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LEGAL OPINION REGARDING THE ENFORCEABILITY OF CLOSE-OUT NETTING AND THE VALIDITY AND ENFORCEABILITY OF COLLATERAL AGREEMENTS AND OTHER RELATED ISSUES UNDER THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY

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1 October 2018

European Federation of Energy Traders

Amstelveenseweg 998

1081 JS Amsterdam

The Netherlands

EFET General Agreement Concerning the Delivery and Acceptance of Electricity

Dear Sirs,

We have been asked to give an opinion on the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity ("**General Agreement**") and the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement ("**Credit Support Annex**") as well as other related issues outlined in your instruction letter ("**Instruction Letter**"). These issues include the validity and enforceability of other provisions of the EFET General Agreement in respect of issues such as Limitation of Liability and Force Majeure and their respective consequences ("**General Enforceability**"), the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation or other non-written documentation to be eligible for evidencing a legally binding Individual Contract ("**Confirmation Practices**"), the validity and enforceability of the EFET General Agreement and how this may be affected when certain provisions are modified by the Parties ("**Core Provisions**"), the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**"), and the existence of specific licencing requirements or currency exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("**Regulatory Regime**").

This opinion (the "**Opinion**") discusses the issues outlined above in substantially the same order as shown in the Instruction Letter.

The Opinion does not relate to any Individual Contract under the General Agreement and does not give an opinion on any tax, accounting, regulatory or related matters other than to the extent we express an opinion hereunder.

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EXECUTIVE SUMMARY

On the basis of the assumptions and subject to the limitations set out in this Opinion, this is an executive summary of the opinions expressed in this Opinion. This executive summary does not form part of this Opinion and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having and interpretative effect on the opinions in this Opinion.

Enforceability of Close-out Netting

(a) Close-out netting in a pre-insolvency scenario is generally enforceable (please refer to points C.I and C.I.2 of this Opinion on pages 10 and 34).

(b) In the event of insolvency, both early termination by notice and automatic termination will in most cases be upheld by the Croatian courts (please refer to point C.I.1.2(a) on page 21). Early termination with regard to automatic termination will in most cases be upheld by the Croatian courts, but specific considerations apply in this respect (please refer to points C.I.1.3 and C.I.1.4 of this Opinion on page 24).

(c) Enforceability of the netting provisions of the EFET General Agreement (the netting of all positive and negative Settlement Amounts in determining the Termination Amount) in the event of insolvency depends primarily on the categorisation (legal nature) of the Individual Contract under the EFET General Agreement, and specifically if it qualifies as a fixed-term contract or a Qualified Financial Agreement within the meanings of the Obligations Act and the Insolvency Act (please refer to point C.I.1.1(b) and (c) of the Opinion). In the absence of such qualification, the enforceability of the netting provisions of the EFET General Agreement may still be ensured through application of the rules on financial collateral agreements (please refer to point C.I.1.1(d) of the Opinion).

(d) The fact that a Croatian Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency would not change our conclusions regarding the Enforceability of Close-out Netting (please refer to point C.II.1 of this Opinion on page 36).

(e) The fact that separate insolvency proceedings were initiated over the Croatian Branch of an insolvent Party F should not affect the enforceability of close-out netting provisions of the EFET General Agreement concluded by Party F and partially performed through the Croatian Branch (please refer to point C.II.2 of this Opinion on page 37).

Collateral

(a) The legal treatment of collateral to be provided in accordance with the Credit Support Annex mainly depends on whether the provision of such collateral falls within the scope of the Financial Collateral Act, i.e. whether the collateral can benefit from the preferential treatment provided by the Financial Collateral Act. In general, only cash collateral can benefit from such a preferential treatment, assuming that it is granted to financial market participants.

(b) The right to substitute collateral shall be mainly exercisable under Croatian laws. In respect to Letters of Credit, we believe such right should be explicitly included in the Letters of Credit.

(c) The rights of the party to whom collateral has been transferred shall be generally enforceable irrespective of the insolvency of the party who transferred the security in respect to all types of collateral (exceptions may apply in case of resolution proceedings under the Resolution Act). However, the transfer, substitution or withdrawal of collateral during the "suspect period" preceding insolvency proceedings may be subject to challenge.

General Enforceability and Core Provisions

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, we understand that:

(a) the documents listed in point A are generally enforceable under the laws of Croatia (please refer to point C.IV.1 of this Opinion on page 49); and

(b) none of the elections as suggested in the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) would change the substance of our conclusions reached in respect of the Enforceability of Close-out Netting (please refer to point C.VI of this Opinion on page 54).

A. DOCUMENTS CONSIDERED

For the purpose of this Opinion the following documents were considered in accordance with the Instruction Letter:

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

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

- EFET Electronic Confirmation Agreement (published 28 June 2005);
- Confirmation of Allowance Transactions (including AEUA, EUA, CER & ERU Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2)) to the Allowances Appendix to the EFET Power Master Agreement (Version 2.0, published 3 April 2012).

For the purpose of Part C.VI (Core Provisions) only:

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

B. SCOPE OF REVIEW

B.I ASSUMPTIONS

B.I.1 General Assumptions

The general assumptions on which the Opinion is based in accordance with the Instruction Letter are the following:

- Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organised or has its centre of main interest in Croatia ("Party A").
- Party A is a corporation, financial institution or other entity as further described in Appendix A.
- The relevant EFET General Agreement is governed by the laws of Germany or England and Wales.
- Each EFET General Agreement and of the above Annexes (including the Credit Support Annex) is enforceable under the laws of any jurisdiction for purposes of private international law (other than the laws of Croatia) and each counterparty has duly authorised, executed and delivered, and has the capacity to enter into, each document.
- On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of individual Contracts which include all of the Individual Contracts described in Appendix B.
- The Individual Contracts provide for the physical delivery of commodities, certificates or emission rights in exchange for cash. All products – except for emission allowances and derivatives thereon, may only be settled physically and are traded on an OTF (former non-MTF).

In accordance with the Instruction Letter, additional assumptions are set forth in the relevant part of the Opinion in relation to the specific issue analysed.

B.I.2 Further assumptions

In addition to the assumptions given in the Instruction Letter, the opinions in this Opinion are given on the basis of the assumptions and are subject to the limitations set out under this point below in each case in their entirety. The opinions given in this Opinion are strictly limited to the matters expressly stated under point C (*Issues and Additional Assumptions*, page 10) below and do not extend to any other matters.

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

(a) That the EFET General Agreement and the Individual Contracts are legally binding and enforceable against both Parties under the laws by which they are expressed to be governed, if not the laws of this jurisdiction, and that none of the opinions expressed below will be affected by the laws (including, without limitation, the insolvency laws and the public policy) of any jurisdiction outside Croatia.

(b) That no Material Reason for termination as outlined in § 10.5 (Definition of Material Reason) with respect to a party has occurred and is continuing when entering into this EFET General Agreement.

(c) That the EFET General Agreement and any Individual Contracts under it are entered into prior to the formal commencement of any insolvency proceedings against either party.

(d) That both Parties have all licences, authorisations, consents and approvals required by any applicable laws to enter into the EFET General Agreement and any Individual Contracts and that the EFET General Agreement and any Individual Contracts comply with the electricity and financial sector legislation and regulations in all relevant jurisdictions.

(e) That the EFET General Agreement and Individual Contracts are mutual between the Parties in the sense that each is personally and solely liable for its own account as regards obligations owing by it and is the sole beneficial owner of obligations owed to it.

(f) That the EFET General Agreement and all Individual Contracts under it were entered into, and each delivery and payment made thereunder were 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 a party to prefer the other party in the event of its insolvency.

B.II LIMITATIONS

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

B.II.1 Limitations regarding the enforceability of claims

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

(1) enforcement of the obligations under an Agreement may be limited by the general principle of good faith. Courts may not grant enforcement in the event they take the view that a right has not been exercised in good faith or that it has been exercised in such a manner as to constitute an abuse of rights (in Croatian: "*zlouporaba prava*");

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

(3) enforcement may be further refused by Croatian courts, if the recognition of the enforceability of the obligation would manifestly be contrary to Croatian public policy (in Croatian: "*javni poredak*"), or it would be irreconcilable with an earlier judgement rendered by Croatian courts in a dispute between the same parties on the same basis; or if the jurisdiction of the other court rendering the judgement the enforcement of which is sought in Croatia is in conflict with Croatian rules pertaining to special or exclusive jurisdiction; and

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

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

(c) Any provision in the EFET General Agreement providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto. The courts of this jurisdiction may regard any calculation, determination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified.

(d) Unless the agreement stipulates otherwise, a party to an agreement is not entitled to terminate it upon default by the other party of obligations or covenants which are insignificant in relation to the main obligation under the contract.

(e) If an agreement requires one party to perform its obligations first, that party may postpone its performance or seek additional security if the position of the other party deteriorates so that the performance of such other party's obligations is put into question. The same applies if a party's business standing was poor at the time when the contract was concluded, if the other party did not know or ought to have known of such poor business standing. This suggests that parties must exercise prudent behaviour and examine the business standing of their counterparts in order to be able to withhold performance if the other party's business standing materially deteriorates.

B.II.2 Other limitations

(a) We express no opinion as to matters of fact.

(b) We express no opinion as to the validity and enforceability of any provisions of any master trading agreements other than the EFET General Agreement. We express no opinion as to the validity and enforceability of any provisions of the EFET General Agreement other than those to which express reference is made in this Opinion.

(c) We express no opinion as to whether the method for settling the claims arising from the Individual Contracts under the EFET General Agreement is acceptable and recognised on the market for transactions set out in Appendix B to the Instruction Letter and this Opinion, or whether it is eligible for recognition for risk-reducing or other similar purposes.

(d) Based on the Instruction Letter, we were not requested to analyse, and therefore we do not express opinion on the application of the terms of the EFET General Agreement if termination is triggered by insolvency of a party's Credit Support Provider.

(e) If a party to an Agreement is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Community or Croatian sanctions implemented or effective in Croatia, or is otherwise the target of any such sanctions, then the obligations of the other party to that party under the EFET General Agreement may be unenforceable or void.

(f) The opinions given in this Opinion are governed by and relate only to Croatian law as applied by the Croatian courts as at today's date. We express no opinion on and consider the impact or application of any laws and regulations other than Croatian law (as applicable), even where, under Croatian law, any foreign law fails to be applied. In this Opinion Croatian legal concepts are expressed and described in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying Croatian law concepts. Therefore, this Opinion is issued and may only be relied upon the express condition that any issues of interpretation or liability arising hereunder will be governed by and construed in accordance with Croatian law and all disputes in relation to this Opinion will be brought before the courts of Croatia.

B.III POTENTIAL PARTIES

Further to the Instruction Letter, we were required to give an opinion in respect of potential party types listed in Appendix A. Without prejudice to this, when assessing the potential parties to the Agreement, the following needs to be taken into account.

Trading in electricity is defined under the Electricity Market Act as the purchase and sale of electricity, excluding sales to end-customers. Pursuant to the same Act, such activity is subject to licence in Croatia (except for trading conducted by EU or Energy Community traders operating exclusively through the Croatian Power Exchange). Such licence can be obtained by any entity or natural person who meets the statutory requirements and the law does not contain further restrictions based on the type of an entity (restrictions may arise under sector-specific regulations e.g. ability of an entity to perform energy trading may be prohibited or limited by industry laws).

We note that certain potential parties listed in Appendix A are defined on the basis of the specific activity pursued by the corporation (e.g. banks, financial service providers, etc.). These types of potential parties (as well as the types of transactions envisaged in Appendix B) apparently go beyond the traditional meaning of pursuing physical trading (delivery and acceptance) of electricity.

This is important to note, since from an energy and financial regulatory viewpoint the borderline between physical trading in electricity and trading commodity derivatives is not crystal clear. The Capital Markets Act states, in accordance with the MiFID II, that its provisions do not apply to persons who deal on their own account in commodity derivatives, emission allowances or derivatives thereof, or who provide investment services in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business, provided that (i) such activity is an ancillary activity to their main business on a group basis, (ii) the main business is neither the provision of investment services within the meaning of the Capital Markets Act nor of banking activities, nor market making in commodity derivatives, and (iii) those persons do not apply a high-frequency algorithmic trading technique. However, similar provisions on the energy regulatory side are missing. The Electricity Market Act does not specifically deal with trading of electricity derivatives, but requires electricity traders to report all transactions relating to the sale and purchase of electricity, including derivatives. Although such requirement seems to equalize the physical trading in electricity with the trading in derivatives, there is no clear requirement that suggests that an electricity trading licence would be required for the trading of such derivatives. Pursuant to the unofficial information obtained from HERA, no specific requests for licencing of trade in electricity derivatives was made by the time of finalisation of this Opinion. Consequently, there is no clear delineation in practice between physical trading in electricity and the trading in derivatives. The lack of clear allocation of regulatory (including licencing) competences between the two regulatory sectors might cause practical difficulties, for instance, in view of the limitations on the scope of activities which financial institutions and similar entities may engage in, as prescribed by the financial regulatory rules.

Finally, it is important to emphasise that further to the General Assumptions it is possible that Party A is not an entity incorporated under the laws of Croatia but only has its main centre of interest in Croatia. Moreover, as further detailed under point C.VIII (*Regulatory Regime*, page 57), foreign entities may engage in trading in electricity in Croatia without having any permanent establishment in Croatia. Therefore, potential parties may also be entities incorporated under a foreign law, in which case we are not in the position to give any opinion in that respect.

Based on the above, please refer to Appendix A regarding the potential parties to the Agreement.

C. ISSUES AND ADDITIONAL ASSUMPTIONS

On the basis of the assumption and subject to the limitations respectively set out in point B.I (page 6), we are of the following opinion.

C.I ENFORCEABILITY OF CLOSE-OUT NETTING

Since for the purpose of this part the meaning of close-out netting is of core importance, prior to the detailed analysis it is essential to define this notion under the laws of Croatia.

There is no general definition for netting in the Civil Code or in other legislation of a general nature. Close-out netting is most precisely defined in the Resolution Act, which further references the Financial Collateral Act and the Settlement Finality Act.

Article 4 para 2 item 95 of the Resolution Act contains the following definition:

*“**netting arrangement**” means an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including:*

*“**close-out netting provisions**” as provisions of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or, in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise:*

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

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

*“**netting**” as the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed and in Croatian includes “netting” within the meaning of the financial collateral legislation (obračunavanje (netiranje)) and “netting” (obračunavanje) within the meaning of settlement finality legislation.*

This definition closely mirrors the definition set out in the Resolution Directive. Thus, this definition would appear to only be relevant (if at all) in respect of those potential parties in Appendix A, which fall under the scope of the Resolution Act (i.e. credit institutions and investment firms). However, in the absence of a definition that more precisely defines what netting is within Croatian legislation, we believe that the definition itself should be relied upon also when interpreting the permissibility of netting under different Croatian regulatory regimes.

As a general concept and with a view of achieving the same end effect, netting may be viewed as a set-off action from a civil law perspective, by which mutually consenting parties agree on a balancing of their mutual obligations.

According to Sections 195-202 of the Obligations Act, a party is entitled to set-off its due and payable claim of the same type against its debt by a statement addressed to its counterparty. Obligations cease to exist up to the value of the set-offs.

No set-offs can be made against claims for support, accident benefits, compensation for wilfully caused damages. The obligees shall not be entitled to include claims that cannot be enforced in court; they may, however, set off their lapsed claims if they have not yet lapsed by the time the counterclaim comes into existence. Notwithstanding the above restrictions, the general requirements for two claims to be set off against each other are that both claims must be either monetary or of the same type and quality (in Croatian: “*rod i kakvoća*”), and must be matured, due and payable (in Croatian: “*dospjele*”). Furthermore, set-off occurs by delivering the set-off (netting) statement to the other party. No set-off can occur without such statement being delivered; this is a precondition to the effectiveness of the set-off.

Croatian law also specifically deals with the permissibility of close-out netting in an insolvency scenario. The legislative approach is not uniform and several Croatian acts govern close-out netting in an insolvency scenario, depending either on the classification of an underlying contract or the classification of the contractual parties, or both.

The primary legislation governing the effects of netting in an insolvency scenario is the Insolvency Act. However, if products/transactions under a framework agreement do not fall within the categories specified in the Insolvency Act, the framework agreement as well as the transactions entered into under it may still benefit from the preferential regimes set out under the Financial Collateral Act. Furthermore, transactions under the framework agreement as well as the transactions entered into under it may also be impacted by industry specific legislation, including among others the Resolution Act, the Credit Institutions Act, the Capital Markets Act and the Settlement Finality Act (please see Appendix A for details).

C.I.1 Winding-up, Insolvency or Attachment

C.I.1.1 *Insolvency law interpretation of close-out netting and application of the insolvency laws to the Commodity Transactions*

As discussed under point C.I (page 10) above, irrespective of the specific nature of the Commodity Transactions entered into under the Agreement, the civil law interpretation of close-out netting enables the parties to the Agreement to enforce the netting provisions of the Agreement (subject to limitations discussed under point C.I (page 10) above) up to the moment of opening of the pre-insolvency/insolvency proceedings.

(a) A general rule on performance of reciprocal contracts and divisible obligations under the Insolvency Act

Reciprocal contracts are contracts in which both parties have rights and obligations under the contract. All of the Appendix B contract types should in our view be considered reciprocal.

Pursuant to Article 181 of the Insolvency Act, the performance of reciprocal contracts which were not (fully) performed at the time of opening the insolvency proceedings will be dependent primarily on the Administrator, so that he can:

- perform the contract on behalf of the insolvent party and demand performance from its counterparty; or

- refuse performance of the contract on behalf of the insolvent party, in which case the counterparty can claim for non-performance solely as the creditor in insolvency (in Croatian: "*stečajni vjerovnik*").

Specific rules also exist for divisible obligations (those which can performed in portions without altering the characteristics of the overall performance). We believe that while the EFET General Agreement may be viewed as a single agreement, Individual Contracts arising thereunder should be viewed as separate, divisible obligations (given how it is possible to perform only certain Individual Contracts at any given time).

Pursuant to Article 183 of the Insolvency Act, a party who partially performed its obligation before the opening of the insolvency proceedings may only claim the equivalent counter-performance of its insolvent counterpart as a creditor in insolvency, even in cases where the Administrator requests that such party performs the remaining portion of such obligation. The performing party does not have the right to reclaim from the insolvency estate those assets which were acquired by the insolvent party on the grounds of such partial performance before the opening of the insolvency proceedings.

Under such general rules, the Administrator is generally permitted to "cherry-pick" the contracts to be performed by the counterparts of the insolvent counterparty. However, certain exceptions apply based on the rules applicable to "fixed-term" contracts and "qualified financial agreements", as set out below.

(b) Specific regime for fixed term contracts

Pursuant to Article 182 of the Insolvency Act, a party may not claim performance from the insolvent party, but may only claim compensation for non-performance, in the following cases:

- if the delivery of goods was agreed (i) for a certain date or within a certain time period which falls after the opening of the insolvency proceedings and (ii) at a market price (in Croatian: "*tržišna cijena*") or at a goods exchange price (in Croatian: "*burzovna cijena*") (Article 182/1 of the Insolvency Act), or

- if the payment of a fee was agreed (i) for a certain date or within a certain time period which falls after the opening of the insolvency proceedings, and (ii) the fee is based on a market price (in Croatian: "*tržišna cijena*") or at a goods exchange price (in Croatian: "*burzovna cijena*") (Article 182/2 of the Insolvency Act).

This specific regime should in our view only apply to the fixed-term contracts within the meaning of Article 361 of the Obligations Act. In fixed-term contracts, the performance of a contractual obligation within a certain deadline is an essential element of the contract and the contract is terminated by virtue of the law if the obligation is not performed by the contracted deadline.

