To
European Federation of Energy Traders
Keizersgracht 62-64
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The Netherlands

PORTUGAL

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Types of Counterparty What types of counterparty are covered by the opinion?	(a) a commercial undertaking having a legal personality and having adopted the form of a limited liability company by shares ("*sociedade anónima*"), or (b) a credit institution having adopted the form of a limited liability company by shares ("*sociedade anónima*") (except for "*Caixas de Crédito Agrícola Mútuo*")	**Page: 6**
Types of Transaction What types of transaction are eligible for closeout netting?	No distinction is made in terms of close-out netting	**Page: 15-17**
Automatic Early Termination Does the opinion require or recommend that automatic early termination applies to a counterparty organised in the jurisdictions?	Yes	**Page: 13-14**
Early termination provision	Generally yes, please see caveats and exceptions,	**Page: 13-14 and 19**

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Is the early termination provision of the agreement enforceable in the jurisdiction?	including in case of insolvency	
Close-out netting **Is the close-out netting provision of the agreement enforceable in a local insolvency?**	The netting provisions included in the General Agreement are capable of, *(i)* in certain circumstances, being enforceable in relation to insolvent companies in respect of which Portuguese Law would be the applicable law and *(ii)* being enforceable in relation to Portuguese banks in liquidation to the extent such provisions are enforceable under the laws applicable to the General Agreement in accordance with Articles 31 and 33 of Decree-Law no. 199/2006, of 25 October, as amended ("Liquidation of Credit Institutions and Financial Companies Act"), and subject to the exercise of any resolution powers to the contrary by the Bank of Portugal pursuant to articles 145-AB and 145-AV of the Banking Act.	**Page: 15-17**
Characterization of collateral **Would laws of jurisdiction characterize transfer of collateral as effecting an unconditional transfer of ownership or is there risk of re-characterizing such transfer as creating a security interest?**	Transfer of ownership has been admitted despite the lack of specifically applicable legal rules, if it has been validly agreed between the parties. Please see recommended precautions.	**Pages: 29**
Further action required **Is any action required to ensure that ownership title continues to rest with Party B?**	In principle, no requirements are applicable to transfer the title of the cash.	**Page: 29**

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Amendments necessary **Are there any recommended amendments to the standard documents?**	Recommended	**Page: 14**
Other remarks **Does the opinion specify issues that you deem to be of specific interest in negotiating an agreement with a counterparty in the jurisdiction?**		

This Executive Summary is merely a summary and must be read in conjunction with the opinions below. It does not form part of the opinion and is given for the purposes of convenience only.

Documents to be considered

For Electricity:

i) the EFET General Agreement Concerning the Delivery and Acceptance of Electricity, version 2.1(a) published 21 September 2007 (the "**General Agreement**");
i) the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000);
ii) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 6.1, published 4 November 2021);
iii) EFET French Capacity Certificates Appendix, (Version 1.0, published March 2013);
iv) EFET EECS Certificate & National Scheme Certificate Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.1 (b), published 4 November 2021)
v) UK ETS Allowances Appendix (Power) (Version 1.0, published July 29, 2021);
vi) EFET Allowances Appendix (Power) to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published 3 April 2012);
vii) EFET Allowances Appendix (Power) to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published 28 February 2018);
viii) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005);
ix) GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a), published 21 September 2007) (Version 1.0, published 11 September 2009);
x) EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013);
xi) EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013);
xii) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015);

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

For Natural Gas:

i) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a), published 11 May 2007);
ii) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 6 January 2003);
iii) EFET Sample Amendment Agreement to § 14 (VAT and Taxes), the definition of "Other Tax" and "Zero-Rated" in Annex 1, and the Election Sheet to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published July 2007);
iv) EFET Sample Amendment Agreement to § 8 (Remedies for Failure to Deliver and Accept the Contract Quantity) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published October 2005);
v) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 16 December 2013);
vi) EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0 (a)/May 11, 2007 (Version 5.1, published 4 November 2021);
vii) EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0(a)/May 11, 2007 (Version 4.0 published on 28 February 2018);
viii) EFET IBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0/4 December 2017);
ix) EFET PVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 27 March 2020);
x) Italian PSV Appendix (Version 1.0, published January 2007);
xi) Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 20 September 2013);
xii) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 26 May 2014);
xiii) EFET TVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 - 29 May 2020);
xiv) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/October 2018);
xv) EFET Polish VP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 14 December 2013);
xvi) EFET Portuguese VTP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/ June 21, 2021);
xvii) EFET Ukrainian Customs Warehouse Storage Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/May 2021);
xviii) EFET Ukrainian Border Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published February 2020);
xix) EFET Recommended Clauses for use with Ukrainian Counterparties, published February 2020;

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xx) EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 4 December 2017);
xxi) EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 2016);
xxii) EFET UK 5:5 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 7 September 2015);
xxiii) EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 7 September 2015);
xxiv) Change Letter EFET Trading Hub Europe amendments to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, published 26 July 2021;
xxv) UK ETS Allowances Appendix (Gas) (Version 1.0, published December 13, 2021).

For Electricity and Natural Gas:

i) EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010);
ii) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas Version 2.0/January 6, 2003 and the EFET General Agreement Concerning the Delivery and Acceptance of Electricity Version 2.1/December 20, 2000 (Version 1.0, published 20 November 2005);
iii) Amendment Agreement IBOR Transition wording for General Agreements, CPPNA, PPA and Appendices, published November 4, 2021;
iv) EFET Credit Support Annex to the General Agreement (Version 1.0(a), published September, 2005);
v) EFET Credit Support Annex to the General Agreement (Version 3.1, published November 4, 2021);
vi) Ratification Letter for Amendments to Covered Principal Agreements governed by English law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13th October 2020;
vii) Ratification Letter for Amendments to Covered Principal Agreements governed by German law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13th October 2020.

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

i) EFET Electronic Confirmation Agreement (published 28 June 2005).

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

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

Capitalised terms used in this opinion and not otherwise defined shall have the respective meanings ascribed thereto in the General Agreement and in the remaining EFET Standardised Documentation. Whenever "General Agreement" is referred to in this opinion it shall be read as referring to both Electricity and Natural Gas General Agreements, unless specifically specified otherwise.

We are qualified under Portuguese Law to give this opinion and we do not give, and we are not, nor do we purport to be, qualified to give any opinion in connection with any law of any jurisdiction other than the laws of the Portuguese Republic, nor do we express any opinion on matters of fact or other matters other than Portuguese Law in force as of the date hereof.

The relevant EFET Standardised Documentation are not executed agreements but rather a set of draft standard terms and conditions to be used by any number of different interested parties. In view of its abstract form and the absence of any real parties, in giving our opinion we shall not be liable or otherwise responsible for its use and for any damages or losses resulting out of its use in any individual case and in whatever jurisdiction. It is therefore the responsibility of each party wishing to use the relevant EFET Standardised Documentation to ensure that its terms and conditions are legally binding, valid and enforceable and best serve to protect the user's legal interest in each individual case.

In our examination of the relevant EFET Standardised Documentation, we have assumed, among other things:

i) the creation of valid and legally binding obligations of any Parties to the relevant EFET Standardised Documentation and Individual Contracts enforceable against such Parties in accordance with their respective terms;

ii) that any obligations under the relevant EFET Standardised Documentation which are to be performed in any jurisdiction outside Portugal will not be illegal or contrary to public policy under the laws of such jurisdiction;

iii) that there are no supplemental terms and conditions agreed between the Parties to the relevant EFET Standardised Documentation that could affect or qualify our opinion as set out herein;

iv) that the Portuguese party is either (a) a commercial undertaking having a legal personality and having adopted the form of a limited liability company by shares ("*sociedade anónima*"), or (b) a credit institution having adopted the form of a limited liability company by shares ("*sociedade anónima*") (except for "*Caixas de Crédito Agrícola Mútuo*");

v) unless otherwise set forth below, in case the EU Insolvency Regulation applies, it determines Portuguese Law as being the *lex concursus* (which means the law applicable to the Portuguese party's insolvency);

vi) that each party to the relevant EFET Standardised Documentation is duly organised, incorporated and validly existing and working in accordance with the laws of the jurisdiction of its incorporation and/or the place of effective management;

vii) in respect of each party to the relevant EFET Standardised Documentation, that no steps have been taken pursuant to any insolvency or similar proceedings to appoint an administrator, receiver 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 relevant EFET Standardised Documentation and/or any Individual Contract;

viii) that the relevant EFET Standardised Documentation and the Individual Contracts are duly authorised, executed and delivered by each party, are within each party's legal capacity and are complying with each party's constitutional documents;

ix) that each party has taken all necessary corporate and other appropriate steps to execute, deliver and perform the relevant EFET Standardised Documentation and the Individual Contracts;

x) that the relevant EFET Standardised Documentation and the Individual Contracts are properly executed;

xi) the relevant EFET Standardised Documentation and the Individual Contracts are entered into, and each payment or delivery made thereunder is made, at arm's-length 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 insolvency or similar circumstances;

xii) that all obligations under the relevant EFET Standardised Documentation and the Individual Contracts are reciprocal between the Parties in the sense that there are only two Parties involved and each is personally liable as regards the obligations owed by it and is the beneficial owner of the obligations owed to it;

xiii) that nothing in this legal opinion is affected by the provisions of any law (other than the laws of the Portuguese Republic);

xiv) that there is no fraud in connection with the relevant EFET Standardised Documentation and the Individual Contracts;

xv) that the relevant EFET Standardised Documentation are executed in a form identical to the one published by EFET;

xvi) that there exists no other contract, general agreement, deed, document and instrument between the Parties governing the Individual Contracts which is conflicting with, or amending, the relevant EFET Standardised Documentation;

xvii) that 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 relevant EFET Standardised Documentation, unless otherwise specified in this legal opinion;

xviii) that each Party performs its obligations under the relevant EFET Standardised Documentation and the Individual Contracts in accordance with their respective terms;

xix) that all representations, warranties and similar statements set forth in the relevant EFET Standardised Documentation are true and accurate on the date of the entry by the Parties into the relevant EFET Standardised Documentation and on each day on which the Parties enter into an Individual Contract;

xx) that all authorisations, approvals and consents of any country (other than Portugal) which may be required in connection with the execution, delivery and performance of the relevant EFET Standardised Documentation and the Individual Contracts have been or will be obtained;

xxi) that the entry by the Parties into the relevant EFET Standardised Documentation and the Individual Contracts will materially benefit the Parties and are in the best interest, and for the corporate benefit, of the Parties;

xxii) that the relevant EFET Standardised Documentation and the Individual Contracts are not subject to termination pursuant to Article 120 of the Portuguese Insolvency Act because they were knowingly (in respect of one or both Parties) entered into to the detriment of the insolvency estate;

xxiii) that the relevant EFET Standardised Documentation and the Individual Contracts are entered into between and performed by the Parties in good faith and without any fraudulent intent;

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xxiv) that the Parties entered into the relevant EFET Standardised Documentation and the Individual Contracts in the course of their usual business activity;

xxv) that the relevant EFET Standardised Documentation is entered into by the Parties prior to the entry by the Parties into any Individual Contract;

xxvi) that all Individual Contracts entered into between the Parties and governed by the General Agreement shall exclusively consist of one of the two following types of contracts:

Electricity Forward Transaction: A transaction in which one party agrees to buy from or sell to the other party a specified quantity of commodity in exchange for payment of a specified price, which becomes due on an agreed future date. The transaction will be settled by physical delivery of the quantity of commodity in exchange for the specified price and the party may agree that the specified price is based or dependent, at least partially, on the price for a specified security, different commodity or an interest rate; or

Electricity Option: A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of electricity at a specified strike price. The option will be settled by physically delivering the quantity of electricity in exchange for the strike price;
and

xxvii) all Individual Contracts will be entered into in relation to transactions to be made over-the counter.

We express no opinion:

i) as to any law other than the laws of Portugal in force as at the date hereof;

ii) that the future or continued performance of the EFET Standardised Documentation or the consummation of the Individual Contracts contemplated therein will not contravene such laws, if their interpretation is altered in the future;

iii) on the tax laws of Portugal or any tax related obligations in connection with the EFET Standardised Documentation, on international law, including (without limitation) the rules of or issued under or by any bi or multi-lateral treaty or treaty organisation (unless implemented into the laws of Portugal) or on any anti-trust laws;

iv) with regard to the effect of any systems of law (other than the laws of Portugal) even in cases where, under Portuguese Law, any foreign laws falls to be applied and we assume that any applicable law (other than Portuguese Law) would not affect or qualify our opinion as set out below; or

v) on any factual, commercial, accounting or other non-legal matter or on the ability of any party to meet its financial or other obligations under the EFET Standardised Documentation or the Individual Contracts.

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

Our opinions regarding enforceability below are subject, among other things mentioned in the opinion itself, to *(a)* the general principle that a judgement of competent court will occur prior to enforcement, *(b)* the nature and kind of legal remedies awarded by such court decision prior to a judicial enforcement procedure, *(c)* Portuguese legal requirements and limitations, including those respecting to enforcement in kind ("*execução específica*"), mandatory rules ("*lois de police*" "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*"), *(d)* the effect of bankruptcy, insolvency, moratorium, fraudulent conveyance to the detriment of creditors, reorganisation, suspension of payments or similar laws affecting creditors' rights generally and court decisions with respect thereto, competence of the courts, and other legal requirements related to the recognition of foreign judgements or foreign arbitral awards and *(e)* the rights of debtors, and limitations to the enforcement of a creditor's remedies under applicable law. We express no opinion with respect to application of equitable principles or the availability of equitable remedies in any proceeding, whether in equity or at law as those concepts do not exist as such under Portuguese Law.

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I. Enforceability of Close-out Netting

1. Winding-up, Insolvency or Attachment

1.1 General Overview of the Portuguese insolvency framework

For a general summarised overview of the Portuguese Insolvency framework applicable to the parties and agreements concerned in this opinion, please refer to Appendix A.

1.2. Set-off of claims (both in an Early Termination scenario and otherwise):

(a) between Parties (of claims arising under the General Agreement)

i) Legal set-off

Outside an Insolvency scenario, set-off of amounts is possible if the requirements of Article 847 of the Portuguese Civil Code are met. For the set-off to be possible it is necessary that *(i)* two entities are reciprocally creditor and debtor, *(ii)* payment of the credit to be set off may be demanded in a court of law, without being subject to an exception, whether peremptory or dilatory, of substantive law; and *(iii)* both obligations are constituted by fungible assets of the same kind and quality.

As long as claims under the General Agreement meet these requirements, set-off would be possible under Portuguese Law.

ii) Conventional set-off

The Parties to an agreement may, in general, establish a set-off mechanism different from the one established by law, within the scope of the principle of freedom of contracting set forth in Article 405 of the Portuguese Civil Code; under the conventional set-off mechanism the Parties can choose not to apply some of the legal requirements or to apply further requirements.

(b) between Parties (of claims arising outside the General Agreement if contractually provided for in an amendment to the General Agreement)

Please see (a) above.

Legal set-off does not depend on whether the claims arise from the General Agreement but rather on the fact that there are reciprocal credits and debits between two Parties.

In what regards contractual set-off, the Parties should be able to extend the set-off rights to claims under other agreements, subject to mandatory provisions of Portuguese Law in respect of the nature of such claims.

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

Please see (a) above.

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For legal set-off to be possible it is necessary that there are reciprocal credits and debits between two Parties; this will not include credits/debits of third parties.

Contractual set-off would be valid between the Parties to the General Agreement but will only bind such Parties and not the Affiliates or Credit Support Providers (unless they are themselves parties to the agreement or expressly assume or consent to such obligations). According also to Portuguese Law, the parties to a contract cannot generally impose obligations on third parties, even if they are its affiliates.

With regard to the obligations undertaken by the Parties to the General Agreement themselves, they may generally assume obligations under a contract not only in relation to their counterparty in the General Agreement, but also in relation to third parties, since Portuguese Law recognizes the concept of the contract established in favour of another person ("*contrato a favor de terceiro*").

1.3. Set-off and close-out netting as separate or similar rights

Set-off is a mechanism contemplated in Portuguese Law ("*compensação*"). Close-out netting is not contemplated as an autonomous concept under Portuguese Law, although set-off can, in certain terms, be effective in a termination situation, as described in further detail below.

