certain date") (please refer herein below where article 446 of the Greek Code of Civil Procedure, which provides for the "certain date" process, is discussed), which is prior to the declaration of insolvency or the commencement of the collective measure or procedure similar to insolvency.

The following must be noted regarding these conditions in the context of an EFET General Agreement:

It is sufficient for one of the parties to fall within one of the categories listed in the provision, irrespective of the identity of the other party, which may be any natural person or legal entity. The parties listed are the Greek State[43] and institutions in the sense of par. 5 of article 2 of Greek law 2396/1996. With respect to the entities that qualify as "institutions" for the purposes of article 16 of the Bond Loan Law, we note that articles 1 to 31 of Greek law 2396/1996 were abolished by the Greek law 3606/2007, which has been replaced by MiFID II law[44]. According to the abolished article 2 of Greek law 2396/1996, an institution meant either an investment firm or a credit institution. The MiFID II Law does not include a corresponding definition of the entities that constitute an institution. However, as a matter of interpretation it must be considered that an institution, in the context of par. 5 of article 2 of Greek law 2396/1996, is either a credit institution or an investment firm, as defined by the MiFID II Law. According to article 4 of the MiFID II Law, "*investment firms*" shall mean every legal entity whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis and "*credit institution*" shall mean a credit institution according to the definition provided in point 1 of par. 1 of article 4 of Regulation (EU) No 575/2013. Section A of Annex 1 to the MiFID II Law defines investment services and activities almost *verbatim* as they are defined in the respective provisions of MiFID II[45]. It is obvious that the term "*institution*" in this context covers entities authorised to act as such in an EU/EEA member state. In addition, it also covers entities organised in non-EU/EEA member states (even if they are not characterised as such by the relevant applicable laws), if they undertake the activities mentioned in the above definitions. In conclusion, this condition is met if at least one of the parties is the Greek State or a Greek or foreign credit institution or investment firm. Conversely, it is not sufficient for one of the parties to be an insurance undertaking, as insurance companies are not covered by the provision, unless their counterparty is the Greek State, a credit institution or an investment firm.

The EFET General Agreement regulates the set-off of the claims deriving from the Transactions entered into by the parties thereunder (but not otherwise, unless included within the scope of the parties' close-out netting agreement by virtue of a bridging or master netting agreement).

All EFET General Agreements which have been or will be entered into with Greek counterparties can comply with the formalities under Greek law to satisfy the "certain date" requirement in the Bond Loan Law by following one of the procedures described below. It

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[43] This term includes only the legal entity of the State *per se*, i.e. only the central government, but not other entities of public law (such as municipalities and agencies having a separate legal personality) or entities controlled by the State, such as public undertakings, the Bank of Greece etc.. The Bank of Greece, however, falls within the definition of "institution".

44 Please refer to footnote 43 above.

[45] According to Section A of Annex 1 to MiFID II law, investment services and activities shall mean the following:

(1) Reception and transmission of orders in relation to one or more financial instruments;
(2) Execution of orders on behalf of clients;
(3) Dealing on own account;
(4) Portfolio management;
(5) Investment advice;
(6) Underwriting of financial instruments or placing of financial instruments on a firm commitment basis;
(7) Placing of financial instruments without a firm commitment basis;
(8) Operation of Multilateral Trading Facilities (MTF);
(9) Operation of Organised Trading Facilities (OTF).

is sufficient for the EFET General Agreement to have a certain date and there is no such requirement for the Individual Contracts.

The definition of a document of certain date is contained in article 446 of the Greek Code of Civil Procedure, which provides as follows:

"*A private document acquires a certain date as to third parties only if it is certified [as to the date] by a public notary or by another public servant having such authority according to law, or if one of those signing it has died, or if its material contents are referred to in a public document, or if there is another event that creates certainty as to the date in an analogous manner. The certification is effected through a notation on the document of the word "certified" and of the date*".

It is not required to certify the actual date on which the relevant EFET General Agreement was executed, which could only be achieved by signing it before a public official. It is only required that it be certified that the relevant agreement existed on the date of certification, which must precede the declaration of insolvency of Party A. Therefore, there is no requirement to re-execute any existing EFET General Agreement, but simply to go through the formality of certification[46].

A foreign notary or other public authority can also perform the certification provided that it will be possible immediately or at a later stage[47] to attach an Apostille on such certification, in accordance with the Hague Convention dated October 5, 1961.

The date of certification must precede the date of the declaration of Insolvency or the commencement of the collective measure or procedure. Bankruptcy Proceedings and General Reorganisation Measures are initiated through the issuance of a court decision upon application of the insolvent debtor or its creditor(s), whereas the Special Liquidation Proceedings applicable to credit institutions, insurance undertakings and investment firms, as well as Credit Institution Reorganisation Measures and Insurance Undertaking Reorganisation Measures commence through the issuance of an administrative act of the competent supervisory body.

It should be noted that the provisions of article 16 of the Bond Loan Law apply to the agreements that were in place on the date it entered into force, as well as those executed after such effective date, provided the Insolvency or Reorganisation Proceedings commenced after such date.

We note that article 16 of the Bond Loan Law does not render the conclusion of the EFET General Agreement *per se* immune to a challenge on the basis of Greek insolvency law. In order, however, for such a challenge to be successful three conditions would have to be met: (i) the EFET General Agreement as well as any Individual Contract made thereunder must have been concluded (meaning initially executed and delivered) within the suspect period (such period starts at the time of the cessation of payments[48], as this is determined by the court, and its duration cannot exceed two years); (ii) the counterparty of the insolvent entity must have had at such time positive actual knowledge of the status of cessation of payment; and (iii) entering into the EFET General Agreement must be determined to have been to the

[46] The most practical way to create a certain date is to have a process agent serve a copy of the relevant document to one of the parties. As the process agent is a public official and then certifies that he or she served the document, this creates proof that the document existed on the date in question. Please note that this is the usual way in which Greek banks perfect pledges (which also need to have a certain date). Another way is to deposit the document with a public notary. Other ways to certify a document are more cumbersome as they involve actually signing the document before a public official who certifies the signature. Public authorities having the competence to certify signatures include police stations, municipal offices and citizen service centres.

[47] Even after the declaration of insolvency.

[48] Please note that it has been assumed that at the time the parties entered into the EFET General Agreement or any of the Documents they were not in a state of cessation of payments.

detriment of the creditors of the insolvent party (whether this was the intention of the parties or otherwise)[49].

**B) the Collateral Law**

The Collateral Law provides that within its scope close-out netting provisions have to be recognised and given effect in the case of insolvency. As the Collateral Directive contains no condition corresponding to the date certification, after the issuance of the aforementioned law, close-out netting provisions falling within its scope are recognised without the requirement that the relevant agreements have a certain date. The Collateral Law prevails over all previous laws in its field of application, including all general and specific insolvency law provisions, except from the limitations provided by the provisions of the BRR Law.

Even though there is no express provision regarding the application of the Collateral Law to existing close-out netting agreements, it is our reasoned opinion that the Collateral Law applies to close-out netting agreements, which existed when it entered into force, provided that the applicable Insolvency Proceedings commenced after the Collateral Law entered into force.

The Collateral Law lays down the regime applicable to financial collateral arrangements and financial collateral. Par. 1 of article 2 of the Collateral Law defines "financial collateral arrangement" as "*a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or general terms and conditions*".

In order to fall within the scope of the Collateral Law, according to par. 5 of article 1 of the Collateral Law, financial collateral arrangements must be evidenced in writing or in a legally equivalent manner.

The wording of the aforementioned provision resolves the issue as to whether the Collateral Law, and in particular its provisions on netting, apply in cases where a collateral agreement has been signed, but no collateral has been provided, since par. 5 of article 1 of the Collateral Law renders such law applicable to collateral arrangements irrespective of the actual provision of collateral, to the extent that such collateral arrangement is entered with the serious intention to provide collateral in the future and not simply as a technique to cause the Collateral Law to apply to the netting provisions of the EFET General Agreement. However, in cases where no collateral has been actually provided, an argument could be made, in particular circumstances, that the collateral document was only executed in order to circumvent the provisions of the Bond Loan Law and the Bankruptcy Code. Since there is no case-law and limited legal writing on the Collateral Law it is difficult to quantify the risk of courts accepting such argument. Therefore, in cases where no collateral is provided, and depending upon the type of the counterparties entering into the EFET General Agreement, it may be prudent to also comply with the provisions of the Bond Loan Law (certification of date).

[49] According to Greek legal writing, the analysis whether an act is to the detriment of the creditors of the insolvent party entails the application of a hypothetical scenario where the chances of the satisfaction of the creditors of the insolvent party are examined with or without the act in question. The act in question must be further proved to have actually caused the damage to the creditors. For example, as long as Transactions under the Master Agreement are entered into at market rate (rather than off market value), the fact that the market may later move in such a manner that the Transaction is out of the money would not mean that the relevant Transaction is to the detriment of the creditors of the insolvent counterparty.