Namely, the performance of fixed-term contracts within a certain deadline is the crucial element of such contracts and the key driver behind the parties' intent to execute such contracts. The Administrator should thus not be entitled to "cherry-pick" only those contracts which are favourable to the insolvency estate and will thus stay in force, thus overriding the basic principles of such contracts. Also, although this has not been clearly set out in the law, the legislator has seemingly taken a position that the insolvent debtor is incapable of performing its obligations within the contracted deadlines. Consequently, all fixed-term contracts within the meaning of Article 182 of the Insolvency Act are deemed terminated with the date of the opening of the insolvency proceedings.

The Insolvency Act enumerates certain fixed-term contracts in a non-exhaustive manner, so to include:

- delivery of precious metals;

- delivery of securities or similar rights if the acquisition of shares in a company is not done with the intent to acquire a permanent bond with such company;

- payments performed in a foreign currency;

- payments whose amounts are directly or indirectly linked to the FX rate, interest rate or the price of other goods and services;

- options and other delivery claims or payments within the meaning of the above.

Pursuant to Article 182/4 of the Insolvency Act, if the fixed-term contracts[1] are encompassed by a single framework agreement which contemplates the termination of such framework agreement in cases of default thereunder, all the individual fixed-term contracts shall be deemed to be a single reciprocal agreement within the meaning of Article 181 of the Insolvency Act (please see Point C.I.1.1(a) above).

Article 182/5 of the Insolvency Act specifically addresses the compensation for non-performance of the fixed-term contracts, so that such compensation:

- consists of the difference between (i) the contracted price, and (ii) the market price or good exchange price applicable to fixed-term contracts at the place of delivery on the next day after the opening of the insolvency proceedings; and

- may only be claimed by the non-insolvent party as a creditor in insolvency.

In our view, the regime applicable for fixed-term contracts will allow for close-out netting. Consequently, due to the single agreement concept, all claims under the Individual Contracts concluded under the umbrella of the same EFET General Agreement will be netted as if they were made pursuant to a single reciprocal contract (assuming that the EFET General Agreement and the Individual Contracts concluded thereunder are qualified as fixed-term contracts, which is currently not the case). This rule would in our view apply to all Individual Contracts concluded under the umbrella of the same EFET General Agreement irrespective of the products traded under such contracts and the parties would not be entitled to opt-out of such an arrangement. Consequently, parties' elections that aim to disallow cross product payment netting are likely to be unenforceable under Croatian law if different products would be traded under the umbrella of the same EFET General Agreement. However, we also understand that the parties are unlikely to trade different products under the umbrella of a single EFET General Agreement, but rather employ different agreements for different products (such as allowances or EECS certificates). We have analysed the permissibility of cross-product payment netting in Point C.VI below.

Finally, it should be noted that if the EFET General Agreement and the Individual Contracts thereunder do not qualify as Qualified Financial Agreements, the parties will not be able to rely on the calculation method set out in the EFET General

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[1] Although the wording of the Insolvency Act seems to apply the single agreement concept only to agreements set out in Article 182/2 of the Insolvency Act, we believe that there is no reason to exclude the application of the same concept to agreements set out in Article 182/1 of the Insolvency Act.

Agreement, but will have to use the calculation method set out in Article 182/5 of the Insolvency Act. To the extent any amounts remain after netting, these may be claimed by the non-insolvent counterparty as a creditor in insolvency.

Is the EFET General Agreement a fixed term contract?

We believe that the EFET General Agreement would not be qualified as a fixed-term contract and neither would the Individual Contracts concluded thereunder.

Primarily, we understand that the general concept behind the EFET General Agreement is to subject all Individual Contracts concluded under the umbrella of the EFET General Agreement to the same terms as the EFET General Agreement. Therefore, the provisions on termination set out in the EFET General Agreement would apply equally to all Individual Contracts.

Under § 10.5(a)(i) of the EFET General Agreement, a defaulting party is permitted to cure its non-performance in delivery within ten Business Days of the other party's written demand. In that way, the parties are setting a long stop date for the performance of the defaulting party's contractual obligations, which should in itself not be problematic. In this respect, we would however like to point out that it could be argued that by giving one party the authority to unilaterally determine the exact deadline for performance (by way of deciding when to dispatch the written demand) rids the contract of its fixed-term nature, as the deadline becomes arbitrary and not fixed. Consequently, we would recommend that this issue is addressed as well as set out below.

Furthermore and more importantly, for the EFET General Agreement and the Individual Contracts concluded thereunder to be fixed-term contracts, they should expire automatically if the performance is not made by the agreed deadline. Consequently, a termination for breach of this deadline should not be within the discretion of the non-defaulting party, but should occur automatically at the expiry of such deadline. This is not the case under the presented EFET General Agreement.

In order to remedy these issues and ensure that the EFET General Agreement is a fixed-term contract, we would recommend to amend the draft EFET General Agreement to:

- link the cure period to a fixed date (e.g. the date of default) instead of linking it to the date of written demand, so as to stress the importance of timely performance; and

- make the termination automatic in case of failure to perform within the additional cure period.

If the EFET General Agreement or the Individual Contracts concluded thereunder are not qualified as fixed-term contracts, they will not be able to benefit from the preferential treatment contemplated under the Insolvency Act for close-out netting arrangements (including for cases of Qualified Financial Agreements as set out below), but only from set-off in insolvency (also as set out below).

However, the parties may still be able to benefit from the preferential treatment contemplated for agreements that fall within the scope of a financial collateral agreement under the Financial Collateral Act (see Point C.I.1.1(d) below).

(c) Specific regime for Qualified Financial Agreements

Qualified Financial Agreements, within the meaning of the Insolvency Act, are financial agreements where:

- at least one party is either a credit institution, a financial institution, an investment company, a leasing company, a management company (in Croatian: "*društvo za upravljanje*"), an AIFM company, a pension company or an insurance company; and

- the parties have undertaken obligations which must be performed at a certain time or within a certain time period, irrespective of whether such obligations are conditional or not,

("**Qualified Financial Agreements**").

Based on the above, it may be concluded that Qualified Financial Agreements are a specific type of fixed-term contract concluded by participants in the financial sector. As such, they will terminate with the opening of the insolvency proceedings, but should benefit from the single agreement concept set out above, as well as from a specific treatment of close-out netting in case of insolvency of either of the parties.

Namely, pursuant to Article 182/6 of the Insolvency Act, the commencement of insolvency proceedings does not affect Qualified Financial Agreements in which the parties agreed on netting of their mutual obligations. In such cases, the compensation for non-performance of the agreement may be requested under the provisions of such agreement. If a residual payment obligation of the insolvent debtor remains after the netting of the obligations has been made, a creditor may claim such residual payment as a creditor in insolvency.

The Insolvency Act enumerates certain agreements in a non-exhaustive manner, so as to include:

- agreements with financial instruments, within the meaning of the Capital Markets Act;

- repo agreements and other financial collateral agreements within the meaning of the Financial Collateral Act;

- use of financial instruments, including financial loans and loans as auxiliary services within the meaning of the Capital Markets Act;

- netting agreement within the meaning of credit institutions regulations; and

- sale and purchase of foreign currency.

Following the commencement date of the insolvency proceedings only close-out netting agreements complying with the requirements set out for qualified financial agreements qualify for the "safe harbour" protection of the Insolvency Act.

The above means that for Commodity Transactions to be eligible for the beneficial treatment of close-out netting agreements under the Insolvency Act, they need to fall within one of the types of transactions listed in the Qualified Financial Agreement definition of the Insolvency Act.

(d) Specific regime for financial collateral agreements

The Financial Collateral Act sets out special rules for securing financial obligations with financial collateral instruments included in the agreements between the participants of the financial market.

Pursuant to Article 8 of the Financial Collateral Act, a settlement of obligations arising out of the financial collateral agreements, including the cases of an early termination of such obligations and their netting, shall be performed according to provisions of such agreement despite the fact that either insolvency proceedings or liquidation proceedings or reorganisation measures are imposed against either the collateral provider or the collateral receiver.

For the parties to benefit from the preferential treatment of close-out netting set out by the Financial Collateral Agreement, two primary conditions would have to be fulfilled:

- their agreement would have to qualify as a financial collateral agreement; and
- the parties themselves would have to be eligible for protection under the Financial Collateral Act.

Financial Collateral Agreements

A financial collateral agreement is an agreement under which a collateral provider, with the purpose of securing his/other's financial obligations, agrees to transfer certain financial collateral to the collateral taker, or to establish a certain kind of pledge over that collateral in the collateral taker's favour, under the conditions set out in the agreement, framework agreement or terms of business.

At the same time, the collateral taker agrees to return that (or equivalent) financial collateral to the collateral provider (under the conditions set out in the agreement, Financial Collateral Act or other relevant acts), whereas financial collateral shall mean financial instruments, funds assets or credit claims.

With respect to the collaterals provided under the EFET Credit Support Annex, we believe that only cash should qualify as financial collateral within the meaning of the Financial Collateral Act. Consequently, the arrangements concluded among qualified parties and including cash as collateral would benefit from the "safe harbour" regime under the Financial Collateral Act. On the other hand, Letters of Credit and Parent Company Guarantee do not grant the same benefit and those arrangements would fall outside the scope of the Financial Collateral Act. As a consequence, arrangements with Letters of Credit and Parent Company

Guarantees as collaterals may benefit from a preferential regime only if they qualify for such protection under the Insolvency Act.

Parties eligible for protection under the Financial Collateral Act

The Financial Collateral Act enumerates in detail the entities/participants of the financial market[2] eligible for protection when entering into "financial collateral agreements" within the meaning of the Financial Collateral Act. Furthermore, any individual or entity entering into a financial collateral agreement with such eligible party is also eligible for protection under the scope of the Financial Collateral Act.

Consequently, if any of the parties set out in Appendix B enters into a Credit Support Annex which qualifies as a financial collateral agreement as defined by the Financial Collateral Act, the close-out netting provisions under such Credit Support Annex would not be affected by the opening of insolvency proceedings over either party of such Credit Support Annex. Furthermore, since we understand that the Credit Support Annex is to form part of the EFET General Agreement (i.e. the EFET General Agreement and the Credit Support Annex form an integral agreement), we believe that if a Credit Support Annex is entered into alongside the EFET General Agreement, the EFET General Agreement and the Credit Support Annex shall both have benefit of the "safe harbour" under the Financial Collateral Act as one single agreement.

Netting

The Financial Collateral Act also contains a specific definition of netting, described as:

"*calculation of present or future payments, delivery obligations or rights arising from one or more agreements on a specific financial agreement, whereby such calculation may result in a termination or cancellation or an early maturity of a payment or delivery obligation, or an acquisition of another right. Netting may also*

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[2] Parties eligible for protection under the Financial Collateral Act are EU Member States public authorities entrusted with public debt management or the management of business accounts, EU Member States central banks, European Central Bank, International Monetary Fund, European Investment Bank, Bank for International Settlements (BIS), International Bank for Reconstruction and Development, International Finance Corporation, Inter-American Development Bank, Asian Development Bank, African Development Bank, Council of the European Fund for Redistribution, Nordic Investment Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, European Investment Fund, Inter-American Investment Corporation.

Also eligible are (i) credit institutions whose business is to receive deposits or other repayable funds from individuals and legal entities and to grant credits for its own account; (ii) investment firms, as legal entities that are not credit institutions, whose regular business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis; (iii) financial institutions, except credit institutions, whose exclusive or prevailing business is to gain share in capital or perform one or several basic financial services; (iv) insurance companies; (v) companies for collective investment in transferable securities; and (vi) settlement agents or clearing houses.

In Croatia, parties eligible for protection under the Financial Collateral Act are the Republic of Croatia, Croatian National Bank, Croatian Bank for Reconstruction and Development, credit institutions as regulated by the act regulating credit institutions, financial institutions as regulated by the act regulating the capital market, investment firms as regulated by the act regulating the capital market, insurance and reinsurance companies as regulated by the act regulating insurance, investment and pension funds, Central Depository Agency, Croatian Institute for Health Insurance, Croatian Pension Insurance Institute as well as the central counterparty, the settlement agent and clearing organization, in accordance with the act regulating the settlement finality in payment and securities settlement systems.

mean the calculation or assessment of a unique, market, liquidation or substitution value in relation to one or more rights and obligations, and may also mean a conversion into a single currency and/or a determination of a net amount of an obligation, whether by way of set-off or otherwise."

We believe that this definition of netting is adequate to safeguard the interests of parties entering into a General EFET Agreement secured by a financial collateral agreement and that it permits the enforceability of close-out netting provisions of the General EFET Agreement in an insolvency scenario, subject to the terms set out in this opinion.

(e) Simple set-off rules under the Insolvency Act

Set-off rules applicable in the event of a non-insolvency scenario are discussed under point C.I.2 (page 34) of this Opinion.

Without prejudice to the enforceability of the close-out netting agreements as described above in points C.I.1.1(a) to (c), the Insolvency Act limits the possibility of civil law set-offs.

If a creditor had a set-off right (based on either law or contract) towards the insolvent debtor at the time of opening of the insolvency proceeding, the opening of the insolvency proceedings does not affect such set-off right.

Set-off is not permitted in the following cases:

- if the creditor's claim to the insolvency estate arises after the opening of the insolvency proceedings;
- the creditor acquired the claim from another creditor after the opening of the insolvency proceedings;
- the claim was acquired through assignment within six months prior to the opening of the pre-insolvency proceedings or insolvency proceedings (if pre-insolvency proceedings had not been opened) and acquiring party knew or ought to have known that the debtor was insolvent or that a petition was filed. Exceptionally, set-off will be permitted if it is related to a claim assigned in connection with fulfilment of outstanding agreements or a claim revived by a successful challenge of the debtor's voidable actions; and
- if the creditor's claim is successfully challenged.

In cases where the Croatian court conducts insolvency proceedings over a branch or assets of the foreign debtor (please see Point C.II.2), set-off will further not be permitted if (i) the assignment of claim was made between the opening of foreign insolvency proceedings and the date of publication of the Croatian court's decision recognising the foreign decision on opening of the insolvency proceeding, and (ii) the recipient knew or ought to have known at assignment that insolvency proceedings were initiated abroad against the debtor.

The Insolvency Act also governs the set-off of non-matured claims (either concluded under resolutive condition or not yet due) and non-identical claims (not of the same type or quality). As an exception to the general rule, non-matured claims which are subject to set-off will not become due and payable after the opening of the insolvency proceedings. Non-matured and non-identical claims may be offset only when the relevant civil law conditions have been met (see Point C.I on page 10). The Insolvency Act also stipulates that set-off will not be permitted in cases where a claim becomes unconditional and payable before the civil law conditions for set-off have been met. Although this provision is unclear and untested in practice, we believe that it is likely to be read in a way that only allows the creditor in insolvency to offset its due and payable claims against the claim of the insolvency debtor which are not yet due and payable, and not the other way around (the principle of preservation of the insolvency estate).

Contractually agreed set-off of claims between the Parties arising outside of the EFET General Agreement will be enforceable in an insolvency scenario if the above requirements are met. Contractually agreed set-off between the Parties with claims of Affiliates or Credit Support Providers will not be enforceable under the laws of Croatia in an insolvency scenario (please also refer to Point C.I on page 10).

However, where the EU Insolvency Regulation is applicable, set-off may be enforceable beyond the above described scope if such set-off is permitted by the law applicable to the insolvent debtor’s claim. This is because according to Article 9 of the EU Insolvency Regulation, the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor’s claim (which means, in the event of a contractual set-off agreement, the law governing the agreement from which the claims concerned arise).

(f) Conclusion

The enforceability of the EFET General Agreement’s close-out netting provisions will primarily depend on the possibility to classify the EFET General Agreement as a Qualified Financial Agreement. If the EFET General Agreement is classified as a Qualified Financial Agreement, the opening of the insolvency proceedings should not affect the enforceability of close-out netting provisions thereunder.

If the EFET General Agreement cannot be classified as a Qualified Financial Agreement, but is classified as a fixed-term contract, the parties should consider whether they wish to be subject to the rules of the Insolvency Act governing calculations of termination payments in case of fixed-term contracts.

If the EFET General Agreement is not classified as a Qualified Financial Agreement or a fixed-term contract, the parties may still achieve a desired effect through set-off in insolvency. However, due to the fairly complex requirements applicable to such set-offs and the consequent risk of collection of such claim, this option should be approached carefully.

Finally, irrespective of the EFET General Agreement not being classified as a Qualified Financial Agreement or a fixed-term contract, if (i) it is concluded by a party eligible for “safe harbour” protection under the Financial Collateral Act, and (ii) the performance of obligations thereunder is secured by a financial collateral within the meaning of the Financial Collateral Act, we believe that the opening of the insolvency proceedings should not affect the enforceability of close-out netting provisions under such EFET General Agreement.

SPECIFIC QUESTIONS

For the purpose of this section we have made the following additional assumptions in accordance with the Instruction Letter:

The relevant EFET General Agreement is governed by any law (including English or German law or the laws of Croatia).

After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Croatia and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") Individual Contracts for the insolvent counterparty.

Since Party A is a party incorporated, organised or having its centre of main interest in Croatia, the courts of Croatia will have jurisdiction to open insolvency proceedings and will proceed in accordance with Croatian insolvency laws. Provisions of the EU Insolvency Regulation or of a foreign law will have any relevance if the proceedings involve a "foreign element" (e.g. a foreign creditor).

We further assumed that Party A is not classified as a major economic operator of preferential status for strategic consideration since in this case a special regime would apply to the insolvency of Party A, as detailed in Point 2 of Appendix C.

C.I.1.2 ***Assuming the Parties have not specified that Automatic Termination (as defined in § 10.4 of the EFET General Agreement) applies, are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of Croatia or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the early termination by notice itself could be challenged by a liquidator, administrator, receiver or third party?***

Our analysis below is prepared under the assumption that the EFET General Agreement or any of the Individual Contracts concluded thereunder are not classified as fixed-term contracts. However, please note that in that case the parties would not be able to benefit from the preferential treatment in regard to close-out netting provisions (see point C.I.1.1(b) above).

If the EFET General Agreement submitted to us is classified as a fixed-term contract, it would terminate with the date of opening of the insolvency proceedings by operation of the law and any of the parties' elections contrary to such operation would be null and void.

(a) Enforceability of termination rights

The provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement upon an insolvency-based Material Reason in most cases will be enforceable under the laws of Croatia. Certain exceptions may apply in cases of special proceedings conducted under the Resolution Act, where agreed termination rights may be overridden and close-out rights temporarily suspended (please see Section 3.2 of Appendix C).

As regards liquidation proceedings, neither the Obligations Act nor the Companies Act contain any limitation regarding the termination of agreements by one party upon the other party entering into liquidation.

Notwithstanding the above, we note that in some cases the insolvency related events listed in § 10.5 (c) of the EFET General Agreement are difficult to interpret in light of the definition of the commencement date of the insolvency proceedings under the Insolvency Act. This is because most of the listed events do not expressly cover the Croatian insolvency law meaning of the commencement date of the insolvency proceedings.

- The event specified in § 10.5 (c) (i) occurs definitely much later, in fact, when the insolvent party is dissolved (in Croatian law interpretation this means that the party ceases to exist) no claims can be enforced at all against such (non-existing) party.
- Events specified in § 10.5 (c) (iii) and (vii) (and to a certain extent in § 10.5 (c)(ii)) of the EFET General Agreement are rather vague and do not necessarily mean the occurrence of insolvency proceedings under the laws of Croatia, but an insolvent financial status of a party, without the initiation of any insolvency proceedings.
- Events set out in § 10.5 (c) (iv) are not in themselves indicative of the occurrence of insolvency. Namely, a petition seeking judgement of insolvency may under Croatian insolvency law be initiated at any time without any immediate adverse effect on the parties. The filing of a petition for insolvency will have relevance only if the court finally orders the opening of the insolvency proceedings.
- Events specified in § 10.5 (c) (v) of the EFET General Agreement reflect situations that could be matched to Croatian insolvency proceedings (in Croatian: "*stečajni postupak*"), pre-insolvency (in Croatian: "*predstečajni postupak*") and liquidation proceedings (in Croatian: "*likvidacija*"). We note however that these provisions to some extent overlap each other, whereas in other cases those refer to consecutive events in the same insolvency proceeding. This may give rise to disputes or even to different termination dates depending on which provision or which part thereof is referred to by the terminating party.
- Events specified in § 10.5 (c) (vi) describe occurrences that are not necessarily insolvency related matters (e.g. the competent court may also appoint an officer if the shareholders fail to do so).

