ENFORCEABILITY OF CLOSE-OUT NETTING, AND VALIDITY AND ENFORCEABILITY OF THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY AND ITS COLLATERAL ARRANGEMENTS

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Our ref 0061961-0000026 LU:13553026.9
Luxembourg, 4 November 2019

Enforceability of Close-Out Netting, and Validity and Enforceability of the EFET General Agreement concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements

Dear Sirs,

We write further to Instruction Letter (as defined below) requesting Allen & Overy, *société en commandite simple*, to update its legal opinion dated 1 May 2008, as amended from time to time, to the members of the European Federation of Energy Traders (**EFET**) in respect of the following documents:

A. DOCUMENTS

(i) the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published on 21 September 2007) (the **2007 General Agreement**);

(ii) the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published on 20 December 2000) (the **2000 General Agreement** and when referred to collectively with the 2007 General Agreement, the **General Agreement**);

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

(iv) the EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published on 3 April 2012) (the **2012 Allowances Appendix**);

(v) the EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published 28 February, 2018) (the **2018 Allowances Appendix**);

(vi) the EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005) (the **VAT Annex**);

(vii) the EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published on 20 December 2000) (the **Italian Electricity Appendix**);

(viii) the GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published on 20 December 2000 and Version 2.1(a), published on 21 September 2007) (Version 1.0, published on 11 September 2009) (the **GTMA Appendix**);

(ix) the EFET EECS Certificates Master Agreement (Version 1.0, published on 14 December 2013) (the **EECS Certificates Master Agreement**);

(x) the EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published on 14 December 2013) (the **EECS Certificates Appendix**);

(xi) the Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published on 16 December 2013) (the **EECS Certificates Change Letter**);

(xii) the Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published on 1 October 2015) (the **EECS Certificates Change Letter**):

(xiii) the EFET Electronic Confirmation Agreement (published on 28 June 2005) (the **Electronic Confirmation Agreement**);

(xiv) the Confirmations 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 (Version 2.0, published on 3 April 2012) (the **Confirmations of Allowance Transactions 2012**);

(xv) the EFET Cross Product Payment Netting Agreement (Version 1, published on 20 October 2005) (the **Cross Product Payment Netting Agreement**);

(xvi) the EFET Master Netting Agreement (Version 1.0, published in June 2010) (the **Master Netting Agreement 2010**);

(xvii) the 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 **EFET CPMA Cross-Product Master Agreement**);

(xviii) the EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published on 23 June 2003) (the **Cross-Product Credit Support Annex 2003**); and

(xix) the EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published on 1 February 2011) (the **Cross-Product Credit Support Annex 2011**).

The documents listed in paragraphs (i) to (xii) (inclusive) above are hereinafter referred to as the **Agreements** (though any reference to Agreements includes, for the purposes of Part C.V. (Confirmation Practices) and Part C.VI. (Core Provisions), the documents (xiii) and (xiv) and the documents (xv) to (xix) (inclusive), above.

This legal opinion examines the validity (solely if, for the purposes of section 22 of the General Agreement, the General Agreement was governed by Luxembourg law) and enforceability of the General Agreement in light of the laws of the Grand Duchy of Luxembourg (**Luxembourg**) and by reference to the e-mailed instruction letter in respect of the Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements dated 2 July 2018 (the **Instruction Letter**). It is strictly limited to the matters stated herein and does not extend, and is not to be read as extending by implication, to any other matters[1]. This legal opinion is based exclusively on, and relates solely to matters of, Luxembourg law as now

[1] In particular, this legal opinion is limited to the matters stated herein and does not extend, and is not to be read as extending by implication, to compliance with, or the effects of (including any unenforceability as a result of a failure to comply with) (i) any Luxembourg laws and regulations of

in force and as currently construed by the courts of Luxembourg. No opinion is expressed with regard to any system of law other than Luxembourg or to any matters other than those expressly set out herein. The advice in this legal opinion raises a number of issues, which, to our knowledge, have neither been considered by Luxembourg courts nor by Luxembourg legal literature. It was therefore necessary to form a view on the basis of general principles of Luxembourg law and it cannot be ruled out that a Luxembourg court, the CSSF (as defined below) or another Luxembourg competent authority would take a different view. This legal opinion is expressly subject to that reservation. To the extent that we have not reviewed any particular draft General Agreement or transaction thereunder, we do not express any view in respect of any General Agreement or any transaction thereunder. Consequently, this Memorandum has been prepared on the basis of the description of the proposed contractual framework set forth in the General Agreement and is subject to the assumptions and comments made below. It is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions (together the **Addressees**). It is for these person's sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other persons without EFET's or our prior written approval. This legal opinion shall not be used as the sole basis for entering into an Individual Contract (as defined in the General Agreement), making an investment decision or taking any financial or other commitment.

Unless otherwise provided herein and, unless the context otherwise requires, terms and expressions shall have the meaning ascribed to them in the General Agreement.

This legal opinion is given in respect of the following three scenarios:

- as if Section 22 of the General Agreement was adjusted to provide for Luxembourg law to govern the General Agreement;
- with respect only to those insolvency and default-related issues identified below, assuming a choice of either Luxembourg law or another governing law, our views regarding optimising the General Agreement will be limited to an Insolvent Party that is legally organised or incorporated in Luxembourg (under the assumption that Luxembourg law is the *lex concursus*); and
- if German law remains the governing law of the General Agreement or if the governing law of the General Agreement is the law of England and Wales, our views will be limited to the enforceability by Luxembourg courts of the terms of the General Agreement.

B. ASSUMPTIONS

In giving this legal opinion, we have assumed with your consent, and we have not verified independently that:

(A) the Agreements are made between two parties (the **Parties** and each a **Party**), one of which is incorporated or organised and has its centre of main interest in, Luxembourg (**Party A**) and is subject (unless otherwise specified in this legal opinion) to Luxembourg law;

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the financial sector (including applicable regulations, circulars or circular letters of the CSSF (as defined below)), (ii) any European regulations directly applicable into the laws of the European Member states (including Luxembourg), including, but not limited to, Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (**EMIR**), Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (**MiFID II**), Regulation (EU) N° 600/2014 of 15 May 2014 on markets in financial instruments (**MiFIR**), Regulation (EU) No 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (**SFTR**), Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the EU and on central securities depositories (**CSDR**) and Regulation (EU) No 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the **Benchmarks Regulation**) and the relevant implementing and regulatory technical standards of the European Commission, (iii) Luxembourg lawstransposing European directives, including but not limited to, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (**AIFMD**) and, other than expressly set out herein, 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, and (iv) Luxembourg laws applicable to natural persons, including but not limited to, the regime applicable to individuals in a situation of over-indebtedness.

(B) Party A[2] is either:

1. a commercial undertaking;

   (i) having a legal personality and having adopted the form of a public limited liability company (*société anonyme*), a simplified joint-stock company (*société par actions simplifiée*), a private limited liability company (*société à responsabilité limitée*), a simplified private limited liability company (*société à responsabilité limitée simplifiée*), a corporate partnership limited by shares (*société en commandite par actions*), a special limited corporate partnership (*société en commandite spéciale*), an unlimited partnership (*société en nom collectif*), a limited partnership (*société en commandite simple*) or a co-operative company (*société coopérative*) (including insurance companies, UCIs and SIFs (as defined in Schedule 2));

   (ii) being a Luxembourg registered credit institution and having adopted the form of a *société anonyme*, a *société en commandite par actions* or a *société coopérative*; or

   (iii) being a branch[3] established or located in Luxembourg of an entity incorporated or having its central administration outside of Luxembourg;

2. a publicly-owned entity (which means, for the purposes of this legal opinion, a private law company in which the majority of the shares is held by entities from the public sector; this type of entity is generally governed by the same rules as normal commercial undertakings); or

3. a quasi-governmental entity (which means, for the purposes of this legal opinion, a public entity, other than the State of Luxembourg, such as a territorial authority (*collectivité territoriale*) or a public establishment (*établissement public*), which is a public law entity created by the State of Luxembourg or by a territorial authority);

(C) unless otherwise set forth below, in the case that Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), as amended (the **European Insolvency Regulation**) applies, it determines Luxembourg law as being the *lex concursus* (which means the law applicable to Party A's insolvency);

(D) each Party to the Agreements is duly organised, incorporated and validly existing in accordance with the laws of the jurisdiction of its incorporation and/or its registered office and/or the place of effective management;

(E) in respect of each Party to the Agreements, no steps have been taken pursuant to any insolvency, bankruptcy, liquidation or equivalent or analogous proceedings to appoint an administrator, insolvency receiver, insolvency officer or liquidator over such Party or its assets and that no voluntary or judicial winding-up or liquidation of such Party has been recorded prior to the execution of the Agreements and/or any Individual Contract;

(F) the Agreements and the Individual Contracts have been duly authorised by, and are within, each Party's capacity, power, and legal right to enter into, execute, deliver and perform their respective

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[2] We have further assumed that the Parties do not qualify as a retail client within the meaning of MiFID II (as defined below).

[3] There is no general legal definition under Luxembourg law of a branch of a commercial undertaking (other than, in respect of credit institutions and investment firms, in the BRR Act 2015 (as defined below) which definition cross-refers to the CRR (as defined below)), the legal nature of which is fundamentally different from that of a subsidiary (*filiale*). There is, however, an established concept deriving from Belgian and French legal literature according to which a branch is a place of business which forms a legally dependent part of the headquarters, which conducts directly all or some of the operations inherent to the business of the headquarters, and which is represented by a person duly authorised to enter into transactions on behalf of the headquarters. The EU Regulation No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms (the **CRR**) defines a branch as a place of business which forms a legally dependent part of an institution (that is, a credit institution or an investment firm, both terms as defined in the CRR) and which carries out directly all or some of the transactions inherent in the business of institutions.

obligations thereunder and are complying with each Party's constitutional documents and internal authorisation procedures;

(G) each Party has taken all necessary corporate and other appropriate steps to enter into, execute, deliver and perform the Agreements and the Individual Contracts;

(H) the Agreements and the Individual Contracts have been duly executed;

(I) the Agreements and the Individual Contracts are entered into, and each payment, transfer or delivery thereunder is made, on an arm's length basis and are in accordance with market practice so that no element of gift or undervalue from one Party to the other Party is involved and without any intention of the former Party to prefer the latter Party in the event of the former Party's going into insolvent liquidation;

(J) all obligations under the Agreements and the Individual Contracts are mutual between the Parties in the sense that there are only two parties and each is personally liable as regards the obligations owed by it and beneficial owner of the obligations owed to it;

(K) there are no provisions of the laws of any jurisdiction outside Luxembourg, which would adversely affect, or otherwise have any negative impact on, the opinions expressed in this legal opinion;

(L) there is no fraud in connection with the Agreements and the Individual Contracts;

(M) all payments under the Agreements are effected by the Parties in Euro (or in another generally recognised and freely exchanged currency) by wire transfer to the payment address or to the other Party's bank account;

(N) the Agreements have been executed (subject to Part V below) in a form identical to the documents attached as Schedule 1 to this legal opinion;

(O) there exists no other contract, agreement, deed, document and instrument between the Parties governing the Individual Contracts, which is conflicting with, or amending, the Agreements;

(P) the Parties have not opted for arbitration in the Election Sheet (as defined in the General Agreement) for the settlement of any dispute arising out of or in connection with the Agreements, unless otherwise specified in this legal opinion;

(Q) each Party performs its obligations under the Agreements and the Individual Contracts in accordance with their respective terms;

(R) all representations, warranties and similar statements set forth in the Agreements are true and accurate on the date of the entry by the Parties into the Agreements and on each day on which the Parties enter into an Individual Contract;

(S) all authorisations, approvals and consents under any applicable law (other than Luxembourg law to the extent opined upon herein) which may be required in connection with the entry into, execution, delivery and performance of the Agreements and the Individual Contracts have been or will be obtained;

(T) the entry into, execution, delivery and performance of the Agreements and the Individual Contracts are for the corporate interest (*intérêt social*) of the Parties and there is no illicit cause (*cause illicite*), no abuse of rights (*abus de droit*), abuse of trust or abuse of corporate assets in connection with the Agreements and the Individual Contracts;

(U) the Agreements and the Individual Contracts are entered into, executed, delivered and performed by the Parties thereto in good faith and without any intention of fraud or intention to deprive of any legal benefit any persons (including for the avoidance of doubt third parties) or to circumvent any applicable mandatory laws or regulations of any jurisdiction (including without limitation any tax laws);

(V) except if governed by Luxembourg law (for the purposes of section 22 of the General Agreement), the Agreements and each Individual Contract made under the General Agreement, are legally valid, binding and enforceable against both Parties so far as the law by which they are governed is concerned;

(W) the Parties enter into the Agreements and the Individual Contracts in the course of their usual business activity;

(X) to the extent that the Commodity Forwards, the Commodity Options or the Commodity Swaps (each as defined below) qualify as securities or financial instruments under applicable Luxembourg law, they will not be offered to the public or to any retail client within the meaning of MiFID II and/or admitted to trading and/or listed on a regulated market or an alternative market;

(Y) the Agreements have been entered into by the Parties prior to the entry by the Parties into any Individual Contract; and

(Z) all Individual Contracts, entered into between the Parties and governed by the Agreements, shall exclusively consist of one of the following types of contracts:

- *Commodity Forward*[4] means a transaction in which one party agrees to buy from, or sell to, the other party a specified quantity of a Commodity (as defined below) at a future date in exchange for payment of a specified price to be set on a specified date in the future. The transaction may either be settled by physical delivery of the quantity of Commodity in exchange for the specified price or it may provide for cash settlement with the payment calculation based on the quantity of the Commodity and settled based, among others, on the difference between the agreed forward price and the prevailing market price at the time of settlement; or
- *Commodity Option* means a transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price; or
- *Commodity Swap* means a transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity. All calculations are based on a notional quantity of the Commodity. The swap may either be settled by physical delivery of the quantity of Commodity or it may provide for cash settlement.

Commodity means, in the context of this legal opinion, electricity (including certificates or capacity rights thereto) or emission allowances[5].

[4] A Commodity Forward transaction with a short tenor, which can be as short as the same day or as long as one or typically two days would typically categorised as a **Commodity Spot**. A Commodity Spot transaction contemplates the settlement by only physical delivery of the quantity of Commodity.

[5] We have assumed herein that emission allowances rights encompass greenhouse gas emission allowance rights covered by the Emission Act 2004 (as defined below).

C. OPINIONS

EXECUTIVE SUMMARY

This executive summary intends to provide a summary of the key conclusions set out in Part C of this legal opinion. It does not purport to be complete and is qualified in its entirety by the remainder of the legal opinion. This executive summary must therefore be read in conjunction with Part C and the other parts of this legal opinion. It should not be relied upon without referring to the others parts of this legal opinion.

(1) Enforceability of the General Agreement

We take the view that (i) the choice of German law or the choice of the laws of England and Wales as the governing law of the General Agreement and (ii) the submission of any disputes in connection with the General Agreement to the jurisdiction of either German or English arbitration proceedings or to the courts of either Germany or England and Wales would be upheld as valid choices by a Luxembourg court.

(2) Enforceability of Early Termination

We take the view that the early termination provisions of the General Agreement in relation to Insolvency Proceedings would be upheld by a Luxembourg court.

(3) Enforceability of Close-Out Netting

We take the view that, pursuant to the Luxembourg act dated 5 August 2005 relating to financial collateral arrangements, as amended (the **Collateral Act 2005**), the close-out netting provisions of the General Agreement in relation to Insolvency Proceedings[6] would be upheld by a Luxembourg court.

(4) Multibranch Parties

Our conclusions are (subject to the comments made in Part C.II. below) as follows[7]:

- We take the view that the conclusions in paragraphs C.I.1. and C.I.2. of this legal opinion concerning the enforceability of close-out netting under the General Agreement would not change if Party A has entered into the General Agreement and then conducted business under the General Agreement on a multibranch basis prior to its insolvency.
- We take the view that if a Luxembourg court had jurisdiction (if any) over the assets of Party A (a Luxembourg bank), a multibranch General Agreement would, in principle, be treated as a single agreement by the Luxembourg court under Luxembourg law, regardless of the treatment of the agreement or transactions thereunder by an insolvency official in a jurisdiction where close-out netting may be unenforceable.

[6] Subject to the specific provisions set out in the BRR Act 2015 and the Banking Act 1993 and subject to the discussion in part C.I, section 1.(A) below.

[7] Subject to the European system of financial supervision, the Single Supervisory Mechanism (the **SSM**) comprising the European Central Bank (the **ECB**) and the national competent authorities (the **NCAs**) of euro area countries and the integrated supervisory mechanism applying to both significant and less significant supervised entities (as defined in Regulation (EU) N°468/2014 of the ECB). Power is given to the ECB in respect of authorisations, acquisition of qualifying holdings and withdrawal of authorisations of credit institutions in the euro area, the supervision of significant supervised entities and, together with the NCAs, the supervision of less significant supervised entities. Applications for authorisations are sent by the applicant entity (irrespective of whether it is significant or less significant) to the relevant NCA for the granting of the banking license. The NCA notifies the ECB of the receipt of the application for authorisation within fifteen (15) working days. The NCA will check compliance of the application with national conditions for authorisations and propose to the ECB a draft decision containing its assessment (the draft decision will be deemed to be adopted by the ECB unless the ECB objects within a period of maximum ten (10) working days). Once a final decision is reached, the applicant is notified by the NCA processing the application (More information can be found in the document called "Guide to banking supervision" accessible on the following link: https://www.ecb.europa.eu/ssm/html/index.en.html#prpub (the **ECB Guide**)). The classification of institutions as significant or less significant is determined in light of specific conditions set out in article 3.1 of the ECB Guide.

- We take the view that reorganisation measures (*mesures d'assainissement*), taken by the administrative and judicial authorities of a country other than Luxembourg (**Country H**), which is an EU Member State, in the context of reorganisation measures opened in Country H would be effective in Luxembourg in accordance with the legislation of Country H without any further formality, even where Luxembourg law does not provide for such measures or makes their implementation subject to conditions. If the Luxembourg competent authority, the *Commission de surveillance du secteur financier* (the **CSSF**) deems necessary to implement in Luxembourg a reorganisation measure against the branch of an institution of Country H, it informs without delay the national competent authority of Country H (Article 125 BRR Act 2015).

  Where Country H is not an EU Member State, the reorganisation measures taken by the administrative or judicial authorities of that State, in accordance with the laws of that State, would be effective in Luxembourg without any further formality in accordance with the legislation of that State. This principle applies even where Luxembourg law does not provide for such measures or makes their implementation subject to conditions. The reorganisation measures shall be effective in Luxembourg once they become effective in that State. Notwithstanding the above, the Luxembourg district court has the power to order, at the request of the CSSF, the suspension of payments in respect of the Luxembourg branch of the credit institution of Country H. The CSSF is solely competent to request the Luxembourg district court to implement suspension of payments measures if the CSSF takes the view that this is necessary to preserve the interests of the creditors of the Luxembourg branch. The suspension of payments measures ordered by the Luxembourg district court would be governed by Luxembourg law and would be made in accordance with the procedures applicable in Luxembourg (unless otherwise provided for by the BRR Act 2015) (Article 126 BRR Act 2015).

