EVERSHEDS

Eversheds
Victoria Center, 9th floor
145 Calea Victoriei
Bucharest 1
010072
Romania

T: +40 21 311 2561
F: +40 21 311 2562

eversheds.com

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Legal Opinion for the European Federation of Energy Traders (EFET) on the Enforceability of the EFET General Agreement concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements

TABLE OF CONTENTS

We have been instructed by the European Federation of Energy Traders ("**EFET**") to review and opine under Romanian Law on the Enforceability of Close-Out Netting and the validity and enforceability of the EFET General Agreement concerning the delivery and Acceptance of Electricity and its Collateral arrangements. In this respect, we refer to the current Instruction Letter for the EFET Legal Opinion (the "**Instruction Letter**") provided to us via electronic mail.

A. DEFINITIONS AND DOCUMENTS CONSIDERED. EXECUTIVE SUMMARY

I. Definitions and Documents considered

Capitalised terms used in this Opinion and not defined herein have the meanings given to such terms in the Instruction Letter or, as the case may be, in the documents considered in rendering the Opinion (the "**Documents**"). Throughout the Opinion, we have also defined (between brackets) and used certain capitalized terms.

For the purpose of this Opinion, we have examined the following forms of the Documents:

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007 (the "**EFET General Agreement**"),
- EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010), (the "EFET Credit Support Annex"),
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published April 3, 2012),
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (version 5.0, published February 28, 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/December 20, 2000 and Version 2.1(a)/September 21, 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).

<u>For purposes of Part C.V (Confirmation Practices) only:</u>

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

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

- EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005),
- EFET Master Netting Agreement (Version 1.0, published June 2010),
- CPMA Cross-Product Master Agreement (Version published February 2000),

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

We have not examined any other agreements, instruments, records or other documents, and have not made any other enquiries or investigations in connection with the giving of this Opinion.

II. Executive Summary

In this Section of the Opinion, we briefly set out the main conclusions and some of the issues that we identified during our review, which are described in more detail in the other Sections of this Opinion. Please note that this Executive Summary contains only a short description of some of the material issues discussed in the Opinion, which we have considered to be of particular interest to you. This Executive Summary does not enumerate all and does not provide an exhaustive and comprehensive review of the issues raised in the Opinion. For detailed description of such issues, please refer to the relevant Sections of this Opinion.

1. General validity and enforceability of the EFET General Agreement

Based on the assumptions and limitations set out below throughout the opinion, and save as otherwise indicated in this Opinion, it is our view that the EFET General Agreement is a valid, binding and enforceable agreement according to Romanian law.

2. Insolvency Issues

The enforceability of the Agreement may be limited by the provisions of the insolvency regulations limiting creditor's rights generally. In particular:

2.1. Early Termination

Insolvency Law expressly invalidates contractual provisions seeking to (i) terminate the contract, (ii) to forfeit benefit of the term or (iii) to declare accelerated maturity in the case of insolvency of a party on grounds that insolvency procedures have been instituted against that party and gives the insolvency official statutory powers to terminate or maintain contracts. As such, it would not be possible under Romanian law to exercise Early Termination rights as a result of an insolvency-based Material Reason.

However, Romanian legislation provides for a safe harbour with respect to certain transactions which are considered "qualified financial contracts", a notion that can, for the purposes of this opinion, be translated into "derivative financial instruments", or "derivatives" as defined in article 2.1, paragraph (29) of Regulation no. 600/2014 on Markets in Financial Instruments (**MiFIR**). Transactions that fall under the definition of derivative financial instruments provided by MiFIR would benefit of the safe harbour provisions under the Insolvency Law, while all other transactions would not. In our view, spot and forward electricity transactions that must be physically settled are not derivatives and neither are spot transactions with emission allowances. On the other hand, options, swaps and forward transactions that must be settled in cash or may be settled in cash at the option of one of the parties are derivatives, and so are options and swaps relating to electricity that can be physically settled, but only if they are traded on a regulated market, a MTF, or an OTF (except for wholesale energy products traded on an OTF that must be physically settled). In our opinion (which has been informally confirmed with OPCOM), OPCOM cannot be considered as a trading venue with relevance for the purposes of MiFID 2. A more detailed reasoning can be found in Section C.I.1.1.

An insolvency-related event affecting a Credit Support Provider (to the extent that such Credit Support Provider is not a party to the Agreement) is not affected by the provisions of the Insolvency Law. Therefore, the Agreement may be terminated due to an insolvency-related event affecting a Credit Support Provider.

2.2. Close-out Netting

Close-out netting is expressly permitted only in case the General Agreement and the Individual Contracts are qualified financial contracts under the Insolvency Law (please see a more detailed analysis in Section C.I.1.1.).

In case the transactions contemplated under the General Agreement are not qualified financial contracts, it is unlikely that other provisions of the Romanian Law with general applicability (such as binding effect of termination rights under the contract or general set-off) would be sufficient to ensure enforceability of close-out netting provisions in the General Agreement, which, in our view, would not be possible for transactions that are not qualified financial contracts.

2.3. Active Termination and Automatic Termination

The conclusions above generally apply regardless of whether or not Automatic Termination is chosen to be applicable. Accordingly, we do not see any legal benefit in opting for Automatic Early Termination. We have made some recommendations with respect to potential amendments of § 10.5(c) of the Agreement and the application of Automatic Termination in Section C.I.1.3.

3. Other netting and set-off considerations

Legal set-off is expressly recognised by the Civil Code, provided certain conditions are met. Conventional set-off is also recognised in the legal doctrine and jurisprudence. Netting is not recognised as such (except in insolvency legislation), but in our view it is legally possible to perform such operation as an application of contractual freedom rights and set-off principles. In all cases, such rights are limited in the insolvency of a party as described in this Opinion.

4. Non-insolvency related Material Reasons

By virtue of the general principle of the freedom to contract, the parties are entitled to set specific termination events (*mutuus dissensus*) even if they do not necessarily relate to the non-performance of a party. In our view, the right of termination for non-insolvency related Material Reasons and the close-out provisions create legal, valid and binding obligations of the parties and are enforceable as a matter of Romanian law.

5. Multibranch Parties

The ability of Romanian authorities to institute insolvency proceedings against the Romanian Branch of a foreign entity depends greatly on the regulatory regime governing the parent company (*i.e.* whether it is a general corporation or an authorized/licensed entity on the financial market: such as e.g. a bank) and on the territorial scope in which the cross-border effects of insolvency are analysed, in particular whether insolvency targets entities (and their branches) located in the European Union or outside it.

Section C.II hereof sets forth a more detailed description of the particulars of cross border insolvency procedures in the context of the EFET General Agreement.

6. Performance Assurance and Credit Support

Third-party Performance Assurances or Credit Support Documents would not be affected by the insolvency of a Party. Performance Assurance or Credit Support Documents posted by the debtor would still grant the other Party certain benefits and priorities in the insolvency procedure, in accordance with various rules described in this Opinion.

In our view transfer of ownership in collateral as contemplated under the EFET Credit Support Annex should have the intended result and be valid. However, there are a number of possible adverse interpretations which should be considered, and certain vulnerabilities in case of insolvency of the transferor, mainly in relation to transfers made in the "suspect period". Please see Section C.III for more details.

7. Force Majeure. Limitation of Liability

The provisions in the General Agreement regarding Force Majeure and limitation of liability are valid and enforceable under Romanian law.