With respect to the above, although termination rights triggered by insolvency-based (or other) events are generally permitted and enforceable under the laws of Croatia, since some of the above events cannot be directly linked to any Croatian insolvency law concept, it cannot be excluded that the termination is challenged on the grounds that the trigger event (i.e. Material Reason) has not in fact occurred and accordingly the termination was unlawful. Nevertheless we believe that this is a remote risk and is not directly related to the fact whether termination is triggered by an insolvency-based or any other event.

(b) Right to challenge contracts

As a general rule, the Insolvency Act grants the Administrator and the creditors in insolvency the right to challenge the debtor's contracts which have been entered into prior to the commencement of the insolvency proceedings, if such contracts disturb the creditors' rights to equal satisfaction of claims or which put certain creditors in a preferential position.

The Insolvency Act regulates the grounds on which certain contracts can be voided:

- if a creditor receives security for its claims or its claim is settled in line with the existing contractual arrangements (in Croatian: "*kongruentno namirenje*") within three months prior to filing the petition for insolvency or during the period between the filing and opening of the insolvency proceedings. Such debtor's action will be voided if the debtor was insolvent at the time of the performance and the creditor was aware of that (including if an application of insolvency was already filed). A typical example may include payment of a due invoice to a creditor.

- if a creditor receives security for its claims or its claim is settled although the creditor had no right to request it under the existing contractual arrangements (in Croatian: "*inkongruentno namirenje*"). Such debtor's action will be voided if undertaken (i) within one month prior to filing the petition for insolvency, or (ii) during the third or the second month prior to filing the petition for insolvency, if the debtor was insolvent at the time of the performance or that the creditor was aware that discharge was damaging to other creditors. A typical example would include granting security for originally unsecured obligations at the request of a creditor.

Any transaction directly damaging creditors can be challenged if it was entered into (i) within the last three months prior to filing the petition for insolvency, if the debtor was insolvent and the other party was aware of such insolvency, or (ii) after filing the petition for insolvency, if the other party was aware of the debtor's insolvency or the filing of the petition. A typical example of a damaging transaction may include the debtor's waiver of security instruments.

C.I.1.3 ***Assuming the Parties have elected Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of Croatia or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?***

According to the Obligations Act, parties to an agreement are free to determine conditions upon which their agreement terminates. We are of the opinion that the insolvency-based Material Reasons as set out in § 10.5 (c) of the EFET General Agreement do not qualify as illegal.

Further, Croatian law does not recognise automatic termination *per se*. However, the same effect may be achieved by expressly making the relevant Material Reasons a resolutive condition (in Croatian: "*raskidni uvjet*") and introducing appropriate wording in the Agreement to that effect. This would mean that the EFET General Agreement would terminate immediately upon the occurrence of such condition. By way of an example, § 4 of the EFET General Agreement should be supplemented with the following sentence to be added at the end of § 4:

"*For the avoidance of doubt, the Material Reasons described in § 10.5 (c) shall be deemed to be resolutive conditions if the Parties elect the Early Termination Date to fall on the date of the occurrence of the Material Reason and the Agreement shall automatically terminate on that date*".

C.I.1.4 ***Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? Would it be necessary or advisable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) by adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (ii) by limiting those insolvency events specified in § 10.5(c) which would trigger 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 to provide for optimal timing of such termination under local law?***

We would recommend electing Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement.

Namely, if the EFET General Agreement is not classified as a fixed-term contract, it cannot benefit from the single agreement concept contemplated for such agreement under the Insolvency Act. It is furthermore questionable whether the Administrator would respect the parties' election to treat the EFET General Agreement and the Individual Contracts as a single agreement. In our view, there is a substantial risk that the Administrator will view the EFET General Agreement and each of the Individual Contracts as separate agreements, allowing him the right to "cherry-pick" the agreements favourable to the insolvent party. In such cases, the calculation and payment of the Termination Amount would depend on the possibility to conduct set-off in insolvency. It would thus be important to make all claims due and payable at the time of the opening of the insolvency proceedings.

Should the parties wish to elect Automatic Termination to apply, we are of the view that the Material Reasons upon which Automatic Termination is triggered need to be further specified in order to cover those events which are relevant from a Croatian insolvency law viewpoint. Thus, the Automatic Termination should apply at the time when insolvency proceedings are opened over the insolvent party.

As an alternative, the parties should consider allowing for Early Termination in cases where a Material Reason described in § 10.5(c) of the EFET General Agreement has not occurred, but the circumstances indicate a likelihood of its occurrence in the immediate future. In such cases, a party would be in the position to further evaluate the circumstances of the case and decide whether it wants to terminate the EFET General Agreement and the Individual Contracts. Thus, the Early Termination should be permitted in the following cases:

(i) passes a resolution on its voluntary dissolution. Although the institution of such proceedings does not have direct adverse effect on creditors' rights, the creditors will likely prefer to ensure the satisfaction of their claim without risking that the liquidation proceedings turn into insolvency proceedings;

(ii) passes a resolution on the filing of the application for insolvency;

(iii) fails to settle or contest its previously uncontested or acknowledged contractual debts within 20 days of the due date, and fails to satisfy such debt upon receipt of the other party's written payment notice;

(iv) has its bank accounts blocked for longer than 45 days;

(v) a petition is presented for its insolvency, and is not withdrawn, dismissed, discharged, stayed or restrained within such period as specified in the Election Sheet.

It is important to note in this respect that the occurrence of the events listed above is not always evidenced by publicly available information. However, filings requesting opening of insolvency proceedings over a debtor are published on an e-bulletin board of the relevant court within three days after the filing has been submitted to the court.

C.I.1.5 ***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 proceedings dismissed or otherwise terminated?***

The mere filing for the opening of the insolvency proceedings does not always give a clear indication on the solvency of the party against whom insolvency proceedings have been initiated. Therefore, if a Material Reason for termination is simply linked to the submission of a petition for the insolvency of a party, even frivolous applications may trigger the termination. The reason for this is that although the minimum content of a petition to institute insolvency proceedings is set out in the Insolvency Act, nothing prevents someone from filing a petition to this end, even if later on the unfounded application lacking the statutory minimum content is rejected by the court. A grace period regulated for those events when a petition is submitted by third parties may reduce, but not eliminate the risk of terminating the Agreement on the basis of a frivolous application.

If insolvency proceedings were requested and not rejected ex officio due to formal reasons (e.g. ongoing pre-insolvency, incompleteness of proposal, or failure to pay procedural costs), the court will schedule a hearing on which prerequisites for insolvency shall be discussed. This hearing should be scheduled within 30 days from the date when the proposal for insolvency was filed (or 60 days in cases where initiation of pre-proceedings is necessary). Following the hearing, the relevant court has three days to reject or to adopt the proposal on insolvency and initiate the proceedings.

In practice, however, the time limits set out above are frequently exceeded. The actual decision making timeframe depends on a variety of factors outside the parties' control and may vary greatly. Hence, it is virtually impossible to make an accurate assessment of the time required for the court to schedule the hearing on which prerequisites for insolvency will be discussed. For purposes of this opinion, we believe that the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceedings should be set at 90 days.

C.I.1.6 ***If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event, please supply specific recommended language for purposes of customizing § 10.4 of the General Agreement to implement such optimal termination timing.***

The latest time Automatic Termination should take effect is the time of the opening of the insolvency proceedings.

C.I.1.7 ***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 Croatia or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?***

The enforceability of the netting provisions of the EFET General Agreement under the laws of Croatia in insolvency proceedings depend on (i) the categorisation (legal nature) of the transaction covered by the Individual Contracts under the EFET General Agreement (please refer to point C.I.1.1 of this Opinion on page 12), and (ii) the type of contracting party (in the case of insolvency proceedings).

(a) Close-out netting in insolvency proceedings

(1) In order to analyse the enforceability of close-out netting provisions, one would have to primarily observe the legal nature of the transaction and the type of the contracting party.

(2) In that regard, it will be important to determine whether the transactions under the Agreement qualify as (i) Qualified Financial Agreements within the scope of the Insolvency Act (please refer to point C.I.1.1(c) of this Opinion on page 16) or as (ii) financial collateral agreements within the scope of the Financial Collateral Act (please refer to point C.I.1.1(d)of this Opinion on page 17). If the answer to either of those questions is affirmative, the opening of the insolvency proceedings will not affect the netting provisions under the Agreement.

(3) If the transactions under the Agreement do not qualify as Qualified Financial Agreements within the scope of the Insolvency Act or as financial collateral agreements within the scope of the Financial Collateral Act, it will be important to determine whether a party to the Agreement would be affected by a specific regime under industry specific regulations (please refer to the relevant segments of Appendix C).

(4) If the transactions under the Agreement (i) do not qualify as Qualified Financial Agreements within the scope of the Insolvency Act or as financial collateral agreements within the scope of the Financial Collateral Act, and (ii) the parties to the Agreement are not affected by a specific regime under industry specific regulations, a close-out netting effect could still be achieved with the application of set-off rules in insolvency (please refer to point C.I.1.1(e) of this Opinion on page 19).

(b) Close-out netting in pre-insolvency proceedings

(1) The opening of the pre-insolvency proceedings will not affect the netting provisions under the Agreement provided that the Agreement qualifies as a Qualified Financial Agreement.

(2) The Insolvency Act and the Financial Collateral Act do not expressly govern the effects of the opening of pre-insolvency proceedings on the financial collateral agreements. Nonetheless, we are of the view that the application of less stringent rules in pre-insolvency proceedings should not allow the parties to avoid their obligations under the financial collateral agreements. Consequently, we believe that the opening of the pre-insolvency proceedings should not affect the netting provisions under the Agreement provided that the Agreement qualifies as a financial collateral agreement.

(3) If the transactions under the Agreement do not qualify as Qualified Financial Agreements within the scope of the Insolvency Act or as financial collateral agreements within the scope of the Financial Collateral Act, it is likely that the enforcement of close-out netting provisions would be somewhat difficult as it would require a set-off of mutual claims under the Individual Contracts.

(4) As the Insolvency Act does not expressly govern set-off in pre-insolvency proceedings, we believe that the general rules set out in the Obligations Act should apply (please see Point C.I), but subject to the limitations set out under the Insolvency Act.

(5) Specifically, we believe that a set-off of mutual claims should be permitted in pre-insolvency proceedings. The main argument for that is the permissibility of set-off in case of insolvency. Consequently, the application of less stringent rules in pre-insolvency proceedings should not preclude the parties to offset their mutual claims as they would permitted to do so in insolvency proceedings.

(6) However, certain restrictions would likely apply as to the collection of the residual amount after set-off. Similar as in insolvency, the creditor would have to claim such residual amount in the regular course of the pre-insolvency proceedings, with fairly limited chances of successful collection.

For further details on pre-insolvency proceedings, we refer to Point 1.2 of Appendix C.

(c) Close-out netting in voluntary dissolution proceedings

Our conclusions on the enforceability of close-out netting outside of an insolvency scenario apply accordingly to close-out netting in voluntary dissolution proceedings.

C.I.1.8 ***Do the laws of Croatia recognize that the close-out netting provisions in section §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate the net amount? If the single agreement concept is particularly important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contract under the General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the General Agreement following a previous Partial Close-Out.***

We have outlined the general rules applicable to the Administrator's "cherry-picking" rights and exceptions thereto in Point C.I.1.1 hereof and we hereby refer to that section.

Specifically, Article 182/4 of the Insolvency Act specifies that all of the fixed-term contracts encompassed by a single framework agreement which contemplates the termination of such framework agreement in cases of default thereunder shall be deemed to be a single reciprocal agreement if such contracts meet the following requirements:

- the delivery of goods was agreed (i) for a certain date or within a certain time period which falls after the opening of the insolvency proceedings, and (ii) at a market price (in Croatian: "*tržišna cijena*") or at a goods exchange price (in Croatian: "*burzovna cijena*") (Article 182/1 of the Insolvency Act), or

- the payment of a fee was agreed (i) for a certain date or within a certain time period which falls after the opening of the insolvency proceedings, and (ii) the fee is based on a market price (in Croatian: "*tržišna cijena*") or at a goods exchange price (in Croatian: "*burzovna cijena*") (Article 182/2 of the Insolvency Act).

This rule gives effect to the single agreement clause set out in § 1 of the EFET General Agreement in respect of close-out netting agreements within the meaning of the Insolvency Act.

If Individual Contracts do not meet the requirements set out in Articles 182/1 and 182/2 of the Insolvency Act, we believe that such contracts would not be eligible to benefit from the single agreement concept and close-out netting regime applicable thereto. However, if Individual Contracts meet the requirements set out in Articles 182/1 and 182/2 of the Insolvency Act, the single agreement concept would in our view apply to all Individual Contracts traded under the umbrella of the same EFET General Agreement.

As regards the effects of Partial Close-Out on subsequent termination and close-out rights, we are of the view that the enforceability of netting under an EFET General Agreement in an insolvency scenario will not be weakened by an earlier partial close-out under the same Agreement outside the insolvency scenario. We further believe that a Partial Close-Out would not be possible in the insolvency scenario if the EFET General Agreement and the Individual Contracts concluded thereunder are deemed as fixed-term contracts, as the termination of the General EFET Agreement would automatically result in the close-out netting of all remaining obligations under the Individual Contracts.

Finally, in respect of the Administrator's rights we also refer to the particular provisions of the Electricity Market Act. Pursuant to Article 55b of the Electricity Market Act, if the conditions for set-off of mutual claims between the Croatian Power Exchange and its members are met, the provisions of the Insolvency Act on the impermissibility of set-off in cases of pre-insolvency or insolvency of an insolvent debtor shall not apply.

C.I.1.9 ***Is the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD, GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Croatia or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?***

Claims denominated in a foreign currency must be converted into Croatian Kuna at an exchange rate applicable on the date of opening of the insolvency proceedings at the place of payment.

The rule does not apply in cases of set-off, but only if the currencies are freely convertible at the place of payment of the insolvent party's claim. In that case, the conversion is done on the basis of an exchange rate applicable at the place of payment of the insolvent party's claim on the date when the set-off statement is received.

C.I.1.10 ***Please specify, if and as applicable, the degree to which termination and close-out netting rights in insolvency in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorisation or regulatory or legal status?***

(a) General provisions

Under the laws of Croatia, insolvency and pre-insolvency proceedings cannot be initiated against:

- the Republic of Croatia and funds financed from the state budget;
- the Croatian Health Insurance Fund;
- the Croatian Pension Insurance Fund;
- local and regional administration units;
- producers of weapons and military gear and service providers to the Croatian military, unless approved by the Ministry of Defense.

Pre-insolvency proceedings cannot be initiated against:

- financial institutions;
- credit unions;

- investment companies and investment fund managers;

- credit institutions;

- insurance and reinsurance companies;

- payment institutions (in Croatian: "*institucija za platni promet*"), and

- electronic money institutions.

However, all such institutions may be subject to special recovery and resolution proceedings to remove grounds or illiquidity or insolvency, as further detailed in Point 3 of Appendix C.

Beneficial treatment of close-out netting agreements in insolvency proceedings in cases of Qualified Financial Agreements are further detailed in Point C.I.1.1(c) on page 16 of this Opinion.

We outline below special rules applicable to close-out netting arrangements under industry specific legislation.

(b) Specific rules for close-out netting of eligible transactions under the Resolution Act

The Resolution Act governs the resolution and recovery of:

- credit institutions and investment firms (together referred to as institutions);

- financial institutions established in Croatia if covered by consolidated supervision;

- financial holding companies, mixed financial holding and mixed holding companies established in Croatia;

- parent financial holding companies, parent EU financial holding companies, parent mixed financial holding companies, and parent EU mixed holding companies, all if established in Croatia; and

- the Croatian branches of institutions that are established in third countries.

The nature and basic principles of the recovery proceedings under the Resolution Act are set out in Point 3 of Appendix C. Primarily, recovery proceedings shall be conducted instead of the insolvency proceedings if this is deemed to be in the public interest.

If Party A is classified as one of the institutions above and undergoes a special administration in the form of risk prevention measures or risk management measures (as defined by the Resolution Act), Party A's counterparty may freely invoke netting provisions of contracts concluded by Party A as follows:

- by relying on other reasons not based on the implementation of such risk prevention measures or risk management measures (e.g. termination for a

Material Reason other than described in § 10.5(c) of the EFET General Agreement);

- by invoking the reasons of risk prevention measures or risk management measures, if Party A does not materially perform its obligations under the concluded financial collateral contracts.

In the recovery of financial institutions and credit institutions, DAB acting as a recovery administrator cannot partially transfer, amend or cancel obligations secured under (i) financial collateral agreements with transfer of ownership, (ii) set-off agreements; or (iii) netting arrangements concluded between a financial or credit institution undergoing recovery and a third party.

As an exception to this rule, DAB may, but only for the purpose of making available the secured deposits:

- transfer secured deposits subject to any financial collateral agreements with transfer of ownership, set-off agreements or netting arrangements without transferring other assets, rights or obligations forming a part of such agreements; and

- transfer, liquidate or encash assets, rights or obligations forming a part of such agreements without transferring the secured deposits.

In cases of such limited transfers, DAB must ensure that the creditors receive at least the amount which they would have received had the institution undergone insolvency proceedings.

(c) Specific rules for close-out netting of eligible transactions under the Credit Institutions Act

The Credit Institutions Act addresses netting arrangements only marginally and stipulates that during the implementation of reorganisation measures, as well as during liquidation and insolvency proceedings, the validity of netting agreements shall be determined under the law applicable for such agreements.

Although Croatian law lacks an interpretation of what is the applicable law for such agreements, we hold the view that the applicable law should be the one validly agreed between the parties in the framework agreement, as qualified by the mandatory application of the Croatian Insolvency Act.

The Credit Institutions Act also stipulates that the implementation of reorganisation measures, as well as liquidation and insolvency proceedings shall not affect a creditor's right to offset its claims with the claims of the credit institution seated in Croatia or another EU member, if such set-off is permitted under the law applicable to the claim of the credit institution.

Thus, we believe that the general framework provided by the Insolvency Act and the Financial Collateral Act (as set out under point C.I.1.1 above) should apply, unless the credit institution is subject to recovery proceedings under the Resolution Act, in which case additional specific rules may apply (as set out under point C.I.1.10(b)).

(d) Specific rules for close-out netting of eligible transactions under the Capital Markets Act

Pursuant to the Capital Markets Act, the opening of insolvency proceedings does not affect Qualified Financial Agreements which have been cleared by a central counterpart.

Consequently, as the legislative solution under the Capital Markets Act closely mirrors the one set out in the Insolvency Act, we believe that Qualified Financial Agreements which have been cleared by a central counterpart should benefit from the "safe harbour" regime under the Insolvency Act (as described in Section C.I.1.1).

(e) Specific rules for close-out netting of eligible transactions under the Settlement Finality Act

The Settlement Finality Act addresses the issue of close-out netting from the perspective of operating the system (as defined by the Settlement Finality Act) in the insolvency of system participants (institution, central counterparty, settlement agent, or clearing house, as defined under the Settlement Finality Directive).