- We take the view that in respect of winding-up proceedings (*liquidation*), the administrative and judicial authorities of Country H are alone empowered to order the opening of winding-up proceedings against the Luxembourg branch. The Luxembourg branch would be wound-up in accordance with the laws, regulations and procedures applicable in Country H (unless otherwise provided for by the BRR Act 2015). A decision to open winding-up proceedings taken by the administrative or judicial authorities of Country H (which is an EU Member State) would be recognised, without any further formality, in Luxembourg and would be effective in Luxembourg once the decision becomes effective in Country H (Article 135 BRR Act 2015).

  Where Country H is not an EU Member State, the administrative and judicial authorities of that State are alone empowered to order the opening of winding-up proceedings against the Luxembourg branch. The Luxembourg branch would be wound-up in accordance with the laws, regulations and procedures applicable in that State (unless otherwise provided for by Luxembourg law). The decision to open winding-up proceedings is effective in Luxembourg according to the laws of that State without any further formality. Notwithstanding the above, the Luxembourg district court has the power to open, at the request of the CSSF, winding-up and liquidation proceedings in respect of the Luxembourg branch of the credit institution of Country H. The CSSF is solely competent to request the Luxembourg district court to order the winding-up and liquidation of the Luxembourg branch if the CSSF takes the view that this is necessary to protect the interests of the creditors of the Luxembourg branch. The Luxembourg branch would be wound-up and liquidated in accordance with Luxembourg law and procedures applicable in Luxembourg (unless otherwise provided for by the BRR Act 2015) (Article 136 BRR Act 2015).

- We take the view that if separate proceedings were initiated in Luxembourg (if any) with respect to the assets and liabilities of the Luxembourg branch upon the start of the insolvency proceedings for Party F in Country H, the close-out netting provisions of the General Agreement should, in principle, be observed.

(5) Collateral

We take the view that the provisions of the Credit Support Annex would be recognised by a Luxembourg court as a transfer of title by way of security. A transfer of title to assets by way of security (including the provision of additional collateral or the substitution of collateral) pursuant to the Credit Support Annex as well as the inclusion of the assets so transferred in the set-off arrangements agreed upon by the parties to the General Agreement, would be recognised in the event of Insolvency Proceedings affecting Party A (subject, in respect of BRR Entities, to the relevant restrictions of the BRR Act 2015 and in respect of in-scope entities (as defined in article 59-16 of the Banking Act 1993), the relevant restrictions of article 59-47 of the Banking Act 1993).

I. ENFORCEABILITY OF CLOSE-OUT NETTING

For the purposes of this legal opinion, netting and set-off (in the sense of *compensation*) shall have the same meaning unless expressly otherwise provided for.

1. Winding-up, Insolvency or Attachment

We refer to Schedule 2 for the general features of Luxembourg insolvency laws and relevant terminology.

(A) Opinion on effects of insolvency proceedings on the General Agreement and transactions arising under the General Agreement

(a) to (b) Enforceability under Luxembourg law of Early Termination rights openable as the result of an insolvency-based Material Reason (§10.5(c)) (whether by automatic or active termination)

We note that §10.3 and §10.4 (in conjunction with §10.5) of the General Agreement contain an active or optional early termination clause and an automatic early termination clause, respectively. The position under Luxembourg law will largely depend whether the Collateral Act 2005 applies or not.

Ratione materiae, the Collateral Act 2005 applies to claims (*créances*) and to financial instruments in the widest sense. Pursuant to the parliamentary works of the Luxembourg act dated 1 August 2001 on the transfer of title by way of security (Doc. Parl. N° 4696, page 7), financial instruments include "options, futures, FRA, swaps" and (pursuant to Article 1. 8)c) of the Collateral Act 2005) forward financial instruments *(instruments financiers à terme*). Article 1.8)e) of the Collateral Act 2005 covers expressly financial instruments relating to commodities and Article 1 19) of the Banking Act 1993, cross referring to Annex II section B of the Banking Act 1993, includes, in the definition of "financial instruments", options, futures, swaps, forwards and other derivatives contracts relating to emission allowances, commodities settled in cash or settled physically and emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/6C (Emission Trading Scheme)[8].

[8] Pursuant to Annex II, section B of the Banking Act 1993, "financial instruments" include, among others, the following:
[...]
(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowance or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;
(5) Options, futures, swaps, forwards and any other derivatives contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;
(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;
(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 4 of this section and not being for commercial purposes, which have the characteristics of other derivatives financial instruments;
[...]
(11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).

It follows that there are credible arguments in support of the proposition that (although this has, to our knowledge, not been tested in court yet and has not been addressed specifically by Luxembourg legal literature) where Commodity Forwards, Commodity Options or Commodity Swaps (each as referred to above) are entered into, the Collateral Act 2005 applies[9].

Finally, in respect of emission allowance transactions, pursuant to item (11) of Section B, Annex II of the Banking Act 1993, emission allowances (in this section, the term "emission allowance" includes the term "emission rights" falling under the scope of the Luxembourg act dated 23 December 2004 on, among others, emission trading scheme in respect of greenhouse gas, as amended (the **Emission Act 2004**) are recognized as financial instruments. It follows that, in light of the wide definition of financial instruments (by reference to the Banking Act 1993 – Annex II B.) as contemplated by the Collateral Act 2005, we are aware of no reason why, so far as Luxembourg law is concerned, the Collateral Act 2005 would not apply with respect to the General Agreement.

(1) Automatic termination

Article 19 of the Collateral Act 2005, which has implemented Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements, as amended, into Luxembourg law, states that termination clauses (*clauses de résolution* and *clauses de résiliation*) entered into with a view to set-off assets are valid and binding against third parties, administrators, insolvency receivers and liquidators or other similar organs and are effective:

- notwithstanding the commencement or continuation of a reorganisation measure or liquidation proceedings, irrespective of the time at which such clauses have been agreed upon or enforced; and
- notwithstanding any civil, criminal or judicial attachment or criminal confiscation as well as a purported assignment or other disposition of or in respect of such rights.

The termination of a contract made by reason of enforcement or conservatory measures or proceedings including one of the measures or procedures set out above, is deemed to have occurred before any such measures or proceedings apply.

The Collateral Act 2005 applies (and article 19 comes into play), irrespective of the status of the parties involved, each time where set-off between assets (that is, financial instruments and claims) is made with respect to transactions that are covered by bilateral or multilateral clauses between two or more parties.

It is important to note that certain safe harbour provisions of the Collateral Act 2005 do not apply to any restriction on the enforcement of financial collateral arrangements or any restriction on the effect of a security financial collateral arrangement, any close out netting or set-off provision that is imposed by Part I (title II, Chapter VI, VII and VIII) (resolutions tools, write-down of capital instruments and resolution powers) of the BRR Act 2015 and/or article 59-47 (exclusion of

[9] Where a Commodity would be sold under a simple sale and purchase contract (not qualifying as a Commodity Forward, a Commodity Option or a Commodity Swap) but as a Commodity Spot, the Collateral Act 2005 would, in our view, not apply and the qualification (J) in Part E. below would be relevant. This may include Commodity Spot Transactions where there tenor is short, that is, as short as the same day or as long as typically one or two days for instance, in that this would be akin to an outright sale and purchase contract in respect of a Commodity (with physical delivery). Please note that there is no definition per se of "spot transactions" under applicable Luxembourg law, so uncertainty on this point remains inevitable.

certain contractual clauses in the context of early intervention) in Part IV of the Banking Act 1993.

If the Collateral Act 2005 does not apply, the situation based on legal doctrine and case law would be as follows:

I. Under Luxembourg law, on the basis of Belgian legal doctrine and case law *(Van Ryn et Heenen, Principes de droit commercial, Tome IV, Bruylant, 1965, n° 2780),* bankruptcy, composition or moratorium do not automatically terminate contracts. The receiver may, in principle, elect either to perform or to refuse to perform contracts existing before the bankruptcy depending on whether it is in the interest of the bankrupt's estate and the general body of creditors.

However, Insolvency Proceedings do terminate both contracts concluded *intuitu personae* or *intuitu firmae* by the party declared bankrupt (or in composition or who filed a petition for moratorium) and contracts containing a clause providing expressly (by operation of law, *de plein droit*) for termination in the case of insolvency *(Van Ryn et Heenen, op. cit., n° 2780, 2781 et 2782; Cloquet, Les concordats et la faillite, Novelles, Droit commercial, Larcier, 1985, n° 670, 1463, 1470).*

By reference to prevailing Belgian legal doctrine, it is likely that even in the absence of contractual stipulations on close-out, the *intuitu personae* or *intuitu firmae* character of the General Agreement would, in principle, lead to the termination of the General Agreement upon the occurrence of Insolvency Proceedings.

II. Termination clauses which are designed to operate upon insolvency are, in principle, effective and, accordingly, do terminate all Transactions upon the occurrence of the relevant insolvency event. As a consequence, the insolvent party or (more likely) the receiver may not enforce the selective performance of contracts profitable to the insolvent party's estate and renounce to the performance of contracts which are not profitable to the insolvent party's estate.

This selective performance of contracts is commonly referred to as cherry-picking.

The risk of cherry-picking is limited by the "single agreement" concept. Provided that the validity thereof is not challenged (which must therefore not be artificial, *Cloquet, op. cit., n° 1544),* these provisions facilitate set-off *(Frédéric Peltier, Les problèmes juridiques posés par la compensation bilatérale d'opérations d'échange de devises ou de conditions d'intérêts à l'intérieur d'un contrat cadre, Banque & Droit N°12, Juillet-Août 1990, page 186).*

III. In principle, clauses providing for the termination of a contract upon the occurrence of specified events *(e.g.,* bankruptcy or other insolvency events) should (in the light of applicable Belgian legal doctrine and case law) be valid under Luxembourg law and effective notwithstanding the occurrence of bankruptcy or other insolvency proceedings *(De Page, Traité élémentaire de droit civil belge, Tome 2, n° 894).* If the termination clause expressly states that termination is automatic and that no prior notice *(mise en* *demeure)* or other formality is required, then the relevant contract is automatically terminated without notice of termination to the other party *(Alex Weill & François Terré, op. cit., n° 494 and 496, page 515 et seq.).*

IV. According to Luxembourg case law, the termination of a contract is binding upon the general body of creditors *(masse des créanciers)* in the event of bankruptcy, provided that (i) termination is based on an express (by operation of law) close-out clause *(clause résolutoire de plein droit),* (ii) the contract in respect of which there is a close-out clause cannot be challenged and (iii) termination is exercised by the creditor before the day of the bankruptcy judgment (no matter that it is exercised during the suspect period; *Cassation civ., 30 May 1968, Pas. XXI, page 75 et seq.*; *Michel Gregoire, Théorie générale du concours des créanciers en droit belge, Bruylant, 1992, page 242).*

The above principle according to which, in an insolvency scenario, a close-out clause must be exercised before the bankruptcy judgment is not applicable (by reference to Belgian legal doctrine) to the extent that where the close-out clause stipulates that the termination occurs *automatically* and *without notice* upon bankruptcy, there is no obligation to exercise it expressly before the occurrence of the bankruptcy *(Van Ommeslaghe, Examen de jurisprudence, Les obligations, R.C.J.B. 1986, n°126).* Automatic termination by way of an automatic termination clause is binding upon the general body of creditors and the bankrupt estate *(Michel Grégoire, op. cit., page 243).*

By way of conclusion, the provisions of the General Agreement automatically terminating all Transactions upon the occurrence of certain insolvency events with respect to the counterparty incorporated or organized in Luxembourg should be enforceable under the laws of Luxembourg.

We must however stress that there is no Luxembourg case law or legal doctrine on this specific point which might support directly this opinion. Luxembourg courts would presumably turn to Belgian case law and legal doctrine in order to render a decision should such a case arise.

(2) Active termination

The Collateral Act 2005 does not distinguish between active or optional early termination clauses and automatic early termination clauses. Consequently, we are aware of no reason why the active Early Termination rights (under §10.3 of the General Agreement) should not be enforceable.

As indicated in the above section, the Collateral Act 2005 applies (and article 19 comes into play), irrespective of the status of the parties involved, each time where set-off between assets (including financial instruments and cash) is made with respect to transactions that are covered by bilateral or multilateral clauses between two or more parties. The termination of a contract made by reason of enforcement or conservatory measures or proceedings including one of the measures or procedures set out in section (1) above, is deemed to have occurred before any such measures or proceedings apply. As such, automatic early termination clauses are not expressly required under Luxembourg law for the Parties to benefit from the protections afforded under the Collateral Act 2005.

With respect to the regime applicable in the case that the Collateral Act 2005 does not apply, please refer to section (1) above.

(c) Enforceability of close out netting and the calculation and payment of a Termination Amount under § 11 arising as the result of an insolvency.

We note that § 11 of the General Agreement is expressed to allow the Parties to terminate the General Agreement and to calculate the Termination Amount with a view to setting off the relevant obligations under the Individual Contracts payable between the Parties under the General Agreement.

Pursuant to the Collateral Act 2005 (articles 18 and 19):

(1) Set-off between assets (which term means financial instruments and all claims, including monetary claims) operated in the event of reorganisation measures, liquidation proceedings or any situation of competition between creditors, is valid and binding against third parties, administrators, insolvency receivers and liquidators or other similar organs, irrespective of the maturity date, the subject matter or the currency of the assets, provided that set-off is made in respect of transactions which are covered by bilateral or multilateral set-off provisions between two or more parties.

(2) Clauses establishing connexity between assets (as referred to above), termination clauses, indivisibility clauses, margin call and substitution clauses, close-out netting provisions, clauses relating to the terms of valuation and set-off and all other clauses stipulated in order to allow for set-off are valid and binding against third parties, administrators, insolvency receivers and liquidators or other similar organs and are effective:

- notwithstanding the commencement or continuation of a reorganisation measure or liquidation proceedings, irrespective of the time at which such clauses (including set-off clauses) have been agreed upon or enforced; and

- notwithstanding any civil, criminal or judicial attachment or criminal confiscation as well as a purported assignment or other disposition of or in respect of such rights.

(3) Set-off clauses agreed upon by the parties (in accordance with the Collateral Act 2005) are valid and binding against third parties, administrators, insolvency receivers, liquidators and other similar organs notwithstanding the existence of a reorganisation measure, liquidation proceedings or any situation of competition between creditors, Luxembourg or foreign. Set-off made by reason of enforcement or conservatory measures or proceedings including one of the measures or procedures set out above, is deemed to have occurred before any such measure or procedures.

(4) With the exception of Luxembourg law provisions on over-indebtedness (*surendettement*), Luxembourg law provisions relating to bankruptcy (as set out in book III, Title XVII of the Luxembourg civil code, Book I, Title VIII and Book III of the Luxembourg commercial code) and Luxembourg and foreign provisions relating to reorganisation measures, liquidation proceedings, other situations of competition between creditors or other measures set out above are not applicable to set-off clauses.

(5) Set-off clauses made on the date of opening of liquidation proceedings or the entry into effect of reorganisation measures but before the issue of a judgment declaring the opening of such proceedings or the coming into force of such measures are valid and binding against third parties, administrators, liquidators, insolvency receivers and similar organs. Similarly, where a set-off clause has been made on the date of opening of liquidation proceedings or the entry into force of reorganisation measures but after the opening of such proceedings or the entry into force of such measures, the set-off clause is valid and binding against third parties, administrators, insolvency receivers, liquidators and similar organs if the relevant party proves that it ignored the fact that such proceedings had been opened or that such measures had been taken or that it could not reasonably know it.

As has been seen, it is important to note that the Collateral Act 2005 applies, irrespective of the status of the Parties[10], each time where set-off between assets is made with respect to transactions that are covered by bilateral or multilateral clauses between two or more parties.

If the Collateral Act 2005 does not apply, the situation based on legal doctrine and case law would be the following:

Basic features

Under Luxembourg law, set-off is governed by article 1289 *et seq.* of the Luxembourg civil code.

I. Legal and judicial set-off *(compensation légale* and *compensation judiciaire)* can be exercised before the commencement of Insolvency Proceedings and even during the suspect period unless set-off is the result of an artifice, which would, for instance, be the case if the future bankrupt gave up the benefit of a term, so as to be able to set-off.

Contractual set-off *(compensation conventionnelle)* can be exercised during the suspect period provided that the agreement on the basis of which it is effected has been entered into before the suspect period *(Trib. Arr. Lux. 15 June 1966, Pas. XX, 212; Christiane Faltz et Jean-Jacques Rommes op. cit., page 1150 et seq.).*

II. After the commencement of Insolvency Proceedings, any set-off (whether legal, judicial or contractual) of claims is in principle forbidden and unenforceable. Being a way of payment, if it were possible, set-off would enable one creditor to be paid to the detriment of others, thereby conflicting with article 1298 of the Luxembourg civil code and the principle of equal treatment of creditors *(Van Ryn et Heenen, op. cit, n° 2682).* Consequently, claims which fall due on the day of the bankruptcy judgment and those falling due thereafter cannot be set-off, giving thus rise, to a certain extent, to cherry-picking by the receiver. Cherry-picking is however not possible, if the other party can oppose the *exceptio non adimpleti contractus* (which is comparable to the English concept of fundamental breach of contract).

As an exception to the above principle, set-off is allowed after bankruptcy if the relevant claims are linked by close connection (nexus, *connexité)* or arise out of the same contract *(e.g.,* current account) even if one of the claims arises after the bankruptcy judgment *(Trib. Arr. Lux. 1 April 1977, Pas. XXIII, 556).*

Specific features - Set-off after the commencement of Insolvency Proceedings

[10] Please however refer to the specific provisions applicable to credit institutions and certain other entities pursuant to the BRR Act 2015 (as discussed in Schedule 2).

Insolvency Proceedings commence at 0'clock (*i. e.*, the *zero hour principle*) of the day on which the court issues the bankruptcy judgment (save where the Collateral Act 2005 applies).

Principle: prohibition of *post* insolvency set-off

Luxembourg law does not allow set-off after the commencement of Insolvency Proceedings. The same prohibition applies also in judicial composition proceedings *(Van Ryn and Heenen, op. cit., n° 2949)*, in liquidation proceedings (*Van Ommeslaghe, La situation des créanciers d'une société en liquidation: une construction jurisprudentielle de la Cour de cassation de Belgique, Z.G.R., 1978, page 379)* and, probably, in moratorium proceedings.

Exception: post insolvency set-off is admitted in the case of close connection *(connexité étroite)*

Set-off is allowed after the commencement of Insolvency Proceedings provided the relevant claims are closely inter-related. The required inter-relationship between mutual claims is achieved provided the claims arise under the same contract or, if arising under different contracts, they are closely connected by means of, for instance, contractual (indivisibility) clauses, single account, *etc. (Van Ryn and Heenen, op. cit., n° 2682).*

We take the view that it is likely that the Transactions entered into under the General Agreement would be considered as sufficiently connected to allow set-off upon the occurrence of Insolvency Proceedings, provided such connection also exists in fact.