8. Confirmation Practices

Under Romanian law, contracts can be validly concluded in any form (whether written, oral or by electronic means) as of the time the consent of the parties is expressed. However, the admissibility in court of other means of evidence than written confirmations may be subject to the discretion of the court or challenges by the counterparty, as further described in in Section C IV – in the answers to question *(bb)* under Section C.V.2 below. As such, written confirmation is in our view advisable.

9. Choice of law and Jurisdiction

Under the general principles of law, the governing law for an agreement will be the law chosen by the contracting parties and expressly stipulated in their agreement. However, doctrine and case law are not clear as to whether the above-mentioned provision applies only to contractual relationships already including a foreign element (e.g. nationality, place where contractual obligations are performed) or whether it also applies when there is no foreign element included in the contractual relationship. In our view, the principles set out in article 3 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) should apply and parties should be free to choose the applicable law even in this case, with mandatory provisions of the national law remaining applicable. For more details please see our considerations under Section VII below. Accordingly, we believe that the choice of law provisions of the EFET General Agreement constitute a valid and enforceable provision under Romanian law.

With respect to the submission of potential disputes under the General Agreement to Romanian or foreign arbitration (which is contemplated in the General Agreement), under the Romanian Civil Procedure Code referral of disputes to arbitral courts instead of ordinary courts is generally accepted, except for certain types of disputes. However, the potential disputes contemplated under the General Agreement would not fall under the exclusive jurisdiction of Romanian Courts. Therefore, the referral to international or local arbitration would be valid. However, please note that ordinary courts may still judge the case if the defendant does not challenge this in formulating his defence, or in case the arbitral tribunal cannot be constituted because of the conduct of the defendant. Furthermore, ordinary courts may take provisional urgent matters in the interest of the claimant or when attachment of assets located in Romania is concerned.

10. Licensing requirements

Section C.VIII below briefly describes the main licensing requirements applicable to electricity trading in Romania.

B. GENERAL ASSUMPTIONS AND LIMITATIONS. RESERVATIONS

We have based our Opinion, unless specifically indicated otherwise, on the general assumptions mentioned under letter (B) of the Instruction Letter.

Also, we have based our Opinion on certain additional assumptions provided below:

- Neither Party is a captive (domestic) consumer;
- All other requirements applicable to the execution of and performance under the EFET General Agreement under any laws other than the laws of Romania that may be applicable to the EFET General Agreement, will be complied with;
- There are no other arrangements between the Parties to the EFET General Agreement that might modify or supersede any of the terms of the EFET General Agreement;
- The EFET General Agreement will be entered into, and each payment and delivery made thereunder will be made, at arm's length so that no element of gift or undervalue from one Party to the other Party will be involved; Save from what is discussed under Part VI (Core Provisions), no provision of the EFET General Agreement that is necessary for the giving of this Opinion has been altered in any material respect; and
- The EFET General Agreement will be entered into prior to the formal commencement of any insolvency procedure of any of the Parties.

Where so instructed in the Instruction Letter, we have made other additional assumptions as stated in the relevant parts of the Opinion.

Please note that, given the fact that the EFET General Agreement has been drafted in a way to enable the Parties to be as flexible as possible, and given that the EFET General Agreement may be widely amended and modified by inserting specifically negotiated changes into the Election Sheet or other Annexes, Appendices or Schedules thereto, it is impossible to render an exhaustive and final legal opinion that would cover all possible such modifications that are not explicitly envisaged by the EFET General Agreement and their impact on the other provisions thereof.

This Opinion is limited to the issues addressed therein, which we have reviewed in accordance with the Instruction Letter, and which we deemed important to fit the purpose of this document. Where we have considered appropriate, we have presented only a brief overview of the applicable laws and our interpretation based on our understanding of the law, without entering all the details applicable to a particular case or person.

C. ISSUES AND ADDITIONAL ASSUMPTIONS

I. Enforceability of Close-out Netting

1. *Winding-up, Insolvency or Attachment*

For a general overview of the Romanian pre-insolvency and insolvency proceedings applicable to Party A, please see Schedule A of this Opinion.

For the purposes of this Opinion (including Schedule A), any reference to the "**Opening of the Procedure**" generally shall be construed as a reference either to the opening of the general insolvency procedure ("**Opening of the Insolvency Procedure**") or, to the opening of the simplified insolvency procedure ("**Opening of the Bankruptcy Procedure**"). Any reference to an "**insolvency official**" shall be construed as a reference to the judicial administrator or to the liquidator, as the case may be.

1.1. *Brief discussion of Romanian insolvency law as it applies to the contract types listed in Appendix B to the Instruction Letter*

The Insolvency Law does not include specific provisions regulating commodity forward, commodity option, commodity swap or physical commodity electricity transactions.

Consequently, in our view, such transactions fall under the general category of "contracts".

The regime of obligations under a contract, which has not been fully or substantially performed at the relevant time after the date of the Opening of the Procedure, is different depending on whether or not a netting agreement exists, and on whether or not such contracts are considered as qualified financial contracts.

1.1.1. *Qualified financial contracts*

Under Article 5 (point 11) of the Insolvency Law, a "*qualified financial contract*" means any contract having as object operations with (i) derivative financial instruments, (ii) any repo or reverse repo agreement, (iii) any buy-sellback and sell-buyback agreement, (iv) any agreement having as an object securities loan operations performed on regulated markets, assimilated markets or over the counter markets, as these are regulated by the Romanian law.

Note that the Insolvency Law does not provide a definition of derivative financial instruments covered by the specific provisions governing qualified financial contracts and netting. A general definition is provided by Law no. 126/2018 on financial instruments markets ("**MiFI Law**") which transposes into national legislation the provisions of the MiFID 2. We note that the national transposition law contains some errors[1] as regards the definition of derivative financial instruments. On balance, we consider that the courts should give prevalence to the definition of derivative financial instruments under MiFIR (which cross-refers MiFID 2[2]), of which we consider relevant as follows:

(i) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission

[1] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments defines ***derivatives*** as *"[..] those financial instruments defined in point (44)(c) of Article 4(1) of Directive 2014/65/EU; and referred to in Annex I, Section C (4) to (10) thereto*;" (**Article 2 para 1, point 29**) and ***commodity derivatives*** as "those financial instruments defined in point (44)(c) of Article 4(1) of Directive 2014/65/EU; which relate to a commodity or an underlying referred to in Section C(10) of Annex I to Directive 2014/65/EU; or in points (5), (6), (7) and (10) of Section C of Annex I thereto;" (**Article 2 para 1, point 30**); while the national law (MiFI Law) defines ***derivatives*** as "derivatives as such are defined at art. 2 para 1, point 29 of Regulation 600/2014" and ***derivative financial instruments*** as "*derivative financial instruments as such are defined at art. 2 para 1, point 30 of Regulation 600/2014*", without providing a definition for the commodity derivatives.

[2] Annex I, Section C (4) to (10) of Directive 2014/65/EU.

allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

(ii) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;

(iii) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a multilateral trading facility (MTF), or an organized trading facility OTF, except for wholesale energy products traded on an OTF that must be physically settled;

(iv) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned at (iii) above and not being for commercial purposes, which have the characteristics of other derivative financial instruments;

(v) Derivative instruments for the transfer of credit risk;

(vi) Financial contracts for differences;

As such, to the extent a transaction does not fall under any of the definitions above, it would not be considered a *qualified financial contract*. In our view, spot and forward electricity transactions that must be physically settled are not derivatives and neither are spot transactions related to emission allowances. On the other hand, options, swaps and forward transactions that must be settled in cash or may be settled in cash at the option of one of the parties are derivatives, and so are options and swaps relating to electricity that can be physically settled, but only if they are traded on a regulated market, a MTF, or an OTF (except for wholesale energy products traded on an OTF that must be physically settled). In our opinion (which has been informally confirmed with OPCOM), OPCOM cannot be considered as a trading venue with relevance for the purposes of MiFID 2. We note that there is some uncertainty regarding the qualification of certain forward transactions, resulting from the drafting of the MiFID 2 annex 1 (items C6 and C7), with conflicting views with respect to whether or not forward agreements are derivatives, in particular where they are traded on a regulated market, a MTF, or an OTF or when they are not for commercial purposes).