Furthermore, according to par. 3 of article 1 of the Collateral Law the financial collateral to be provided must consist of cash[50], financial instruments[51] or credit claims[52].

Par. 2 of article 1 of the Collateral Law lists the entities to the collateral transactions to which it applies, as follows:

*"(a) a public authority excluding publicly guaranteed undertakings, unless they fall under points (b) to (e), including:*

*(i) public sector bodies of Member States charged with or intervening in the management of public debt, and*

*(ii) public sector bodies of Member States authorised to hold accounts for customers;*

*(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as defined in the Act of the Governor of the Bank of Greece no 2588/2007 (B' 1758/4.9.2007) under "Standardized Approach", Section E' par. 6, as well as in Annex VI, Part 1, Section 4 of the Directive 2006/48/EC[53] as transposed into the legislation of the member states, the International Monetary Fund and the European Investment Bank;*

*(c) a financial institution subject to prudential supervision including:*

*(i) a credit institution as defined in Article 2 par. 1 of Greek law 3601/2007[54];*

*(ii) an investment firm as defined in Article 2 par. of Greek law 3606/2007[55];*

*(iii) a financial institution as defined in Article 2 par. 11 of Greek law 3601/2007;*

*(iv) an insurance undertaking as defined in Article 2a(a) of the Legislative Decree 400/1970 (Official Government Gazette, Issue A 10), and a life assurance undertaking as defined in the same provision of the aforementioned law;*

*(v) mutual fund management company, an undertaking for collective investment in transferable securities (UCITS), mutual funds as defined in Greek law 3283/2004 (Official Government Gazette, Issue A 210)[56];*

*(vi) a leasing company in accordance with Greek law 1665/1986 (Official Government Gazette, Issue A 194);*

*(d) a central counterparty, settlement agent or clearing house, as defined respectively in cases (c), (d) and (e) of par. 4 of article 1 of Greek law 2789/2000, as well as in article 2 points (c), (d) and (e) of Directive 98/26/EC, as transposed into the domestic legislation of other member states, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by the present legislation and the said Directive, and a person, other than a natural person, acting in a trust or representative*

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[50] For the purposes of the Collateral Law, "*cash*" means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits.

[51] For the purposes of the Collateral Law, "*financial instruments*" means shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing.

[52] For the purposes of the Collateral Law, "*credit claims*" means pecuniary claims arising out of an agreement whereby a credit institution grants credit in the form of a loan or any other claims of the collateral provider against third parties or against the collateral taker. Please note that the definition of "credit claims" in the Collateral Law is wider than the relevant definition in the Collateral Directive.

[53] These provisions have been replaced by Regulation (EU) No 575/2013.

[54] This definition is now provided by Regulation (EU) No 575/2013.

[55] Greek law 3606/2007 has been replaced by MiFID II Law.

[56] Greek law 3283/2004 has been replaced by Greek law 4099/2012.

*capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or any institution as defined in points (a) to (d);*

*(e) any legal person, provided that the other party is an institution as defined in points (a) to (d)*”[57].

According to par. 1 (j) of article 2 of the Collateral Law and for the purpose of this law, “close-out netting provision” is defined as *“a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms a part, or in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of set-off or netting or otherwise:*

*(i) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or*

*(ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party*”.

According to article 7 of the Collateral Law, a close-out netting provision can take effect in accordance with its terms:

(a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider and/or the collateral taker; and/or

(b) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

(*please also refer to sub-paragraph E further down with respect to any restrictions to the application of the Collateral Law in case of application of the BRR Reorganisation Measures*)

**C) Article 6 of the Recast Insolvency Regulation**

If the Defaulting Party is a corporate, its insolvency will be governed by the Recast Insolvency Regulation. In accordance with article 9 of the Recast Insolvency Regulation[58], even if set-off is not permitted by the law governing insolvency, in this case Greek law, it is still enforceable if it is permitted by the law governing the insolvent debtor’s claim.

It is worth noting that even though, contrary to a number of other provisions of the Insolvency Regulation, article 9 of the Recast Insolvency Regulation does not differentiate between the law of the member states of the EU and the law of non-EU member states, the influential Virgos-Schmit report seems to conclude that article 6 of Regulation (EC) No 1346/2000, which contained in its article 6 a similar provision to the one of article 9 of Recast Insolvency Regulation, will only apply if the law governing the insolvent debtor’s claim is the law of an EU member state. Even though this report runs contrary to the letter of the Recast Insolvency Regulation and is not based on convincing arguments, in view of the fact that the report is influential and that there is still very little case law on the Regulation (EC) No 1346/2000 or the Recast Insolvency Regulation and none, to our knowledge, on this particular matter, it seems to be advisable to go through the date certification procedure in cases where the EFET General Agreement concluded with a Party A that is a corporate is governed by a non-EU member state law, under the condition that the remaining pre-conditions for applicability of article 16 of the Bond Loan Law are

[57] The Collateral Law in the aforementioned article repeated almost *verbatim* the relevant provisions of the Collateral Directive, adding only references to the relevant Greek laws implementing the directives to which the provision makes reference.

[58] Regulation (EC) No 1346/2000, which was replaced by Recast Insolvency Regulation with effect from 26.06.2017, also included the same provision.

satisfied[59]. On the contrary, one can safely dispense with this procedure, when English law applies.

Also, it should be noted that the certification procedure can only be dispensed with (in case of choice of English law) if there is a connection (other than the choice of law and jurisdiction) of the EFET General Agreement with a country other than Greece. In the adverse case, par. 3 of article 3 of the Rome I Regulation, as the case may be[60], would apply and as a result all Greek provisions of mandatory law would apply to the contract, including any provisions potentially deemed to restrict the applicability of set-off in case of Insolvency. The Recast Insolvency Regulation applies to the proceedings listed in Annex A thereto. In the case of Greece these include Bankruptcy, Special Liquidation Proceedings and General Reorganisation Measures.

**D)** **Insurance undertakings** are not subject to the Recast Insolvency Regulation, but to Greek law 4364/2016, which has transposed into Greek law Solvency II Directive. The enforceability of the netting provisions of the EFET General Agreement is secured pursuant to par. 5 of article 234 (in case of reorganisation measures) and par. 5 of article 247 (in case of special liquidation proceedings)[61] of Greek law 4364/2016.

**E)** **Credit institutions** are also not subject to the Recast Insolvency Regulation, but to the Credit Institution Insolvency Directive, which has been implemented by Greek law 3458/2006, as amended by the BRR Law (the **Credit Institution Insolvency Law**). Article 23 of the Credit Institution Insolvency Directive contains a rule practically identical to that of article 9 of the Recast Insolvency Regulation. Article 24 of the Credit Institution Insolvency Law repeated *verbatim* article 23 of the Credit Institution Insolvency Directive. Additionally, article 25 of the Credit Institution Insolvency Directive provides that netting agreements are governed exclusively by the law applicable to the relevant contracts. The same rule, subject to the provisions of articles 68 and 71 of BRR Law, is included *verbatim* in article 27 of the Credit Institution Insolvency Law. Similar to article 9 of the Recast Insolvency Regulation, article 25 of the Credit Institution Insolvency Directive does not differentiate between the law of EU member states and the law of non-EU member states, but one could apply the arguments of the Virgos – Schmit report *mutatis mutandis*. Therefore, in case of a Defaulting Party, which is a credit institution, the analysis of paragraph (C) above will apply subject to the provisions of sub-articles 64, 68, 71, 111 and 112 of article 2 of the BRR Law in case of initiation of BRR Reorganisation Measures or Credit Institution Reorganisation Measures.

More specifically, par. 1 (f) of sub-article 64 of article 2 of the BRR Law provides that the competent resolution authority shall have the power to cancel or modify the terms of a contract to which the credit institution under resolution is a party or substitute a recipient as a party. However, par. 4 of sub-article 64 of article 2 of the BRR Law provides, *inter alia*, that such powers will not affect the right of a party of a contract to terminate such contract, where it is entitled to do so according to the terms of that contract, by virtue of any act or omission by the institution under resolution taking place prior to the relevant transfer, or by the recipient after the relevant transfer. Furthermore, par. 1 of article 68 of the BRR Law explicitly provides, *inter alia*, that the implementation of the Early Intervention Measures and the BRR Resolution Tools shall not, *per se*, under a contract entered into by the credit

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[59] According to Lambros Kotsiris, The Regulation on insolvency proceedings (in Greek), DEE 2003, p. 1016-1029, 1024, article 6 applies even in case the law applicable to the claim being set-off is that of a state, which is not a member of the EU. See also Alexander Metallinos, in Ch. Pamboukis, International Bankruptcies in Law of International Transactions (collective edition), 2010, p. 180.

[60] This provides that when all circumstances of a case are connected to one country, the choice of the law of a different country as applicable cannot affect the application of the provisions of the former country, which are mandatory in the sense that they cannot be derogated from by contract.