The requisite connection is supported by (i) the fact that the relevant transactions form part of a single course of business in the sense that although the transactions are separate, they are inter-related and form part of a global economical transaction which is covered by one master agreement *(Coppens &. T'Kint, Les faillites, les concordats et les privilèges, Revue Critique de Jurisprudence Belge, 1992, n° 109)* and the Single Agreement concept in the General Agreement *(Frédéric Peltier, op. cit., page 185; Christiane Faltz et Jean-Jacques Rommes, op. cit., page 1151).*

The General Agreement suggests that there should be a sufficiently strong connection between the relevant Transactions in order to allow *post* insolvency set-off. It is important that the relevant Transactions are documented under one master agreement *(Frédéric Peltier, op.cit., page 185; French Supreme Court, 17 May 1989, Dalloz Sommaires commentés, 1989, page 396* concerning set-off in the context of a master agreement putting emphasis on the contractual parties' will to set-off).

Consideration must however be given to Belgian legal doctrine which takes the view that it is debatable whether sufficient connection exists between, for instance, multiple swap transactions or, more debatable, whether such connection exists between different master agreements *(Diego Devos, Le "netting" en droit belge, Revue de la Banque, 3/1994, page 162 et seq.).*

(d) Do the close-out netting provisions in section §§ 10 to 11 of the General Agreement apply to all Individual Contracts? Do we need the Single Agreement concept in order to preserve the enforceability under Luxembourg law of Early Termination rights and the ability to close out net?

Under the Collateral Act 2005, it is not required, *per se*, to adopt the Single Agreement concept in order to preserve the enforceability of the Early Termination rights and the ability to close out net. If Early Termination is expressed to apply to one or more (but not all)

Individual Contracts (including Allowance Transactions in the sense of the 2018 Allowances Appendix) under the General Agreement, an express early termination and close-out netting provision must be agreed upon between the Parties and expressed specifically to cover those Individual Contracts.

To the extent that in practice, it might be difficult to document early termination provisions applying to some but not all of the Individual Contracts and to the extent that in severing or terminating Individual Contracts from the General Agreement, the Single Agreement concept is likely to be adversely affected, it is not necessarily recommended, in our view, to provide for the possibility to severe/terminate Individual Contracts from the General Agreement. The Single Agreement concept is useful to ensure an efficient termination and close-out netting of Individual Contracts.

The Single Agreement concept is important in the case that the Collateral Act 2005 does not apply. Please refer to our responses in (c) above in this regard.

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

The agreement of the Parties regarding the currency of any compensation claim constitutes a contractual arrangement and as such it will be upheld by the Luxembourg courts, subject to the qualification (I) in Part D. below.

(f) **Are the termination and close-out rights in insolvency dependent upon, or otherwise affected by, the status of one or more concerned parties falling within a particular category of classification or entity and do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorisation or regulatory legal status?**

The termination and close-out rights are, in principle, not dependent upon the status of the parties in an insolvency scenario. However, a certain number of regulated entities (credit institutions, investment firms and establishments managing funds for third parties) are subject to the relevant provisions (on resolution and insolvency proceedings including early intervention measures and resolution measures) of the Banking Act 1993 and the BRR Act 2015 as set out in section I.(2) (*Non-insolvency related Material Reasons*) of this legal opinion.

(B) **Opinion on whether or not the mere institution of proceedings seeking a judgment of insolvency prior to the opening of the proceedings has any implication on the Enforceability of Early Termination, close out netting and the calculation and payment of the Termination Amount (§§10.3 and 11):**

(a) **the filing of proceedings seeking a judgment of insolvency**

Pursuant to article 437 of the Luxembourg commercial code, a company is adjudicated bankrupt where the following conditions are met on the day of the adjudication by the court:

(i) the company has a commercial purpose or has adopted a commercial status (*société anonyme, société à responsabilité limitée*, etc.) as opposed to a civil status (*société civile*);

(ii) the company has ceased its payments and is unable to meet its commitments (*cessation des paiements*). A company is considered to have ceased its payments if it is no longer able to repay its debts as and when they fall due. In order to assess the situation, the company (or the competent court, as the case may be) will only take into consideration the debts of the company which are certain, liquid and due. In other words, any liability of the company *vis-à-vis* third parties which has not fallen due or for which there is a justifiable reason for challenging the liability or its amount should be disregarded for the purpose of this test. However, the non-payment of any single debt that is due would, strictly speaking, suffice for a company to be declared bankrupt; and

(iii) the company's credit is exhausted and the company has lost its creditworthiness (*ébranlement du crédit*). The company (or the court, as the case may be) needs also consider whether the company is still in a position to obtain fresh monies. Loss of creditworthiness is established by the fact that no creditor or other unrelated party is willing to grant any further credit to the company, whether in the form of a loan, a guarantee or the rescheduling of debts.

If a company is no longer able to pay its debts but may obtain further credit, it is not, strictly legally speaking, bankrupt. However, in practice, both tests (referred to in (ii) and (iii) above) are difficult to distinguish.

The bankruptcy of a company is adjudicated by the district court which presides over commercial matters in the district in which the company has its principal place of business in one of the following ways:

- *upon acknowledgement by the company*: the directors or (as applicable) the managers of a company which has ceased its payments and is unable to obtain new credit, must acknowledge the cessation of payments at the clerk's office at the commercial court within one (1) month from the cessation of payments; or

- *at the request of a creditor:* if the company fails to admit its bankruptcy, creditors may bring an action before the commercial court. However, the court does not automatically declare the company bankrupt as creditors frequently use such action as a means of pressure on the company to get payment of their claims. The court will assess in its sole discretion whether the conditions of bankruptcy (as set out above) have been met; or

- *by the court*: a company may also be declared bankrupt by the court on its own motion, where the court, by virtue of the knowledge and information gained in the course of actions brought against the company, considers that the conditions of bankruptcy are met.

The "filing" for the opening of proceedings (i.e. a filing by the company itself, by a creditor or at the initiative of the court) would in principle take place prior the day of adjudication by the court. On that basis, to the extent close-out netting arrangements have been made on or before the date of opening of liquidation proceedings or the entry into effect of reorganisation measures (but before the issue of a judgement declaring the opening of such proceedings or the coming into force of such measures), they are, according to the Collateral Act 2005, valid and binding against this parties.

(b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency

The main effects of a bankruptcy judgment are as follows:

(1) The bankruptcy judgment deprives the bankrupt company's directors or (as applicable) the managers of their powers regarding the administration, management and disposal of the assets of the company. As of the date of the commencement of the bankruptcy proceedings, no payments can, in principle, be made or received by the bankrupt company.

(2) The bankruptcy judgment is immediately enforceable notwithstanding any right of recourse. Any interested party who has not been party to the procedure may oppose the judgment within fifteen (15) days as of the date when the bankruptcy judgment has been published in the newspapers. The bankrupt company has eight (8) days to oppose the judgment if it was not party to the procedure. If the judgment after opposition confirms the bankruptcy adjudication, the second judgment may still be appealed. The bankrupt company or any person which has been party to the bankruptcy adjudication may appeal the judgment within fifteen (15) days as of its service of process or as of the publication of the judgement in the newspaper.

(3) The court appoints a supervising judge (*juge-commissaire*) to supervise the bankruptcy proceedings, and one or more insolvency receivers, depending on the anticipated complexity of the liquidation. The receiver, under the supervision of the supervising judge, represents the company in any proceedings and dealings with third parties. The receiver also represents the creditors collectively (*masse des créanciers*). It is the duty of the receiver to administer the liquidation of the bankrupt company's estate. In particular, the receiver draws up an inventory of the assets of the bankrupt company, pursues claims which the bankrupt company may have against its debtors and, having converted into cash all assets belonging to the bankrupt company and having determined all of the company's liabilities, allocates the proceeds of the sale between the creditors.

(c) the date on which a bankruptcy court determines a party first becomes insolvent

As has been seen, the court may fix the date on which the company has already ceased the payment of debts, on its own motion or at the request of any interested party. This date may not fall more than six (6) months (and for certain acts ten (10) days and six (6) months) prior to the date on which the court has declared bankrupt the company.

(d) any other stage of the proceedings where a creditor's rights may be affected

Apart from filing their claims with the clerk's office of the court, the creditors have only limited rights to intervene in the bankruptcy proceedings.

(1) The bankruptcy judgment provides for a period of time (usually not exceeding twenty (20) days) during which the creditors have to file their claims (together with evidence thereof) with the clerk's office of the commercial court. The clerk will forward the claims to the receiver. The judgment also schedules a court hearing where the claims are verified and may be challenged by the receivers (in the presence of the supervising judge) and a date for a hearing at which the challenged claims will be examined by the court. However, in practice, the above rules do not prevent the creditors from filing their claim at a later stage, as long as the bankruptcy proceedings are not closed. The receivers must publish excerpts from the judgment in newspapers specified by the court so that the creditors will be made aware that they may present their claims.

(2) Once a company has been declared bankrupt, creditors are no longer allowed to take any individual action against the bankrupt company. Any form of proceedings, whether a personal action or proceedings based on title to real property and all means of compulsory enforcement on movables or immovables may now only be taken, or exercised, against the receivers. The adjudication of bankruptcy stops every seizure or attachment made at the request of any unsecured creditors on movable assets or real estate. Bankruptcy removes third parties' rights to take enforcement action against the bankrupt's assets. If, prior to the bankruptcy judgement, a sale of seized movable assets or real estate through a public auction had been scheduled, the sale will take place for the account and benefit of the bankruptcy.

(3) As from the date of the adjudication of bankruptcy, no interest on any unsecured claim will accrue *vis-à-vis* the bankruptcy estate.

(4) If the receiver sells real estate, he may distribute the proceeds of the sale to those creditors with either mortgages or liens on this real estate. If the proceeds of the sale are not sufficient to reimburse secured creditors, these creditors will in principle be treated as unsecured creditors for the balance of their claims. Once all the assets in the bankruptcy have been converted into cash, the funds remaining after deduction of the costs and charges incurred by the administration of the bankruptcy will be distributed first to secured creditors in order of priority. Any balance remaining will then be distributed to unsecured creditors in proportion to their claims.

(C) Is there publicly available information that would confirm any of the procedural steps mentioned in paragraph (B) above under (a) through (d) or other solvency related facts (e.g., financial statements, corporate actions, etc.)?

- Financial statements and selected corporate documents of a Luxembourg company, which have been filed with the Luxembourg trade and companies register (*Registre de commerce et des sociétés,* Luxembourg) (the **Register**), are publicly available and may be requested in exchange for a fee on the Register's website[11].

- The Register may also be consulted to view any court orders affecting a Luxembourg company (including, but not limited to, the notice of a winding-up order or resolution, notice of the appointment of a receiver or similar officer). On request, the Register may issue a negative certificate (*certificat négatif*) (the **Certificate**) in respect of a Luxembourg company, stating that on the day immediately prior to the date of issuance of the negative certificate, there were no records at the Register of any court order regarding, among others, a (i) bankruptcy adjudication against the company, (ii) reprieve from payment (*sursis de paiement*), (iii) controlled management (*gestion contrôlée*) or (iv) composition with creditors (*concordat préventif de la faillite*).

- However, a search at the Register is not capable of conclusively revealing whether a (and the Certificate does not constitute conclusive evidence that no) winding-up resolution or petition, or an order adjudicating or declaring a, or a petition or filing for, bankruptcy or reprieve from payment (*sursis de paiement*), controlled management (*gestion contrôlée*), composition with creditors (*concordat préventif de la faillite*) or judicial liquidation (*liquidation judiciaire*) or similar action has been adopted or made. The corporate documents of, and relevant court orders affecting, a Luxembourg company (including, but not limited to, the notice of a winding-up order or resolution, notice of the appointment of a receiver or similar officer) may not be held at the Register immediately and there is generally a delay in the relevant document appearing

[11] https://www.rcsl.lu/mjrcs/displayConsultDocuments.do?removeList=true&isFromIndex=false&time=1285686127700

on the files regarding the company concerned. Furthermore, it cannot be ruled out that the required filing of documents has not occurred or that documents filed with the Register may have been mislaid or lost.

- In accordance with article 466 of the Luxembourg commercial code, an excerpt of the bankruptcy judgment together with an indication to the creditors where and until when to make their claims must be published by the insolvency receiver in the newspapers indicated to that effect by the bankruptcy court. In practice, this publication will be made in two local newspapers. As for controlled management, an excerpt of the judgment deciding to place a company under controlled management must be published in the Luxembourg official gazette by the appointed commissioners.

2. Non-insolvency related Material Reasons

(A) Provisions relating to termination and close-out netting operating upon the occurrence of a non-insolvency related event would be upheld by a Luxembourg court provided that they are legally valid, binding and enforceable under their governing law.

(a) Under Luxembourg law, clauses that grant to the debtor of an obligation the power to determine, in its sole and absolute discretion, if, and if so, under which conditions its obligation will be performed, may be declared void by a Luxembourg court (if competent) on the basis of articles 1170 and 1174 of the Luxembourg civil code (*condition purement potestative*, one-sided clause). The provisions of articles 1170 and 1174 of the Luxembourg civil code are generally considered to be a point of public policy under Luxembourg law. It is possible that a Luxembourg court (if competent) would consider these provisions to be a point of international public policy, that would set aside the relevant foreign governing law.

(b) We take the view that the termination for Non-insolvency related Material Reasons should be enforceable under Luxembourg law though a distinction should be made between administrative contracts and commercial contracts:

Administrative contracts

Under Luxembourg law, there is no concept of administrative contract as a special category of contract concluded by public authorities and governed by specific rules, which derogate from the rules applicable to private law contracts.

Contracts entered into by quasi-governmental entities are governed by the provisions of articles 1134 et *seq.* of the Luxembourg civil code setting out common contractual principles. In the event of termination for breach of contract, quasi-governmental entities have a contractual liability which is similar to that of private persons.

However, unlike private persons, quasi-governmental entities are not entirely free to enter into a contract. They must act in the general interest and are, therefore, obliged to abide by public law constraints, which do not exist for private entities. The most important constraints exist in the field of public procurement (*marchés publics*). But also in this field, any liability incurred for improper performance or breach of a public law contract will be subject to the common rules of contractual liability.

Commercial contracts

In respect of commercial contracts, which are contracts made between Parties, none of which is a quasi-governmental entity, the termination due to a breach of contract could be distinguished from termination which is not due to a violation of a contractual obligation.

(1) Termination for breach of contract

According to article 1184 of the Luxembourg civil code, contracts containing reciprocal obligations for the contracting parties and expressed to be (early) terminated upon the giving of notice in the event that a party does not meet its contractual obligations, are not automatically terminated upon the giving of the notice or on the date stated in the notice. Termination must be petitioned in front of a court. As an exception to this principle, and because it is generally held that article 1184 is not Luxembourg public policy, the contracting parties may set aside the intervention of the court required pursuant to article 1184 by inserting an express (by operation of law) termination clause or an optional termination clause in the contract.

(2) Termination for a reason other than a breach of contract

Article 1134 of the Luxembourg civil code sets out the general principle of contractual freedom, which is subject only to compliance with Luxembourg public policy. Pursuant to this principle, the parties may freely determine the circumstances (other than for reasons relating to a breach of contract and reasons not depending on the sole discretion of one of the Parties) under which (such as *force majeure* or cross default) an agreement is (automatically) or may be (upon the filing of a notice) terminated early.

We take the view that, under Luxembourg law, termination of the General Agreement for Cross Default and Acceleration or Force Majeure should be enforceable.

(B) In the context of non-insolvency related Material Reasons, is the insolvent counterparty's obligations to pay the amount of any compensation claim in Euro, USD, or GBP (as agreed between the parties in the Election Sheet) enforceable or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator receiver or third party?

Please see paragraph (C)(f) of Part C.I. above.

3. General description of limitations in Luxembourg, if any, applicable to set off of claims (both in Early Termination scenario and otherwise)

(a) between Parties (of claims arising outside the General Agreement if contractually provided for in an amendment to the General Agreement)[12]

Provided that the amendment to the General Agreement is legally valid, binding and enforceable under its governing law and provided that the relevant claims are covered by set-off provisions lawfully entered into between the Parties, we are aware of no reason why, so far as Luxembourg law is concerned, the Parties could not agree to provide for set-off of claims arising between them outside the General Agreement.

(b) between Affiliates or Credit Support Providers of Parties (if contractually provided for in an amendment to the General Agreement)

Article 18 of the Collateral Act 2005 expressly recognises, in addition to bilateral set-off provisions, multilateral set-off provisions between two or more parties. Consequently, where the General Agreement is expressly amended to that effect and caters for set-off of all the transactions in respect of which the Parties intended to set-off their obligations, we are aware of

[12] It should be noted that a general description of limitations in Luxembourg applicable to set-off of claims (both in Early Termination scenario and otherwise) between Parties of claims arising under the EFET General Agreement have been covered in Sections C.I.1 and C.I.2 above.

no reason why, so far as Luxembourg law is concerned, the Parties could not agree with their Affiliates or Credit Support Providers to set-off their obligations.

(c) by a quasi governmental entity

While the validity of close-out netting provisions do not give rise to a particular concern with respect to quasi-governmental entities, it is not certain whether, because of the principle of immunity of public law entities and the general prohibition of enforcement measures, the relevant provisions are enforceable against such entities. However, it would, in our view (though we express no definite opinion on this point), be possible to argue that close-out netting is a voluntary payment (accepted by the Parties) which does not constitute an enforcement measure and hence is not a forced payment.

(d) whether the laws of Luxembourg jurisdiction consider set-off and close-out netting as separate or similar rights.

Set-off is a payment mechanism, which is regulated by the Luxembourg civil code and which results in the total or partial merging (and, subsequently, extinction) of a claim of one person against the claim of another person.

Close-out netting is as such not a legally recognised concept by the Luxembourg civil code in that close-out netting is not considered as a pure set-off but rather as a contractual method to evaluate loss resulting from the early termination or cancellation of outstanding financial transactions and to provide for the payment of a termination amount (following the set-off of losses and gains). Netting is often used loosely as another term for set-off.

II. MULTIBRANCH PARTIES

Our discussion concerning Multibranch Parties concentrates on credit institutions[13].

1. Luxembourg Multibranch Party

(a) Provisions relating to Luxembourg branches of foreign headquarters are laid down in the Companies Act 1915, the relevant accounting laws and, in particular, so far as branches of foreign banks are concerned, the Banking Act 1993 and the BRR Act 2015 and a number of CSSF regulations, circulars and circular letters .

In order to protect third parties who intend to enter into agreements with a branch, information on the branch has to be disclosed and specific publications and filing requirements have to be fulfilled in Luxembourg (such as, among other things, the publication of the particulars of the branch, the filing of accounts, etc.).

Under the BRR Act 2015, a branch is defined by reference to the definition of branch under the CRR, as a place of business which forms a legally dependent part of an institution and which carries out directly all or some of the transactions inherent to the business of institutions.

Because a branch is not a separate legal entity (from the headquarters) and has no legal personality, it shall be regarded as an integral part of the headquarters even if it is located in a country other than the country of its headquarters. Hence, a debt arising in connection with a branch's activity is regarded as a debt of the headquarters and the branch's assets are part of the assets which may, in principle, be apprehended by the headquarters' creditors in the event of insolvency proceedings.

[13] Note that the BRR Act 2015 has extended the applicable provisions to investment firms and certain of their branches. The provisions discussed in this section also apply to undertakings managing third party funds.

Also, a branch's claim against a third party can be validly set-off against a debt of the headquarters against that third party.