1.1.2. *Safe harbour provisions for qualified financial contracts*

Under Article 89 of the Insolvency Law (our emphasis):

(i) Any transfer, performance of an obligation, exercise of a right, act or fact on the basis of qualified financial contracts, as well as any netting agreement, is valid, can be performed and/or claimed against an insolvent counterparty or an insolvent guarantor of a counterparty, being recognized as the basis for registering a receivable in accordance with the procedure set under the Insolvency Law;

(ii) The only obligation of a counterparty, if such obligation exists under the contract, as a result of netting performed in the conditions provided by a qualified financial contract, shall be that of performing (the equivalent of) the resulting net obligation (of payment or of performing another action) to its counterparty thereof. Also, the only right of a counterparty, if such right exists under the contract, as a result of netting performed in the conditions provided by a qualified financial contract, shall be that of receiving (the equivalent of) the resulting net right (to payment or to the performance of another action) from its counterparty thereof;

(iii) None of the powers granted in accordance with the Insolvency Law to a body responsible with the application of the insolvency procedures shall preclude the termination of a qualified financial contract and/or the acceleration of payment obligations or other such obligations or the accomplishment of a right resulting from one or more qualified financial contracts based on a netting agreement, such powers being limited to the resulting net amount obtained by application of the netting agreement;

(iv) Unless fraudulent intent of the debtor is proven, no judicial administrator/liquidator or court, as applicable, may prevent, request the annulment of or decide to unwind any transaction with derivative financial instruments, including the performance of a netting agreement on the basis of a qualified financial contract.

Also, according to Article 125 of the Insolvency Law, if the debtor is a party to a contract governed by a master netting agreement, which provides for the transfer of certain commodities, titles for commodities or financial assets listed on a regulated commodities, services and derivative financial instruments market, on a certain date or within a certain period of time, and the due date or the respective period occurs on/expires after the date of the Opening of the Procedure, then netting of all the contracts whose terms are governed by the master netting agreement shall be performed and the resulting net amount shall be paid to the debtor or registered with the panel of receivables, as the case may be.

Please note that although Article 125 of the Insolvency Law appears to cover transactions for the transfer of commodities, the definitions of "netting" and "master netting agreement" described below restrict the provision only to those transactions which are also considered qualified financial contracts.

Under Article 5 point 40 of the Insolvency Law, "netting" (bilateral set-off) means the occurrence, in relation to one or more qualified financial contracts, of one or more of the following operations:

(i) The termination of a qualified financial contract and/or the acceleration of any payment or delivery obligations or entitlements under one or more qualified financial contracts entered into under a netting agreement.

(ii) The calculation or estimation of a close-out value, market value, liquidation value or replacement value in respect of any obligation or entitlements referred to under (i) above.

(iii) The conversion of any value calculated under (ii) above into a single currency.

(iv) The determination of the net balance of any values calculated under (ii) above, as converted under (iii), by operation of set-off.

Under Article 5 point 1 of the Insolvency Law, a "netting agreement" (bilateral set-off agreement) means:

(i) Any master netting agreement – any agreement or clause under a qualified financial contract between two parties that provides for the netting of payments or performance of obligations or exercising of rights future or present under or in connection with one or more qualified financial contracts.

(ii) Any master-master netting agreement – any master netting agreement between two parties that provides for the netting between two or more master netting agreements.

(iii) Any subsequent or collateral arrangement related to one or more master netting agreements.

Based on the foregoing, it would result that the protective provisions of Article 89 and Article 125 of the Insolvency Law apply only to transactions that would be considered as qualified financial contracts (i.e. derivative financial instruments as described in Section C.I.1.1 above)). Consequently, the enforceability under Romanian law of Early Termination rights exercisable as a result of an insolvency-related Material Reason would depend on whether or not the EFET General Agreement and/or the Individual Contracts are considered qualified financial contracts under the Insolvency Law.

1.1.3. General descriptions on limitations applicable to set off

Under the Civil Code (Articles 1616-1623), when two parties are concomitantly debtor and creditor towards each other, a set-off will operate by virtue of law between their obligations, and the obligations shall be terminated to the amount of the lesser debt, provided certain conditions are met:

(i) the parties must have reciprocal obligations;

(ii) the receivables must be fungible (e.g. monetary receivables or other interchangeable goods);

(iii) the receivables must exist, they must have matured (i.e. they must be due and payable) and they must be quantified;

(iv) neither receivable shall have been assigned to a third party prior to the operation of the set-off by operation of the law;

(v) neither party shall have previously accepted payment of any of the relevant obligations;

(vi) the receivables must not result from a fraudulent act concluded with the intention of causing a damage;

(vii) the receivables must not correspond to an obligation to return an asset (pursuant to a deposit or a free lease agreement); and

(viii) the receivable must not relate to an asset which cannot be seized under the law;

Provided these conditions are fulfilled, set-off will occur automatically, by operation of the law (although in order to operate in practice, set-off would need to be "invoked" or "activated" by one of the parties). In the absence of such conditions being fulfilled, set-off by operation of the law cannot be invoked after the Opening of the Procedure.

In addition to the above, legal doctrine recognizes that set-off can occur by agreement and, further, that contractual set-off may operate even if the conditions necessary for set-off under the Civil Code are not fulfilled. There is thus no reason, as a matter of Romanian law, to consider contractual set-off to be contrary to any principle of Romanian law prior to insolvency.

In case of insolvency, Article 90 of the Insolvency Law provides that the Opening of the Procedure does not affect the right of a creditor to invoke the set-off of its receivable against the receivable of the debtor, provided that the pre-requisite conditions for the operation of legal set-off are met. The operation of the legal set-off may be ascertained also by the judicial administrator/liquidator. If all the conditions for legal set-off are met, set-off operates also with respect to receivables arising after the Opening of the Procedure. However, contractual set-off (being any contractual arrangement between the parties to set-off reciprocal obligations where one or more of the conditions for set-off by operation of the law are not met) cannot be invoked after the Opening of the Procedure.

Please note that, under Government Emergency Ordinance no. 77/1999 regarding certain measures for preventing incapacity of payment ("EGO 77/1999"), and the secondary legislation adopted in the implementation thereof (*i.e.* the Norms approved by Government Decision no. 685/1999), certain measures have been adopted to reduce financial blockages within the national economy. EGO 77/1999 provides that all companies having debts older than 30 days must report them to the Ministry of Economy and Commerce – Settlement Service, in order for them to be included in a centralized set-off mechanism for overdue debts. EGO 77/1999 has been amended in 2017 so as it currently refers to the obligation to use this set-off mechanism only for companies where the state is a shareholder (even a minority one), but the secondary legislation has not been updated and still refers to any Romanian legal person. In our view, under these circumstances, this requirement no longer subsists for companies where the state is not a shareholder.

The secondary legislation contains provisions which appear to indicate that no set-off is permitted for debts exceeding 10,000 RON unless this is done within the Settlement Service provided by the Ministry of Economy and commerce and based on specific forms

(Article 3 of Government Decision no. 685/1999 specifically provides that, after the date of its entry into force, no other set-off documentation – other than as allowed by/provided therein – may be used for setting-off purposes).