[61] Both of them include a provision similar to that of article 27 of the Credit Institution Insolvency Law. In particular, par. 5 of article 234 of Greek law 4364/2016 provides that, in case of reorganisation measures, the right of creditors to set-off is not affected where such a set-off is permitted under the law governing the claim of the insurance undertaking. Par. 5 of article 247 of Greek law 4364/2016 provides the same in case of special liquidation proceedings.

institution, be deemed to be an enforcement event within the meaning of the Collateral Directive or as insolvency proceedings within the meaning of the Greek law 2789/2000, provided that all material contractual obligations continue to be performed. Moreover, article 71 of the BRR Law provides for the right of the competent resolution authorities to temporarily suspend termination rights of any party to a contract with an institution under resolution proceedings. Such suspension would prevent the Non-Defaulting Party from exercising any right to terminate the relevant arrangement and accelerate the obligations of the defaulting party for the time period during which the aforementioned suspension is in force. Moreover, articles 27 and 28 of the Credit Institution Insolvency Law, as amended by the BRR Law, provides that the provisions securing the enforceability of a close-out netting or a repurchase agreement shall apply without prejudice to the provisions of articles 68 and 71 of the BRR Law. Furthermore, article 1 of the Collateral law provides that the provisions securing the enforceability of a close-out netting, a set-off or a financial collateral shall not apply in cases where restrictions are imposed by virtue articles 59 to 72 of the BRR Law[62]. Based on the wording of the above provision, the application of the latter could have the effect that the competent Resolution Authority could suspend termination rights until the midnight of the business day following the day of publication of a notice of such suspension. Moreover, the appointment of a commissioner, the mandatory transfer or the establishment of a bridge institution or the application of any other BRR Reorganisation Measures would not *per se* trigger termination rights.

In light of the above, if the competent authority suspends the termination right without extending the maturity of the obligations of the credit institution under resolution or otherwise modifies the terms of the relevant agreement with similar effect, then the non-defaulting counterparty should be able to exercise its termination right not on the basis of the Insolvency Proceedings initiated against Party A but on the basis of non-delivery/non-payment by Party A.

Further to the above, par. 7 of article 6(a) of Greek law 3864/2010 provides that in the context of the implementation of the relevant bail-in measures, either on a voluntary or mandatory basis, such measures cannot in any case be: (i) the reason for the triggering of contractual clauses that are put into place in case of liquidation, insolvency or other event that can be characterised as a credit event or event equivalent to insolvency; and (ii) considered as non-fulfillment or violation of the contractual obligations of the credit institution in order to establish material grounds for the early termination of an agreement by counterparties of the credit institution. According to par. 6 of article 6(a) of Greek law 3864/2010 the HFSF Bail-In Measures are considered reorganisation measures as defined in the Credit Institution Insolvency Law. As such, the analysis provided herein above as to the impact of the BRR Reorganisation Measures on the termination rights applies to this case as well.

### F) General Reorganisation Measures and Extrajudicial Debt Settlement Mechanism

Further to the above, within the context of General Reorganisation Measures, article 106 of the Bankruptcy Code provides for an automatic suspension of pending or non-pending measures of individual and collective enforcement against the debtor for the satisfaction of claims generated prior to the submission of the petition for ratification of the Reorganization Agreement, which takes place as of the submission of the Reorganization Agreement for ratification until the issuance of a decision by the bankruptcy court on the ratification or non-ratification of the Reorganization Agreement; such suspension should not exceed a period of four (4) months, upon the lapse of which a moratorium on individual

[62] It should be noted that article 71 of the BRR Law provides for a suspension on termination rights that is not *ipso iure* imposed along with the application of a resolution measure. The suspension on termination rights must be explicitly imposed by the competent resolution authority, only for the short period of time provided for by article 71 of the BRR Law and taking also into account the exceptions provided thereunder.

and collective enforcement measures against the debtor could take place in the Reorganization Agreement proceedings' context through an order of the bankruptcy court in accordance with article 106a of the Bankruptcy Code. Article 106a of the Bankruptcy Code provides that the competent bankruptcy court may impose under the interim measures procedure ("*ασφαλιστικά μέτρα*", in Greek) a moratorium on individual legal actions against the insolvent debtor pending the negotiations to conclude the ratification of a Reorganisation Plan, which may not impact financial collateral arrangements or relevant close-out netting provisions. Article 106 of the Bankruptcy Code does not contain a similar provision to the abovementioned one of article 106a of the Bankruptcy Code; despite this, upon appropriate construing of article 106 of the Bankruptcy Code, it could be argued that a similar provision to the aforementioned one of article 106a of the Bankruptcy Code could also apply as to automatic suspension of individual measures in the context of article 106 of Bankruptcy Code.

With respect to Extrajudicial Debt Settlement Mechanism, article 13 of Greek law 4469/2017 provides for an automatic suspension of pending or non-pending measures of individual and collective enforcement against the debtor for the satisfaction of claims to be included in the extrajudicial settlement. The suspension entails the prohibition of the disposal of the immovable property and the equipment of the debtor's business. Explicit reference is made in article 13 par. 6 of Greek law 4469/2017 to the lack of impact of any measures taken on the basis of article 13 of Greek law 4469/2017 on the enforcement of financial collateral agreements. It is our considered opinion that the same reasoning outlined herein above with respect to the General Reorganisation Measures should also apply with respect to any suspension of enforcement measures imposed in the context of the Extrajudicial Debt Settlement Mechanism.

## G) Enforceability of the netting provisions under generally applicable Greek law Provisions

In any case, we further note that the Greek public policy restriction and Greek overriding mandatory provisions shall apply irrespective of the law applicable to the contract, according to paras. 2 of article 9 and article 21 of the Rome I Regulation. It is, however, our considered opinion that an EFET General Agreement is not contrary to Greek public policy or Greek overriding mandatory provisions.

It must also be noted that the above restrictions to the enforceability of close-out netting provisions of the EFET General Agreement will apply irrespective of whether the claims included in such netting arise under and/or outside the EFET General Agreement. The same will apply for netting of claims between Affiliates or Credit Support Providers of Parties (if contractually provided for in an amendment to the EFET General Agreement). In a more general context, an agreement on multilateral set-off is valid in Greek law, in accordance with the principle of freedom of contract.

a) Assuming the Parties have elected Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of Greece or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?

The same arguments regarding the enforceability of netting through the exercise of discretionary termination rights apply to netting under an Automatic termination scenario. Indeed, the authors who reject netting under the generally applicable provisions in the former case also reject it in the latter. Furthermore, the enforceability of netting in case of

Special Liquidation Proceedings or in case one of the provisions protecting netting applies is not affected by the choice of Automatic Termination.

Nevertheless, the chances that netting will be enforceable in case of Bankruptcy and under the generally applicable provisions are marginally better in a scenario of Automatic Termination. This is so because it can be argued that termination took place prior to Bankruptcy and therefore the prerequisites of set-off existed before the declaration of Bankruptcy and, therefore, set-off is possible. The proponents of the opinion that netting is not enforceable after the declaration of Bankruptcy argue that such a contractual clause constitutes a circumvention of bankruptcy law and therefore is null and void[63]. On the other hand one could argue that such a clause does not constitute a circumvention of the law, but a legitimate effort to mitigate the risk of insolvency of the counterparty[64].

(*please also refer to section C.I.1.i. General Overview of Greek law Insolvency Proceedings for restrictions to the right to terminate and set-off, in case of Insolvency Proceedings and section C.I.1.a. as to the enforceability of the contractual right of a counterparty to terminate an agreement in case of Bankruptcy Proceedings and initiation of BRR Reorganisation Measures in relation to a credit institution*).

b) Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or advisable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) limiting those insolvency events specified in § 10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in § 10.5(c)(iv) of the EFET General Agreement?

   - If you are recommending that a grace period be made applicable in respect of § 10.5(c)(iv), 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 Greece, what is the optimal timing for that Automatic Termination to take effect?

   Please supply specific language for purposes of customizing § 10.4 of the EFET General agreement to implement your recommendation and the optimal termination timing.

In the above context and in reference to the Automatic Termination option, it is recommended, that in cases (i) where the mandatory law for the insolvency of one of or both Parties is Greek law [***KP comment: We do not believe that this addition is necessary as in general this type of discussion is relevant only to the extent that one of the parties would be subject to Greek law insolvency; otherwise, Greek law is not relevant.***] and (ii) not falling within the scope of application of the Bond Loan Law or the Collateral Law or the Recast Insolvency Regulation (and, thus, the close-out netting provisions will not benefit from the privileged treatment of their provisions (*please refer to the relevant analysis made in our reply to question C.I.1. herein above*)), one could opt to make Automatic Termination operative *vis-à-vis* Party A, in order to ascertain that the claims under the EFET General

[63] See Michalopoulos, op. cit., p. 114.