According to Luxembourg company law, a company's headquarters may enter into a contract in its name and/or the name of its (and, as the case may be, through its) branches. Consequently, to the extent that a branch has no legal personality, the obligations of the branch are obligations of the headquarters and vice versa. It would follow that the enforceability of the close-out netting provisions of the General Agreement is not altered where the Party A has entered into the General Agreement on a multibranch basis. If Party A became insolvent, the liquidator will (from a Luxembourg law perspective) be bound by the terms of the General Agreement even as regards transactions which have been entered into by branches of the Party A.

We are therefore of the view that the conclusions reached in this legal opinion concerning the enforceability of close-out netting under the General Agreement are (and subject to the impact of applicable foreign local laws) not altered by the fact that the Luxembourg bank had entered into and conducted business under the General Agreement on a multibranch basis prior to its insolvency. We must however stress that there is no Luxembourg case law or legal literature on this specific point, which would directly support our view.

(b) In the absence of specific Luxembourg legal literature or case law on the question whether the General Agreement will be treated as a single agreement by the Luxembourg court regardless of the treatment of the General Agreement or the transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable, it is possible that a Luxembourg court would not take into consideration transactions relating to jurisdictions where the legal basis of close-out netting is disputed. While the Luxembourg court might, as the case may be, apply the laws of such jurisdiction, we however believe (although the matter cannot be free from doubt and we express no definitive view on this issue) that the possibility that a Luxembourg court would apply such foreign laws is rather unlikely.

(c) The Luxembourg receiver would, pursuant to the Luxembourg law principle of unity and universality of insolvency, attempt to gather in Luxembourg all the assets of the insolvent Luxembourg bank irrespective of the country in which such assets are actually located. We note that the practical efficacy of the above principle may depend upon the relevant foreign jurisdiction recognising the same principle of unity and universality of insolvency and the application and impact of Directive 2001/24/EC. If the relevant foreign jurisdiction were not to recognise the same principle of unity and universality of Directive 2001/24/EC, the receiver might be limited in its action if a secondary bankruptcy was opened in respect of a branch of the insolvent Luxembourg bank in the jurisdiction where that branch is located. It is possible that the insolvency official appointed in respect of that secondary bankruptcy would seek to isolate the relevant branch's assets for the benefit of local creditors of that branch. Such ring-fencing might adversely affect the General Agreement. We must however stress that there is no Luxembourg case law or legal literature on this specific point, which would support directly our view.

2. Foreign Multibranch Party

Luxembourg recognises the principle of unity and universality of insolvency. Under Luxembourg law, the courts having jurisdiction to hear insolvency matters are those of the principal place of business (*siège social réel*) of the bankrupt. Only one court is competent to decide a bankruptcy and the court's decision is effective beyond the jurisdiction in which it has been rendered. A foreign company (acting through a branch) may not be declared bankrupt by a Luxembourg court, unless the company's actual and effective principal place of business is in Luxembourg. Pursuant to this principle, a Luxembourg insolvency receiver may not divide the assets of the Luxembourg headquarters and its foreign branch between their respective creditors, but must collect all the assets and form a single pool of assets (*masse unique*).

2.1 Luxembourg branches of foreign banks

Luxembourg branches of foreign banks are governed by article 30 (for banks of EU Member States) and article 32 (for banks of non-EU Member States) of the Banking Act 1993.

Branches of banks from EU Member States, which are subject to the supervision of the home Member State authorities, may exercise their activities in Luxembourg under the European passport and the home Member State control principle. No licence or authorisation (*agrément*) is required from the Ministry of Finance. The CSSF's competence with regard to these branches is rather marginal to the extent that it is confined to the supervision of the branch's liquidity and the branch's compliance with applicable Luxembourg law.

Branches of banks from non-EU Member States must, prior to conducting their activities, obtain the license from the Ministry of Finance. These branches must establish separate accounts, dispose of their own financial assets (different from those of the headquarters) and have an ad hoc share capital (*capital de dotation*). They must also have an appropriate administrative infrastructure in Luxembourg and the persons in charge of their management must be of good repute and have a solid professional standing.

2.2 Effects on the Luxembourg branch of the headquarters' insolvency

(a) Pursuant to article 125 of the BRR Act 2015, reorganisation measures (*mesures d'assainissement*)[14] opened in respect of an institution in Country H (other than Luxembourg), which is an EU Member State H, may only be taken by the administrative and judicial authorities of Country H. Such reorganisation measures would, pursuant to the BRR Act 2015, be effective in Luxembourg in accordance with the legislation of Country H, without any further formality, even where Luxembourg law does not provide for such measures or makes their implementation subject to conditions. If the CSSF deems necessary to implement in Luxembourg reorganisation measures against the Luxembourg branch of an institution of Country H, it informs without delay the national competent authority of Country H.

Pursuant to article 126 of the BRR Act 2015, where Country H is not an EU Member State, the reorganisation measures taken by the administrative or judicial authorities of that State, in accordance with the laws of that State, would be effective in Luxembourg, without any further formality, in accordance with the legislation of that State. This principle applies even where Luxembourg law does not provide for such measures or makes their implementation subject to conditions. The reorganisation measures shall be effective in Luxembourg once they become effective in that State. Notwithstanding the above, the Luxembourg district court has the power to order, at the request of the CSSF, the implementation of suspension of payments measures. The CSSF is solely competent to request the Luxembourg district court to implement suspension of payments measures if the CSSF takes the view that this is necessary to preserve the interests of the creditors of the Luxembourg branch. The suspension of payments measures ordered by the Luxembourg district court would be governed by Luxembourg law and would be made in accordance with the procedures applicable in Luxembourg (unless otherwise provided for by the BRR Act 2015).

(b) Pursuant to article 135 of the BRR Act 2015, the administrative and judicial authorities of Country H, which are responsible for winding-up, are alone empowered to order the opening of winding-up proceedings concerning the Luxembourg branch. The Luxembourg branch would be wound-up in accordance with the laws, regulations and procedures applicable in Country H (unless otherwise

[14] The BRR Act 2015 defines reorganisation measures as measures whose purpose is to safeguard or restore the financial position of a credit institution or investment firm (as defined the CRR) which could affect the pre-existing rights of third parties, including measures which may lead to a suspension of payments, a suspension of execution measures or a reduction of claims. These measures include, where applicable, the application of the resolution tools and powers provided by the BRRD.

provided for by the BRR Act 2015). The decision to open winding-up proceedings taken by the administrative or judicial authority of Country H shall be recognised, without any further formality, in Luxembourg and shall be effective in Luxembourg once the decision becomes effective in Country H.

As a result of the recognition of the decision taken in Country H, the Luxembourg relevant authorities would defer to the proceedings in Country H so that the assets and liabilities (if any) of the Luxembourg branch of the credit institution of a EU Member State (**Bank F**) would be handled as part of the proceedings for Bank F in Country H. It would be the law of Country H that would determine, among others, the conditions under which set-off may be invoked, the effects of winding-up proceedings on current contracts to which Bank F or the Luxembourg branch is party, the rules governing the distribution of the proceeds of the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off, or the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Pursuant to article 136 of the BRR Act 2015, where Country H is not an EU Member State, the principle outlined above in respect of Luxembourg branches of credit institutions set up in EU Member States apply, *mutatis mutandis*, to Luxembourg branches of third country credit institutions, except that, according to article 136(2) of the BRR Act 2015, the Luxembourg district court has the power to order, at the request of the CSSF, the winding-up and liquidation of the Luxembourg branch of the third country credit institution. The CSSF is solely competent to request the Luxembourg district court to order the winding-up and liquidation if the CSSF takes the view that this is necessary to preserve the interests of the creditors of the Luxembourg branch. In that case, the Luxembourg branch is liquidated in accordance with Luxembourg law and procedures applicable in Luxembourg (unless otherwise provided for by the BRR Act 2015).

The assets (and liabilities) of the Luxembourg branch would be added to those of the headquarters to form a single pool of assets (*masse unique*). The insolvency of the headquarters will thus in principle comprise all the assets and liabilities of the Luxembourg branch (which will be handled as part of the proceeding for Bank F in Country H).

Separate proceedings (if any) against the Luxembourg branch could, in principle, be initiated exclusively at the request of the CSSF or the Luxembourg public prosecutor in the case that the Luxembourg branch would be considered as the principal place of business of Bank F (or, in addition to the presence of a Luxembourg branch, the principal place of business of the headquarters of Bank F would in fact be located in Luxembourg). In the case of a re-characterisation of the Luxembourg branch into headquarters of Bank F, the provisions of the BRR Act 2015 regarding winding up would apply.

(c) If, notwithstanding the principles set out above, there was a separate proceeding in Luxembourg with respect to the assets and liabilities of the Luxembourg branch (if any), article 141 of the BRR Act 2015 (which applies to legal set-off) states that the opening of winding-up proceedings (and the adoption of reorganisation measures) shall not affect the right of creditors to demand the set-off of their claims against the claims of the credit institutions, where such a set-off is permitted by the law applicable to that credit institutions' claim. This principle shall not preclude the actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors (unless the beneficiary of these acts provides proof that the act detrimental to the creditors as a whole is subject to the law of a Member State other than the home Member State and that the law does not allow any means of challenging that act in the case in point). Accordingly, to the extent that the claims arising under the General Agreement are governed by English or German law (and provided set-off is legally valid, binding and enforceable under English or German law), Luxembourg reorganisation measures or winding-up proceedings should not interfere with the effectiveness of netting under the General Agreement.

(d) Article 143 of the BRR Act 2015 (which applies to contractual set-off) provides that Netting Arrangements shall be governed solely by the law of the contract which governs such arrangements (without prejudice to the application of article 66 and 69 of the BRR Act 2015 (as further discussed above)). Accordingly, to the extent that the General Agreement (and we believe that the General Agreement would be a netting agreement for these purposes) is governed by English or German law (and provided that it is legally valid, binding and enforceable under such law), Luxembourg reorganisation measures or winding-up proceedings should not interfere with the effectiveness of netting under the General Agreement (subject to the application of articles 66 and 69 of the BRR Act 2015).

III. COLLATERAL

We have assumed, in accordance with the Instruction Letter, that, although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, (i) Party A would, at all times, be the Transferor (as such term is defined in the Credit Support Annex) under the Credit Support Annex and (ii) Party A is the legal owner of the Collateral (as defined below) and is duly authorised and empowered to transfer ownership in the Collateral.

We have also assumed that any collateral that may be transferred under the Credit Support Annex (the **Collateral**) will consist of either cash[15] or Letters of Credit (as such term is defined in the Credit Support Annex).

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

- We understand that the Credit Support Annex (§7.1) provides for a transfer of title to Collateral by way of security (*transfert de propriété à titre de garantie*) under the governing laws of the Credit Support Annex (that is, either German law or English law). §7.3 of the Credit Support Annex also specifies that the Credit Support Annex is not intended to create any form of security interest in any Collateral transferred pursuant to the Credit Support Annex.
- In light of Luxembourg conflict of laws rules, the Credit Support Annex does not create a form of security interest (that is, a right *in rem*), but provides for a full transfer of ownership of the asset concerned. It follows that the transfer of title of §7.1 of the Credit Support Annex is a matter which is within the sole scope of the governing law of the Credit Support Annex. Luxembourg law may however become relevant and applicable as the *lex concursus* in the event that Party A becomes subject to Insolvency Proceedings.

(b) Would the laws of Luxembourg characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred?

The Collateral Act 2005 recognises the validity and enforceability of outright transfers of title (*transferts de propriété à titre de garantie*). The Collateral Act 2005 applies to transfers of title by way of security (including by way of a fiduciary transfer) of assets (*avoirs*) (meaning financial instruments and claims)[16] (together, the **Collateral Act 2005 Assets**) in respect of which neither the transferor nor the transferee needs to be a finance professional (*professionnel de la finance*) (as defined in the Collateral Act 2005), except for fiduciary transfers where the fiduciary must be a finance professional.

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[15] It is further assumed that cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

[16] With respect to letters of credit, there are good arguments that these should be captured by the concept of "financial instruments" (which term is to be interpreted, according to the Collateral Act 2005, in the broadest sense possible). Cash claims would also be covered by the Collateral Act 2005.

The transfer of title of present or future assets from the transferor to the transferee made with a view to secure present or future obligations of the transferor or a third party *vis-à-vis* the transferee must provide for an undertaking by the transferee to retransfer the assets that have been transferred or assets of equivalent value in accordance with the parties' agreement, except in the case of total or partial default under the secured obligations. The transfer of title by way of security of assets, as well as the terms relating to the termination of the agreements covering the secured obligations, the terms of valuation (*modalités d'évaluation*) and set-off agreed upon by the parties are valid and binding against third parties, administrators (*commissaires*), insolvency receivers, liquidators and other similar organs notwithstanding the existence of a reorganisation measure, liquidation proceedings or the occurrence of any situation of competition between creditors, Luxembourg or foreign. So far as rights, title, interest and benefit (other than the Collateral Act 2005 Assets) are to be transferred by way of security, the safe harbour provisions of the Collateral Act 2005 do not apply.

It follows that we are aware of no reason why, so far as Luxembourg law is concerned, the provisions of the Credit Support Annex would not be recognised by a Luxembourg court (where competent) as a transfer of title by way of security. Any transfer of assets by way of security (including the provision of additional collateral or the substitution of collateral) in the Credit Support Annex and the set-off arrangements agreed upon by the parties to the General Agreement to that effect would be recognised in the event of Insolvency Proceedings affecting Party A.

Pursuant to Article 13 last paragraph of the Collateral Act 2005, credit institutions and investment firm must not, in connection with the provision of investment services, conclude a title transfer collateral arrangement with retail clients to guarantee the obligations of such clients.

Pursuant to Article 13-1 of the Collateral Act 2005 (and article 15 SFTR), investment firms and credit institutions must properly consider, and be able to demonstrate that they have done so, the use of title transfer collateral arrangements in the context of the relationship between a client's obligation to the firm and the client assets subject to title transfer collateral arrangements by the firm.

When considering, and documenting, the appropriateness of the use of title transfer collateral arrangements, investment firms and credit institutions shall take into account all of the following factors:

(a) whether there is only a very weak connection between the client's obligation to the firm and the use of title transfer collateral arrangements, including whether the likelihood of a clients' liability to the investment firm or credit institution is low or negligible;

(b) whether the amount of client funds or financial instruments subject to title transfer collateral arrangements far exceeds the client's obligation, or is even unlimited if the client has any obligation at all to the investment firm or credit institution; and

(c) whether all clients' financial instruments or funds are made subject to title transfer collateral arrangements, without consideration of what obligation each client has to the investment firm or credit institution.

Where using title transfer collateral arrangements, investment firms and credit institutions shall highlight to professional clients and eligible counterparties the risks involved and the effect of any title transfer collateral arrangement on the client's financial instruments and funds.

(b) cont'd **Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?**

- As mentioned above, the transfer of title of §7.1 of the Credit Support Annex is a matter which is within the sole scope of the governing law of the Credit Support Annex.

- Transfers of title by way of security being expressly recognised under the Collateral Act 2005 (and assuming that it is the parties' clear intention to transfer title rather than creating a security interest). We are aware of no reason why, so far as Luxembourg law is concerned, a Luxembourg court would (in the event of Insolvency Proceedings initiated in respect of Party A), re-characterise such transfer as creating a security interest (*sûreté*).

(c) **Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Luxembourg 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?**

Pursuant to article 14(2) of the Collateral Act 2005, the transfer of title by way of security of book-entry financial instruments takes effect, between the parties and shall be binding against third parties, either on the registration of these instruments in an account opened in the name of the assignee or an agreed upon third party acting for the benefit of the assignee or on their designation in the books of the custodian as being the property of the assignee in an account opened in the name of the assignor.

A transfer of title by way of security of non-book-entry financial instruments (including cash) is effective as between the parties concerned and is enforceable against third parties upon the agreement being made between the transferor and the transferee. Nevertheless, the debtor of an assigned debt validly pays off the assigned debt to the assignor as long as it did not have knowledge of the transfer of its debt to the assignee.

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

As mentioned above, the provisions of the Credit Support Annex would be recognised by a Luxembourg court (where competent) as a transfer of title by way of security. Any transfer of assets by way of security (including the provision of additional collateral or the substitution of collateral) would be recognised in the event of Insolvency Proceedings affecting Party A.

Furthermore, as far as the Collateral Act 2005 is concerned, the parties to the Credit Support Annex may contractually agree whether or not each individual substitution of Collateral (at the Luxembourg Counterparty's initiative) pursuant to §6 of the Credit Support Annex should require the counterparty's prior consent or not (this assumes that the parties have pre-agreed on the general framework for substitutions of Collateral, as laid down in §6 of the Credit Support Annex).

(e) **Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the General Agreement together with §11 of the Credit Support Annex. Assuming that § 11 of the General Agreement is valid and enforceable in Luxembourg 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 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 General Agreement as "other amounts payable"?

As mentioned above, the provisions of the Credit Support Annex would be recognised by a Luxembourg court (where competent) as a transfer of title by way of security. Any transfer of assets by way of security in the Credit Support Annex and the set-off arrangements agreed upon by the parties to the General Agreement to that effect would be recognised in the event of Insolvency Proceedings affecting Party A.

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

Please see paragraph (b) 2nd paragraph above.

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

To the extent that the Collateral consists of claims (including cash) and financial instruments (in the widest sense), the safe harbour provisions of the Collateral Act 2005 would apply. So far as rights, title, interest and benefit (other than the Collateral Act 2005 Assets) are to be transferred by way of security, the safe harbour provisions of the Collateral Act 2005 do not apply.

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

Please see paragraph (b) above. We are not aware of any specific additional requirements that would need to be observed from a Luxembourg law perspective.

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

We are not aware of any additional Luxembourg legal aspects to be considered in this context. We refer however to the relevant restrictions of the BRR Act 2015 which cover title transfer financial collateral arrangements (see in particular article 66 (exclusion of certain contractual clauses in the event of resolution) and article 68 (power to restrict the enforcement of security interest - though this article should not apply with respect to the Credit Support Annex) of the BRR Act 2015) and article 59-47 (exclusion of certain contractual clauses in the event of early intervention) of the Banking Act 1993.

IV. GENERAL ENFORCEABILITY

(a) Enforceability of the General Agreement

Subject to the assumptions and qualifications set out in this legal opinion, the General Agreement constitutes contractual arrangements of the Parties and as such it would be enforceable before Luxembourg courts in accordance with its express terms.

(i) Force Majeure (§ 7)

- Under Luxembourg law (article 1148 of the Luxembourg civil code), a party, which failed to satisfy its contractual obligations for reasons of force majeure, is completely exempted from its liability for damages. Traditionally, Luxembourg courts rule that an event constitutes an event of force majeure if the event:
  - is beyond the control of the affected party (*extériorité*);
  - could not have been reasonably foreseen (*imprévisibilité*); and
  - could not have been avoided or overcome (*irrésistibilité*).
- The above three criteria are applied cumulatively and must be analysed *in abstracto* (by reference to a normal person acting in similar circumstances). However, there is published Luxembourg case law which has decided that an event can constitute an event of *force majeure* while satisfying the criteria of unforeseeability and unavoidability only. Furthermore, drawing on French case law (to which Luxembourg courts tend to look) Luxembourg legal literature goes further and considers that the condition of unavoidability is key and should by itself suffice to constitute a *force majeure*.
- Pursuant to the principle of contractual freedom (embedded in article 1134 of the Luxembourg civil code) and in light of the general understanding that force majeure is not public order under Luxembourg law, the Parties may freely determine the scope of what they consider to be force majeure. The limit to this freedom is set by articles 1170 and 1174 of the Luxembourg civil code relating to one-sided clauses (*condition potestative*), which declare null and void clauses that are purely one-sided.