It is unclear whether this applies only to debts older than 30 days or also to other debts. It is also unclear whether the provisions above would apply even in cases where the law expressly allows netting or set-off as part of an insolvency procedure or otherwise, or whether it applies to contracts concluded with foreign persons or to debts expressed in foreign currencies. While the sanction imposed by EGO 77/1999 (a fine up to 5,000 RON) seems to apply only for failure to report overdue debts, we have reviewed some older case law under which accounting entries in relation to bilateral set-offs were invalidated for failure to use the forms and the settlement process provided by the norms discussed above. In our view, even for companies where the state is a shareholder, the netting mechanism contemplated under the EFET General Agreement does not fall under the reporting and set off requirements described above unless it involves debts older than 30 days, and even in this case, the implications of such requirements would be unclear.

Our unofficial inquiries with the Ministry of Economy and Commerce failed to bring more clarity to on this matter.

(a) *between Parties (of claims arising <u>under</u> the General Agreement)*

Set-off of claims arising under the General Agreement is enforceable between the Parties to the General Agreement, subject to the limitations/provisions applicable to set-off as set out in the introduction of this Section.

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

Set-off of claims arising outside the General Agreement is enforceable between the Parties to the General Agreement subject of such amendment, and subject of the limitations/provisions applicable to set-off as set out in the introduction of this Section.

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

Set-off of a third-party claim requires a relevant agreement to be entered into with the third party (unless conditions for set-off by operation of the law are fulfilled).

1.1.4. Legal regime of early termination, set-off and close-out netting under Romanian law

There is no clear distinction under Romanian law between set-off and close-out netting. In our view, close-out netting is a more complex concept, but still an application of the set-off concept in the event of termination of multiple transactions. Romanian law provides certain separate rules for set-off and close out netting in the context of insolvency legislation, as described in more detail above.

Under Romanian law, a party to an agreement is generally entitled to terminate the respective agreement under circumstances justifying such termination but (absent any specific termination clauses) the court intervention in this respect is required. The term "early termination" may be translated into Romanian both as rescission (*rezolutiune*) and as termination (*reziliere*).

While the effect of rescission (*rezolutiune*) applies to the termination of the agreement with retroactive effect (and can be invoked only in case of contracts providing for a one-off obligation/performance required from both parties) and, as a result, the parties are restored to their original position prior to the entering into the agreement (the *status quo ante*), the effect of termination (*reziliere*) is the termination with effects only from the termination date.

Under the Civil Code, termination (other than as declared by the court) may, if parties so agree, either be triggered by notice of the innocent party or operate automatically. However, certain conditions must be met: (i) the reason for termination must be material enough to justify it and (ii) the debtor must be formally put in default (unless he is in default by virtue of law). In addition, in order for termination to operate automatically, the contract should be clear as to the exact obligations the breach of which triggers automatic termination. Moreover, there are scholar interpretations claiming that a notice is needed even in case of automatic termination in order to “invoke” or “activate” the operation of such termination. It is not clear whether the materiality of the termination reason is required even in the cases where the parties have agreed expressly on the termination cases, as under the Civil Code there is a provision stating that a contract cannot be terminated unless the breach is material and any clause to the contrary is void. Our opinion is that in case the parties so agree; this requirement is no longer applicable. Moreover, in our view the Material Reasons set out in the Agreement appear to be material enough to justify termination, in particular since the parties so agree, but we cannot exclude challenges on grounds that termination is not justified, in particular where the reasons invoked are not of a nature to prevent the counterparty from performing the agreement. We have made certain recommendations on the wording of the Agreement in Section C IV – in the answers to **question (w)** in order to clarify the legal regime under Romanian law and strengthen the termination clause.

1.2. Opinion on whether the termination of the Agreement, the calculation of the Termination Amount and/or its payment is voidable, challengeable or in any way capable of being invalidated by a liquidator, receiver, other third party or the court

Apart from common ground challenges regarding contractual entitlement or miscalculation of the Termination Amount (and except as specifically provided for in Section C.I 1.3 of this Opinion with respect to the legal issues related to the termination for an insolvency related Material Event), the following specific cases may apply:

Under Article 117(2) letter f) of the Insolvency Law, early repayments made by the debtor within a period of 6 months before the Opening of the Procedure, may be annulled if the due date for such payments had been initially set for a date falling after the Opening of the Procedure. However, if the respective transactions have been performed within the normal course of business, annulment cannot be requested, as per Article 119 of the Insolvency law.

There is some doubt as to whether the insolvency official could not deem the termination, close-out and netting arrangements under various agreements prior to the Opening of the Procedure as "early repayments" within the meaning of the Insolvency Law and accordingly seek to unwind the netting and the transactions and claw back appropriate payments. Opinions have been expressed in doctrine that Article 119 of the Insolvency law would not even apply in case of early repayments. In our view, this would be relevant only in case of voluntary early repayments, and not in case such payments are made by virtue of a binding contract.

1.3. Opinions

Our opinions as expressed in this Section C.I. are based on the following additional assumptions:

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

a) Automatic Termination

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

We do not see any benefits for Automatic Termination to occur for reasons that are not insolvency related. As described in our answer to **question (b)** below, Early Termination for an insolvency-related reason is possible only for qualified financial contracts (i.e. derivative transactions as described in Section C.I.1.1. Even in such case, the benefit would be limited to adding more clarity with respect to the date when such termination would occur, but only in case the Early Termination Date would be designated as being the date of the Opening of the Procedure (as described in the answer to **question (c)** below, there is some lack of clarity as to whether termination and close-out netting would occur for such transactions automatically on the Opening of the Procedure or by following the provisions of the agreement – if different; moreover, such termination would be consistent with other principles of the Insolvency Law that provide for the freezing of all debts and currency exchange rates as at the date of the Opening of the Procedure). If the transaction carried out under the EFET General Agreement fall under the definition of qualified financial contracts, and if the marginal benefits mentioned above are sought, this would involve splitting the Material Reasons listed in § 10.5(c) of the EFET General Agreement into (i) Material Reasons which are not insolvency related; and (ii) Material Reasons which are insolvency related and electing Automatic Termination to apply only for the Material Reasons which are insolvency related, with the Early Termination date being set as the date of the Opening of the Procedure.

We consider that the following Material Reasons listed in § 10.5(c) of the EFET General Agreement fit the description of Material Reasons which are not insolvency related: items (i), (v), (vii), as well as (viii) and (ix) of § 10.5(c) of the EFET General Agreement, provided that the Material Reasons indicated under (viii) and (ix) refer to the events provided under (i), (v) and (vii).

Similarly, the following Material Reasons listed in § 10.5(c) of the EFET General Agreement should be considered as insolvency related Material Reasons: items (ii), (iii), (iv), (vi), as well as (viii) and (ix) of § 10.5(c) of the EFET General Agreement, provided that the Material Reasons indicated under (viii) and (ix) refer to the events provided under (ii), (iii), (iv) and (vi).

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

Our analysis and conclusions expressed in the response provided to **question (b)** below (including the distinction in treatment depending on the qualification of the EFET General Agreement as a qualified financial contract or not) are equally applicable to Automatic Termination. Similarly, differences may exist depending on whether or not the Material Reasons for termination are insolvency related.

b) Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the EFET General Agreement) upon the occurrence of an event described in § 10.5(c) of the EFET General Agreement: (aa) would it be necessary or recommendable to modify the scope of termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would permit the Terminating Party to terminate and/or (ii) adding other Material Reasons upon the occurrence of which it should be entitled to terminate)? bb) are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of Romania) enforceable under the laws of Romania or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?