[64] See Metallinos, Legal Issues arising from financial derivatives contracts entered into by legal persons established or having its registered office in Greece, DEE 5/2003, p. 515.

Agreement have become due and payable before the occurrence of the Insolvency/Winding Up/Attachment of § 10.5(c) of the EFET General Agreement.

In light of the above, we would suggest that clause 10.4. would be amended as follows: *"... and the Early Termination Date in such event shall be considered to occur immediately prior to the occurrence of any of the events listed in 10.5.c. ...*".

c) Are the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Greece or is there a risk that such determination could be challenged by a liquidator, receiver or third party?

Netting (as contemplated in the EFET General Agreement) could be considered under Greek law implying the performance (even as an accounting and not an actual act) of a set-off between claims owed so that only one net claim remains. As such any restriction considered applicable to set-off should be considered applicable to netting, as well.

d) Do the laws of Greece recognize that the close-out netting provisions in sections §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept 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 Greece, please elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement[65] might impact termination and close-out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.

Please refer to our answer to question C.I.1.a. above as to the enforceability of close-out netting under Greek law.

In the above context, the Single Agreement concept is not necessary to establish the right to terminate, though it is arguably necessary in order to establish the right to subsequently set-off the various claims from the terminated transactions against each other. Finally, it is possible to severe/terminate individual transactions or contracts from the EFET General Agreement or the EFET Master Netting Agreement and still preserve the Single Agreement concept, because it is possible under Greek law to partially terminate an agreement.

e) Is the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Greece or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?

On the matter of the currency in which compensation may be paid, one must differentiate between money of account and money of payment. The parties are free to determine the currency for the calculation and payment of such compensation. However, if the payment is made through the forced liquidation of the assets of the debtor, such payment must be made in Euro. Two opinions have been supported among legal commentators regarding the conversion rate in case of bankruptcy: according to one opinion, the relevant conversion rate is that prevailing at the time of the declaration of Bankruptcy[66]; according to another,

[65] As per the Instructions, the Allowances Appendix provides for the right to initiate a termination of only those Individual Contracts under a General Agreement concerning Allowances Transactions, leaving unaffected and not terminated the balance of the Individual Contracts concerning Power Transactions, as well as the General Agreement itself (a "Partial Close-Out").
[66] See Elias Anastasiades, Greek Commercial Law (in Greek), Vol. 3, Athens 1938, p. 299.

that of the time of liquidation[67]. Case law supports the former opinion[68]. It should, however, be noted that this case law comprises only of decisions of first instance courts[69]. Also, please note that such case law only covers Bankruptcy Proceedings but not other insolvency proceedings. In case of the latter, it is our considered opinion that the conversion will take place at the time of liquidation.

f) Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party in Greece 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 refer to our reply to question (a) above for the different restrictions and safeguards applying depending upon the type of Party A.

**2. Non-insolvency related Material Reasons**

Are the rights of the Terminating Party to terminate and close-out the EFET General Agreement enforceable in accordance with the terms of the EFET General Agreement, irrespective of the insolvency of Party A?

Under the principle of freedom of contract enshrined in article 361 of the Greek Civil Code, the parties may agree any grounds of termination for their contracts. Therefore, any agreed termination grounds would be enforceable, if the EFET General Agreement were to be governed by Greek law. Obviously, if the EFET General Agreement were to be governed by a foreign law and such law permitted the above termination grounds, the enforcement of such a foreign law rule would not be contrary to Greek public order.

According, however, to article 281 of the Greek Civil Code, the abuse of rights is prohibited. Specifically, article 281 of the Greek Civil Code states: "The exercise of the right is prohibited if it obviously exceeds the boundaries set by good faith, bonos mores, or the social or economic purpose of the right."

Therefore, even if a party has the right to terminate the EFET General Agreement on any grounds, it may be constrained in the exercise of such right, if in the light of the particular circumstances of the case, such termination is found to be abusive.

In case the EFET General Agreement is governed by a foreign law, article 281 of the Greek Civil Code will not apply. Nevertheless, certain abusive practices may be deemed to be contrary to Greek public policy and, even if the applicable law allows them, it will be dissapplied in this respect and Greek law will apply instead on the relevant matter.

No Greek law restrictions apply to netting in such cases.

Our replies to questions (e) and (f) above apply to this case as well.

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[67] In favour of the opinion that the conversion date is that of the liquidation see Leonidas Georgakopoulos, Manual of Commercial Law, Vol 1 – The Merchants, Sub-volume 3 – Bankruptcy and re-organisation (in Greek), 2nd ed., Athens 1997, p. 157.

[68] See Thessaloniki Single Member Court of First Instance 248/1971, EEmpD 1971, p. 99, Athens Multi Member Court of First Instance 2634/1972, EEmpD 1972, p. 277, Pireaus Multi Member Court of First Instance 12491/1999, EempD 2000, p. 555, Pireaus Multi Member Court of First Instance 1128/2000, DEE 2000, p. 989.

[69] Greek law does not contain the rule of precedent or stare decisis principle. Nevertheless, case law has persuasive effect, which depends on the seniority of the relevant court.

## II. Multibranch Parties

### 1. Greek Multibranch Party

*Additional Assumptions*

In addition to the assumptions outlined under Part C.I. we also make the following assumptions for the purposes of C.II.:

Party A has entered into Individual Contracts under the EFET General Agreement through offices in Greece as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Greece.

a) 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 the EFET General Agreement on a multibranch basis prior to its insolvency?

There is no change in our conclusions concerning the enforceability of close-out netting under the relevant provisions of the EFET General Agreement in case of a Party A which has its centre of main interests in Greece and has entered into Individual Contracts through its offices in Greece, as well as through one or more branches located abroad and becomes subject to Insolvency Proceedings in Greece. The fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency also doesn't affect the said conclusions.

b) Would the EFET General Agreement be treated as a single unified agreement by the Greek receiver under the laws of Greece, regardless of the treatment of the EFET General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?

The Single Agreement concept would apply in the treatment of the EFET General Agreement and Individual Contracts by a Greek bankruptcy receiver or liquidator, regardless of the treatment of such documentation by an insolvency official in a country where close-out netting may be unenforceable.

### 2. Foreign Multibranch Party

*Additional Assumptions*

For the purposes of C.II.2. we also make the following assumptions:

i. A corporation, a bank, an investment services provider, an insurance company, 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 Greece has entered under the EFET General Agreement into Individual Contracts 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 Greece (the "Greek Branch").
ii. After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

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

The following cases may apply with respect to Party F, as the latter is defined above:

(a) *Party F is a credit institution or an insurance undertaking or an investment services firm that undertakes the activity of holding of funds or securities on behalf of third parties:*

In such case, if Party F is licensed from a competent authority and incorporated within the EU (*i.e.* Country H is an EU member state), then no separate insolvency proceedings may be initiated in Greece, as according to the relevant provisions of the Credit Institution Insolvency Directive and the Insurance Insolvency Directive, no separate proceedings may be initiated against the Greek Branch and its assets by Greek authorities or creditors resident in Greece.

If Party F is licensed and incorporated in a jurisdiction outside the EU (*i.e.* Country H is not an EU member state), then, separate proceedings can be initiated in Greece either by the relevant Greek authorities or the Greek Branch's creditors in accordance with the relevant provisions of the Banking Law or Greek law 4364/2016, respectively. Failing this, the insolvency proceedings in Country H would be given effect in Greece.

(b) *Party F is a corporate (société anonyme, limited liability company, general and limited partnership, an AEDAK or an investment services firm that does not undertake the activity of holding funds or securities on behalf of third parties):*

If Country H is an EU member state, the Recast Insolvency Regulation will apply and shall be, therefore, possible to recognise the main insolvency proceedings initiated in Country H and initiate secondary separate insolvency proceedings that shall be governed by Greek law, subject to the provision of article 36 *et. seq.* of the Recast Insolvency Regulation. In the latter case, the right to request the initiation of such proceedings shall be either the liquidator of the main proceedings initiated in Country H or the Greek Branch's creditors or the competent Greek authorities. The effects of such separate proceedings shall be restricted to the assets of Party F located in Greece. Within this context please note that separate proceedings without the opening of proceedings in Country H could be initiated only under par. 4 of article 3 of the Recast Insolvency Regulation, *i.e.* (a) where insolvency proceedings cannot be opened in Country H because of the conditions laid down by the law of Country H (*i.e.* the EU member state within the territory of which the centre of the debtor's main interests is located); or (b) where the opening of territorial insolvency proceedings is requested (i) by a creditor whose claim arises from or is in connection with the operation of an establishment situated in Greek territory; (ii) by a public authority which has the right to request the opening of insolvency proceedings with respect to the establishment situated in Greece.

In case there were only assets of Party F, but no secondary establishment in Greece (*i.e.* no Greek Branch), the scenario of opening separate proceedings would not apply. It must be noted at this point that the Recast Insolvency Regulation defines "establishment" as "*any place of operations where the debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*".