The Settlement Finality Act contains a definition of netting corresponding in segment to the one in the Resolution Act, described as:

"*conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed.*"

Consequently, the Settlement Finality Act only governs the netting of transfer orders which have been issued or received through the system and give such orders a preferential treatment in insolvency.

Pursuant to the Settlement Finality Act, in case of insolvency of a system participant:

- transfer orders and netting shall be legally enforceable and binding on third parties, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings; and

- if transfer orders are entered into a system after the moment of opening of insolvency proceedings and are carried out on the day of opening of such proceedings, they shall be legally enforceable and binding on third parties only if the system administrator can prove that it was not aware, nor should have been aware, of the opening of such proceedings at the time when such transfer order became irrevocable.

Further, invalidation or nullity of transactions and contracts concluded before the moment of opening of insolvency proceedings shall not lead to the unwinding of a particular netting.

The opening of insolvency proceedings against a participant or an administrator of an interoperable system shall not prevent funds or securities available on the settlement account of that participant from being used to fulfil that participant's obligations in the system on the day of the opening of the insolvency proceedings.

On the day of the opening of the insolvency proceedings, the insolvent participant shall be entitled to receive credit against available and existing collateral security to fulfil that participant's obligations in the system.

C.I.2 Non-insolvency related Material Reasons

The opinions expressed under this section C.I.2 regarding the specific questions below relate to termination for non-insolvency related Material Reason in a non-insolvency scenario. In case of termination for a non-insolvency related Material Reason in an insolvency scenario, unless otherwise provided in relation to a specific question, the same shall apply as expressed under point C.I.1 (page 12).

As introduced under C.I and subject to the limitations set out in the Opinion and as further detailed below, the civil law interpretation of close-out netting enables the parties to the Agreement to enforce the netting provisions of the Agreement against each other under the laws of Croatia. The netting effect is achieved through the application of a civil law set-off.

According to Sections 195-202 of the Obligations Act, a party is entitled to set-off its due and payable claim of the same type against its debt by a statement addressed to its counterparty. Obligations cease to exist up to the value of the set-offs.

No set-offs can be made against claims for support, accident benefits, or compensation for wilfully caused damages. The obligees shall not be entitled to include claims that cannot be enforced in court; they may, however, set-off their lapsed claims if they have not yet lapsed by the time the counterclaim comes into existence. Notwithstanding the above restrictions, the general requirements for two claims to be set-off against each other are that both claims must be either monetary or of the same type and quality (in Croatian: "*rod i kakvoća*") and must be matured, due and payable (in Croatian: "*dospjele*"). Furthermore, set-off occurs by delivering the set-off (netting) statement to the other party. No set-off can occur without such statement being delivered; this is a precondition to the effectiveness of the set-off.

Based on the principle of freedom of contract, we are of the view that in a non-insolvency scenario the parties may agree on contractual provisions that provide for the termination of their relationship and acceleration of their mutual claims. With respect to this and the above, we are of the view that the provisions of the Agreement providing for set-off of claims between the parties arising out of such Agreement will be enforceable in a non-insolvency scenario.

Similarly, the set-off of claims between the parties arising outside the EFET General Agreement contractually provided for in an amendment to the EFET General Agreement will be enforceable under the laws of Croatia in a non-insolvency scenario. However, in our view, the set-off of claims between Affiliates or Credit Support Providers of the parties contractually provided for in an amendment to the EFET General Agreement will not be enforceable, except that a guarantor of an obligation may set-off the claims of the debtor with the claims of the creditor. This is because set-off generally requires the mutuality of the claims (i.e. that they are due to and from the same person). Set-off may be used only in respect of counterclaims between the same parties (i.e. the parties to the Agreement) and third party claims (i.e. claims of Affiliates) could be included in the set-off only with the prior consent of the third party (which practically means the assignment of the claim of the party's Affiliate to the party concerned). Contracting parties could resort instead to multilateral agreements, which may provide the necessary mutuality.

C.I.2.1 ***Please discuss and advise on the issue outlined under point C.I.1.7 in the context of non-insolvency related Material Reason.***

Based on the principle of freedom of contract, we are of the opinion that 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 are enforceable under the laws of Croatia in the context of non-insolvency related Material Reason on a civil law basis.

C.I.2.2 ***Please discuss and advise on the issue outlined under point C.I.1.8 in the context of non-insolvency related Material Reason.***

The laws of Croatia recognise that the netting provisions in sections §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts subject to the single agreement concept as described in § 1 of the EFET General Agreement. The single agreement concept is necessary in order to preserve the enforceability of the termination right and of the ability to calculate the net amount under the Agreement. In the absence of any express provision to this end, any default under (or other event in respect of) an individual transaction entered into under a framework agreement would not result in the termination of the framework agreement as well as of all other individual transactions under thereof.

On a contractual civil law basis the Parties may agree on exceptions from the single agreement concept by precisely specifying those transactions and/or events which break through the veil of uniformity. Nevertheless, in our view this goes against the general single agreement concept.

Finally, in our view the exact wording of provisions allowing partial close-out is of high importance. From a legal drafting viewpoint we believe that it would be more appropriate if the possibility (if any) of partial close-out was regulated together with the single agreement concept (and not in an annex in which way possible inconsistencies could be better avoided), for instance with additional wording in § 1.1 of the EFET General Agreement as follows:

"*All Individual Contracts and this General Agreement shall form a single agreement between the Parties (collectively referred to as the “Agreement~~”.~~ <u>Notwithstanding the aforesaid, the Parties shall have the right, without however prejudice to the force and validity of the remaining Individual Contracts and of the General Agreement, to terminate solely [type of individual contract] for those special material reasons that are set out as grounds for partial close-out in the [type of individual contract]</u>.*"

C.I.2.3 ***Please discuss and advise on the issue outlined under point C.I.1.9 in the context of non-insolvency related Material Reason.***

The parties are basically free to determine the currency they wish to apply in their contractual relationship, except in cases of transactions between residents (*i.e.* both entities are registered in Croatia) which must be performed in Croatian Kuna (certain exceptions apply). Therefore, we believe that in the context of non-insolvency related Material Reasons under the laws of Croatia and apart from the exception outlined above, nothing prevents the Parties to the EFET General Agreement to pay the amount of any compensation claim in Euro, USD, GBP (or as agreed between the Parties in the Agreement) and to further seek enforcement of such provision.

C.I.2.4 ***Are the rights of the Terminating Party to terminate and close-out the Agreement enforceable in accordance with the terms of the EFET General Agreement, irrespective of the insolvency of Party A?***

The rights of the Terminating Party in the context of non-insolvency related Material Reason are principally enforceable, based on the principle of freedom of contract under the Obligations Act.

However, if a party is insolvent, the effects of insolvency, as outlined in Section C.I.1.1 of this Opinion, would apply equally irrespective of whether the Agreement is terminated on grounds of insolvency or any other Material Reason.

C.II MULTIBRANCH PARTIES

According to the Instruction Letter, under this section we make a distinction between (i) a Multibranch Party incorporated, organised or having its centre of main interest in Croatia (*Croatian Multibranch Party*), and (ii) a Multibranch Party incorporated, organised or having its centre of main interest outside Croatia, but operating through one or more branches in Croatia (*Foreign Multibranch Party*).

C.II.1 Croatian Multibranch Party

For the purpose of this section (*Croatian Multibranch Party*) our opinion is based, in accordance with the Instruction Letter, on the following additional assumption:

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

C.II.1.1 ***Would there be any change in your conclusions reached under C.I.1 or C.I.2 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multilateral branch basis prior to its insolvency?***

We are of the view that the fact that Party A has conducted business under the EFET General Agreement on a multilateral branch basis prior to its insolvency would not change our conclusions under points C.I.1 and C.I.2 above.

According to the Insolvency Act, Croatian courts are exclusively competent to conduct insolvency proceedings in the following cases:

- if the debtor's centre of main interest is in Croatia (whereby it is deemed that the place of the registered seat is the centre of main interest); and
- if the debtor's registered seat is in Croatia, but its centre of main interest is in a foreign country where insolvency proceedings cannot be initiated on the basis of the centre of main interest.

In such cases, the insolvency proceedings conducted in Croatia comprise all of the debtor's assets in Croatia and abroad.

Accordingly, we believe that the Administrator will seek to collect, as far as possible and practicable, all assets of Party A worldwide, including claims under the EFET General Agreement and any of the associated transactions. Certainly there will be limitations arising under either the EU Insolvency Regulation or the principles of private international law (including international treaties or state of reciprocity) on the ability of the Administrator to recover assets located outside Croatia. If the branch(es) is (are) located within the territory of the EU (other than Denmark), territorial insolvency proceedings may be initiated further to the EU Insolvency Regulation, whose effects will be restricted to the assets of the debtor situated in the territory of the Member State where the branch is located.

C.II.1.2 ***Would the EFET General Agreement be treated as a single unified agreement by the Croatian receiver under the laws of Croatia, 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?***

Based on our conclusion under point C.II.1.1 (page 36), we are of the view that the EFET General Agreement will likely be treated as a single unified agreement by the Croatian receiver under the laws of Croatia.

C.II.2 Foreign Multibranch Party

For the purpose of this section (*Foreign Multibranch Party*) our opinion, in accordance with the Instruction Letter, is based on the following additional assumptions.

*A corporation, a bank, an investment service provider, an insurance company, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organised or having its centre of interest in a country ("**Country H**") other than Croatia has entered under the EFET General Agreement into Individual Contracts both through its home offices and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Croatia ("**Croatian Branch**").*

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

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

(a) Party F being a corporation

Insolvency proceedings initiated over Party F in Country H shall primarily be governed by the EU Insolvency Regulation, if the relevant requirements are met (please see below). If the relevant requirements are not met and absent an international agreement applicable to the insolvency of Party F, the Insolvency Act will apply.

Applicable regime under the EU Insolvency Regulation

If the EU insolvency regulation applies, the courts of Country H shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings"). That being said, the laws of Country H will generally be applicable to the proceedings. Note that in certain cases linked to the debtor having economic interests in Croatia (a branch office or assets – please see below), the Croatian court may have jurisdiction and consequently the Insolvency Act may apply. However, it should be noted that the effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of Croatia.

Applicable regime under the Insolvency Act

As a main principle of the Insolvency Act, the insolvency proceedings and its effects are primarily determined under the laws of the country where the insolvency proceedings are opened. Consequently, a decision rendered in Country H on the opening of the insolvency proceedings against Party F may be recognised in Croatia if the statutory requirements are met (primarily that the decision is enforceable under the applicable foreign law, that it was rendered by the competent authority and that it is compatible with Croatian public order). If the decision rendered in Country H is recognised in Croatia, its effects will primarily be determined under the law of Country H and recognised in Croatia unless they are incompatible with the basic principles of Croatian insolvency law. This includes the enforceability of the provisions of the EFET General Agreement and Individual Contracts concluded thereunder. In that regard, we point to our analysis set out in Point C.I.1.

Under the Insolvency Act, Croatian courts may also conduct separate insolvency proceedings in cases where a foreign debtor:

- operates a branch in Croatia (a business unit without legal personality), or

- has assets in Croatia, but only if (i) insolvency proceedings cannot be opened against the debtor under the laws of its main centre of interest despite the existence of grounds for insolvency, or (ii) the insolvency proceedings under the laws of the debtor's main centre of interest only include the assets located in that country, or (iii) if there is a request for opening of special insolvency proceedings in Croatia in the process of recognising a foreign decision on opening of insolvency proceedings against the debtor; or (iv) the foreign decision on opening of insolvency proceedings against the debtor cannot be recognised in Croatia.

In such cases, the special insolvency proceedings in Croatia shall only encompass the assets of the debtor located in Croatia.

Special insolvency proceedings may be initiated:

- by any of the debtor's creditors before the foreign decision on insolvency of Party F is recognised. In that case, a foreign insolvency administrator cannot challenge the claims that were already established in the special insolvency proceedings before the foreign decision was recognised;

- by the foreign insolvency administrator, when requesting the recognition of the foreign decision on the opening of insolvency proceedings;

- by certain domestic creditors authorised to do so on the basis of salaries and social security contributions; and

- on an exceptional basis, if the creditor proves that the collection of claims in foreign insolvency proceedings would be extremely difficult.

In all of the cases above, Croatian insolvency laws shall apply, unless specifically set out otherwise by the Insolvency Act. In our view, there are no special provisions of the Insolvency Act that would provide for a treatment of close-out netting provisions different than already set out above in Point C.I.1.1. in cases of separate insolvency proceedings being conducted in Croatia.

(b) Party F being a financial institution or other specific type of entity

If Party F is a bank, an investment service provider, an insurance company, an investment fund management company or any other similar financial institution as listed below and is seated in the EEA, the exceptional rule provided for in the relevant act as set out in Appendix C will apply.

C.II.2.2 ***If there were separate proceedings in Croatia with respect to the assets and liabilities of the Croatian Branch, would the receiver or liquidator in Croatia and the Croatian courts, based on the facts above, include Party F's position under the EFET Agreement, in whole or in part, among the assets of Croatia and, if so, would the receiver or liquidator and the Croatian 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 Croatian receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Croatian Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Croatian Branch to the liquidator or receiver of the Croatian 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.***

Under the Companies Act, the branch is an organisational unit of the foreign company registered as such with the Croatian Commercial Court. Although the branch does not have its own legal personality and assumes the rights and obligations for the name and the account of its founder, the business books of the branch and the foreign business must be clearly segregated.

Consequently, it is possible that the Croatian Branch enters into Individual Contracts under the umbrella of the EFET General Agreement concluded by Party F. In such case, the rights and obligations of the Croatian branch should be deemed as undertaken for the name and for the account of Party F.

The law applicable to close-out netting provisions of the EFET General Agreement would depend on the situation applicable to the case at hand (please see Point C.II.2.1 above). However, it is possible that separate insolvency proceedings subject to Croatian law are conducted over the Croatian Branch in parallel to the main insolvency proceedings over Party F, or even irrespective of whether the main insolvency proceedings are opened over Party F. In the latter case, the competent Croatian court would have to establish whether the grounds for insolvency have been met for Party F under the laws of Country H.

To the extent Croatian law would apply, we believe that the general rules of the Insolvency Act governing the treatment of close-out netting provisions as set out in Point C.I.1.1. above would apply. However, the Insolvency Act does not specify how the single agreement concept would be preserved if there would be separate insolvency proceedings opened over the Croatian Branch in Croatia.

In that regard, we note again if there were separate proceedings in Croatia with respect to the assets and liabilities of the Croatian Branch, such proceedings would only encompass the assets and liabilities of the Croatian Branch located in Croatia.

Croatian law is unclear as to whether claims under Individual Contracts would be deemed to comprise the assets of the Croatian Branch located in Croatia. As pointed out above, the main feature of the Croatian Branch is the absence of a legal personality of its own, i.e. it assumes the rights and obligations for the account of its parent and not for its own name and its own account. Consequently, we believe that all rights and obligations assumed under Individual Contracts should be viewed as being assumed for the account of Party F and thus any claims under such Individual Contracts should be beyond the scope of the separate insolvency proceedings in Croatia.

Although different interpretations of the Insolvency Act are possible, we believe that the principles of equal satisfaction of creditors and preservation of a single agreement concept would be paramount in evaluation of both Party F's and the Croatian Branch's position under the Individual Contracts. If a different viewpoint was taken, it would allow Party F to seriously manipulate its counterparts by "cherry-picking" locations for operation where its assets would be insulated from claims under the single agreement concept which Party F's counterparts relied on when concluding the EFET General Agreement.

However, in the absence of clear statutory guidance and the possibility of different interpretations of the law, we believe it would be difficult to anticipate the actions of the Administrator. We would thus strongly recommend that the Croatian Branch enters into a separate EFET General Agreement and all of the Individual Contracts thereunder, as opposed to acting through the EFET General Agreement concluded by its parent. This approach should somewhat reduce, albeit not eliminate, the risk of not being able to enforce the close-out netting provisions of the EFET General Agreement.

C.II.2.3 ***Please consider your answer to the question assuming instead that Party F has no branch located in Croatia but has assets in Croatia.***

We are of the view that our conclusions set out in Point C.II.2.2 with respect to application of the Insolvency Act would apply equally.

C.III COLLATERAL

For the purpose of this section, we have based our opinion on the following additional assumptions provided in the Instruction Letter:

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

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

In order to provide more explicit answers and eliminate ambiguity to the most extent possible, for the purpose of this section we have further assumed the following:

- Letters of Credit may have the form of a (a) bank guarantee (in Croatian: "*bankarska garancija na poziv*") as provided in Article 1039 et seq. of the Obligations Act and in the Uniform Rules for Demand Guarantees (URDG 758), and/or (b) letter of credit (in Croatian: "*akreditiv*") as provided in Article 1028 et seq. of the Obligations Act and the Uniform Customs and Practice for Documentary Credits (UCP 600).

- Parent Company Guarantee means the undertaking of the parent company of Party A to pay to Party B any amounts due pursuant to the terms of the EFET General Agreement upon the request of Party B preceded by the default of payment of those amounts by Party A.

- Under Croatian law, a distinction is to be made between the various forms of Eligible Credit Support (i.e. cash, Letters of Credit, and Parent Company Guarantee) in respect to the regulation thereof. The answers to the questions under this section are, where necessary or practicable, split accordingly.

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

The law chosen by the Parties in the Credit Support Document (or later) shall govern the transfer of the ownership over the Eligible Credit Support under the EFET Credit Support Annex. Further to Rome I, the parties are free to choose the governing law applicable to their contractual agreements. However, if at the time of the choosing all other elements relevant to the situation are located in Croatia (i.e. in a country other than the country whose law has been chosen), then according to Article 3 (3) of the Rome I, the choice of the parties shall not prejudice the application of provisions of the law of Croatia which cannot be derogated from by agreement. Beyond the scope of Rome I, the Parties' choice of law will be upheld in Croatia on the basis of the Conflicts of Laws Act, if there is a foreign element in the dispute.

We understand that both under Rome I and the Conflict of Laws Act the law applicable to the EFET General Agreement will also govern the EFET Credit Support Annex in the absence of an explicit and clear choice of law by the Parties in the Credit Support Documents (or later). The reason for this is the accessory nature of the EFET Credit Support Annex to the EFET General Agreement. If the Parties have neither chosen the law applicable to the EFET General Agreement nor the law applicable to the EFET Credit Support Annex, the international private law rules of the court investigating the EFET General Agreement and the EFET Credit Support Annex will determine which law the EFET General Agreement and thus, the law the EFET Credit Support Annex, is governed by.

C.III.2 ***Would the laws of Croatia 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 re-characterization?***

C.III.2.1 Cash

If cash is granted as collateral by Party A to Party B and either of the parties is eligible for protection under the Financial Collateral Act (please see Point C.I.1.1(d) above), such transfer of cash would constitute an unconditional transfer of ownership over the transferred cash if the Parties do not agree otherwise. Party B acquires the full right of usage and disposal regarding the cash by virtue of such transfer.

The Financial Collateral Act also provides for the possibility to establish a financial collateral by way of security interest in favour of Party B, where the full ownership of the financial collateral would remain with Party A. However, as long as the Parties clearly express their will to establish an unconditional transfer of ownership, there should be no risk of any other characterisation of the security right. For the avoidance of any doubt, we would recommend that the parties expressly confirm that their intent is to establish a financial collateral through an unconditional transfer of ownership, all within the meaning of the Financial Collateral Act.

Outside of the scope of the Financial Collateral Act (i.e. whereby neither Party A nor Party B is eligible for protection under the Financial Collateral Act), a transfer of cash from a bank account of Party A to the bank account of Party B for purposes of security is known as a “guarantee deposit”. A guarantee deposit is permitted under the general rules of the Obligations Act and the parties should thus be permitted to freely agree on such type of security with the effect of constituting an unconditional transfer of cash.