Subject to the above, we take the view that § 7 of the General Agreement should be enforceable in Luxembourg courts.

(ii) Are there relevant principles of law in Luxembourg which might expand a Party's rights to claim and be excused by force majeure or a similar legal concept (e.g. commercial impracticability, impossibility, etc.)? If so, please discuss.

Under Luxembourg law, the principle of exception of non-performance (*exception d'inexécution*) enables a party to stop performing its contractual obligations in the case that its counterparty fails to fulfil its own contractual obligations.

As regards the notion of impossibility, when at the time of entry into a contract, the performance thereof is impossible, Luxembourg law would consider that the contract is void. However, this requires that the performance is impossible for any third party and not only for the non-performing party.

As regards the concept of frustration (or its civil law equivalent of the "*théorie de l'imprévision*"), according to which, where it is commercially impracticable or impossible to continue the performance of a contract and where certain conditions are met, parties may have an obligation to renegotiate a contract, is recognized under Luxembourg law. However and to our best knowledge, it has not been applied by a Luxembourg court to discharge a party from its obligations or to terminate or amend a frustrated contract.

(iii) cont'd Remedies for Failure to Deliver and Accept (§ 8)

In the case of failure to deliver or to accept electricity in accordance with the terms of the General Agreement:

- the debtor of the delivery or, as the case may be, the acceptance could be held liable to pay damages, either because of its failure to perform its obligations under the agreements or because of the delay in the execution of the obligations under the agreements, whenever it cannot justify that the failure of delivery or, as the case may be, acceptance has been a result of a *force majeure* event, which cannot be attributed to it and in spite of the fact that there was no bad faith on its part;
- the amount of damages payable by the relevant debtor would be determined by a court in order to compensate the other party, and would, in principle, be equivalent to the suffered loss of the other party; and
- no specific performance can be granted against the debtor for failing to deliver/accept electricity.

Subject to the above, we take the view that § 8 of the General Agreement should be enforceable in a Luxembourg court.

(iv) Limitation of Liability in Luxembourg (§ 12)

- General Enforceability of Exclusion of Liability (§ 12.2)

Pursuant to article 1134 of the Luxembourg civil code (which sets forth the general Luxembourg law principle of contractual freedom), the Parties may include clauses in the General Agreement whereby they limit or exclude their liability for damages caused by them (the **Exclusion Clauses**). Exclusion Clauses are also recognised by Luxembourg courts[17/18].

Exclusion Clauses are subject to strict interpretation and must be drafted carefully so as to precisely cover the liability which it is intended to exclude.

Furthermore, Luxembourg courts have limited the effectiveness of the Exclusion Clauses by excluding their application to damages caused by gross negligence (*faute lourde*) or wilful misconduct (*faute dolosive*)[19]. Similarly, damages caused by a criminal offence (*faute pénale*)[20] may not be covered by Exclusion Clauses.

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[17] Court of Appeal 13 December 1984 (Pas. XXVI, 238), Court of Appeal 9 February 1994 (Pas. XXIX, 315); Court of Appeal 16 March 2005, N° 27915 court's role; Court of Appeal 28 June 2007, N° 31373 court's role; District Court 13 January 2009, N° 10/09 XI; District Court 25 October 2011, N° 232/11 VIII.

[18] Court of Appeal 13 December 1984 (Pas. XXVI, 238); Court of Appeal 9 February 1994 (Pas. XXIX, 315); Court of Appeal 16 March 2005, N° 27915 court's role.

[19] Court of Appeal 13 December 1984 (Pas. XXVI, 238), Court of Appeal 8 February 2006 (Pas. XXXIII, 197); District Court 10 October 2007, N° 203/07 XVII.

[20] Ph. Le Tourneau et L. Cadiet, Droit de la responsabilité, Dalloz 1996, n°522, p. 154.

Exclusion Clauses may, in principle, cover all types of damages, even physical injuries (including death). It is only in the relation between professionals and consumers that Exclusion Clauses for physical injuries are not valid.

Exclusion Clauses may also cover latent defects (*vices cachés*) in contracts for sale of goods between professionals, provided that the seller of the goods is of good faith[21].

However, Exclusion Clauses cannot be devised in a manner so as to empty a contract of its substance. They may not concern the core obligation (*obligation essentielle*) of a contract. Exclusion Clauses that would violate this limitation would be set aside by Luxembourg courts[22].

Subject to the above, we take the view that §12.2 of the General Agreement should be enforceable in a Luxembourg court.

- Enforceability of Limitation of Consequential Damages and similar types of liabilities (§ 12.3, § 12.4)

Under Luxembourg law, in order to indemnify a party for a damage incurred on a contractual basis, the damage must be lawful (*licite*), certain (*certain*), direct (*direct*), personal (*personnel*) and foreseeable (*prévisible*).

A damage is lawful if the aggrieved party is not itself in an unlawful situation and if a lawfully protected interest has been harmed[23].

A damage is certain when it has occurred or, if it has not yet occurred, it is expected that it will occur with a reasonable degree of certainty[24].

The damage is direct in that it may only include what is the immediate and direct consequence of the violation of a contractual obligation[25]. In other words, the loss must result from the alleged breach of contract.

The damage is personal in that only the person who has suffered a prejudice has legal standing to claim a remedy.

Finally, the damage is foreseeable if at the time of entering into the contract, the parties have identified the possibility of a prejudice[26].

In relation to consequential damage (*dommage par ricochet*), the position is that if such damage meets the above requirement of directness, a claim based on consequential damage is admissible[27].

Subject to the above, we take the view that § 12.3 and § 12.4 of the General Agreement should be enforceable in a Luxembourg court.

- Enforceability of Duty to Mitigate (§ 12.5)

[21] District Court 24 April 1991, N° 283/91.
[22] District Court 21 March 2003, N°77/2003.
[23] Court of Appeal 26 January 2005, N°26919.
[24] Luxembourg Supreme Court 16 March 2000, N°15/00.
[25] Court of Appeal 16 October 2013, N°38718; Article 1151 of the Luxembourg civil code.
[26] Article 1150 of the Luxembourg civil code; Court of Appeal 6 June 1984, n°374.
[27] District Court 30 November 2011 N°291/11.

Under Luxembourg law, it is possible, under certain circumstances, for a party against whom a claim is made, to limit (though not to exclude) its liability on the basis that the aggrieved party has contributed to the damage which has arisen. The aggrieved party may be seen as having contributed to the damage either where there is a causal link between the acts which have given rise to the damage and the damage or where the aggrieved party has accepted the risks inherent to the act.

Luxembourg courts recognise the principle that a claimant is under a duty to mitigate the risks[28]; this means the claimant must take all reasonable steps to minimise his loss and he must refrain from taking unreasonable steps that might increase his loss.

Subject to the above, we take the view that § 12.5 of the General Agreement should be enforceable in a Luxembourg court.

(b) We are not aware of any additional Luxembourg legal aspects to be considered in this context.

V. CONFIRMATION PRACTICES

1. Binding individual contract

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

Luxembourg law does in principle not require contracts to be made in writing in order to be valid. According to article 109 of the Luxembourg commercial code, any means of evidence are acceptable in respect of commercial agreements.

In specific areas (such as, the granting of a mortgage over real estate, the creation of a financial collateral arrangement, certain fiduciary agreements), the agreement between the parties must be recorded in writing to be binding upon the parties.

It follows that oral agreements are, in principle, enforceable under Luxembourg law (though, for practical reasons, it may be difficult to evidence the content of an oral agreement).

In addition, article 1341 of the Luxembourg civil code provides that a contract shall be evidenced by a (private or notarised) deed if the value of the contract exceeds the amount of two thousand five hundred euros (EUR2,500). This requirement does not apply to contracts made between merchants (*commerçants*) where the content of an agreement can be evidenced, unless otherwise provided for by law, by any means[29].

(b) At what point in time does an Individual Contract agreed upon orally and later confirmed in writing become legally enforceable?

Under Luxembourg law, and unless otherwise provided for, a contract becomes legally enforceable as from the moment of exchange of the parties' consents. Consents would be validly exchanged and the contract would become legally enforceable in the case that, following an offer made by a party, the other party sends its acceptance in respect thereof or confirms orally the acceptance of the offer to the offeror.

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[28] Court of Appeal 26 February 1997 (Pas. XXX, 207); Court of Appeal 12 November 2008, N°32328.

[29] For the purposes of this opinion, we have assumed that both Parties are merchants (in respect of whom consumer protection provisions do not apply) that enter in the General Agreement in the course of their usual business activity. It is important to note that recording of natural persons is subject to the prior information of that person pursuant to the Data Protection Act 2002.

Where an Individual Contract has been agreed upon orally and is confirmed in writing at a later stage, such Individual Contract became legally enforceable at the time of the oral agreement among the Parties.

(c) **Does failure to object to incorrect terms in a received Confirmation (as provided for in § 3.3) constitute "acceptance" of those terms? If so, is there a relevant time period per the laws of Luxembourg that could potentially override the governing law of the General Agreement, and permit the parties to object?**

Under Luxembourg law, as a matter of principle, the silence kept by one party in respect of the terms of a contract may not be regarded as an implicit acceptance of those terms. However, deviations to this principle have been established by Luxembourg case law and legal literature. Silence may be treated as an implicit acceptance for instance in a situation where the parties are bound by a long standing contractual relationship or where the contract in question is of a type that has been used by the parties in the past or where it is customary, within a specific sector of activity, that the silence may be treated as implicit acceptance or where between the parties the offer is made in the sole interest of the offeree.

Under Luxembourg law, there is no relevant time period within which a party must object. This time period will normally be assessed in light of the parties' intentions and the market practice in the relevant sector.

It might be helpful though to clarify (by reference to business days or hours) the terms "promptly" and "without delay" (used in § 3.3 of the General Agreement) to the extent that these terms are key in the determination of the relevant period of time.

As mentioned in paragraph (y) above, under Luxembourg law, and unless otherwise provided for, an agreement between two parties becomes enforceable as from the moment of exchange of the parties' consents. On that basis, if there has been oral agreement prior to the signing of a confirmation, then under Luxembourg law one can say that such agreement became legally enforceable at the time of the oral agreement.

(d) **Is the reference to the relevant 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?**

Master agreements are designed to standardise the terms on which individually featured transactions will be entered into by the contracting parties. This is done by setting out in the master agreement all the provisions which it is envisaged to make applicable to such individual transactions with the documentation for a particular transaction needing only to set out the commercial terms and to apply or dis-apply provisions of the master agreement, as appropriate.

Essentially, a master agreement can be described as an agreement under which the parties agree upon the general terms and conditions that will govern individual contracts that will be entered into by the parties in the future and in respect of which the terms and conditions of the master agreement will apply.

We are consequently aware of no reason why, so far as Luxembourg law is concerned, Individual Contracts could not be validly entered into and incorporate by reference the terms and conditions of the General Agreement.

For consistency reasons and for reasons of evidence, it is important that the General Agreement is entered into prior to the entry into by the Parties of Individual Contracts and that the Parties are able, in the case of a verbal agreement, to prove that the terms and conditions of the General Agreement were intended to apply to Individual Contracts.

2. Means of Evidence

Assuming there is a dispute with respect to the existence or the terms and 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 Luxembourg:

(a) Taped Recording

In line with principles set out in paragraph C.V.1.(y) above, we are of the view that a taped verbal agreement is sufficient to record the entry into an Individual Contract. For evidence purposes, however it is recommended to confirm in writing the verbal agreement. Article 1341 of the Luxembourg civil code requires a (private or notarised) deed in order to prove contractual commitments exceeding the value of two thousand five hundred euros (EUR2,500) (unless the contract is between merchants, as discussed in paragraph C.V.1.(y) above).

(b) Witness Statement

In commercial matters, evidence of any kind is admissible, including oral testimony submitted to a court in the form of a written witness statement. In order to be valid, a witness statement has to comply with the requirements set out in article 402 of the NCPC.

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

As already stated, it is not required to have a written document in order to form a legally binding agreement. Electronic documents qualify as private deeds under Luxembourg law if these documents have been signed electronically within the meaning of the Luxembourg act on e-Commerce of 14 August 2000, as amended (which implements Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures and amends several provisions of the Luxembourg civil code).

Pursuant to articles 1322-1 and 1322-2 of the Luxembourg civil code, an electronic signature consists of an assembly of data linked to a document in an indivisible way guaranteeing its integrity and satisfying the necessity to identify the author of the signature as well as his/her consent to adhere to the content of the document. Under Luxembourg law, electronic signatures are deemed to have the same probative value as handwritten signatures provided that they are based on a qualified certificate and are created through a secured creation device that remains under the signatory's exclusive control.

We assume that confirmations of Transactions made by electronic means will take the form of either an exchange of (standard) e-mails or an electronic exchange of data.

Although notifications via e-mail may qualify as private deeds if signed electronically, normal e-mail systems do in practice not satisfy the requirements laid down for electronic signatures to the extent that they do not authenticate the sender nor guarantee the integrity of the communication's content.

Electronic mail notifications that fail to fulfil the requirements for electronic signatures will not automatically be recognised as conclusive evidence by a judge. However, some probative value may be given to such electronic communications as they may be considered as *prima facie* evidence (*commencement de preuve par écrit*) of the existence and conditions of the Transactions.

To strengthen the probative nature of confirmations made via e-mail or other electronic communication means, it is recommended to provide for a statement in the General Agreement whereby the Parties expressly agree to accept exchanges and confirmations made between the Parties through electronic means. To that end, it could be specified in the General Agreement that the Parties have the right to use e-mail and other elements of electronic communications in order to prove any facts in relation to the General Agreement or Individual Contracts and that the Parties shall refrain from challenging the validity or the probative nature of such communications.

(d) Facsimile

As previously stated, commercial contracts can be evidenced by any means.

A written contract may thus be proved by a facsimile or by any other means of modern telecommunications if Luxembourg courts consider such document or communication means to constitute sufficient evidence of its contents.

Are there any local requirements or other considerations that are relevant to each form of evidence?

Under Luxembourg law, telephone recordings are subject to laws relating to privacy and to data protection:

(1) Privacy

The act dated 11 August 1982 on the protection of privacy (the **Privacy Act 1982**) provides for criminal sanctions in the case of recordings of private conversations where such recordings have not been previously authorised by the concerned persons themselves.

It is generally admitted that the required consent can be evidenced by the fact that the concerned persons continue the conservation after an automatic message mentioning the existence and purpose of the recording has been played. In the case of a dispute, it is thus crucial that the party who carries out the recordings is able to evidence that such message is played automatically for all incoming and outgoing recorded calls.

Where the concerned persons are employees, however, the Luxembourg Data Protection Authority (*Commission nationale pour la protection des données, the* ***CNPD***) generally considers that the consent given by an employee to his/her employer is not freely given (due to the subordination link with the employer) and thus not valid.

(2) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data (the **GDPR**), the act dated 30 May 2005 on personal data protection in the electronic communications sector, as amended (the **Electronic Communications Act 2005**) and (in relation to the surveillance of employees) the Luxembourg labour code provide for restrictions to the recording of telephone conversations.

GDPR

The GDPR applies to the processing of personal data (i.e. data by which individuals may be directly or indirectly identified, the **Data Subject**) carried out by a data controller (that is, the party which has determined the purposes and means of the processing of personal data by, for example, deciding to record telephone conversations) who:

- is established in Luxembourg, regardless of whether the processing takes place in Luxembourg or not; or
- is not established in the European Union, but where the processing activities are related to:
    - the offering of goods or services to Data Subject in the European Union; or
    - the monitoring of the behaviour of Data Subjects, as far as their behaviour takes place within the European Union.

Under the GDPR, personal data may only be processed if the processing thereof is lawful and legitimate. The processing is legitimate to the extent that it falls under one of the conditions listed in Article 6 of the GDPR (e.g. processing is necessary for compliance with a legal obligation, processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, the data subject has given consent to the processing, etc.).

Electronic Communications Act 2005

The Electronic Communications Act 2005 prohibits, as a matter of principle, recordings made without the prior consent of the users concerned by the recordings.

By way of exception, however, the Electronic Communications Act 2005 allows telephone recordings to take place in the course of lawful business practice where necessary to evidence the existence and content of a commercial transaction or of any other commercial communication. In that case, the users concerned must be informed prior to the recording about the recording, its purposes and the duration of its storage.

CNPD

The Luxembourg Data Protection Authority requires that employers who carry out telephone recordings make available, in all departments of the company concerned by phone recordings, a telephone line which is not recorded. This allows employees and external correspondents to have private/personal telephone conversations.

VI. CORE PROVISIONS

(a) Would any of the selections contemplated by the General Agreement or any of the Agreements other than the General Agreement (such elections being set out in the Election Sheet, as defined in the General Agreement) change the substance of the conclusions set out in the Executive Summary in Part C?

The elections set out in the Election Sheet should, in principle, not materially alter the conclusions reached in Part C of this legal opinion provided that the elections set out in the Election Sheet do not have an impact, either directly or indirectly, on the core provisions referred to in the section below.

(b) Please identify any provisions of the General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in Part C of your opinion (each such provision a "Core Provision" and, together, the "Core Provisions"). For example, EFET member companies believe that the following provisions could be regarded as Core Provision:

§§ 1.1, § 10.3 (a), the second sentence of § 10.3(d), 10.5(c)(iv), § 11, and the related definitions contained in Annex 1 to the General Agreement.

Pursuant to article 1108 of the Luxembourg civil code, a contract is valid and binding, if:

- the parties to the contract express their consent to be bound by the contract;
- the parties have the capacity to enter into the contract;
- the contract has a subject matter which is determined at the time of entering into the contract or which may be determined in the future; and
- the contract has a lawful cause.

For sale and purchase agreements, the asset to be sold and the price to be paid must be determined or capable of being ascertained.

On that basis, all those provisions of the General Agreement which relate to the subject matter of the General Agreement may be regarded as core provisions. These include in particular §§ 1.1, 3, 4, 5, 6, 7, 10, 13, and 23.1.

(c) **Would the inclusion of the General Agreement in the Cross-Product Payment Netting Agreement, the Master Netting Agreement or in the EFET CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of the conclusions set out in the Executive Summary in Part C?**

No, as long as set-off is expressed to apply between assets relating to transactions that are covered by bilateral and multilateral clauses between two or more parties.

(ii) **Are there any other provisions of the General Agreement that, given a choice of Luxembourg law, either**

- **need to be revised in order to be enforceable in Luxembourg; or**
- **the legal efficacy of which could be materially improved upon or optimized with different wording (given such provision's apparent intent)? Please provide suggested revisions.**

(1) To address the potential risk that a dispute arises between the Parties on the basis of a discrepancy between the written or the taped oral agreement and the Confirmation, a specific provision could be inserted in § 3.2. of the General Agreement along the following lines:

"*The Parties have the power to use telephone recordings, e-mail communications, facsimile transmissions or other electronic means in order to prove any agreement, confirmation or fact in relation to any Individual Contract and the General Agreement.*

The Parties agree not to dispute or otherwise challenge the use and probative nature of the above means. Unless otherwise duly established and proven, such means shall be acceptable and enforceable between the Parties as if they were documented in writing."