1.4. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EU Insolvency Regulation")

The EU Insolvency Regulation, on insolvency proceedings, is applicable in Portugal, as in all Member States, with the exception of Denmark. Portuguese courts are, therefore, bound by its provisions.

Under Article 9 of the EU Insolvency Regulation, the conditions under which set-off is admissible are usually regulated by the law applicable to the debtor's counterclaims. Should it be Portugal, Portuguese Insolvency Act expressly allows for set-off to occur under certain circumstances (please refer to a) and b) below).

Portuguese courts have jurisdiction in relation to proceedings regarding companies which have their head offices or their main centres of interests in Portugal (Article 3 of the EU Insolvency Regulation).

Past court decisions allowing set-off may be considered as to showing that Portuguese courts usually apply Portuguese Law, without feeling the need to resort to the EU Insolvency Regulation. Although there are not many judicial decisions by Portuguese courts that we are aware of involving the application of the EU Insolvency Regulation concerning the close-out netting and/or set-off, we believe that the Portuguese courts would in principle apply, in accordance with Article 9 of the EU Insolvency Regulation and Article 286 of the Portuguese Insolvency Act, the provisions of the governing law chosen in the General Agreement (as permitted by the Rome Convention on the law applicable to contractual obligations and, from 17 December 2009 on, by Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) as to the regulation of the debtor's cross-claim.

Note, however, that when a set-off is made in accordance with the provisions of the governing law and it takes place before the opening of the insolvency proceedings before a Portuguese court, the set-off can still be set aside in favour of the insolvent's estate by applying the Portuguese Insolvency

Act dispositions with respect to acts detrimental to the insolvency estate (Articles 120 and 121) as provided in Article 7/2 of the EU Insolvency Regulation, unless the conditions of Article 16 of the said Regulation are met[1].

In what concerns the close-out netting, as the EU Insolvency Regulation does not make an express reference to it in its provisions, namely in its Article 9, it is arguable if the Regulation would apply, and, if so, in what terms.

The answer involves a consideration as to what concerns the legal characterisation of close-out netting. If each stage of this mechanism – termination upon default; calculation of gains and losses, and the set-off – is considered as a distinct and separate operation, at least in what involves the set-off, the governing law chosen in the General Agreement would be applicable in such terms as abovementioned. In what concerns the termination, when taking place after the opening of the insolvency proceedings before a Portuguese court, the governing law would not be applicable, as the application of the Portuguese Insolvency Act is established by Article 7/2 (e) of the EU Insolvency Regulation. If the close-out netting is considered to be a single operation, it would be harder to sustain the application of the governing law as a result of the application of Article 9 of the EU Insolvency Regulation, as it refers expressly to "set-off" as being a compensation of the claims of the creditor against the claims of the debtor.

We are, however, assuming in this opinion that close-out netting is the ability to set-off in a termination situation (not including the termination or the calculation of gains and losses).

We further note that the EU Insolvency Regulation does not apply to Credit Institutions.

1.5. Implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, and amending Directive (EU) 2017/1132 of 20 June 2019 and its impact on netting and close-out netting (the "EU Insolvency Directive")

On January 11, Law no. 9/2022 (the "**Law**") was published, transposing Directive (EU) 2019/1023 of the European Parliament and of the Council, of June 20, 2019, and aiming, inter alia, to increase the efficiency of proceedings relating to restructuring, insolvency and discharge of debt.

This Law is a product of a government initiative destined, among other things, to expedite and redefine the insolvency process, in order to contribute to a more efficient judicial system.

To that effect, the Law determined, e.g., the softening of the requirements for the approval of the insolvency plan, with the respective approval quorum being reduced, and that the insolvency administrator should be entrusted with the task of drawing up a liquidation plan, with time-definite milestones, to sell the assets comprising the insolvent estate.

As to the impacts of the Law on netting and close-out netting, it should be mentioned that the compensatory claims arising from the termination of employment contracts by the insolvency

[1] According to Article 16 of the EU Insolvency Regulation, Article 7/2 (m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

administrator, after the debtor's declaration of insolvency, are now transformed into claims over the insolvency. However, this only applies to termination of employment contracts, which is not the case.

a) Automatic termination

aa) Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or recommendable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in §10.5(c)(iv) of the EFET General Agreement? If you are recommending that a grace period be made applicable in respect of §10.5(c)(iv), what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of your jurisdiction to have that proceeding dismissed or otherwise terminated? If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? Please supply specific language for purposes of customizing §10.4 of the EFET General Agreement to implement your recommendation and the optimal termination timing.

Taking in consideration the framework better described and detailed in bb) below, and if §10 could be construed as an acceleration clause, the applicability of the Automatic Termination will enhance the probabilities of enforceability of the netting provisions of the General Agreement. Therefore, the wider the scope and number of the Material Reasons which are able to justify Automatic Termination, the greater is the possibility of the netting provisions being enforceable (once again only if § 10 could be interpreted as constituting an acceleration clause).

If Clause § 10 is to be seen, on the contrary, as establishing the judicial declaration of insolvency, the request for the opening of a Special Revitalisation Process or the opening itself of a Special Revitalisation Process as a cause of termination, the comments made in bb) below will apply, which means that the validity of such clause will always depend on the assessment made by the judge, and not on the number and scope of the material reasons which might justify termination. Therefore, in this case, the election of Automatic Termination would not enhance the possibility of enforcement.

These conclusions apply, *mutatis mutandis*, to Active Termination, given that the insolvency laws do not distinguish between automatic and active termination.

Concerning the establishment of a grace period in §10.5 (c) (iv), although the insolvency proceedings are subject to a preliminary decision by a judge on their admissibility (see Article 27 of the CIRE), as is the case with the Special Revitalisation Process and the Extraordinary Company Viability Procedure, it is not possible to define a timeframe within which such decision is taken.

In respect of the customization of §10.4, the wording of such paragraph could be improved by determining that the Early Termination is the date upon which any of the events described in §10.5 (c) occur (always under the assumption that § 10 could be interpreted as constituting an acceleration clause).

bb) Assuming you recommend Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the EFET General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of Portugal or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party? Will there be a difference in the treatment of electricity/natural gas and green certificates traded separately or in combination?

According to Article 119/2 of the Portuguese Insolvency Act a contractual provision that states that the fact of one of the Parties being judicially declared insolvent in itself is a cause for termination of an agreement or gives the other party the right to an indemnity or to terminate the agreement in different terms than the ones set forth in the Portuguese Insolvency Act shall be considered null and void. The Parties can, however, attribute to any earlysituations prior to the insolvency declaration the aforementioned effects, excluding the situations mentioned on the paragraph below.

Additionally, under Article 17-E/13 of the Portuguese Insolvency Act a contractual clause that attributes to the request for the opening of a Special Revitalisation Process or the opening itself of a Special Revitalisation Process, and to the request for an extension of the suspension of enforcement measures or the granting thereof the value of a cause for termination of an agreement or gives the other party the right to an indemnity or to terminate the agreement shall be considered null and void.

As to the Extrajudicial Company Reorganization Regime and the Extraordinary Company Viability Procedure, their regime does not establish any similar restrictions.

It is, however, arguable that the provisions of Articles 119/2 and 17-E/13 do not permit the termination but the insolvency provisions would permit acceleration of the obligations of the Parties, provided that it could be also construed that, in accordance with applicable law, the provisions of the General Agreement concerning early termination are, in their substance, acceleration clauses. In fact, it seems that, in case of an early termination under the General Agreement, the Parties are still obliged to comply with obligations under the agreement, although not the primary obligations but the ones arising from §11.

If §10 is seen as an acceleration clause, it could be considered enforceable under the general terms of Portuguese Law and the obligations under Individual Contracts could be declared due and payable before they would otherwise be due and payable. Please note, however, that we are not aware of prior cases dealing with this issue and accordingly our opinion is based on our general interpretation of the general rules of Portuguese insolvency laws, without the benefit of a judicial precedent or any supporting legal doctrine.

The Portuguese Insolvency Act does not distinguish between the separate or combined trade of electricity/natural gas and green certificates.

b) Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the EFET General Agreement) upon the occurrence of an event described in § 10.5(c) of the EFET General Agreement:

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

Not applicable.

> **bb) are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of Portugal or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?**

Not applicable.

cc) is there a risk that a termination notice given in accordance with the E-Notice Agreement (e.g. by e-mail with attached document in PDF format) (i) may not be recognised as valid termination notice by a liquidator, receiver or court or (ii) could the deemed receipt of the termination notice be challenged by a liquidator, receiver or court?

Not applicable.

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

Netting against the insolvency estate under Portuguese Insolvency Act (Article 99) is possible if, at least, one of the following requirements is met:

- the legal requirements for netting are met before the date of declaration of insolvency;
- the credit right over the insolvency estate meets the requirements of Article 847 of the Portuguese Civil Code before the insolvency estate counter-credit does.

Regarding the preventive restructuring frameworks, there is no similar legal provision to Article 99 that applies. Therefore, in a scenario of a Special Revitalisation Process, of an Extrajudicial Company Reorganization Regime or of an Extraordinary Company Viability Procedure the provisions embedded in § 11 of the EFET General Agreement regarding the netting of all positive and negative Settlement Amounts in determining the Termination Amount would be enforceable under the laws of Portugal in accordance with the requirements laid out above in I, 1.2..

If §10 is seen as an acceleration clause, as explained before, the fact that one of the scenarios of §10.5 (c) occurs will mean that the obligations of the Parties are due prematurely in accordance with the calculations of §11. Therefore, netting can be made before the declaration of insolvency in accordance with these provisions of the General Agreement within the limits of Article 99 of the Portuguese Insolvency Act mentioned above.

If, however, netting pursuant to the provisions of the agreement is not, for any reason (*v.g.* because the counterparty was not aware of the initiation of the insolvency proceedings), made before the declaration of insolvency, it will still be possible to net amounts owed under each Individual Contract. At this stage (*i.e.* after the declaration of insolvency) the regime established in Article 107 of the Portuguese Insolvency Act[2] – which sets forth a legal (or statutory) close-out netting - will apply and the calculations should be made accordingly.

Please note that it is our interpretation that this article applies in cases where none of the Parties has completely fulfilled its obligations under an agreement. If this is not the case, the creditor will have a regular credit right against the insolvency estate.

Nevertheless, Article 286 of the Portuguese Insolvency Act, as a conflict of laws rule establishes that "The declaration of insolvency shall not affect the right of creditors to demand set-off, where such a set-off is permitted by the laws applicable to the debtor's cross-claim". This means that the application of netting upon termination provisions on physically settled transaction would be accepted under the Portuguese Law to the extent that these are admissible under the law (including insolvency laws) applicable to the General Agreement.

A specific legal framework applies in relation to credit institutions according to the Liquidation of Credit Institutions and Financial Companies Act. Article 31 of this Act, as a conflict of laws rule, expressly states that the adoption of recovery measures or the filing of liquidation proceedings shall not affect the rights of set-off of the creditors, provided that such right is recognised by the law applicable to the credits of the credit institution and Article 33 establishes that netting agreements are exclusively ruled by the laws applicable to such agreements, without prejudice to the exceptions

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[2] *Article 107 (Forward transactions)*

"1. If the delivery of commodities, or the execution of financial obligations, which have a market value, is to be executed at a fixed date or within an established time period, and the given date occurs or time period elapses after the declaration of insolvency, the execution cannot be requested by none of the parties, and the buyer or the seller, as the case may be, will only be entitled to the payment of the difference between the adjusted price and the market price of the relevant commodities or the financial obligations on the second day counted as of the date of the declaration of insolvency, in relation to agreements with the same date or the same deadline for compliance, which, if due by the insolvent party, constitutes a credit over the insolvency estate.

2. Whichever the case may be, the seller shall retransfer the amounts already paid, having the possibility to set-off such obligation with the credit conferred pursuant to the previous number, until the relevant amounts are matched; if the seller is the insolvent party, the right of restitution shall constitute a credit over the insolvency estate in favour of the other party.

3. For the purposes of the application of the previous number, financial obligations shall be considered to be, notably:

a) The delivery of securities, except for shares which represent, at least, 10% of the company's equity and in relation to which the contractually established settlement is not merely financial;

b) The delivery of precious metals;

c) The payments in cash of amounts which are directly or indirectly determined by reference to a foreign currency interest rate, to the legal interest rate, to a unit calculation or to a price or other goods or services;

d) Options or other rights to sell or deliver the goods referred to in a) and b) or to the payments referred to in c).

4. If there are several transactions over financial obligations under a master agreement which can only be terminated in its entirety in case of default, that group of transactions shall be construed as being a bilateral agreement, for the purposes of this Article and Article 102.

5. Number 5 of article 104 shall apply, mutatis mutandis, to forward instruments not included in number 1 above."

provided for in articles 145-AB and 145-AV of the Banking Act concerning the application to credit institutions of certain resolution measures by the Bank of Portugal.

Therefore, subject to the limitation mentioned before, netting upon termination provisions on physically settled commodities transactions where the insolvent party is a credit institution with head office in Portugal are capable of being enforceable to the extent they are valid provisions under the laws (including insolvency law) applicable to the General Agreement.

d) Do the laws of Portugal recognize that the close-out netting provisions in section §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.

In order for all Individual Contracts to be seen as a whole for netting purposes it is important to establish that this was, in fact, the intention of the Parties when executing the General Agreement, *i.e.* that they only entered into that particular group of transactions as a whole and would not have executed them separately. In this regard, please see no. 4 of the abovementioned article 107 of the Portuguese Insolvency Act, which states that, if there are several transactions over financial obligations under a master agreement which can only be terminated in its entirety in case of default, that group of transactions shall be construed as being a bilateral agreement (for the purposes of Article 107 and of Article 102, which are not applicable to the preventive restructuring frameworks).

If this is not the case Transactions under the General Agreement are to be considered as separate bilateral agreements in an insolvency scenario. This does not, however, mean that netting according to §11 is impossible; as it is allowed in certain scenarios described in c) above.

As to preventive restructuring frameworks, please see c) above.

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

Pursuant to Article 96 of the Portuguese Insolvency Act, for the purposes of participation in the insolvency proceedings, any amounts expressed in foreign currencies must be converted into Euro at the rate effective in the place of payment at the date of the declaration of the insolvency.

Regarding the preventive restructuring frameworks, there is no similar legal provision to Article 96 of the Portuguese Insolvency Act that applies.

f) Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party based in your jurisdiction are dependent upon, or otherwise affected by, the status of one or more of the concerned parties

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falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?

As referred to in Appendix A, according to Article 9/3 of the Liquidation of Credit Institutions and Financial Companies Act, the liquidation proceeding of such institutions shall be carried out according to the Portuguese Insolvency Act, to the extent compatible with such specific liquidation regime, with certain exceptions. Please refer also to the considerations made regarding credit institutions in c) and d) above.

As to preventive restructuring frameworks, please note that Credit Institutions and Financial Companies cannot be the subjects of these frameworks.

g) Please specify if any of your conclusions in this Section I would be changed or qualified if the Parties would enter into several Individual Contracts for multiple types of products (e.g., some Individual Contracts would provide for delivery of electricity/natural gas, other ones for green certificates) under the same General Agreement? Is there a risk that any safe harbor provisions applicable to one type of product, but not the other, would cease to apply as a result?

Conclusions laid out in Section I would not be changed or qualified if the Parties would enter into several Individual Contracts for multiple types of products. Under Portuguese Insolvency Act, and for purposes of admissibility of netting-out clauses, it is irrelevant the type of products covered by the Individual Contracts, as the law does not distinguish between them.

2. Preventive restructuring frameworks

There are three preventive restructuring frameworks foreseen under Portuguese law aimed at promoting the financial reorganisation of companies in difficulties, thus avoiding an insolvencial procedure: the Special Revitalisation Process ("*Processo Especial de Revitalização*"), the Extrajudicial Company Reorganization Regime ("*Regime Extrajudicial de Recuperação de Empresas*") and the Extraordinary Company Viability Procedure ("*Processo Extraordinário de Viabilização de Empresas*").

The Special Revitalisation Process intends to allow a company in economic difficulty or imminent insolvency, but still able to be rescued, to negotiate with creditors in order to reach an agreement leading to the Revitalisation of that company which can then be homologated by the Court, applicable to all the company's creditors.