C.III.2.2 Letters of Credit/Parent Company Guarantee

Our analysis below is based on the assumptions that:

- *Letters of Credit/Parent Company Guarantee under the EFET Credit Support Annex are without exception issued for the benefit of the Transferee with respect to the uncovered exposure of Party B, and*

- *the provision of Letters of Credit/Parent Company Guarantee is not effected by way of an assignment of the Letters of Credit/Parent Company Guarantee already issued in favour of the Transferor.*

Based on §3. 2. b) of the EFET Credit Support Annex, we understand that the Letters of Credit/Parent Company Guarantee are not being transferred, but rather provided for the benefit of Party B. By issuance of the Letters of Credit/Parent Company Guarantee in favour of Party B, Party A shall become the sole beneficiary of the relevant Credit Support Documents.

There should be no risk that the provision of Letters of Credit/Parent Company Guarantee is re-characterised as creation of a security interest.

C.III.3 ***Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Croatia 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?***

No further steps are required under the laws of Croatia to ensure that the ownership title of Party B over the collateral granted to it continues.

C.III.4 ***What is the effect, if any, under the laws of Croatia 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?***

C.III.4.1 Cash

Through a strict interpretation of the Financial Collateral Act, the right to substitute collateral does not seem to be equally available to the Transferor and the Transferee. The Transferee may request additional collateral and the substitution of granted collateral if the granted collateral loses value. The Transferor (Party A), however, may withdraw the granted collateral if its value increases, but may not request its substitution.

However, the Financial Collateral Directive, as legislation underlying to the Financial Collateral Act, does not differentiate between the rights of the Transferor and the Transferee with regard to substitution rights. Against this background, and by interpretation of the Financial Collateral Act in conformity with the Financial Collateral Directive, the right to substitute the collateral should be available to the Transferor in the same way as it is to the Transferee. Consequently, we believe that both parties should be equally permitted to substitute the granted collateral under the Financial Collateral Act.

The transfer of cash outside of the scope of the Financial Collateral Act in the form of a guarantee deposit is not specifically regulated by law. Consequently, we believe that the Parties are free to determine the conditions of their agreement, including the right of Party A to substitute the granted collateral.

Under § 6 of the EFET Credit Support Annex, the execution of the substitution right of Party A is subject to Party B's consent. Pursuant to this provision, Party A would generally not be entitled to arbitrarily substitute the cash. Furthermore, as the transfer of cash (both within the scope of the Financial Collateral Act and outside of its scope) would constitute an unconditional transfer of ownership rights (see Point C.III.1), Party A should not be able to execute its substitution right without the consent of Party B.

C.III.4.2 Letters of Credit

The Parties generally may agree on the right of Party A to substitute the Letters of Credit. However, Letters of Credit create the abstract obligation of the assigned bank to pay out to Party B the amount determined in the Letters of Credit. In this way, a bank has a genuine obligation towards Party B independent from the underlying obligation between the two Parties. Consequently, we believe that Party A's substitution right would need to be explicitly included in the Letters of Credit. Otherwise, Party A could not effectively execute its substitution right because of the abstract nature of the Letters of Credit.

Under § 6 of the EFET Credit Support Annex, the execution of the substitution right of Party A is subject to Party B's consent. Pursuant to this provision, Party A would generally not be entitled to arbitrarily substitute the Letters of Credit. Furthermore, because of the independent nature of the Letters of Credit with regard to the General Agreement, Party A should not be able to substitute the Letters of Credit without the consent of Party B.

C.III.4.3 Parent Company Guarantee

The Parties generally may agree on the right of Party A to substitute the Parent Company Guarantee. Under the Parent Company Guarantee, the Parent Company's obligation to pay the secured amount to Party B is limited to the amounts arising from the EFET General Agreement and the Individual Contracts arising thereunder. Furthermore, in contrast to the Letters of Credits, the Parent Company's obligation is dependent of the secured obligation and is not abstract. Because of the accessory nature of the Parent Company Guarantee, we believe that the substitution right of Party A would not need to be explicitly included in the Parent Company Guarantee if such right is already determined by the EFET General Agreement.

Under § 6 of the EFET Credit Support Annex, the execution of the substitution right of Party A is subject to Party B's consent. Pursuant to this provision, Party A would generally not be entitled to arbitrarily substitute the Parent Company Guarantee. Furthermore, the validity of the Parent Company Guarantee may not be directly affected arbitrarily by Party A as it is issued by the Parent Company and generally only dependent of the validity of the EFET General Agreement. Consequently, the only way for Party A to execute the substitution right would be to execute it based on the consent of Party B.

C.III.5 ***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 Croatia insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?***

If § 11 of the EFET General Agreement is valid and enforceable in Croatia insofar as it relates to the determination of a net amount payable by either party on the termination of Individual Contracts, § 11 of the EFET Credit Support Annex will also be valid and enforceable to the extent that it provides for the value of the collateral provided (and received, i.e. the title transfer has occurred) to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable". As such collateral was already provided and transferred by Party A, we understand that those will be deemed as negative items of Party B in the netting that will practically decrease the claim of Party B.

We understand that the term *"collateral provided and not yet transferred"* in this question refers to *"Eligible Credit Support demanded but not received"* as set out in § 3.1 of the EFET Credit Support Annex. Further to § 3.1 of the EFET Credit Support Annex, this collateral shall be deemed to be held by the demanding party. We are of the view that although this assumption appears to support the title transfer nature of the collateral, such collateral which does not exist (because it has not been transferred) cannot be included in the calculation of the net amount payable under § 11 of the EFET General Agreement as "other amounts payable".

As to the detailed analysis of close-out netting, please refer to point C.I.1.7 (page 26) of this Opinion.

C.III.6 ***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?***

C.III.6.1 Cash

If the collateral granted falls within the scope of the Financial Collateral Act, the rights of Party B in respect to cash transferred to it as Eligible Credit Support shall be enforceable irrespective of Party A's insolvency.

If the collateral granted falls outside the scope of the Financial Collateral Act, we understand that the rights of Party B in respect to cash transferred to it as Eligible Credit Support shall also be enforceable irrespective of Party A's insolvency. The main argument would be that the full title to the Cash has been transferred with the consequence that Party A no longer has any rights over it. However, there is the possibility that the granting of collateral may be challenged by the Administrator if the relevant statutory requirements are met (please see Point C.I.1.2).

Further restrictions may apply in cases where a party is subject to a special procedure under the Resolution Act (please see Section 3 of Appendix C). Namely, pursuant to Article 56/10 of the Resolution Act, application of the Financial Collateral Act regarding collection or use of financial collateral and early termination provisions is overridden by the provisions of the Resolution Act if a recovery tool applies.

C.III.6.2 Letter of Credit

We understand that this question is partially redundant in light of the wording of § 11 of the EFET Credit Support Annex, Version 2.0, where the primary intention is rather not to include the Eligible Credit Support that was provided in the form of Letters of Credit for the purpose of determining the Termination Amount under § 11 of the EFET General

Agreement by the Valuation Agent. Still, we cannot exclude that Party A will draw against a Letter of Credit which it was provided with, in which case Party B should be discharged in an amount equal to such drawings pursuant to § 11 of the EFET Credit Support Annex.

Notwithstanding the generality of the foregoing, if a Letter of Credit is issued directly and expressly for the benefit of Party B as beneficiary (under the EFET Credit Support Annex), then under Croatian law this will constitute a direct legal relationship between the issuing party and Party B. Accordingly, we understand that such Letters of Credit will be valid and enforceable according to its terms and conditions regardless of the insolvency of Party A.

C.III.6.3 Parent Company Guarantee

If a Parent Company Guarantee is issued directly and expressly for the benefit of Party B as beneficiary (under the EFET Credit Support Annex), then under Croatian law this will constitute a direct legal relationship between the issuing party and Party B. Accordingly, we understand that such Parent Company Guarantee will be valid and enforceable according to its terms and conditions regardless of the insolvency of Party A.

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

The Insolvency Act provides for the possibility to challenge actions undertaken before the opening of an insolvency procedure (please see Point C.I.1.2). It is under those rules that Party A (i.e. Party A's Administrator and creditors) may generally recover collateral during the "suspect period" preceding the date of insolvency. Party A's rights to recovery may be limited depending on (i) whether the transfer was made between financial market participants, and (ii) the type of Eligible Credit Support (i.e. Cash, Letters of Credit, or Parent Company Guarantee), as explained further below.

C.III.7.1 Recovery of collateral

(a) Cash

If the Financial Collateral Act applies, the transfer of cash to Party B could be challenged in case Party B received the cash as a security for its claims although it had no right to request such a security under any existing contractual arrangements (in Croatian: "*inkongruentno namirenje*"). If Party B's right to request security arises from the EFET General Agreement and the EFET Credit Support Annex, there should be no room for challenging Party B's security in this respect. Nevertheless, pursuant to the Financial Collateral Act, the transfer of cash to Party B could be challenged in case Party B received the cash as a security on the date of the opening of the insolvency proceedings, liquidation proceedings or reorganisation proceedings, but after the decision on opening of such proceedings was adopted, if Party B knew (or ought to have known) about the opening of such proceedings. Otherwise, the financial collateral agreement shall not be voidable or null and void simply because the cash has been transferred:

- during the "suspect period" before submitting the proposal for opening of insolvency proceedings, winding-up proceedings or commencement of reorganisation measures, or

- on the day of opening of the insolvency proceedings, winding-up proceedings or commencement of reorganisation measures.

If the Financial Collateral Act does not apply and cash is transferred as collateral between parties that are not eligible for protection under the Financial Collateral Act, in addition to the above, the transfer of cash to Party B could also be challenged even if Party B obtained its security in accordance with an existing contractual arrangement (in Croatian: "*kongruentno namirenje*" – please see Point C.I.1.2). This type of challenge is not available to the Administrator in cases where the Financial Collateral Act applies.

(b) Letters of Credit / Parent Company Guarantee

In essence, the issuance of Letters of Credit/Parent Company Guarantee in favour of Party B may not be challenged directly within the insolvency procedure of Party A. This is due to the fact that the Letters of Credit and the Parent Company Guarantee represent obligations of third parties who issued such collateral, and not an obligation of Party A. This is without prejudice to the possibility of the bank/parent company to claim the funds paid to Party B on the basis of the guarantee in Party A's insolvency.

C.III.7.2 Substitution of collateral during the "suspect period"

If the Parties have unconditionally transferred the collateral (cash, Letters of Credit, Parent Company Guarantee) with full ownership and right to use and dispose with that collateral, all transfers including all collateral substitutions should in general be valid, unless damaging to the insolvent party and challenged as such (please see Point C.I.1.2).

If cash is provided as collateral within the scope of the Financial Collateral Act, special safeguarding rules apply. Namely, the Financial Collateral Act provides that in case the Parties have agreed to substitution rights in case of a change in the collateral value, such substitution, provision of additional collateral or withdrawal shall not be voidable or null and void simply because:

- it has been performed during the "suspect period" before submitting the proposal for opening of insolvency proceedings, winding-up proceedings or commencement of reorganisation measures, or

- it has been performed on the day of opening of the insolvency proceedings, winding-up proceedings or commencement of reorganisation measures, but before rendering the decision on opening of such proceedings, or

- the relevant financial obligations have come into existence before the day on which the additional or alternative collateral has been delivered, i.e. before the day on which the collateral has been withdrawn.

However, substitution of Letters of Credit/Parent Company Guarantee with cash may be problematic. This is due to the fact that Letters of Credit/Parent Company Guarantee actually represent an obligation of the bank/parent company (and not directly Party A) towards Party B while cash as a security is provided directly from Party A. The substitution of Letters of Credit/Parent Company Guarantee with cash would essentially represent the establishment of a new obligation of Party A and, as such, there is an increased risk that such substitution may be subject to challenge during the "suspect period".

C.III.7.3 Transfer of additional collateral pursuant to the mark-to-market provisions of EFET Credit Support Annex

Under Croatian law there are no special regulations that would prohibit the transfer of additional collateral pursuant to the mark-to-market provisions. Nevertheless, please note that despite the fact that the transfer of additional collateral is valid *per se*, conducting such collateral arrangement for an antecedent or pre-existing obligation in the "suspect period" is likely to be regarded as "suspicious" and therefore contested in the insolvency procedure.

C.III.8 ***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 Croatia 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 point C.III.2 above?***

The EFET Credit Support Annex is basically an appropriate form to create the intended outright transfer of ownership in the collateral to Party B. Apart from those expressly referred to here above, there are no further requirements to ensure the validity and effect of the transfer.

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

In case a Parent Company Guarantee is issued by a Croatian Company for the benefit of a foreign entity, a collateral should be provided (most often by the beneficiary company) in favour of the Croatian Company securing the repayment of funds paid by the Croatian Company as guarantor in case the guarantee is called upon. Collateral can be given in any permitted form (*e.g.,* promissory note) and hence only constitutes a formality. An absence of such collateral will not result in invalidation of the guarantee, but it could cause the imposition of misdemeanour fines ranging from HRK 50,000 (equal to approx. EUR 6,000) to HRK 1,000,000 (equal to approx. EUR 130,000).

C.IV GENERAL ENFORCEABILITY

Is the EFET General Agreement and any of the Annexes (including the EFET Credit Support Annex) defined in point A enforceable under the laws of Croatia in accordance with its own terms?

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, the documents listed in point A are generally enforceable under the laws of Croatia.

C.IV.1 Non-performance due to Force Majeure (§ 7 of the EFET General Agreement)

Under Section 373 of the Croatian Obligations Act, if performance of a party's obligations becomes impossible due to extraordinary external circumstances, the other party's obligation is also extinguished. If the other party has already performed some of its obligations, it may reclaim them under the rules on unjust enrichment. For these rules to apply, the abovementioned extraordinary circumstances must:

- arise after the conclusion of an agreement but before the obligations thereunder become due and payable; and
- be unforeseeable at the time when the agreement is concluded; and
- be such that the other party could not prevent, avoid or eliminate them; and
- be beyond the responsibility of either party.

Under Section 209 of the Obligations Act, however, the debtor is not released from its liability in cases where the debtor's obligations consist of delivery of items designated by type, and all such items held by the debtor perish. The purpose of the provision is to require the debtor to obtain replacement items to be able to perform its obligation. Considering the underlying purpose, we believe that the scope of the provision may be applied to also include delivery of electricity.

However, the parties are free to agree on the terms of their agreement, and may depart from the provisions relating to their rights and obligations with mutual consent, unless prohibited by the Obligations Act. With regard to the liability for extraordinary events, we believe that the parties should be able to agree that their mutual obligations may be released even in cases of extraordinary events that do not meet the criteria above (e.g. if a force majeure event occurs after the obligations under the Agreement become due and payable) or to release the debtor from its obligation to procure replacement items. Thus, the Parties may agree that a *force majeure* occurrence will result in release from certain obligations and therefore we are of the opinion that § 7 of the General Agreement is valid and enforceable under Croatian law.

The legal situation under the EFET Allowances Appendix is not as clear. Specifically, we believe that an agreement between the parties could be considered illegal if it deviates from the general principles of (i) the parties being released from their obligations, and (ii) a party's obligation to reclaim its performed obligation. Thus, if an agreement on Force Majeure Termination Payment (as contemplated by Clause 7.4 (b) of the EFET Allowances Appendix) would not allow a party to reclaim its performed obligation, such agreement could be challenged as illegal.

The Energy Act also stipulates that an energy entity (licenced entity or natural person performing energy activities) shall not be liable for damages incurred by other energy entities or users as a result of force majeure. The Energy Act describes force majeure as any event or circumstance which could not have been prevented even if anticipated and the effects of which cannot be affected, reduced, removed or alleviated by the parties. The Energy Act lists such events in a non-exhaustive manner:

- natural disasters;
- epidemics;
- explosions (if not a result of mishandling or equipment wear-and-tear);
- war, rebellion or sabotage;
- cyber attacks;
- restrictive governmental measures imposed to counter domestic market disturbances caused by crisis situations.

We note that the provisions of the Energy Act on the liability for damages in cases of force majeure will prevail over the general rules of the Obligations Act. However, in all other aspects, the general rules set out by the Obligations Act on the effects of force majeure to non-performance of obligations should still apply, including the provisions on release from liability and unjust enrichment. Thus, our views on the enforceability of § 7 of the General Agreement as set out above still apply. Furthermore, please note that the regime set out in the Energy Act will not apply to the transactions under the EFET Allowances Appendix or the EFET EECS Certificates Master Agreement.

C.IV.2 Remedies for non-performance (§ 8 of the EFET General Agreement)

Considering the fact that § 8 of the EFET General Agreement regulates the contractually agreed consequences of delivery and acceptance failures on mutual grounds for the benefit of both parties with the same remedy and compensation method, we are of the view that § 8 of the EFET General Agreement, and claims based thereon, will be most likely enforceable and upheld by the Croatian courts.

With respect to the Allowance Appendix, we note that the term “interest” is being used interchangeably to mean both “default interest” (in Croatian: “*zatezna kamata*”) and “contractual penalty” (in Croatian: “*ugovorna kazna*”) within the meaning of Croatian law. As a general rule, under Croatian law default interest is effectively a penalty for default in the performance of monetary obligations. A contractual penalty cannot be agreed for default in performance of monetary obligations. It is meant to be a lump-sum payment of damages, but does not preclude the damaged party to seek compensation of damages in excess of what has been agreed as a contractual penalty. Also, the penalty is payable even if no damages were incurred.

Croatian law sets out specific guidelines with respect to the permitted interest rates which depend on the classification of parties involved. To the extent Croatian law applies, the interest rate agreed in excess of what is permitted under Croatian law would not be enforceable. The parties would not be entitled to charge default interest on the amount of outstanding default interest.

Croatian law also sets out specific guidelines with respect to the contractual penalty, including different regimes depending on whether the penalty was agreed for non-performance or delayed performance.

Considering the above, we would recommend that the parties to the EFET Allowance Appendix exercise increased caution when agreeing on the terms of § 8 of the EFET Allowance Appendix, depending on their classification and contractual preferences.

C.IV.3 Limitation of liability (§ 12 of the EFET General Agreement)

Pursuant to the Obligations Act, any contractual provision limiting or excluding liability for damages caused intentionally or for breach of contract damaging life, physical integrity or health shall be null and void. Since the existing wording of § 12.4 of the EFET General Agreement does not fully correspond to the relevant provisions of the Obligations Act, we suggest supplementing this section in the Election Sheet by reference to breach of contract damaging life, physical integrity or health, by adding a new item § 12.4 (d) to read:

(d) death, physical integrity or health.

Further, an otherwise permitted contractual limitation or exclusion of liability may be removed by the court if such limitation or exclusion was imposed by a party using its monopolistic position or a misbalanced relationship between the contractual parties.

A cap on damages amount is valid unless clearly disproportionate with the damage. Also, the cap may be removed if the debtor’s failure to perform results from the debtor’s intent or gross negligence.

C.V CONFIRMATION PRACTICES

For the purpose of this point, the following additional assumptions were given in the Instruction Letter.

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

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

C.V.1 Binding Individual Contract

C.V.1.1 *Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization)?*

As a general rule, Croatian law does not require any specific form of communication for entering into an agreement. Therefore, agreements can be concluded either orally or in writing. Moreover, the intent to conclude a contract may also be expressed by conduct that implies such intent. Nevertheless, irrespective of the form of the agreement, the Parties are obliged to agree on all essential terms of the relevant transaction.

Following from the general principle that there are no formality requirements regarding the conclusion of Individual Contracts, a signature is also not necessary.

In the absence of any mandatory formality requirement of Croatian law, the Individual Contract shall be deemed concluded at the time when the parties reached an agreement on the essential terms, thus a Confirmation is not necessary. This rule is in accordance with § 3.2 of the EFET General Agreement which provides that a written Confirmation shall not constitute a requirement for a legally valid Individual Contract.

