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To: **European Federation of Energy Traders** ("**EFET**")
Amstelveenseweg 998
1081 JS Amsterdam
The Netherlands

9 September 2019

Dear Sirs:

RE: EFET / General Agreement concerning the Delivery & Acceptance of Natural Gas - and Credit Support Annex – Natural Gas

EXECUTIVE SUMMARY

Terms defined in this Opinion shall have the same meanings when used in this Executive Summary.

Based on the assumptions and subject to the qualifications set out in this Opinion (including restrictions applying to credit institution, investment firm, insurance company and Public Entities as described in Exhibit 2 and Exhibit 5 to this Opinion) and assuming that the French Netting Law and the French Collateral Regime would apply we are of the opinion that:

- the termination and close-out netting provisions contained in paragraphs 10 and 11 of the 2003 EFET General Agreement and of the 2007 EFET General Agreement would be enforceable against the French Counterparty in accordance with their terms;

- the EFET Credit Support Annex is in an appropriate form to be recognised under French law; close-out netting provisions contained in paragraph 11 of the EFET Credit Support Annex would be enforceable against the French Counterparty in accordance with their terms;

- articles L. 211-36 and seq. of the MFC provide for a special regime allowing the termination, whether automatic or by notice, and liquidation of the Individual Contracts, notwithstanding the fact that Voluntary Settlements may be pending in respect of the French Counterparty or that an Initial Judgement may have been rendered in respect of the French Counterparty; and

- French law will recognise the transfer of title of Cash as Eligible Credit Support located in France or outside France under the EFET Credit Support Annex as a valid means of securing an exposure arising from the Individual Contract, assuming that the Financial Collateral Regime applies. We are in the view that, from a French law perspective, the Letter of Credit cannot be included in the mechanism of the EFET Credit Support Annex and therefore cannot benefit of the favourable regime of the Financial Collateral Regime.

This executive summary is for ease of reference and should be read in accordance with the full terms of this Memorandum.

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1. Introduction

We have been requested, as legal advisers to the European Federation of Energy Traders ("**EFET**") to render an opinion (the "**Opinion**") as to the validity and enforceability under French law of some of the provisions of the documents listed in paragraph 2 below.

This opinion has been prepared and drafted on the basis of your instruction letter dated 2 July 2018 from EFET (the "**Instruction Letter**") which forms part of this Opinion[1].

2. Documents examined

For the purposes of this legal Opinion, we have examined a copy of each of the documents listed below as available on the EFET website:

a) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a), published 11 May 2007) (the "**2007 EFET General Agreement**");

b) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 6 January 2003) (the "**2003 EFET General Agreement**" and together with the 2007 EFET General Agreement, an "**EFET General Agreement**", which expression shall include, unless the context otherwise requires, the 2007 EFET General Agreement and/or the 2003 EFET General Agreement);

c) EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010) (the "**2010 EFET Credit Support Annex**");

d) EFET Credit Support Annex to the General Agreement (Version 1.0, published 5 April 2002) (the "**2002 EFET Credit Support Annex**" and together with the 2010 EFET Credit Support Annex, an "**EFET Credit Support Annex**", which expression shall include, unless the context otherwise requires, the 2010 EFET Credit Support Annex and/or the 2002 EFET Credit Support Annex);

e) EFET Allowances Appendix (Gas) to the EFET General Agreement Version 2.0 (a)/ 11 May 2007 (Version 4.0, published 28 February 2018);

f) EFET Amendment Letter to the Allowances Appendix (Version 3.0, published 3 April 2012);

g) EFET Allowances Appendix (Gas) to the EFET General Agreement (Version 3.0, published 3 April 2012);

h) EFET Amendment Letter to the Allowances Appendix Version 2.0/17 July 2008 (Version 2.0, published 3 April 2012);

i) EFET VAT Annex for use with the 2003 EFET General Agreement (Version 1.0, published November 2005);

j) EFET VAT Agreement for use with the 2003 EFET General Agreement (Version 1.0, published 20 November 2005);

k) Amendment to each of § 14 (*VAT and Taxes*), the definition of "Other Tax" and "Zero-Rated" in Annex 1, and the Election Sheet to the 2003 EFET General Agreement (Version 1.0/July 2007);

l) Clarification of § 8 (*Remedies for Failure to Deliver and Accept the Contract Quantity*) of the 2003 EFET General Agreement (Version 1.0, published October 2005);

m) IBP Appendix to the EFET General Agreement (Version 1.0, published 4 December 2017);

n) PVB Appendix Version 1.0 to the 2007 EFET General Agreement (Version 1.0, published 19 September 2016);

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[1] Please note that for the purposes of this Opinion, we have assumed that the definition of "Commodity" in Appendix B of the Instruction Letter shall be read as "*Natural Gas, emission allowances, certificates or capacity rights*" instead of "*electricity, emission allowances, certificates or capacity rights*".

o) PSV Appendix to the 2003 EFET General Agreement (Version 1.0, published January 2007);

p) Austrian VTP Appendix to the EFET General Agreement (Version 2.0, published 20 September 2013);

q) TTF Appendix to the EFET General Agreement (Version 4.0, published 26 May 2014);

r) TTF Appendix to the EFET General Agreement (Version 3., published April 2011);

s) TTF Appendix to the 2003 EFET General Agreement (Version 2.0, published on 14 July 2006);

t) EFET TTF Appendix Guidance Notes (Version 2.0, published 20 September 2006);

u) PEG Appendix to the EFET General Agreement (Version 4.0/October 2018);

v) PEG Appendix to the EFET General Agreement (Version 3.0, published 30 March 2015);

w) PEG Appendix to the EFET General Agreement (Version 2.0, published 31 March 2008);

x) ZBT 2004 Appendix to the 2003 EFET General Agreement (Version 1.0, published June 2006);

y) ZBT 2012 Appendix to the EFET General Agreement (Version 2.0, published 19 April 2013);

z) Zeebrugge Appendix to the EFET General Agreement (Version 1.0/4 December 2017);

aa) UK 6:6 Beach Appendix to the 2007 EFET General Agreement (Version 1.0, published 2016);

bb) UK 5:5 Beach Appendix to the 2007 EFET General Agreement (Version 1.0, published 7 September 2015);

cc) UK Beach Appendix to the 2007 EFET General Agreement (Version 1.0, published 19 April 2013);

dd) NBP Appendix to the 2007 EFET General Agreement (Version 2.0, published 7 September 2015);

ee) NBP Appendix to the 2003 EFET General Agreement (Version 1.0, published December 2006);

ff) GasPool Appendix to the EFET General Agreement (Version 1.1(a), published 1 March 2012);

gg) GUD Appendix to the EFET General Agreement (Version 2.0, published 31 December 2008), which itself replaced the outdated BEB Appendix (Version 1.0, published September 2007);

hh) EFET ITAB Appendix to the EFET General Agreement (Version 1.0, published 1 December 2009);

ii) Guidance Notes for the ITAB Appendix to the EFET General Agreement (published 20 January 2010);

jj) Gas Capacity Appendix (Fluxys/GRTgaz) (Version 1.0, published 31 December 2008);

kk) Polish VP Appendix to the EFET General Agreement (version 1.0, published 14 December 2013);

ll) Individual PRISMA Gas Capacity Contract (version 2.0, published 15 October 2014);

mm) Individual PRISMA Gas Capacity Contract (version 1.0, published 7 May 2014);

nn) Guidance Notes for the Individual PRISMA Gas Capacity Contract (published 14 May 2014);

oo) Change Letter to amend § 14 (*VAT and Taxes*) of the EFET General Agreement (Version 1.0, published 16 December 2013);

pp) EFET Electronic Confirmation Agreement (published 28 June 2005), but only to the extent of our opinion under paragraph 7.5 of this Opinion;

qq) 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 Natural Gas (Version 2.0, published 3 April 2012), but only to the extent of our opinion under paragraph 7.5 of this Opinion;

rr) Cross Product Payment Netting Agreement (Version 1, published 20 October 2005), but only to the extent of our opinion under paragraph 7.6 of this Opinion;

ss) Master Netting Agreement (Version 1.0, published June 2010), but only to the extent of our opinion under paragraph 7.6 of this Opinion;

tt) 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) (the "**Cross-Product Master Agreement**"), but only to the extent of our opinion under paragraph 7.6 of this Opinion;

uu) EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master agreement (Version 1.0, published 23 June 2003), but only to the extent of our opinion under paragraph 7.6 of this Opinion; and

vv) EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011), but only to the extent of our opinion under paragraph 7.6 of this Opinion.

(together the "**Agreements**" and individually, an "**Agreement**").

3. Definitions

When used in this Opinion, terms defined in the EFET General Agreement, the EFET Credit Support Annex and in any of the other Agreements shall have the same meaning when used in this Opinion, unless otherwise defined.

4. Scope of the opinion

We are *avocats* of the *Cour d'appel* in Paris and this Opinion is given only with respect to French law. In this Opinion, references to French law are to be read as references to the laws and regulations of France in full force and effect as at the date hereof, as interpreted by the *Cour de cassation* and the *Conseil d'Etat* in their reported decisions published 15 days prior to the date hereof.

In this Opinion, legal concepts shall be interpreted under French law and, therefore, although they are described in English terms in this Opinion and not by their original terms, the latter prevail in case of discrepancy. The concepts concerned may not be exactly equivalent to the concepts described by the English terms used herein if they had to be construed under French law. Words appearing in the French language have the meaning ascribed to them under French law and prevail over their English translation.

We express no opinion as to the laws of any jurisdiction other than French law in full force and effect at the date of this Opinion and do not consider the impact of any laws other than French law, even in the case where, under French conflict of laws rules, a foreign law would apply, and we undertake no responsibility to notify any Addressee of this Opinion of any change in French law after the date of this Opinion.

We express no opinion as to matters of fact, nor as to questions of law which can be decided only on the basis of matters of fact nor as to the effect of facts, whether known to us or not, which may impact on the opinions given herein.

This Opinion is strictly limited to the opinions set out in paragraph 7 below and may not be interpreted as covering, either directly or indirectly, any other question, including tax questions, regulatory capital or accounting treatment relating to the Agreements.

This Opinion is itself (and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to it or its formation (including any non-contractual disputes or claims) shall be) governed and construed in accordance with French law. By accepting this Opinion you irrevocably agree and accept that the Civil Court of Nanterre

(*Tribunal de grande instance de Nanterre*) shall have exclusive jurisdiction to hear and determine any dispute or claim relating to it or its formation.

The opinions herein expressed do not take into account legislative or regulatory proposals currently under consideration.

5. General information

The French counterparty to which this Opinion relates has one of the legal status and forms which are identified in Exhibit 1 to this Opinion.

6. Assumptions

6.1 Assumptions set out in the Instruction Letter

In the Instruction Letter we are requested to make the following assumptions for our Opinion:

- two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organised and has its center of main interest in France (the "**French Counterparty**", the other party to the EFET General Agreement being referred to as the "**Other Party**", each party being, a "**Party**");
- the French Counterparty is either a corporation, a bank or credit institution, an investment services provider or an investment firm, an insurance company, an investment fund management company, a municipality or a county, an association of local government or a publicly-owned corporation, as further described and defined in Exhibit 1 to this Opinion;
- the relevant EFET General Agreement is governed by the laws of Germany or England (as specified in the relevant election sheet to the EFET General Agreement); for the purposes of paragraph 7.1 (*Enforceability of Close-out Nettin*g), paragraph 7.2 (*Multi-branch Parties*) and paragraph 7.7 (*Governing Law, Arbitration and Jurisdiction*) below only, we have also assumed that the relevant EFET General Agreement could also be governed by French law as requested by the Instruction Letter;
- each EFET General Agreement and any of the above mentioned Annexes (including the EFET Credit Support Annex) are enforceable under the laws of any jurisdiction (other than French law) and each Party has duly authorised, executed and delivered, and has the capacity to enter into, each document;
- on the basis of the terms and conditions of the relevant EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in such EFET General Agreement, the Parties over time enter into a number of transactions under the Agreements which include some or all of the transactions described in Appendix B of the Instruction Letter (each an "**Individual Contract**"); and
- Individual Contracts can provide for the physical delivery of commodities (as described in Appendix B of the Instruction Letter) or emission rights in exchange for Cash; however, some of them may also provide for Cash settlement.

6.2 Additional assumptions

Furthermore, we have, with your permission, assumed the following for our Opinion:

6.2.1 each Party:

a) is validly subsisting, is duly incorporated or constituted under the laws of its jurisdiction of incorporation or constitution and complies with the specific regulations applicable to it;

b) has all requisite power and capacity to enter into, deliver and perform its obligations and exercise its rights under each of the Agreements and each Individual Contract to which it is a Party and the execution of the Agreements and each Individual Contract by each Party thereto and the performance of its obligations thereunder conform with the constitutive documents and the purposes (*objet*) or, with respect to Public Entities (each, as defined in Exhibit 1 to this Opinion), public interest mission of such Party; and

c) has validly obtained and complies with all necessary corporate or internal authorisations or any other authorisations from any administrative authority or third party which are to be obtained pursuant to any applicable laws and its constitutive documents in order to authorise the entry into, delivery of and performance of its obligations and the exercise of its rights under each of the Agreements and in respect of any Individual Contract, such authorisations being unconditional and in full force and effect;

6.2.2 each signatory on behalf of each Party to the Agreements and each person entering into Individual Contracts has the requisite capacity and authority to execute the Agreements or the relevant Confirmation, as the case may be, and is duly authorised to do so;

6.2.3 each Party complies with applicable French laws and regulations regarding the solicitation with respect to, or the offering or provision of, banking activities, financial services, investment services, or other regulated activities notably the provisions of the French Monetary and Financial Code (the "**MFC**");

6.2.4 each Party complies with (i) its contractual obligations under or in connection with the Agreement and each Individual Contracts and (ii) all regulatory matters, including without limitation the obtaining of the necessary authorizations, permissions, consents, licenses, consents and exemptions by or from any governmental, judicial, administrative, supervisory or public bodies or authorities of any country or supra-national organization, the making of the necessary filings, registration, notifications (including without limitation notification of major shareholding, or disclosure under Regulation (EU) 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**") or Regulation (EU) 2015/2365 of 25 November 2015 on transparency of securities financing transactions and of reuse), all applicable requirements including under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("**MIFID II**"), the European Regulation (EU) no. 600/2014 of the European Parliament and of the Council dated 15 May 2014, on markets in financial instruments and the European Regulation (EU) no. 2016/1011 of the European Parliament and of the Council dated 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and the payment of stamp duties and other documentary taxes and charges;

6.2.5 each Party is either a professional dealer in privately negotiated derivatives or a sophisticated end-user;

6.2.6 the choice of German law or English law to govern the Agreements is a valid choice of law under the laws of Germany (if German law has been elected) or England (if English law has been elected);

6.2.7 the provisions of the Agreements and each Individual Contract create valid, legal, binding and enforceable obligations for both Parties under all relevant laws (other than French law) and are, valid and legally binding between the Parties thereto under all relevant laws (other than French law);

6.2.8 each Agreement and each Individual Contract is capable of being terminated, closed out and liquidated in the manner envisaged by the EFET General Agreement and the EFET Credit Support Annex and capable of having a Settlement Amount or Termination Amount determined;

6.2.9 each of the Agreements is properly entered into and each of the Confirmations and EFET Credit Support Annex is properly filled out by both Parties and no provisions of the Agreements and EFET Credit Support Annex, that are necessary for the giving of this Opinion, has been varied, altered or waived;

6.2.10 except for the Schedule to the relevant Agreement and Confirmations exchanged, there exists no other agreement or instrument between the Parties, or to which the Parties are subject, amending or otherwise affecting or being inconsistent with, the provisions of the relevant Agreement;

6.2.11 each Party performs its obligations under the relevant Agreement in accordance with its terms and all representations, warranties and similar statements set forth in each of the Agreements are true and accurate, save in relation to any non-performance by one Party which leads to the taking of action by the other Party under the termination and close-out provisions of the Agreements;

6.2.12 all Individual Contracts qualify as forward financial instruments (*instruments financiers à terme*) within the meaning of Articles L. 211-1, L. 211-36 II and D. 211-1 A of the MFC; Physical Commodity Transactions are excluded from the benefit of the French Netting Law as further set out in Exhibit 2 to this Opinion;

6.2.13 at least one of the Parties to the Agreements is a Qualifying Party under the French Netting Law (as further described in Exhibit 3 to this Opinion);

6.2.14 Individual Contracts are capable of being terminated under the law governing such Agreement in accordance with the provisions of the relevant Agreement;

6.2.15 each Agreement and each Individual Contract is entered into prior to (i) the commencement of any Insolvency Proceedings (as defined in Exhibit 4) and (ii) any Date of Cessation of Payments (as defined in Exhibit 4) in respect of the French Counterparty;

6.2.16 all payments under the relevant Agreement are effected by the Parties in Cash, by negotiable instruments, by bank transfers, by bordereaux (*bordereaux Dailly*) referred to in Articles L. 313-23 to L. 313-49 of the MFC or by any other means commonly accepted in business relationships, so that no payment under the relevant Agreement during the Hardening Period (as defined under Exhibit 4 to this Opinion) is subject to automatic cancellation pursuant to Article L. 632-1 paragraph 4 of the MFC;

6.2.17 there are no factual circumstances of which we are unaware that may affect the opinions expressed in this memorandum;

6.2.18 where the French Counterparty is a corporation referred to in Exhibit 1 to this Opinion, the centre of main interests of such French Counterparty is located in France (as that term is defined in the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the "**Insolvency Proceedings Regulation**")) and the courts of France would have jurisdiction to open insolvency proceedings in relation to such French Counterparty and subject to the exceptions provided in this regulation, would apply the Bankruptcy Rules to such proceedings;

6.2.19 all obligations under each of the Agreements are mutual between the Parties in the sense that there are only two Parties and each is personally liable as regards obligations owing by it and beneficial owner of obligations owed to it;

6.2.20 the Agreements and each Individual Contract have been entered into for *bona fide* commercial reasons and on arms' length terms by each of the Parties;

6.2.21 each Settlement Amount or Termination Amount falling to be determined under an Agreement is duly determined in accordance with the provisions thereof;

6.2.22 under all relevant laws (excluding French law) the close-out netting procedures incorporated in the Agreements are valid and enforceable in insolvency proceedings and the obligation to pay the Settlement Amount or Termination Amount calculated under each Agreement is legally binding and enforceable against the Parties under its governing law(s) and must be deemed to have originated prior to the insolvency of the relevant Party under its governing law(s);

6.2.23 the obligations to pay the Settlement Amount or Termination Amount pursuant to each Agreement are legally binding and enforceable and under all relevant laws (other than French law) capable of being set-off under each of the EFET General Agreement and mutual between the Parties in the sense that they (a) arise between the Parties acting in the same capacity and as principals and not as agents, (b) are not assigned to one of the Parties by a third party and (c) are not assigned, pledged or otherwise encumbered by one of the Parties to a third party or otherwise transferred to a third party;

6.2.24 neither the Agreements nor the Individual Contracts are capable of being avoided or otherwise held ineffective (in whole or in part) by reason of fraud, error, misrepresentation, undue influence, illegality or otherwise;

6.2.25 Individual Contracts are not, or have ceased to be, traded on a regulated market and/or a multilateral trading facility ("**MTF**") or an organised trading Facility ("**OTF**");

6.2.26 each Party, when entering into any Individual Contract with the other Party, shall comply with applicable laws and regulations, if any, providing for specific conditions to be complied with by such Party regarding the conclusion of Individual Contracts and/or the posting of Eligible Credit Support. This is in particular the case (but without limitation) if the French Counterparty is:

(a) a real estate credit company (*société de crédit foncier*)[2];

(b) an housing financing company (*société de financement de l'habitat*)[3];

(c) a Public Entity[4]; and

(d) an insurance company (*entreprise d'assurance*).