(2) In relation to § 10.5.(c)(iv) of the General Agreement, the Collateral Act 2005 provides that a set-off clause that has been entered into on the date of opening of the Insolvency Proceedings but after the rendering of the court's insolvency order is enforceable provided the relevant Party ignored the existence of the insolvency court order or could not reasonably

know it. As a result, it would be recommendable to reduce the period during which the relevant petition may be withdrawn, dismissed, discharged, stayed or restrained to a minimum to ensure the efficiency of the above legal protection.

VII. GOVERNING LAW, ARBITRATION AND JURISDICTION

We assume that the General Agreement and the Individual Contracts are governed by the laws of a jurisdiction other than Luxembourg (including English or German law).

(a) Choice of law

As a matter of principle, and in accordance with article 3 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the **Rome Regulation**), Luxembourg law recognises the right for the parties to a contract to freely choose the governing law of the contract provided (i) the contract is an international contract (that is, a contract which has international elements vis-à-vis the Luxembourg jurisdiction giving rise to the application of foreign laws), (ii) the selection is not intended to avoid the application of mandatory provisions of Luxembourg law (such as provisions in relation to consumer contracts) which would have otherwise been applicable to the contract and (iii) the foreign law is not incompatible with Luxembourg international public policy.

Given that the parties to the General Agreement will have supposedly their registered office in two different jurisdictions, we are aware of no reason why the Parties to the General Agreement would be prevented from selecting German law or English law as the governing law of the General Agreement.

The Luxembourg courts might not apply German law or English law if these choices were not made *bona fide* and/or:

- if German or English law was not pleaded and proved; or
- if pleaded and proved, German law or English law would be contrary to the mandatory provisions (*lois impératives*) or overriding mandatory provisions (*lois de police*) of Luxembourg law or manifestly incompatible with Luxembourg public policy; or
- to the extent that relevant contractual obligations or matters fall outside of the scope of Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations; or
- if all other elements relevant to the situation are located in a country other than Germany or the United Kingdom (as applicable), in which case the Luxembourg courts may apply the applicable mandatory provisions of such country; or
- where contractual obligations are to be or have been performed in another country where such performance is prohibited by overriding mandatory provisions; or
- if a party is subject to insolvency proceedings, in which case the Luxembourg courts would apply the law of the jurisdiction where such insolvency proceedings have been duly opened (*lex concursus*) to the effects of such insolvency proceedings without prejudice to the exceptions provided for in the European Insolvency Regulation.

(b) Choice of jurisdiction; arbitration

- We note it is contemplated that the General Agreement be subject to the jurisdiction of either German or English arbitration proceedings or to the courts of either Germany or England and Wales

- Luxembourg law recognises the right for the parties to a contract to submit to arbitration those rights which are at their free disposal. According to article 1225 of the NCPC, matters relating to a person's personal status and capacity, marital relationships, divorce and separation cannot be made subject to arbitration. All other civil and commercial rights or obligations, which may be regulated by contract, can be submitted to arbitration. However, in respect of certain contracts, which are subject to specific legislation (such as employment contracts, insurance contracts, consumer contracts), arbitration clauses are not valid.

- Under the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the **Recast Brussels Regulation 1215/2012**), the Parties may lawfully choose a court of a Member State to have jurisdiction to settle any disputes provided such choice is properly documented in accordance with article 25 of the Recast Brussels Regulation 1215/2012. Under the Recast Brussels Regulation 1215/2012, a final and conclusive judgment obtained in a court of a Member State would be recognised and enforced in the other Member States without re-examination of the merits of the case subject to and in accordance with the Recast Brussels Regulation 1215/2012, provided that the judgment in question qualifies as a judgment (as defined therein), or, as the case may be, subject to and in accordance with the Council Regulation 805/2004 of 21 April 2004 creating a European enforcement order for uncontested claims, provided that the judgment in question has been certified as a European Enforcement Order (as referred to therein).

  However, the recognition of a judgement shall be refused:

  - if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed;

  - where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

  - if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

  - if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

  - if the judgment conflicts with (i) Sections 3, 4 or 5 of Chapter II of the Recast Brussels Regulation 1215/2012 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or (ii) Section 6 of Chapter II of the Recast Brussels Regulation 1215/2012.

VIII. REGULATORY REGIME

(a) Are there any exchange control laws or license requirements that may affect the enforceability of the relevant EFET General Agreement or of the Individual Contracts?

(a) There are no specific Luxembourg exchange control or currency limitation regulations, nor any central bank approval requirements in Luxembourg, that would adversely affect the enforceability of the General Agreement or the Individual Contracts.

(b) For information[30], the Luxembourg act dated 1 August 2007 relating to the organisation of the electricity market, as amended (the **Electricity Act 2007**) organises the generation, transmission, distribution and supply of electricity in Luxembourg. According to article 46 of the Electricity Act 2007, the supply of electricity (which includes the resale of electricity and would hence encompass the trading in this sector) by any physical or legal person in Luxembourg is subject to prior licence requirements. The relevant license has to be requested with the Minister of Economy and may be made by any physical or legal person established within an EU Member State or the European Economic Area.

(c) Since 28 December 2011, Regulation (EU) 1227/2011 on wholesale energy market integrity and transparency (**REMIT**) has introduced a new pan-European market abuse regime for energy companies and new reporting and disclosure requirements. Article 4(1) of REMIT requires markets participants in wholesale energy markets (including electricity) to (i) publicly disclose, in an effective and timely manner, inside information (as defined in article 2(1) of REMIT) and (ii) notify the agency for the cooperation of energy regulators (**ACER**) and the relevant national regulatory authority in case of delayed publication of inside information. Market participants (as defined in REMIT) will have to register with the national regulatory authority after which they will be required to report transactions. The implementation measures (to be adopted by the European Commission) set out in REMIT are pending.

Under REMIT, transactions in wholesale energy products (including derivatives) will be subject to reporting obligations. To that end, on 3 April 2015, the CSSF announced that market participants (including those who are subject to the CSSF's prudential supervision) who enter into transactions, which are subject to the reporting obligation and who are established in Luxembourg, must register with the *Institut Luxembourgeois de Régulation* (**ILR**) in accordance with article 9 of REMIT.

(d) Energy spot transactions are not financial instruments under MiFID II and are therefore not within the scope of EMIR. Energy derivatives are, however, covered by EMIR[31].

The purpose of EMIR is to introduce new requirements to financial counterparties (**FCs**)[32] and non-financial counterparties (**NFCs**)[33] that are established in the EU and that enter into derivative transactions with a view to improve transparency and to reduce the risks associated with derivatives markets, EMIR also applies indirectly to non-EU counterparties (for example, when trading with FCs or NFCs).

All FCs and NFCs above a certain clearing threshold (also known as NFC+s) have to clear all OTC derivative contracts with a central counterparty (**CCP**) authorised or recognised under EMIR pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation by the European Commission. Contracts not cleared by a CCP are subject to operational risk management requirements and bilateral collateral requirements.

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[30] Please note that we do not express any view with regard to licensing requirements applicable to entities trading Commodities or Commodity derivatives or to position limits and position reporting (within the meaning of MiFID II)

[31] Please see footnote 9.

[32] Article 2(8) of EMIR defines 'financial counterparty' as an investment firm authorised in accordance with MiFID II, a credit institution authorised in accordance with Directive 2013/36/EU, an insurance undertaking authorised in accordance with Directive 73/239/EEC, an assurance undertaking authorised in accordance with Directive 2009/138/EC, a reinsurance undertaking authorised in accordance with Directive 2009/138/EC, a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC, an institution for occupational retirement provision within the meaning of article 6(a) of Directive 2003/41/EC and an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU.

[33] NFCs are broadly defined as all undertakings other than CCPs (as defined below) and FCs.

EMIR establishes common organisational conduct of business and prudential standards for CCPs as well as organisational and conduct of business standards for trade repositories. EMIR also requires all FCs and NFCs (including those below the clearing threshold) to report details of their derivative contracts, whether traded OTC or not, to a trade repository.

According to article 12(3) of EMIR, an infringement of the clearing, the reporting or the risk mitigation rules under EMIR shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract. An infringement of these rules shall not give rise to any right to compensation from a party to an OTC derivative contract.

IX. OTHER PROVISIONS

We are not aware of any additional Luxembourg legal aspects to be considered in this context.

D. GENERAL LUXEMBOURG LAW FEATURES

(a) The parties have the freedom to select the governing law in respect of a contract. This may however not lead to the avoidance of mandatory or overriding mandatory provisions (or public order and policy provisions) of national law of the country with which the contractual performance is most closely connected. Mandatory provisions of national law will typically include matters such as, for instance, taxation, consumer protection legislation, requirements in respect of the transfer and pledge of securities and, particularly, bankruptcy law.

(b) A penalty clause and similar clauses on damages or liquidated damages, as governed by article 1152 and article 1226 *et seq.* of the Luxembourg civil code, are allowed to the extent that they provide for a reasonable level of damages. The court has however the right to reduce (or increase) the amount thereof if it is unreasonably high (or low). In relation to the Agreements, we have assumed that the level of damages provided for, stands in accordance with general market practice and could therefore, in principle, be considered as reasonable. As a result, the risk that the relevant clause of the Agreements would be construed as an excessive penalty clause would be rather low. Under Luxembourg law, a penalty clause provides for a maximum and final amount to be paid by the defaulting party. In other words, the non-defaulting party could, in principle, not claim more than the amount referred to in the penalty clause. The discussion relating to the penalty clause would only affect the amounts that would ultimately have to be paid. The provisions of article 1152 and articles 1226 *et seq.* of the Luxembourg civil code are generally considered to be a point of public policy under Luxembourg law. It is possible that a Luxembourg court would hold them to be a point of international public policy that would set aside the relevant foreign governing law.

(c) Interest may not accrue on interest that is due on principal, unless such interest has been due for at least one year (article 1154 of the Luxembourg civil code). The right to compound interest is limited to cases where (i) the interest has been due for at least one year and (ii) the parties have specifically provided in an agreement (to be made after that interest has become due for at least one year) that such interest may be compounded (or in the absence of such an agreement, the creditor may file an appropriate request with the relevant court). The provisions of article 1154 of the Luxembourg civil code are generally considered to be a point of public policy under Luxembourg law. It is possible that a Luxembourg court would consider these provisions to be a matter of international public policy that would set aside the relevant foreign governing law.

(d) Belgian and French legal literature (to which Luxembourg courts tend to turn, in the absence of Luxembourg legal literature) have discussed the issue whether derivative transactions taking the form of a credit default product could be re-characterized as insurance contracts. To our knowledge, there is no Luxembourg published case law and only little legal literature as to whether derivatives taking the form of a credit default product constitute contracts of insurance. Although the matter cannot be free from doubt, there are, in our view, arguments in support of the proposition (although we do not express a definitive opinion) that derivatives taking the form of a credit default product would not be considered as contracts of insurance by a Luxembourg court (if competent) because derivatives taking the form of a credit default product are, *a priori*, not a form of contract of insurance as governed by the Insurance Act 2015. What is analogous between a derivative taking the form of a credit default product and a contract of insurance is the existence of a risk (independent from the parties' will), the realization of which triggers payment in favour of the protection buyer or the insured person and the obligation to pay a premium to the protection seller or the insurer to obtain protection or coverage. What differentiates a derivative taking the form of a credit default product from a contract of insurance is that (i) in the case of a credit default product, the seller is obliged to pay the protection buyer on the occurrence of the credit event irrespective of whether the protection buyer has suffered a loss or not, whereas insurance products give rise to payment, in principle, only if the policyholder has suffered a loss (article 50 of the Insurance Act 2015), (ii) in the case of an insurance contract, the policyholder must have an economic interest that the secured risk is not realised whereas the derivative counterparty of the credit default product may have an interest in having the secured risk realised (iii) pursuant to the Insurance Act 2015, an insurance company is subrogated in the rights of the policyholder (*subrogation légale*) for its claims against the person responsible for the loss suffered by it and (iv) the writing of insurance contracts must be invariably based on actuarial techniques of risk mutualisation, (that is, it implies the covering of a series of identical or similar risks). Thus, provided the relevant contract is not expressed to cover the risk of loss and provided that the Transaction (as documented under its proper law) is not considered (and cannot be construed or treated) as a contract of insurance pursuant to the law by which it is governed, we believe that derivatives taking the form of a credit default product should not be considered as contracts of insurance. However, there may be circumstances where the character of the specific financial instruments or interests and obligations of the parties are such that a Transaction would be considered as an insurance contract under Luxembourg insurance law.

(e) According to legal literature, forward contracts (*marchés à terme*) are synallagmatic (the parties enter into mutual commitments, each binding itself to the other) and onerous contracts (one party gives or promises something as a consideration for the commitment of the other party) and contain an aleatory element (*contrat aléatoire*). The term "forward contracts" is used in this Memorandum with a broad meaning and includes option and swap agreements and typical derivative transactions. Luxembourg courts traditionally held (by reference to article 1965 of the Luxembourg civil code) that forward contracts were wagering and gaming contracts, thereby jeopardizing the legal enforceability thereof. Article 1965 grants an exception to the debtor to a wagering and gaming contract and precludes the creditor from enforcing the claim. Even where the law selected by the parties to apply to forward contracts is the law of another jurisdiction (say the laws of the State of New York or English law) which may recognise the legal validity of such contracts, the rules prohibiting wagering and gaming are likely to be considered as mandatory provisions of Luxembourg law applying to the contract notwithstanding the foreign law selected by the parties. The above concern is tempered by more recent case law and legislative changes. On the one hand, pursuant to a decision rendered by the Luxembourg court of appeal, forward contracts are valid and enforceable unless they are entered into with the sole view to hide a wagering and gaming purpose. On the other hand, article 63 of the MiFID II Act 2018[34] expressly states that article 1965 of the Luxembourg civil code does not apply to forward contracts. It

[34] The Luxembourg act dated 30 May 2018 concerning markets in financial instruments.

grants protection to forward contracts (in the largest sense) concluded on a regulated market, an MTF or an OTF or to forward contracts to which at least one of the parties is a credit institution, a professional in the financial sector, an undertaking for collective investment, a management company of an investment fund, a pension fund, an insurance or reinsurance undertaking, a commercial or industrial enterprise benefiting from a professional access to the financial markets or an international public body active in the financial markets. It follows that there are credible arguments to the effect that article 1965 of the Luxembourg civil code does not endanger the enforceability of forward contracts (and, in general, derivative transactions) under Luxembourg law.

(f) The registration of the Agreements with the *Administration de l'enregistrement des domaines et de la TVA* in Luxembourg will be required where the Agreements are physically attached (*annexé*) to a public deed or to any other document subject to mandatory registration, in which case either a nominal registration duty or an ad valorem duty (of, for instance, 0.24 (zero point twenty four) per cent. of the amount of the payment obligation mentioned in the document so registered) will be payable depending on the nature of the document to be registered. These registration duties will equally be payable in the case of voluntary registration of the Agreements.

(g) In the case of legal proceedings being brought before a Luxembourg court or production of the Agreements before an official Luxembourg authority, such Luxembourg court or official authority may require that the Agreements and/or any judgment obtained in a foreign court must be translated into French or German.

(h) Clauses that grant to the debtor of an obligation the power to determine, in its absolute discretion, if, and if so, under which conditions its obligation will be performed may be declared void by a Luxembourg court (if competent) on the basis of articles 1170 and 1174 of the Luxembourg Civil Code (*condition purement potestative*, one-sided clause). It is possible that a Luxembourg court would hold articles 1170 and 1174 of the Luxembourg civil code to be a point of international public policy that would set aside the relevant foreign governing law.

(i) Unless otherwise provided for or unless the contrary results from the factual circumstances, a power of attorney or agency or mandate (*mandat*), whether or not irrevocable, will terminate by force of law, and without notice, upon the occurrence of insolvency events affecting the principal or the agent. A power of attorney or agency or mandate might become ineffective upon the principal entering into controlled management (*gestion contrôlée*) or reprieve from payment (*sursis de paiement*).

E. QUALIFICATIONS

This legal opinion is subject to the following qualifications:

(A) If Party A is a commercial entity, the validity, legality, effectiveness, performance and enforceability of the Agreements and the Individual Contracts are subject to, and may be affected or limited by, the provisions of any applicable bankruptcy (*faillite*), insolvency, liquidation, reprieve from payment (*sursis de paiement*), controlled management (*gestion contrôlée*), composition with creditors (*concordat préventif de la faillite*), reorganisation proceedings or similar Luxembourg or foreign law proceedings or regimes affecting the rights of creditors generally.

(B) Any certificate or determination which would by contract be deemed to be conclusive may not be upheld by the Luxembourg courts.

(C) Certain obligations may not be the subject of specific performance pursuant to court orders, but may result in damages only. Accordingly, Luxembourg courts may issue an award of damages where specific performance is deemed impracticable or an award of damages is determined adequate.

(D) Where any obligations are to be performed or observed or are based upon a matter arising in a jurisdiction outside Luxembourg, they may not be enforceable under Luxembourg law if and to the extent that such performance or observance would be unlawful, unenforceable, or contrary to public policy under the laws of such jurisdiction. Notwithstanding a foreign jurisdiction clause or an arbitration clause, Luxembourg courts would, in principle, have jurisdiction to order provisional measures in connection with assets or persons located in Luxembourg and such measures would most likely be governed by Luxembourg law.

(E) No opinion is expressed as to the validity and enforceability of provisions whereby interest on overdue amounts or other payment obligations shall continue to accrue or subsist after judgment. Any indemnity provision entitling one party to recover its legal and other enforcement costs and expenses from another party may be limited in terms of items or amounts as a Luxembourg court (if competent) deems appropriate.

(F) Monetary judgments may be expressed in a foreign currency and/or its euro equivalent at the time of payment, and any loss incurred as a result of currency exchange fluctuations can be recovered under Luxembourg law. However, any obligation to pay a sum of money in any currency other than the euro will be enforceable in Luxembourg in terms of the euro only.

(G) Claims may become barred under statutory limitation period rules and may be subject to defences of set-off or counter-claims.

(H) As used in this legal opinion, the term enforceable means that the relevant rights and obligations assumed by the Parties pursuant to the Agreements and the Individual Contracts (or any document in connection therewith) are of a type which the Luxembourg courts do normally enforce. It does not mean that these obligations will necessarily be enforced in all circumstances in accordance with their respective terms.

In particular:

- as stated above, the validity, performance and enforceability may be limited by Luxembourg laws affecting creditors' rights generally, as well as mandatory provisions of Luxembourg law or principles of Luxembourg international public policy, from time to time in force; and
- the enforcement of the Agreements and the Individual Contracts (or any document in connection therewith) and the rights and obligations of the parties thereto will be subject to the general principles of Luxembourg law and no opinion is given herein as to the availability of any specific performance remedy, other than monetary damages, for the enforcement of any obligation of the Agreements and the Individual Contracts (or any document in connection therewith) and this legal opinion should not be taken to imply that a Luxembourg court will necessarily grant any remedy, in particular, orders for specific performance and injunctions will not be available.