For a response to point (aa) of this question (b), please see our answer at letter (a) point (aa) above.

As regards question (bb) herein, the right to terminate the Agreement and the Individual Contracts depends on whether or not the Agreement and the Individual Contracts are considered to be qualified financial contracts (i.e. derivative transactions as described in Section C.I.1.1). If they are, then the protective provisions of Articles 89 and 125 of the Insolvency Law (described in Section C.I 1.1.2 above) would apply and Early Termination should be possible. If the Agreement and the Individual Contracts are <u>not</u> considered to be qualified financial contracts, then Early Termination may not be possible or may be impaired as discussed below. To the extent certain Individual Contracts would be deemed to be qualified financial contracts, while others would not, we cannot exclude the possibility that this would result in a segregation of the portfolio of Individual Contracts into one or more separate pools, affording the bunch of Individual Contracts eligible as qualified financial contracts the benefit of the more favourable provisions of the Insolvency Law governing qualified financial contracts, while refusing to apply the same to Individual Contracts not considered as qualified financial contracts, despite the single agreement concept.

With respect to termination of contracts which are not considered as qualified financial contracts, we would note the following:

Article 123 of the Insolvency Law expressly invalidates contractual provisions seeking the termination of a contract solely on the grounds of the Opening of the Procedure. The relevant provision of Article 123(1) of the Insolvency Law now reads as follows: "*Current contracts shall be deemed maintained on the date of the opening of the procedure [...]. Any contractual clauses providing for termination of a contract,* forfeiture from benefit of term or accelerated maturity *on grounds that the procedure has been opened are null and void*".

Consequently, a clause seeking to terminate the EFET General Agreement on the grounds of the Opening of the Procedure against the counterparty shall be deemed null and void, as it would be against the purpose of the law and would diminish the chances of recovery of the business of the debtor and would attempt to circumvent the application and effects of the Insolvency Law. As such, termination for those Material Reasons set out in § 10.5(c) of the EFET General Agreement which relate to the Opening of the Procedure does not appear to be possible.

This restriction does not apply to a clause seeking the termination of the EFET General Agreement on the grounds of the Opening of the Procedure with respect to a Credit Support Provider (to the extent the Credit Support Provider is not a party to the EFET General Agreement).

With respect to termination for Material Reasons set out in § 10.5(c) of the EFET General Agreement which do not relate to the Opening of the Procedure, it is unclear whether the parties may terminate current contracts for grounds other than an insolvency related Material Reason occurring after the Opening of the Procedure, but we incline towards the opinion that such termination would be enforceable in accordance with the terms of the parties' agreement (as the provision of the Insolvency Law invalidating termination by virtue of the Opening of the Procedure represents, in effect, an exception from/a limitation on the parties' ability to contractually agree the terms of their arrangement, and any limitation must be applied strictly, without allowing for an extension of its scope for reasons of (perceived) analogy).

However, we note that under Article 123 of the Insolvency Law, the insolvency official may, within 3 months as of the Opening of the Procedure, choose to continue or terminate any contracts which have not yet been performed or substantially performed by all parties. The same article provides that the insolvency official must reply within a maximum 30 days to any notice issued by the other contracting party under which an answer in respect of the continuation/termination can be requested. Should the insolvency official fail to provide an answer within the above-mentioned term, the contract shall be deemed as terminated as of the date of expiry of the 30 days term.

While it is clear that the insolvency official has the discretion to terminate contracts, it is not clear whether he has the power to maintain contracts which the counterparty is otherwise entitled and willing to terminate in accordance with the terms of such contracts. For instance, in case of credit agreements, the law seems to indicate that the insolvency official may maintain them only with the agreement of the counterparty. However, given that the law does not make such a distinction for other types of contracts, we cannot exclude that the solvent counterparty would be held to maintain (against its contractual entitlement to terminate) those contracts for which the insolvency official so opts, while other contracts may be terminated. The "single agreement" concept could provide some protection in the sense that the insolvency official may be obliged to terminate or maintain that "single agreement".

In all cases, the decision of the insolvency official may be challenged before the insolvency court.

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

For qualified financial contracts:

To the extent the close-out netting provisions of the EFET General Agreement can apply in an insolvency proceeding (*i.e.* it refers to derivative transactions as described in Section C.I.1.1), our opinion is that the provisions of § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination amount are valid and enforceable under Romanian law. However, note that the provisions of the Insolvency Law are not clear in respect of (i) the date upon which the netting is to be performed (as at the date of the Opening of the Procedure/after such date) and (ii) the principles governing such operation. The more likely interpretation is that the netting is to be performed in accordance with the provisions of the General Agreement, considering the provisions of Article 89 of the Insolvency Law. We note however that Article 125 of the Insolvency Law appears to imply that a netting would occur automatically (regardless of whether or not the solvent party serves a notice of Early Termination), presumably at the date of the Opening of the Procedure, so please be advised that there is some lack of clarity in this respect.

For transactions other than qualified financial contracts:

To the extent the EFET General Agreement and the Individual Contracts concluded thereunder cannot be considered qualified financial contracts, and termination cannot be declared or does not lawfully operate automatically in accordance with the provisions of the Agreement, such termination can occur either at the request of the judicial administrator with the consent or deemed consent of judicial administrator under Article 123 of the Insolvency Law quoted above. Even in case the contract is maintained by the judicial administrator, termination may also occur after the Opening of the Procedure if the agreement is breached by the insolvent counterparty (but please note that in such case the Insolvency Law provides that termination needs to be requested in court, thus not being clear as to whether or not the agreement of the parties that termination occurs by notice only would be observed). In all cases of termination described above, the solvent counterparty may request the court for damages, and any damages so awarded would be paid in liquidation with priority over any other debts except for (i) amounts resulting from the liquidation of assets encumbered by secured debts (that are paid to the secured creditors), (ii) expenses required for the carrying out of the insolvency procedure, stamp duties, fees of the insolvency official and other experts, current expenses and similar, (iii) debts resulting from financings granted after the Opening of the procedure and (iv) debts resulting from employment relationships. The Insolvency Law is silent on what principles apply in the case of termination in the cases described above, but we tend to believe that, in such cases, the court will give prevalence to the contractual provisions providing for the effective operation of the netting of all positive and negative Settlement Amounts under such Individual Contracts and for the calculation of the Termination Amount (with the caveat that the Termination Date may not be the one chosen by the solvent counterparty, but, as the case may be, the one agreed or deemed agreed by the insolvency official or the one determined by the court). A different solution (whereby the insolvency official would require the contracting party to pay the market value of the relevant Individual Contracts owing to the debtor's estate, with the inclusion of such party's receivable against the debtor resulting from the rest of the Individual Contracts in the panel of receivables) would be particularly onerous for the contracting party and against the spirit of the law. However, it should be noted that, to our knowledge, these provisions have not been tested in courts and therefore other interpretations are possible.

d) Do the laws of Romania recognize that the close-out netting provisions in section §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or

providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.

As discussed in further detail in Section C.I.1.1, it is unlikely under the relevant Romanian laws that close-out netting can apply to contracts which cannot be considered as qualified financial contracts (i.e. derivative transactions as described in Section C.I.1.1).

As a general remark, Romanian law does not specifically regulate the "single agreement" concept. Notwithstanding the above, we are of the opinion that preserving the "single agreement" concept is advisable, as it may contractually limit the ability of the insolvency official to segregate Individual Contracts and ignore the "single agreement" concept which was considered by the parties as essential to their entering into the EFET General Agreement.