6.2.27 When the winding-up of a French Counterparty is contemplated, applicable French conflict of laws rules, including those provided for by the Insolvency Proceedings Regulation, by Articles L. 613-31-1 et seq. of the MFC, implementing Article 3 of EU Directive no. 2001/24/EC of 4 April 2001 on the reorganization and the winding-up of credit institutions, as amended by the BRRD (as defined in Exhibit 5 to this Opinion) (the "**Winding-Up Directive**"), or by Articles L. 326-20 et seq. of the French Insurance Code, implementing Article 269 of EU Directive no. 2009/138/EU of 25 November 2009 on the taking-up an pursuit of the business of Insurance and Reinsurance (the "**Solvency II Directive**"), designate French law as the applicable *lex concursus*;

6.2.28 each Letter of Credit is valid, binding and enforceable in accordance with its own respective terms and conditions and taken in the form referred to in Article L. 211-38 MFC;

6.2.29 Individual Contracts to which this opinion relates are those that are not, or have ceased to be, cleared through a central counterparty; and

6.2.30 there is nothing in the laws of another jurisdiction that affects the opinions herein expressed.

Where an assumption is stated to be made in this Opinion, we have not made any investigation or enquiry with respect to the matters that are the subject of such assumption and we express no views as to such matters.

We emphasise that a wide variety of Individual Contracts can be entered into, to which special considerations may apply. For this Opinion, we have not reviewed the terms of any Individual Contract that may be concluded under any Agreement and consequently no opinion is expressed in relation to the binding nature and enforceability of any specific Individual Contract.

7. Opinion

The EFET questions as set out in the Instruction Letter have been included in bold below before our responses and are set in the same order and numbering as the questions set out in the Instruction Letter.

Subject to the assumptions above and qualifications below, we are of the following opinion:

7.1 Enforceability of Close-out Netting

Paragraph 7.1.1 below will address termination and close-out based on an event that constitutes a Winding-up, Insolvency or Attachment (as defined in paragraph 10.5 (c) of the EFET General Agreement) or a similar insolvency related Material Reason and paragraph 7.1.2 below will address non-insolvency related Material Reasons.

[2] Real estate credit companies are credit institutions licensed as specialised credit institution (*établissement de crédit spécialisés*); The regime applicable to real estate credit companies is contemplated in Articles L. 513-2 et seq. of the MFC and in Articles R. 513-1 et seq. of the MFC. While a real estate credit company may enter into Transactions the effectiveness of the EFET Close-out Netting Provisions is subject to limitations upon occurrence of a Voluntary Settlement or an Insolvency Proceedings (See in this respect paragraph 7.1.1 (f) to this Opinion).

[3] Housing financing companies are credit institutions licensed as specialised credit institution. The regime applicable to housing financing companies is contemplated in Articles L. 513-28 et seq. of the MFC and in Articles R. 513-19 et seq. of the MFC. While a housing financing company may enter into Individual Contracts the effectiveness of the EFET Close-out Netting Provisions is subject to limitations upon occurrence of a Voluntary Settlement or an Insolvency Proceedings (See in this respect paragraph 7.1.1 (f) to this Opinion).

[4] See in this respect paragraph 7.1.1 (f) to this Opinion.

7.1.1 Winding-up, Insolvency or Attachment

For the purpose of this paragraph 7.1.1, we have assumed that after entering into the Individual Contracts and prior to the maturity of the Individual Contract, the French Counterparty is subject to Insolvency Proceedings under the Bankruptcy Rules, and, subsequent to the commencement of the Insolvency Proceeding, either the French Counterparty or an insolvency official seeks to assume the Confirmations representing profitable Individual Contracts for the Insolvent Party.

I. General overview of French insolvency proceedings and close-out netting under French law

Legal provisions applicable to close-out netting under French law are set out under Articles L. 211-36 through L. 211-40 of the MFC (the "**French Netting Law**").

Based on the description of the Individual Contracts included in Appendix B of the Instruction Letter, a description of the French Netting Law and of the eligibility of an Individual Contract for close-out netting under French law is set out in Exhibit 2 to this Opinion.

French rules applicable to Insolvency Proceedings of most of the French Counterparties are set out in Book VI of the French Commercial Code. A general overview of the Insolvency Proceedings applying to these French Counterparties is described in Exhibit 4 to this Opinion.

II. Close-out Netting in the Context of an Insolvency Proceeding

For the purpose of this paragraph 7.1.1 II only, we have assumed that (i) at least one Party is a Qualifying Party, (ii) the Individual Contracts contemplated thereunder qualify as transactions on financial instruments and (iii) the relevant EFET General Agreement is governed by either the laws of Germany, England or (for the purposes of the enforceability of the EFET General Agreement Netting Provisions (as defined in paragraph 7.1.1 (a) bb)) below only) France.

Where none of the Parties is a Qualifying Party, the agreement would still be valid but the remedy of close-out netting and termination following commencement of an Insolvency Proceeding as provided by the French Netting Law would not be available where termination occurs on the grounds of the opening of Insolvency Proceedings (as further described in Exhibit 2 to this Opinion) towards the French Counterparty.

Limitations applicable to set-off of claims arising under the EFET General Agreement when the French Counterparty is a credit institution, an investment firm, an insurance company or a Public Entity are addressed in Exhibit 2, Exhibit 5 and paragraph 7.1.1 (f) to this Opinion.

(a) **Automatic Termination**

aa) 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? 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) by 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?

1. 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?

2. If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of

your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event?

Please supply specific recommended language for purposes of customizing § 10.4 of the General agreement to implement such optimal termination timing.

The provisions of the EFET General Agreement entered into between the French Counterparty and the Other Party entitling the Other Party to Early Termination (as defined in the Agreement) of the Agreement upon the occurrence and continuance of a Material Reason described in paragraph 10.5 (c) of the EFET General Agreement in respect of the French Counterparty are valid and enforceable under French law when the French Netting Law applies.

French Netting Law allows the termination, without specifying whether such termination should occur automatically or by notice and the enforceability of the netting procedures set out in the Agreement.

Article L. 211-36-1 of the MFC provides that the conditions under which the termination may occur can be determined by the provisions of the agreement entered into between the parties. Therefore, the Parties to the EFET General Agreement can choose to apply or not to apply Automatic Termination.

Please note that when the French Netting Law regime applies, termination by notice is recommended as such termination mode provides the flexibility which may be required in order to process an orderly Insolvency Proceeding as experience has shown. It avoids, in particular, situations where the Individual Contracts would be terminated without the Parties having knowledge of it.

Consequently, assuming that the French Netting Law regime is applicable, we would not recommend to elect Automatic Termination and would consequently not suggest to amend the scope of Automatic Termination or to specify or refrain from specifying a grace period to benefit of the favorable provisions of the French Netting law.

bb) Assuming you recommend Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the EFET General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to French law) enforceable under French law or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party?

Subject to the assumption that Automatic Termination has been specified as applying in the Election Sheet and that the French Netting Law regime applies, the provisions of the EFET General Agreement contemplating that such agreement shall close-out automatically immediately upon the occurrence of a Material Reason (the "**EFET General Agreement Netting Provisions**"), are valid and enforceable under French law (as further described in Exhibit 2 to this Opinion). We however draw your attention to our advice set out in our answer to question 7.1.1 (a) aa) immediately above.

(b) **Assuming you recommend not to elect Automatic Termination upon the occurrence of an event described in § 10.5(c) of the EFET General Agreement:**

aa) would it be necessary or recommendable to modify the scope of termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would permit the Terminating Party to terminate and/or (ii) adding other Material Reasons upon the occurrence of which it should be entitled to terminate)?

bb) 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 (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under French law

or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?

As set out in our answer to question (a) aa) above, French Netting Law allows the termination without specifying whether such termination should occur automatically or by notice.

Consequently, it is not necessary to amend the scope of the events listed in paragraph 10.5(c) of the EFET General Agreement to benefit from the favorable provisions of the French Netting law (assuming that the French Netting Law regime is applicable).

Even if the Parties have not elected Automatic Termination, the entering into the EFET General Agreement, the entering into an Individual Contract and the provisions of the EFET General Agreement described in paragraph 10.5(c) of the EFET General Agreement would not be able to be challenged by a liquidator, receiver or third party upon the occurrence of an event described in paragraph 10.5(c) of the EFET General Agreement, assuming that the French Netting Law applies.

(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 French law or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?**

The close-out netting provisions of the EFET General Agreement are valid and enforceable under French law even in the case where such close-out netting occurs after the Initial Judgement (as defined in Exhibit 4 to this Opinion), provided that the French Netting Law regime applies[5].

Article L. 211-36-1 and Article L. 211-40 of the MFC provide that:

a) the Parties may provide for the calculation of a single netted settlement amount, irrespective of whether the financial obligations resulting from transactions on financial instruments are governed by one or several agreements or master agreements;

b) the netting procedure is binding on third parties; and

c) the provisions of the Bankruptcy Rules do not prevent the application of Articles L. 211-36 and following of the MFC.

The provisions of the French Netting Law validate both the netting process but also the valuation methodology and procedures agreed between the Parties. The Parties can consequently incorporate in the termination amount, termination values of different types of derivative transactions, taken either separately or as a portfolio, whether cash or physically settled, and different currencies related or denominated products, which, if performed in good faith, using pre-agreed determinable means and commercially reasonable procedures and rules to produce a commercially reasonable result, would be enforced by a French court when the conditions of the French Netting Law are met.

In addition, Article L. 211-36-1 of the MFC provides that the netting agreements may contemplate a single net settlement amount whether related arrangements are governed by one or several agreements or master agreements.

Please note that the contractual provisions for the termination, valuation and netting of the Individual Contracts are effective *vis-à-vis* third parties and any termination, valuation, or netting effected on grounds of civil enforcement proceedings or pursuant

[5] Limitations applicable to set-off between Parties of claims arising under the EFET General Agreement are addressed in Exhibit 2 to this Opinion.

to the exercise of a right of opposition (*droit d'opposition*)[6] will be deemed to have taken place before the said proceedings. This means that the right of a creditor of one of the Parties either under civil enforcement proceedings initiated against the asset of the relevant Party or pursuant to the exercise of a right of opposition (*droit d'opposition*) in relation to the assets of the relevant Party will not interfere with the termination of the Individual Contracts and the calculation of the Termination Amount (even if the relevant enforcement action has been initiated by a creditor prior to the termination of the Individual Contracts by one of the Parties).

(d) **Do French law recognise that the close-out netting provisions in § 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?**

Assuming that the French Netting Law regime applies, the opening of an Insolvency Proceeding against the French Counterparty would have no implication on the enforceability of the close-out netting provisions in paragraphs 10 to 11 of the EFET General Agreement which would apply to all Individual Contracts assuming that they are Qualifying Transactions.

As set out in Exhibit 2, Individual Contracts must be Qualifying Transactions in order to fall in the scope of the French Netting Law. If all Individual Contracts fall in such scope and when the French Netting Law applies, the close-out netting provisions could not be challenged by a liquidator, receiver or third party.

If an Individual Contract does not meet the requirements of Qualifying Transactions, provisions of the Bankruptcy Rules will apply and consequently the provisions of paragraphs 10 and 11 of the EFET General Agreement would in this case be subject to the Bankruptcy Rules (see in this respect paragraph 3 of Exhibit 2 to this Opinion, in particular in respect of the consequences of documenting both Qualifying Transactions and non Qualifying Transactions under the same EFET General Agreement).

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?

Requirement to use an industry master agreement was removed from French legislation in the context of the transposition of the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements as amended (the "**Collateral Directive**") in 2005.

Article L. 211-36-1 of the MFC does not impose the use of a single agreement to benefit from the favorable provisions of the French Netting law.

Article L. 211-36-1 of the MFC provides that:

"*Agreements relating to the financial obligations referred to in article L. 211-36 may be early terminated, and the debts and claims relating thereto may be netted among themselves between all the parties. The parties may provide for the calculation of a* ***single netted settlement amount, such financial obligations being governed either by one or several agreements or master agreements****.*

The termination, valuation and netting procedures of the transactions and obligations referred to in Article L. 211-36 and in I of this Article are binding on third parties. ***These procedures may be contemplated in particular by agreements or master agreements.*** *Any termination, valuation or netting realized on grounds of civil execution proceedings or exercise of a right of opposition shall be deemed to have taken place prior to said proceedings.*"

Article L. 211-36-1 of the MFC consequently provides that close-out can cover Individual Contracts whether they have been entered into under one or several agreements or

[6] Civil enforcement proceedings and right of opposition (*droit d'opposition*) refer to execution measures which may be taken by a creditor against the assets of its debtor (e.g. seizing claims held by the debtor over a third party) and are distinct from Insolvency Proceedings.

master agreements. Such Article does not require that all Individual Contracts should be entered into pursuant to a single agreement for the netting provisions to be effective.

If the single agreement concept is particularly important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some but not all Individual Contracts under the EFET General Agreement might impact termination and close-out rights generally, as well as subsequent rights to terminate transactions remaining under the EFET General Agreement following a previous Partial Close-Out?

As set out above, the concept of single agreement is not under the French Netting Law particularly important.

However, in our view, although this is not expressly provided by the French Netting Law, we believe that a mechanism where, for example, only Individual Contracts which are in the money for the non-defaulting Party would be terminated could be challenged under the Bankruptcy Rules.

As discussed above, the French Netting Law provides for the recognition of contractual close-out netting mechanisms despite the opening of Insolvency Proceedings in respect of the defaulting Party. Nevertheless, we believe that there would be a risk that an administrator, receiver or third party would challenge the mechanism described above on the grounds of breach of the principle of equality between creditors and the principles under French law which require a contract to be executed in good faith and on an arm's length and balanced terms.

We would consequently suggest not to provide in the EFET General Agreement a mechanism providing for some but not all Individual Contracts to be terminated upon decision of a Party; this could be seen as a breach, in an insolvency situation, of the principle of equality between creditors.

(e) **Is the insolvent counterparty 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 French law or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?**

Assuming that French Netting Law applies, the provisions of the EFET General Agreement contemplating, for the purpose of calculating the amount of any compensation claim, the conversion in a single currency of any amount denominated in a different currency, are valid and enforceable under French law, even in the context of Insolvency Proceedings affecting the French Counterparty.

Conversion in the single currency of any amount to be calculated upon termination of Individual Contracts for the purposes of calculating the Termination Amount would be part of the valuation methods contemplated by paragraph II of Article L. 211-36-1 of the MFC; assuming that the compensation claims are linked to the close-out netting mechanism set out in paragraphs 10 and 11 of the EFET General Agreement, provisions of Article L. 211-36 and following of the MFC should prevail in respect of valuation since Article L. 211-40 of the MFC provides that the close-out netting provisions apply notwithstanding the Insolvency Proceedings.

Please note that under the Bankruptcy Rules, claims denominated in foreign currencies are to be converted into euros at the rate prevailing on the date of the Initial Judgement in the case of a safeguard procedure or a judicial reorganisation and on the date of the judgement ordering the liquidation in the case of a judicial 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 based in France 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?**

As further described in Exhibit 2, it is a requirement of the French Netting Law that at least one of the Parties be a Qualifying Party and that Individual Contracts qualify as Qualifying Transaction. Moreover, the Qualifying Transaction regime is wider when both Parties are Eligible Parties (please see in this respect Exhibit 2).

Consequently, the status of at least one of the Party is crucial since it is a condition for the French Netting Law to apply.

In addition to the restrictions applying to the credit institution and investment firms as further described in Exhibit 2 and Exhibit 5 to this Opinion and to the Insurance Company as further described in Exhibit 2 to this Opinion, the following entities, without such list being exhaustive, may, however, be subject to close-out netting restrictions:

(1) <u>Validity and enforceability of the close-out netting provisions of the Agreements against real estate credit company (*Sociétés de crédit foncier*) and housing financing company (*Sociétés de financement de l'habitat*)</u>

There are two types of French covered bond issuers: the real estate credit company (*Sociétés de crédit foncier*) and the housing financing company (*Sociétés de financement de l'habitat*) (together, the "**Covered Bond Issuers**").

Each Covered Bond Issuer is a financial institution created solely to: (i) grant or acquire secured loans, loans granted to, or guaranteed by, public sector entities or other eligible securities and (ii) finance such loans or securities by issuing covered bonds (respectively, *obligations foncières* or *obligations de financement de l'habitat*), other forms of privileged liabilities and non-privileged liabilities.

Pursuant to Article L. 513-10 and Article L. 513-28 of the MFC, Covered Bond Issuers can enter into derivatives transactions benefiting from the privilege set out in Article L. 513-11 of the MFC (the "**Privilege**") or into derivative transactions not benefiting from the Privilege[7].

It results from the Privilege that sums due in respect of privileged liabilities shall be paid in priority to all other debts and Insolvency Proceedings shall not result in the acceleration of the privileged liabilities (as an exception to the Bankruptcy Rules). If Individual Contracts entered into between the Parties benefit from the Privilege, the provisions of the EFET General Agreement entitling the non-defaulting Party to early terminate all outstanding Individual Contracts upon the opening of Insolvency Proceeding shall not be enforceable against the Covered Bond Issuers.

Such provisions would prevent the exercise of the close-out netting right under the French Netting Law.

[7] As far as forward financial instruments are concerned, Article L. 513-10 of the MFC provides (i) that, under certain circumstances, a Covered Bond Issuer may enter into forward financial instruments and (ii) that amounts due in respect of forward financial instruments entered into for hedging its assets and liabilities, after set-off, if need be, benefit from a priority lien referred to in Article L. 513-11 of the MFC, as well as certain amounts due in respect of forward financial instruments entered into for hedging or managing the global risk on its assets, liabilities or off-balance sheet items.

(2) <u>Validity and enforceability of the close-out netting provisions of the Agreements against Public Entities</u>

Regarding the validity and enforceability of close-out netting provisions of the EFET General Agreement *vis-à-vis* Public Entities, Article L. 2311-1 of the *Code général des propriétés des personnes publiques* and general principles of administrative law provide respectively for the impossibility to seize assets of public legal entities and impossibility to enforce specific rights (*immunité d'exécution*). These two principles prevent the operation of enforcement proceedings (*exécution forcée*) and, by analogy, set-off mechanism (*compensation*) (as set-off is a type of mandatory payment). Both civil and administrative courts strictly apply this prohibition.

However, a law can allow the possibility to use set-off mechanisms against public legal entities. In this respect, according to Article L. 211-36 I of the MFC, financial obligations which can benefit from the French Netting Law include, in particular, the ones that result from Individual Contracts (which we have assumed above would be Qualifying Transactions) when at least one of the parties is an *établissement public*, the French State and the *Banque de France* or a Local Entity. Consequently, our view is that one should interpret Articles L. 211-36 and seq. of the MFC as setting out a special derogation to the above prohibition of set-off mechanisms against public legal entities. Indeed, otherwise one could wonder why *établissements publics*, the French State, the *Banque de France* and Local Entities have expressly been included in Article L. 211-36 1° of the MFC.

On this basis, we believe that our opinions in our answer above should apply to a French Counterparty which is an *établissement public*, the French State, the *Banque de France* or a Local Entity and the Other Party could seek recovery of any net balance in favour of the Other Party pursuant to a definitive judgment ordering payment of its debt by such a French Counterparty, in accordance with the provisions of Article 1 of Law no. 80-539 dated 16 July 1980 (as amended) relating to the enforcement of judgments against public legal bodies[8].

7.1.2 Non- Insolvency related Material Reasons

The views expressed in respect to subparagraph d), e) and f) of paragraph 7.1.1 above are further elaborated below for purposes of this paragraph 7.1.2 where issues discussed in those sub-paragraphs may apply in the context of non-insolvency related Material Reasons.

d) Do French law recognise that the close-out netting provisions in paragraphs 10 to 11 of the EFET General Agreement apply to all Individual Contracts in the context of non-insolvency related Material Reasons?

As described further in our answer to question 7.1.1(c) above, termination and close-out rights are recognised under Article L. 211-36-1 of the MFC as being binding upon third parties.

Consequently, *vis-à-vis* third parties, when the French Netting Law regime applies, we are of the opinion that close-out netting provisions in paragraphs 10 and 11 of each of the EFET General Agreement would apply to Individual Contracts in the context of non insolvency related Material Reasons.