As to the Extrajudicial Company Reorganization Regime, it is also meant to enable the negotiations between a company in economic difficulty or imminent insolvency, but still able to be rescued, and its creditors in order to reach an agreement leading to the Revitalisation of that company, but that agreement is not to be homologated by the Court, and it is only binding between the company and the creditors who signed it.

The Extraordinary Company Viability Procedure is very similar to the Special Revitalisation Process, but it is only directed for companies affected by the COVID-19 pandemic.

Please see the answers to issues a) to g) regarding these preventive restructuring frameworks above.

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3. Non-insolvency related Material Reasons

Please discuss and advise on the issues outlined in 1.5 above under c), d) and e) in the context of non-insolvency related Material Reasons:

Question c) in relation to Non-insolvency related Material Reasons

As previously mentioned in 1.2. above, notwithstanding the fact that the Portuguese Civil Code provides for requirements of set-off under Portuguese Law, such requirements may be, in general, put aside under the principle of freedom of contracting provided for in Article 405 of the Civil Code. Thus, and insofar as set-off is based on non-insolvency related Material Reasons, the Parties shall be free to determine the conditions under which such set off operates.

However, that does not mean that § 11 would be enforceable under any circumstances. We are unable to make a general and abstract statement regarding their enforceability, as that conclusion would ultimately depend in part on the concrete circumstances of any given specific situation.

Question d) in relation to Non-insolvency related Material Reasons

Please refer to d) above, as the applicability of such provisions to Individual Contracts does not depend on the Material Reasons being insolvency-related or not. Please see also 1.2. above.

Question e) in relation to Non-insolvency related Material Reasons

The currency in which the obligations of the parties under the contracts shall be fulfilled is, in general, subject to the principle of freedom of contract, pursuant to Article 405 of the Portuguese Civil Code. However, as mentioned above, that does not mean that such a provision would be enforceable under any circumstances, as its enforceability will always depend in part on the concrete circumstances of any given specific situation.

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

Outside a scenario of insolvency of Party A, if the General Agreement was adapted to select Portuguese Law as its governing law, it should be noted that the principle of freedom of contracting set forth in Article 405 of the Portuguese Civil Code gives contracting Parties ample freedom to stipulate the circumstances under which contracts may be early terminated. This conclusion is reinforced by the express reference to conventional termination rights made in Article 432/1 of the Portuguese Civil Code.

Outside a scenario of insolvency of Party A, assuming that the General Agreement constitutes a valid and legally binding agreement in accordance with its terms under the laws of Germany or England, as the case may be, to the extent it is expressed or deemed to be governed by such laws, the General Agreement, under Portuguese Law, will constitute a valid and legally binding agreement in accordance with its terms and subject to mandatory public policy provisions ("*lois de police*" or "*normas de aplicação imediata*") and principles of law, including, without limitation, Portuguese international public policy ("*ordem pública internacional portuguesa*"), and §§ 10.3, 10.5 and 11 of ad

the General Agreement would be capable of being held valid and effective in a Portuguese court, which does not mean that they would be enforceable under any circumstances.

II. Multibranch Parties

1. Portuguese Multibranch Party

i) Would there be any change in your conclusions reached under I.1 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?

In our opinion, the conclusions would be the same, to the extent that Portuguese Law applies to the insolvency proceedings.

This matter is governed by the EU Insolvency Regulation, which applies in Portugal, as previously referred to in I. 1 above[3].

According to Article 7 of the EU Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. Article 3/1 states that the jurisdiction to open insolvency proceedings belongs to the courts of the Member State within the territory of which the centre of a debtor's main interests is located (which shall be presumably, and in the absence of proof to the contrary, the place of the registered office, in the case of companies or other legal persons).

In accordance with Article 7/2, the law of the State of the opening of proceedings shall govern the opening, conduct and closure of the proceedings, and, in particular: "*(a) the debtors against which insolvency proceedings may be brought on account of their capacity; (b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings; (c) the respective powers of the debtor and the insolvency practitioner; (d) the conditions under which set-offs may be invoked; (e) the effects of insolvency proceedings on current contracts to which the debtor is party; (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits; (g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings; (h) the rules governing the lodging, verification and admission of claims; (i) the rules governing the distribution of proceeds from 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; (j) the conditions for, and the effects of closure of, insolvency proceedings, in particular by composition; (k) creditors' rights after the closure of insolvency proceedings; (l) who is to bear the costs and expenses incurred in the insolvency proceedings; (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.*"[4]

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[3] Please note that, as mentioned in I.1.6 above, Denmark did not participate in the adoption of this Regulation and is therefore not bound or subject to its application.

[4] As mentioned in I.1.4 above, please note that Article 7/2 (m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that *(i)* the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and *(ii)* that law does not allow any means of challenging that act in the relevant case (Article 16 of the EU Insolvency Regulation).

Notwithstanding this, there are some exceptions to the applicability of the law of the State of the opening of proceedings, which include, among others:

- The opening of insolvency proceedings may not affect the rights in *rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets belonging to the debtor which are situated within the territory of another Member-State at the time of the opening of the proceedings. These rights include *(a)* the right to dispose of and obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage; *(b)* the exclusive right to have a claim met, in particular a right guarantee by a lien in respect of the claim or by assignment of the claim by way of a guarantee; *(c)* the right to demand the assets from and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; *(d)* a right in *rem* to the beneficial use of the assets (a right, recorded in a public register and enforceable against third parties, under which any of the previously mentioned rights in *rem* may be obtained shall be considered a right in *rem*) (Article 8 of the EU Insolvency Regulation).
- The opening of insolvency proceedings shall not affect the rights of the creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim, without prejudice of actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors made in accordance with the law of the state of the opening of proceedings (Article 9 of the EU Insolvency Regulation).
- The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of the proceedings, without prejudice of actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors made in accordance with the law of the State of the opening of proceedings (Article 10/1 of the EU Insolvency Regulation).
- The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of the proceedings, without prejudice of actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors made in accordance with the law of the State of the opening of proceedings (Article 10/2 of the EU Insolvency Regulation).
- Without prejudice to what has been written on third parties' rights in *rem*, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market. However, actions for voidness, voidability or unenforceability may be taken to set aside payments or transactions under the law applicable to the relevant system or financial market (Article 12 of the EU Insolvency Regulation).
- The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat. (Article 18 of the EU Insolvency Regulation).[5]

[5] The EU Insolvency Regulation set outs other exceptions to the applicability of the law of the State of the opening of proceedings, whose object is however not related to the object of the EFET General Agreement, which are the following: *(a)* The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property

Without prejudice of these exceptions, the EU Insolvency Regulation also foresees that, where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State within the territory of which the debtor possesses an establishment shall have jurisdiction to open secondary insolvency proceedings. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State (Article 3/2 of the EU Insolvency Regulation). The law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened (Article 35 of the EU Insolvency Regulation).

It should be noted that, as mentioned above, the EU Insolvency Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Also in accordance with the Portuguese Insolvency Act, or CIRE, the insolvency proceedings and its respective effects are governed by the law of the State of the opening of the proceedings (Article 276).

There exist some exceptions regarding the general principle set out in Article 276 of the CIRE. In particular:

- The effects of the declaration of insolvency on property rights of creditors or third parties to corporeal or incorporeal property, movable or immovable property (whether specific goods or sets of undetermined goods considered as a whole, and which composition may vary through time), belonging to the debtor and which at the time of the beginning of the proceedings are located in the territory of another State, shall be exclusively governed by the law of such State; the same applies to the rights of the seller regarding goods sold to the insolvent debtor with retention of title (Article 280/1 of CIRE);
- The declaration of insolvency of the seller of a good, after such good has been delivered, is not able to be deemed, alone, a ground for termination or rescission of the sale, and does not hinder the acquisition of the property of the good by the purchaser, as long such good is located in the territory of another State at the time of the opening of the proceedings (Article 280/2 of CIRE)[6];
- The effects of the declaration of insolvency on rights related to securities registered or deposited are governed by the law applicable to their transfer, as provided for in Article 41 of the Portuguese Securities Code[7] (Article 282/1 of CIRE);

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is situated (Article 11 of the EU Insolvency Regulation); *(b)* The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment (Article 13 of the EU Insolvency Regulation); *(c)* The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept (Article 14 of the EU Insolvency Regulation); *(d)* Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of an immoveable asset, a ship or an aircraft subject to registration in a public register or securities whose existence assumes registration in a register laid down by law, the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept (Article 17 of the EU Insolvency Regulation).

[6] According to Article 280/3 of CIRE, neither article 280/1, nor article 280/2 hinder the possibility of termination in favour of the insolvency estate, in general terms.

[7] *"Article 41 Transfer and guarantees: The conveyance of rights and the constitution of guarantees on securities are governed: a) In relation to securities integrated into a centralised system, by the law of the State where the management entity of such system is located; b) In relation to securities registered or deposited and not integrated in a centralised*

– Notwithstanding the provision of Article 281 of CIRE, the determination of the law applicable to the effects of the declaration of insolvency on the rights and obligations of the entities taking part in a financial market or in a payment system, as defined in Article 2 (a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998, or any similar system, shall be governed by article 285 of the Portuguese Securities Code (Article 282/2 of CIRE). Such provision states that, "*with the commencement of proceedings of bankruptcy, recovery of a company or reparation of a participant, the rights and the obligations of this participation or associated to it are governed by the law applicable to the system*".
– Any creditor is able to exercise its rights either on the main or in the secondary proceedings (Article 284/1 of CIRE); in addition, to the extent permitted by the law applicable to foreign proceedings, the appointed manager of the insolvency proceedings may: *(a)* claim in Portugal the credit rights recognised within the foreign proceedings; *(b)* exercise in the general meeting of creditors the voting rights attributable to the credit rights, unless their respective holders oppose (Article 284/2 of CIRE);
– The creditor which is able to obtain payment within foreign insolvency proceedings shall not be paid within the proceedings taking place in Portugal as long as the creditors which are similarly graded have not also obtained such payment (Article 284/3 of CIRE);
– The effects of the insolvency proceedings on pending judicial proceedings regarding a good or right which is part of the insolvency estate shall be exclusively governed by the law of the State in the Courts of which such proceedings are pending (Article 285 of CIRE);
– The declaration of insolvency does not affect the right of the creditor of the insolvency to set-off, if such set-off is possible according to the law applicable to the counter-right of the debtor;
– The termination of deeds in favour of the insolvency state is not admissible, if the third party proves that the deed is subject to a law according to which its dispute is not possible in any case.[8]

Pursuant to Article 7 of CIRE, the competent court for the insolvency proceedings is the court of the place in which the debtor has its head office or domicile, being also competent the court of the place in which the debtor's centre of main interests is located[9].

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system, by the law of the State in which the entity where the securities are registered or deposited is located; c) In relation to securities not included in the previous sub-paragraphs, by the individual law of the issuer."

[8] The CIRE set outs other exceptions to the applicability of the law of the State of the opening of proceedings, whose object is however not related to the object of the EFET General Agreement, which are the following: *(a)* the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law applicable to the contract of employment (Article 277 of CIRE); *(b)* the effects of the declaration of insolvency on the debtor's rights related with immovable property, ships or aircraft, which must be mandatorily registered in a public registry, are governed by the law of the State under which authority such registry is kept (Article 278 of CIRE); *(c)* the effects of the declaration of insolvency on the agreements which grant the right to acquire immovable property, or the right to use it, shall be exclusively governed by the law of the State where such property is located; if the agreement regards a ship or an aircraft which must be mandatorily registered in a public registry, it shall be governed by the law of the State under which authority such registry is kept (Article 279 of CIRE); *(d)* the validity of a deed entered into after the declaration of insolvency by which the debtor disposes, against payment, of immovable property, a ship or an aircraft which must be mandatorily registered in a public registry, are governed by the law of the State in which such immovable property is located or under which authority such registry is kept (Article 281 of CIRE); *(e)* sale and repurchase transactions, as defined in Article 12 of Directive 86/635/EEC of 8 December 1986, shall in any case be governed by the law applicable to such agreements; however forward exchange transactions, options, transactions involving the issue of debt securities with a commitment to repurchase all or part of the issue before maturity or any similar transactions are not deemed to be sale and repurchase transactions for this purpose, as expressly set out in this Article;

[9] Article 7/2 further clarifies that it is understood that the debtor's centre of main interests is the place in which the debtor manages them, in a usual and public way.

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

Regarding the treatment of the EFET General Agreement as a single unified agreement under the laws of Portugal, please refer to I.1 above and to the requirements set out therein.

Nonetheless, as previously mentioned, according to Article 9 of the EU Insolvency Regulation and Article 31 of the Liquidation of Credit Institutions and Financial Companies Act, if the law applicable to the insolvent debtor's claim permits the set-off of the creditors' claims against those of the debtor, the opening of insolvency proceedings shall not affect the right of the creditors to demand such set-off.

Taking into account the considerations made in I.1, concerning the applicability of the latter article to close-out netting, and the assumption set out therein, it might be possible that the Portuguese receiver would treat the General Agreement as a single unified agreement under the laws applicable in Portugal, regardless of the treatment given to it or to Individual Contracts by an insolvency official in a country where close out-netting may be unenforceable as long as the law governing the claim allows such a set-off to take place.

It shall be once more stressed that the provision contained in Article 9 of the EU Insolvency Regulation does not set aside the possibility of legal proceedings being initiated on the basis of voidness, voidability or unenforceability of legal acts detrimental to all the creditors made in accordance with the law of the state of the opening of proceedings (Article 9/2 of the EU Insolvency Regulation).

2. Foreign Multibranch Party

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

According to Article 3/2 of the EU Insolvency Regulation, if the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of such other Member State. That is, if Country H is a Member State of the European Union, and if there is a branch in Portugal, then Portuguese Courts should be able to initiate secondary insolvency proceedings[10].

These proceedings may be initiated only after the opening of the main proceedings in the Member State within the territory of which the centre of the debtor's main interests is situated, unless where the main proceedings cannot be opened because of the conditions laid down by the legislation of the

[10] Please note that, according to Article 15 of the EU Insolvency Regulation, an European patent with unitary effect, a Community trade mark or any other similar right established by Union law may not be included in secondary insolvency proceedings.

Member State within the territory of which the centre of the debtor's main interests is situated, or where the opening of territorial insolvency proceedings is requested by a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested, or by a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings (Article 3/4 of the EU Insolvency Regulation).

The effects of the territorial proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State, and may not be challenged in other Member States (Articles 3/2 and 20/2 of the EU Insolvency Regulation). The secondary insolvency proceedings must be winding up proceedings (Article 3/3 of the EU Insolvency Regulation).

The law applicable to the secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are initiated (Article 35 of the EU Insolvency Regulation).

In what concerns the right to request the opening of secondary proceedings, pursuant to Article 37 of the EU Insolvency Regulation, it shall belong to *(a)* the insolvency practitioner of the main proceedings or to *(b)* any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Therefore, if secondary proceedings can be initiated in Portugal, the debtor shall itself (or through its management corporate body, in the case of legal persons (Article 19 of the Portuguese Insolvency Act)) initiate the insolvency proceedings, within 30 days from the knowledge of the insolvency situation of the company (Article 18 of the Portuguese Insolvency Act). Either any other person responsible for the debt, the creditors or the "*Ministério Público*" (Public Prosecutor) are also entitled to initiate insolvency proceedings, given the case that one of the situations referred to in Article 20 of the Portuguese Insolvency Act verifies.

Also Articles 294 to 296 of the Portuguese Insolvency Act contemplate the possibility of opening secondary insolvency proceedings in Portugal *i)* if the debtor has an establishment in Portugal or *ii)* when the right invoked cannot become effective by any other means than a proceeding in Portugal or there is a meaningful difficulty of the debtor to file the proceedings abroad, in both cases only when there is a relevant element of connection (personal or *in rem*) between the object of the claim and the Portuguese jurisdiction.

As for the opening of proceeding in relation to credit institutions and financial companies after the transposition of Directive 2001/24/EC of the European Parliament and of the Council of April 4, 2001, the rule is that the proceedings against an institution and its branches should be opened in the country where the institution is authorised (in case the institution is authorised in Portugal, *vide* Article 19 of the Liquidation of Credit Institutions and Financial Companies Act). The decisions of the relevant authorities of other Member States taken in accordance with the Directive are capable of being recognised in Portugal without the need of revision, confirmation or any other similar formality in accordance with Article 38 of the Liquidation of Credit Institutions and Financial Companies Act.