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

Under the Insolvency Law, receivables in foreign currencies are registered in the debt records of the debtor in local currency (*lei*), having been converted into *lei* at the official exchange rate of the NBR applicable on the date of the Opening of the Procedure. This means that all currency exchange risks as of the date of the Opening of the Procedure are borne by the foreign counterparty, not the Romanian debtor.

In short, the amount of the receivable owing by the insolvent debtor as at the date of the Opening of the Procedure is converted into *lei* and frozen for all purposes of the insolvency procedure. The registered amount in *lei* shall, absent any contrary reorganization plan, then be the formal amount owed to the foreign creditor, which amount shall be used for all purposes of distributions in liquidation.

We reiterate that, under Article 80 of the Insolvency law, from the date of the Opening of the procedure no interest, penalty or expense can be added to the principal amount due on that date. Although Article 89 seems to give prevalence to contractual provisions, it is possible that this express provision would affect the calculation of the Settlement Amounts as set out in the EFET General Agreement. From this perspective, the application of Automatic Early Termination for insolvency related reasons may provide some marginal benefits (only in relation to qualified financial contracts), for the reasons set out in the answers to **questions (a), (b) and (c)** above.

f) Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings in Romania are dependent upon, or otherwise affected by, the status of one or more of the concerned parties falling within a particular category or classification of entity. Specifically, do these rights differ as a result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?

The classification of one or more of the concerned parties as falling within a particular category of entity does not materially lead to a differentiation in treatment insofar as termination and close-out rights in insolvency in Romania are concerned. We would like to point out however, that since Romanian legislation does not cover close-out netting and other key aspects in respect of municipalities or counties, it is very likely that our views in this Opinion which are based on the provisions of the Insolvency Law would not be applicable to these types of entities.

2. *Non-insolvency related material reasons*

g) *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?*

By virtue of the general principle of the freedom to contract, the parties are entitled to set specific termination events (*mutuus dissensus*) even if they do not necessarily relate to the non-performance of a party. In our view, the right of termination for non-insolvency related Material Reasons, create legal, valid and binding obligations of the parties and are enforceable.

II. Multibranch Parties

1. *EU Insolvency Proceedings*

1.1. Summary of applicable legislation

Council Regulation (EC) no. 848/2015 on insolvency proceedings (the "**Insolvency Regulation**") is directly applicable in Romania.

As mentioned in the Insolvency Regulation (Recital (19), insolvency proceedings concerning: (i) credit institutions; (ii) insurance undertakings; (iii) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC and (iv) collective investment undertakings are excluded from the scope of the Insolvency Regulation, as they are subject to special arrangements.

The Insolvency Regulation applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation: (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

As far as jurisdiction is concerned, the Insolvency Regulation is based on the general principle that "*the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings*" (Article 3(1)) ("main proceedings" within the meaning of the Insolvency Regulation). For a company or a legal person, the centre of its main interests is presumed (though such presumption is rebuttable) to be the place of its registered office.

As an exception to the general principle above, the court of another Member State (other than the court of the Member State within the territory of which the debtor's centre of main interests is located) shall have jurisdiction, but only if "*the debtor possesses an establishment within the territory of that other Member State*" (Article 3(2)).

The mere presence of an asset or only a bank account is not enough to create this establishment. Consequently, Article 3(2) of the Insolvency Regulation does not grant jurisdiction to open territorial proceedings to the courts of the States where the debtor does not have an establishment. The assets located in such State are encompassed in the main insolvency proceedings, if such proceedings have been opened.

The effects of such latter proceedings ("secondary proceedings" within the meaning of the Insolvency Regulation) are however restricted to the assets of the debtor situated within the territory of the other Member State (Article 3(2) last line). Consequently, several proceedings in relation to the same debtor, which run under the insolvency laws of two or more different Member States, may be opened; however, only one main proceeding (opened in the State where the centre of the debtor's main interest is situated) is allowed, whilst there could be as many secondary proceedings in other States as the debtor possesses establishments in these territories.

The law applicable to insolvency proceedings under the Insolvency Regulation is that "*of the Member State within the territory of which such proceedings are opened*" (article 7(1) of the Insolvency Regulation), known as *lex concursus* or *lex forum concursus*. The exceptions to the application of the *lex concursus* are referred to in article 9-17 of the Insolvency Regulations. These exceptions include set-off rights (Article 9).

As already pointed out, opening of main insolvency proceedings in the opening State where the debtor has its centre of main interests does not preclude the opening of secondary proceedings in other Member States provided that the debtor has an establishment there. Secondary proceedings may be said to service mainly two purposes: (i) they protect creditors, usually local creditors, from the main proceedings, and (ii) at the same time, they assist and support the operation of the main insolvency proceedings.

The opening of secondary proceedings may be requested by the liquidator in the main proceedings or by any other person authorized to do so under local law (Article 37 of the Insolvency Regulation). A creditor, for example, who thinks that his chances will be better in local proceedings than in the main proceedings in another State, may file such a request.

1.2. The law applicable and recognition of insolvency proceedings

Under Article 7 of the Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings were opened (the so called 'State of the opening of the proceedings'). This principle applies both to the main insolvency proceedings and the secondary insolvency proceedings.

The law of the State of the opening of proceedings shall determine the conditions for the opening of these proceedings, their conduct and their closure. It shall determine, in particular (Article 7(2) of the Insolvency Regulation):

(i) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(ii) the respective powers of the debtor and the liquidator;

(iii) the conditions under which set-offs may be invoked;

(iv) the effects of insolvency proceedings on current contracts to which the debtor is a party;

(v) the rules relating to voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

The Insolvency Regulation provides for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition means that the effects attributed to the proceedings by the law of the State in which proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary and the decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinise the court's decision.

The recognition of main insolvency proceedings opened under Article 3(1) of the Insolvency Regulation shall, in accordance with Article 3(2), be limited by the opening of the secondary proceedings. In respect of assets and legal situations which come within the jurisdiction of secondary proceedings, the main proceedings cannot produce their 'automatic' effects – the secondary proceedings protect local interests and for that purpose the national law of that Member State applies.

In turn, secondary proceedings can have their effects only on the assets situated in the State of the opening of such secondary procedure. Recognition cannot imply, therefore, the extension of the effects of those proceedings to property situated in other Member States. Recognition of secondary proceedings limits the universal effects of the main proceedings, which may no longer include the assets situated in the state where those secondary proceedings are opened. The main proceedings must observe that limitation.

1.3. Set-off

Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions have been made for a number of exceptions to the general rule.

Amongst the exceptions to the general rule made by the Insolvency Regulation (which include third parties' rights *in rem*, reservation of title, payment systems and financial markets) the Insolvency Regulation also lays down the principle that if a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way "*set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises*" (Recital (70)).

As such, under Article 9 of the 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 their debtor, where such set off is permitted by the law applicable to the insolvent debtor's claim*".

The principle above, however, does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors under Article 7(2) letter (m) of the Insolvency Regulation.

Note that there is controversy as to how Article 9 of the Insolvency Regulation should be interpreted: in legal literature some authors are of the opinion that the "*law applicable to the insolvent debtor's claim*" only means 'general civil law'; other authors however argue that 'law' also encompasses the 'insolvency law' of the Member State in which insolvency proceedings are opened and that therefore, the Member State where the proceedings are opened shall permit set-off according to the conditions established for insolvency set-off by the law applicable to the debtor's claim.