Putting the Individual Contract/Confirmation in writing is, in any case, advisable in order to avoid later disputes regarding the content of the agreement. Similarly, a signature (electronic or otherwise) may help to demonstrate the authenticity and integrity of the agreement and could serve as evidence in case of a dispute.

Finally, we note that although in our view the following goes beyond the original scope of the EFET General Agreement, financial regulatory laws also prescribe formality requirements. The Capital Markets Act as a general rule provides that all contracts between investment firms and their clients must be fixed in writing.

C.V.1.2 ***At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable?***

An Individual Contract agreed orally becomes legally binding and enforceable as from the time when the offeror receives a declaration from the offeree that it accepts the offer. A declaration of acceptance may be substituted by a payment of the price, dispatch of the goods or other activity that may be deemed to constitute an acceptance of the offer based on customary practices or previous practices between the parties.

C.V.1.3 ***Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?***

Any party may claim from the other party a written Confirmation of an oral agreement until the other party fulfils its contractual obligation thereunder. Such claim shall be made in the form of a signed agreement in two counterparts with a request that the other party signs the agreement and returns it signed. If the other party does not deliver such signed confirmed agreement to the other party within eight days, a party may request from the court to determine that a contract was concluded and to award such party damages incurred as a result of not receiving the Confirmation. However, the contract shall be valid irrespective of the fact that the Confirmation was not given.

Based on the above, an Individual Contract would still be valid even if the Confirmation is not given (including in cases where the Confirmation was not requested or given in the required form).

However, we believe that it would practically be very difficult to argue that an Individual Contract was concluded under certain terms, if the other party subsequently delivers a Confirmation with terms differing than the originally agreed terms. In our view, the Confirmation serves the purpose of confirming the essential terms of an Individual Contract. Therefore, a party delivering the Confirmation could likely claim that the orally concluded Individual Contract was in fact not concluded due to a misunderstanding (in Croatian: "*nesporazum*"), i.e. that the parties erroneously thought they were in agreement on the essential components of the Individual Contract.

In such cases, we believe that a Confirmation would be viewed as a new offer to execute an Individual Contract under altered conditions. Failure to object to the terms of the Confirmation would not be deemed an acceptance of such new offer, unless the offeree has a permanent business relationship with the offeror. If such relationship exists, the offeree shall be deemed to have accepted the offer unless it objects immediately or within the deadline set by the offeror.

With a view to the above, we would strongly recommend reviewing the received Confirmations and communicating any discrepancies thereunder to the delivering party immediately when received.

C.V.1.4 ***Is the reference to the relevant EFET General Agreement sufficient for the inclusion of the Individual Contract in the Agreement?***

We are of the opinion that a reference to the relevant EFET General Agreement entered into between the Parties is sufficient for the inclusion of the Individual Contract in the Agreement. This is supported by Article 12 of the Obligations Act which provides that all customs the parties have agreed on in earlier business dealings and any practice they have established between themselves shall become part of their contract. Furthermore, the parties shall be bound by customs which would be considered generally applicable and widely known in the given sector by parties to similar contracts, unless the application of such customs and practices has been excluded.

Notwithstanding the above, we would recommend including explicit references to the applicability of the EFET General Agreement in all Individual Contracts and Confirmations, where applicable.

C.V.2 Means of Evidence

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

Under the general rules of Croatian civil procedures, the Parties may use any means of evidence which they deem suitable for proving their claim unless certain evidentiary means are disallowed under the law (e.g. certain facts, such as an agreement on local court competence, may only be proven with written documents). On the other hand, none of the means of evidence has a pre-determined value or decisive importance in the evidentiary procedure since the court is obliged to evaluate the evidence as a whole. Consequently, any of the listed means of evidence may be eligible for rendering evidence of the agreed terms of the Individual Contract. We further note that the above rules of evidence cannot be modified by agreement of the parties.

Certain types of documentary evidence have increased probative value. Public documents issued by the state authority within its scope of competence in a standard form and private documents issued by a person or an entity entrusted with the issuance of such documents based on law are assumed to be true and correct. Presenting evidence against public documents is limited to the extent permitted by law. Public documents are presumed valid until evidence to the contrary is presented. We would also like to point out that hard-copy original documents are likely to have better evidentiary value than an exchange of electronic documents, due to a more difficult challenge of their authenticity.

We further note that recording telephone conversations is deemed a collection of personal data for the purpose of data protection law, which requires the prior permission of the person concerned. Furthermore, according to the Civil Code, any abuse relating to voice recording (including collection thereof without the subject's consent) is considered an infringement of personal rights and thus subject to criminal prosecution.

C.VI CORE PROVISIONS

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

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, we understand that none of the elections as suggested in the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) would change the substance of our conclusions reached under parts C.I or C.II (Enforceability of Close-out Netting). We point out again, however, the importance of having the EFET General Agreement classified as a fixed-term contract in order to benefit from the preferential regime contemplated by the Insolvency Act, as set out in Point C.I.1.1(b) above. Also, please consider the difference in regimes applicable depending on the type of collateral provided (please see Point C.III.2).

As far as the EFET Credit Support Annex is concerned, the potential effect of electing to allow substitution with or without the consent of a party is indicated in point C.III.4 above.

C.VI.2 Considering your conclusions reached under Part C.I or (Enforceability of Close-out Netting), what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained in Annex 1 to the EFET General Agreement.

We agree that § 1, § 10 and § 11 of the EFET General Agreement are so essential that a material alteration thereof could affect our conclusions reached in respect of the Enforceability of Close-out Netting. Beyond this, we believe that § 4 and § 5 determining the subject of the Agreement and the primary rights and obligations of the parties to the Agreement are also essential, and material alteration thereof could affect our conclusions reached in this Opinion.

Furthermore, elections made with respect to eligible credit support may result in the provision of collateral (cash) that should be classified as financial collateral within the meaning of the Financial Collateral Act. In such cases, the parties may also benefit from preferential treatment contemplated for close-out netting by the Financial Collateral Act.

On the other hand, such elections may result in the provision of collateral (Letters of Credit/Parent Company Guarantee) outside the scope of the Financial Collateral Act whereby, as a consequence, the parties will not be able to benefit from preferential treatment set out by the close-out netting provisions.

C.VI.3 Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "CPMA") or in the EFET Master Netting Agreement change the substance of your conclusions reached under Part C.I or C.II such as, but without limitation, by invalidating the netting provisions in the EFET General Agreement due to its inclusion under the broader netting provisions of the CPMA?

The inclusion of the EFET General Agreement in the referred master netting agreements would not change the substance of the conclusions reached under Parts C.I and C.II. Further, if the master netting agreement would be a valid contract which meets the requirements set out for a preferential treatment of close-out netting agreements, then our conclusions reached in Parts C.I and C.II would apply appropriately. If the master netting agreement would not meet the referred requirements, then the unenforceability (invalidity) of the master netting agreement itself will not affect the validity of the EFET General Agreement (except to the extent the master netting agreement so provides, e.g. in the last sentence of § 2.3 of the EFET Master Netting Agreement, which practically excludes the possibility of partial invalidity). In this case although the netting of the net amounts owed under the EFET (and other type of master) agreements may not be enforced, similar effects may be achieved through the application of the simple set-off rules with the limitations described under Point C.I on page 10.

Due to the lack of any relevant court precedent relating to close-out netting agreements, we are not in the position to opine whether or not the referred master netting agreements would qualify for the protection of the Insolvency Act. However, based on the wording of the master netting agreement which suggests that it intends to operate as an umbrella agreement over other master trading agreements and the fact that the EFET General Agreement and other master trading agreements do not qualify as fixed-term contracts, we are of the view that the master netting agreement itself would not qualify for preferential treatment as a close-out netting agreement.

C.VII GOVERNING LAW, ARBITRATION AND JURISDICTION

For the purpose of the opinions under this point, we have made the following assumption further to the Instruction Letter.

The relevant EFET General Agreement is governed by the laws of a jurisdiction other than Croatia (including English or German law).

C.VII.1 Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in Croatia, and what would be the consequence if it were not?

If both parties are seated or resident in the EU, Rome I will apply. If a party is not seated or resident in the EU, the Conflict of Laws Act will apply.

Further to both Rome I and the Conflict of Laws Act, the Parties are free to choose the governing law applicable to their agreements. If the choice is made expressly or is clearly demonstrated by the terms of the contract or the circumstances of the case, we are of the opinion that the choice of law will be upheld in Croatia, with the following limitations:

Upholding the Parties' choice of law does not restrict the application of the overriding mandatory provisions of the law of the forum. Overriding mandatory provisions are defined by Rome I as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organizations, to such extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract. In addition, the Conflict of Laws Act does not permit a choice of law whose application would violate the foundation of the state organisation as defined by the Croatian Constitution. Furthermore, the Conflict of Laws Act contemplates the exclusive application of Croatian law in certain matters (including the application of the Insolvency Act if the main insolvency proceedings are opened in Croatia).

Furthermore, if at the time of the choice all other elements relevant to the situation are located in Croatia (i.e. in a country other than the country whose law has been chosen), then according to Article 3 (3) of Rome I, the choice of the parties shall not prejudice the application of provisions of the law of Croatia which cannot be derogated from by agreement.

The Parties' agreement on submission to arbitration or jurisdiction will be upheld in Croatia, with certain restrictions:

- arbitration may only be agreed in relation to freely disposable rights;
- arbitration seated outside Croatia may only be agreed if at least one party is seated or resident outside Croatia.

The material validity of the arbitration agreement and the parties' capacity to stand before arbitration is determined under the law validly chosen by the parties.

The resolutions of foreign courts and arbitration tribunals (foreign resolution) are executed on the basis of and to the extent provided by law, international convention or reciprocity, including the provisions of the Conflict of Laws Act, the Arbitration Act, the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

C.VIII REGULATORY REGIME

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

C.VIII.1 Energy law requirements

Electricity trading is subject to licencing in Croatia.

Before beginning of trading, a licence for carrying out energy activities (electricity trading) needs to be obtained. This licence covers all wholesale activities ("**Wholesale Licence**"); there are no other licences required (e.g. for the cross-border export/import of electricity). HERA is the licencing authority.

Only a Croatian company or a Croatian natural person registered as an individual trader may apply for a Wholesale Licence. However, if a foreign entity is set up in the EU or the European Energy Community (including Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia and Kosovo), it may apply for and hold a Wholesale Licence directly provided that it has a branch office registered in Croatia and meets the financial, technical and staffing requirements set out by the law.

There are no restrictions on the ownership of a Croatian company by a non-Croatian company. A Croatian company can be established by a non-EU and non-EEA company in order to successfully obtain a Wholesale Licence.

A trader can purchase electricity from a producer, a supplier, another trader, the Croatian Power Exchange, or can import it from abroad. A trader can sell electricity to a supplier, to another trader, to a producer, to the Croatian Power Exchange, to the Croatian transmission system operator for system services, transmission network losses, compensation plans or system balancing or to HEP-DSO for distribution network services or distribution network losses, or it can export it abroad.

In order to participate in the electricity market, a potential trader needs to enter into an agreement on the regulation of relations on the electricity market with HROTE. As a prerequisite for such agreement, the potential trader needs to undertake the following:

- obtain an EIC code from the Issuing Office authorised by ENTSO-E;
- register with the Centralised European Register of Energy Market Participants (CEREMP);
- enter into an agreement with the Croatian transmission system operator or the balance group leader on system balancing.

The market participants are currently using the standardised transaction documents available on HROTE's website.

Entering into Individual Contracts for the sale and purchase of electricity within Croatia without the contracting parties holding the necessary licence could principally result in administrative sanctions (e.g. fine). Moreover, further to the Obligations Act, a contract which is incompatible with the law or that was concluded by circumventing the law may also be null and void. Moreover, there is a remote risk that the enforcement of a foreign judgement with respect to the Agreement might be refused by the Croatian courts on the grounds that the entering into the Agreement in violation of the Croatian electricity market regulations is in contravention of fundamental Croatian laws and thus is against the public order.

C.VIII.2 Financial regulatory requirements

Investment services may be provided in Croatia only by certain types of entities, such as investment firms (companies in the form of a company with limited liability or a stock corporation) duly licenced by HANFA or credit institutions duly licenced by the CNB under the approval of HANFA to carry out such activities. Investment firms or credit institutions having their seat in an EEA country may also provide investment services in Croatia without a licence from the CNB, provided that they are licenced to provide the same type of services by the supervisory authority under jurisdiction of the member state in which they are seated. The services may either be provided through a branch established in Croatia or on a cross-border basis. In both cases, the foreign entity must notify its own competent supervisory authority in advance in order to be authorised to provide its services in Croatia. The foreign supervisory authority will then inform HANFA or the CNB (in case of credit institutions) of the intended activity of the entity.

Investment firms seated in the EEA may provide cross-border investment services immediately after HANFA has received the foreign supervisory authority's notification. In case investment services will be provided via a branch, the investment firm may commence its activities after two months have elapsed from the day the notification of the foreign supervisory authority was received by HANFA. Upon receipt of the notification, HANFA will also notify the investment firm of the conditions for the activities to be pursued via a branch.

Credit institutions seated in the EEA may provide investment services under conditions that are similar to the above. Cross-border services may be provided immediately after the CNB has received a notification by the foreign supervisory authority. However, such provision may only be executed temporarily. Investment services may be provided via a branch after 90 days have elapsed from the day the notification of the foreign supervisory institution was received by the CNB. Such services may be provided on a long-term basis.

As partly mentioned in point B.III above, in certain cases entities do not have to apply for a licence to enter into derivative transactions, because they are explicitly excluded from the Capital Markets Act. Exceptions apply to:

(i) any person which on their own account deals with financial instruments that are not commodity derivatives, emission allowances or derivatives thereof and does not provide any other investment services with regard to financial instruments that are not commodity derivatives or emission allowances or derivatives thereof unless they are market makers, members or participants of a regulated market or an MTF or have direct electronic access to a trading venue, apply a high-frequency algorithmic trading technique, or deal on their own account when executing client orders;

(ii) any person which provides investment services exclusively for its parent company, subsidiary or for other subsidiaries of its parent company;

(iii) any person which provides investment services consisting exclusively of the administration of employee-participation schemes;

(iv) any person which provides investment services consisting of services exclusively for its parent company, for its subsidiary or for other subsidiaries of its parent company; and the administration of employee-participation schemes;

(v) any person providing investment advice in the course of providing another professional activity not covered by the Capital Markets Act provided that the provision of such advice is not specifically remunerated;

(vi) any person dealing on their own account in commodity derivatives, emission allowances or derivatives thereof, excluding persons who deal on their own account when executing client orders, or who provide investment services in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business should not be covered by the scope of this Directive, provided that that activity is an ancillary activity to their main business on a group basis, and that their main business is neither the provision of investment services in the meaning of the Capital Markets Act nor of banking activities, nor market making in commodity derivatives, and those persons do not apply a high-frequency algorithmic trading.

C.IX OTHER PROVISIONS

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

We do not have other recommendations.

D. ADDRESSEES, FORM AND TENOR, EXECUTIVE SUMMARY AND OTHER ISSUES

D.I ADDRESSEES

This Opinion is addressed exclusively to EFET and is for the sole benefit of EFET and its Legal Committee members and any other subscribing entities, and may not be relied upon by, or disclosed to, any other person or legal entity without the prior written approval of EFET or Wolf Theiss Rechtsanwalte GmbH&CO KG – Zagreb Branch, and may be made available by EFET members to the appropriate regulatory authorities. Furthermore, this Opinion may be made available by each EFET member to the professional chartered auditor engaged by that EFET member, but exclusively on a non-reliance basis, hence this Opinion may not be relied upon by any such auditor.

D.II EXECUTIVE SUMMARY

Please refer to page 3 of this Opinion.

* * *

Yours faithfully,

Wolf Theiss Rechtsanwalte GmbH & Co KG – Zagreb Branch

DEFINED TERMS AND INTERPRETATION

Unless otherwise specified in the Opinion, the terms defined in the General Agreement and in the Instruction Letter have the same meaning in this Opinion and for the purpose of this Opinion.

"**Administrator**" means the insolvency administrator within the meaning of the Insolvency Act.

"**Arbitration Act**" means the Arbitration Act (in Croatian: "*Zakon o arbitraži*", Official Gazette No. 88/2001).

"**Capital Markets Act**" means the Capital Markets Act (in Croatian: "*Zakon o tržištu kapitala*", Official Gazette No. 65/2018).

"**Capital Requirements Directive**" means Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

"**CNB**" means the Croatian National Bank (in Croatian: "*Hrvatska narodna banka*").

"**Collateral Directive**" means Directive 2002/47/EC of the European Parliament and of the Council on financial collateral agreements.

"**Companies Act**" means the Companies Act (in Croatian: "*Zakon o trgovačkim društvima*", Official Gazette Nos. 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013 and 110/2015).

"**Conflict of Laws Act**" means the Act Concerning the Resolution of Conflicts of Laws with the Provisions of Other Countries in Certain Matters (in Croatian: "*Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima*", Official Gazette Nos. 53/91 and 88/01)

"**Credit Institutions Act**" means the Credit Institutions Act (in Croatian: "*Zakon o kreditnim institucijama*", Official Gazette Nos. 159/2013, 19/2015, 102/2015 and 15/2018).

"**DAB**" means the State Agency for Deposit Insurance and Bank Resolution (in Croatian: "*Državna agencija za osiguranje štednih uloga i sanaciju banaka*").

"**EEA**" means the European Economic Area.

"**Electricity Market Act**" means the Companies Act (in Croatian: "*Zakon o tržištu električne energije*", Official Gazette Nos. 22/2013, 95/2015, 102/2015 and 68/2018).

"**EMIR**" means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

"**Energy Act**" means the Energy Act (in Croatian: "*Zakon o energiji*", Official Gazette Nos. 120/2012, 14/2014, 95/2015, 102/2015, 68/2018).

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

"**FINA**" means the Croatian Financial Agency (in Croatian: "*Financijska agencija*").

"**Financial Collateral Act**" means the Financial Collateral Act (in Croatian: "*Zakon o financijskom osiguranju*", Official Gazette Nos. 76/2007 and 59/2012)

“**HANFA**” means the Croatian Agency for Supervision of Financial Services (in Croatian: “*Hrvatska agencija za nadzor financijskih usluga*”).

“**Insolvency Act**” means the Insolvency Act (in Croatian: “*Stečajni zakon*”, Official Gazette Nos. 71/2015 and 104/2017).

“**Insurance Act**” means the Insurance Act (in Croatian: “*Zakon o osiguranju*”, Official Gazette No. 30/15).

“**MiFID**” means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

“**MiFID II**” means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

“**Multibranch Party**” means a party which operates for the purpose of the General Agreement with two or more branches and in two or more jurisdictions.

"**Obligations Act**" means the Obligations Act (in Croatian "*Zakon o obveznim odnosima*", Official Gazette Nos. 35/2005, 41/2008, 125/2011, 78/2015 and 29/2018).

“**Party**” means a party to the Agreement.

“**Resolution Act**” means the Act on Resolution of Credit Institutions and Investment Companies (in Croatian: “*Zakon o sanaciji kreditnih institucija i investicijskih društava*”, Official Gazette No. 19/2015).

“**Resolution Directive**” means Directive 2014/59/EU of the European Parliament and of the Council of 15 may 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

“**Rome I**” means EC Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

“**Settlement Finality Act**” means the Act on Settlement Finality in Payment and Securities Settlement Systems (in Croatian: “*Zakon o konačnosti namire u platnim sustavima i sustavima za namiru financijskih instrumenata*”, Official Gazette Nos. 59/2012 and 44/2016).

“**Winding-up Directive**” means Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on reorganization and winding up of credit institutions.