Article 25 of the same Act states that if the Bank of Portugal considers necessary to take any administrative measures ("*medidas de saneamento*") in relation to a branch of a credit institution

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with head offices in another EU Member State, the latter shall inform the competent authorities of such fact.

In case of a Portuguese branch of a Credit Institution with head offices located in a foreign non-EU country and branches of financial institutions located in Portugal and subject to the supervision of the Bank of Portugal, there may be separate proceeding in Portugal (Article 4/4 of the Liquidation of Credit Institutions and Financial Companies Act).

Under Portuguese Law, creditors are not allowed to file for the judicial liquidation of these institutions. Credit institutions and financial companies may only be dissolved by voluntary liquidation (resolution of the shareholders) or revocation of their authorisation by the Bank of Portugal (which will trigger the judicial liquidation according to the Portuguese Insolvency Act).

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

If Portuguese Law is applicable to secondary insolvency proceedings, according to the EU Insolvency Regulation or to proceedings initiated in relation to Portuguese branch of a foreign institution within the terms of the Liquidation of Credit Institutions and Financial Companies Act, what has been written above concerning the admissibility of close-out netting under Portuguese Law applies.

The provision contained in Article 9 of the EU Insolvency Regulation shall however also be taken into account, particularly considering that both the State of the opening of the proceedings and the State of the secondary proceedings are bound by it. That is, to the extent that each stage of close-out netting can be considered a distinct and separate operation (please see II.1 above), the law governing the stage of set-off shall be the one which governs the insolvent debtor's claim, given the case that the latter admits such a set-off to take place. Additionally, both the insolvency practitioner of the main proceedings and the insolvency practitioner of the secondary proceedings are bound by cooperation and communication duties, according to Article 41 of the EU insolvency Regulation.

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

The location of the assets may be relevant in the determination of the law applicable to certain aspects of insolvency proceedings, particularly taking into consideration some of the exceptions set out in i) above to the general rule of the applicability of the law of the State of the opening of the Proceedings.

Similarly, the location of the assets may be relevant though, as according to Article 27 (b) and (c) of the Liquidation of Credit Institutions and Financial Companies Act, the effects of the opening of liquidation proceedings are governed by the law of the Member State of the registration (in relation to immovable property, ships or aircrafts subject to registration in a public register) and by the law of the Member State within the territory of which the immovable property is situated (in relation to contracts conferring the right to make use of or acquire immovable property).

To the extent Portuguese Law applies, the close-out netting possibilities were discussed above.

The only situation in which the Portuguese Courts would be competent to initiate insolvency proceedings where no registered office, branch or other kind of establishment exists in Portugal shall be the one set out in Article 294/2 of the Portuguese Insolvency Act and in Article 62 (c) of the Portuguese Civil Proceedings Act. Pursuant to these provisions, as long as a relevant connection factor between the object of the dispute and the Portuguese legal system exists, the insolvency proceedings may take place in Portugal wherever the right invoked is not able to become effective through any other way other than such proceedings, or if initiating the proceedings out of Portugal would be significantly hard for the claimant.

III. Collateral

Preliminary Note: According to the EFET Credit Support Annex, eligible Credit Support can be either Cash or a Letter of Credit. According to the definition of the EFET Credit Support Annex a Letter of Credit must always be a standby letter of credit, a bank guarantee or similar document which obliges the bank to pay the amount guaranteed therein upon first demand of the Transferee. Given this definition, some of the following questions may be construed as addressing only the Cash Collateral, particularly the transfer of ownership and title of the Cash as collateral, and not the Letter of Credit. For the sake of accuracy in these cases our answers will refer only to Cash Collateral, mentioning that the matter is not applicable to the Letter of Credit.

Regarding the Letter of Credit, and assuming that it will always be an autonomous, standby letter of credit, a bank guarantee or similar autonomous guarantee which obliges the bank to pay the amount guaranteed therein upon first demand of the Transferee, and which wording includes the maximum guaranteed amount, its enforceability may be facilitated if the Letter of Credit is authenticated by notary or any other entity empowered to authenticate documents, considering that, according to article 703 of the Portuguese Civil Proceedings Act, documents recognising obligations are directly enforceable only if authenticated. If not, a document recognising an obligation may only be able to be enforceable after declaratory proceedings take place in order to declare the existence of an obligation by means of a court decision.

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

<u>Cash Collateral:</u>

Assuming that Party B receives full ownership of the cash but not as a security, the transfer of cash may constitute a contractual obligation and, therefore, the parties may choose the governing law in accordance and within the limits of Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008.

Generally speaking, the Portuguese legal rule sets out that the transfer of ownership and/or title of cash (and the risk related thereto) occurs upon the making of the transferring agreement between the parties, and therefore, unlike other civil law systems, it requires no further execution of acts or formalities for such transfer of ownership and/or title to become effective.

Letter of Credit: Not applicable.

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

Cash Collateral:

There are two possibilities of transferring the ownership of collateral. From the one hand, there are cases falling within the scope of Decree-Law no. 105/2004, of 8 May, as amended, transposing the Collateral Directive (Directive 2002/47/EC of the European Parliament and of the Council of 6 June, 2002, on financial collateral arrangements).

This regime expressly recognizes the validity of financial collateral arrangements based upon the transfer of the full ownership of the financial collateral ("*alienação fiduciária em garantia*") and, therefore, a collateral title arrangement would, in principle, be enforceable in Portugal. In this case, the transfer of ownership would not, in principle, be considered as a security similar to the Portuguese pledge and mortgage, but as a fiduciary transfer of title for the purpose of providing a collateral. Please note, however, that the Portuguese Law (*e.g.* Insolvency Code and Civil Procedure Code) does not contains specific rules for this fiduciary transfer of title, particularly in case of insolvency of the collateral provider or of competition between the collateral taker and other creditors. This means that one may argue that the legal regime provided for strict securities (such as pledge and mortgage) shall be also applicable to title securities. To this extent, it can be considered that there is a risk of considering the title collateral as a security.

It should also be noted that the Portuguese financial collateral arrangements regime only applies if certain requirements are met, including, but not limited to the fact that *i)* both parties are legal persons (it does not apply to individuals) and *ii)* at least one of the parties is a public entity, the Bank of Portugal, other central banks, the European Central Bank, the International Monetary Fund, the International Payments Bank, multilateral developing banks and the European Investment bank or an entity subject to prudential supervision (*v.g.* credit institutions and financial institutions).

On the other hand, transfer of ownership might also correspond to cases not comprised within the mentioned Decree-Law no. 105/2004, of 8 May. Indeed, considering the limited scope of the above mentioned collateral regime, we believe that this second category of cases can correspond to most part of the collateral given under an EFET agreement executed with a Portuguese counterparty. It should be pointed out that in these situations, transfer of ownership has been admitted despite the lack of specifically applicable legal rules, if it has been validly agreed between the parties. This circumstance leads to the conclusion that, in this second category of cases, setting up a detailed agreement between the Parties is a crucial step to avoid risks and uncertainties. It should also be noted that the freedom of contracting only prevails to the extent that no other general principles or civil law rules are breached (for example: a transfer of ownership containing rules against the legally set out principle of good faith in the performance contracts can be challenged before the courts).

Furthermore, as already referred in relation to the first category of cases, Portuguese Law (*e.g.* Insolvency Code and Civil Procedure Code) does not provide specific rules for the aforesaid fiduciary transfer of title for the purpose of providing a collateral in case of insolvency, particularly in case it competes with or affects the rights of other creditors. Again, according to the abovementioned, one may argue that the aforesaid transfer of title serves the purpose of securing a debt and, consequently, that one should consider that the rules and principles applicable to normal securities should also govern this transfer of title collateral.

Letter of Credit: Not applicable.

p) 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 Portugal 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?

Cash Collateral:

In principle, no requirements are applicable to transfer the title of the cash. As previously mentioned, the Portuguese legal rule is that the transfer of ownership and/or title of cash occurs upon the making of the agreement between the parties, and no further acts or formalities are required for such transfer of ownership and/or title to become effective. However, if Decree-Law n. ° 105/2004, of 8 May, applies, assuming that Party B receives full ownership of the cash balance in the relevant bank account, the transfer would only be perfected upon registry of ownership by the relevant bank in Party B's account.

Letter of Credit: Not applicable.

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

Cash Collateral:

In principle, outside the scope of the referred Decree-Law no. 105/2004, of 8 May, the answer depends on the specific rules agreed by the Parties. This means that, in principle, the right to substitute collateral can be agreed between the parties, within the limits set out by the principle of good faith which prevails in contract law. Given the absence of legal rules, please also consider the risks of re-characterisation above mentioned.

However, if the EFET Credit Support Annex qualifies as a financial collateral arrangement under Decree-Law no. 105/2004, of 8 May, the possibility of replacing of the financial collateral with an equivalent collateral (according to Article 13, the equivalent of cash would be a payment in the same amount and currency) is expressly contemplated, if the parties so agree. In this case, the substitute will replace the original collateral. Notwithstanding this, certain particularities should be considered: for instance, the Decree-Law establishes that such substitution will not be null even if occurring throughout the insolvency "suspect periods" (within the meaning set out in t) below) (Article 17/ 2 (b)).

Letter of Credit:

The substitution of a Letter of Credit will imply the issuance of a new document. This means that it will be considered as provided on such date (including for purposes of insolvency law "suspect periods").

r) Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with §11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Portugal insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?

Cash Collateral:

In principle, outside the scope of Decree-Law no. 105/2004, of 8 May, § 11 of the EFET Credit Support Annex is capable of being considered enforceable and close-out netting might also be admitted, provided that it relates only to cash.

If the EFET Credit Support Annex qualifies as a financial collateral arrangement under Decree-Law no. 105/2004, of 8 May, the parties may, upon the occurrence of an event that triggers the enforcement of the collateral (a default or any other event to which the parties confer equivalent effect) agree on *i)* accelerating of the beneficiary's obligation to return the guarantee and on *ii)* setting-off this beneficiary's obligation against the amounts payable ("close-out netting")

Letter of Credit:

Considering what was said in relation to Letters of Credit, our understanding is that the amounts payable under a Letter of Credit should not be included in the calculations of § 11 unless the Letter of Credit was drawn, as ultimately provided for in Version 2.0 of the EFET Credit Support Annex.

If the Letter of Credit was already drawn by the Transferee, that credit is already satisfied, and, therefore, amounts already received under the Letter of Credit should be deducted from the total amount owed to the Transferee (if any) as per § 11, as ultimately provided for in Version 2.0 of the EFET Credit Support Annex.

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

Cash Collateral:

In principle, regarding the cases not governed by Decree-Law no. 105/2004, of 8 May, if Party A is a Portuguese company, then the Portuguese insolvency code rules might apply. In this case and if a number of conditions is met, the claw-back provisions and other creditor's protection rules might affect the collateral transfer and thus Party B's rights. Therefore, we cannot consider that Party B's rights are irrespective of the insolvency of Party A.

If the EFET Credit Support Annex qualifies as a financial collateral arrangement under Decree-Law no. 105/2004, of 8 May, specific provisions shall also be considered. According to Article 17 the fact that financial collateral agreements were executed on the same day of the commencement of liquidation proceeding (as long as there was no decision yet) or within a certain period before such date ("suspect periods") *per se* does not cause these agreements to be invalid. Moreover, Article 18 states that upon the commencement of liquidation proceedings in relation to either the collateral taker or the collateral provider, the financial collateral agreements produce effects according to the terms and conditions agreed by the parties. Further, financial collateral agreements executed and financial collateral provided after the proceedings have been initiated are effective towards third parties as long as the beneficiary of the guarantee proves that it did not know, nor should have known, that the proceedings were initiated.

However, it should be also noted that this regime has certain restrictions: for instance, these rules do not apply if the agreements were entered into intentionally to the detriment of other creditors.

Letter of Credit:

The answer to this question depends on the type of Letter of Credit. If this is equivalent to a bank guarantee on first demand (*i.e.,* a standby letter of credit) without limitations then, in principle, the insolvency of Party A should have no impact on Party B's rights against the Bank. This analysis should, nevertheless, be made on a case by case basis and will depend on the content of each Letter of Credit.

t) Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

Cash Collateral:

Please refer to s) above.

For the situations falling outside the scope of Decree-Law no. 105/2004, of 8 May, please see the answer to s) above. It should be also pointed out that the claw-back provisions rely upon the decisions taken by the appointed manager of the insolvency proceeding. Timeframes are also variable and in certain cases claw-backs can challenge the transactions made two years prior to the insolvency proceeding.

For the other cases, it should be also considered that Article 17 of Decree-Law no. 105/2004, of 8 May, expressly recognises the possibility of substitution of financial collateral for an equivalent guarantee (according to Article 13, the equivalent of cash would be a payment in the same amount and currency), establishing that such substitution will not be null if effected in insolvency suspect periods.

Letter of Credit:

The insolvency of Party A should have no impact on these documents as these are issued by a third party and the EFET definition entails that they should be autonomous demand guarantees. This analysis should, nevertheless, be made on a case by case basis and will depend on the content of each Letter of Credit.

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

Cash Collateral:

In our opinion, the wording of the agreement seems to make clear that the parties' intent when executing the EFET Credit Support Annex is *i)* for the ownership of the collateral to be effectively transferred and *ii)* not to create a security interest.

If such arrangement is valid under applicable law and does not violate Portuguese mandatory rules ("*lois de police*", "*normas de aplicação imediata*") or Portuguese public policy principles, it is capable of being enforced under Portuguese Law, without the fulfilment of any further requirements. Notwithstanding this, it should be also noted that this position has not been previously challenged before the Portuguese courts and thus different understandings cannot be excluded.

In case of a title collateral executed under Decree-Law no. 105/2004, of 8 May, a reference to this particular regime (in the governing law provisions) should be included.

Letter of Credit

As mentioned above, our understanding is that Letters of Credit are initially issued in favour of the beneficiary of the collateral and, therefore, there is no transfer of ownership in that case.

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

On the drafting side, according to what was mentioned in the previous paragraphs, it could be worth distinguishing between Cash Collateral and Letters of Credit and to establish different mechanisms for each of these types of collateral.

Furthermore, it might also reinforce the creditor's rights to include other types of collateral to be transferred, and not only cash.

Parent Company Guarantee

Are there any specific statutory formalities that should be (or recommendable as good practice for the benefit of the Beneficiary) complied with in order to create a valid guarantee document?

There are no general requirements concerning the formalities of a guarantee in order to render it valid. However, at least in guarantees deemed as accessory to the main obligation, if any specific formalities apply to the guaranteed obligation, such formalities will extend to the guarantee (which renders it recommendable to submit guarantees to the same formalities of the guaranteed obligation, to the extent possible).

Are there any specific statutory provisions that should be expressly set-aside, varied or referred to, or any specific statement/wording based on any such statutory provisions that should be expressly included, in the document of the guarantee in order to increase the chances of an effective enforcement of the guarantee as may be expected by the Beneficiary based on the assumptions?

The enforceability will ultimately depend on the contents of the guarantee and of the underlying obligation and on the characteristics of the guarantor and the beneficiary.

In any case, it is expectable that the guarantee contains representations and warranties on, at least, the corporate authority and capacity of the guarantor.

In order to reduce the probability of the guarantor refusing payment on the basis of the inexistence or invalidity of the guaranteed obligation or of any other defences arising out of the guaranteed obligation or of the relationship between the debtor and the beneficiary, it could be worth drafting and qualifying the guarantee as autonomous from the main obligation, and obliging the guarantor to pay the amount guaranteed therein upon first demand.

Additionally, the enforceability of an autonomous guarantee may be facilitated if the guarantee expressly references the maximum amount guaranteed and is authenticated by notary or any other entity empowered to authenticate documents, considering that, according to article 703 of the Portuguese Civil Proceedings Act, documents recognising obligations are directly enforceable only if authenticated. If not, a document recognising an obligation may only be able to be enforceable after declaratory proceedings takes place in order to declare the existence of an obligation by means of a court decision.

It is however not totally clear whether such provision of autonomy would be effective in all situations under Portuguese law, especially in cases in which the guarantee is not issued by a bank. Some scholars defend that companies which do not perform banking activities may not grant autonomous guarantees and such guarantees so granted may be considered null and void, as the relevant company may not have legal capacity to perform such act. However, this position is not unanimous within Portuguese academy and other authors argue that, whenever a company has a justified own interest, it may grant such a guarantee.