[8] However, set-off of the debts and claims arising out of the transfers of collateral provided by Public Entities could be unenforceable, as further described in paragraph 7.3 m) below.

e) Is the 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 French law or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

The remarks in paragraph 7.1.1(e) above apply equally outside the scope of an Insolvency Proceeding but for the specific references applying to Insolvency Proceedings.

Subject to qualifications 8.(t) below, in case the French Netting Law regime does not apply, under French law, pursuant to the prevailing case law, the contractual provisions of the EFET General Agreement contemplating the conversion in a single currency of any amount denominated in another currency for the purpose of calculating the amount of any compensation claim would also be valid and enforceable outside the scope of an Insolvency Proceedings. Obligations to make a payment in France in a currency other than euro are legal and valid if the relevant contract is an international contract but may be challenged in domestic contracts unless the debtor is allowed to discharge its obligations in euros (at the exchange rate applicable on the payment date).

However, please note that this question needs also to be answered from the perspective of the governing law of the EFET General Agreement.

f) Please specify, if and as applicable, the degree to which termination and close-out rights, against a party based in France 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?

Reference is made to paragraph 7.1.1(f) above and the principles described therein apply equally outside an Insolvency mode.

g) 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 the French Counterparty?

The remarks set out in paragraphs 7.1.1(a) and 7.1.1(b) above with respect to the rights of the Terminating Party to terminate and close-out the EFET General Agreement apply equally outside the scope of an Insolvency when the French Netting law applies.

7.2 Multi-branch Parties

Paragraph 7.2.1 will address circumstances where a Multi-branch Party[9] is incorporated, organized or has its centre of main interest in France and enters into Individual Contracts under the EFET General Agreement through a branch located outside of France and paragraph 7.2.2 to this Opinion will address the context where a Multi-branch Party is incorporated, organized or has its centre of main interest outside of France, but operating through one or more offices in France.

For the purposes of paragraph 7.2 we have assumed that the French Netting Law applies.

7.2.1 French Multibranch Party

For the purposes of paragraph 7.2.1 to this Opinion only, we have assumed that:

- the EFET General Agreement is governed by a law recognizing close-out netting including where the French Counterparty is facing Insolvency Proceeding in an insolvency mode (including English law and German law); and
- after entering into Individual Contracts and prior to the maturity, the French Counterparty becomes subject to an Insolvency Proceeding under the Bankruptcy Rules,

[9] As such term is defined under the Instruction Letter ("*party which has entered into Individual Contracts under a EFET General Agreement as a multibranch party, i.e., where it operates for the purposes of the EFET General Agreement with two or more branches and in two or more jurisdictions*").

and, subsequent to the commencement of the Insolvency Proceeding, either the French Counterparty or an insolvency official seeks to continue performing the obligations of the Individual Contracts representing profitable (in the money) transactions for the insolvent counterparty.

As a preliminary comment, when the French Counterparty is a credit institution, an investment firm or an insurance company we refer to our Assumption 6.2.27, to Exhibit 2 and Exhibit 5 to this Opinion.

h) Would there be any change in your conclusions reached under or above based upon the fact that the French Counterparty has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?

There would be no change to our conclusions stated under or above if a French Counterparty has conducted business under the EFET General Agreement on a multibranch basis prior the opening of Insolvency Proceeding.

If a French Counterparty becomes insolvent, (i) the judicial administrator or the liquidator, as the case may be, will be bound by the terms of the Agreements, even as regards Individual Contracts entered into by French Counterparty through branches located outside France and (ii) a court in France would require the judicial administrator or the liquidator, as the case may be, to give effect to the provisions of the Agreements, in accordance with their terms, not only as between the head office of the French Counterparty incorporated in France and the Other Party but also between the various branches of the French Counterparty incorporated in France and the Other Party.

Under French law, the head office of a corporation incorporated in France organised under French law and its unincorporated branches (whether domestic or foreign) are treated as one and single legal entity. Obligations incurred by an unincorporated branch office (whether domestic or foreign) of a corporation organised under French law are obligations of such corporation, even if not entered directly by the head office[10].

Furthermore, the Bankruptcy Rules recognise the principle of the unity-universality theory where debtor can only be subject to one single Insolvency Proceeding which extends to and has effects in any jurisdictions where the debtor owns assets.

Court having jurisdiction in bankruptcy matters would have jurisdiction over all assets of the debtor, whether in France or abroad. This principle would extend to both domestic and foreign branches of a corporation.

Please note that for certain regulated entities, such conclusions would also have to be checked under the foreign *lex contractus* governing law (i.e. English law or German law, as further described in paragraph 4 of Exhibit 2 to this Opinion) and in case of application of the provisions of the BRRD (as further described in Exhibit 5 to this Opinion).

i) Would the EFET General Agreement be treated as a single unified agreement by the French receiver under the French law, 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?

Under the principle of the universality of the assets and liabilities detailed above, our view is that the EFET General Agreement should be treated as one single unified agreement by the French receiver if the French Counterparty is subject to Insolvency Proceeding.

7.2.2 Foreign Multibranch Party

For the purpose of this paragraph 7.2.2 to this Opinion, we have assumed that:

- A corporation, a credit institution, 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 France has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches

[10] See in this respect Cass. Civ. 1ere, February 20, 1979, JCP 1979, ed. G, II, no. 19147.

located in other countries including in each case a branch of Party F located in and subject to French law (the "**French Branch**"); and

- 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.

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

The answer to this question depends upon the location of Party F:

- If Party F is registered in another Member State of the European Economic Area[11] ("**EEA**") and is subject to the Winding-Up Directive (applicable to credit institution and investment firm, as further described in Exhibit 1) or the Solvency II Directive (applicable to insurance company, as further described in Exhibit 1), the principles set forth by the Winding-Up Directive (applicable to credit institution, as further described in Exhibit 1) and the Solvency II Directive (applicable to insurance company, as further described in Exhibit 1) are universality and unity of insolvency proceedings. French authorities would not be competent to open separate proceedings with respect to the assets and liabilities of the French Branch.

- If Party F is registered in another EEA Member State and is subject to the Insolvency Proceedings Regulation (applicable to corporation, as further described in Exhibit 1), Insolvency Proceedings Regulation contemplates the possibility to open secondary proceedings.

  Pursuant to Article 37 paragraph 1 of the Insolvency Proceedings Regulation, the opening of secondary proceedings may be requested by (i) the insolvency practitioner in the main proceedings or (ii) any other person or authority empowered to request the opening of insolvency proceedings under the law of the EEA Member State within the territory of which the opening of secondary proceedings is requested.

- If Party F is not registered in another EEA Member State and neither exequatur of the judgement opening the insolvency proceedings against Party F in its home country has been granted by a French court nor an insolvency international treaty has been signed between France and Party F’s jurisdiction, R. 600-1 of the French Commercial Code provides that French courts have jurisdiction to rule on reorganisation and winding-up proceedings concerning any debtor having the main centre of its interests (*centre principal de ses intérêts*) in France (subject to any international treaty between France and Party F's jurisdiction).

  In practice, Party F in such scenario may be declared bankrupt in France and be subject to the Bankruptcy Rules, irrespective of the fact as to whether it is insolvent in its home jurisdiction.

  Under the Bankruptcy Rules, a Judicial reorganisation proceeding or a judicial liquidation proceeding may be opened, *inter alia,* at the request of any creditor, whatever the nature of its claim may be[12].

- If Party F is not registered in another EEA Member State and (i) a French court has granted an exequatur in respect of the judgement opening the insolvency proceedings against Party F in its home country or (ii) such judgement has been recognised through an insolvency international treaty, then (a) no separate insolvency proceedings may be started in France as regards the assets and liabilities of the French Branch, and (b) said judgement would be enforceable in

[11] As of today, EEA includes all European Union Member States, Iceland, Norway and Lichtenstein.

France by the relevant bankruptcy official of such country. The bankruptcy proceedings would then remain subject solely to the laws of such country.

Where an exequatur judgement of the judgement opening the insolvency proceedings has been rendered in France, French courts are bound to recognise the authority of a foreign judicial administrator and French authorities would not be empowered to open separate proceedings.

k) If there were separate proceedings in France with respect to the assets and liabilities of the French Branch, would the receiver or liquidator in France and the French 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 France

Within the context of a separate Insolvency Proceeding opened in France with respect to the French Branch, we believe that a French insolvency official and courts would include Party F's position under the EFET General Agreement in whole among the assets of the French Branch.

Under French law, a branch is not a separated legal person, even if established abroad. French courts generally have a universal approach of the Insolvent Party patrimony, subject to the exception mentioned in paragraph 7.2.2 j) above.

and, if so, would the receiver or liquidator and the French courts recognise the close-out netting provisions of the EFET General Agreement in accordance with their terms?

The most significant problem arising would be if a French receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the French Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the French Branch to the liquidator or receiver of the French 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.

We believe that the French insolvency official and courts would recognise the close-out netting provisions of the EFET General Agreement in accordance with their terms.

French insolvency official and courts would be bound by the terms of the Agreement entered into by Party F on a multibranch basis, and would have to comply with the close-out netting provisions in accordance with their terms. Therefore, they would not require the counterparty of the French Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the French Branch of Party F while at the same time forcing such counterparty to claim in the proceeding in Country H for its net value from other Individual Contracts with Party F under the same EFET General Agreement.

Please note that, however, to the best of our knowledge there is, however, no case law in this respect.

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

Where Party F has no branch in France we do not believe that a French court would have jurisdiction to open an Insolvency Proceeding against a foreign debtor under circumstances where that foreign debtor is holding assets in France without operating a branch in France. In that scenario, attachment procedures against assets located in France would be more appropriate.

7.3 Collateral

For the purposes of paragraph 7.3 to this Opinion, we have assumed that:

- although it is in bilateral form in that it contemplates that each Party may be required to post Eligible Credit Support[13] to the other, we assume that (i) the French Counterparty is at all times Transferor under the EFET Credit Support Annex and (ii) that the Eligible Credit Support is owned by the French Counterparty or that the French Counterparty is authorised and empowered to transfer ownership in the collateral; and
- the Parties agree that Eligible Credit Support will include only Cash and Letters of Credit[14]. Cash is denominated in a freely convertible currency and is held in an account under the control of the Transferee maintained in the jurisdiction of the relevant currency; such currency shall never be that of country which is subject to United Nations, European Union or French sanctions.

It should be noted that where the Eligible Credit Support is located outside France, this Opinion does not consider the validity and enforceability of the transfer of Eligible Credit Support under the laws of the country where such Eligible Credit Support is located; consequently this Opinion does not consider whether such country might impose specific requirements in relation to the creation, perfection and enforcement of the Eligible Credit Support which is not a French law question.

Article L. 211-38 of the MFC provides for a favorable regime relating to the constitution and the enforcement of certain types of collateral arrangements (the "**Financial Collateral Regime**") which is derogatory to the Bankruptcy Rules and to other principles of French law. This regime results from the implementation in France of the Collateral Directive.

The Financial Collateral Regime recognises in particular the transfer in full ownership of cash or securities owned by the Transferor.

However, the Financial Collateral Regime can only apply where the French Netting Law described in Exhibit 2 to this Opinion applies. The conditions for the Financial Collateral Regime to apply are the same as the ones required for the French Netting Law to apply.

Assuming that the Financial Collateral Regime applies, French law will recognise the transfer of Cash (assuming it is owned by the Transferor) located in France or outside France under the EFET Credit Support Annex to the Transferee as a valid means of securing an exposure arising from the Individual Contract.

However, we understand from the definition of Letter of Credit[15] that this letter will be issued directly to the benefit of the Transferee since the Letter of Credit "*obliges the bank to pay the amount guaranteed therein upon the first demand of the Transferee*". Consequently, in our view, the Letter of Credit cannot be "transferred" *per se*. It is not owned by the Transferor and seems to be issued directly to the Transferee.

From a French law perspective, the Letter of Credit can consequently not be included as Eligible Credit Support under the EFET Credit Support Annex in order to benefit from the favorable regime of the Financial Collateral Regime. The Financial Collateral Regime would not be applicable to the transfer of Letter of Credit.

Our Opinion should be read accordingly and thus is only relevant for Cash; reference to Eligible Credit Support in such paragraph 7.3 below will only be reference to Cash, except if otherwise mentioned.

Specific rules apply to the enforceability of collateral provisions where the French Counterparty is a Public Entity, as set out in paragraph 7.3 n) below.

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[13] Following Appendix 1 to the EFET Credit Support Annex, "Eligible Credit Support means either Cash; or a Letter of Credit".

[14] Please see below our view in relation to Letter of Credit.

[15] As defined in Appendix 1 to the EFET Credit Support Annex.

m) Under French law, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?

If the Eligible Credit Support is located in France, assuming that the conditions for the Financial Collateral Regime apply, French law will govern the transfer of ownership of the Eligible Credit Support deliverable under the EFET Credit Support Annex.

Notwithstanding the fact that the EFET Credit Support Annex is not governed by French law, based on the *lex rei sitae* rule, French law would be competent to govern the formalities and perfection requirements that are necessary in order to establish, enforce or maintain the ownership interest in the Eligible Credit Support located in France.

If the Eligible Credit Support is located outside France, according to French private international law rules French law will not be competent to govern the transfer of ownership of the Eligible Credit Support deliverable under the EFET Credit Support Annex.

With regards to Letter of Credit, there is no "transfer of ownership" properly speaking and consequently the question does not arise. As set out above, in our view, from a French law perspective, a Letter of Credit could not be included as Eligible Credit Support under the EFET Credit Support Annex.

n) Would French law 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?

Assuming that the Financial Collateral Regime is applicable and that no amendment is made by the Parties to the EFET Credit Support Annex, the risk of re-characterisation of the relevant transfers of Cash as security interests by a French court, irrespective of whether the Eligible Credit Support is located inside or outside France should not be an issue, since the EFET Credit Support Annex makes it clear that the intention of the Parties is that the Eligible Credit Support is transferred in full ownership to the Transferee. Article L. 211-38 of the MFC recognises expressly such possibility. Please note that, as set out above, in our view a Letter of Credit could not be included as Eligible Credit Support under the EFET Credit Support Annex.

However, it should be noted that French courts have the power to re-characterise an agreement when the content of such agreement does not reflect the real intention of the Parties, as evidenced by other elements. Consequently, the conclusion set out in the previous paragraph is subject to the condition that the Parties do not evidence by their conduct or amendments made to the EFET Credit Support Annex their intention to create a security interest in respect of the transferred Eligible Credit Support.

Please note that legal definitions of security interests provided by French law would not necessarily match with the characteristics of an EFET Credit Support Annex which would have been amended in the way described above so that the latter could not be necessarily re-characterised as a valid security interest in all circumstances.

Security interests may also benefit from the Financial Collateral Regime. In the situation where a transfer of Eligible Credit Support under the EFET Credit Support Annex would be re-characterised as a security interest by a French court (which, as mentioned above, should not constitute a material risk under French law). However, as mentioned below, such security interest could be held invalid and/or unenforceable if it does not comply with the formalities that are required in order to create or perfect the relevant security interest. The enforcement of a security interest would also be subject to specific rules which might not be set out in the EFET Credit Support Annex.

However, pursuant to Article L. 211-38 II of the MFC, if the Eligible Credit Support is designed to secure transactions that are referred to in Article L. 211-36 2° of the MFC (i.e. transactions entered into between two Eligible Entities that give rise to a cash settlement or a delivery of financial instruments) and assuming that the transferred Eligible Credit Support is located in France, then the constitution and enforceability of such security interest is exempted from any formalities, provided that the assets on which the security interest relates have been evidenced in writing. Based on such provision, one could argue that even if re characterised as a security interest, the transfer of Eligible Credit Support between two Qualifying Entities under the EFET Credit Support Annex would still be valid and enforceable since it would indeed be evidenced in writing.

To avoid any confusion, we draw your attention to the fact that, as set out in the first paragraph to our answer above, it is in any event unlikely that the transfer of collateral be recharacterised as creating a security interest since Article L. 211-38 of the MFC recognises expressly, where the conditions are met, transfer of ownership as a valid mean of securing transactions on financial instruments.

Specific rules apply to the enforceability of collateral provisions where the French Counterparty is a Public Entity, as set out in paragraphs 7.3 n) a) and b) below.

a) Specific issues in relation to the use of Eligible Credit Support with Public Entities

General principles of French administrative law which apply to Public Entities limit their capacity to enter into collateral arrangements as detailed below. In particular, Article 3 of the EFET Credit Support Annex, may not be fully enforceable to the extent that it allows the Other Party to set-off under Article 11 of the Agreement (i) any single amount owed to the French Counterparty or due by the French Counterparty to it in respect of the terminated Individual Contract against (ii) any amount due by the French Counterparty to the Other Party or, as the case may be, owed by the Other Party to the French Counterparty in respect of any collateral held by the French Counterparty or, as the case may be, the Other Party under the EFET Credit Support Annex.

(i) Restrictions to the use of French State or *établissements publics*' funds

Article 47 of Decree no. 2012-1246 dated 7 November 2012, as amended, (the "**2012 Decree**") requires public bodies *(organismes publics)* referred to in article 1 of the 2012 Decree to deposit their available funds with the French Treasury unless they obtain a derogation from the Minister of Economy and the Minister responsible for the Budget to deposit their available funds with the Banque de France or another credit institution. Pursuant to Article 1 of the 2012 Decree, the French State and *établissements publics* fall within the category of public bodies and thus are subject to the above mentioned requirement. Besides, pursuant to the applicable hierarchy of legal texts, the rules provided for by the 2012 Decree are only applicable to the extent that another law or regulation of same level does not provide differently. Certain *établissements publics* being set up and their constitutive documents being approved by law or decree, their constitutive documents may provide for a derogation to the above mentioned requirement.

As a consequence, the transfer by the French State or an *établissement public* of cash collateral without the prior consent of the Minister of Economy and the Minister responsible for the Budget or without following the required procedures of their constitutive documents in respect of *établissements publics*, could be viewed as a breach of Article 47 of the 2012 Decree.

It is then necessary to check for each *établissement public* if its constitutive documents provide for such a derogation. If not, an authorisation should be obtained from the Minister of Economy and the Minister responsible for the Budget. This authorisation only needs to be obtained to open the account and not for each transfer of funds to and from such account.

There is no provision which in our view prevents the French State or an *établissement public* from receiving cash collateral from its counterparty. Furthermore, we consider that the receipt of such collateral would normally be required by the principles of prudent management.

(ii) Restrictions to the use of Local Entities and their *établissements publics*' funds

Under French administrative law, Local Entities and their *établissements publics* are required to deposit their available cash with the French Treasury, unless otherwise provided for by special legislative provisions. Such is the case pursuant to Article L. 1618-2 of the *Code Général des Collectivités Territoriales* (the "**CGCT**"):

(A) upon a special decision taken by their council *(organe délibérant)* for cash generated by donations, sale of one of their property, loans which have not been used for reasons which are out of reach of the Local Entity and the *établissement public*, or exceptional revenues;

(B) upon a special authorisation given by the Minister of Budget, for any cash whose origin is specified (*régies de recettes, régies d'avances et régies de recettes et d'avances*);

(C) for cash surplus generated by a *service public industriel et commercial* directly managed by Local Entities[16]; and

(D) upon a special authorisation delivered by the State's relevant authority, for cash generated by a *service public industriel et commercial* indirectly managed by Local Entities, i.e. through an *établissement public*[17]*.*

In addition, Local Entities and their *établissements publics* are not allowed to open accounts with other financial institutions and must record all their financial transactions on the account open with the French Treasury except in cases (B) and (D).

A circular (*circulaire*) of 25 June 2010 no. IOCB1015077C relating to the financial products offered to local entities and their *établissements publics* (the "**Circular**") specifically recalls that Local Entities are prohibited from entering into Individual Contracts which are characterised as being incompatible with the rule that cash deposits must in principle be held with the French Treasury (the "**Non-Authorised Investments**").