APPENDIX A

Types of Counterparties

The Instruction Letter required us to base our opinion on the assumption that Party A is an entity of the following types:

- Corporations (e.g. a limited liability company, stock corporation or *Societas Europea*)
- Partnerships (e.g. a general or limited partnership)
- Banks/Credit Institutions
- Investment Service Providers/Investment Firms
- Insurance Companies
- Investment Fund Management Companies
- Other Financial Institutions
- Municipalities or Counties
- Associations of Local Government
- Publicly-owned Corporations
- Quasi Governmental Entities

As further analysed in point B.III (*Potential Parties*, page 9) of this Opinion, the Electricity Market Act's broad definition of trading in electricity does not narrow the scope of electricity trading solely to physical trading in electricity. As a consequence, we cannot eliminate the risk that trading in electricity derivatives also requires a trading licence from HERA. Consequently, the scope of potential parties is limited to those parties, who are eligible for obtaining the electricity trading licence, as further detailed under point C.VIII.1. (*Regulatory Regime, Energy law requirements*, page 57). We also note that, albeit the Electricity Market Act does not contain restrictions on the types of eligible entities, restrictions may arise under sector-specific regulations (e.g. the ability of an entity to perform energy trading may be prohibited or limited by industry laws).

The Electricity Market Act does not principally prevent licence holders (traders) from engaging in activities other than trading in electricity. Therefore, on the one hand, from an industry regulatory viewpoint, licence holders may pursue other specific activities such as (ancillary) investment or financial services, as a result of which they would qualify as banks, investment firms, insurance companies, etc.

On the other hand, from a financial regulatory viewpoint, relevant laws governing the status of financial institutions and similar entities list the activities which may be pursued by such entities. Generally, such institutions are permitted only to pursue the main activities for the purposes of which they were established, with further services to be performed only as ancillary/supporting activities. It is unclear whether such institutions would be permitted to be registered for energy trading, which may be a prerequisite for trading electricity derivatives. This practically means that on the one hand, from a financial regulatory viewpoint, they would not be entitled to obtain an electricity trading licence that is, on the other hand, from an industry regulatory viewpoint, necessary for conducting trading in electricity.

Due to the above described legislative gap we cannot opine on the potential parties from the viewpoint of the particular scope of activity they pursue, but only from the viewpoint of their legal form that is decisive in respect of the ability to obtain an electricity trading licence.

Summarizing the above, this Opinion is solely given in respect of:

- corporations incorporated, organized or established in Croatia in accordance with the laws of Croatia in the form of a general partnership, limited partnership, limited liability company or a joint stock company;
- Croatian branches of foreign entities (which are specifically dealt with under point C.II.2 (*Foreign Multibranch Party*) of this Opinion on page 37).

APPENDIX B

Transactions under the EFET General Agreement

Commodity Forward

A transaction in which one party agrees to purchase from or sell to the other party a specific quantity of a Commodity at a future date in exchange for payment of an agreed price to be set on a specified date in the future. The transaction may either be settled by physical delivery of the quantity of Commodity in exchange for the specified price or it may provide for cash settlement with the payment calculation based on the quantity of the Commodity and settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Spot

Some jurisdictions recognise a subset of Commodity Forward transactions with an extremely short tenor (i.e. the period of time between entry into the transaction and its settlement) which can be as short as the same day or as long as one or more days (in accordance with the local definition of the term, if any). Such a "Commodity Spot" transaction typically contemplates settlement by only physical delivery of the quantity of Commodity.

Commodity Option

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

Commodity Swap

A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g. the EEX EU Carbon Futures); all calculations are based on a notional quantity of the commodity. The swap may either be settled by physical delivery of the quantity of Commodity or it may provide for cash settlement.

Commodity means electricity or emission allowances.

APPENDIX C

INSOLVENCY PROCEEDINGS OVERVIEW

Unless otherwise specified, this Section describes the relevant insolvency proceedings, laws and terminology applicable to Party A, which is incorporated or organised or has its main centre of interest in Croatia.

1. PROCEEDINGS IN ACCORDANCE WITH THE INSOLVENCY ACT

Under the Insolvency Act, insolvency proceedings may be conducted as:

(a) **insolvency proceedings** (in Croatian: "*stečajni postupak"*), resulting in the sale of the debtor's assets and dissolution of the debtor; or

(b) **judicial reorganisation** which aims at preserving a debtor's business and allows the debtor to discharge its liabilities within a certain period of time as prescribed under the relevant reorganisation plan (in Croatian: "*stečajni plan"*).

Additionally, (c) **pre-insolvency proceedings** (in Croatian: "*predstečajni postupak*") was introduced in 2012 as an option for distressed companies to force their creditors to the negotiating table outside of the formal insolvency proceedings. In the pre-insolvency proceedings, the debtor's true aim should be to revitalise its business, while the aim of the insolvency proceedings is to settle the creditors and dissolve the debtor. During the duration of pre-insolvency proceedings, there is no possibility to initiate the insolvency proceedings over the concerned debtor.

1.1 Insolvency proceedings (in Croatian: "*stečajni postupak*")

1.1.1 <u>*Grounds for insolvency*</u>

Under the Insolvency Act, a debtor is required to file an application for the opening of insolvency proceedings without delay in the event of:

- over-indebtedness (in Croatian: "*prezaduženost*") – the book value of the debtor's assets is less than its liabilities; or
- insolvency (in Croatian: "*nesposobnost za plaćanje*") – the inability of a debtor to pay its due monetary debts on a more permanent basis.

Insolvency shall be presumed in the following cases:

- if a debtor has one or more due and unsettled obligations recorded in FINA's Register of Due Obligations, in a period longer than 60 days; or
- if a debtor has failed to pay salaries to its employees for more than 30 days from the date when salaries were last due.

In case of impending insolvency (in Croatian: "*prijeteća nesposobnost za plaćanje*") – when a debtor is not yet insolvent but can demonstrate that it will most likely not be able to pay its existing obligations when they become due – a debtor may file for insolvency proceedings, or for pre-insolvency proceedings (in Croatian: "*predstečajni postupak*" – see Point 1.2 of this Appendix C).

1.1.2 *Opening of the insolvency proceedings*

A request for initiating insolvency proceedings may be filed by (i) the debtor itself, (ii) creditors of the debtor (immediately after they learn about the insolvency reason, without requirement to obtain any consent from the debtor), or (iii) by FINA. Typically, most applications for the opening of insolvency proceedings are filed by creditors.

The legal effects of opening of the insolvency proceedings come into effect on the day the decision of opening of the insolvency proceedings is published on the e-bulletin board of the relevant court ("**Commencement Date**").

On the Commencement Date, the following most important consequences occur:

- the (management and other) rights of the debtor's corporate bodies are assumed by the Administrator;

- all encumbrances and restrictions on disposal of assets, if established over the debtor's assets with the purpose of protecting only the interests of certain persons, lose their legal effect (save as in relation with security or enforcement proceedings);

- creditors may pay their claims only in the insolvency proceedings and no enforcement proceedings over the estate may be initiated;

- an automatic stay of any pending court proceedings involving assets belonging to the insolvency estate comes into effect. Also, the insolvency proceedings temporarily prevent the initiation of any further lawsuits against the estate (the stay is, however, only of a temporary nature as these proceedings will be resumed when the Administrator assumes them on behalf and for the account of the debtor);

- if there is an outstanding bilateral contract at the opening of the insolvency proceedings, the Administrator may decide to fulfil the obligation arising out of that contract on behalf of the debtor and request the other party to do the same. If, on the other hand, the Administrator refuses to assume the contract, the other contracting party may realise its claims against the debtor as an insolvency claim;

- the right to set-off is not affected by the opening of the insolvency proceedings to the extent that the requirements for such set-off already existed prior to the opening of the insolvency proceedings.

1.1.3 *Bodies in the insolvency proceedings*

The Insolvency Act requires the formation and/or appointment and participation of the following insolvency-related bodies in the insolvency proceedings:

(i) the insolvency court (in Croatian: "*stečajni sud*")

Proceedings under the Insolvency Act are conducted by the insolvency division of the commercial courts competent for the judicial district where the debtor has its legal seat. While the powers of overseeing, appointment and confirmation placed in the hands of the insolvency court reflect its dominant formal role in any insolvency, in practice the Administrator is the far more prominent actor in any insolvency proceeding.

(ii) the Administrator (in Croatian: "*stečajni upravitelj*")

Only persons listed on the relevant lists of the commercial court are eligible to act as Administrators. The duties of the Administrator generally include: administrative duties, preserving the estate and ensuring collection of all debtor's receivables, distribution of the proceeds to the creditors, etc.

(iii) the Creditors' Committee (in Croatian: "*odbor vjerovnika*")

The Creditors' Committee needs to include representative of (i) creditors with the largest claims, (ii) creditors with small claims, and (iii) former employees of the debtor (unless they have insignificant claims). Secured creditors and persons who are not creditors may be appointed to the Committee if their expertise may expedite the committee's work. Generally, the Creditors' Committee reviews the Administrator's reports, inspects the documentation, may lodge an objection to the Administrator's work and, when asked to do so, provides different opinions in the procedure.

(iv) the Creditors' Assembly (in Croatian: "*skupština vjerovnika*")

The following persons/entities are entitled to participate in the creditors' meeting: creditors with security interests, insolvency creditors, the Administrator and the individual debtor. However, only the creditors whose claims have been confirmed are always entitled to vote at the creditors' meeting.

The primary functions of the creditors' meeting are: (i) to appoint a Creditors' Committee (unless installed by the court), make changes to the composition of the Creditors' Committee or disband the Creditors' Committee, (ii) to appoint a new Administrator, (iii) to request the Administrator to prepare the reorganisation plan, (iv) to decide on the continuation of the debtor's operations and on the manner in which the assets will be disposed of, and (v) to decide on all other significant aspects of the insolvency process.

1.1.4 *Reporting of claims*

A decision on opening the insolvency proceedings is published at the Commencement Date. In that decision, the court invites the creditors to notify their claims and special rights to the Administrator within 60 days. In the decision on opening the insolvency proceedings, the court will also schedule the creditors' meeting as the (i) examination hearings (in Croatian: "*ispitno ročište*") for the purpose of examining the reported claims, and (ii) report hearings (in Croatian: "*izvještajno ročište*") for the purpose of deciding on further course of proceedings based on the Administrator's report.

Creditors are required to file their claims by the date specified by the court. They must substantiate their claims, indicating any relevant particulars and the claimed rank (see below), and submit any supporting documentation. Claims not filed by that date will be deemed as discharged. Reported claims may be contested by the Administrator and any insolvency creditor (even if its claim is being contested). The Administrator's decision on how to respond to creditors' claims is usually taken in close cooperation with the debtor's management. If the claim is contested, the creditor's only option is to sue for recognition. By way of exception, if the contested claim is based on an enforceable title (e.g. a notarial security instrument), the Administrator or the creditor contesting the claim has to sue.

1.1.5 *Types of creditors and ranking of claims*

In general, there are four types of creditors in insolvency proceedings, with the following order of priority in settlement of claims:

1. Secured creditors

The Insolvency Act distinguishes between two categories of secured creditors:

(a) Creditors with exemption rights (in Croatian: "*izlučni vjerovnici*") – creditors who can prove, on the basis of their proprietary or personal right, that an asset should not be part of the estate of the debtor (e.g. owners of the machinery leased to the debtor or vendors holding title retention rights). The exemption right is enforced outside of insolvency proceedings. If a particular asset that should have been exempted has been improperly disposed of by the debtor or the Administrator, the creditor may, at its choice, demand that either (i) the right to receive payment be transferred to it, if possible, or (ii) the payment is made out of the estate, or (iii) demand compensation for damage as an insolvency creditor.

(b) Creditors with security interests (in Croatian: "*razlučni vjerovnici*") – creditors who have a security (mortgage or pledge) or an equivalent right (e.g. the right of retention) over particular assets of a debtor. These creditors have a right of separate satisfaction with respect to the collateral established in their favour. However, if a creditor, during or after the 60-day period prior to filing an insolvency petition, acquires the right to separate satisfaction by an enforcement of a claim or by a forced judicial security on the debtor's estate, these rights will cease upon the opening of the insolvency proceedings and such creditor will not be considered as a creditor with security interests. The actual collection process is governed by the rules of the insolvency procedure and with the involvement of the insolvency court and/or court appointed Administrator. A notification to the Administrator is required. To the extent such separate satisfaction is not sufficient to cover the full amount of the claim or creditors with security interests waive the right to separate satisfaction, creditors with security interests may request settlement in the insolvency proceedings, under the same terms as insolvency creditors.

2. Claims of creditors of the insolvency estate (in Croatian: "*vjerovnici stečajne mase"*)

These claims consist of administrative expenses (such as court fees and remuneration and compensation awarded to the Administrator and the Creditors' Committee), claims of former or current employees (not including the debtor's officers) for unpaid salaries prior to the opening of the insolvency proceedings (to the extent not covered by a public-type insurance), salaries of employees during the insolvency proceedings and claims incurred in connection with the management of the insolvency estate, including continuation of the debtor's business, disposal of assets and division of proceeds. Claims of creditors of the insolvency estate are settled as they fall due. In case of an eventual shortfall of funds, the due date will be a decisive factor determining whether or not particular claims get settled.

3. Claims of insolvency creditors

Once the liquidation of the insolvency estate has commenced, and the claims of the creditors of the insolvency estate are settled or properly secured, the Administrator may start distributing the remaining proceeds (if any) among the insolvency creditors in accordance with the priority ranking of their claims.

First rank claims include (i) claims of former and current employees of the debtor that arose before the opening of the insolvency proceedings, (ii) severance payments set out by the law or collective bargaining agreement, and (iii) indemnification claims for work-related injuries or professional illness.

Second rank claims include all other claims against the debtor, except certain lower ranking claims (e.g. interest accrued after opening of the insolvency, monetary fines and shareholder loans) specifically listed in the Insolvency Act.

Insolvency Creditors of the same priority will be satisfied in proportion to the amount of their claims.

1.1.6 *Contesting the debtor's actions*

The Administrator and/or other creditors can also contest legal actions and transactions (including, without limitation, the granting of security interests) undertaken by the debtor within certain periods before the opening of insolvency proceedings, which were either detrimental to the uniform satisfaction of the creditors (transactions damaging creditors), or more favourable to certain creditors than others (transactions favouring creditors).

The debtor's actions placing any of its creditors into a preferential position as compared to other creditors may be challenged:

- if a creditor receives security for its claims or its claim is settled in line with the existing contractual arrangements (in Croatian: "*kongruentno namirenje*") within the three months prior to filing the petition for insolvency or during the period between the filing and opening of the insolvency proceedings. Such debtor's action will be voided if the debtor was insolvent at the time of the performance and the creditor was aware of that (including if an application of insolvency was already filed). A typical example may include payment of a due invoice to a creditor.

- if a creditor receives security for its claims or its claim is settled although the creditor had no right to request it under the existing contractual arrangements (in Croatian: "*inkongruentno namirenje*"). Such debtor's action will be voided if undertaken (i) within one month prior to filing the petition for insolvency, or (ii) during the third or the second month prior to filing the petition for insolvency, if the debtor was insolvent at the time of the performance or that the creditor was aware that the discharge was damaging to other creditors. A typical example would include granting security for originally unsecured obligations at the request of a creditor.

Any transaction directly damaging creditors can be challenged if it was entered into (i) within the last three months prior to filing the petition for insolvency, if the debtor was insolvent and the other party was aware of such insolvency, or (ii) after filing the petition for insolvency, if the other party was aware of the debtor's insolvency or the filing of the petition. A typical example of a damaging transaction may include the debtor's waiver of security instruments.

1.1.7 *Conclusion of the insolvency proceedings*

Upon completion of the liquidation of the estate, the Administrator submits the final accounts of the estate and the court schedules the final hearing (in Croatian: "*završno ročište*"). At the final hearing, creditors may submit their objections to the final accounts and decide how to deal with the assets that could not be sold (if any). Once the court rules on all creditors' objections, the final distribution to insolvency creditors will be made and the insolvency proceedings will be concluded.

1.1.8 *Judicial reorganisation under the relevant reorganisation plan*

After the Commencement Date, deviation from the provisions of the Insolvency Act is allowed regarding the monetisation and division of the insolvency state in order to conduct the debtor's reorganisation which will, if successful, result in continuance of the debtor's business.

The reorganisation is conducted on the basis of a reorganisation plan which may be submitted to the insolvency court by the Administrator. If approved by all classes of creditors and the debtor, a reorganisation plan is confirmed by the insolvency judge in the form of a ruling. The approved reorganisation plan qualifies as an enforceable legal instrument and as a new agreement on settlement of claims between the debtor and the creditors listed therein.

If the reorganisation plan is rejected by the creditors, withdrawn, or fails to be confirmed by the court, the case will continue as straight insolvency proceedings.

The attractiveness of the judicial reorganisation was further diminished by the introduction of a procedure under the Pre-Insolvency Act (see Point 1.2 below). The pre-insolvency settlement process enables debtors to introduce the same restructuring measures offered by the judicial reorganisation proceedings under significantly less stringent rules. In addition, such process is much faster than judicial reorganisation. Also, if a pre-insolvency settlement process fails, there is generally little incentive for the debtor or the Administrator (independently or under the instruction of creditors) to attempt a similar restructuring within the scope of the insolvency proceedings.

1.2 Pre-insolvency proceedings (in Croatian: "*predstečajni postupak*")

1.2.1 *Grounds for pre-insolvency*

Debtors may, as an alternative to making an insolvency filing, initiate pre-insolvency proceedings in the event of impending insolvency (in Croatian: "*prijeteća nesposobnost za plaćanje*"), i.e. a debtor may propose the opening of pre-insolvency proceedings even if it is not yet insolvent but can demonstrate that it will most likely not be able to pay its existing obligations when they become due. In such event, the debtor may freely choose whether to initiate pre-insolvency or insolvency proceedings. However, once the choice is exercised, the other proceedings are no longer available.

The impending insolvency shall be presumed in the following cases:

(a) if a debtor has one or more due and unsettled obligations recorded in FINA's Register of Due Obligations;

(b) if a debtor has failed to pay salaries to its employees for more than 30 days from the date when salaries were last due or;

(c) if a debtor has failed to pay contributions and taxes related to salaries of its employees for more than 30 days from the date when the salaries were last due.

Creditors can also initiate pre-insolvency proceedings only with the consent of the debtor.

1.2.2 *Eligibility for pre-insolvency*

Pre-insolvency proceedings are not available to financial institutions, credit unions, investment companies and investment fund management companies, credit institutions, insurance and reinsurance companies, leasing companies, electronic cash institutions or funds transfer institutions.

1.2.3 *Initiating pre-insolvency proceedings and restructuring plan*

The request for initiating pre-insolvency proceedings should be submitted to the commercial court, which is obliged to render its decision as to whether to initiate the pre-insolvency proceedings within eight days from the receipt of the request. In the procedure itself, the role of the court includes monitoring whether the formal conditions for the settlement have been met and does not include a substantive review of the settlement or of the feasibility of the restructuring plan.

Together with the request for initiating pre-insolvency proceedings, debtors must submit a proposal of a restructuring plan. The plan must include a plan of both financial and operative restructuring of their business, as well as the settlement offers to the creditors. Namely, debtors are expected to prepare a detailed proposal on how to restructure their operations and financial obligations into a viable business. Some of the restructuring measures that can be proposed may, for example, include: (i) reduction of debtor's liabilities, payment in instalments or extension of payment terms, (ii) full or partial waiver of claims or reduction of interest rates, (iii) debt to equity swap, etc.

The pre-insolvency process incorporates similar features as that of the judicial reorganisation proceedings, however with much tighter timeframes and under administrative supervision of the negotiating process.

1.2.4 *Opening of the pre-insolvency proceedings*

The legal effects of opening of the pre-insolvency proceedings come into effect on the beginning of the day the decision of the opening of the pre-insolvency proceedings has been put on the e-bulletin board of the relevant court ("**Pre-Insolvency Commencement Date**").