(I) The question as to whether or not any provisions of the Agreements and the Individual Contracts which may be invalid on account of illegality may be severed from the other provisions thereof in order to save those other provisions would be determined by the Luxembourg courts in their discretion.

(J) If the Collateral Act 2005 was not to apply, set-off must be examined under Luxembourg civil law and bankruptcy law. After the commencement of Insolvency Proceedings, any set-off is in principle forbidden and unenforceable. As an exception to that principle, set-off is allowed after the commencement of Insolvency Proceedings provided that the claims to be set-off are linked by close connection (*connexité*). Close connection between claims is achieved if the claims arise under the same contract (such as a current account relationship) or, if arising under different contracts, they are closely connected by means of, for instance, contractual indivisibility clauses or single agreement provisions. Mere contractual connection is not sufficient to ensure the enforceability of set-off. The required close connection must also exist in fact. It is generally held that the requirement of close connection is satisfied where transactions are documented under one master agreement (as is, in principle, the case under the General Agreement). The issue of post insolvency set-off is also subject to the provisions of article 6 of the European Insolvency Regulation according to which there is a right of set-off if set-off is available under the governing law of the relevant claims even where such set-off is not available under Luxembourg law. If the Collateral Act 2005 does not apply, it is recommendable to select automatic early termination in order to avoid cherry-picking by the Luxembourg insolvency receiver.

(K) So far as publicly owned or quasi-governmental entities are concerned, the opinions set out in this legal opinion may be affected by the impossibility for these entities to be declared bankrupt as a consequence of the general principle of continuity of public service, their limited capacity as a consequence of the principle of speciality of public law entities, the specific transparency requirements in respect of, among other things, public procurement provisions and the uncertainty in relation to the enforceability of set-off against such entities.

(L) Early termination and close-out netting provisions as well as provisions relating to the calculation and payment of the Termination Amount are valid and binding against third parties, administrators, insolvency receivers and liquidators or other similar organs in Insolvency Proceedings.

However, a transaction could be challenged on the basis of an *actio pauliana* (pursuant to article 1167 of the Luxembourg civil code). Such action allows a creditor to challenge an agreement between his debtor and a third party which was made with the fraudulent intent to violate the rights of creditors. For article 1167 to apply, the following conditions need to be satisfied:

- the creditor's claim against the debtor must precede the agreement between the debtor and the third party;
- the debtor must have had a fraudulent intent (or, in other words, must have acted with the knowledge to cause a prejudice to its creditors);
- the relevant third party must have shared this intent; and
- the creditor must suffer a prejudice.

To challenge a transaction on the basis of an *actio pauliana*, the creditors (who has the onus of proof) must establish that the contracting party knew that the challenged transaction would harm the creditor's rights.

Furthermore, criminal sanctions may apply in the case where a debtor organises fraudulently its own insolvency or where there is an abuse of corporate assets.

This legal opinion is as of this date and we undertake no obligation to update it or advise of changes hereafter occurring. We express no opinion as to any matters other than those expressly set forth herein, and no opinion is, or may be, implied or inferred herefrom. We express no opinion on any economic, financial or statistical information (including formulas determining payments to be made) contained in the General Agreement or the Individual Contracts.

This legal opinion is given on the express basis, accepted by each person who is entitled to rely on it, that this legal opinion and all rights, obligations or liability in relation to it are governed by, and shall be construed in accordance with, Luxembourg law and that any action or claim in relation to it can be brought exclusively before the courts of Luxembourg. Luxembourg legal concepts are expressed in English terms and not in their original French or German terms. The concepts concerned may not be identical to the concepts described by the same English terms as they exist under the laws of other jurisdictions. It should be noted that there are always irreconcilable differences between languages making it impossible to guarantee a totally accurate translation or interpretation. In particular, there are always some legal concepts which exist in one jurisdiction and not in another, and in those cases it is bound to be difficult to provide a completely satisfactory translation or interpretation because the vocabulary is missing from the language. We accept no responsibility for omissions or inaccuracies to the extent that they are attributable to such factors.

Any Addressee of this legal opinion who is entitled to, and does, rely on this legal opinion agrees, by so relying, that, to the fullest extent permitted by law and regulation (and except in the case of wilful misconduct or fraud) there is no assumption of personal duty of care by, and such person will not bring any claim against, any individual who is a partner of, member of, employee of or consultant to Allen & Overy, *société en commandite simple*, Allen & Overy LLP or any other member of the group of Allen & Overy undertakings and that such person will instead confine any claim to Allen & Overy, *société en commandite simple*, Allen & Overy LLP or any other member of the group of Allen & Overy undertakings (and for this purpose "claim" means (save only where law and regulation applies otherwise) any claim, whether in contract, tort (including negligence), for breach of statutory duty, or otherwise).

Yours faithfully,

Allen & Overy
Henri Wagner*
Partner
Avocat à la Cour

* This document is signed on behalf of Allen & Overy, a *société en commandite simple*, registered on list V of the Luxembourg bar. The individual signing this document is a qualified lawyer representing this entity.

SCHEDULE 1

1. the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published on 21 September 2007) (**Appendix 1**);

2. the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published on 20 December 2000) (**Appendix 2**);

3. the EFET Credit Support Annex to the General Agreement (Version 2.0, published in May 2010) (**Appendix 3**);

4. the EFET Allowances Appendix (Power) to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published on 3 April 2012) (**Appendix 4**);

5. the EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 28, 2018) (**Appendix 5**);

6. the EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005) (**Appendix 6**);

7. the EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published on 20 December 2000) (**Appendix 7**);

8. the GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published on 20 December 2000 and Version 2.1(a), published on 21 September 2007) (Version 1.0, published on 11 September 2009) (**Appendix 8**);

9. the EFET EECS Certificates Master Agreement (Version 1.0, published on 14 December 2013) (**Appendix 9**);

10. the EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published on 14 December 2013) (**Appendix 10**);

11. the Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published on 16 December 2013) (**Appendix 11**);

12. the Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published on 1 October 2015) (**Appendix 12**):

13. the EFET Electronic Confirmation Agreement (published on 28 June 2005) (**Appendix 13**);

14. the Confirmations of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) (Version 2.0, published on 3 April 2012) and Fixed Price, Second Compliance Period (Phase 2) (Version 2.0, published on 3 April 2012)), each to the Allowances Appendix to the EFET General Agreement (**Appendix 14**),

15. the EFET Cross Product Payment Netting Agreement (Version 1, published on 20 October 2005) (**Appendix 15**);

16. the EFET Master Netting Agreement (Version 1.0, published in June 2010) (**Appendix 16**);

17. the EFET CPMA Cross-Product Master Agreement by The Bond Market Association (TBMA)[35] (Version 1.0, published on 16 February 2000) (**Appendix 17**);

18. the EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published on 23 June 2003) (**Appendix 18**); and

19. the EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published on 1 February 2011) (**Appendix 19**).

[35] In 2006 The Bond Market Association (TBMA) and the Securities Industry Association (SIA) merged to form the new Securities Industry and Financial Markets Association (SIFMA).

SCHEDULE 2

GENERAL FEATURES OF LUXEMBOURG INSOLVENCY LAWS AND RELEVANT TERMINOLOGY

1. GENERAL PROVISIONS

The main provisions governing the bankruptcy, survival of insolvent commercial companies or generally insolvency laws and proceedings, to which Party A would be subject in Luxembourg, are the following:

(i) the book III of the Luxembourg commercial code (*Code de commerce*) concerning bankruptcy (*faillite*);

(ii) the Luxembourg act dated 14 April 1886, as amended, concerning composition proceedings designed to avoid bankruptcy (*concordat préventif de la faillite*);

(iii) articles 508 to 527 of the Luxembourg commercial code concerning composition proceedings (*concordat après faillite*, which is an arrangement between the bankrupt, its creditors and the court aimed mainly at enabling the bankrupt to pay its debts in instalments);

(iv) the grand ducal decree dated 24 May 1935 concerning controlled management (*gestion contrôlée*), as amended;

(v) the grand ducal decree dated 4 October 1934 concerning reprieve from payment (*sursis de paiement*);

(vi) articles 1100-1 to 1100-15 of the Luxembourg act dated 10 August 1915 on commercial companies, as amended (the **Companies Act 1915**) concerning voluntary liquidation of commercial companies and article 1865 of the Luxembourg civil code;

(vii) article 1200-1 of the Companies Act 1915 concerning judicial (compulsory) liquidation of commercial companies;

(viii) article 142 paragraph 3 and articles 143 to 167 of the Luxembourg act dated 17 December 2010 relating to undertakings for collective investment (**UCIs**), as amended (the **UCI Act 2010**), as may be amended from time to time, concerning the reprieve from payment regime applicable to, and the liquidation of, UCIs subject to the UCI Act 2010;

(ix) articles 46 to 51 of the Luxembourg act dated 13 February 2007 relating to specialised investment funds, as amended (the **SIF Act 2007**), concerning the reprieve from payment regime applicable to, and the forced liquidation of, UCIs subject to the SIF Act 2007;

(x) Part II, Title 2, sub-title V of the Luxembourg act dated 7 December 2015 relating to the insurance sector, as amended (the **Insurance Act 2015**); and

(xi) (A) Part IV of the Luxembourg act dated 5 April 1993 concerning the financial sector, as amended (the **Banking Act 1993**) concerning, among others, recovery plans, intra-group financial support and early supervisory intervention, (B) Part I (articles 1 to 119 (inclusive)) of the Luxembourg act dated 18 December 2015 concerning, among others, the recovery, resolution and liquidation of credit institutions and certain investment firms (the **BRR Act 2015**) amending, among others, the Banking Act 1993, and which sets forth the framework for resolution of the relevant entities covered by that Part of the BRR Act 2015 and (C) Part II (articles 120 to 152 (inclusive)) of the BRR Act 2015 on the reorganisation measures and liquidation of the entities covered by that Part of the BRR Act 2015.

The above laws and proceedings are called **Insolvency Laws** and **Insolvency Proceedings**, as applicable. They correspond broadly to the terms of § 10.5(c) of the General Agreement.

Insolvency situations are governed by a set of rules which have been elaborated by courts and legal literature around the cardinal principle of *pari passu* ranking of creditors. Under applicable Luxembourg law, it is possible for a company to be insolvent without necessarily being bankrupt. If a company fails to meet the two cumulative tests of bankruptcy, namely the cessation of payments (*cessation de paiement*) and the loss of creditworthiness (*ébranlement de crédit*), it is not bankrupt. The judgment declaring the bankruptcy, or a subsequent judgment issued by the court, usually specifies a period not to exceed six (6) months before the day of the judgment declaring the bankruptcy. During this period, which is commonly referred to as the suspect period (*période suspecte*), the debtor is deemed to have been already unable to pay its debts generally and to obtain further credit from its creditors or third parties. Payments made, as well as certain other transactions concluded or performed, during the suspect period, and, as for specific payments and transactions, during an additional period of ten (10) days before the commencement of such period, are subject to cancellation by the Luxembourg court further to proceedings opened at the initiative of the Luxembourg insolvency receiver (*curateur*).

In particular,

(i) article 445 of the Luxembourg commercial code sets out that specific transactions entered into during the suspect period and an additional period of ten (10) days preceding the suspect period fixed by the court (e.g. the granting of a security interest for antecedent debts; the payment of debts which have not fallen due, whether payment is made in cash or by way of assignment, sale, set-off or by any other means; the payment of debts which have fallen due by any other means than in cash or by bill of exchange; transactions without consideration or for materially inadequate consideration) must be set aside or declared void, as the case may be, if so requested by the insolvency receiver;

(ii) article 446 of the Luxembourg commercial code states that payments made for matured debts as well as other transactions concluded for consideration during the suspect period are subject to cancellation by the court further to proceedings opened at the initiative of the insolvency receiver if they were concluded with the knowledge of the bankrupt's cessation of payments; and

(iii) regardless of the suspect period, article 448 of the Luxembourg commercial code and article 1167 of the Luxembourg civil code (*actio pauliana*) give the creditor the right to challenge any fraudulent payments and transactions made prior to the bankruptcy, without limitation of time.

Insolvency Proceedings have, among others, the following effects:

(i) bankruptcy judgments do not result in automatic termination of contracts, except for *intuitu personae* contracts, which are contracts for which the identity of the counterparty or its solvency are crucial. Contracts, therefore, continue to exist in full force unless the insolvency receiver chooses to terminate certain contracts. The insolvency receiver examines, on a case-by-case basis, whether to pursue or terminate a contract. Where it is in the interest of the bankruptcy estate, the receiver may, for instance, maintain a lease or an insurance policy, or pursue commercial operations. Termination by reason of insolvency may also be effectively provided for in an agreement; and

(ii) upon the declaration of bankruptcy of a company, unsecured creditors and the creditors with a general priority right (*privilège général*) are no longer permitted to take any action based on title to movables and immovables, nor any enforcement action against the bankrupt company's movable or immovable assets. Actions may only be exercised against the insolvency receiver.

The above does not apply in the following cases:

- creditors may, notwithstanding the bankruptcy of a company, initiate proceedings against the co-debtors of the company;
- secured creditors may enforce their rights after the bankruptcy adjudication; and
- creditors of new debts, contracted by the insolvency receiver in view of continuing the business of the bankrupt pursuant to an order of the court or in performing the contracts entered into by the bankrupt company, or in making use of the real estate or the movables of the bankrupt (*dettes de la masse*), may initiate proceedings to have their rights recognised and enforced.

The provisions of the European Insolvency Regulation (as discussed in paragraph (3) below) apply with regard to the recognition and enforcement of a foreign judgment issued by a Member State of the European Union (other than Denmark) in relation to insolvency proceedings opened against an entity covered by the European Insolvency Regulation. A foreign judgment establishing a bankruptcy originated abroad and to which the European Insolvency Regulation does not apply, is effective in Luxembourg, pursuant to the principle of universality and unity of bankruptcy and does not need, subject to Luxembourg public policy rules[36] to be declared enforceable. Where enforcement (*actes d'exécution*) of a foreign bankruptcy judgment is sought in Luxembourg, the judgment is subject to the *exequatur* procedure of articles 678 et *seq.* of the Luxembourg new code of civil procedure (the **NCPC**).

2. SPECIAL REGIME APPLICABLE TO LUXEMBOURG CREDIT INSTITUTIONS AND CERTAIN OTHER ENTITIES

(a) The former regime applicable to Luxembourg credit institutions and institutions managing funds for third parties has been significantly amended and its scope of application widened following the entry into force of the BRR Act 2015, which, among others, implemented Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the **BRRD**), into Luxembourg law.

(b) The BRR Act 2015 (Part I) applies to the following entities (together, the **BRR Entities**)[37]:

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[36] Public policy means the fundamental concepts of Luxembourg law that the Luxembourg courts may deem to be of such significance so as to exclude the application of an (otherwise applicable) foreign law (deemed to be contrary to such concepts). Public policy is a matter which is constantly evolving on the basis of the Luxembourg courts' positions with respect to individual cases.

[37] Subject to EU Regulation 806/2014 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.

(i) Luxembourg credit institutions[38] (as defined in the EU Regulation No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms (the **CRR**)), excluding those covered by article 2, paragraph 5 of Directive 2013/36 (concerning central banks and similar institutions) (the **Credit Institutions**);

(ii) certain Luxembourg investment firms (as defined in the CRR) that are, among others, subject to the initial capital requirement laid down in Article 28(2) of Directive 2013/36 (that is, EUR 730,000) (the **BRR Investment Firms** and, together with the Credit Institutions, the **BRR Institutions**);

(iii) Luxembourg financial institutions (as defined in the CRR) that are subsidiaries of a credit institution, an investment firm (all as defined in the CRR) or another company covered by article 1, paragraph 1, letters c) or d) of the BRRD, and to which a consolidated prudential supervision by their parent company (as defined in the CRR) applies as per articles 6 to 17 of the CRR;

(iv) Luxembourg financial holding companies, mixed financial holding companies and mixed-activity holding companies (all as defined in the CRR);

(v) Luxembourg parent financial holding companies, parent financial holding companies in the EU, parent mixed financial holding companies in Luxembourg and parent mixed financial holding companies in the EU (all as defined in, or by reference to, the CRR); and

(vi) Luxembourg branches of credit institutions or investment firms (as defined in the CRR) that are established in a third country in accordance with the specific conditions set out in Part I of the BRR Act 2015.[39]

(c) Following the entry into force of the BRR Act 2015, the provisions governing the reorganisation measures and winding-up have been re-allocated between the Banking Act 1993 (which formerly covered the main insolvency related measures) and the BRR Act 2015, in that the Banking Act 1993 now only includes the provisions on "*going concern*" of the relevant institutions, whilst the BRR Act 2015 contains the provisions on "*gone concern*" of the relevant institutions.

(d) Key aspects the Banking Act 1993 and the BRR Act 2015[40]

Preparatory and preventive measures

Article 59-18 of the Banking Act 1993 dictates that each BRR Institution must produce and maintain a recovery plan[41]. A recovery plan is a document setting out the arrangements that the BRR Institution adopts to allow it to take early action to restore its long-term viability if there was a material deterioration of its financial situation. Recovery plans must be updated at least annually and be submitted to the CSSF for assessment.

Articles 59-28 et seq. of the Banking Act 1993 lay down the conditions under which financial support can be transferred between entities of a cross-border group of BRR Institutions.

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38 A special insolvency regime applies to Luxembourg covered bond banks.

39 Part I of the BRR Act 2015 also applies to institutions and entities covered by article 1, paragraph 1 of the BRRD in respect of which the CSSF exercises a supervision on a consolidated basis pursuant to a decision under article 49, paragraph 2, letter d) of the Banking Act 1993. These are CRR Institutions and include credit institutions and certain investment firms (as determined by the Banking Act 1993).

40 This overview discusses only some of the essential provisions of the BRR Act 2015.

41 There are particular rules to determine the competent authority in respect of groups. Only the parent company of a group at the level of the European Union is normally subject to the requirement to produce a recovery plan. It may however be decided by the relevant competent authorities that a recovery plan be prepared for each BRR Institution of the group on an individual basis.

Early intervention measures

Where a BRR Institution infringes or, owing, among others, to a rapidly deteriorating financial condition, is likely in the near future to infringe the requirements of the CRR, the Banking Act 1993 or any of its execution measures or certain provisions of Regulation (EU) 600/2014 (**MiFIR**), the CSSF may take a number of measures (as set out in article 59-43 of the Banking Act 1993) including, for instance, that the BRR Institution applies one or more of the measures contained in its recovery plan or changes its business strategy.

The Banking Act 1993 gives the CSSF the power, in certain circumstances, to appoint new senior management or replace the existing management. The CSSF may also, if such measure is not deemed sufficient, decide to appoint one or more temporary administrators.

Resolution plans and resolvability

Pursuant to the BRR Act 2015 (article 7), the CSSF, as resolution council (*conseil de résolution*), after consulting the competent national authority and the resolution authority, shall draw up (and update at least on an annual basis) a resolution plan42. A resolution plan is a document setting out how an institution might be resolved in an orderly fashion and its essential functions preserved, if it were to fail. This includes the potential application of resolution tools and powers.