1.4. Netting

We note that opinions have been expressed in legal literature that there are "*various legal uncertainties on the enforceability of contractual set-off and netting agreements that result from certain provisions of the Insolvency Regulation*"[3].

The main cause of such uncertainty lies in that it is less than clear whether the set-off protection under Article 9 of the Insolvency Regulation encompasses close-out netting – as a result of such uncertainty, the enforceability of close-out netting arrangements in insolvency proceedings concerning non-financial counterparties is unclear.

The protection for close-out netting provisions in Directive 2002/47/EC on financial collateral arrangements (the "Collateral Directive"), which was transposed in Romania through Government Ordinance no. 9/2004 on certain financial collateral arrangements, is not sufficient to overcome this uncertainty, as the Collateral Directive applies only to close-out netting provisions in a financial collateral arrangement or an arrangement of which a financial collateral arrangement forms part.

In addition, Romania has opted to exclude from the scope of Government Ordinance no. 9/2004 (in accordance with Article 1(3) of the Collateral Directive) those financial collateral arrangements in which the collateral taker and the collateral provider do not both belong to one of the listed categories of financial institutions and/or public authorities. As such, the Romanian transposition of the Collateral Directive has not replicated letter (e) of Article 1 providing that the collateral taker and the collateral provider may belong to the following category of persons: "*a person, other than a natural person, including unincorporated firms and partnerships, provided that the other party is an institution as defined in points (a) to (d)*".

Doubts on whether close-out netting is fully protected by the Insolvency Regulation focus around the argument that the process of close-out netting involves elements in addition to

[3] Protection for Bilateral Insolvency Set-off and Netting Agreements under EC Law – a Report by the European Financial Market Lawyers' Group dated October 2004. The references in the report are made to the old Insolvency Regulation (no.1346/2000), however the conclusions are still applicable as the new Insolvency Regulation contains identical provisions regarding set-off.

set-off, such as early termination and acceleration of claims, which are themselves contrary to mandatory insolvency law rules, and which are therefore not covered by the protection for set-off in the Insolvency Regulation. It has been also held in legal literature that set-off and netting are two distinct legal concepts and that the lack of specific protection for netting in the Insolvency Regulation indicates that it did not intend to protect close-out netting.

It should be noted that, to our knowledge, experience of Romanian courts with cross-border insolvency procedures is little to none and consequently, legal doctrine and jurisprudence have not yet addressed the matters discussed herein.

2. *Non-EU insolvency proceedings*

Romanian courts have authority to open insolvency proceedings with respect to debtors located in Romania. A non-EU legal entity is deemed to be located in Romania even where it maintains in Romania a branch, agency, representative office or any other similar unincorporated entity without distinct legal capacity.

The Opening of the Procedure vis-à-vis the non-EU debtor in its own state is – unlike the similar situation in EU insolvency proceedings – not automatically recognizable in Romania and the foreign representative is required to file for formal recognition of the decision ruling on the Opening of the Procedure before the Romanian courts.

Romanian courts shall be entitled to refuse the recognition of a foreign insolvency procedure, as well as suspend the execution of the resolution ruling on the Opening of the procedure if (and only to the extent) (i) the resolution ruling on the Opening of the Procedure is the result of a fraud perpetrated in the foreign proceedings or (ii) the resolution breaches the *ordre public* of Romanian private international law.

In cases where a Romanian insolvency proceeding is opened in respect of the Romanian branch of a non-EU debtor, or against its assets, the Insolvency Law provides for assurances to foreign creditors as to the equality of treatment of their receivables within the Romanian insolvency procedure (i.e. foreign creditors enjoy the same rights with respect to the opening of and participation in the Romanian insolvency proceeding and the provision above shall not be interpreted in the sense of modifying the order of preference of receivables covered by the procedure and receivables of foreign creditors shall not be ranked lower than non-secured receivables).

3. *Romanian Multibranch Parties*

Our opinions in this Section II.3 are based on the following additional assumptions:

- The relevant EFET General Agreement is governed by any law (including English or German law or the laws of Romania);
- Party A has entered into the Individual Contracts under the EFET General Agreement through offices in Romania, 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 Romania.

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

There would be no change in our conclusions under C.I.1. or C.I.2 above based on the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency.

Under Romanian Company Law, branches are defined as secondary offices without distinct legal capacity; as a consequence thereof, branches cannot acquire rights or assume liabilities in their own name and any transactions entered into via a branch are considered for all intended purposes transactions entered into by the parent company (and the parent company shall be deemed the holder of all rights and obligations deriving from such contract).

i) Would the EFET General Agreement be treated as a single unified agreement by the Romanian receiver under the laws of Romania, 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?

As branches are considered under the Romanian Company Law as without distinct legal personality, any and all rights and obligations deriving from contracts entered into via such branch are deemed as occurring directly in the patrimony of the parent company.

Consequently (although note that we have not identified any black letter of law with respect to this hypothesis) we would expect the Romanian insolvency official to treat the EFET General Agreement and all Individual Contracts concluded under it as a single unified agreement, irrespective of the fact that some Individual Contracts may have been concluded through foreign branches in a country where close-out netting may be unenforceable.

However, given the absence of any legislative guidance to this effect, as the lack of any relevant case law or practice, our opinion on the matter above can only be purely speculative.

4. *Foreign Multibranch Parties*

Our opinions in this Section II.4 are based on the following additional assumptions:

- The relevant EFET General Agreement is governed by any law (including English or German law or the laws of Romania);
- A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interests in a country ("**Country H**") other than Romania, has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in, and subject to the laws of Romania (the "**Romanian Branch**");
- After entering into these Individual Contracts and prior the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

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

4.1. EU insolvency proceedings – corporations

Based on the Insolvency Regulation, we would opine as follows:

(i) upon opening of insolvency proceedings by the competent authorities in Country H (where the centre of main interests of Party F is located), the decision on the opening of insolvency proceedings would be automatically recognized in Romania, without the possibility of further scrutiny by the Romanian courts;

(ii) provided that no secondary insolvency proceeding in Romania is opened, the main insolvency proceeding in Country H should encompass all the assets and liabilities of the Romanian Branch, such assets and liabilities being handled as part of the proceedings for Party F in Country H;

(iii) however, despite the principle of unity and universality of the main insolvency proceedings in Country H, secondary insolvency proceedings may be opened in Romania, in accordance with Article 3(2) and Article 34 of the Insolvency Regulation;

(iv) such secondary Romanian insolvency proceedings are circumscribed to winding-up/liquidation procedures and shall be restricted to the assets of Party F situated within the territory of Romania;

(v) pursuant to Article 37 of the Insolvency Regulation, the opening of secondary proceeding may be requested by (a) the liquidator in the main proceeding; or (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested;

(vi) consequently, our opinion is that any creditor of the Romanian Branch whose receivable against the Romanian Branch qualifies for the purposes of initiating insolvency proceedings would be able to request the opening of secondary insolvency proceedings in Romanian with respect to the Romanian Branch and such right is not limited by a prior or concomitant endorsement of such action by an insolvency official.

4.2. EU insolvency proceedings – credit institutions and capital markets entities

There would be no separate proceedings in Romania with respect to the assets and liabilities of the Romanian Branch; the insolvency procedure (if any), would be initiated and fully realized in Country H, encompassing the assets and liabilities of the Romanian Branch, without the further ability of the Romanian authorities or, as applicable, the creditors of the Romanian branch to open separate insolvency proceedings against the Romanian Branch.