Pursuant to the Circular and subject to the abovementioned exceptions, it should be considered as applicable law that (i) all the available cash of Local Entities and their *établissements publics* must be deposited with the French Treasury, (ii) such cash deposited with the French Treasury cannot bear interest, (iii) Local Entities and their *établissements publics* cannot enter into financial placements unless expressly authorised by a specific law and (iv) Local Entities and their *établissements publics* cannot open bank accounts since all the movements of cash must be registered with the French Treasury.

Consequently, it is necessary to check on a case by case basis whether a special decision of the council of the Local Entity and their *établissements publics* or a special authorisation given by the Minister of Budget or by the State's relevant authority entitles the Local Entity or the *établissement public* to enter into the EFET Credit Support Annex and more generally, whether the performance of such Credit Support Annex does not constitute Non Authorised Investments. We believe that similar principles should apply to on-cash collateral.

b) <u>Set-off against Eligible Credit Support provided by Public Entities</u>

We believe that the operation of the provisions of the Agreements and the EFET Credit Support Annex, which provide for the set-off of the debts and credits arising out of the transfers of collateral and those arising out of the terminated Individual Contracts, as against a Public Entity could be unenforceable as breaching the principles of impossibility to seize assets of public legal entities and impossibility to enforce specific rights (*immunité d'exécution*), as mentioned above, in relation to enforcement proceedings in respect of assets transferred to the Other Party by the relevant Public Entity, except if, at the time of set-off, the relevant Public Entity expressly agrees to the said set-off and that each transfer of collateral has been authorised in compliance with the applicable rules of the relevant Public Entity. On the contrary, a Public Entity may always invoke such set-off in its favour.

[16] Please see in this respect Article L. 2221-5-1 of the CGCT which refers to Article L. 1618-2 of that Code.
[17] Please see in this respect Article L. 2221-5-1 of the CGCT which refers to Article L. 1618-2 of that Code.

o) Assuming that the Transferee 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 France 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?

Assuming that the Financial Collateral Regime applies, the perfection requirements should be distinguished from the enforcement requirements of the Eligible Credit Support.

A. Perfection requirements

Pursuant to Article L. 211-38 of the MFC, the validity of a transfer in full ownership of Cash, located in France, as Eligible Credit Support is not subject to any formality or perfection requirements. The transfer of ownership should be perfected upon delivery of the Cash provided as collateral to an account opened in the Transferee's name. From a French law perspective, no other requirements would have to be complied with to perfect such transfer of title in France or maintain such ownership interest in the transferred Cash.[18]

B. Enforcement requirements

In accordance with Article L. 211-38 of the MFC, the Cash transferred to the Other Party may be enforced by way of set-off in accordance with the French Netting Law. We draw your attention to our introduction to paragraph 7.3 above which exclude Letter of Credit from the scope of Eligible Credit Support under French law.

Please note that if the collateral is located outside France, according to French private international law rules, French law will not be competent to govern the perfection and the enforcement of the transfer of title of the collateral.

From a French law perspective, where the conditions for the Financial Collateral Regime are met, French law should not challenge the transfer of Eligible Credit Support under an Agreement governed by a foreign law (i.e. German law or English law), assuming that the relevant transfer of title has been validly created under the relevant foreign law. In such case, no particular action should be taken in France by the Transferor to continue such ownership interest.

p) What is the effect, if any, under French law 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 the Transferee have any bearing on this question?

Since only Cash can be Eligible Credit Support under the EFET Credit Support Annex, the question of the legality of substitution of Cash in the same currency would be, under French law, irrelevant since Cash is fungible.

We consequently assume that by substitution in respect of Cash, we should understand that Cash in a specific currency will be substituted for Cash in a different currency.

Assuming that the Parties have not amended paragraph 6 of the EFET Credit Support Annex, if the Transferee holds the Eligible Credit Support outside France, it is not,

[18] Where the transfer of cash under a Credit Support Agreement is effected between two parties, none of which is a Qualifying Party, the common law regime would apply including in respect of perfection. However, in respect of cash, the common law regime as applied by the courts has traditionally upheld that a transfer of cash to the counterparty in the form of a *gage espèce* is effected by transfer to the pledgee who has title to the cash transferred.

pursuant to *lex rei sitae* principle, a question of French law but for the rules applying in case of Insolvency Proceeding affecting the Transferor.

In the same way, if the Eligible Credit Support is hold by the Transferee in France and that paragraph 6 of the EFET Credit Support Annex has not been amended, French law should only interfere with the substitution, if the Transferor is subject to Insolvency Proceedings.

In this case, if the Financial Collateral Regime applies, French Bankruptcy Rules should be set aside.

It could however be discussed whether any substitution during the Hardening Period could be challenged on the grounds of the Bankruptcy Rules despite the safe harbor offered by the Financial Collateral Regime. Please see in this respect paragraph 7.3 s) below.

Although French law should recognise the effect of a consent of substitution, it is debatable whether French law would not challenge the absence of consent since under French law, the ownership of the Eligible Credit Support has already been transferred to the Transferee and, without specific withdrawal provisions in the EFET Credit Support Annex, we are not sure how the Transferee would perform any substitution on the assets owned by the Transferor.

q) The Transferee'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 France 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"?

Under the Financial Collateral Regime, the provisions of paragraph 11 of the EFET Credit Support Annex would be valid where they provide that the value of all Eligible Credit Support provided to the Transferee will be included in the calculation of the Termination Amount as an "other amount payable" by the Transferee.

As set out above, this Opinion is based on the provisions of the Financial Collateral Regime. Article L. 211-38 of the MFC expressly provides that "*reciprocal debts and claims relating to financial guarantees may be set off against debts and claims arising out of financial obligations, in accordance with the provisions of Article L. 211-36-1 I of the MFC*".

In relation to Eligible Credit Support not yet transferred, we are not sure to understand the question since paragraph 11 of the EFET Credit Support Annex sets out expressly "*all claims of the Parties for the transfer of Eligible Credit Support pursuant to §3 or §4 shall expire*". Paragraph 11 of the EFET Credit Support Annex does not provide for the value of the Eligible Credit Support not yet transferred to be included in the calculation of a net amount payable under paragraph 11 of the EFET Credit Support Annex.

r) Are the rights of the Transferee enforceable in accordance with the terms of the § 11 of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of the French Counterparty?

Where the Financial Collateral Regime applies, Articles L. 211-38 and L. 211-40 of the MFC provide that rights of the Other Party to enforce, in accordance with the terms of paragraph 11 of each of the EFET General Agreement and of the EFET Credit Support Annex, benefit from a broad exemption of the Bankruptcy Rules and should be enforceable irrespective of the opening of Insolvency Proceedings against the French Counterparty.

Enforceability of the General Agreement and of the EFET Credit Support Annex is discussed in paragraph 7.1.2 above in a non-insolvency context.

s) Will the French Counterparty (or its receiver or other similar official) be able to recover any transfer of collateral provided to the Transferee 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?

In relation to the opening of a judicial reorganisation or a judicial liquidation, the court which initiates the procedure determines the Date of Cessation of Payments. This date may be set up to 18 months prior to the date of the Initial Judgement (see in this respect Exhibit 4 to this Opinion) and this period is known as the Hardening Period. Certain security interests granted and Individual Contracts made during the Hardening Period may be null and void.

In principle, where the Financial Collateral Regime applies, the rights of the Transferee shall not be affected by the opening of an Insolvency Proceeding against the Transferor, nor by any provisions of the Bankruptcy Rules, including those relating to the Hardening Period.

Therefore, transfer or substitution of Eligible Credit Support should not be subject to voidance during the Hardening Period.

Although Article L. 211-40 of the MFC provides that the provisions of Livre VI of the French Commercial Code (which include rules relating to the Hardening Period) shall not interfere with the application of the provisions of the French Netting Law, it is discutable to which extent the Bankruptcy Rules can be ignored in some specific cases.

Pursuant to Article L. 632-2 of the French Commercial Code, any act for consideration (*actes à titre onéreux*) performed during the Hardening Period are voidable if the person dealing with the debtor had knowledge of the debtor's insolvency. Rights of the Transferee on the Eligible Credit Support would be affected as French courts would have the right to consider that it has not been transferred or substituted lawfully. Although one may argue that all provisions of the Bankruptcy Rules, including Article 632-2 of the French Commercial Code, should be set aside, our view is that it would be prudent to consider that provisions of the Bankruptcy Rules, such as L. 632-2 of the French Commercial Code would apply.

In respect of transfer and substitution of collateral, as a general rule, a French court could analyse the substitution as a new collateral arrangement which would therefore fall within the scope of the prohibitions of the Hardening Period if the French court was to apply the exception provided by Article L. 211-40 of the MFC in a narrow way.

Please note that, in addition to the argument providing that pursuant to the Financial Collateral Regime the rights of the Transferee shall not be affected by Bankruptcy Rules, one could argue that the transfer or substitution of Eligible Credit Support does not consist in the provision of new Eligible Credit Support since the conditions governing such transfer or substitution are set out in paragraph 6 of the EFET Credit Support Annex and have therefore been agreed between the Parties on the date of the entering into the Eligible Credit Support Annex. This means that any transfer or substitution of Eligible Credit Support pursuant to paragraph 6 of the EFET Credit Support Annex forms part of the same collateral arrangement.

Based on this argument, the transfer or substitution of Eligible Credit Support would not be analysed as the provision of new collateral and would therefore not be prohibited.

In any case, it should be stressed that the protection resulting from the Financial Collateral Regime would not prevent a French court from declaring void or unenforceable any transfer or substitution of Eligible Credit Support under the EFET Credit Support Annex on the grounds of fraud, if it appears that Transferee knew at the time of the relevant transfer or substitution of collateral that the transferor was already insolvent.

t) **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 France in order to ensure validity of such transfer in each type of Eligible Credit Support created by the French Counterparty under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under above?**

There are no further requirements other than those described in paragraph 7.3 above.

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

The EFET Credit Support Annex is in an appropriate form to create the contemplated outright transfer of Eligible Credit Support as discussed in this Opinion.

7.4 General Enforceability

v) **Is the EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) enforceable under French law 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 French law, including whether these provisions could and/or need be further "expanded" and/or strengthened under French law. We are especially interested in provisions that you may believe infringe upon the public policy (*ordre public*) in France and that may be challenged by the French courts irrespective of the law that governs the Agreement.**

Subject to the assumptions above (in particular paragraph 6.2.6 to this Opinion), if an Agreement is governed by a foreign law (i.e. English law or German law), the French rules of conflicts of laws[19] will give effect to the choice of governing law made by the Parties.

Although the express choice of English law or German law as the governing law of the Agreements is a valid choice of law within the terms of Article 3.1 of the Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the "**Rome I Regulation**"), such regulation does provide for circumstances where the chosen law may not apply or may be overridden. In particular:

(a) where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, such choice of law will not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (Article 3.3 of Rome I Regulation);

(b) nothing in the Rome I Regulation restricts the application of overriding mandatory provisions of the law of the forum (*lois de police*) (Article 9.2 of Rome I Regulation);

(c) effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful (Article 9.3 of Rome I Regulation); and

(d) the application of a provision of the chosen law may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum (Article 21 of Rome I Regulation).

[19] Article 3.1 of the Rome I Regulation.

Article 9.1 of Rome I Regulation provides for a definition of the overriding mandatory provisions (*lois de police*) referred to in paragraph (b) above. Mandatory provisions are defined as rules the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under Rome I Regulation.

Neither Rome I Regulation nor French law provide for a definition of French public policy (*ordre public*) (as referred to in paragraph (d) above) rules as applicable in international matters (*ordre public international*). Whether a specific rule belongs to one of these categories would have however to be determined, on a case by case basis, by the courts.

Subject to the paragraphs above and assuming that the EFET General Agreement and its Annexes are governed by either English law or German law, the choice of law under the EFET General Agreement would be a valid choice of law and consequently the EFET General Agreement and its Annexes (including the EFET Credit Support Annex) would be enforceable under French law in accordance with their respective terms.

The Force Majeure provision contained in paragraph 7 of the EFET General Agreement would be enforceable and would not violate any French public policy (*ordre public*) or overriding mandatory rules (*lois de police*).

The remedies for non-performance provisions contained in paragraph 8 of the EFET General Agreement would be enforceable and would not violate any French public policy (*ordre public*) or overriding mandatory rules (*lois de police*).

Limitation of liability contained in paragraph 12 of the EFET General Agreement would be enforceable and would not violate any French public policy (*ordre public*) or overriding mandatory rules (*lois de police*).

We would like also to draw your attention to the following regulations which may be considered as French public policy rules applicable in the field of natural gas and contracts linked to natural gas:

– the French government is entrusted with exceptional powers to regulate the gas market, in case of a crisis, which may impact notably the supply contracts and the allocation of the gas on the French territory.

  In particular, in accordance with Article L. 143-1 of the French Energy Code, the French government may, for a specified period, impose a control and allocate energy resources in order to remedy an energy shortage or when the French external trade balance is threatened.

– the Market Abuse Regulation (EU) no. 596/2014 came into effect on 3 July 2016 and is directly applicable in France. It aims to increase market integrity and investor protection. It contains prohibitions of insider dealing, unlawful disclosure of inside information and market manipulation, and provisions to prevent and detect these. Its scope include instruments traded on regulated market, MTF or OTF, emissions allowance auctions and spot commodities contracts whose value is linked to a financial instrument.

w) 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.

We do not have additional recommendations to make with respect to the general enforceability of the EFET General Agreement and its Credit Support Annex.

7.5 Confirmation Practices

For the purposes of this paragraph 7.5, we have assumed that:

– 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 EFET General Agreement (in whichever form, including telex, fax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission);

– Individual Contracts and Confirmations are entered into by merchants (*commerçants*) as defined by the French Commercial code and (ii) concluded for the purpose of their respective business; and

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

Bearing in mind that the EFET General Agreement should be, pursuant to the Instruction Letter, governed by English law or German law, under French rules of conflicts of law, there is a large degree of flexibility as to the law that governs the formal validity of an agreement: an agreement will be formally valid if it satisfies the formal requirements of any one or more of its governing law and the laws of the countries in which any of the parties was present or resident at the time of its conclusion[20].

7.5.1 Binding Individual Contracts

The Opinions set out in this paragraph 7.5.1 deal only with French law. Please note that they are without prejudice to the application of the various foreign law applicable governing the validity rules of an agreement.

x) 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 French law?

Under French law (and subject to the application of the various foreign law that may be applicable governing the validity rules of the Individual Contract), assuming that the Individual Contract under consideration is entered in the context of a commercial act, by a merchant[21], it does not require any formal act to be binding and enforceable (e.g., execution in writing, signature, registration or notarization) upon the Parties.

As set out above, the EFET General Agreement is governed by foreign law and therefore the conditions which govern the formation of the contract under the governing law will apply.

Please pay particular attention to the fact when Individual Contracts are entered into on the phone that persons entering into such Individual Contracts on the phone needs to be duly authorised. Although this is not a French law point, we would recommend that the terms of the EFET General Agreement address the issues relating to oral agreements and their formation as specifically as possible.

y) At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under French law?

Under French law (and subject to the application of the various foreign law that may be applicable governing the validity rules of the Individual Contract), an Individual Contract which is first agreed upon orally and later confirmed in writing will thus be binding as from the time of the oral agreement. Pursuant to the provisions of Article 1368 of the French Civil Code where the law has not provided other principles and in the absence of agreement among the parties, the judge settles evidence issues by determining by any means the most likely instrument.

z) Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? If so, is there a relevant time period per French

[20] Article 11.1 and 11.2 of the Rome I Regulation.

[21] Article L. 121-1 of the French commercial code provides that the merchants *(commerçants)* are the persons who carry out commercial acts *(actes de commerces)* and do it their usual profession.

law that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?

Parties are free to agree between them procedures in respect of verification, objections and tacit acceptance or rejection of or to a contract confirmation sent by either of them to the other. However, such provision will be dealt with by French courts under the law governing the Agreement (i.e. English law or German law). Subject to the assumption 6.2.6 above, French courts should apply to paragraph 3.3 of the EFET General Agreement the relevant provisions of governing the law applicable to the conclusion of Individual Contract, including the provision requiring to send any notice of objection or rejection without delay.

Notwithstanding the content of the confirmation, such confirmation may be disputed before a jurisdiction by using evidence challenging the consent of the plaintiff.

As set out in paragraph 7.5.1 x) above, assuming that the Individual Contract under consideration is entered in the context of a commercial act, by a merchant (*commerçants*), it does not require any formal act to be binding under French law and French law does not specify a period of time for the Parties to object.

Between merchant (*commerçants*), French case law tends to consider that silence after the receipt of a confirmation letter containing the agreement reached by the parties after negotiation, implies acceptance of its terms: this however would be decided on a case by case basis depending on concrete facts.

aa) 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 Agreement?

It is our view that, under French law, an express and clear reference to the EFET General Agreement is sufficient for the inclusion of the Individual Contract in the Agreement. However, the subject matter of the Individual Contract and its terms must be clearly ascertained and evidenced in the Confirmations. This is of course also a matter to be addressed under the governing law of the EFET General Agreement.

7.5.2 Means of Evidence

bb) Assuming 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 France: a (i) taped recording; (ii) witness' statement; (iii) email 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?

The means of evidence in a French court depend on the procedural rules applicable in such court and to the particular procedure; a French court will apply French procedural rules in any proceedings taken before it.

Pursuant to Article 1359 of the French Civil Code, the evidence by a written document is in principle required for any agreement exceeding a sum or value of €1,500.

Pursuant to Article 1361 of the French Civil Code, the written document may be supplemented by, among others, a commencement of evidence in writing (*commencement de preuve par écrit*) supplemented by other evidence.

Nevertheless, establishing a written document is not mandatory where an agreement (i) constitutes a commercial instrument (*acte de commerce*) within the meaning of Articles L. 110-1 and L. 110-2 of the French Commercial Code and (ii) is entered into among merchants (*commerçants*).

Pursuant to Article L. 110-3 of the French Commercial Code, commercial instruments (*actes de commerce*) may be proven by any means unless the law specifies otherwise. This principle means that even when there is a written document provided by one of the Party, the other Party may use any means of evidence to prove the contrary. There is no hierarchy between the different means of evidence although, in practice, written evidence may be favoured.

Nonetheless, in the event of a hybrid act (*acte mixte*) (i.e. an agreement constituting a commercial instrument entered into between a merchant and a non-merchant), the non-merchant may use any means of evidence to prove against the merchant whereas the merchant must comply with the above-mentioned Articles of the French Civil Code.

It should be noted that evidence produced before a court remains subject to the court's discretion.

Subject to the foregoing, the following means of evidence may be used:

(a) **Taped record**

The evidence by taped record is not expressly considered as a mean of evidence under French law. Nevertheless, some French jurisdictions have considered that taped records may be treated as a commencement of evidence in writing (*commencement de preuve par écrit*). Pursuant to Article 1362 of the French Civil Code, a commencement of evidence in writing is any instrument in writing which is provided by the person against whom a claim is brought, or from the person who represents him, and which evidences that the alleged facts are likely to have occurred.

This mean of evidence implies that such commencement of evidence in writing must be supplemented by other evidence.

Nevertheless, taped record should be admitted as a mean of evidence if agreed upon by the Parties in an agreement or in a clause in the agreement dealing with evidence. Pursuant to paragraph 23.1 of the EFET General Agreement, recording telephone conversation would be admitted as a mean of evidence as it is agreed upon by the Parties in the EFET General Agreement.

Please note that specific rules apply in France in order to inform the parties to a transaction when their voice will be recorded and we assume that these rules are complied with by the Parties.

(b) **Witness' statement**

The witness' statement is admitted as a mean of evidence before a jurisdiction and is subject to conditions relating to form and content of the witness' statement and to the witness itself. However witness statements tend to be approached with a certain level of circumspection by French courts.

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

Pursuant to Article 1366 of the French Civil Code, a writing in electronic form is admitted as evidence in the same manner as a paper-based writing, provided that the person who sent it can be duly identified and that it be established and stored in conditions purporting to secure its integrity.