On the Pre-Insolvency Commencement Date, the following most important consequences occur:

- until the day of closing of the pre-insolvency proceedings, the debtor: (i) can only conduct payments necessary for its regular business and fulfilment of obligations undertaken in order to enable temporary financing; (ii) is prohibited to fulfil obligations that came into existence and became due before the opening of the pre-insolvency proceedings (with exceptions to employee-related payments);

- the opening of civil, enforcement, administrative or assurance proceedings is prohibited, and ongoing proceedings are stayed;

- FINA will generally cease to exercise all bases for payment (with exceptions to certain employee-related payments and security measures in criminal proceedings);

- interests do not accrue, except for claims not affected by the pre-insolvency proceedings.

1.2.5 *Bodies in the pre-insolvency proceedings*

The main body of the pre-insolvency proceedings is the court, which holds a wide range of powers, including initiation of the pre-insolvency process, appointment of a pre-insolvency trustee, supervising FINA’s activities, deciding about claims, etc.

As opposed to the insolvency proceedings, the management of the pre-insolvency debtor will remain to manage the debtor and to perform business activities. The pre-insolvency trustee (in Croatian: “*predstečajni povjerenik*”) should be appointed only if the court deems it to be needed.

FINA is also present in the proceedings, but only to provide purely technical support to the courts.

1.2.6 *Reporting of claims and determining claims*

The decision on opening of the pre-insolvency proceedings published on the Commencement Day will, among others, contain an invitation to all creditors of the debtor to report their claims within 21 days to FINA.

The claims should be reported to FINA, which will then prepare a table of all reported claims. Claims which were not reported but are contained in the request for initiating pre-insolvency proceedings should be deemed as determined. The claims shall be determined (i.e. their amount admitted) at the special examination hearing. If the claim is contested, the creditor’s option is to sue for recognition.

1.2.7 *Voting on the restructuring plan*

Only creditors whose claims have been determined will have the voting rights. Additionally, secured creditors who waived their right of separate settlement in the pre-insolvency process will be enabled to vote on the restructuring plan (as it must address the satisfaction of such claims as well).

For the purpose of the voting, the creditors will be grouped in different groups (e.g., employees, secured creditors, creditors with lower ranked claims) where each group will be voting separately on the proposed restructuring plan. The restructuring plan will be deemed accepted if:

- the majority of all creditors voted for it, and

- the sum of all creditors’ claims in each group who voted for the plan exceeds the sum of creditors’ claims who were against the restructuring plan by double.

1.2.8 *Conclusion of the pre-insolvency proceedings*

The pre-insolvency proceedings should be completed within 300 days after the Pre-Insolvency Commencement Date. This deadline may only exceptionally be prolonged for an additional 60 days.

If the pre-insolvency settlement is successful (i.e. the restructuring plan has been adopted) and once it becomes final, the debtor is released from the part of its obligations exceeding those contained in the settlement, even towards the creditors who voted against the settlement.

If the pre-insolvency settlement has not been adopted, the pre-insolvency proceedings will be stopped and, usually, regular insolvency proceedings will be initiated.

2. SPECIAL ADMINISTRATION PROCEEDINGS

In 2017 the Act on Special Administration Procedure for Companies of Systemic Importance for the Republic of Croatia was adopted, which provides for special administration proceedings (in Croatian: "*postupak izvanredne uprave*") that apply to joint stock companies of systematic significance for Croatia.

In order to be eligible for this type of proceedings, a company must:

- be capable of being subject to pre-insolvency or insolvency proceedings (i.e. not available with regard to financial institutions, credit unions, investment companies and investment fund management companies, credit institutions, etc.);

- independently, or on a consolidated level, have (i) an average of more than 5000 employees employed in the calendar year preceding the year when the request for opening of the special administration proceedings was filed, and (ii) more than HRK 7,500,000,000 (approx. EUR 1 billion) of balance sheet liabilities on the day of submission of the request for opening of the special administration proceedings.

The opening of the special administration proceedings can be requested only by (i) the debtor itself, or (ii) any of its creditors (or creditors of its subsidiaries), subject to the debtor's consent.

Opening of the special administration proceedings mandates legal effects the same as in the insolvency proceedings (see Point 1.1.2 of this Appendix C). Any insolvency or pre-insolvency proceedings that may already be initiated against the debtor or its subsidiaries should be suspended.

The recovery of the debtor is handled on the operational level by a special commissioner (in Croatian: "*izvanredni povjerenik*") nominated by the Croatian Government. The debtor's creditors may influence the process through the creditors' council (in Croatian: "*vjerovničko vijeće*") of up to nine members, each representing a group of creditors. The exact number of members and the classification of creditors in groups is set by the court, while the creditors of each group elect the representatives.

The special commissioner may undertake all activities falling into the ordinary course of business of the debtor, including, in particular, payments to suppliers and employees. To that end, the special commissioner may (i) obtain new financing which has a super-priority to all other obligations except claims of the employees and former employees, subject to the prior consent of the creditors' council, (ii) settle the ordinary course of business obligations; however, such obligations are not granted any super-priority (i.e. if the debtor eventually goes into ordinary insolvency, they should rank pari passu with other unsecured obligations), and (iii) settle some of the existing due obligations, where (a) this is necessary to reduce systemic risk, continue operations of the company or preserve its assets, or (b) these are receivables from the ordinary course of business subject to the prior consent of the creditors' council. For asset disposals (including shares in subsidiaries) exceeding approx. EUR 500,000, the special commissioner needs prior approval of the creditors' council.

The special commissioner should propose a restructuring plan covering the entire group within 12 months (with a possible extension for another 3 months). Prior consent of the creditors' council is required. The restructuring plan is deemed as approved if accepted by:

(a) (i) the majority (by number) of all creditors, and (ii) in each class of creditors, if the amount of claims held by creditors voting for is greater than the amount of claims held by creditors voting against, or

(b) if the amount of claims held by creditors supporting the plan amounts to at least 2/3 of all outstanding claims.

Special administration proceedings can last up to a maximum of 15 months; the commissioner may, at any time and with the consent of the creditors' council, end the process and apply for regular insolvency proceedings.

3. REORGANISATION AND RECOVERY UNDER THE RESOLUTION ACT

While financial institutions are still subject to insolvency proceedings, the Resolution Act has introduced a special regime for the reorganisation and recovery of certain financial institutions, in accordance with the Resolution Directive.

Recovery of an institution shall be initiated instead of insolvency proceedings only if it is determined that the recovery is in the public interest i.e. if recovery will generally achieve the following goals:

(a) ensuring the continuity of the fundamental functions of the institution;

(b) safeguarding the stability of the financial system;

(c) protection of public funds so that the reliance on external public financial support is minimised; and

(d) the protection of secured deposits and secured investments and protection of the clients' assets.

In accordance with the provisions of the Resolution Directive, the Resolution Act is applicable to credit institutions and investment firms (together referred to as institutions), financial holding companies, mixed financial holding companies established in Croatia, to financial institutions established in Croatia if covered by consolidated supervision, a parent financial holding company established in Croatia, an EU parent financial holding company established in Croatia, a parent mixed financial holding company established in Croatia, or an EU parent mixed financial holding company established in Croatia, and to the Croatian branches of institutions that are established in third countries. Thus, based on Appendix A, the provisions of the Resolution Act may be of relevance in respect of credit institutions and investment firms.

As with the Resolution Directive, the Resolution Act also provides for four resolution tools: (i) the sale of business tool; (ii) the bridge institution tool; (iii) the asset separation tool; and (iv) the bail-in tool.

3.1 Bail-in tool

The bail-in tool seems to be particularly important in the context of the close-out netting provisions. Pursuant to the Resolution Act (reflecting Article 43 of the Resolution Directive), the resolution via a bail-in tool may be carried out through as:

- an increase of a share capital of an institution under resolution, to the extent sufficient to restore its ability to comply with the conditions for authorisation, to continue to carry out the activities for which it is authorised and to sustain sufficient market confidence; or

- conversion of claims and debt instruments into shares and other instruments of ownership or reduction of the principal amount of claims or debt instruments that are transferred (i) to a bridge institution with a view to providing capital for that bridge institution; or (ii) under the sale of business tool or the asset separation tool.

The bail-in tool shall apply to all liabilities of an institution under resolution. By way of exception, the State Agency for Deposit Insurance and Bank Resolution shall not write down or convert, *inter alia*, a secured liability, in the part which is covered by security, including covered bonds and liabilities in the form of financial instruments used for hedging purposes which form an integral part of the cover pool and which are secured in a way similar to covered bonds.

Additionally, the Resolution Act provides that the write-down and conversion powers in relation to liabilities arising from a derivative transaction shall be applied only after the netting is performed. In addition, in cases where derivative transactions are subject to netting arrangements, the liabilities from those transactions shall be determined on a net basis in accordance with the terms of the respective agreement.

3.2 Other resolving measures

Additionally, the Resolution Act grants wide powers that may be exercised by the competent authority:

3.2.1 *<u>Exclusion of certain contractual terms in early intervention and resolution</u>*

Provided that the substantive obligations under the contract, including payment and delivery obligations and provision of collateral, continue to be performed, a resolution measure, including the occurrence of any event directly linked to the application of such a measure, shall not, *per se*, make it possible for anyone to:

(i) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by a subsidiary, the obligations under which are guaranteed or otherwise supported by the parent company or another group entity;

(ii) obtain possession, exercise control or enforce any security over any property of the institution;

(iii) affect any contractual rights of the institution.

This shall not affect the right of a person to take an action referred to above in subparagraphs (i) to (iii) where that right arises by virtue of an event other than the restoration measure, or the occurrence of any event directly linked to the application of such a measure.

A suspension or restriction under sections 3.2.2 to 3.2.4 below shall not constitute non-performance of a contractual obligation for the purposes of subparagraphs (i) – (iii) above.

Moreover, the Resolution Act expressly provides that the above provisions are to be considered to be overriding mandatory provisions within the meaning of Article 9 of Rome I.

3.2.2 *Suspension of certain obligations*

DAB may adopt a decision on suspension of any payment or delivery of any obligations pursuant to any contracts to which an institution under resolution is a party.

3.2.3 *Suspension of the enforcement*

DAB may suspend the conduct of enforcement proceedings over the assets of the institution under resolution by creditors of that institution.

3.2.4 *Suspension of termination rights*

DAB may suspend the right of the counterparty to terminate the contract with the institution under resolution.

3.3 Safeguard for counterparties in partial transfers

When DAB partially transfers the assets, rights or liabilities of an institution under resolution to another entity or exercises powers of cancellation or modification of contractual terms, certain arrangements are protected.

3.3.1 *Protection for financial collateral, setoff and netting arrangement*

DAB may not partially transfer the rights and liabilities or partially modify or terminate the rights and liabilities protected under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between the institution under resolution and another person (exceptions may apply for purposes of making available the secured deposits).

3.3.2 *Protection of security agreements*

DAB may not: (i) transfer the assets against which the liability is secured unless that liability and benefit of the security are also transferred; (ii) transfer the secured liability unless the benefit of the security is also transferred; (iii) transfer the benefit of the security unless the secured liability is also transferred; and (iv) modify or terminate a security arrangement through the use of ancillary resolution powers, if the effect of that modification or termination is that the liability ceases to be secured.

4. SPECIAL PROVISIONS WITH REGARD TO CREDIT INSTITUTIONS

The CNB as a supervising authority may initiate mandatory liquidation proceedings *ex officio* over a credit institution if:

(a) the resolution plan for the credit institution provides that the credit institution's resolution is not necessary for the protection of public interest, or

(b) DAB rejects the CNB's proposal for the credit institution's resolution.

Insolvency proceedings will be initiated over the credit institution instead of mandatory liquidation proceedings if the conditions for initiating insolvency proceedings (please see Point 4.2 below) are met.

4.1 Mandatory liquidation (in Croatian: "*prisilna likvidacija*")

The CNB will terminate the credit institution's operating licence if it initiates the liquidation proceedings over it. The decision on initiation of liquidation proceedings must be published in the Official Gazette, two Croatian daily newspapers and on the credit institution's web page.

Within one working day upon receiving the CNB's decision, DAB will appoint at least two liquidators (the authorisations of all of the financial institution's corporate bodies lose their effect), being bound by DAB's instructions.

From the moment when the liquidation proceedings are initiated, the performance of all transactions detrimental to the financial institution is generally prohibited. Exceptions of this prohibition exist only for (i) specific transactions by which debtors of the financial institution fulfil their debts towards the financial institution, and (ii) transactions necessary to protect the assets of the financial institution and executed by the liquidators following DAB's consent. Any transaction may be challenged either by the liquidators or by creditors of the credit institution by claiming that a transaction is detrimental to the institution.

The liquidators are obliged to prepare a liquidation balance sheet and an estimation regarding the feasibility of the liquidation. A positive estimation needs to be supported by an agreement concluded with the creditors crucial to the execution of the liquidation. Furthermore, a positive estimation must be approved by DAB before it is finally submitted. The final estimation then needs to be submitted to the CNB and DAB.

Following a positive estimation by the liquidators, the liquidation proceedings will continue. The further run of the liquidation proceedings is generally equal to the liquidation proceedings of corporations in general (voluntary winding up, regulated by the Companies Act).

In case of a negative estimation by the liquidators, they are obliged to initiate insolvency proceedings.

4.2 Insolvency proceedings (in Croatian: "*stečajni postupak*")

The CNB as a supervising authority may initiate insolvency proceedings over a credit institution if:

(a) the resolution plan for the credit institution provides that the credit institution's resolution is not necessary for the protection of public interest, or

(b) DAB rejects the CNB's proposal for the credit institution's resolution; and

(c) one of the insolvency criteria stated below is met.

Insolvency may be initiated only if one of the following criteria is met (i.e. grounds for insolvency):

1. the assets of credit institution is lower than its liabilities;

2. the rate of ordinary capital is less than 6% of the credit institution's risk exposure;

3. the rate of total capital is less than 8% of the credit institution's risk exposure;

4. the regulatory capital of the credit institution is lower than HRK 40,000,000, or regulatory capital of the savings bank is lower than HRK 8,000,000 or the regulatory capital of the mortgage savings institution is lower than HRK 20,000,000;

5. the credit institution is not able to pay its due monetary debts, and especially if the credit institution's bank account has been blocked by FINA for a period longer than two working days; or

6. the CNB passed a decision on non-availability of deposit, which non-availability is not a result of the initiation of insolvency proceedings.

The CNB's decision to file a proposal for insolvency will cause the following effects (which will cease to exist at the day, hour and minute of instituting the insolvency proceedings):

1. temporary suspension of enforcement of payment reference codes imposed on the accounts of the credit institution and its clients shall be conducted in compliance with the law regulating enforcement of financial resources;

2. temporary suspension of executing and receiving payments on the credit institution's accounts;

3. temporary suspension of providing financial services to its clients; and

4. temporary suspension of conducting payments and transactions from clients' accounts.

Following the CNB's proposal, the insolvency judge shall schedule a hearing for discussion on the conditions regarding insolvency. The final decision on whether insolvency should or should not be initiated shall be rendered within 30 days following the CNB's proposal.

If the insolvency proceedings are opened, an Administrator shall be appointed.

Creditors' claims are divided in different groups (e.g. employees' claims as claims of first higher rank, CNB's claims as claims of second higher rank, and secured deposits as claims of third higher rank). When it comes to payment, claims of employees' and CNB's claims should be settled first, while the secured deposit will be paid partially (i.e. relevant payments will be done each month, until the claim is paid out).

For all other questions that are not explicitly regulated by the Credit Institutions Act, the Insolvency Act shall apply.

5. SPECIAL PROVISIONS WITH REGARD TO INSURANCE COMPANIES

Initiation of insolvency proceedings over an insurance company or its branch is in an exclusive jurisdiction of the commercial court. Once the decision on opening the insolvency proceedings has been rendered, the court will inform HANFA, which will immediately terminate the company's licences to perform insurance business activities.

If the insolvency proceedings are opened, an Administrator shall be appointed.

The claims should be reported to the Administrator within three months from the day when the insolvency proceedings over the insurance company are opened.

In addition to those determined by the Insolvency Act, the first higher rank claims include: (i) claims arising from life insurance agreements; (ii) claims arising from non-life insurance agreements; and (iii) claims of the Croatian Insurance Office.

For all other questions that are not explicitly regulated by the Insurance Act, the Insolvency Act shall apply.

6. SPECIAL PROVISIONS WITH REGARD TO PARTICIPANTS OF THE CLEARING AND SETTLEMENT SYSTEM AND ENTITIES PERFORMING TRANSACTIONS ON OR OUTSIDE THE MULTILATERAL TRADING FACILITY (MTF)

The Capital Markets Act regulates the insolvency of participants of the clearing and settlement system and entities performing transactions on or outside the MTF.

Opening of an insolvency, recovery or a liquidation procedure, or taking other legal action against participants of the clearing and settlement system or against another legal entity that performs transactions on:

(i) the regulated market (in Croatian: "*regulirano tržište*");

(ii) the multilateral trading facility (in Croatian: "*multilateralna trgovinska platforma*"); or

(iii) outside the regulated market or multilateral trading facility – if such transactions shall be cleared by the clearing and settlement operator in accordance with Croatian legislation or relevant EU regulation

may cause different consequences, such as suspensive measures or cessation, fulfilment of obligations or the limitation of their capability of free management of assets. However, these procedures or actions shall not produce legal effects towards cash assets located in special dedicated cash accounts opened with the administrator of the payment system, even if such procedure or liquidation or other legal action has been opened or initiated before the transaction has been settled.

Initiation of insolvency proceedings does not affect the Qualified Financial Agreements settled by mediation of the central other party and they would be treated identical as under the Insolvency Act.

The abovementioned protection applies if the order was entered into the settlement system before the initiation of insolvency proceedings, recovery or liquidation and does not apply to orders accepted into the settlement system which were subsequently cancelled pursuant to settlement system rules.

6.1 Financial collaterals

Financial collateral that has been provided in connection with participation in the clearing and settlement system and that has been handed over to the system operator or system participant shall be excluded from the insolvency estate:

(a) of the system participant who provided the financial collateral, or

(b) of the system participant who has concluded interoperability agreements with that system within the meaning of the Settlement Finality Act and who provided the financial collateral, or

(c) of the system operator who has concluded interoperability agreements with that system within the meaning of the Settlement Finality Act and who is not a participant, or

(d) of any other person who provided financial collateral in case of opening of insolvency proceedings against any of the aforementioned subjects.

6.2 Financial collaterals and special lien rights

Financial instruments and monetary assets of the system participant and financial instruments and monetary assets of their clients that are considered as financial collaterals for the benefit of the system operator shall be excluded from the insolvency estate of the system operator and shall not be subject to enforcement proceedings against the system operator (exceptions may apply).

7. VOLUNTARY DISSOLUTION PROCEEDINGS (IN CROATIAN: "*LIKVIDACIJSKI POSTUPAK*")

Voluntary dissolution proceedings of a solvent entity are regulated in the Companies Act. The purpose of such proceedings is to satisfy the creditors before dissolving the solvent entity upon the voluntary decision and request of the members of the entity. Since voluntary dissolution proceedings do not qualify as insolvency proceedings within the meaning of the EU Insolvency Regulation, we do not further discuss this procedure in the context of this Opinion.

Although the initiation or institution of voluntary dissolution proceedings does not have direct adverse effect on creditors' rights, for practical reasons we are of the view that it is advisable to link the early termination right also to the occurrence of voluntary dissolution proceedings. In this way creditors can better ensure the satisfaction of their claim without risking that the voluntary proceedings turn into insolvency proceedings. This happens if in the course of the voluntary dissolution proceedings it turns out that the company's assets are insufficient to cover creditors' claims, and the members fail to supply the necessary funds. In this case the receiver must submit a request for insolvency without delay, and thus the voluntary dissolution proceedings turn into insolvency.