On the other hand, it is worth to note that the obligation of the guarantor is a future and conditional obligation, which will only arise when the beneficiary demands the payment to the guarantor pursuant to the terms of the guarantee.

Thus, in order for the guarantee to be enforced it is also necessary to produce supplementary evidence that a payment obligation arose due to the request made by the beneficiary.

In this context, assuming that the guarantee is autonomous and on first demand as referred to above, and if it is intended that the guarantee is used as basis for enforcement, the following wording should be included in the guarantee:
"*For the purposes of article 707 of Portuguese Civil Proceedings Act, the payment requests made by the [Beneficiary] under Clause [X] of this [Guarantee] are deemed and considered as past events and are enough evidence of the constitution of the payment obligation by the [Guarantor] to the*

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[Beneficiary] under this [Guarantee], with no need of having own enforceability ("força executiva própria")".

Furthermore, it should be noted that there may be tax contingencies arising out of issuing or being the beneficiary of a guarantee on which we do not opine.

IV. General Enforceability

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

Assuming that the General Agreement constitutes a valid and legally binding agreement in accordance with their terms under German Law or English Law to the extent they are expressed or deemed to be governed by such law, the General Agreement, under Portuguese Law, will constitute valid and legally binding obligations in accordance with their terms, subject to Portuguese mandatory provisions of law ("*lois de police*" or "*normas de aplicação imediata*") and in accordance with Portuguese legal requirements and limitations, including those with respect to enforcement in kind, bankruptcy, insolvency, fraudulent transfer, suspension of payments or other laws relating to or affecting creditors' rights in general, competence of the courts' jurisdiction, and other legal requirements pertaining the recognition of foreign judgements. On the other hand, the choice of arbitration for the settlement of any dispute arising out of or in connection with the General Agreement, under the rules of arbitration (*ad hoc* or institutional) selected by the Parties would be upheld by Portuguese Courts. Furthermore, foreign arbitral awards may be enforced by Portuguese courts under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, in accordance with the provisions of the referred Convention (*inter alia* Articles III, IV and V) and in accordance with the provisions of the Portuguese Law on Voluntary Arbitration, approved by Law no. 63/2011, of 14 December (in particular, Articles 55-58).

(a) Force Majeure (§ 7)

Assuming that the General Agreement constitutes a valid and legally binding agreement in accordance with their terms under German Law or English Law to the extent they are expressed or deemed to be governed by such law, force majeure clauses such as § 7 of the General Agreement will constitute valid and legally binding obligations in accordance with their terms, subject to Portuguese mandatory provisions of law ("*lois de police*" or "*normas de aplicação imediata*") and in accordance with Portuguese legal requirements and limitations, including those with respect to enforcement in kind, bankruptcy, insolvency, fraudulent transfer, suspension of payments or other laws relating to or affecting creditors' rights in general, the competence courts' jurisdiction, and other legal requirements pertaining the recognition of foreign judgements. This does not mean that §

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7 would be enforceable under any circumstances. We are unable to make a general and abstract statement regarding its enforceability, as that conclusion would ultimately depend in part on the concrete circumstances of any given specific situation.

The choice of English or German Law to govern the General Agreement is valid under the rules on conflicts of laws applicable in Portugal, particularly, on the basis and within the scope of and subject to the limitations arising out of the 1980 Rome Convention on the law applicable to contractual obligations and, for contracts concluded from 17 December 2009 on, of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), as well as to the limitations arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*"). This would include the application of the chosen law to §7 of the General Agreement. Any limitations thereto arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*") would have to be assessed on a case by case basis. We are unable to make a general and abstract statement regarding its enforceability, as that conclusion would ultimately depend in part on the concrete circumstances of any given specific situation.

In any case, under the freedom of contracting principle, the Parties are free to set the terms and conditions under which they bind themselves to any contractual obligations. The stipulation that such obligations are no longer binding under certain circumstances should not be interpreted to relate to the remedies available for breach of contract but rather to the definition of the limits of their primary obligations, which is an area where contracting Parties are traditionally recognised ample freedom by the courts, subject to the limits of public policy and morality (Article 280/2 of the Portuguese Civil Code).

However, one cannot completely exclude the possibility of the clause being held invalid pursuant to Article 809 of the Portuguese Civil Code, as it will be discussed in more detail in (b) and (c) below.

Nonetheless, please note that under Portuguese Law, and according to Articles 790 to 797 of the Portuguese Civil Code, a party is exempted from performing its contractual obligations whenever the fulfilment of such obligations becomes impossible due to the occurrence of circumstances which are beyond the control of that party, for whose occurrence or non-avoidance that party should not be deemed responsible.

For the obliged party to be exempt from the fulfilment of its obligations, the impossibility must:

- occur after the conclusion of the contract;
- be objective, *i.e.*, it must concern the obligation itself, irrespectively of the person who performs it (whenever the impossibility concerns the obligor, the duty to perform the obligations will only be extinguished if such person cannot be replaced in such performance);
- be absolute, that is, the duty arising from the contract cannot be performed at all (extreme difficulty or commercial impracticability to perform it are, thus, in principle not sufficient for this purpose);
- be definitive, that is, temporary impossibility will not be enough to release the obligor from the duty to perform the obligation as soon as such performance becomes possible, even though such party will not be liable for the loss arising from the other party's delayed performance.

However, if the impossibility applies only to part of the obligation, the performance of the remaining part will still be due, unless the creditor of such obligation terminates the contract.

If there is consideration to be paid for the performance of the obligation which became impossible, such consideration will not have to be paid, or it will have to be returned, if already paid. In case of partial impossibility, the consideration owed shall be proportionally reduced.

Additionally, Article 437 of the Portuguese Civil Code provides for a mechanism of termination or modification of contracts due to a change of fundamental circumstances under which the agreement was entered into. According to such provision, "[i]f the circumstances under which the parties have based their decision to enter into the contract have suffered an abnormal change, the injured party is entitled to terminate the contract, or to its modification *ex aequo et bono*, provided that the enforceability of the obligations it is bound to would seriously affect the principle of good faith and is not covered by the specific risk inherent to that contract". The other party may oppose the contract's termination by agreeing to its modification.

It shall be taken into account that the scope of what can be considered an abnormal change of circumstances should be construed in a restrictive manner (for instance, a change in the price of a product or the failure to obtain the authorisations necessary to the performance of the contract have not been considered by courts as abnormal changes of circumstances for the purpose of Article 437 of the Portuguese Civil Code). It is also important to stress that if at the time the change of circumstances took place, the injured party was late in the performance of its contractual obligations it will not be entitled to its termination or modification.

Commercial impracticability or increased difficulty in performing, in itself, does not exempt the debtor from liability.

(b) Remedies for non-performance (§ 8)

In case Portuguese Law is chosen to govern the General Agreement, the exceptions to the right to compensation regarding both failure to deliver and failure to accept, force majeure and the other's Party's non-performance would be, in principle, capable of being enforced in Portugal, as either force majeure (as further explained in a) above), either as *exceptio non adimpleti contractus* are provided for in Portuguese Law (the latter being set out in Article 428/1 of the Portuguese Civil Code).

As to the remedies for non-performance set forth in § 8, regarding both failure to deliver and failure to accept, Portuguese Law provides, in general, the entitlement to compensation for damages arising from non-performance of contractual obligations (Article 798 of the Portuguese Civil Code) and there is certain room for the application in this respect of the principle of freedom of contracting (Article 405 of the Portuguese Civil Code). Nonetheless, § 8 shall be admissible only to the extent that the remedies therein detailed cannot be deemed as colliding with Article 809 of the Portuguese Civil Code, which forbids a waiver beforehand by the creditor of its rights arising from the non-fulfilment or delay in the fulfilment of the debtor's obligations, in the terms explained in (c) below.

Please note that the abovementioned applies also to the remedies for non-performance provided for in the Annexes to the General Agreement.

As stated above, assuming that the General Agreement constitutes a valid and legally binding agreement in accordance with its terms under the laws of Germany or England, as the case may be,

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to the extent that it is expressed or deemed to be governed by such laws, the General Agreement, under Portuguese Law, will constitute a valid and legally binding agreement in accordance with its terms and subject to mandatory public policy provisions ("*lois de police*" or "*normas de aplicação imediata*") and principles of law, including, without limitation, Portuguese international public policy ("*ordem pública internacional portuguesa*"), and we take the view that § 8 of the General Agreement is capable of being held valid and effective in a Portuguese court, which is not to say that § 8 would be enforceable under any circumstances.

The choice of English or German Law to govern the General Agreement is valid under the rules on conflict of laws applicable in Portugal, particularly, on the basis and within the scope of and subject to the limitations arising out of the 1980 Rome Convention on the law applicable to contractual obligations and, for contracts concluded from 17 December 2009 on, of Rome I Regulation, as well as to the limitations arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*"). This would include the application of the chosen law to §8 of the General Agreement. Any limitations thereto arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*") would have to be assessed on a case by case basis. Again, we are unable to make a general and abstract statement regarding enforceability, as any conclusion on enforceability would ultimately depend in part on the concrete circumstances of any given specific situation.

(c) Limitation of Liability (§ 12)

i) General Enforceability of Exclusion of Liability (§ 12.2)

If the General Agreement is amended to select Portuguese Law as its governing law it should be noted that contracting parties are recognised some margin to regulate the remedies resulting from any breach of the obligations arising from them on terms other than those established by law, within the scope of the principle of freedom of contracting set out in the Portuguese Civil Code (Article 405). Such freedom is subject to the limits and conditions established by law.

According to the Portuguese Civil Code, a general exclusion of liability is not admissible in our legal system (Article 809 of the Portuguese Civil Code), although its limitation is possible, within certain boundaries.

Article 809 of the Portuguese Civil Code sets out the invalidity of any clause pursuant to which the creditor waives beforehand its rights arising from the non-fulfilment or delay in the fulfilment of the debtor's obligations (being nonetheless such exclusion allowed in what concerns actions of third parties to which the debtor has assigned the performance of the obligation, insofar as such exclusion does not violate public policy rules or principles).

In what specifically concerns standard terms contracts between professionals (*B2B*), Portuguese Law provides, among others, for the following express prohibitions of clauses (Article 18 of Decree-Law no. 446/85, of 25 October, as amended):

- clauses which exclude or limit, directly or indirectly, liability for injuries caused to someone's life, physical or moral integrity or health (Article 18 (a));
- clauses which exclude or limit, directly or indirectly, liability for extra contractual economic loss, caused to the other party or to third parties (Article 18 (b));

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- clauses which exclude or limit, directly or indirectly, liability for the non-performance, delayed performance or defective performance caused by wilful misconduct ("*dolo*") or gross negligence ("*culpa grave*") (Article 18 (c));
- clauses which exclude or limit, directly or indirectly, liability for the actions of legal representatives and auxiliaries in case of wilful misconduct or gross negligence (Article 18 (d)).

When applied to B2B contracts, these rules do not qualify as mandatory provisions under Portuguese law and, thus, would not overrule the law chosen by the Parties to rule the General Agreement, if valid and legally binding. Nonetheless, it is noteworthy that, as of May 2022 (effective date of Decree-Law no. 109-G/2021, of 10 December, amending Decree-Law no. 446/85, of 25 October), under Portuguese law, when applicable, the use of any of these prohibited clauses represents a very serious misdemeanour, punishable with a fine in an amount that will vary according to the dimension of the company and the circumstances of the infraction (from € 3,000 to € 90,000).

With regard to the limitations of liability which may be allowed under Portuguese Law, and their extent, there is debate among legal commentators. However, in the opinion of some reputed authors, upheld by some case law, the abovementioned Article 18 (a) and (c) of Decree-Law no. 446/85, of 25 October should be more broadly applicable by analogy, so as to allow limitation of liability clauses insofar as they do not relate to injuries caused to someone's life, physical or moral integrity or health and are not caused by wilful misconduct ("*dolo*") or gross negligence ("*culpa grave*").

Considering this framework, and subject to the above referred to limitations, assuming that the General Agreement constitutes a valid and legally binding agreement in accordance with its terms under the laws of Germany or England, as the case may be, to the extent it is expressed or deemed to be governed by such laws, the General Agreement, under Portuguese Law, will constitute a valid and legally binding agreement in accordance with its terms and subject to mandatory public policy provisions ("*lois de police*" or "*normas de aplicação imediata*") and to principles of law, including, without limitation, Portuguese international public policy ("*ordem pública internacional portuguesa*"), and §12.2 is capable of being held valid and effective in a Portuguese court, which is not to say that it would be enforceable under any circumstances. We are unable to make a general and abstract statement regarding its enforceability, as that conclusion would ultimately depend in part on the concrete circumstances of any given specific situation. In addition, our statement on the validity and effectiveness of this clause under Portuguese Law, and if such law is to be made applicable and govern the General Agreement, should be read with the specific caveat that legal writings and judicial decisions are sometimes conflicting in this regard.

The choice of English or German Law to govern the General Agreement is valid under the rules on conflict of laws applicable in Portugal, on the basis and within the scope of and subject to the limitations arising out of the 1980 Rome Convention on the law applicable to contractual obligations and, for contracts concluded from 17 December 2009 on, of Rome I Regulation, as well as to the limitations arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*"). This would include the application of the chosen law to §12.2 of the General Agreement. Any limitations thereto arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("ordem pública internacional portuguesa") would have to be assessed on a case by case basis. We are unable to make a general and abstract statement regarding its enforceability, as that conclusion would ultimately depend in part on the concrete circumstances of any given specific situation.

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

If the General Agreement is amended to select Portuguese Law as its governing law it should be noted that, under Portuguese Law, a party shall be liable for any loss caused to the other party of which the action of the former was a condition of its occurrence, except if such action was not, in abstract, adequate, according to the normal course of events, to cause such result (the majority of Portuguese legal scholars and case-law adopt the doctrine of adequate causality link in its negative version). Compensation for consequential damages may be awarded, to the extent that such damages fulfil these criteria.

However, the exclusion of liability for consequential damages is generally allowed, subject to the same limitations already mentioned in i) above.

Assuming that the General Agreement constitutes a valid and legally binding agreement in accordance with its terms under the laws of Germany or England, as the case may be, to the extent it is expressed or deemed to be governed by such laws, the General Agreement, under Portuguese Law, will constitute a valid and legally binding agreement in accordance with its terms and subject to mandatory public policy provisions ("*lois de police*" or "*normas de aplicação imediata*") and principles of law, including, without limitation, Portuguese international public policy ("*ordem pública internacional portuguesa*"). Therefore we take the view that § 12.3 and § 12.4 of the General Agreement are capable of being held valid and effective in a Portuguese court, which is not to say that § 12.3 and § 12.4 would be enforceable under any circumstances. We refer to our conclusions and caveat in i) above.

The choice of English or German Law to govern the General Agreement, which would include the application of the chosen law to § 12.3 and § 12.4 of the General Agreement, is valid under the rules on conflicts of law applicable in Portugal, on the basis and within the scope of and subject to the limitations arising out of the 1980 Rome Convention on the law applicable to contractual obligations and, for contracts concluded from 17 December 2009 on, of Rome I Regulation, as well as to the limitations arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*"). Any limitations thereto arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*") would have to be evaluated on a case by case basis.

iii) Enforceability of Duty to Mitigate (§ 12.5)

Considering the principle of freedom of contracting, and assuming that the General Agreement constitutes a valid and legally binding agreement in accordance with its terms under the laws of Germany or England, as the case may be, to the extent it is expressed or deemed to be governed by such laws, the General Agreement, under Portuguese Law, will constitute a valid and legally binding agreement in accordance with its terms and subject to mandatory public policy provisions ("*lois de police*" or "*normas de aplicação imediata")* and Portuguese international public policy principles ("*ordem pública internacional portuguesa").* Therefore we deem that § 12.5 of the General Agreement is capable of being held valid and effective in a Portuguese court, which does not mean that § 12.5 would be enforceable under any circumstances. We refer to our conclusions and caveat in i) above.