A written evidence should be composed of the two followings elements: a written document and a signature.

First, pursuant to Article 1365 of the French Civil Code, "*documentary evidence, or evidence in writing, results from a sequence of letters, characters, figures or of any other signs or symbols having an intelligible meaning, whatever their medium and the ways and means of their transmission*". An email should comply with the abovementioned definition.

Second, pursuant to Article 1367 of the French Civil Code "*the signature necessary to the execution of a legal transaction identifies its author. It makes clear consent to the obligations which flow from that transaction. When the signature is delivered by a public officer, it confers authenticity to the document. Where it is electronic, it consists in a reliable process of identifying which safeguards its link with the instrument to which it relates. The reliability of that process shall be assumed, until proof to the contrary, where an electronic signature is created, the identity of the signatory secured and the integrity of the instrument safeguarded,* *subject to the conditions laid down by decree in Conseil d'Etat.*" The above-mentioned decree requires the use of a specific electronic certificate in order to secure the signature. An e-mail does not comply with the requirement of a secured signature within the meaning of the French regulations.

Nevertheless, an e-mail may be considered as a commencement of evidence in writing *(commencement de preuve par écrit)* (see above paragraph 7.5 (a)).

(d) **Facsimile**

Under French law, facsimile is considered as a copy.

Article 1379 of the French Civil Code provides that a reliable copy has the same probative value as the original. The reliability criteria is left to the judge's discretion. Nevertheless, a binding or authentic copy of an authentic writing is deemed reliable.

Any copy resulting from an identical reproduction of the form and content of the document, and whose integrity is guaranteed over time by a process that complies with conditions set by decree, shall be presumed reliable until proven otherwise. If the original remains, its presentation may still be required.

7.6 Core Provisions

For the purposes of this paragraph 7.6, we have assumed that:

- after entering into Individual Contracts and prior to the maturity thereof, the French Counterparty becomes an Insolvent Party, and, subsequent to the commencement of an Insolvency Proceeding, either the French Counterparty or an insolvency official seeks to assume the Confirmations representing profitable (in the money) transactions for the Insolvent Party.
- the French Counterparty has entered into Individual Contracts through offices in France as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, the French Counterparty becomes the subject of an Insolvency Proceeding.

cc) Would any of the elections contemplated by the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under paragraphs 7.1 and 7.2 above (Enforceability of Close-out Netting)? 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 election made in a Confirmation of an Individual Contract would be considered a material alteration and would change the substance of our conclusion under paragraphs 7.1 and 7.2 above.

Please refer to our answer to question 7.3 p) above regarding the effect of electing to allow substitution of Eligible Credit Support with or without consent.

dd) Considering your conclusions reached under Part 3.1 or 3.2. (Enforceability of Close-out Netting), 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 3.1 or 3.2. (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 Annex 1 to the EFET General Agreement.

Assuming the French courts would apply the rules governing the Agreement (*lex contractus*), material alteration of the Core Provisions of the EFET General Agreement would not have material effect on our conclusions reached in Part 3.1 or 3.2, as long as such alteration:

- does not violate any French public policy (*ordre public*) or overriding mandatory rules (*lois de police*); and

- has no impact on the specific conditions to be met (as further described in paragraph 7.3 above and Exhibit 2 to this Opinion) for the Parties to benefit from the derogatory French Netting Law regimes relating to the set-off of the Individual Contracts. In other terms, if the consequences of the material alteration of paragraph 10.3(a), the second sentence of paragraph 10.3(b), paragraph 10.3(d), paragraph 10.5(c)(iv) and paragraph 11 of the EFET General Agreement are such that the conditions for the French Netting Law to apply are not met anymore, it would affect our conclusion reached in paragraphs 3.1 and 3.2 above.

ee) Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "CPMA") change the substance of your conclusions reached under paragraphs 7.1 and 7.2 to this Opinion?

Subject to the assumptions and qualifications in this Opinion, we do not believe that the inclusion of the EFET General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA would change the substance of our conclusions reached under paragraphs 7.1 and 7.2 above.

7.7 Governing Law, Arbitration and Jurisdiction

ff) Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in France, and what would be the consequence if it were not?

(i) Choice of law

As already set out in respect of question 7.4 v) in relation to enforceability, the express choice of English law or German law as the governing law of the Agreements will be recognised by the French courts, pursuant to Article 3.1 of Rome I Regulation, subject to the other provisions of the Rome I Regulation.

Article 3.1 of the Rome I Regulation provides that a contract shall be governed by the law chosen by the parties. Although the express choice of English law or German law as the governing law of the Agreements is a choice of law within the terms of Article 3.1, the Rome I Regulation does provide for circumstances where the chosen law may not apply or may be overridden. In particular:

(a) where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, such choice of law will not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (Article 3.3 of Rome I Regulation);

(b) nothing in the Rome I Regulation restricts the application of overriding mandatory r of the law of the forum (*lois de police*) (Article 9.2 of Rome I Regulation);

(c) effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful (Article 9.3 of Rome I Regulation); and

(d) the application of a provision of the chosen law may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum (Article 21 of Rome I Regulation).

From the above, it appears that subject to the above, the choice of law under the EFET General Agreement is a valid choice of law and that outside the scope of an Insolvency Proceeding where French law will be relevant in relation to the French Counterparty, the exercise of contractual rights of set-off provided thereunder will be determined by the laws of Germany, or any other law of the Member State of the EU governing the EFET General Agreement as the proper law governing the Agreement, subject to the regulations .

(ii) Arbitration

The provision of paragraph 22(2) (Option A) of the EFET General Agreement providing that, unless otherwise specified in the Election Sheet, any dispute arising under or related to the EFET General Agreement shall be referred to and finally resolved by arbitration in accordance with the London Court of International Arbitration, will be recognised by a French court.

The provision of paragraph 22(2) (Option B) of the EFET General Agreement providing that, unless otherwise specified in the Election Sheet, any dispute arising under or related to the EFET General Agreement shall be referred to and finally resolved by arbitration in accordance with the German Institution of Arbitration, will be recognised by a French court.

Recognition of an arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy[22].

Recognition and enforcement of an arbitral award may be refused in certain limited circumstances. Article V.2(a) of the New York Convention of 1958 provides that recognition and enforcement of an arbitral award may be refused in particular if the competent authority in the country where recognition and enforcement is sought, finds that (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country or (ii) the recognition and enforcement of the award would be contrary to the public policy of that country.

Please note that Article 2061 of the French Civil Code provides that an arbitration clause must have been accepted by the party to whom it is opposed and if one of the parties has not entered into a contract in the course of his professional activity, the clause cannot be invoked against him). Pursuant to Article L. 721-3 of the French commercial Code, an arbitration clause is valid with respect to disputes arising out of, *inter alia,* the liabilities of merchants, credit institutions, finance companies or between them.

It should be noted that special considerations may apply in respect of Public Entities which under relevant provisions governing such entities may be prevented or otherwise restricted from resorting to arbitration.

7.8 Regulatory Regime

gg) 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?

There are no exchange or currency control regulations or license requirements currently in France which would affect the EFET General Agreement.

However, it should be noted that the French Energy Code provides that, for the purposes of purchasing and reselling natural gas to final consumers and transmission system operators in France, gas suppliers must obtain a prior authorization from the Energy Minister[23].

Although the French Energy Code does not provide a clear definition of "natural gas supplier", Directive 2009/73/CE (the "**Gas Directive**") establishes that the notion of gas supply contract excludes the gas derivative, where that instrument relates to natural gas and is a financial instrument specified in Section C(5), C(6) or C(7) of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

[22] Article 1516 of the French civil procedure Code.

[23] Article L. 443-1 of the French Energy Code.

Please refer to our answer to question 7.4 (v) which provides for specific regulations which may be considered as French public policy (*ordre public*) rules applicable despite the fact that agreements are governed by foreign law.

hh) If you have other 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 your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter.

There is no other recommendation that we would like EFET members to consider.

8. Qualifications

This Opinion is subject to the following further qualifications:

(a) the terms "enforceable", "enforceability" and "effective" (or any combination thereof) when used in this Opinion mean that the obligations assumed by the relevant Party under the Agreements are of a type which French law generally recognises and enforces; it does not mean that these obligations will necessarily be enforced in all circumstances in accordance with their terms;

(b) specific remedies, such as specific performance or injunction, other than those culminating in a judgement for the payment of money may not be available in front a French court; a French court may issue an award of damages where specific performance cannot be ordered or an award of damages is determined adequate;

(c) the Agreements may be amended orally by the Parties thereto notwithstanding provisions therein to the contrary;

(d) in respect of payment obligations, (*x*) Article 1343-5 of the French Civil Code allows a French court (i) to grant time to a debtor or reschedule payments for a period of up to two years having taken into account the position of the debtor and the requirements of the creditor, (ii) to decide that any payments should be applied first against repayment of principal or that amounts shall bear interest at a lower rate, and (iii) to suspend any enforcement measures commenced by creditors; contractual interest or penalties for late payment can be postponed for a period fixed by the French court and can be limited or increased; in addition, specific conditions would apply for Public Entities; and (y) Article 1231-5 of the French Civil Code allows a French court to limit or increase the amount of payment due under any penalty obligation which, taking into consideration the respective position of the parties, is considered by the relevant French court to be manifestly excessive or derisory;

(e) a French court may reduce or increase the amount of interest or damages (including default interest) where it considers that the level of interest or damages is manifestly excessive or negligible or reduce that amount in the case of partial performance;

(f) where the Agreements contain a conditional obligation in relation to which the determination as to whether such condition has been satisfied is left to the discretionary power of the obligor or a provision which entitles the obligations to be determined at the discretion of one of the Parties, French courts may invalidate or decline to enforce such condition or provision, in particular on the ground of Articles 1163, 1104 and 1304-2 of the French Civil Code;

(g) claims under the Agreements may become time-barred;

(h) a debtor may be released from its obligations by *force majeure*;

(i) subject to paragraph 9 (*Pending developments*) below, interest (including default interest) accrued on principal cannot bear interest unless it has been due for at least one year;

(j) the validity of the Agreements may be affected by one of the grounds for lack of consent (*vices du consentement*) set out in Article 1130 of the French Civil Code; there are three grounds for lack of consent under French law: mistake, fraud and duress; a mistake would occur where the consent of one Party has been given on the basis of a false representation relating to a material aspect of an agreement's subject matter and on which such Party has relied to enter into the agreement; fraud involves some fraudulent behaviour of one Party which causes the other Party to enter into the contract on the reliance of a false representation; the fraudulent behaviour does not need to take the form of a positive action and can also be characterised when a Party refrains from disclosing a material information to the other; duress refers to the situation where one Party is forced to enter into a contract because of actual physical constraint or threats towards itself or its assets;

(k) any contractual limitation or exclusion of liability, in case of wilful misconduct (f*aute dolosive*) or gross negligence (*faute lourde*), would be unenforceable under French law;

(l) the validity of the Agreements may be affected by any breach from the French Counterparty or the Other Party of their information duty set out in Article 1112-1 of the French Civil Code;

(m) pursuant to Article 1104 of the French Civil Code, agreements must be negotiated, formed and performed in good faith (*de bonne foi*); this principle, which is part of French public policy (*ordre public*), is subject to wide interpretation and application by French courts;

(n) the invalidity of a provision may invalidate an agreement as a whole, notwithstanding any provision therein to the contrary, if the clause affected by invalidity constituted a decisive factor in the undertaking of the Parties, or of one of them; a French court may decide that agreements are mutually dependent, notwithstanding any provision therein to the contrary, and may decide that the termination of an agreement gives rise to the lapse (*caducité*) of another agreement on the ground of Article 1186 of the French Civil Code;

(o) in accordance with our conclusions contained in paragraphs 7.4 (v) and 7.7 (ff) above which are included by reference in those qualifications, the chosen law and any mandatory law of any country may not be applied by French Courts if its application would be manifestly incompatible with French public policy (*ordre public*) and the chosen law will not restrict the application of overriding mandatory provisions (*lois de police*) of French law by French court;

(p) pursuant to Articles 100 et seq. of the French Civil Procedure Code, a French court may disclaim competence if an interested party has previously brought a proceeding with respect to an Agreement in another competent jurisdiction if both proceedings are based upon identical or connected *(connexes)* claims;

(q) where any obligations of any person are to be performed in jurisdictions outside France, such obligations may not be enforceable under French law to the extent that such performance thereof would be illegal or contrary to overriding mandatory provisions under the laws of such jurisdiction;

(r) in an action before a French court, the provisions of the Agreements whereby the certificates and determinations of any Party will be conclusive and binding, may be set aside by the French court which could proceed to its own determination;

(s) any document which is not in French language will need to be translated into French by an official sworn translator (*traducteur assermenté*) before it may be used for any purpose with Public Entities or submitted as evidence in any proceedings in France; documents may be provided in English without being translated before the international chamber of the Commercial Court of Paris and the international chamber of the Paris Court of Appeal;

(t) a judgement rendered by a French court in respect of proceedings initiated before it in relation to either of the Agreements may be expressed in a Termination Currency other than euro or, provided it is so requested by the plaintiff in its pleadings filed with the French courts, the euro equivalent calculated at the market rate as on the date of payment, except in the case of an Initial Judgement, in which case, the liability of the Parties in such Termination Currency would be converted into euro at the rate of exchange prevailing on the date of such judgement;

(u) we express no opinion with respect to the effects of Insolvency Proceedings in any jurisdiction other than France;

(v) we have not reviewed and therefore we express no opinion as to the validity and enforceability under French law of any agreement or any provision thereof other than the Agreements even if referred to in such Agreements;

(w) we express no opinion in respect of the enforceability under French law of the provisions of the Agreements in respect of which a Party may be under the duty to pay to the other Party the Termination Amount in the context of an Insolvency Proceeding; indeed, Bankruptcy Rules prevent a debtor subject to Insolvency Proceedings from making any payment of any debt arisen prior to the Initial Judgement, except in respect of connected claims;

(x) Bankruptcy Rules prohibits discharge of pre-Initial Judgement claims except in the form of set-off where debts are found to be connected; set-off is a mean of discharge of obligations under French law; paragraph 11 of the EFET General Agreement contemplates the possibility to set-off the Termination Amount or part thereof against any payment obligation of the Parties under or in connection with Individual Contracts;

(y) many of the matters covered in this Opinion have not been considered by the French courts and moreover the French courts are not bound by precedent;

(z) any provision under either of the Agreements providing that any calculation or certification is to be conclusive and binding will not be enforceable if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary, if not supported by other evidence provided independently or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any Party thereto;

(aa) French courts proceedings may be set aside or stayed if earlier or concurrent proceedings have been commenced elsewhere;

(bb) French courts may re-characterise an agreement or undertaking notwithstanding the characterisation given to such agreement or undertaking by the parties thereto; indeed, pursuant to Article 12 of the French Civil Procedure Code, a judge has the duty to give an agreement its correct characterisation notwithstanding the characterisation given to such agreement by the parties thereto; for instance, a judge may re-characterise a contract if there are elements (such as the parties' conduct or amendments) which evidence that the parties' common intention entails another characterisation;

(cc) French courts may consider that two or more agreements are deemed as being indivisible (*contrats indivisibles*) forming one entire agreement (*ensemble contractuel*) based on factors which would evidence the parties' intention to treat such agreements as a whole (such evidence being sovereignly assessed by the French courts on a case-by-case basis), such as factors evidencing their intention to establish legal or economical links between such agreements, which is known as the theory of indivisibility of contracts, so that where one of these agreements is ended (for whatever reason, including termination or voidness), the other agreements forming part of the whole agreement are automatically ended as well and cannot be maintained;

(dd) the existence of a fraud (*fraude*) or a sham (*fictivité*) may affect the opinions expressed above;

(ee) if the Other Party is still creditor of the French Counterparty under the relevant Agreement, once termination right and EFET General Agreement Netting Provisions are exercised pursuant to the EFET General Agreement, the Other Party may only enforce a payment obligation under the relevant EFET General Agreement if it benefits from an officially recognised act (*titre exécutoire*), including in particular, a French court decision which has executor force (*force exécutoire*), subject to the Regulation (EU) No. 1215/2012 of 12 December 2012 on recognition and enforcement of judgments in civil and commercial matters;

(ff) we draw your attention to the limitations applicable to set-off of claims arising under the EFET General Agreement when the French Counterparty is a credit institution, an investment firm, an insurance company or a Public Entity addressed in Exhibit 2, Exhibit 5 and paragraph 7.1.1 (f) to this Opinion;

(gg) If a French Counterparty becomes subject to a resolution proceeding pursuant to Articles L. 613-49 et seq. of the MFC or subject to an early intervention measure or a resolution measure pursuant to Articles L. 613-34 et seq. of the MFC, decision or action taken by the Resolution Authority (as defined in Exhibit 5 below), the Opinions expressed in paragraph 7 above are subject to the qualifications set out in Exhibit 5 below;

(hh) subject to our Opinion set out in paragraph 7.1.1 (f) above with respect to the validit and enforceability of the EFET Close-out Netting Provisions, Article L. 2311-1 of the French *Code général de la propriété des personnes publiques* and general principles of administrative law provide respectively for the impossibility to seize assets (*principe d'insaisissabilité*) of public legal entities and impossibility to enforce specific rights (*immunité d'exécution*); these two principles prevent the operation of enforcement proceedings (*voies d'exécution de droit commun*) and, by analogy, set-off mechanism (*compensation*) (as set-off is a type of mandatory payment) *vis-à-vis* the Public Entities;

(ii) powers of attorney and mandates may be terminated, notwithstanding any provision therein to the contrary; in order to be valid, they must have a limited purpose and not be drafted in a general way;

(jj) we express no opinion on whether a French court would hold that the Agreement and all Individual Contracts contracted thereunder fulfil the technical conditions to form a single agreement between the Parties, however, in case where a French court would hold that the Agreement and all Individual Contracts contracted thereunder do not satisfy the technical conditions for constituting a single agreement under French law, this would not affect the conclusions reached in this opinion;

(kk) we draw your attention to the possibility that the withdrawal of the United Kingdom from the European Union may have an impact on the regulations and legal concepts referred to in this opinion once the withdrawal is effective, notably in respect of Agreements governed by English law and subject to the jurisdiction of English courts;

(ll) Public Entities may not be subject to Bankruptcy Rules[24]; accordingly, the provisions of the EFET General Agreement entitling one Party to early terminate all outstanding Individual Contracts upon the occurrence of Insolvency Proceedings against the other Party are de *facto* not applicable to such types of French Counterparties;

(mm) assuming the Individual Contract does not qualify as Qualifying Transaction, when the conditions set out therein are met, Article 1195 of the French Civil Code gives the right to the affected Party to renegotiate the relevant contract and, in fine, in the absence of agreement between the Parties and at the request of one of them, a French court has the power to revise the contract or terminate it;

(nn) any payment under either of the Agreements involving a country which is currently the subject of United Nations, European Community or national sanctions (an "**Affected Country**"), any person or body resident in, incorporated in, or constituted under the laws of any Affected Country or exercising public functions in any Affected Country, or any person or body controlled by any of the foregoing may be subject to restrictions pursuant to such sanctions as implemented in French law; obligations of that party under the Agreements may be unenforceable or void;

(oo) the Agreements and the Confirmations will be entered into in the English language; Article 2 of the Law No. 94-665 of 4 August 1994 related to the use of French language (the "**Toubon Law**") provides that "*the use of French shall be mandatory for the designation, offer, presentation, instructions for use, and description of the scope and conditions of a warranty of goods, products and services, as well as bills and receipts*"; Article 5 of the Toubon Law requires that agreements entered into by public entity (*personne morale de droit public*) or private entity performing a public mission (*personne privée exécutant une mission de service public*) must be drafted in the French language; the approach below remains within the scope of judicial discretion in the absence of case law precedents in this respect:

(i) Article 2 of the Toubon Law does not refer to contracts; Article 2.1.1 (1°) of the Circular of 19 march 1996 concerning implementation of the Toubon Law further specifies that, regarding contracts, Article 2 of the Toubon Law applies to *Contrats*