If Country H is not an EU member state, then Greek law 3858/2010 (the Greek law implementing the UNCITRAL Model Law) shall apply.

Under Greek law 3858/2010, and specifically its article 28, separate proceedings may be initiated in Greece, only after the recognition of the main insolvency proceedings having been initiated in Country H against Party F and only in case the insolvent Party F has assets in Greece. This means that if Party F has only the Greek branch in Greece, but no assets in Greece, there will be no grounds on initiating separate insolvency proceedings in Greece merely based on the existence of the Greek branch. The results of such separate proceedings shall be restricted only to the assets located in Greece, and to the extent necessary, according to the provisions of Greek law 3858/2010, to other assets as well. The foreign bankruptcy officer has the right to request from Greek competent courts to initiate separate insolvency proceedings in Greece, as well as the foreign and Greek creditors of the insolvent Party F.

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

In the context of our reply to question C.II., in case where separate proceedings could be initiated in Greece, the following shall apply:

(i) in case where separate proceedings may be initiated under the Recast Insolvency Regulation, the rules that secure the validity and enforceability of the close-out netting provisions of the Recast Insolvency Regulation shall apply, *i.e.* either article 9 of the Recast Insolvency Regulation, according to which "*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*[70]" or the Collateral Law or article 16 of The Bond Loan Law;

(ii) in case where separate proceedings may be initiated under Greek law 3858/2010, the relevant provisions of Greek Law 3858/2010 shall apply. Article 13 of Greek law 3858/2010 confirms the rule of the previously applicable unwritten Greek International Insolvency Rules on the non-discrimination of Greek and non-Greek creditors. Specifically, the aforementioned article provides that foreign creditors have the same rights regarding the commencement and participation of insolvency proceedings according to the Bankruptcy Code as the rights of creditors with habitual domicile, residence, or registered seat stay in Greece, under the reservation that the ranking of claims of Greek creditors in accordance with the Bankruptcy Code shall not be affected on the condition that foreign creditors are not ranked lower than unsecured creditors, except if they are subordinated creditors.

Further to the above, it is our opinion that the Greek law rules that secure the validity and enforceability of the close-out netting provisions in accordance with their terms shall also apply.

c) Please consider your answer to your question assuming instead that Party F has no branch located in Greece, but has assets in Greece.

Please refer to our answers to questions (a) and (b) above.

[70] Such provision would be applicable on the assumption that according to the law applicable to the EFET General Agreement the close-out netting provisions are valid and enforceable.

## III. Collateral

*Additional Assumptions*

For the purposes of this section C.III. we make the following assumptions:

i. Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral.

ii. The counterparties agree that Eligible Credit Support will include cash and Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

**a) Under the laws of Greece, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?**

Under the Greek conflict of law rules, the contractual aspects of an EFET Credit Support Annex and any relevant transfer agreement entered into thereunder shall be governed by the law chosen by the parties to such agreement (par. 1 of article 3 of Rome I Regulation), while all their proprietary aspects shall be governed by the applicable *lex rei sitae*, depending upon the type of the Collateral provided. The matter of which aspects of a security arrangement are considered as proprietary aspects has been addressed by article 9 of the Collateral law. According to article 9 of the Collateral Law, the following matters of a collateral arrangement are considered proprietary aspects: (a) the legal nature and proprietary effects of book entry securities collateral; (b) the requirements for perfecting a financial collateral arrangement and the provision of book entry securities collateral under such an arrangement, and more generally the completion of the steps necessary to render such an arrangement and provision effective against third parties; (c) whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred; (d) the steps required for the realisation of the book entry securities collateral following the occurrence of an enforcement event.

In case of a Collateral consisting of Letters of Credit, no proprietary aspect should apply, as the latter refers to the undertaking of a payment obligation by the payor of the Letter of Credit.

In case of cash provided as collateral under the EFET CSA, the applicable law on the ability to invoke the pledge vis-à-vis the bank would be the law governing the agreement under which the specific bank account (to which the cash collateral has been credited) was opened and is operated.

**b) Would the laws of Greece 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?**

The risk of re-characterisation has been eliminated pursuant to the entry into force of the Collateral Law. Based on the above, if the facts applicable bring the EFET Credit Support Annex within the scope of application of the Collateral Law (*i.e.* the collateral provided consists of either cash, financial instruments or credit claims) (as the latter are defined in the Collateral Law) and at least one of the counterparties is one of the entities listed in par. 2 of article 1 of the Collateral Law (please refer herein above to section C.I. for the description of the Collateral Law) where the other counterparty is a corporate entity and none of them is a natural person) no such risk applies.

On the other hand, if it does not fall within the scope of application of the Collateral Law, there is the risk that a Greek court may rule that the relevant assets transfer was made by way of security and not as an outright transfer and apply the relevant rules of the Greek Civil Code. In case the Collateral is provided in cash, according to article 1254 of the Geek Civil Code which applies to pledges on monetary claims, Party B has the right, as soon as the secured debt becomes due and payable, to collect alone the amount of such pledged amount that is due and payable. In the context of the above, Party B may validly keep the amount that is due and payable by Party A pursuant to the termination of the EFET General Agreement (*i.e.* the Termination Amount as calculated under § 11 of the EFET General Agreement) and return (any) remainder to Party A.

In cases of Collateral consisting of Letters of Credit, no re-characterisation risk should apply.

**c) 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 Greece 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?**

As already discussed in our answer to question (a) herein above, the matters listed in this are proprietary aspects of a financial collateral arrangement. On the assumption that the cash provided as collateral is held in an account outside Greece (in the sense that it is governed by a foreign law) no Greek law requirement may apply.

On a separate note it must be clarified that in cases where Greek law would apply, the Collateral Law has eliminated the relevant administrative burdens for collaterals that fall within its scope of application (par. 1 of article 3 of the Collateral Law). The only perfection requirements set by the Collateral Law and the Collateral Directive are the following: (i) according to par. 5 of article 1 of the Collateral Law and par. 2 of article 3 of the Collateral Law, both the EFET Credit Support Annex and (any) further specific financial collateral arrangement should be in writing, or evidenced in a legally equivalent manner, in order for the collateral in question to fall within the scope of the Collateral Law; and (ii) according to Recital 9 of the Collateral Directive as incorporated (although not *verbatim*, as in other articles) in par. 2 of article 2 of the Collateral Law, in order for the financial collateral to fall within the scope of the Collateral Directive (and in the Collateral Law, respectively) the financial collateral should be delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf (the right in favour of the collateral provider to substitute collateral or to withdraw excess collateral or in case of credit claims to collect the proceeds thereof until further notice, shall not prejudice the financial collateral having been provided to the collateral taker by virtue of the Collateral Law).

In case of cash transferred to a bank account controlled by Party B by virtue of a written agreement, all the requirements mentioned above are met. In such case, no further action (filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) is required under the Collateral Law for a valid and enforceable collateral.

None of the above applies to Letters of Credit; under the Greek conflict of laws rules, all relevant matters should be governed by the law chosen to govern the Letter of Credit provided as collateral.

**d) What is the effect, if any, under the laws of Greece of the right to substitute collateral pursuant to § 6 of the EFET Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this question?**

In the above context, it must also be mentioned that no further separate individual consent for each such substitution is necessary under Greek law; the relevant consent provided *ab initio* in the EFET Credit Support Annex would suffice.

**e) Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with § 11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Greece insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET 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 a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?**

If under the terms of the EFET General Agreement and the EFET Credit Support Annex such amount is payable and the relevant term is valid and enforceable under the relevant law governing the EFET General Agreement and the EFET Credit Support Annex, in accordance with the relevant Greek conflict of laws rules, then, such amount shall be validly included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable". In the same context, it must be noted that according to article 7 of the Collateral Law, "*a close-out netting provision can take effect in accordance with its terms (a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider and/or the collateral taker; and/or (b) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.*", as well as that the Collateral Law shall apply to cases where a collateral has been agreed to be provided but has not yet been transferred at the time the relevant agreement is terminated (so long as the relevant agreement has been entered into with the serious intention to transfer collateral).

**f) Are the rights of Party B enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A?**

According to par. 1 of article 8 of the Collateral Law "*A financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided:*

*(a) on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement; or*

*(b) during the suspect period or generally during a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures.*"

With respect to substitution of the collateral within the suspect period, par. 3 of article 8 of the Collateral Law provides that "*Where a financial collateral arrangement contains:*

*(a) an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or*

*(b) a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, then the provision of financial collateral or of additional financial collateral or substitute or replacement the financial collateral under such an obligation or right is not treated as invalid or reversed or declared void on the sole basis that:*

*(i) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement or within the suspect period and generally within a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures; or*

*(ii) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, or of additional financial collateral or substitute or replacement financial collateral.*"

. With regard to disposals made during the day on which the bankruptcy was declared, par. 2 of article 8 of the Collateral Law provides as follows:

"*In case where a financial collateral arrangement or a relevant financial obligation has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of winding-up proceedings or reorganisation measures, the arrangement or the claim or the financial collateral shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor should have been aware, of the commencement of such proceedings or measures.*"

No relevant restriction should apply on the enforcement of a Letter of Credit in case of Insolvency of Party A.