Under the BRR Act 2015 (articles 26 and 27), the CSSF, as resolution council, assesses whether a BRR Institution (or the relevant group, as applicable) is resolvable. To that end, the relevant entity will be deemed resolvable if it is feasible and credible for the resolution council/authority to liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers without giving rise to significant adverse consequences for the financial system. If the CSSF, as resolution council, considers that there are obstacles to resolvability, it may require the BRR Institution (or group, as applicable) to take any steps to address or remove these obstacles (set out in article 29 of the BRR Act 2015) by requiring, for example, the BRR Institution to limit or stop certain activities or to limit its exposures.

The BRR Act 2015 provides harmonised resolution tools and powers to manage BRR Institutions' failure on condition that the resolution conditions are satisfied. Pursuant to article 33 of the BRR Act 2015, the CSSF, as resolution council, will only be permitted to use resolution powers and tools in relation to a BRR Institution if it decides that all the conditions for resolution are satisfied. In other words, essentially (i) the BRR Institution must be failing or likely to fail, (ii) there is no reasonable prospect that any solution, other than a resolution action taken in respect of the BRR Institution, would prevent the failure of the BRR Institution within a reasonable timeframe and (iii) intervention through resolution action is necessary in the public interest (article 33 of the BRR Act 2015).

Articles 38 et seq. of the BRR Act 2015 organise four resolution tools and powers, which may be used alone or in combination with each other:

- **sale of business** - which enables the resolution council to direct the sale to an entity that is not a bridge institution of the BRR Institution or the whole or part of its business on commercial terms;

- **bridge institution** - which enables the resolution council to transfer the ownership of, all or part of the business, of the BRR Institution to a "*bridge institution*" (an entity created for this purpose that is wholly or partially controlled by one or several public authorities);

[42] Including, where the CSSF acts as resolution authority at the level of the relevant institution's group, group resolution plans.

- **asset separation** - which enables the resolution council to transfer impaired or problematic assets to one or more asset management vehicles wholly or partially owned by one or several public authorities to allow them to be managed with a view to maximising their value through eventual sale or orderly wind-down (this must only be used together with another resolution tool); and

- **bail-in** - which gives the resolution council the power to write down certain claims of unsecured creditors of a failing BRR Institution and to convert certain unsecured debt claims into equity (which equity could also be subject to any future write-down). In the frame of a bail-in, according to article 61(1)12. of the BRR Act 2015, the CSSF, as resolution council, would have the power to close-out and terminate derivative contracts for the purposes of applying article 50 of the BRR Act 2015 (relating to the bail in of liabilities under derivatives instruments). If a close-out mechanism is foreseen under the said derivative contract, it should be applied first by the CSSF and only the close-out amount resulting from such mechanism would fall within the scope of the bail-in tool, as applicable[43].

In line with the BRRD, the BRR Act 2015 gives the CSSF, as resolution council, a number of additional powers to enable it to use the resolution tools effectively such as, for example, the power to close-out and terminate derivative contracts (according to article 61(1)12. of the BRR Act 2015).

(e) Suspension of payments measures and liquidation proceedings

In addition to the tools and powers described in paragraph 2.5 above, credit institutions (as defined in the Banking Act 1993), investment firms (as defined in the CRR), as well as their branches established in a Member State other than that of its registered seat, other professionals in the financial sector (as defined in the Banking Act 1993), which are managing funds for third parties (together, the Undertakings and each individually an **Undertaking**) may be subject to suspension of payments measures and liquidation proceedings (articles 120 to 159 (inclusive) of the BRR Act 2015).

Suspension of payments

Suspension of payments (*sursis de paiement*) may be applied for in the event that the global performance of an Undertaking's business is compromised, in the event that the Undertaking is unable to obtain further credit or fresh monies or has no longer any liquidity whether there is a cessation of payments or not, or in the event that a provisional decision has been taken to withdraw the Undertaking's authorisation (*agrément*). In these circumstances, the Undertaking or the CSSF may request the court to apply suspension of payments proceedings to the Undertaking. The suspension of payments may not exceed six months and the court will lay down the terms and conditions thereof, including the appointment of one or more persons (*administrateurs*) responsible for managing the reorganisation measures and supervising the Undertaking's activities.

Liquidation

A petition for liquidation may be filed either by the Luxembourg public prosecutor or the CSSF. This would typically occur in a situation where the suspension of payments cannot cure the Undertaking's difficult financial situation, where the Undertaking's financial situation is so serious that it can no longer satisfy its creditors or where the Undertaking's licence has been permanently withdrawn. The court will appoint a judge-commissioner (juge-commissaire) and one or more liquidators. The court may decide to apply bankruptcy rules in respect of the liquidation and, accordingly, fix the suspect period (which is the period which may date back not more than six

[43] In our view, securities lending agreements would however not be covered by the definition of derivative instruments in the BRR Act 2015.

months before the date of filing of the application for suspension of payments). The court as well as the judge-commissioner and the liquidator(s) may decide to vary the mode of liquidation initially agreed upon. The liquidation procedure is terminated when the court has examined the documents submitted to it by the liquidator(s) and the documents have been reviewed by one or more commissioners.

Voluntary liquidation by an Undertaking is possible only where the CSSF has been notified thereof by the Undertaking one month before notice is given to hold the extraordinary general meeting of the shareholders called to consider the voluntary liquidation.

(f) ***Specific cross-border insolvency provisions under Part II of the BRR Act 2015***

Directive 2001/24/EC on the reorganisation and winding-up of credit institutions, as amended (**Directive 2001/24/EC**) contains a number of substantive provisions common to reorganisation measures and winding-up proceedings of credit institutions and certain of their branches, whose aims are similar to those of the European Insolvency Regulation[44]. The BRRD amends certain of the provisions of Directive 2001/24/EC and extends its scope to investment firms and certain of their branches. The key provisions of Directive 2001/24/EC that were implemented in the Banking Act 1993, have been transferred into articles 138 to 152 of the BRR Act 2015 (applicable to any Undertaking):

- article 141 of the BRR Act 2015 (so far as legal netting is concerned) states that the opening of winding-up proceedings (and the adoption of reorganisation measures) shall not affect the right of creditors to demand the set-off of their claims against the claims of an Undertaking, where such a set-off is permitted by the law applicable to that Undertaking's claims. This principle shall not preclude the actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors (unless the beneficiary of these acts provides proof that the act detrimental to the creditors as a whole is subject to the law of a EU Member State other than the home EU Member State and that the law does not allow any means of challenging that act). Accordingly, to the extent that the claims arising under the Agreement are governed by German or English law (and provided set-off is legal, valid, binding and enforceable under such law), Luxembourg reorganisation measures or winding-up proceedings should not interfere with the possibility to set-off under the Agreements;

- article 143 of the BRR Act 2015 (so far as contractual netting is concerned) provides that Netting Arrangements (as defined below) shall be governed solely by the law of the contract which governs such arrangements, without prejudice to the application of articles 66 (Exclusion of certain contractual terms in early intervention and resolution) and 69 (Power to temporarily suspend termination rights) of the BRR Act 2015. Accordingly, given that the Agreements are governed by German or English law (and provided that they are legal, valid, binding and enforceable under such law), Luxembourg reorganisation measures or winding-up proceedings should not interfere with the effectiveness of the Agreements (subject to the application of articles 66 and 69 of the BRR Act 2015).

According to article 208 of the BRR Act 2015, articles 10, 11, 13, 14, 18, 19 and 20 (paragraphs 1 to 3 inclusive), of the Collateral Act 2005 shall not apply to any restriction on the enforcement of financial collateral arrangements, any restriction on the effect of a financial collateral arrangement or any close out netting or set-off provision that is imposed pursuant to Part I, Title II, Chapter VI or VII of the BRR Act 2015 (that is, the provisions relating to resolution tools and write-down of capital instruments).

[44] Please see footnote 2.

(i) Exclusion of certain contractual terms in the context of resolution

Pursuant to article 66 of the BRR Act 2015, a crisis management measure[45] taken in relation to a BRR Entity, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, under a contract entered into by a BRR Entity, be deemed to be an enforcement event within the meaning of article 1 of the Collateral Act 2005 or insolvency proceedings within the meaning of the Luxembourg act dated 10 November 2009 concerning payment services, as amended, provided that the substantive obligations under the contract, in particular payment and delivery obligations and the provision of collateral, continue to be performed[46].

It follows that, provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed and without prejudice to the contractual early termination rights contemplated by the relevant Agreements (provided that they are not linked to crisis prevention measures or crisis management measures), a crisis prevention measure or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, enable any person to, among others, exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by (A) a subsidiary, the obligations under which are guaranteed or otherwise supported by a group entity or (B) any group entity which includes cross-default provisions (Article 66(3) of the BRR Act 2015 and article 59-47(2) of the Banking Act 1993). These provisions are considered as overriding mandatory provisions pursuant to article 9 of the Rome I Regulation.

(ii) Power to temporarily suspend termination rights

Pursuant to article 69 of the BRR Act 2015, the CSSF, as resolution council, has the power to temporarily suspend the termination rights of any party to a contract with a BRR Institution under resolution (that is, a BRR Institution subject to the application of any of the instruments provided for in article 38(2) of the BRR Act 2015 including sale of business, bridge institution, asset separation and bail-in) from the publication of the notice pursuant to article 83(4) of the BRR Act 2015 until midnight, Luxembourg time, at the end of the business day following that publication (the **BRR Act 2015 Temporary Termination Right Suspension Period**), provided that the payment and delivery obligations and the provision of collateral continue to be performed and without prejudice to the contractual early termination rights contemplated by the relevant Futures and Options Agreement or CDA (provided that they are not linked to crisis prevention measures or crisis management measures). The CSSF may also, in certain circumstances, suspend the termination rights of any party to a contract concluded with a subsidiary of the BRR Institution subject to a resolution procedure.

A person may however exercise a termination right under a contract before the end of the BRR Act 2015 Temporary Termination Right Suspension Period, if that person receives notice from the CSSF, as resolution council, that the rights and liabilities covered by the contract shall not be (A) transferred to another entity or (B) subject to write-down or conversion on the application of the bail-in tool in accordance with the BRR Act 2015.

Where the CSSF, as resolution council, exercises its powers to suspend termination rights, and where no notice from the CSSF has been given, those rights may be exercised on the expiry of the period of suspension, subject to Article 66 of the BRR Act 2015 if (A) the rights and liabilities covered by the contract have been transferred to another entity, a counterparty may exercise termination rights in accordance with the terms of that contract only on the occurrence of any continuing or subsequent

[45] As defined in article 1(84) of the BRR Act 2015 and as including the application of resolution measures, tools and powers.

[46] Article 59-47 of the Banking Act 1993 lays down the same principle in connection with a crisis prevention measure (as defined in the Banking Act 1993) taken in relation to an entity covered by Part IV of the Banking Act 1993 (that is, according to article 59-16 of the Banking Act 1993, the BRR Entities, excluding Luxembourg branches of credit institutions or investment firms (as defined in the CRR) that are established in a third country).

enforcement event by the recipient entity or (B) the rights and liabilities covered by the contract remain with the BRR Institution under resolution and the CSSF (as resolution council) has not applied the bail-in tool in accordance with the BRR Act 2015, a counterparty may exercise termination rights in accordance with the terms of that contract on the expiry of the BRR Act 2015 Temporary Termination Right Suspension Period.

(iii) Power to suspend certain obligations

Pursuant to article 67 of the BRR Act 2015, the CSSF (as resolution council), has the power to suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension until midnight (Luxembourg time) at the end of the business day following that publication.

When a payment or delivery obligation would have been due during the suspension period, the payment or delivery obligation shall be due immediately upon expiry of the suspension period.

If an institution under resolution's payment or delivery obligations under a contract are suspended, the payment or delivery obligations of the institution under resolution's counterparties under that contract shall be suspended for the same period of time.

Any such suspension shall not apply to:

(A) eligible deposits;

(B) payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, and central banks; and

(C) eligible claims (for the purpose of Directive 97/9/EC).

When exercising a power, the CSSF (as resolution council) has regard to the impact the exercise of that power might have on the orderly functioning of financial markets. These provisions apply irrespective of the law applicable to the contact. They shall apply to the outstanding contracts.

(iv) Safeguard measures

The BRR Act 2015 (articles 73 to 80) includes safeguard measures for the benefit of counterparties to protect their positions where the resolution tools described above are used.

In particular, in the case of a transfer of assets between a BRR Institution subject to a resolution procedure and another person, article 77 of the BRR Act 2015 prohibits transfers of only some, but not all, of the rights and obligations protected by title transfer financial collateral arrangements[47], including via a fiduciary arrangement, or by any other similar mechanism, that is subject to Luxembourg or foreign law, as well as the rights and obligations protected by a Netting Arrangement[48] or a Set-Off Arrangement[49] between the institution under resolution and another person (together, the **Protected Arrangements**). Article 77 of the BRR Act 2015 further provides that no amendment or termination of the rights and obligations under a Protected Arrangement may

[47] Within the meaning of Directive 2002/47/EC.

[48] Under the BRR Act 2015, Netting Arrangement means an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of article 2(1) of Directive 2002/47/EC and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC.

[49] Under the BRR Act 2015, Set-Off Arrangement means an arrangement under which two or more claims or obligations owed between the BRR Institution under resolution and a counterparty can be set off against each other.

be made through the use of ancillary powers of the CSSF (as provided for in article 62 of the BRR Act 2015).

(g) ***Collateral***

As mentioned above, the Credit Support Annex would be recognised in the event of Insolvency Proceedings affecting Party A. However, there are certain restrictions in respect of the counterparty's ability to enforce its rights. Early intervention measures under the Banking Act 1993 cannot constitute an event allowing the enforcement of the Collateral provided that Party A is not in breach of its obligations under the Credit Support Annex.

Furthermore, resolution tools and resolution powers under the BRR Act 2015 apply and may affect the Credit Support Annex. However, in respect of the bail-in tool, no write down or conversion power may be exercised in relation to a "secured liability" (as defined in article 1 (43) of the BRR Act 2015) which refers, among others, to title transfer collateral arrangements. Restrictions come into play under article 66 to 69 (as applicable) of the BRR Act 2015 (as discussed above).

3. EUROPEAN INSOLVENCY REGULATION

The European Insolvency Regulation is applicable, with the exception of Denmark, in all EU Member States. The objective of the European Insolvency Regulation is to establish common rules on cross-border insolvency proceedings, based on principles of mutual recognition and co-operation. Insurance undertakings, credit institutions, investment firms and collective investment undertakings are, among others, specifically excluded from the scope of the European Insolvency Regulation.

Essentially, the European Insolvency Regulation provides that main insolvency proceedings are to be opened in the EU Member State where the debtor has its centre of main interests. These proceedings will have universal scope and encompass a debtor's assets throughout the European Union (subject to secondary proceedings opened in one or more EU Member States although such proceedings will be limited to the assets in that State and will run in parallel to the main proceedings). Creditors will have the comfort that where a company has a branch or significant assets or activities in more than one EU Member State, the proceedings opened in one EU Member State will encompass assets located throughout the European Union and even those assets moved by the debtor to another EU Member State after the date of filing.

The Party A will, in principle, be subject to the Luxembourg Insolvency Proceedings if it has its centre of main interests (the **COMI**) in Luxembourg. In the case of a company or legal person, the place of its registered office shall be presumed to be its COMI in the absence of proof to the contrary. Accordingly, if the Party A's registered office is located in Luxembourg, Luxembourg courts will, in principle, be entitled to open main insolvency proceedings against it and apply the Luxembourg Insolvency Laws. However, before opening insolvency proceedings, the competent court shall examine of its own motion whether the centre of the Party A's main interests is actually located within its jurisdiction. The above presumption may be rebutted, if it can be established, by applying article 3 (1) in combination with recitals 28 and 30 of the European Insolvency Regulation, that despite having its registered office in Luxembourg, the Party A conducts the administration of its interests on a regular basis in and/or from another EU Member State, which is ascertainable by third parties. In other words, in the case of a company, it should be possible to rebut this presumption where the company's central administration is located in an EU Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests are located in that other EU Member State. Hence, the courts of another EU Member State could consider having jurisdiction and open main insolvency proceedings against the Party A where it is established that the COMI is located in that EU Member State. Finally, pursuant to article 3 (1) of the European Insolvency Regulation, the above presumption shall only apply if the registered office has not been moved to another EU Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

Under the European Insolvency Regulation, the conditions under which set-off is available are normally governed by the law of the EU Member State in which insolvency proceedings are opened. On the present facts, if the Insolvency Proceedings are commenced in Luxembourg and Luxembourg law allows for insolvency set-off, it will in principle be effective. If however Luxembourg law does not recognise insolvency set-off, article 9 of the European Insolvency Regulation comes into play and, provided the law applicable to the insolvent debtor's claim allows for set-off in the event of insolvency, the right of set-off will be recognised in Luxembourg Insolvency Proceedings (subject to the avoidance rules of the relevant *lex concursus*). Accordingly, if the claim is governed by German or English law and a contractual right of set-off is available as a matter of German or English law, the creditor is able to exercise the right of set-off even if it is not available under Luxembourg law (which would be the insolvency law of the main proceedings).

The question as to whether the European Insolvency Regulation applies to close-out netting has been debated (article 7 of the European Insolvency Regulation refers to set-off rather than close-out netting). Close-out netting implies a three stage process. First, all transactions are terminated upon the occurrence of an event of default. Secondly, each party calculates the gains and losses to itself. Thirdly, the parties set-off their gains and losses under the terminated transactions. If close-out netting is to be considered, in legal terms, as an indivisible operation (distinct from set-off as a simple payment mechanism governed by articles 1298 *et seq.* of the Luxembourg civil code), it is debatable whether the European Insolvency Regulation applies (so far as the European Insolvency Regulation deals with set-off as one operation only and which is a mere operation of reciprocal termination of obligations). If however, each stage of close-out netting has to be assessed separately as to its validity and enforceability upon the opening of insolvency proceedings, article 9 of the European Insolvency Regulation would apply to the close-out netting and the effects of the Insolvency Proceedings on the Agreements so far as termination is concerned, would have to be assessed in accordance with the Luxembourg Insolvency Laws.

The validity and enforceability of a contractual set-off clause of the Agreements would, pursuant to the European Insolvency Regulation, not be affected by Luxembourg Insolvency Laws unless article 7.2(m) of the European Insolvency Regulation applies. Article 7.2(m) states that the avoidance rules (such as those included in article 445 of the Luxembourg commercial code concerning pre-insolvency set-off during the suspect period) continue to apply in respect of a challenge of the validity or enforceability of a claim to which the benefit of set-off would otherwise be applicable under article 9.1 of the European Insolvency Regulation (unless the conditions of article 16 of the European Insolvency Regulation are satisfied).

The above discussion is largely academic though, as under the Collateral Act 2005, set-off and close-out netting are generally recognised and enforceable.

4. QUASI-GOVERNMENTAL ENTITIES

Only private entities having a commercial purpose or a commercial status are subject to the Insolvency Laws. Quasi-governmental entities, such as a territorial authority (*collectivité territoriale*) or a public establishment (*établissement public*) can, in principle, not be subject to the Insolvency Laws or the Insolvency Proceeding.