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The choice of English or German Law to govern the General Agreement, which would include the application of the chosen law to § 12.5 of the General Agreement, is valid under the rules on conflicts of law applicable in Portugal, particularly on the basis and within the scope of and subject to the limitations arising out of the 1980 Rome Convention on the law applicable to contractual obligations and, for contracts concluded from 17 December 2009 on, Rome I Regulation, as well as to the limitations arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*"). Any limitations thereto arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*") would have to be assessed on a case by case basis. Please note that, once more, we are unable to make a general and abstract statement regarding enforceability, as any conclusion on enforceability would ultimately depend in part on the concrete circumstances of any given specific situation.

However, if Portuguese Law is chosen as the governing law of the General Agreement, it should also be noted that Article 570 of the Portuguese Civil Code sets out that, whenever the injured party has contributed to the creation or aggravation of the loss, the court shall decide whether compensation shall be fully granted, reduced or even excluded, based on the fault of each party and on its consequences. Furthermore, if the liability of the party against whom the claim is made is based solely on a presumption of fault, the fault of the injured party generally excludes the former's duty to compensate for the loss, this being particularly relevant as the Portuguese Civil Code foresees, as a general rule, the presumption of the debtor's fault in situations of contractual liability. Hence, to some extent, some of the effects of § 12.5 of the General Agreement would already have been covered by the rules applicable by force of law in the absence of specific contractual provisions to that effect.

x) Is there a risk that a notice, declaration or other communication given in accordance with the E-Notice Agreement may not be recognised as valid? Could the deemed receipt of a notice be challenged? Who bears the burden of proof that the document attached to the e-mail is not falsified?

The choice of English or German Law to govern the E-Notice Agreement, which would include the application of the chosen law to its Schedule 1 ("Amendments and E-mail Address Details"), is valid under the rules on conflicts of law applicable in Portugal, particularly on the basis and within the scope of and subject to the limitations arising out of the 1980 Rome Convention on the law applicable to contractual obligations and, for contracts concluded from 17 December 2009 on, Rome I Regulation, as well as to the limitations arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*"). Any limitations thereto arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*") would have to be assessed on a case by case basis. Please note that, once more, we are unable to make a general and abstract statement regarding enforceability, as any conclusion on enforceability would ultimately depend in part on the concrete circumstances of any given specific situation.

i) Validity of a notice, declaration or other communication given in accordance with the E-Notice Agreement

Pursuant to the E-Notice Agreement contained in Enclosures 43 and 44, *"(...) any notice, declaration or other communication (including but not limited to a termination notice or default* *notice) other than an Excluded Communication, may also be sent by e-mail to the e-mail address provided by such Party in its Ratification Letter*".

If the E-Notice Agreement is amended to select Portuguese Law as its governing law it should be noted that, under the Portuguese Civil Code (Article 219 (1)), the validity of a contractual declaration does not depend on the observance of a special form, except if that is legally required. Hence, if there is no special legal requirement as to the form of the declaration, there is no risk of making the declaration via email.

However, even if such written requirement exists, in accordance with Article 26 of Decree-Law no. 7/2004, of 7 January, as amended (on electronic commerce, which enacts Directive 2000/31/EC), contractual declarations made by electronic means satisfy the legal requirements concerning the written form of a declaration when they are contained in a software which guarantees the reliability, intelligibility and conservation of the information in a way similar to that of a written document (i.e., in a software that does not change or allows the change of its contents). Furthermore, under Decree-Law no. 12/2021, of 9 February (Electronic identification and trust services for electronic transactions, which enacts Regulation (UE) 910/2014), an electronic document satisfies the legal requirement of written form when its content can be represented as a written statement. Consequently, a declaration made via electronic means which fulfils the requirements mentioned above shall be valid.

ii) Validity of the deemed receipt

The E-Notice Agreement establishes that "[f]*or the avoidance of doubt, the deemed receipt and the effectiveness of a notice, declaration or other communication sent by e-mail shall remain unaffected by any deviating evidence of receipt or non-receipt of the respective e-mail and/or of any attached legal notice or declaration.*".

If the E-Notice Agreement is amended to select Portuguese Law as its governing law it should be noted that, under Article 345 (2) of the Portuguese Civil Code, such clause may be deemed invalid as it involves the exclusion of legally foreseen means of proof. As consequence, indeed, the deemed receipt of a notice could be challenged.

Under Article 5 (1) of Decree-Law no. 12/2021, of 9 February, an electronic document communicated by an electronic means of communication is considered to have been sent and received by the recipient if it is transmitted to the electronic address defined by the parties and is received there. Therefore, any party alleging that a certain email was sent must prove both the sending and the receipt of the email. The proof of receipt under Portuguese Law involves proving that (i) the declaration has reached its addressee or (ii) is known to addressee or that (iii) it has not been received due to the addressee's fault (Article 224 of the Portuguese Civil Code).

In that view, Portuguese law establishes that to the extent that an electronic document contains a chronological validation issued by a qualified trust service provider, it will be sufficient to prove the date and time of creation, dispatch or receipt of an electronic document (Article 5 (2) of Decree-Law no. 12/2021, of 9 February).

Furthermore, if an email contains a qualified electronic signature ("*assinatura eletrónica qualificada*") or a qualified electronic seal ("*selo eletrónico qualificado*"), it will be equivalent to the delivery of a document by registered mail. Additionally, if the receipt of that email is confirmed by a confirmation message addressed to the sender by the recipient in an identical manner, it will be

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equivalent to the delivery of a document by registered mail with acknowledgment of receipt. These statutory equivalences are very relevant as they substantially reduce the declarant's difficulties of proving – as above stated – that the declaration has reached the recipient's sphere of knowledge, or that it has received it, or that non-receipt was due to the recipient's fault, as is required by Portuguese Civil Law (Article 224 (1) and (2) of the Portuguese Civil Code).

iii) Burden of proof regarding the authenticity of the document attached to the e-mail

The E-Notice Agreement establishes that "[t]*he Party sending such notice, declaration or other communication by e-mail shall attach it in PDF format to such e-mail*".

The burden of proving that the document attached is not falsified will depend on whether a qualified electronic signature ("*assinatura eletrónica qualificada*") was or was not affixed to said document. There are three possible scenarios in need of pondering:

- If a qualified electronic signature was affixed to the electronic document, under Article 3 (5) of Decree-Law no 12/2021, of 9 February, the document has full evidentiary force, which means that it can only be contradicted by evidence showing that it was falsified (Article 347 of the Portuguese Civil Code). This burden relies on the party claiming the falsification of the document.

- If a qualified electronic signature was not affixed to the electronic document, then it will be assessed under the general terms of the law (Article 3 (10) of Decree-Law no 12/2021, of 9 February). In this case, if a simple electronic signature is affixed to the electronic document, the document is generally considered to be true if its genuineness is acknowledged, or not contested, by the party against whom it is invoked. If the genuineness of the electronic document is, however, contested, then the party presenting the electronic document must prove said genuineness (Article 374 of the Portuguese Civil Code).

- If the electronic document is not signed, it will be freely assessed by the court (Article 3 (10) of Decree-Law no 12/2021, of 9 February and Article 366 of the Portuguese Civil Code).

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

We refer to our previous comments and take the view that the limitations and exclusions under this provision should not be further expanded or strengthened, especially in what concerns § 12.3 of the General Agreement. We believe that any expansion would contribute to the risk of the provision being set aside in a Portuguese court.

V. Confirmation Practices

1. Binding Individual Contract

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

Under Portuguese Law, a verbal agreement is, in general, sufficient, as Article 219 of the Portuguese Civil Code provides that, in order for a contract to be valid and binding, it is not necessary to make it in writing, unless there is a special provision requiring any specific form. Except for the legal requirement of written form in contracts regarding the provision of electricity and gas to end consumers (Article 22 of Regulation no. 1129/2020, of 30 December, of the national regulatory authority for energy services, *Entidade Reguladora dos Serviços Energéticos*, which approves the Commercial Relations Regulation), we are not aware of any other provision requiring that an agreement for the purchase and sale of electricity or natural gas is made in written form.

One shall additionally take into account, to the extent applicable, not only the duties of information on the conditions of the contract which arise from Article 6 of the above mentioned Decree-Law no. 446/85, of 25 October, as amended (on pre-regulated standard terms contracts, which, as mentioned above, enacts Directive 93/13/EEC), Article 4 of Law no. 23/96, of 26 July, as amended (Legal regime for the protection of the users of essential public services) and also the Regulation of Commercial Relations, approved by Regulation no. 561/2014, of 22 December ("Regulamento"), of the ERSE (Portuguese Authority for the Regulation of Energy Services), as amended, which sets out the elements that must mandatorily be included in an agreement for supply of electrical power.

Electronically transmitted confirmation of a Transaction

In accordance with Article 25 of Decree-Law no. 7/2004, of 7 January, as amended (on electronic commerce, which enacts Directive 2000/31/EC), the Parties are free to enter into a contract by electronic means. However, a party only has to accept the conclusion of contract by electronic means if he has bound himself to accept such means. There is a principle of admissibility and assimilation of electronic and non-electronic contracts under Portuguese law.

According to the abovementioned decree-law, both the conclusion of contracts through individual electronic communication, such as e-mail, and the conclusion of contracts by other electronic means are admissible. The conclusion of contracts by non-individual electronic means of communication is subject to additional requirements, regarding, in particular, the information that must be provided to the consumer prior to its acceptance and the formalities of the order form and of the acknowledgement receipt.

It is important to stress that contractual declarations made by electronic means satisfy the legal requirements concerning the written form of a contract only when they are contained in a software which guarantees the reliability, intelligibility and conservation of the information in a way similar to that of a written document (*i.e.*, in a software that does not change or allows the change of its contents).

Signature requirement

To the extent that no written form is required for a contract of purchase and sale of electricity, no written or electronic signature is also required.

In what concerns contracts regarding the provision of electricity to end consumers, the party's signature will be required for evidence purposes only, pursuant to Article 373/1 of the Portuguese Civil Code. In what concerns contracts entered into by electronic means, electronic signature will also be required for evidence purposes (Article 3/2 of Decree-Law 290-D/99, of 2 August, as amended).

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Exchange of data

Electronic exchange of data is recognized as a valid way of entering a contract in the Portuguese legal system. Article 33 of Decree-Law no. 7/2004, of 7 January, states that the common framework of such law (which provides for the possibility of the Parties entering into agreements by electronic means, without the validity or effectiveness of such agreements being prejudiced by the use of such means) is to apply even to contracts concluded by computer means, without any human intervention, to the extent that the relevant provisions do not assume a human intervention.

Thus, it must be taken into account that, even though the use of electronic means does not affect the validity and effectiveness of the agreements, the way in which courts may apply the general provisions regarding the formation of contracts may vary, depending on each courts' interpretation on which provisions "assume a human intervention".

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

The General Agreement will become legally binding and enforceable from the moment of the exchange of the Parties' statements of acceptance, in the required legal form (to the extent no legally required form exists, such exchange may be oral). Acceptance is deemed to have been given whenever a party makes an offer and the other party accepts such offer, the so-called "meeting of minds" (*acordo de vontades*).

In what concerns agreements in relation to which no special form is legally required, if the essential terms of the contract were agreed orally and later confirmed in writing, as the agreement exists since the oral exchange of statements, the obligations arising from it will be due and enforceable henceforth. In any case, it should be noticed that there is a contract when and only when the Parties reached an agreement as to the fundamental terms of their obligations; that is, "there is no contract as long as the parties have not reached an agreement on all clauses which any one of them deems necessary to be agreed" (Article 232 of the Portuguese Civil Code).

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

Portuguese Law (in particular, Article 218 of the Portuguese Civil Code) explicitly sets out that the silence of the Parties regarding the terms of the contract can be considered as an acceptance of such contract or terms only if the Parties have agreed that silence would have such value (or the law or usages prescribe it). Therefore, it is for the Parties to define whether or not the silence shall be considered as an acceptance and the terms under which such acceptance shall operate.

Considering this, two different perspectives may be taken into consideration. Firstly, it is possible to admit that, in situations where an agreement is already in force, the confirmation is a mere formalisation (for evidence purposes) of the Parties' will, not adding anything new to the agreement already entered into. In such cases, an explicit acceptance is probably unnecessary, being then up to the party that received the Confirmation to dispute any of the terms of the Confirmation, for not expressing its will at the time of the agreement. Portuguese Law does not provide a relevant time period within which the party must object.

Differently, if the confirmation is to be construed as being a proposal for an amendment of the General Agreement, the party which receives the Confirmation should explicitly accept its terms, in the legally required form, if any; otherwise they will be deemed as not having been accepted. In such case, the party which received the Confirmation should accept it (according to article 228 of the Portuguese Civil Code):

- within the time period set out by both Parties in the previous agreement, or set out by the party which sent the Confirmation on its clauses, if any; or
- within the normal time period that the Confirmation and its acceptance would have taken to reach their destinations, if the party which sent the Confirmation asks for a prompt answer and no time period was agreed; or
- within five days after the period provided for above, if no time period was agreed, and the Confirmation is made to an absent person, or in writing to a present person.

The determination of whether or not the Confirmation constitutes a different agreement, as well as of the applicable legal framework, will depend on the construction of the Parties' General Agreement, on the document of Confirmation, and particularly on their declarations at the time of the negotiations, considering all the relevant circumstances. As such, we are unable to make a general and abstract statement, as that conclusion would ultimately depend in part on the specific circumstances of any given specific situation.

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

If the Parties, when entering into Individual Contracts, refer to it being an Individual Contract for the purpose of the General Agreement between the Parties, Individual Contracts may be validly included in the General Agreement. However, two additional aspects have to be considered: on the one side, to the extent written form is legally required, the terms of the Parties' agreement have to be set out in writing; on the other side, in terms of evidence, it is important in any case to be able to prove that both Parties knew of the conditions set out in the General Agreement, or the General Agreement may be considered as not even having existed at all, as it may be proved that the Parties have not agreed on the essential terms of it, besides the fact that there are some information requirements that must be fulfilled, according to the provisions referred to in aa) above.

In particular, one should take into consideration the framework of Decree-Law no. 446/85, of 25 October, referred to above which, besides foreseeing a general information duty (Article 6), also envisages a duty of communication (Article 5), in the following terms: standard terms clauses must be entirely communicated to the adherent party; its communication shall be made in a way and within a time period which allows its full comprehension by a reasonably diligent person, taking into consideration the importance, length and complexity of the contract; the burden of proof of the adequate and effective communication shall be borne by the party which presents the pre-regulated standard clauses to the other party.

In cases in which the Parties enter orally (to the extent legally permitted) into an Individual Contract without any reference being made to the General Agreement between them, but subsequently confirm the Individual Contract, referring to it as an Individual Contract for the purposes of the General Agreement between the Parties, we take the view that the General Agreement may be deemed as having been included in the Individual Contract validly; the terms of the General Agreement will then be valid between the Parties as of the date of the Confirmation, as it is the date

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in which the Parties express their wish to incorporate its terms into their deal. This written Confirmation method is also an advisable one, in terms of evidence, as long as the confirmation expressly refers to the General Agreement.

In situations in which the Parties enter orally into a Transaction (to the extent legally permitted) and subsequently confirm the Transaction, but without referring to the General Agreement or stating anything negative concerning the applicability of the General Agreement, if the elements of the General Agreement entered into by the Parties in oral means are similar to those of the General Agreement (and such agreed elements are able to be evidenced) and as the Confirmation is made within the context of such General Agreement (even though it does not refer to it), it can be agreed, in general terms, that it proves that the Parties wanted to reproduce the terms of the General Agreement, and thus, that they meant its terms to bind them. This also arises from the principle of contract unity.

However, in particular in case of dispute, we cannot exclude that, in some cases, it may be very difficult to prove that the Parties wanted the conditions of the General Agreement to apply instead of those subsidiary conditions set out in civil and commercial legislation. This assessment will ultimately rest upon the discretionary powers of the court, the circumstances of the individual contract at stake and the evidence presented before the court.

2. Means of Evidence

dd) 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 your jurisdiction: a (i) taped recording, (ii) witness' statement, (iii) e-mail or other electronic message or transaction entry system, and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

(a) Taped recordings

According to Article 4 of Law no. 41/2004, of 18 August (which regulates the protection of personal data and privacy in the sector of electronic communications, enacting Directive 2002/58/EC), legally authorized recordings of communications and the respective traffic data are allowed, when performed within the scope of lawful commercial practices, for the purposes of evidencing a commercial transaction, as well as any other recording of communications made within the scope of a contractual relation, as long as the owner of the data has been informed and given his consent to such recording.