[24] As further described in Exhibit 4 to this Opinion.

d'Adhésion which are standard terms and conditions to which clients must adhere; the *Contrat d'Adhésion* is a French law concept which is mainly defined by three characteristics: (1) the existence of a social or economic inequality between the parties; (2) the offer to contract being made in similar terms, not to one particular individual, but to the general public or at least a fraction of it; (3) and the contract being the exclusive work of one of the Parties, without any discussion with the Other Party; to the extent that the French Counterparty has been invited to negotiate and in the elaboration of each the relevant Agreements, the relevant Agreements are not a template produced by the Other Party but rather a template proposed by the EFET to facilitate the business relationship between the Parties, and that both the Other Party and the French Counterparty have had the same opportunity to discuss, negotiate and amend the terms of each of the Agreement, such documents should not be considered as *Contrats d'Adhésion* and could consequently be entered into in English, provided that the above-mentioned conditions are met;

(ii) Article 2 of the Toubon Law applies to the "(…) *designation, offer, presentation, instructions for use, and description of the scope and conditions of a warranty of goods, products and services* (…)"; to the extent that the Confirmation constitutes the agreement of the Parties on the terms of an Individual Contract and that the French Counterparty has had the same opportunity to discuss, negotiate and amend the terms of the Confirmation, the Confirmation in itself should not fall within the scope of Article 2 of the Toubon Law; on the contrary, term sheets may be considered as designating, offering or presenting any Individual Contract and thus are likely to fall within the scope of Article 2 of the Toubon Law; they should consequently be sent to the French Counterparty in French;

(iii) French courts will ensure that each Party to any Individual Contract is capable of understanding the meaning of each of the relevant Agreement written in English; French courts have previously ruled that even if the parties sign a contract with the wording "read and approved", if it is later established that a Party was not able to read the language of the contract, consent was not given at the time of the signature and the contract is void; to minimise this risk and assuming this is the case, the French Counterparty should add a handwritten sentence, in French, to the relevant Agreement and Confirmation stating that the French Counterparty has fully read such documents and that the French Counterparty certifies that the French Counterparty has a sufficient knowledge of the English language to have understood their terms in their full extent; the French Counterparty should further certify that the French Counterparty has had the possibility to raise any question, to usefully clarify any points and to freely negotiate the terms of each of the relevant Agreements and Confirmations and that the French Counterparty's signature shall testify for the French Counterparty's informed consent (*consentement éclairé*) to execute the relevant Agreements and Confirmations;

(iv) pursuant to Article 5 of the Toubon Law, agreements entered into by public entity (*personne morale de droit public*) must be drafted in the French language except for agreements entered into by public entity engaging in industrial or commercial activities, by Caisse des dépôts et consignations or Banque de France and which are entirely performed outside France; agreements entered into in connection with "investment services", provided that the performance of such contracts is subject to "the judicial jurisdiction of a foreign court" are deemed to be entirely performed outside France; the question as to whether the French Counterparty would be a public entity engaging in industrial or commercial activities when entering into Individual Contract related to natural Gas or Allowances needs to be checked on a case by case basis; provided these above conditions are met (public entity engaging in industrial or commercial activities, investment service agreements relative to financial instruments and jurisdiction clause), all Agreements and Confirmations concluded by Public Entities may be drafted in a foreign language;

(v) pursuant to Article 5 of the Toubon Law, with respect to agreements entered into by private entity performing a public mission (*personne privée exécutant une mission de service public*), the question which arises is (*x*) whether the Toubon

Law is applicable to all agreements contracted by a private entity which, by law, regulation, or contractual arrangements with the French State or public entities, is responsible for a public service mission or (*y*) whether it is only applicable to those agreements which relate directly to the performance of the public service mission entrusted to the said private entity; although this has not been confirmed by case-law, it appears from the parliamentary debates relating to the Toubon Law that it is only applicable to agreements which are specifically entered into for the performance of the public service mission by the said private entity; this means in practice that there is no requirement to draft in the French language an agreement when concluded with a French private entity, even in charge of a public service mission, if the purpose of such agreement falls outside the scope of the relevant public service mission; in the absence of case-law relating specifically to the Toubon Law, one should refer to the general principles of French public law and administrative doctrine; public law authors generally consider that an agreement of a financial nature, except if it is directly, closely and specifically linked to the public service, should not be considered as performing a public service mission[25]; thus, complex financing documents, including those contracted for the financing of an asset necessary to the performance of the public service mission, are generally not considered as falling within the scope of the public service mission; however, activities linked to the gas might be analysed as a public mission, such as the gas supply; Consequently it is necessary to check on a case by case basis if the relevant Agreements and the Individual Contract concluded by a private entity performing a public mission may be drafted in a foreign language; and

(pp) we have not addressed issues which may arise under EMIR and implementing regulations in this Opinion; it should be noted, however, that under EMIR, certain Individual Contract may need to be centrally cleared by financial or non-financial counterparties; furthermore, derivative contracts will need to be reported to a trade repository and risk mitigation techniques will need to be applied to those derivative contracts which are not subject to the clearing obligation.

9. Pending developments

We believe that there are no pending developments as a result of which a material adverse change in the current legal environment in France concerning the enforceability of the EFET General Agreement referred to in the opinion, may be expected in a foreseeable future.

This Opinion and the matters addressed herein are as of the date hereof, and we undertake no, and hereby disclaim any obligation to advise you of any change in any matter set forth herein occurring after the date hereof.

This Opinion is limited to the matters stated herein, and no opinion is implied or may be inferred beyond the matters expressly stated.

This Opinion is given for the sole benefit of EFET and its Legal Committee members (the "**Addressees**") and is not to be relied upon by or communicated to any other person, nor is to be quoted or made public in any way, in each case without our prior consent. This Opinion constitutes a legal opinion for banking regulatory purposes and may be made available, but for information purposes only, to professional advisors of you and your members and the appropriate bank regulatory authorities having jurisdiction on a member. Except expressly requested so by EFET, we shall have no liability to inform the Addressees of this opinion, nor any other person, of any event, including any change in French law, occurring after the issue date of this Opinion. The disclosure of this Opinion to any third party other than the Addressees does not make this third party our client, and none of the third parties to which this Opinion will be disclosed may rely on this Opinion for its own benefit or for that of any other person.

The purpose of this Opinion is to assist EFET members in understanding general issues under French law relating to enforceability of the EFET Close-out Netting Provisions, validity and

[25] CE, 29 April 1938, de Lestrac.

enforceability of the EFET General Agreement and the Eligible Credit Support arrangements. It is not designed to be used as the sole basis for entering into any Individual Contract or Eligible Credit Support arrangement under any EFET Credit Support Annex, making an investment or subscription decision or taking any financial or other undertaking.

As we have not reviewed any particular specific EFET General Agreement, Individual Contract, Eligible Credit Support arrangement or EFET Credit Support Annex, we incur liability toward EFET only and we do not assume any liability under this Opinion with respect to the enforceability of any particular Individual Contract or Eligible Credit Support arrangement entered into under such EFET Credit Support Annex or the enforceability of the EFET Master Agreement when applied to any Individual Contract or particular Eligible Credit Support arrangement entered into under such EFET Credit Support Annex.

Very truly yours,

Exhibit 1

List of French Counterparty

The French Counterparty to which this memorandum relates is either (a) a corporate entity, (b) a credit institution, (c) an investment services provider, (d) an insurance company, (e) an *établissement public*, (f) *a collectivité territoriale*, (g) the *Banque de France*, (h) the *Caisse des dépôts et consignations* or (i) the French State (the French State together with the *établissements publics*, the *collectivités territoriales*, the Banque de France and the Caisse des dépôts et consignations, the "**Public Entities**"), as described below.

EFET description	Covered by the Opinion	Legal form(s)
Corporation	Yes	A corporate entity shall mean a commercial company incorporated and existing under French law having one of the forms listed in the *Livre II Titre II* of the French Commercial Code, such form of companies being *société anonyme (SA), société par actions simplifiée (SAS), société en nom collectif (SNC), société en commandite simple (SCS), société en commandite par actions (SCA)* and *société a responsabilité limitée (SARL),* other than credit institutions, investment services providers, insurance companies and investment fund management company.
Partnership	No	Such category would include the *société en participation* and *société de fait* (types of unregistered corporations), the associations, *syndicats* (unions) and the *fondations* (foundations).
Credit institution or bank	Yes	A credit institution shall mean a corporation, as referred to in paragraph "*Corporation*" above, which is licensed as a credit institution pursuant to Article L. 511-9 of the MFC but not a *banque mutualiste* (mutual bank), a *banque coopérative* (co-operative bank), a *caisse d'épargne et de prévoyance* (saving bank), *a caisse de crédit municipal* (municipal bank).
Investment services provider or investment firm	Yes	An investment services provider *(prestataire de services d'investissement)* shall mean a corporation, as referred to in paragraph "*Corporation*" above, which, pursuant to Article L. 531-1 of the MFC, is licensed as either an investment firm, an asset management company or a credit institution authorised to provide investment services but not *a banque mutualiste* (mutual bank), *a banque coopérative* (co-operative bank), a *caisse d'épargne et de prévoyance* (saving bank), *a caisse de crédit municipal* (municipal bank).
Insurance company	Yes	An insurance company shall mean an insurance company incorporated as a *société anonyme,* which is regulated as an insurance company under Article L. 310-1 of the French Insurance Code.

EFET description	Covered by the Opinion	Legal form(s)
Investment fund management company	Yes	An investment fund management company *(société de gestion d'actifs)* shall mean a corporation, as referred to in paragraph "*Corporation*" above, which, pursuant to Article L. 531-1 of the MFC, is licensed as an asset management company.
Municipality or county	Yes	A *collectivité territoriale* shall mean a French *région* ("**Region**"), a French *département* ("**Department**") or a French *municipalité* (a *municipalité,* together with a Region and a Department, the "**Local Entities**") but shall exclude *Collectivité territoriale de Guyane, Collectivité territoriale de Martinique, Polynésie française, Saint-Pierre-et-Miquelon, Wallis-et-Futuna, Mayotte, Saint-Martin, Saint-Barthélemy, Nouvelle-Calédonie* and *Terres australes et antarctiques françaises.*
Association of local government	No	
Publicly-owned corporation	Yes	An *établissement public* shall mean a French national (i) *établissement public industriel et commercial* or (ii) *établissement public administratif* but shall exclude *établissements publics d'habitation à loyer modéré* (known as *offices publics de l'habitat*); an *établissement public* is a French public special purpose legal entity created by law or decree to satisfy a public interest; each *établissement public* has a separate legal personality, financial autonomy and capacity to own assets but shall act in compliance with the principle of specialization. The *Banque de France* shall mean the entity referred to in Articles L. 141-1 and seq. of the MFC. The Caisse des dépôts et consignations shall mean the specific *établissement public* referred to in Articles L. 518-2 and seq. of the MFC.
Quasi-governmental entity	Yes	A quasi-governmental entity shall mean an *établissement public* as described in the paragraph "publicly-owned corporation" above.

Exhibit 2

Legal provisions applicable to set-off and close-out netting under French law

1. Set-off

Under French law, contractual obligations may be subject to legal set-off (*compensation légale*), contractual set-off (*compensation conventionelle*) or judicial set-off (*compensation judiciaire*).

Legal set-off occurs automatically, as a matter of law. Contractual set-off is any form of set-off that takes place pursuant to an agreement to that effect between the parties. Judicial set-off is a form of set-off ordered by a court.

Scope and conditions of legal set-off, contractual set-off and judicial set-off are set out under Articles 1347 to 1348-2 of the French Civil Code.

In order for legal set-off to occur between two debts each owed by one party to the other under a contract, Article 1347-1 of the French Civil Code requires that debts must fulfill five criteria:

(i) the debt must exist between the same parties (principle of mutuality) to the agreement;

(ii) the purpose of each debt must be a sum of money or a quantity of fungible[26] things;

(iii) the existence of each debt must be certain;

(iv) each debt must be liquid (i.e. the amount of each debt must be determined); and

(v) each debt must be due and payable (matured).

Legal set-off should be invoked by the relevant party.

However, in the context of an Insolvency Proceeding, the requirements that the debt must be certain, liquid and due and payable is not necessary to set-off connected debts (*créances connexes*).

As further described in Exhibit 4, the Initial Judgement has the effect to stay payment of debts (including pre-existing debts), but should not prevent payment by way of set-off of connected debts[27] (*créances connexes*).

French Supreme Court held that obligations were connected (*connexes*) when resulting from one contract or when carried out pursuant to the same contract that has defined the framework of the business relationship of the parties such as a master agreement[28], or when the obligations are carried out pursuant to different contracts which constitute a single global contractual arrangement[29].

In addition, debts not qualifying for legal set-off may still be set-off if the parties have agreed to do so through contractual set-off. The parties may thus agree to set-off debts which do not meet the criteria applicable to the legal set-off excluding mutuality. The principle of mutuality is a fundamental principle under French Law and that no set-off may occur if such condition is not met.[30]

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[26] Pursuant to Article 1347-1 of the Civil Code, obligations are fungible if they are of a sum of money, even in different currencies, provided that they can be converted; or if they have as their subject-matter a quantity of things of the same generic kind.

On the contrary, different classes or types of commodities or physically and financially transactions would not qualify for set-off under the fungibility requirement.

[27] Article L. 622-7 of the French Commercial Code

[28] Cass. Corn., 12 December 1995, Bull. Civ. IV n°293.

[29] Cass. com., 1ermars 2005, no 03-17.954.

[30] Furthermore, the contractual set-off may be subject to voidance if concluded during the Hardening Period, as further described in Exhibit 4.

Judicial set-off would be decided by a court when requested by claimant, in relation to debts existing between the same parties, even if the debts (which must be certain) are not liquid or due and payable.

French Netting Law addresses set-off under various scenari and its enforceability in the framework of Insolvency Proceedings.

2. French Netting Law and Individual Contracts

In order for the Individual Contracts entered into between the French Counterparty and the Other Party under the Agreements to benefit from the favorable close-out netting regime provided for in the French Netting Law, Individual Contracts have to qualify as either:

(i) transactions on financial instruments (as defined in paragraph 2.1.A below), if only one of the Parties to the Individual Contract is a Qualifying Party (see in this respect paragraph (2.2) below); or

(ii) any contract giving rise to cash settlement or to delivery of financial instruments, if the Parties are both Qualifying Parties other than those referred to in paragraphs c) to n) of 2° of Article L. 531-2 of the MFC (the "**Eligible Party**").

Each of the transactions and contracts referred to in (i) and (ii) is referred to as a "**Qualifying Transaction**".

2.1 Qualifying Transactions

A. Legal approach

Although the notion of "transactions on financial instruments" is not defined under French law, the consensus among authors is that forward financial instruments (*instruments financiers à terme*) as defined under Articles L. 211-1 III and D. 211-1 A of the MFC are transactions on financial instruments within the meaning of Article L. 211-36 1°) of the MFC.

To qualify as transactions on financial instruments under French law, Individual Contracts have to fall under the categories mentioned in:

- Article D. 211-1 A of the MFC; or
- paragraph II of Article L. 211-36 of the MFC.

Pursuant to Article D. 211-1 A-I of the MFC, forward financial instruments[31] include:

1. Options, futures, swaps, forward rate agreements and any other forward contracts relating to financial instruments, currencies, interest rates, yields, units mentioned under Article L. 229-7 of the French Environmental Code, financial indices or financial measures which may be settled physically or in cash;
2. Options, futures, swaps, forward rate agreements and any other forward contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties otherwise than by reason of a default or other termination event;
3. Options, futures, swaps and any other forward contracts relating to commodities that can be physically settled provided that they are traded on a regulated market and/or a MTF or an OTF, with the exception of wholesale energy products, as defined in point 4 of Article 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on the integrity and transparency of the wholesale energy market, which are traded on an organised trading system and which must be settled by physical delivery;
4. Options, futures, swaps, and any other forward contracts relating to commodities, that can be physically settled not otherwise mentioned in 3. and not being for commercial purposes, which have the characteristics of other forward financial instruments;

[31] Pursuant to Article L. 211-1 of the MFC, financial instruments include forward financial instruments listed in Article D. 211-1 A of the MFC.

5. Forward contracts for the transfer of credit risk;
6. Financial contracts for differences;
7. Options, futures, swaps, forward rate agreements and any other forward 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 otherwise than by reason of a default or other termination event;
8. Any other forward contract relating to assets, rights, obligations, indices and measures not otherwise mentioned in 1 through 7 above, which have the characteristics of other forward financial instruments, having regard to whether, *inter alia,* it is traded on a regulated market, a MTF or an OTF, is cleared and registered by a recognised clearing house.

Furthermore, Article L. 211-36 II of the MFC extends the scope of application of the French Netting law to instruments which are not considered as financial instruments under neither Article D. 211-1 A I of the MFC Code nor MIFID II. Article L. 211-36 II of the MFC provides indeed that for the sole purposes of Articles L. 211-36 et seq. of the MFC (i.e. the French Netting Law), options, futures, swaps and any forward contracts other than those mentioned in Article L. 211-1 III of the MFC (i.e. MIFID II qualifying forward financial instruments) are considered as forward financial instruments, provided that, when such instruments are settled by physical delivery, they must give rise, to registration by a recognised clearing house or to periodical margin calls. Article L. 211-36 of the MFC is a significant extension of the definition, when compared to MIFID II and with no more reference to any limited type of underlying.

It should be noted that Article D. 211-1 A of the MFC comes from MIFID II which sets out similar criteria than French law for an Individual Contract to qualify as a financial instrument.

B. Application to the Individual Contract

Following the Instruction Letter, it appears that Individual Contracts include either options, futures, swaps and any other forward contract on Natural Gas or Allowance[32]. Our understanding is that those Individual Contracts are not meant to be listed and/or admitted to trading on a regulated market, a MTF or an OTF.

1. Natural Gas

Natural Gas is a commodity and is not *per se* a financial instrument. From the above, it appears that in order to qualify as a Qualifying Transaction, an Individual Contract on Natural Gas must meet the qualification requirements of a financial instrument, assuming that both Parties are not Eligible Parties.

To benefit from the French Netting Law pursuant to Article L. 211-36 I of the MFC, options, futures, swaps, and any other forward contracts relating to Natural Gas must consequently:

- be settled in cash[33] or may be settled in cash at the option of one of the parties otherwise than by reason of a default or other termination event; or
- where physically settled:
  (a) be traded on a regulated market and/or a MTF or an OTF, with the exception of wholesale energy products, as defined in point 4 of Article 2 of Regulation (EU) no. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on the integrity and transparency of the wholesale energy market, which are

[32] Under the Allowances Appendix (in particular the EFET Allowances Appendix (GAS) to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/28 February 2018), an Allowance is defined as "*an allowance to emit one tonne of carbon dioxide (CO2) or equivalent during* a *specified period, or such other type of unit as may be recognised as, valid for the purposes of meeting the requirements of applicable law and the relevant Emissions Trading Scheme on the Delivery Date, including, without limitation, for the purpose of meeting emissions' related commitment obligations under the EU ETS*". This definition is in line with the definition appearing in Article L. 229-7 of the French Environmental Code.

[33] The possibility for a transaction to be cash settled needs to be consistent with real commercial expectation and must not remain theoretical. The Parties should not draft their transactions in a way which would practically prevent the parties from opting for a cash settlement.

traded on an organised trading system and which must be settled by physical delivery; or

(b) for those not otherwise mentioned in (a) above have the characteristics of other forward financial instruments, while not being for commercial purposes.

It should be noted that the notion of "characteristics of other forward financial instruments" (sets out in paragraph (b) above) is not defined under French law.

As mentioned in paragraph A. above, since MIFID II sets out similar criteria than French law for an Individual Contract to qualify as a financial instrument[34], the terms "characteristics of other forward financial instruments" and "for commercial purposes" should be interpreted in light of Article 7 of the Regulation (EU) no. 2017/565 of 25 April 2016 supplementing MIFID II ("**Regulation 2017/565**")[35].