**g) 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 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?**

Please refer to our answers to questions C.III.e) and C.III.f) with respect to the provisions of articles 7 and 8 of the Collateral Law.

No relevant restriction should apply on the enforcement of a Letter of Credit in case of Insolvency of Party A.

**h) Is the EFET 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 Greece in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under c) above?**

Under Greek conflict of law rules, the matter whether the EFET CSA is an appropriate form to create the intended outright transfer of ownership in the collateral to Party B would be a matter of the law governing the specific agreement (in terms of how the relevant contractual clauses can be interpreted) but primarily a matter governed by the applicable *lex rei sitae*, in order to ascertain the legal nature and the proprietary effects of the collateral provided thereunder. From a Greek law perspective, the EFET CSA would be an appropriate form to create the contemplated outright transfer. Please also refer to our answers to questions a), b) and c) of this section herein above, according to which no further requirements apply.

**i) Do you have other specific recommendations on the subject of collateral that EFET and its members need to be aware of?**

None.

**V. General Enforceability**

a) Is the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit Support Annex) enforceable under the laws of Greece in accordance with its own terms? We would like you to specifically discuss, in a detailed and circumstantiated manner the provisions on (i) non-performance due to Force Majeure (§ 7 of the EFET General Agreement), (ii) remedies for non-performance (§ 8 of the EFET General Agreement) and (iii) limitation of liability (§ 12 of the EFET General Agreement) and any other provisions which in your opinion need to be commented on according to the law of Greece, including whether these provisions could and/or need to be further "expanded" and/or "strengthened" under the laws of Greece. We are especially interested in provisions that you may believe, for example infringe upon the *ordre public* in Greece and that may be challenged by the courts in Greece irrespective of the law that governs the EFET General Agreement.

The provision of § 7 of the EFET General Agreement would be enforceable under Greek law and would not be contrary to Greek public policy, if the agreement were governed by a foreign law.

With respect to remedies for non-performance, according to Greek law a party is absolved of the obligation to pay compensation for breach of contract, if it can prove that such breach did not result from its intentional or negligent acts or omissions. Therefore, a party is absolved of liability for compensation not only when it is inhibited by an event of force majeure to fulfil its obligations, but also in case its inability to perform its obligations (or its failure to perform them in a timely manner) is caused by what is called in Greek law simple chance event, *i.e.* an event for which the obligor is not culpable, but which does not constitute a force majeure event. If such an event is the cause of the inability to perform, the relevant party will not be obliged by law to pay compensation.

Notwithstanding the forgoing, it is permissible for the parties to agree that a party will assume the risks of simple chance events (or even of force majeure events) and will compensate its counterparty, if such events cause an inability to perform. In this case the cause of the obligation to pay compensation is not the breach of contract, but the independent undertaking to compensate the counterparty. In view of the wording of § 8.1 of the EFET General Agreement and of its purpose, it is our opinion that in all likelihood it will be interpreted as creating an independent undertaking to compensate for failure to perform and that a failure to perform caused by a chance event falling outside the definition of force majeure will not absolve the non-performing party from the obligation to compensate its counterparty.

In particular, with respect to the limitations of liability provided for under § 12 of the EFET General Agreement, Greek law (article 332 of the Greek Civil Code) generally permits limitation of liability, save for liability due to wilful misconduct and gross negligence. Therefore, § 12.2 of the EFET General Agreement would be valid, if the EFET General Agreement were to be governed by Greek law. Also, if it is governed by a foreign law, the application of § 12.2 of the EFET General Agreement will not be deemed to be contrary to Greek public policy. The Limitation of Consequential Damages and similar types of liability does not exclude losses caused by gross negligence of a party. In this respect it is contrary to article 332 of the Greek Civil Code and, therefore, if the EFET General Agreement is subject to Greek law, such limitation of liability will not be valid, if the relevant loss was caused by gross negligence. It should be noted, however, that many types of consequential loss are not compensated under Greek law in any case and irrespective of any limitation of liability. This is so because under Greek law it is not sufficient for the breach of contract to constitute a necessary condition in the chain of events that lead to the loss (*conditio sine qua non*), but also for it to constitute a *causa adequata*, *i.e.* a cause that objectively and without the benefit of hindsight was reasonably likely to produce the loss.

It is our reasoned opinion that the prohibition of the limitation of liability for gross negligence does not form part of the Greek public order. Therefore, if the EFET General Agreement is governed by a foreign law permitting the limitation introduced by the above paragraphs of the EFET General Agreement, Greek courts will enforce such clauses. Please note, however, that there is to our knowledge no case law on this matter and therefore there can be no guarantee that the courts will follow this opinion. The duty to mitigate will be enforceable, if the EFET General Agreement is governed by Greek law and will not be deemed to be contrary to Greek public order, if it is governed by a foreign law. It is not possible to expand or to strengthen the limitations and exclusions under § 12 of the EFET General Agreement in accordance with Greek law.

b) Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be made aware of regarding the general enforceability, from a legal stand point, of the EFET General Agreement and its Credit Support Annex.

Please refer to our answer to question (a) above.

## VI. Confirmation Practices

*Additional Assumptions*

i. As far as the Confirmation Practice is concerned, when entering into an Individual Contract, the counterparties in each case (i) make oral reference to the EFET General Agreement when concluding the relevant Individual Contract over the phone or (ii) refer to the EFET General Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT or other means of electronic transmission).

ii. Parties may or may not (i) use the EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations or (ii) enter into the EFET Electronic Confirmation Agreement.

### *1. Binding Individual Contract*

a) Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g. execution in writing, signature, registration or notarization) under the laws of your jurisdiction?

None of the contracts listed in Appendix B requires a written agreement. The law does not require a written form and therefore even though an electronically transmitted confirmation does not constitute "writing" for the purposes of Greek law (unless an advanced electronic signature is attached to the confirmation), it is from a legal point of view permissible for the confirmation to be transmitted electronically. Please note, however, that since § 3.2 of the EFET General Agreement refers to a written confirmation an electronically transmitted confirmation will not be sufficient. If the intention is for confirmations to be transmitted electronically this should be stated explicitly.

b) At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction?

When it is agreed upon orally.

c) Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of your jurisdiction? If so, is there a relevant time period per the laws of your jurisdiction that could potentially override the governing law of the EFET General Agreement, and permit parties to object still?

If the EFET General Agreement is governed by Greek law, according to generally applicable Greek law rules, silence is not deemed to constitute consent. However, the parties to a contract may validly agree that failure to object constitutes acceptance. In case of Greek law contracts, it is advisable that if this is the intention to be stated expressly.

d) Is the reference to the relevant EFET General Agreement made in the relevant written confirmation exchanged (post trade) between the parties sufficient for the inclusion of the Individual Contract in the EFET General Agreement?

If the EFET General Agreement is governed by Greek law, the explicit expression by both Parties in any manner whatsoever of their intention to include the Individual Contract to the EFET General Agreement will be an effective agreement.

## *2. Means of Evidence*

a) Assumed there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in front of a court in your jurisdiction: a (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?

All of the means of evidence mentioned above are in principle acceptable means of evidence before a court in Greece, however, the latter may freely take them into account (*i.e.* it is not bound to decide according to the substance of the information provided by such means of evidence).

In particular, according to article 18 of the Rome I Regulation, contracts may be proved by any acceptable means of proof, either according to *lex fori* or according to any of the laws referred to in article 11 of the Rome I Regulation, provided that such means of proof suggested by such law may be conducted under the *lex fori*.

If the case were brought before Greek courts, then *lex fori* would be Greek law. According to article 444 of the Greek Code of Civil Procedure both fax and electronic data exchanged through e-mails, subject to conditions set by the relevant case law, are considered as scripts, in terms of signed documents, and may be used as a means of proof.

In general terms, the most favourable law will apply, in order to facilitate the proof of the contractual transaction.

In light of the above with respect specifically to the transaction entry system, it is our opinion that the fact that the counterparties have themselves put the key terms in the exchange data system and the automated system is merely determining discrepancies between such terms (*i.e.* the system is not itself making up the terms of the Individual Contract) suffices to conclude that the will of the counterparties is expressed and the conclusion of an agreement is effected by the concurrence of the counterparties' will.

More specifically, with respect to tapped recording, in accordance with par. 2 of article 370A of the Penal Code, as amended and in force, recording a private conversation without the explicit consent of the other party constitutes a criminal offence. No offence is committed, if the person whose telephone conversation has been recorded, has *a priori* granted his/her explicit consent.

In this case, the explicit consent must be granted by the natural person the telephone conversation of which is being recorded. Consent by an employer will not be sufficient, unless the latter simply conveys the employee's consent.