Considering this framework, provided that the authorisation of the Parties regarding such recording is obtained, we find no legal reason why it shall not be admissible. Obtaining the employees' consent seems advisable, as the employer himself has to obtain the employees consent to record their conversations (Article 4 of Law no. 41/2004, of 18 August, to which the Recommendation of the Portuguese Commission for Data Protection concerning treatment of phone call data recordings refers) and also according to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("GDPR"). As recorded conversations have the potential to contain a host of personal information, it should be assured that there is a legal basis for collecting and processing personal data that may be contained therein. Additionally, pursuant to the GDPR the capture of conversations would have to be actively justified, otherwise the tape recording α

could be deemed unlawful. Besides, there are several other aspects of the GDPR that should be complied with, in particular in respect of individual rights of access, challenge, amendment and erasure, security and notification of breaches. In any case, if these requirements are met, tape recording may be used as evidence for judicial purposes.

Nevertheless, according to Article 368 of the Portuguese Civil Code, such recordings shall prove the facts and things to which they refer, as long as their accuracy is not disputed by the other Party (and, naturally, as long as no special form is required for the existence and evidencing of such facts and things contained in the agreement).

(b) Witness' statements

Witness' statements are in general admitted as evidence in Portuguese Law, according to Article 392 of the Portuguese Civil Code. There are, however, some exceptions, namely:

- The cases in which the agreement shall, in accordance to legal or contractual requirements, be made in writing or evidenced by a written document – Article 393/1 of the Portuguese Civil Code.
- The situation in which the fact the witness' statement is intended to prove is already proven by a document or another mean of evidence which value as evidence is higher (e.*g.* confession) – Article 393/2 of the Portuguese Civil Code.
- The cases in which the witness statements are intended to prove any agreements which are contrary, or which amend the provisions of, a document created by a public authority or official or signed by their author, irrespective of such conventions being prior, contemporary, or subsequent to the document. This is not applicable to third parties to the contract – Article 394/1 and 3 of the Portuguese Civil Code.

The provisions referred to above only apply to the proof of the fulfillment, surrender, novation, netting and, in general, to the agreements which terminate the contractual relationship, but not to the facts which extinguish the obligation, whenever invoked by a third party, pursuant to Article 395 of the Portuguese Civil Code.

According to Article 396 of the Portuguese Civil Code, the value of witness' statements as proof shall be freely assessed by the Court.

(c) E-mail or any other transaction entry system

E-mail and other transaction entry systems are also generally admissible as a mean of evidence, as they are, in the terms described above, a valid way of entering into a contract.

Nonetheless, it should be once more stressed that contractual declarations made by electronic means satisfy the legal requirements concerning the written form of a contract only when they are contained in a software which guarantees the reliability, intelligibility and conservation of the information in a way similar to that of a written document. According to some legal scholars, the electronic documents should be regarded as a *tertium genus* beyond written and oral.

Additionally, and taking into consideration the requirement of a written form and written confirmation in certain contracts referred to above, one should notice that an electronic document will only have the same value as a signed document (as mean of evidence of its author's statements) if it satisfies the legislative requirements concerning electronic signature and certification (Article 26 of Decree-Law no. 7/2004, of 7 January; the legislation governing digital signature being Decree-Law no. 290-D/99, of August 2, as amended). This is particularly important if one considers the value as evidence that an electronic statement may have or lack, depending on whether its authorship can be precisely determined or not; as expressly stated in Article 3 of Decree-Law no. 290-D/99, of August 2, as amended, "*the evidence value of electronic documents without a qualifying electronic signature certified by a credentialed entity shall be determined in accordance with the general terms of the law*" – that is, shall be discretionarily assessed by the Court. On the contrary, if the document shall have the same value as a signed document, it fully proves the statement attributed to his author, as well as the facts contained in such statement which present a disadvantage for him.

In conclusion, there is a principle of symmetry that forms the discipline of evidence, that is, the greater the security of evidence, the greater its evidential efficacy. The probative value of the electronic document, such as an email, lies, firstly, in the guarantees that it offers as to its origin (identity of the author/authorship) and inalterability of its content (integrity), and secondly, in the veracity of its content.

(d) Facsimile

Given that facsimile constitutes a document for evidence purposes, the provisions of the Portuguese Civil Code regarding documents as evidence apply. That is, facsimile shall be generally admitted as mean of evidence. However, and taking once more into consideration the fact that written form or written confirmation in certain contracts referred to above is required, it shall be noticed that a facsimile shall only have the value as evidence of a signed document if its signature is recognised or not disputed by the party against who the document is presented, or if such party declares that it doesn't know whether it belongs to him, or if such signature is legally or judicially deemed true.

As mentioned in (c) above, a document which authorship is recognised fully proves the statements of its author, as well as the facts contained in such statement which present a disadvantage to him.

The value as evidence of any document which does not meet these requirements shall be freely assessed by the Court.

VI. Core Provisions

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

In principle, any election (or inclusion of additional provisions) should not materially alter the conclusions of this legal opinion assuming that these amendments do not have the effect of modifying any Core Provision (as defined in ff) below), although we are not able to make any general and abstract conclusion as it will depend on the specific content of the additional provision at stake.

The substitution with or without consent in the EFET Credit Support Annex is discussed in III above.

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ff) Considering your conclusions reached under Part I or II (Enforceability of Close-out Netting) above, what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part I or II (each such provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained Annex 1 to the EFET General Agreement.

In general terms and pursuant to Portuguese Law and doctrine, the essential elements of an agreement are those without which the agreement does not exist or does not bear any validity (requisites of existence and validity) and also those which determine the type of the agreement (elements necessary to determine the type). Among these elements it is normal to identify the capacity of the Parties ("*capacidade*"), the mutual consent to enter into the agreement ("*mútuo consenso*") and the subject of the agreement ("*objecto do contrato*").

Bearing this in mind, an amendment to an essential element of the General Agreement might affect the existence or validity of the General Agreement or its qualification as a specific (as defined by law or by commercial usages) type of agreement. For that purpose, we consider that the core provisions (*i.e.*, the essential elements) of the General Agreement include the following clauses: §1, §3, §4, §5, §6, §7, §13.

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

To the extent that the CPMA and the MNA and the inclusion under the CPMA or MNA of the General Agreement are valid under its governing laws, the fact that it is included in the CPMA or in the MNA should not invalidate what was said in Part I and II regarding the General Agreement in a non-insolvency scenario.

In case of insolvency, what is mentioned above under Part I and II is applicable. We should, nevertheless, stress that, when it is not possible to set-off the credits because the legal requirements set forth in Article 99 of the Portuguese Insolvency Act are not fulfilled, there are mandatory rules applicable depending on the nature of the obligations and the type of contracts in cause (v. g. Articles 102 to 119 of the Portuguese Insolvency Act) which may impair the applicability of set-off provisions of the CPMA or of the MNA in relation to certain types of agreements. The analysis will need to be made on a case by case basis.

In what concerns the MNA in particular, it should be also noted that, regarding what is said in d) above, the interpretation and decision of the Portuguese courts on the "single agreement" concept and on the intention of the Parties in such respect may vary, i.e., each court may have a different interpretation regarding the treatment of the MNA, the EFET General Agreement and the Individual Contracts thereunder as a single agreement in each particular situation and further to the evidence produced by the parties of their intention in that regard.

VII. Governing Law, Arbitration and Jurisdiction

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

The choice of English, German or other foreign Law to govern the General Agreement is valid under the rules on conflicts of law applicable in Portugal, on the basis and within the scope of and subject to the limitations arising out of the 1980 Rome Convention on the law applicable to contractual obligations, and, for contracts concluded from 17 December 2009 on, of Rome I Regulation, as well as to the limitations arising from mandatory rules ("*lois de police*" or "*normas de aplicação imediata*") and Portuguese international public policy ("*ordem pública internacional portuguesa*").

The submission of the General Agreement to the jurisdiction of the German and English national courts is valid and binding under Article 25 of the Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 (Brussels I-bis Regulation) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, within the limits established in such Regulation. As stated above, the choice of arbitration for the settlement of any dispute arising out of or in connection with the General Agreement, under the rules of arbitration (*ad hoc* or institutional) selected by the Parties is valid under the rules on settlement of disputes applicable in Portugal. Furthermore, foreign arbitral awards are capable of being enforced by Portuguese courts under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, in accordance with the provisions of the referred Convention, (*inter alia* Articles III, IV and V) and in accordance with the provisions of the Portuguese Law on Voluntary Arbitration, approved by Law no. 63/2011, of 14 December (in particular, Articles 55-58).

VIII. Regulatory Regime

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

Currency or Exchange Control Law

There are no general legal restrictions on international capital movements and foreign exchange transactions, except in international embargo circumstances.

Pursuant to Article 8 of Decree-Law no. 295/2003, of November 21, as amended, contracting and settlement of economic and financial operations with foreign entities (*i.e.*, according to Article 2 of the referred Decree-Law, the acts and contracts, irrespectively of its nature, which result or may result in receipts or payments between resident and non-resident persons or entities or transfers of funds from or to outside Portugal) can be generally freely made.

Furthermore, payments between resident and non-resident persons or entities, related to economic and financial operations with foreign entities, as defined in the foregoing paragraph, can be effected directly through any means of payment expressed in a foreign currency, as stated in Article 14 of said Decree-Law.

Under the terms of Article 3 of Decree-Law no. 61/2007, of March 14, any individual travelling into, or from Portugal, coming from, or into, a non-EU country carrying net moneys in an amount equal to or in excess of € 10,000, must report that fact to the Portuguese custom authorities. For these

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purposes the following assets are, amongst others, deemed as net moneys: *(i)* payment means in bearer form, including monetary instruments, traveller's cheque and negotiable securities, such as cheques, promissory notes and other payment orders, *(ii)* cash, including banknotes or hard money with legal tender in the respective issuing states and banknotes or hard money without legal tender (although still in the period of time in which such banknotes or hard money are accepted for exchange) and *(iii)* golden coins, bars or any other unworked golden forms.

In accordance with Instruction no. 27/2012 of the Bank of Portugal ("*Banco de Portugal*"), as amended, legal persons residing in Portugal, or exercising their activity in Portugal, which enter into economic or financial transactions with foreign entities or which perform currency or exchange transactions are bound to certain reporting duties towards the Bank of Portugal for statistical purposes. The information to be reported refers to:

a) economic and financial transactions with foreign entities (i.e. between entities residing in Portugal and entities not residing in Portugal) which entail an exchange of value or a transfer, except for transactions related to travel and accommodation, which are deemed as expenses auxiliary to the activity of the residing entities.
b) end-of period balances in relation to deposits, loans and commercial credits before foreign entities;
c) information on liquidations associated to: i) transactions with foreign entities performed on the account of clients residing in Portugal; ii) transactions on the accounts of clients not residing in Portugal.

Certain entities may be exempted from the provision of some of this information in particular situations and the frequency and dates for the provision of the required information depend on the type of entity concerned, all as per the abovementioned Instruction.

License Requirements

(a) Electricity and Gas Sector

According to the regulation approved by the National Authority for Energy Services (*Entidade Reguladora dos Serviços Energéticos*, "**ERSE**") on the technical management of both the electricity system and the gas system (*Manual de Gestão Técnica Global do Sistema*), any entity wishing to trade electricity or gas through bilateral agreements or as a participant in organized markets must obtain the Market Agent status – this applies, in particular, to generators, suppliers, aggregators and clients.

Entities registered with regulatory authorities within the European Union and with the Agency for the Cooperation of Energy Regulators, under article 9 of Regulation (EU) 1227/2011 of the European Parliament and of the Council of 25 October 2011, on wholesale energy market integrity and transparency, may obtain the abovementioned status.

As a rule, Market Agent status is obtained with the execution of an agreement with the transmission system operator ("**TSO**"), in its capacity as technical manager of the system, which establishes the technical and commercial conditions.

Energy may be traded under organized markets, non-regulated platforms and bilateral agreements.

According to ERSE's Commercial Relations Regulation, organized markets are based on principles of transparency, liquidity, competition, self-organization and self-financing and include the following categories:

a) futures markets (*mercados a prazo*), which allow the match between supply and demand and may imply the physical or financial delivery;

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b) daily markets (*mercados diários*), corresponding to transactions of batches of electricity with physical delivery in the day following the contracting;
c) spot markets (*mercados a contado*), which allow the match between supply and demand of gas with same day physical delivery or within two days following the contracting;
d) intraday markets (*mercados intradiários*), concerning transactions that are intended to make adjustments to daily market's program;
e) market mechanisms that allow the TSO to change the gas flow in and out of the transmission system;
f) system services markets (*mercados de serviços de sistema*), which include transactions of energy and power that allow the system to run with adequate levels of safety, stability and service quality.

Market Agents participating in organized markets are subject to ERSE's regulation on the electricity and gas systems' technical management.

Energy trading through non-regulated platforms may entail both physical (whenever there is not a bilateral agreement) and financial delivery (under the terms agreed by the parties).

Bilateral agreements are executed between two Market Agents, whereby one party commits to selling and the other commits to purchasing electricity or gas, at a price and under the terms of conditions set out by the agreements and subject to ERSE's regulation on the electricity and gas systems' technical management.

These agreements must be communicated to the TSO, including the relevant periods of execution. The parties may establish that one of them will be responsible for making such communication.

Other than the recognition as Market Agents, depending on the activity carried out by them, these entities may also be subject to specific licensing procedures, which, in some cases, establish change of control obligations.

In the National Electricity System, this is true for the activity of electricity generation, which is, in most cases, subject to an *ex-ante* licensing procedure. According to article 11(2) of Decree-Law no. 15/2022, of 14 January ([11]), the generation of electricity is subject either *(i)* to the attainment of a generation license, which depends on the prior reservation of grid capacity by means of a permit (the so-called "**TRC**"), and an operation license, *(ii)* to the acceptance of a prior registration and the attainment of an operation certificate, or *(iii)* to the submission of a prior communication. In some cases, no licensing procedure is required for the development of electricity generation.

The transfer of TRC prior to the issuance of the generation license is governed by article 18 of DL 15/2022, which determines the following:

(i) the transfer of TRCs depends on the endorsement (*averbamento*) of the titles by the Directorate General for Energy and Geology ("**DGEG**");

(ii) the direct or indirect change of control of the holder of the TRC is considered a transfer of the relevant TRC;

*(iii)*the request to assign the TRC to a third party (*alteração de titularidade*) depends on the increase of the amount of the bond that was provided in the context of the procedure to grant the TRC. Such increase, of an amount corresponding to half of the original bond, is a condition for the endorsement of the TRC;

([11]) Decree-Law no. 15/2022, of 14 January establishes the principles and rules concerning the organization and functioning of the National Electricity System and transposes Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, as well as Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.

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(iv) the increase of the amount of the bond is not required in the following situations:

- the incorporation of a company whose main activity is the construction and operation of power plants (including for self-consumption) or electricity storage systems and whose only shareholder is the holder of the TRC;
- the encumbrance of equity holdings in favor of financing entities;
- the direct change of control of the holder of the TRC as a result of the enforcement of a pledge over equity holdings by those financing entities;
- the direct change of control of the holder of the TRC in the context of restructuring operations of the relevant group provided that the ultimate beneficial owner (as registered with the Ultimate Beneficial Owner Registrar) remains the same entity.

Even though the encumbrance of equity holdings should not be subject to an authorization, the fact that this is an exemption of the obligation to increase the amount of the bond, which is the condition for the endorsement, it may be argued that such encumbrance is subject to the same authorization procedure that is applicable to situations of change of control.

The transfer of the generation license is subject to an authorization by the licensing authority.

According to article 36 of DL 15/2022, if such transfer occurs before the operation license is issued by DGEG, the procedure applicable to the transfer of TRC shall apply.

The request for the transfer of a generation license after the operation license is issued must include the assignee's identification and information on its technical and financial repute, as well as a statement subscribed by the assignee, accepting the transfer and all obligations established in the license.

DGEG should decide within 15 days of the receipt of the abovementioned request, but may request additional elements once, which must be provided within a maximum period of 30 days and, during such period, the decision deadline will be suspended.

DGEG's authorization determines the endorsement of the generation license, as to include the designation of its new holder.

The assignee will be subject to the same obligations and charges, as well as all conditions established by the authorization of the transfer.