Pursuant to Regulation 2017/565 and Article D. 211-1 A I 4°) of the MFC, a contract which is not a spot contract (as set out below) and which is not for commercial purposes shall be considered as having the characteristics of other derivative financial instruments where it satisfies the following conditions:

- meets one of the following criteria:
  - it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF;
  - it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue; or
  - it is equivalent to a contract traded on a regulated market, MTF, an OTF or such a third country trading venue, with regards to the price, the lot, the delivery date and other contractual terms; and
- it is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

Pursuant to the Guidelines (as defined in footnote 34 below), a spot contract shall be 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:

- 2 trading days; or
- the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

However, a contract should not be a spot contract if, irrespective of its explicit terms, there is an understanding between the parties that the delivery of the underlying is to be postponed and not to be performed within the period mentioned in the first subparagraph.

In addition pursuant to Article 7, 4°) of Regulation 2017/565, a contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to MIFID II and Article D. 211-1 A I 4°) of the MFC, and as not having the characteristics of other derivative financial instruments, where the following conditions are both met:

- it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network; and
- it is necessary to keep in balance the supplies and uses of gas at a given time, including the case when the reserve capacity contracted by a gas transmission system operator as defined in Article 2(4) of Directive 2009/73/EC is being transferred from one prequalified balancing service provider to another prequalified balancing service provider with the consent of the relevant transmission system operator.

[34] Please refer to Section C(7) of Annex I to MIFID II which is similar to Article D. 211-1 A 4° of the MFC.

[35] Regulation 2017/565 is to be read in conjunction with the guidelines issued by the European Securities and Markets Authority has published on 5 June 2019 guidelines on the application of C6 and C7 of Annex 1 of MIFID II (ESMA-70-156-889) (with the Regulation 2017/565, the "**Guidelines**").

Furthermore, under Article L. 211-36 II of the MFC, any Individual Contracts would also qualify as financial instruments if, when physically settled, they must give rise to periodic margin calls or they are registered by a recognised clearing house.

Please note that the provisions of the EFET Credit Support Annex contemplating periodic margin calls should be designed in such a manner that margin call must indeed occur. The protection provided through periodic margin calls in the context of the EFET Credit Support Annex would only be sustainable where such periodic margin calls are not merely theoretical but correspond to a reality both in contractual terms and in practice.

In other words, if the operation of the margining provisions were subject to broad discretion or a threshold or minimum transfer amount were to be included at such a level, so that mark to market exposure was not in fact margined at all, or at intervals which appear not to be periodic, the EFET Credit Support Annex may not be considered to provide a true periodic margin call arrangement.

However, where as a contractual and factual matter, daily valuation results in an amount of collateral being due from a party and a demand is made (as part of the administration of the arrangement) for the provision of additional collateral resulting from such valuation and the collateral is required to be transferred and is in fact posted, this situation would appear to correspond to transactions being subject to a rear periodic margin call.

In fact under that scenario, periodic margining arrangements will be close or comparable to an exchange margin maintenance regime where demands to supplement collateral are made as a matter of routine on a daily basis.

2. Allowance

Pursuant to L. 211-36 I 1°) of the MFC, transactions on an Allowance are covered by the French Netting Law[36]; a forward contract related to Allowances would qualify where it may be settled in cash or physically[37] when it complies with Article D. 211-1 A I 1°) of the MFC.

As discussed in respect of Natural Gas in paragraph 1 above, spot transactions on an Allowance should also be excluded from the definition of forward contracts. The provisions of Article 7 of Regulation 2017/565 referred to above would not apply directly to Allowance since they have been drafted for the purposes of commodity derivatives contracts.

However, these provisions are useful to understand what, generally speaking, a spot transactions is. Consequently, we would tend to apply the same criteria than above in respect of Natural Gas[38]. Individual Contracts on Allowances which would fall in the description of spot transactions, in particular because delivery would for example takes place within two trading days, would not qualify as forward contract and would not benefit from the French Netting Law.

2.2 Qualifying Parties

a) Scenario where only one of the counterparties is a Qualifying Party

If only one of the Parties to the Agreements is a party referred to in Article L. 211-36 I 1° of the MFC[39] (each, a "**Qualifying Party**") (as listed in Exhibit 3 below), Individual Contracts must be Qualifying Transactions as described above in paragraph 2.1 in order to qualify under the French Netting Law.

b) Scenario where both counterparties are Eligible Parties

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[36] Pursuant to the law no. 2019-486 dated 22 May 2019, Article L. 211-36-I (1°) of the MFC has been amended in order to add, after the terms "*Financial obligations resulting from transactions on financial instruments*", the following terms: "*or units listed in Article L. 229-7 of the French Environment Code, spot FX transactions* (operations de change au comptant*), or purchase, sell or delivery transactions on gold, silver, platinum, palladium or other precious metals*".

[37] Pursuant to Article D. 211-1 A of the MFC.

[38] Please note that Article 10 of Regulation 2017/565 provides for a definition of spot transactions relating to currencies.

[39] The list of Qualifying Parties under the French Netting Law is reproduced in Exhibit 3 to this Opinion.

The scope of Qualifying Transactions under the French Netting Law is wider if both parties are Eligible Parties referred to in Article L. 211-36 I 2° of the MFC. It consists of financial obligations which result from any contract giving rise to cash settlement or to delivery of financial instruments.

Under this scenarios, the Individual Contracts do not consequently have to consist exclusively of "transactions on financial instruments" in order to benefit from the French Netting Law but need to qualify as financial obligations which give right to cash settlement or delivery of financial instruments.

Please note that Physically Commodity Transactions (as defined in Appendix B of the Instruction Letter) will not qualify if they only give rise to physical delivery of Natural Gas or Allowance.

However, where Article L. 211-36, I, 2° of the MFC applies, certain institutions, firms or establishments (referred to in c) to n) of 2° of Article L. 531-2 of the MFC) are excluded as Qualifying Parties (see in this respect Exhibit 3 to this Opinion.

The institutions, firms and establishments listed in subparagraph c) through n) of paragraph (e) 2° of Exhibit 3 to this Opinion) are excluded from the definition of Qualifying Parties.

Therefore when that scenario applies, both parties must be either:

- a credit institution *(établissement de crédit)*[40],
- an investment services provider *(prestataire de services d'investissement),*
- a public establishment *(établissement public),*
- a local authority *(collectivité territoriale),*
- a clearing house *(chambre de compensation),*
- the State, the *Caisse de la dette publique* and the *Caisse d'amortissement de la dette sociale,*
- the *Banque de France,*
- the *Institut d'émission des départements d'outre-mer* and the *Institut d'émission d'outre-mer,*
- insurance and reinsurance companies governed by the French Insurance Code,
- collective investments mentioned in I of Article L. 214-1 and their asset management companies,
- a non-resident establishment with a comparable status,
- an international financial organisation or body which France or the European Union is a member of.

3. Individual Contracts falling outside the scope of the French Netting Law

If an Individual Contract does not meet the requirements of Qualifying Transactions, provisions of the Bankruptcy Rules will apply (see in this respect Exhibit 4 to this Opinion) and the French Netting Law will not prevent such application.

In this case, Articles L. 622-13 and L. 631-14 of the French Commercial Code will provide that notwithstanding any legal or contractual provision to the contrary, no indivisibility, termination or rescission of a contract may result solely from the opening of safeguard

[40] Please note that whereas most of the entities composing the network of a category of mutual or cooperative banks are licensed as credit institutions, certain entities such as *la Confédération nationale du crédit mutuel* may only have supervisory functions and do not purport to conduct banking or financial activities.

Therefore, the question as to whether an entity composing the network of a category of mutual or cooperative banks or the central body of a network qualifies as a Qualifying Party must be analysed on a case by case basis.

procedure or judicial reorganisation (refer to Exhibit 4 for a description of the Insolvency Proceedings).

Furthermore pursuant to Article L. 622-7 of the French Commercial Code, where an Initial Judgment is rendered, a payment on account of pre-bankruptcy debts is prohibited except in respect of set-off on account of connected claims. Therefore, Parties are only allowed to set-off claims related to Individual Contracts if they are connected debts (*créances connexes*).

Although in the absence of case law to such effect this matter is not free of uncertainty, we believe that if an Agreement documents both Qualifying and non Qualifying Transactions, the presence of non Qualifying Transactions should not impact the application of the French Netting Law to the Qualifying Transactions leaving non Qualifying Transactions subject to the provisions of Articles L. 622-13, L. 631-14 and L. 622-7 of the French Commercial Code.

However, please note that there is no French case law on such a question. Therefore, we recommend segregating in independent portfolios Qualifying Transactions and non Qualifying Transactions.

How such segregation may be organized is a practical matter which needs to be addressed by a counterparty in the context of its accounting regime. Consideration needs to be given to the desirability to identify in a special segregation ledger those transactions which may not meet the qualifying transaction test so that, in the context of close-out, those transactions may be contractually carved-out from the close-out netting process. Appropriate provisions may need to be considered from that perspective for introduction in the relevant schedule.

In addition those transactions may not meet the fungiblity test which is required to be considered for post-insolvency set-off in the context of connexity or related transactions.

In the absence of case law precedents, that matter remains subject to uncertainty in an area such as insolvency law where exemptions of mandatory rules should be interpreted narrowly.

In this situation it would also be advisable to avoid provisions contemplating automatic termination so that room for discretion should remain available with respect to close-out netting.

Consequently, it may be preferable to avoid resorting to those arrangements and segregate the non Qualifying Transactions under a separate master agreement.

4. Impact of the Insolvency Proceedings Regulation, of the Winding Up Directive and of the Solvency II Directive as implemented in France

4.1 Where the French Counterparty is a corporate entity referred to in Exhibit 1, the Insolvency Proceedings Regulation would apply.

Pursuant to Article 7 of the Insolvency Proceedings Regulation, unless otherwise provided in the Insolvency Proceedings Regulation, the law applicable to insolvency proceedings[41] and their effects shall be that of the EU Member State within the territory of which such proceedings are opened. In particular, the law of the EU Member State within the territory of which such proceedings are opened shall determine the conditions under which set-off may be invoked (Article 7(2)(d) of the Insolvency Proceedings Regulation).

However, Article 9(1) of the Insolvency Proceedings Regulation provides that the opening of insolvency proceedings as defined in the Insolvency Proceedings Regulation shall not affect the right of creditors to demand the set-off of their claims against the claims of the corporate entity, where such a set-off is permitted by the law applicable to the insolvent corporate entity's claim. Article 9(2) of the Insolvency Proceedings Regulation further provides that Article 9(1) shall not preclude actions for voidness, voidability or unenforceability referred to in Article 7(2)(m) of the Insolvency Proceedings Regulation.

[41] With respect to France, such procedures are the safeguard procedure, the accelerated safeguard procedure, the accelerated financial safeguard procedure, the judicial reorganisation and the judicial liquidation as listed in Annex A of the Insolvency Proceedings Regulation.

Article 16 of the Insolvency Proceedings Regulation provides that the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors referred to in Article 7(2)(m) of the Insolvency Proceedings Regulation shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that (i) the said act is subject to the laws of an EU Member State other than that of the State of the opening of the proceedings and (ii) that law does not allow any means of challenging that act in the relevant case.

With respect to the first condition (i), although it is unclear which "act" is relevant for the purposes of the Insolvency Proceedings Regulation, we believe that the set off provisions of the EFET General Agreement should be treated as this "act".

With respect to the second condition (ii), it relates to a question of the foreign law governing the set-off clause (i.e. English law or German law in our case) to decide whether or not there is any means of challenging the set-off in the relevant case.

Subject to our view set out in paragraph 4.4 below, thus, in principle, pursuant to Article 9(1) of the Insolvency Proceedings Regulation, the French Bankruptcy Rules should not affect the rights of Other Party to demand the set-off of its claims against the claims of the French Counterparty where such a set-off is permitted by the law applicable to the Other Party's claim.

4.2 Subject to our view set out in paragraph 4.4 below, where the French Counterparty is a credit institution or an investment firm referred to in Exhibit 1, the Winding-Up Directive would apply.

Provisions of the Winding-Up Directive, as implemented under Articles L. 613-31-1 et seq*.* of the MFC, governs the opening of reorganisation measures and winding-up proceedings as defined in the Winding-Up Directive ("**Reorganisation Measures and Winding-Up Proceedings**") against credit institutions and investment firms.

Pursuant to Article 25 of the Winding-Up Directive, as implemented under Article L. 613-31-5 4° of the MFC, "*netting agreements shall be governed solely by the law of the contract which governs such agreements without prejudice to the measures taken by a competent resolution authority*". Such provision seem to mean that French law would not be competent to govern the enforceability of the EFET General Agreement against the French Counterparty, where the French Counterparty is licensed as a credit institution or an investment firm, assuming that such provisions qualify as "*netting agreements*" (*convention de compensation*) under French law.

However, the above mentioned provision creates a lot of uncertainty as to which extent it should apply[42]. There is no precedent and real guidance on this issue. It is in particular unclear whether in this case the Bankruptcy Rules should be ignored. It is also unclear as to what extent the such provisions would fall within the definition of a "*netting agreement*" for the purposes of Article 25 of the Winding-Up Directive.

Indeed, it should be noted that neither the Winding Up Directive nor French law provides for any definition of such notion. French courts should apply French law to determine whether such provision is a "*netting agreement*" and, if so, they should make a "direct application" of the law of the EFET General Agreement.

In our opinion, this provisions should be considered by French courts as a "*netting agreement*" for the purposes of Article 25 of the Winding Up Directive, as implemented in France by Article L. 613-31-5 4° of the MFC. Therefore, where the French Counterparty is a credit institution, the enforceability and validity of the Article L. 613-31-5 4° should also be checked under the law elected in the EFET General Agreement.

4.3 Subject to our view set out in paragraph 4.4 below, where the French Counterparty is an insurance company referred to in Exhibit 1, the Solvency II Directive would apply.

Where the French Counterparty is an insurance company referred to in Exhibit 1, provisions of the Directive 2009/138/EC of the European Parliament and of the Council of

[42] See in particular, in relation to derivative transactions, the letters from the International Swaps and Derivatives Association Inc. to the European Commission dated 28 September 2007 and 20 January 2010 on this matter. In particular, such letters stress the incoherence between the provisions of the Collateral Directive and the provisions of the Winding-Up Directive.

25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (the "**Solvency II Directive**") would need to be considered.

Pursuant to Article 288(1) of the Solvency II Directive, the opening of reorganisation measures or winding-up proceedings as defined in the Solvency II Directive shall not affect the right of creditors to demand the set-off of their claims against the claims of the insurance company, where such a set-off is permitted by the law applicable to the insolvent insurance company's claim. However, Article 288(1) of the Solvency II Directive shall not preclude actions for voidness, voidability or unenforceability referred to in Article 274(2)(I) of the Solvency II Directive.

Article 290 of the Solvency II Directive provides that the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors referred to in Article 274(2)(1) of the Solvency II Directive shall not apply where the person who has benefited from a legal act detrimental to all the creditors provides proof that (i) the said act is subject to the law of an EU Member State other than the home EU Member State and (ii) that law does not allow any means of challenging that act in the relevant case.

With respect to the first condition (i), although it is unclear which "act" is relevant for the purposes of the Solvency II Directive, we believe that the EFET General Agreement Netting Provisions should be treated as this "act".

With respect to the second condition (ii), it relates to a question of the foreign law governing the set-off clause (i.e. English law or German law in our case) to decide whether or not there is any means of challenging the set-off in the relevant case.

Such provisions have been implemented in Article L. 326-25 of the French Insurance Code in such a way that the French text differs from the Solvency II Directive. Article L. 326-25 of the French Insurance Code only covers the situations where reorganisation measures or winding-up proceedings as defined in the Solvency II Directive have been opened against an insurance company in an EU Member State other than France.

Consequently, a French court could decide that Article L. 326-25 of the French Insurance Code should not apply to the case contemplated by this Opinion, i.e. the case where the French Counterparty is facing proceedings opened in France.

In our view the provisions of Article L. 326-25 of the French Insurance Code are not an exact transposition of Article 288(1) of the Solvency II Directive. However, if one was to argue that the provisions of Article 288(1) of the Solvency II Directive were not to apply, it should not prevent the Other Party to benefit from the French Netting Law.

4.4 Please note that our Opinion relies on the application of the French Netting Law which derived from the financial collateral regime, as set out under Articles L. 211-36 and seq of the MFC from the implementation of the Collateral Directive. However, in the absence of precedents a potential conflict exists between the different solutions provided for by the European legislation and their implementation in France.

When the French Netting Law is applicable, the Parties should be aware that the solution set out by the Insolvency Proceedings Regulation, the Winding-up Directive and the Solvency II Directive would, if apply to the EFET General Agreement and the Individual Contract, point out to English Law or German Law, depending the governing law applicable to the EFET General Agreement and the Individual Contract, to determine whether the EFET General Agreement Netting Provisions are enforceable against the French Counterparty in accordance with their terms and the application of the French Netting Law in this case would not be relevant.

5. Please provide a General description of limitations applicable to set-off (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise): (a) between Parties of claims arising under the EFET General Agreement, (b) between Parties of claims arising outside the EFET General Agreement if contractually provided for in an amendment to the EFET General Agreement and (c) between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the EFET General Agreement.

Assuming that the French Netting Law applies, our discussions under paragraph 7.1.1 c) above applies equally to claims arising under the EFET General Agreement and between Parties of claims arising outside the EFET General Agreement if contractually provided for in an amendment to the EFET General Agreement (assuming such claims relate to Qualifying Transactions).

Article L. 211-36-1 of the MFC refers to set-off applicable "between all the parties". It provides that:

Agreements relating to the financial obligations referred to in article L. 211-36 ***may be early terminated, and the debts and claims relating thereto may be netted among themselves between all the parties****. The parties may provide for the calculation of a single netted settlement amount, such financial obligations being governed either by one or several agreements or master agreements.*

The termination, valuation and netting procedures of the transactions and obligations referred to in Article L. 211-36 and in I of this Article are binding on third parties. ***These procedures may be contemplated in particular by agreements or master agreements.***

In respect of Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the EFET General Agreement, we are in the view that such claims would be outside the scope of the French Netting Law and would not be set-off between Affiliates or Credit Support Providers of Parties even if contractually provided.

Pursuant to Article L. 211-36-1 of the MFC, the French Netting law is applicable between the parties to the "*Agreements relating to the financial obligations*". Therefore, Affiliates or Credit Support Providers of the Parties are excluded.

Furthermore, the principle of mutuality is fundamental under French law for contractual set-off and would not be met if claims does not exist between the same parties to the agreement.

Exhibit 3

Qualifying Parties under the French Netting Law

Under the French Netting Law, at least one of the Parties to Qualifying Transactions must be a party referred to in Article L. 211-36 of the MFC, i.e.:

a) a credit institution or a financing company;

b) a financing company;

c) an investment firm;

d) an *établissement public*;

e) a local entity;

f) an institution, firm or establishment referred to in Article L. 531-2 of the MFC.