It should be noted, however, that since the relevant offence is punishable, only if committed intentionally (article 26 of the Greek Penal Code), if a party believes (based on a representation by the employer or otherwise) that such consent has been granted, it should not be punished. If, for example, prior to the commencement of any conversation to be recorded a pre-recorded message is played stating that the following conversation will be recorded, continuation of the telephone call should be deemed as constituting consent.

Furthermore, according to par. 3 of article 4 of Greek law 3471/2006, which transposed Directive 2002/58/EC on privacy and electronic communications, it is permitted to record communications and the related traffic data, when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication, provided that both parties of the communication give their consent to the recording, pursuant to a prior notification on the reason of such a recording. In this context, the provisions of Regulation (EU) No 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data must, also, be complied with by the party acting as data controller or data processor.

According to the wording of § 23.1 of the EFET General Agreement, the parties thereto represent that they have obtained the relevant consents from their employees. Under Greek law the above representation would be read, *inter alia*, as follows: the party making the relevant representation has assumed liability for any recording made without the consent of its employee(s) being recorded.

Further to the above, it must also be noted that witness' statements can be presented before court only if obtained pursuant to the process that the Greek Code of Civil Procedure provides.

## VII. Core Provisions

*Additional Assumptions*

The additional assumptions made in Part C.I.1. and C.II. are made for this section as well.

a) Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under Part C.I. or C.II. (Enforceability of Close-out Netting) above? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

No. Please also refer to our answer to question C.III.d) above with respect to the substitution with or without consent.

b) Considering your conclusions reached under Part C.I. or C.II. (Enforceability of Close-out Netting) above, what are the provisions of the EFET General 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")? We believe that the following provisions are Core Provisions: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained in Annex 1 to the EFET General Agreement.

The following provisions should be considered as Core Provisions in relation to the Opinion: §§ 1.1, 2.1. (to the extent it refers to defined terms that are listed herein as Core Provisions of the EFET General Agreement), §§§ 10.3(b), 10.5(c)(iv), 11, and the related Defined Terms contained in Annex 1 to the EFET General Agreement.

c) Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of your conclusions reached under Part C.I. or C.II.?

No.

## VIII. Governing Law, Arbitration and Jurisdiction

a) On the assumption that the relevant EFET General Agreement is governed by the laws of a jurisdiction other than Greece (including English or German law)[71], would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in Greece, and what would be the consequence if it were not?

According to Greek conflict of law rules, and, specifically, according to article 3 the Rome I Regulation, the Parties' agreement on the governing law to their contract will be upheld by the Greek courts, subject to:

- rights in *rem* over Collateral (such rights will be governed by the law of the location of the assets (*lex rei sitae*) or the law indicated by the Place of the Relevant Intermediary Approach (PRIMA);
- the application of the relevant contractual clauses is not contrary to Greek public policy (article 21 of the Rome I Regulation);
- the application of such contractual clauses does not contravene Greek overriding mandatory provisions (par. 3 of article 9 of the Rome I Regulation);
- matters which are outside the scope of the conflict of laws rules regarding contracts (for example, representation authority of the signatory on behalf of a counterparty);
- the application of provisions which cannot be derogated from by agreement of the laws of a country (other than the country whose law has been chosen) with which all other elements relevant to the situation at the time of the choice are located (par. 3 of article 3 of the Rome I Regulation);
- matters referring to the existence and validity of the consent of the parties as to the choice of the applicable law, formal validity of the relevant contract and capacity of the contracting parties to enter into the relevant contract.

Further to the above, the Parties' agreement on a foreign jurisdiction will be also upheld by the Greek courts under the provisions of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation) (and specifically, its article 25 on prorogation of jurisdiction) and

[71] Please note that, unless otherwise specified by the Parties in the Election Sheet, the Agreement would be governed by the laws of the Federal Republic of Germany (§ 22 of the EFET General Agreement), but that it is not the policy of EFET to recommend or mandate any particular choice of governing law and that Parties regularly select other governing laws for their EFET General Agreements.

article 42 of the Greek Code of Civil Procedure on parties' agreement on jurisdiction prorogation, in case of an EU member state jurisdiction choice and a third country jurisdiction choice, respectively. The Parties' agreement on the jurisdiction of the court of a contracting state of the 2005 Hague Convention on Choice of Court Agreements shall be upheld pursuant to the provisions of that convention.

The same as above applies in case the Parties agree to subject any dispute to arbitration; Greek courts will uphold the arbitration agreement and shall enforce any foreign arbitral award[72] subject to specific reasons listed in the 1958 New York Convention on recognition and enforcement of foreign arbitral awards (ratified by the Greek Legislative Decree 4220/1961); these are listed in article V of the 1958 New York Convention. According to article V of the 1958 New York Convention, the following apply:

"*1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

*(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

*2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.*"

## IX. Regulatory Regime

a) Are there any exchange control laws or license requirements (under, e.g. any banking, securities trading or energy law) that may affect the enforceability of the relevant EFET General Agreement or of the Individual Contracts?

*Capital Controls*

Following the imposition of capital control rules in Greece, namely the currently applicable relevant provisions are the Legislative Act dated 18 July 2015, as amended and currently applicable (the **Capital Controls Legislative Act**) on the termination of the bank holiday period initially imposed in Greece on 28 July 2015 and capital controls restrictions imposed thereof[73] and the Ministerial Decision dated 31 July 2015 on Greek markets reopening and

[72] We have assumed that the place of arbitration shall not be Greece.

[73] According to the relevant provision, the Capital Controls Legislative Act applies to (a) credit institutions operating in Greece in any form, including branches of foreign credit institutions, the Consignment Deposits and Loans Fund, the payment

relevant rules applying to transactions on securities, as replaced in its entirety by the Ministerial Decision no dated 7 December 2015 on the lifting of restrictions imposed on transactions on financial instruments performed on Greek regulated markets (the **New MoF Decision**), as subsequently amended and in force, the Transactions covered by this opinion, may be affected as follows:

The provisions of the Capital Controls Legislative Act are applicable, *inter alia*, to the banks/credit institutions operating in Greece in any form, including branches of foreign credit institutions in Greece falling within the scope of the Banking Law (the **Institutions**). According to par. 4 of article 1 of the Capital Controls Legislative Act, any capital[74] or cash transfers abroad, in any manner whatsoever, are prohibited, including any capital transfer orders to accounts held at credit institutions which have their corporate seat and operate abroad and, including, any capital transfers by using credit, pre-paid and debit cards for cross-border payments, unless and to the extent exempted under relevant rules.

Pursuant to par. 2 of article 1 of the New MoF Decision, by way of derogation from the aforementioned prohibition, the Institutions may credit any clearing and settlement proceeds from transactions on financial instruments mentioned in Section C of Annex I to the MiFID II Law (which include the clearing and settlement of derivative transactions), to a bank account until the end beneficiary[75], even outside the Greek banking system, on the condition though that through such account the clearing and settlement of transactions of the relevant investment account was made before the commencement of the bank holiday period in Greece, *i.e.* before the 28$^{th}$ June 2015. It is to be noted that if the relevant transactions are not performed on a regulated market, the person applying for the transfer of the funds and the settlement must submit to the respective Institution or the competent for the clearing and settlement legal entity, full evidence of the transactions.

The credit of the proceeds from the clearing and settlement to a bank account up to the end beneficiary even outside the Greek banking system can be made even for new investment accounts (*i.e.* accounts opened after June 28, 2015), provided that the funds through which the purchases or opening of position on derivatives originated from bank accounts held abroad.

Notwithstanding the above and *in dubio* whether a specific payment to a foreign bank account benefits from the any currently applicable exemption, Party A could seek to obtain the approval of the respective payment by the Committee for Approval of Banking Transactions (the **CABT**).

The scope of the exemption mentioned above has not been clarified and we have no access to the decisions issued by the CABT, in order to better understand what the legislator aimed to cover with this provision (apart from what is obviously covered based on the wording of the relevant provision). No other exemption provided for by the capital controls restrictions seems to directly apply to this case. Based on the above, it would be advisable that Party A's counterparty requests Party A to obtain an approval (when and if necessary) by the competent authority, so that any payment abroad is possible and dully performed.

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institutions under the law that has transposed into Greek law the Directive on payment institutions, the electronic money institutions under the law that has transposed into Greek law the Directive on electronic money institutions, as well as branches in Greece and representatives of payment institutions and electronic money institutions that have their registered seat in other states and lawfully operating in Greece. It does not directly apply to (a) subsidiaries of Greek credit institutions operating overseas and (b) Greek corporates or individuals. However, individuals and corporates are indirectly affected by such act, in cases where the order/instruction that they give to an institution falling within the scope of its application is a non-permitted activity.

[74] The term capital transfer is broader than a cash transfer and should also include the transfer of debt and/or equity securities.

[75] This reference means that account is taken as to the end beneficiary of the settlement proceeds or the cash distribution which is to be transferred outside the Greek banking system each time, ignoring for example the existence of a Greek local (sub-) custodian with an account within Greece.