The decision to authorize the transfer of the generation license is publicized on the website of the licensing authority and notified to the relevant grid operator, to the National Electricity System global manager and the entities that had intervention in the licensing procedure.

Pursuant to article 55(9) of DL 15/2022, the transfer of the prior registration until the issuance of the operation certificate is subject to the regime approved by article 36, with the necessary adaptations, except in the cases of self-consumption.

Even though DL 15/2022 does not refer specifically to the transfer of the prior registration once the operation certificate is issued, it does determine that non-substantial amendments to the registration are not subject to a new registration, but to a mere endorsement of the existing registration.

According to article 55(7), these amendments are processed in the electronic platform and are automatically endorsed to the initial registration, except if they are expressly rejected within 30 days.

Electricity suppliers and aggregators are subject to a registration procedure. The registration is not transferrable, except in cases of corporate restructuring, but the law does not limit the supplier and aggregator's change of control or encumbrance their equity holdings.

When the Portuguese state is a party to an agreement that establish energy markets, electricity and gas suppliers recognized by the other party to the agreement are automatically recognized as such in Portugal, under the terms of such agreement.

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The National Gas System is governed by Decree-Law no. 62/2020, of 28 August, which transposed into national law Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas. The gas system includes activities pertaining not only to natural, but also renewable gases.
The activity of renewable gas generation is subject to registration. The transfer of such registration depends on its endorsement and can only occur after entry into operation.
The supply of gas is carried out by entities registered with the DGEG as suppliers. The registration is not transferrable, except in cases of corporate restructuring, but the law does not limit the supplier and aggregator's change of control or encumbrance their equity holdings.

(b) MiFID

i) Summary of the main aspects of license requirements (concerning financial services)

The MiFID (Directive 2004/39/EC, as amended) was implemented into Portuguese Law essentially by Decree-Law no. 357-A/2007, of October 31, which amended the Portuguese Securities Code (Decree-Law no. 486/99, of November 13, as amended from time to time), as well as other laws, such as the Portuguese Legal Framework of Credit Institutions and Financial Companies (Decree-Law no. 298/92, of December 31, as amended from time to time) (the "Banking Act"). MiFID was amended and recast by MiFID II (Directive 2014/65/EC, as amended), which was implemented into Portuguese Law by Law no. 35/2018, of July 20[12].

Article 2 of the Portuguese Securities Code explicitly includes under its scope certain options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities and emission allowances, among others, qualifying them as financial instruments. It should be noted, however, that the amendments made to this list by the abovementioned law transposing MiFID II expressly excluded from the scope of financial instruments options, futures, swaps and forwards relating to wholesale energy products traded in an organised market and subject to physical settlement only.

Pursuant to Article 290/1(e) of the Portuguese Securities Code, dealing on own account constitutes an investment activity in financial instruments and, as per Article 289/1 of the same Code, investment services and activities in financial instruments (as well as ancillary services to investment services and activities) are deemed to constitute financial intermediation activities.

In general, only financial intermediaries are allowed to perform, on a professional basis, financial intermediation activities (Article 289/2 of the Portuguese Securities Code).

However, there are some exceptions to this rule, which concern to, among others (Article 289/3 of the Portuguese Securities Code):

"*b) Persons who provide investment services exclusively for the controlling company, subsidiary of same or own subsidiary;*
(...)

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[12] Directive 2004/39/EC was repealed by Article 94 of Directive 2014/65/UE of the European Parliament and of the Council, of 15 May, with effects from 3 January 2017.

d) Persons whose sole investment activity is dealing in financial instruments which are not commodities derivatives or emission licenses and their derivatives on own account provided that said persons:

i) Are not market makers;

ii) Are not members or participants on a regulated market or multilateral trading facility or have direct electronic access to a trading platform, except if said persons are non-financial entities which execute transactions on a trading platform that reduces, in a measurable objective way, the risks directly related to the business activity or treasury funding activity of such non-financial entities and respective groups;

iii) Do not engage in high frequency trading;

iv) Do not trade on own account when executing clients' orders;

(...)

g) Persons, including market makers, who trade on own account in commodities derivatives or emission licenses and their derivatives, except if they trade on own account when executing clients' orders, or provide other investment services related to those instruments only to clients or suppliers of their main business and who fulfil the following requirements:

i) The services or activities are performed as an activity ancillary to their group's main activity, both on an individual and collective basis, as defined EU legislation, that main activity not being the provision of investment services or banking activities provided under the Banking Act, or the creation of a commodity derivatives market;

ii) They do not engage in algorithmic high frequency trading;

iii) In the case of entities incorporated in Portugal, communicate to Portuguese Securities Market Commission ("Comissão do Mercado de Valores Mobiliários" or "CMVM") *the grounds for considering that the rendered services or activities are ancillary to their main activity*".

Therefore, insofar as a commodity transaction concerned in any Individual Contract constitutes a financial intermediation activity, a license is in principle (and subject to the exceptions indicated above) required, once the professional performance of financial intermediation activities in Portugal depends on (Article 295 of the Portuguese Securities Code):

- An authorisation to be granted by the competent authority (which concerns the requirements on credit institutions and financial companies pursuant to the Banking Act);
- Prior registration with the CMVM (in accordance with the proceedings set out in Articles 297 to 300 of the Portuguese Securities Code and in CMVM Regulation no. 2/2007, as amended).

ii) EU passport for the provision of financial services

Credit institutions authorised in other European Union Member States may also provide financial services in Portugal, particularly by way of establishment of branches and free provision of services, on the condition that they are authorised to provide them in their home country. The framework of the EU passport for credit institutions (Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013, relating to the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, as amended), as well as the general principle of "home-member state control", shall apply to the activity in Portugal of credit institutions having their offices in other Member-State of the European Union, but there are still some duties that must be fulfilled before the Bank of Portugal, which are also set out in the Banking Act (Articles 44 to 56 and 60 to 61, in what concerns credit institutions, and 188 to 193, in what concerns financial companies) .

Pursuant to Article 188 of the Banking Act, the framework described above will also apply to financial companies if such entities *(i)* are subsidiaries of a credit institution or jointly-owned subsidiaries of two or more credit institutions, *(ii)* benefit from rules which allow them to exercise one or more of the activities referred to in nos. 2 to 12 and 15 of the list annexed to Directive 2013/36/EU, and *(iii)* fulfil each of the following conditions:

- The parent undertakings are authorised as credit institutions in the Member State by the law of which the subsidiary is governed;
- The relevant activities are actually carried on within the territory of the same Member State;
- The parent undertakings hold 90% or more of the voting rights attaching to the subsidiary's capital;
- The parent undertakings satisfy the supervisory authorities of the home Member State regarding the prudent management of the subsidiary and declare, with the consent of the same authorities, that they jointly and severally guarantee the commitments entered into by the subsidiary;
- The subsidiary is effectively included, in particular for the relevant activities, in the consolidated supervision of the parent undertaking or of each of the parent undertakings, in particular, for the calculation of the solvency ratio, for the control of large exposures and for purposes of the limitation of holdings in other companies; and
- The subsidiary is also subject to non-consolidated supervision by the authorities of the home Member State, under the provisions set forth in the EC legislation.

Particularly in what concerns the free provision of services (Articles 60 and 61 of the Banking Act), credit institutions authorised in their home Member State to provide the services listed in the Annex I to Directive 2013/36/EU, may carry on such activities within the Portuguese territory, even if they are not established in Portugal, subject to the credit institution notifying the supervisory authority of the home country which, in turn, shall notify the Bank of Portugal. The same applies to financial companies, pursuant to Article 191, subject to the supervisory authority of the home Member State issuing a certificate attesting the fulfilment of the conditions referred to in the previous paragraph.

In what regards the requirements in respect of the activities in Portugal of investment firms with head office located in other EU Member-State, by way of establishment of branches and free provision of services, the framework is, in general, similar to that of the credit institutions referred to in the previous paragraphs.

It is also important to stress that no EU passport is available for non-EU credit institutions, financial companies and investment firms that intend to provide investment services by way of establishing a branch in Portugal, different proceedings being applicable.

IX. Other Provisions

jj) If you have other recommendations that you would like EFET member companies to consider (for example to fully optimize the General Agreement for a specific purpose such as to support limited trading between two entities both organized and doing business solely in your

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

§ 10 - In order to improve the possibilities of enforcing netting under § 11 in an insolvency scenario this clause could be construed as an acceleration clause instead of a termination clause, in the sense that the clause would determine that the obligations of the Parties are declared prematurely due and payable by the non-defaulting party in case any Material Reason occurs.

§18.1 a) – Portuguese companies that are obliged to have consolidated accounts have the possibility to approve the same up to five months from the end of the respective financial year (which in most cases is the same as the end of the civil year). In order to ensure that accounts are available to be delivered pursuant to this clause the 120-day-term should be amended in order to allow the five months period to approve accounts contemplated under Portuguese Law.

§18.1 b) – Under Portuguese Law only some companies produce quarterly reports (either mandatorily or voluntarily); this clause should make clear that these are only to be delivered if the company produces such reports.

§21 (l) – This representation should be amended according to Portuguese applicable law. We suggest the following wording:

"It is a supplier ("*comercializador*") within the meaning of Decree-Law no. 29/2006, of 15 February and Decree-Law no. 172/2006, of 23 August, both as amended, and does not accept electricity as an end user ("*consumidor*") (In this case if it has its registered office within Portugal, and upon the other party's request it shall present evidence of its registration as a supplier ("*registo*")"

§ 23.4 – We suggest that in the Partial Invalidity clause one uses the same language as that of Portuguese Law. For that effect, we suggest to add at the end of the first sentence: "except if the present agreement would have not been executed by the Parties without the illegal, invalid or unenforceable provision".

The opinion expressed above is subject to the following qualifications:

A. The terms "enforceable", "legal", "valid", "binding" and any combination thereof, where used above, mean that the obligations assumed by the relevant party under the relevant document are of a type which Portuguese Law generally recognises or enforces; they do not mean that these obligations will necessarily be enforced in all circumstances in accordance with their terms; in particular, enforcement before the courts of Portugal will in any event be subject to:

(a) the degree to which the relevant obligations are enforceable under their governing law (if other than Portuguese Law);

(b) Portuguese courts might not treat as conclusive those certificates and determinations which the General Agreements state that are to be so treated;

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(c) the nature of the remedies available in such courts (and nothing in this opinion must be taken as indicating that specific performance or injunctive relief would be available as remedies for the enforcement of such obligations);

(d) the possibility of Portuguese courts not granting any remedy the availability of which is subject to good faith, reasonable conduct or public policy considerations, or which is otherwise at the discretion of the court;

(e) the possibility of provisions in the General Agreement, which provide that the terms thereof can only be amended or varied or provisions thereof can only be waived by an instrument in writing, not being effective. Under certain circumstances, a General Agreement may be varied, amended, or any provision thereof waived by a further General Agreement or effected by a collateral General Agreement which may be effected by oral agreement of the Parties, or by a course of dealing reasonably implying a variance to or a deviation from what had been previously agreed in writing, notwithstanding any provision to the contrary;

(f) the acceptance by such courts of jurisdiction; and

(g) the availability of defences such as, without limitation, set-off (unless validly waived), error, fraud, duress, misrepresentation, undue influence, force majeure, abuse of right ("*abuso de direito*") *"venire contra factum proprium"*, *exceptio non adimpleti contractus* and counter-claim;

in addition, except where express references are made to Portuguese insolvency laws, our opinion is subject to and limited by the provisions of any applicable insolvency, liquidation, reorganisation, moratorium and other similar laws of general application relating to or affecting generally the enforcement of creditors' rights and remedies from time to time in effect.

B. all translations into English contained are free translations and for information purposes only.

C. in issuing this opinion we do not assume any obligation to notify or to inform you of any development subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time.

This opinion:

(a) expresses and describes Portuguese legal concepts in English and not in their original Portuguese terms; consequently, this opinion is issued and may only be relied upon on the express condition that it shall be governed by and that all words and expressions used herein shall be construed and interpreted in accordance with the laws of Portugal;

(b) is strictly limited to the matters set forth herein and no opinion may be inferred or implied beyond that expressly stated herein; and

(c) is furnished to you and except as expressly approved by us in writing this opinion may not be delivered to or relied upon by any other person, it being understood that it is given as of the date hereof and may not be relied upon as of any later date.

Very truly yours,

Maria Soares do Lago

By and on behalf of
Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL

Appendix A

Insolvency Framework

1. General Overview of the Portuguese insolvency laws

On September 15, 2004 entered into force in Portugal Decree-Law no. 53/2004, of 18 March, which approved the Código da Insolvência e da Recuperação de Empresas – the Insolvency and Recovery of Undertakings Act (this Decree-Law, as amended, referred to in this document as "CIRE" or "Portuguese Insolvency Act").

The Portuguese Insolvency Act provides for a special proceeding to apply to the insolvency situations of both individuals and companies. Pursuant to this special proceeding the final result may be (1) the liquidation of the debtor's assets and the sharing of the product obtained as a consequence thereof by the creditors; or (2) the undertaking's recovery as the result of a "Recovery Plan".

According to the Portuguese Insolvency Act, "being insolvent" means being generally unable to fulfil someone's due obligations, and also, regarding companies, having clearly more liabilities than assets.

Besides the key principle of the *par conditio creditorum* present throughout the Portuguese Insolvency Act, it also results from CIRE that creditors play a fundamental role in the insolvency proceedings, with effective power to decide what to do with the undertaking, mainly by choosing whether to liquidate it or to recover it and by establishing how to achieve any of such results in an Insolvency or Recovery Plan. The plan is named Recovery Plan when it envisages the recovery of the insolvent entity. On any other situation the plan is named Insolvency Plan.

Whenever the creditors do not provide otherwise, there are several legal steps of the insolvency proceedings related to the following key moments, not necessarily in the listed order:

- Request for the opening of the insolvency proceedings, which must be filed by (1) the debtor itself; (2) whoever is legally responsible by the debtor's debts; (3) any creditor; (4) the Public Prosecutor ("*Ministério Público*");
- Preliminary assessment and possible adoption of interim or conservatory measures, even prior to the debtor's notification, in case of justified fears of assets depletion or increase of liabilities resulting from acts of bad management by the debtor;
- Insolvency sentence and possible impugnation;
- Seizure of property;
- Creditors' report assessment meeting;
- Submission of credits, restitution and separation of property;
- Decision on verification and ranking of submitted credits;
- Liquidation and payment;
- Classification of insolvency (as deliberate, negligent or fortuitous);
- The Insolvency Plan;
- Closing of the proceedings.

It should be noted that both the Insolvency Plan and the Recovery Plan are an alternative to full liquidation proceedings established by law, and they may be submitted by *(i)* the debtor, *(ii)* whoever is legally responsible by the debtor's debts, *(iii)* the insolvency administrator or *(iv)* by a creditor or a group of creditors whose credits represent more than 20% of the non-subordinated credits. In derogation of the proceedings provided by law, the Insolvency Plan (or the Recovery Plan, if it envisages the recovery of the insolvent) may establish: *(i)* an alternative way for the creditors to obtain payment for their credits over the insolvent's estate, namely based on the continuation and recovery of the undertaking comprised therein and on whether to maintain the debtor's ownership or entrust it or transmit it to third parties; *(ii)* an alternative form for liquidation of the insolvent's estate; *(iii)* different rules in what concerns the liquidation product's distribution between the creditors; *(iv)* different rules for the debtors' liability after the closing of the proceeding.

2. Liquidation of Credit Institutions

In what regards the liquidation of credit institutions, the Liquidation of Credit Institutions and Financial Companies Act applies. Article 9/3 of the abovementioned Decree-Law states that the liquidation proceedings shall be carried out according to the Portuguese Insolvency Act, to the extent compatible with such specific liquidation regime, and with certain exceptions. Therefore, many of the provisions applicable to Portuguese companies will also apply to Portuguese banks.

3. Application to forward, physically settled electricity transactions

There are no specific insolvency laws applicable to forward physically settled electricity transactions (other than the ones described above)[13].

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[13] Please note, however, that there is one specific rule concerning insolvency of companies which have transferred to a third party the right to collect, by means of electricity tariffs, the amount of the positive tariff adjustments and of the associated financial costs; in such case, the amounts which are within the possession of the insolvent company (or of the company's insolvent depository) are not considered part of the insolvent's estate.