The following are within the scope of Article L. 531-2 of the MFC:

1°

a) the State, the *Caisse de la dette publique* and the *Caisse d'amortissement de la dette sociale*;

b) the *Banque de France*;

c) the *Institut d'émission des départements d'outre-mer* and the *Institut d'émission d'outre-mer*;

2°

a) insurance and reinsurance companies governed by the French Insurance Code;

b) the collective investments mentioned in I of Article L. 214-1 and their asset management companies;

c) supplementary occupational retirement funds mentioned in Article L. 381-1 of the Insurance Code, occupational retirement institutions mentioned in Article L. 370-1 of the same Code for their operations mentioned in Article L. 370-2 of the same Code, as well as legal persons administering an occupational retirement institution mentioned in Article 8 of Ordinance no. 2006-344 of 23 March 2006 on supplementary occupational pensions;

d) enterprises which solely supply investment services to (i) legal entities controlling such enterprises, (ii) legal entities which the latter control and (iii) legal entities which they control. For purposes of this paragraph d), "control" means a direct or indirect control within the meaning of Article L. 233-3 of the French Commercial Code;

e) enterprises whose investment services activities are restricted to the management of an employee savings system;

f) enterprises whose activities are restricted to operations referred to in paragraph d) and e) above;

g) persons who supply the service of investment advice or the service of reception and transmission of orders for third parties on an ancillary basis and in connection with a non-financial professional activity or a chartered accountant activity, to the extent that such activity is governed by legislative or regulatory provisions or a code of good conduct approved by a public authority which do not prohibit the performance of such services;

h) crow-funding financial investment advisers, under the conditions and within the limits contemplated in Chapter VII of Title IV of the MFC;

i) Persons who provide no investment services other than proprietary trading in financial instruments other than commodity derivatives within the meaning of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, the units referred to in Article L. 229-7 of the Environmental Code or derivatives with underlying instruments; however, the following are not exempted on this basis:

- market makers;
- members of a regulated market or multilateral trading facility and persons who have direct electronic access to a trading venue, with the exception of non-financial entities that execute transactions on a trading venue whose contribution to reducing the risks directly related to their commercial activity or to financing their cash flows or those of their groups within the meaning of Article L. 233-17-2 of the French Commercial Code can be objectively measured;
- persons who use a high frequency algorithmic negotiation technique;
- persons who trade on own account when executing their clients' orders;
- persons benefiting from an exemption under a, b and j are not required to meet the conditions set out in this i) to benefit from the exemption;

j) Persons who trade on own account, including market makers, in commodity derivatives within the meaning of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, in the units referred to in Article L. 229-7 of the Environment Code or derivative instruments underlying them, or which provide investment services other than proprietary trading in these same financial instruments to clients or suppliers of their main activity, provided that these services, individually or in aggregate, are ancillary, according to criteria defined by decree, to their main activity considered at group level within the meaning of Article L. 233-17-2 of the French Commercial Code, where this principal activity does not consist in the provision of investment services, the performance of banking transactions or the provision of payment services, or the exercise of the market-making function in relation to commodity derivatives; however, the following are not exempted on this basis:

- persons who use a high frequency algorithmic negotiation technique;
- persons who trade on own account when executing their clients' orders;

k) financial investment advisers, under the conditions and within the limits contemplated in Chapter I of Title IV of the MFC;

l) persons providing investment advice in the course of providing another professional activity not covered by Title III of Book V of the MFC, provided that the provision of such advice is not specifically remunerated;

m) Central securities depositories within the meaning of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and central securities depositories, except in the cases provided for in Article 73 of that Regulation;

n) When providing investment services in commodity derivatives, transmission system operators performing their tasks pursuant to Articles L. 321-6 to L. 321-17 or L. 431-3 to L. 431-6 of the Energy Code, Regulations (EC) no. 714/2009 and no. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and to the natural gas transmission networks, network codes or guidelines adopted pursuant to those texts, persons acting as service providers on behalf of network operators to carry out the tasks mentioned in this n and operators or administrators of an energy flow adjustment mechanism, a gas pipeline network or a system to balance energy supply and demand when performing such tasks;

However, this exemption from licensing does not apply to the operation of a secondary market, including a secondary trading platform for transport financial rights;

o) Persons covered by Article L. 229-5 of the Environment Code who, when trading units mentioned in Article L. 229-7 of the same Code, do not execute orders on behalf of clients and do not provide any investment services other than proprietary trading, provided that such persons do not use a high frequency algorithmic trading technique.

For the purposes of this Article, a market maker is a person who is continuously present on the financial markets to trade on his own account and who buys and sells financial instruments by committing his own capital at prices fixed by him.

The subsidiaries mentioned in Article L. 511-47 may not benefit from the exemption from approval provided for in this Article.

g) a clearing house;

h) a non-resident establishment with a comparable status[43]; or

i) an international financial organisation or body which France or the European Union is a member of.

As indicated in Exhibit 2, the French Netting Law is applicable to financial obligations resulting either (i) from Individual Contracts on financial instruments, when only one of the parties to such Individual Contracts is a Qualifying Party, or (ii) from any contract giving rise to cash settlement or to delivery of financial instruments, if both parties to such Individual Contracts are Qualifying Parties other than those referred to in paragraphs (c) through (n) of paragraph (e), 2° above (i.e. Eligible Parties).

[43] Foreign investment providers carrying out their activities in France under the European Passport, either by way of a branch or under the principle of freedom to provide services, are Qualifying Parties.

Exhibit 4

Types of Proceedings - General Insolvency Issues

1. Main provisions

1.1. The main provisions of French law concerning voluntary settlements ("**Voluntary Settlements**") are contained in the *Livre VI Titre I* of the French Commercial Code which provides for procedures (*mandat ad hoc* and conciliation) aiming at solving the legal, economic or financial difficulties of debtors (provided that, as far as the conciliation is concerned, the relevant debtor has not been in cessation of payments - i.e unable to meet its currently due debts with its currently available assets - (the "**Cessation of Payments**") for more than 45 days) by reaching an agreement with its main creditors. A conciliation may be opened against a credit institution, an investment firm or an insurance company only after having obtained an advice from the French *Autorité de Contrôle Prudentiel et de Résolution* (the "**ACPR**").

A conciliator is appointed by the president of the competent court for a period not exceeding, as far as the conciliation is concerned, four months renewable for an additional one month. Under the conciliation procedure, claims against the debtor are not stayed. However, the court may decide, with respect to a creditor who seeks enforcement against the debtor, upon request of the debtor and after consultation with the conciliator, to give the debtor a deferment or a rescheduling of its debt for a period not exceeding two years. The court's order suspends the pending creditor's legal action.

1.2. Insolvency rules, which are relevant for the purposes of this Opinion, are the provisions of *Livre VI Titre II*, *Titre III* and *Titre IV* of the French Commercial Code relating to the safeguard procedure, the accelerated safeguard procedure, the judicial reorganisation and the judicial liquidation, as amended (the "**Bankruptcy Rules**") and its implementing regulations. In addition credit institution, investment firm and French insurance companies are also subject to specific provisions which result from the specificities of their legal regime. These specific provisions imply notably the intervention of the ACPR for certain steps of the proceedings under the Bankruptcy Rules.

Proceedings under the Bankruptcy Rules ("**Insolvency Proceedings**") would be opened in respect of the French Counterparty (or the "**Insolvent Party**") in three different situations: (i) when the Insolvent Party, which is not yet in Cessation of Payments, is facing insurmountable difficulties or is in Cessation of Payments for less than 45 days (the safeguard procedure and the accelerated safeguard procedure), (ii) when the Insolvent Party is in Cessation of Payments (the judicial reorganisation) and (iii) when the Insolvent Party is in Cessation of Payments and its restructuring is evidently impossible (the judicial liquidation). The Insolvent Party must request the opening of either the judicial reorganisation or the judicial liquidation within 45 days of its being in Cessation of Payments provided that it has not already filed for a conciliation procedure. However, there are some others situations where the court may also open a judicial reorganisation or a judicial liquidation; for instance, at its own initiative when a conciliation has failed or when it occurs that the debtor was already in Cessation of Payment at the time of the opening of the safeguard procedure or falls into Cessation of Payment during the course of the safeguard procedure or the implementation of the safeguard plan, or at the request of the public prosecutor or of a creditor. Insolvency Proceedings formally commence when a judgement (the "**Initial Judgement**") is rendered by the competent court in respect of the Insolvent Party.

1.3. In respect of both the judicial reorganisation and the judicial liquidation, the Initial Judgement determines the date of Cessation of Payments; this date may be set up to a maximum of 18 months prior to the date of the Initial Judgement (the "**Date of Cessation of Payments**"). The period between the Date of Cessation of Payments and the date of the Initial Judgement is called the *période suspecte* (the "**Hardening Period**"). Certain payments made or transactions carried out during the Hardening Period shall or may (depending upon the fact that the debtor's counterparty is aware of the Cessation of Payments or not) be held null and void by the court.

1.4. Article L. 632-1 I of the French Commercial Code declares null and void, when made during the Hardening Period, inter alia, any payment, whatever its means, for debts which have not become due and payable on the date of payment (Article L. 632-1 I 3° of the French Commercial Code) and any payment for due debts made by a means other than cash, negotiable instruments, bank transfers, bordereaux (*bordereaux Dailly*) referred to in Articles L. 313-23 to L. 313-49 of the MFC or any other means commonly accepted in business relationships (Article L. 632-1 I 4° of the French Commercial Code). In addition, pursuant to Article L. 632-2 of the French Commercial Code, a court has the power to declare void or unenforceable, when made from the Date of Cessation of Payments, inter alia, any payments for due debts and any acts for valuable consideration (*actes à titre onéreux*), if the counterparty of the insolvent debtor knew that the debtor was in Cessation of Payments[44].

1.5. The safeguard procedure is designed to help restructure the business and is a precautionary procedure in that it must be commenced prior to a Cessation of Payments. The relevant court opens an observation period of a maximum of six months, which can be renewed twice (although a second renewal may only be sought by the public prosecutor, and is unusual), and appoints an administrator (who supervises or assists the debtor's management) and a creditors' representative (*mandataire judiciaire*) (who represents the creditors' collective interest).

1.6. The Initial Judgment:

(a) stays payment (excluding the set-off of connected debts (*créances connexes*)) of any pre-existing debts or debts which arose after the opening of the proceeding but were not necessary in relation to the proceedings or the observation period itself or which do not constitute consideration for services rendered to the company during this period ("**Undeserving Debts**"); certain payments may, however, be permitted by the court provided that they are justified on business continuity grounds; and

(b) stays or prohibits (i) any judicial action on behalf of any creditor holding an Undeserving Debt who seeks the payment of a sum of money from the company and/or the termination of a contractual arrangement for payment default and (ii) any enforcement action on behalf of the said creditors whether with respect to moveable property or real estate.

1.7. Creditors must declare their Undeserving Debts to the creditors' representative, failing which these creditors will not benefit from distributions. Pursuant to Article L. 622-25 of the French Commercial Code, where the claims are expressed in a foreign currency, they must be converted into euros at the exchange rate prevailing on the date of issue of the commencement order. It is the company which, with the help of the administrator, puts forward a safeguard plan.

1.8. The judgment which approves the plan makes its provisions enforceable *erga omnes* (enforceable against all).

1.9. The aim of a judicial reorganisation is to preserve the business of the debtor and the jobs of its employees and to pay off creditors. If the relevant court so decides, the management of the business may be entirely handed over to the administrator. Most of the provisions of the safeguard procedure apply equally to the judicial reorganisation procedure including an observation period of 6 months renewable twice (although a second renewal may only be sought by the public prosecutor, and is unusual). The plan may contemplate a reorganisation or a sale of the business in whole or in part. Failing deciding on a reorganisation plan, the court may order the liquidation of the company.

1.10. The objective of the liquidation procedure is to wind up the debtor's business and to realise the company's assets, either via a sale of the business in whole or in part or a sale of the assets on a separate basis. From the date of the Initial Judgment, the management is no longer in charge of the debtor's business or assets, even those acquired for whatever reason until the liquidation procedure is brought to a close. The court-appointed liquidator will have all rights and carry out all acts with respect to the debtor's assets during the liquidation process. If the whole or partial disposal of the business is contemplated, the court may authorise the continuation of the debtor's activity for a period of 3 months (renewable upon request of the public prosecutor). The debtor will then be run by the liquidator pending such disposal, unless the number of employees or the debtor's turnover exceeds a certain threshold, in which case (or if it appears necessary to do so for other reasons) the courts will appoint an administrator. To implement the liquidation plan approved by the relevant court, the liquidator (or the administrator if one has been appointed) will enter into any acts necessary for the

[44]Please note that under Article L. 632-2 of the French Commercial Code, a judge has the discretion to set aside the relevant payment/act, whereas under Article L. 632-1 of the French Commercial Code, the cancellation is automatic and the judge has no discretion in this respect.

disposal to occur and will recover and apply the proceeds of such disposal in payment of the debtor's debts.

1.11. Upon request made at the Commercial Court Registry, it is possible to obtain a certificate verifying the existence or non-existence of Insolvency Proceedings of commercial company incorporated and existing under French law having one of the forms listed in the Livre II Titre II of the French Commercial Code, along with copies of the resulting decisions.

It should be noted, however, that that information may only be recorded in the Commercial Court Registry several days following the entry of the insolvency judgment.

Conciliation Proceedings remain, however, confidential.

Creditors are usually required to file a proof of claim in respect of pre-Bankruptcy Judgment claims within two months from publication of the Bankruptcy Judgment in the *Bulletin Officiel des Annonces Civiles et Commerciales* (BODACC). Such time period is extended for a further two month period in respect of creditors located outside of metropolitan France.

2. Public Entities

Bankruptcy Rules do not apply to Public Entities, in their capacity as debtors, as they are public legal entities. They consequently cannot be subject to Voluntary Settlements and Insolvency Proceedings.

Exhibit 5

French Banking Resolution Regime

Articles L. 613-34 et seq of the MFC, which transposes under French law the Directive 2014/59/EU of the European parliament and of the council of 15 may 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the "**BRRD**") provides a legal and regulatory framework applicable to the resolution of French credit institutions and investment firms meeting certain conditions (the "**French Banking Resolution Regime**")[45].

In addition, France is a participant EU Member State of the Single Resolution Mechanism established by Regulation (EU) no. 806/2014 of 15 July 2014 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**"), therefore the SRM Regulation applies directly to credit institutions and investment firms established in France.

If the French Counterparty which is in the scope of the French Banking Resolution Regime is considered as significant entity as listed in "the List of significant supervised entities and the list of less significant institutions" published by European Central Bank and as amended from time to time, the relevant resolution authority (the **"Resolution Authority**") will be the Single Resolution Board, in close cooperation with the French ACPR which may take resolution measures or actions to implement the Single Resolution Board's resolution decisions. For the purposes of this opinion, the Resolution Authority designates the relevant resolution authority to which the SRM Regulation and the Resolution Act confers the resolution tools and powers.

The Resolution Act sets out resolution tools, which may have significant impact on the enforceability of the close-out netting provisions and of the collateral arrangements against a French bank or investment firm under resolution, although, as required by the BRRD, a safeguard is provided by the Resolution Act in respect of netting agreements, set-off agreements or title transfer financial collateral arrangements.

Restrictions to the enforcement of the EFET General Agreement Netting Provisions may apply where the French Counterparty is subject to the provisions of the MFC resulting in particular from French law no. 2013-672 dated 26 July 2013 relating to the separation and regulation of banking activities and French Ordinance no. 2015-1024 dated 20 August 2015 implementing various provisions of the law of the European Union in financial matters implementing in particular the provisions of the BRRD (the "**Banking Law**").

Certain restrictions may apply where the French Counterparty is a credit institution or an investment firm[46] within the meaning of Article L. 613-34 of the MFC which could face resolution measures within the meaning of the Banking Law (a "**BRRD Entity**"). In particular:

(i) pursuant to Articles L. 613-56-4 and L. 613-56-5 of the MFC, the resolution college of the ACPR is entitled, in particular, to suspend any contractual obligation of a BRRD Entity[47] to pay or to deliver financial instruments, and to suspend any termination rights of a party to an

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[45] The French Banking Resolution Regime has been implemented by way of Ordinance (*Ordonnance*) no. 2015-1024 of 20 August 2015, as ratified by the Act no. 2016-1691 of 9 December 2016.

[46] Please note that Article L613-34 excludes from its scope, certain investment firms depending on which investment services they are authorised to carry out.

[47] Under the Banking Law, subject to certain conditions being met, the ACPR is entitled to order resolution measures against a BRRD Entity when it is in default.
Pursuant to Article L. 613-49 of the MFC, for the purposes of resolution measures, a BRRD Entity is in default if the following conditions are satisfied:

(a) the supervision or resolution college of the ACPR has decided that such default is either in effect or predictable;

(b) there is no reasonable perspective that such default may be avoided in a reasonable delay other than with the application of a resolution measure; and

(c) a resolution measure is necessary in order to fulfil the objectives of the resolution as set out in Article L. 613-50 of the MFC and a winding-up procedure under *Livre VI* of the French Commercial Code could not fulfil such objectives.

agreement entered into with a BRRD Entity until no later than midnight on the business day (*jour ouvré*) following the publication of the ACPR's decision to order the suspension;

(ii) moreover, Article L. 613-50-3 of the MFC provides that the provisions of Articles L. 211-36-1 to L. 211-38 of the MFC cannot prevent the application of the restrictions mentioned in (i) above; the French Netting Law regime would consequently be ineffective in this case;

(iii) close-out netting rights under the EFET General Agreement Netting provisions are close-out netting rights provided by Articles L. 211-36-1 to L. 211-38 of the MFC; consequently, in the case where the resolution college of the ACPR would decide to suspend the exercise of the close-out netting rights of the Other Party under the EFET General Agreement Netting Provisions, the EFET General Agreement Netting Provisions would not be enforceable against the relevant BRRD Entity until no later than midnight on the business day (*jour ouvré*) following the publication of such decision by the ACPR; and

(iv) in addition, pursuant to Articles L. 613-52 and L. 613-53 of the MFC, the resolution college of the ACPR may also decide (*x*) to transfer any or part of the assets, rights and obligations of a BRRD Entity to a third party, or (*y*) to use a bridge institution (*établissement-relais*) in charge of receiving, on a temporary basis, all or part of the assets, rights and obligations of the relevant BRRD Entity, in view of a subsequent transfer in accordance with the modalities set forth by the resolution college of the ACPR. The transfer referred to in (*x*) and (*y*) above could include the Agreements.

The Banking Law provides that notwithstanding any contrary legal or contractual provision, the contracts relating to the transferred activities continue and that no termination nor netting may take place solely by reason of such transfer[48] (Articles L. 613-52 and L. 613-53-3 of the MFC).

Pursuant to Article L. 613-54 of the MFC, the resolution college of the ACPR may also transfer any or part of the rights, assets or obligations of a BRRD Entity to an asset management vehicle (*structure de gestion d'actif*), in the view of liquidating them at the best price.

Besides, the ACPR may take some additional measures linked to the transfer of assets, rights and obligations of the BRRD Entity, including in particular:

(i) the modification or the cessation of certain terms of a contract entered into by the BRRD Entity (Article L. 613-56-3 II of the MFC);

(ii) the release of the security interests or any undertakings on the financial instruments, rights, assets or undertakings that are subject to the transfer (Article L. 613-56-2 I of the MFC).

In addition to the measures set out above, other measures taken on the basis of the Banking Law could include, in particular but not exclusively, the limitation or prohibition for the BRRD Entity to enter into certain types of transactions, the dismissal of any manager within the meaning of Article L. 511-13 of the MFC, the intervention of the *fonds de garantie des dépôts et de résolution*.

The EFET General Agreement Netting Provisions would not be enforceable against the relevant BRRD Entity if such EFET General Agreement Netting Provisions were triggered as a result of a resolution measure taken by the resolution college of the ACPR. The ACPR decision to order suspension pursuant to Article L. 613-56-4 of the MFC will suspend the termination rights of a party to an agreement entered into with a BRRD Entity until no later than midnight on the business day (*jour ouvré*) following the publication of the ACPR's decision to order the suspension. The termination rights of the party to an agreement entered into with a BRRD Entity will be enforceable once the suspension is over. Consequently, if an event of default occurs during the suspension period, the non-defaulting Party will not be allowed to enforce the EFET General Agreement Netting Provisions against the BRRD Entity.

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[48] Although the articles of the MFC listed in this Opinion are not entirely clear on this point our interpretation would be that it is only the relevant Agreement which can be transferred. In addition, Article L. 613-57-1 of the MFC provides that the ACPR should, when transferring agreements similar to the Agreements, try not to affect netting agreements which consequently would prevent a cherry picking. However, the Banking Law has been drafted to provide flexibility to the ACPR and consequently is not always entirely clear. We would however, based on the arguments above, believe that the ACPR cannot do cherry picking.