Further to the above, it would also be advisable to include in the EFET General Agreement and the Individual Contracts a representation reading substantially as follows:

"*We confirm that all payments made with respect to Transactions under this Agreement, comply or will comply with all currently applicable Greek law capital control restrictions. This, inter alia, means that, where relevant, we hold or will hold all necessary approvals required under Greek law to make the payments to you.*"

None of the above mentioned is relevant, if the Counterparty maintains a bank account abroad and has sufficient funds therein to make the payments from such account.

Further to the above, by derogation of the restriction under par. 10(c) of article 1 of the Capital Controls Legislative Act, pursuant to article 5 of the New MoF Decision, transfers of financial instruments to a custodian outside Greece is permitted, if performed in order to clear and settle transactions on such financial instruments. Provided that such transactions are not performed on a regulated market, the person applying for the transfer of the financial instruments, in the context of the settlement of the transaction, would have to submit to the custodian abroad full evidence of the transaction, by -indicatively- submitting the data referring to the transaction in conjunction with the securities transfer order, the settlement form and the underlying transaction or other information about the same that evidence that it has taken place.

The restrictions mentioned above are of a non-permanent nature but are nevertheless currently applicable. There is no clear indication as to how long these will remain in full force and effect.

*Licensing Requirements*

Greek law 4001/2011 provides for the licensing requirements of the supply and trading of electricity in the Greek territory.

According to article 134 of Greek law 4001/2011, the trading or supply of electricity is permitted to entities having been granted the Trading and/or the Supply License (the **License**). The License is granted by the Greek Regulatory Authority for Energy (**RAE**) in accordance with the terms and conditions of Greek law 4001/2011 and the Supply and Trading License Regulation and following the process provided for by the Supply and Trading License Regulation.

According to par. 3(a) and 5(a) of article 134 of Greek law 4001/2011, as amended and currently in force as well as article 3 of the Supply and Trading License Regulation, as currently applicable, the right to apply for:

a) a **Supply License** is granted to legal entities with share capital of at least €600,000, operating in the form of: (i) a société anonyme (A.E., in Greek); or ii) a limited liability company (Ε.Π.Ε., in Greek); or iii) a private company (I.K.E., in Greek) or iv) an energy community entity namely a civil law partnership of an exclusive purpose provided by law 4513/2018, with a minimum share capital of €60,000[76] or
b) a **Trading License** is granted to legal entities with share capital of at least €60,000, operating in the form of: i) a société anonyme (A.E., in Greek); or ii) a limited liability company (Ε.Π.Ε., in Greek); or iii) a private company (I.K.E., in Greek), provided that the respective Supply and Trading License applicants:

    (aa) have been legally incorporated and are seated in a member state of the European Union, or the European Economic Area (EEA), or the Energy

[76] Pursuant to oral clarifications provided by RAE, the requirement for the applicant to be a société anonyme or a limited liability company is satisfied, with respect to EU nationals, if the company applying has a similar to a société anonyme or a limited liability company corporate form.

Community, or in third countries which have concluded bilateral agreement with Greece or the European Union, or

(bb) have a branch in Greece.

It is noted that the holder of an electricity Supply License may perform the activities of an electricity Trading License holder, without being required to apply for a seperate Trading License.

Both Trading and Supply Licenses are granted for a period of up to twenty (20) years and can be renewed following a written request submitted by their respective holders to RAE at least six (6) months prior to the License's expiration date.

It is explicitly provided in par. 7 of article 134 of Greek law 4001/2011, that an entity lawfully pursuing the activity of power trading or supply in any other EU member state (and in accordance with the laws of such state) is entitled to a power trading or supply license accordingly, pursuant to a special process provided for in the Supply and Trading License Regulation, in order to avoid discrimination between local suppliers or suppliers intending to commence relevant activities in the Greek territory.

From a regulatory perspective, emission rights and commodity derivatives are explicitly classified as financial instruments within the meaning of Section C of Annex I to MiFID II and MiFID II Law, therefore, trading in emission rights and commodity derivatives is considered as provision of investment services and triggers the regulatory and licensing requirements set out by MiFID II.

According to articles 34 and 35 of MiFID II law an investment services firm established in another EU/EEA member state has the right to provide investment services in Greece with or without having a permanent (secondary) establishment in Greece, under the terms and conditions set under the MiFID II Law. If an investment services firm, however, is established in a third country (*i.e.* a non-EU/EEA member state), such firm can only provide investments services in Greece, according to article 39 of MiFID II law, *i.e.* through a branch established in Greece pursuant to the respective permit granted by the HCMC, which is the Greek competent supervisory authority for investment services firms.

Further to the above please also note that pursuant to article 46 of Regulation (EU) No 600/2014 on markets in financial instruments (the **MiFIR**), an investment firm established in a non-EU/EEA member state may provide investment services to eligible counterparties and professional clients within the meaning of Section I of Annex II to MiFID II Law throughout the Union without the establishment of a branch, provided that such entity is registered with the Third Country Firms register kept by the European Securities and Markets Authority (**ESMA**)[77]. However, we note that to the best of our knowledge up until the date of this advice, no equivalence decision has been issued by ESMA under article 47 of MiFIR.

In conclusion, entities trading on the above mentioned commodity derivatives listed in the MiFID II Law having such activity as their regular occupation or business will be considered under Greek law as investments services firms which have the right to provide investment services in Greece either on a cross border basis or through a secondary establishment (if such entity is an EU/EEA entity) or mandatorily through a branch and after obtaining the respective license by the HCMC (if such entity is a non-EU/EEA entity).

[77] The Third Country Firms register will operate on the basis of an equivalence decision, issued by ESMA, in relation to a third country, stating that the legal and supervisory arrangements of that third country ensure that firms authorized in that third country comply with legally binding prudential and business conduct requirements which have equivalent effect to the requirements set under MiFIR and MiFID II. Investment firms established in such countries may apply to be included in the relevant ESMA register and benefit from article 46 of MiFIR.

MiFID II law provides for the following exemptions from its scope of application, specifically with regard to commodity derivatives: (i) according to par. 1(i)(aa) of article 3 of the MiFID II law persons who do not provide any investment services or activities other than dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons dealing on own account when executing clients' orders and (ii) according to par. 1(i)(bb) of article 3 of the MiFID II law persons that do not offer investment services other than dealing on own account commodity derivatives, emission allowances or derivatives thereof to the customers or suppliers of their principal activity, on condition that:

- in any of the above cases under (i) and (ii), individually and on an aggregate basis, this is an ancillary activity to the person's main business, when considered on a group basis, where such main business is not the provision of investment services within the meaning of the MiFID II law or the provision of banking services by virtue of the Banking Law or market-maker activities in relation to commodity derivatives;

- the person does not apply a high-frequency algorithmic trading technique;

- those persons notify annually the HCMC that they make use of this exemption and upon request report to the HCMC the basis on which they consider that their activity under points (i) and (ii) above is ancillary to their main business.

## X. Other Provisions

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

Save for the specific suggestions made above in sections C.I.1. (sub-section *Insolvency Proceedings with respect to Greek mutual funds*), C.VI.1.(a), C.VI.1.(c) and C.VI.1.(d), C.VII.2.(a) and C.IX.a) there are no other provisions that, given a choice of Greek law, either need to be revised in order to be enforceable in Greece or the legal efficacy of which could be materially improved upon or optimised with different wording.

## XI. Qualifications

The Opinion is subject to the following qualifications:

a. we do not express any opinion on tax matters;

b. we do not express any opinion on factual matters;

c. the EFET General Agreement or any of the Documents governed by Greek law (where applicable) as well as the Opinion expresses and describes Greek legal concepts in the English language rather than in their Greek form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying Greek law concepts. Accordingly, any issues of interpretation arising in respect of any of such Documents which is in the English language or this opinion will be determined by the Greek courts in accordance with Greek law and we express no views on the interpretation that the Greek courts may give to any such expressions or descriptions.

**For Karatzas and Partners Law Firm**

**Alexandra Kondyli**

**Appendix A - Types of Counterparties**

i. Corporations (e.g. sociétés anonymes or limited liability companies);
ii. Partnerships (e.g. general or limited partnerships);
iii. Banks/Credit Institutions;
iv. Investment Services Provider/Investment Firms;
v. Insurance Undertakings;
vi. Investment Funds and Investment Fund Management Companies;
vii. Pubic Law Entities, including Municipalities and Publicly-owned Corporations;
viii. Greek central bank (The Bank of Greece).

**Appendix B - Transactions under the EFET General Agreement**

**Commodity Forward**. A transaction in which one party agrees purchase a specified quantity of a Commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the Commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

**Commodity Option**. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price.

**Commodity Swap**. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g. the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.

**Physical Commodity Transaction**. A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.

**"Commodity"** means Electricity, emission allowances rights, certificates or capacity rights.