4.3. Non-EU insolvency proceedings

The applicable legislation governing the cross-border effects of insolvency outside the scope of the territorial application of European Union regulations and directives (as implemented in Romania) seem to indicate that the Romanian authorities would be entitled to open separate insolvency proceedings with respect to Romanian branches of non-EU entities (irrespective of their classification as corporations, credit institutions or capital markets authorized entities).

We would note, as a general remark, that the applicable legislation governing the treatment of multibranch parties outside the context of EU regulations is lacking in clarity and it is difficult to determine the exact regulatory regime and practical constraints of the type of insolvency procedures discussed in this Section. However, given the fact that Insolvency Law specifically allows (Article 300) the opening of secondary proceedings in Romania after the opening (and recognition) of main foreign proceedings, provided that the debtor has an establishment in Romania, our view is that the Romanian insolvency official would be acting within its prerogatives provided by the law in initiating a separate insolvency procedure against the Romanian branch, without having to defer to the main insolvency procedure commenced in Country H.

At the same time, the Insolvency Law does not expressly nominate the parties with an entitlement to request the opening of the procedure; however, it is our opinion that the opening of the secondary insolvency procedure in Romania in relation to the Romanian branch of such non-EU debtor can also be requested by a creditor.

We would note that there is virtually no known practice or judicial or other guidelines with respect to the conduct of such secondary insolvency proceedings and the scope of application thereof, for which reason our conclusions above should be not be construed as providing a final and definitive interpretation of the law on the matters discussed above.

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

4.4. EU insolvency proceedings – corporations

Under Article 3(2) and Article 34 of the Insolvency Regulation, secondary insolvency proceedings may be opened against the Romanian Branch of Party F in Romania. The effects of these proceedings however, shall be restricted to Party F's assets situated in the territory of Romania.

The extent to which Party F's position under the EFET General Agreement would be included in the category of assets deemed as situated in Romania depends on whether the correlative claims which Party F may make on the basis of the EFET General Agreement would be themselves deemed as situated in the territory of Romania.

In respect of claims, the Insolvency Regulation defines 'the Member State in which the assets are situated' as being "*the Member State within the territory of which the third party required to meet them has the centre of his main interests*" (*i.e.* claims arising from the EFET General Agreement or Individual Contracts concluded thereunder with Romanian counterparties would appear to qualify as assets situated in the territory of Romania).

However, we cannot definitely conclude as to whether, in the situation above, the insolvency official will preserve the "single agreement" concept with respect to the EFET General Agreement and all Individual Contracts concluded under it or pick and choose only those Individual Agreements concluded by the Romanian branch and under which its position is positive/favourable and enforce them against the counterparty individually.

Therefore, we cannot exclude the possibility that the Romanian insolvency official may require the counterparty of the Romanian Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Romanian 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.

However, at the current stage of the insolvency legislation and case law, a conclusive opinion on how the insolvency official would choose to address the matters discussed herein would be purely speculative.

4.5. EU Insolvency proceedings – credit institutions and capital markets entities

As discussed above, there would be no separate insolvency proceedings opened against the Romanian branch of Party F, as the principles of unity and universality of insolvency proceedings (which apply within even stricter parameters in respect of licensed entities such as those analysed under this Section) prevents the opening of secondary insolvency proceedings in Romania. The competent empowered authorities/persons in the home state of Party F shall have sole and exclusive powers with respect to Party F and all of its branches, including the Romanian branch.

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

To the extent Party F does not have a Romanian Branch, but merely assets located in Romania (and irrespective of the specific nature of Party F as being a corporation, bank/credit institution, investment firm, investment service provider or investment fund management company), it would not be possible to open secondary insolvency proceedings in Romania and all assets of Party F located in Romania would be handled solely and exclusively as part of the proceedings for Party F in Country H, provided that Party F is an entity whose centre of main interests is located in a EU member state.

With respect to the cross border effects of a secondary insolvency procedure opened in Romania with respect to the estate of a non-EU debtor (prior to the opening and recognition of a main insolvency procedure in the third state where the non-EU debtor is headquartered), as mentioned above in Section C.II.4.3 such secondary insolvency proceeding may also be opened with respect to assets of the non-EU debtor in Romania (including immovable assets), without it being necessary for Party F to have established a branch in Romania. Our considerations under Section C.II.4.4 above apply *mutatis mutandis*, to this situation.

III. Collateral

Our opinions as expressed in this Section III are based on the additional assumptions mentioned under Section C, point III of the Instruction Letter.

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

Under the laws of Romania, the transfer of Eligible Credit Support in cash would be governed by the law chosen by the parties (but Romanian law may nevertheless govern the capacity of Party A and the effects of insolvency with respect to Party A). The issuing of Letters of Credit would be governed by the laws governing the Letter of Credit.

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

In our view, Romanian laws would characterize transfer of collateral in accordance with the will of the parties as expressed in their agreement. However, since the purpose of the Credit Support Annex is to 'collateralize' outstanding obligations, it cannot be completely excluded that a court would treat the transfer of title as creating a security interest in so far as cash is concerned. This may give rise to a number of risks:

(i) The Transferor may request that cash is transferred back to it on the grounds that the transfer was not made for clear consideration and it is not valid as a security (albeit in our view the likelihood of a court approving such request is very low). However, in this case, we consider that even if ordered to transfer back cash, the Transferee may invoke set-off against the Termination Amount, if appropriate (but please note that this would be applicable only in case the Transferor is not insolvent to the extent the conditions for the operation of legal set-off are not met at the time of the Opening of the Procedure); and

(ii) If the Transferor becomes insolvent, it may be possible for the insolvency official to request cancellation of the transfer as being made during the "suspect period" (please see more details in the answer to **question (s)** below) and attempt to take such transfer outside the application of the netting arrangements contemplated by the EFET General Agreement. At the present stage of the Romanian legislation and case law, it is difficult to fully assess the likelihood and the effects of such cancellation.

A possible mitigation would be to include a clause to the effect that in case the transfer of ownership is found not to be valid (and only to that extent), the effect of the Credit Support Annex would be to create a valid security over cash (and thus exclude it from the calculation of the Termination Amount). Such creation of security would entail a number of clauses in order to make it compliant with requirements of Romanian security interests legislation set out in the Civil Code. Although this would not have the originally intended result, it would grant Party B additional protection which would enable it to retain from the cash posted as security any amounts owing to it.

It should be noted that the risk presented above does not exist in the case of Letters of Credit, which are undertakings of third parties.

o) Assuming that Party B receives absolute ownership of the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Romania necessary or advisable, including any filing, registration, notification, stamping, notarization 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. However, to the extent such transfer would be considered a security, it would need to be registered with the Electronic Archive for Securities in order to gain ranking.

p) What is the effect, if any, under the laws of Romania 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?

Substitution of collateral (cash with Letter of Credit or substitution of Base Currency with Eligible Currency or other combinations) may give rise to some issues related mainly to (a) Letter of Credit being less vulnerable to adverse legal interpretations with respect to its nature than transfer of cash for the reasons detailed in the answers to **question (n)** above and (b) currency exchange risks in light of the considerations set out in Schedule A, point 1.5.3.

Substitution of collateral does not appear possible without the consent of Party B, which would either have to transfer back the Eligible Credit Support it holds, or discharge and release the issuer of the Letter of Credit from its obligations (unless the terms of the Letter of Credit provide otherwise).

q) 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 Romania 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"?

We are of the view that § 11 of the EFET Credit Support Annex would be valid.

r) 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?

In the event of insolvency of Party A, the rights of Party B may be affected by mandatory provisions of insolvency legislation related in particular to termination right and enforceability of close-out netting, as well as other matters presented in this Opinion. We are of the view that other than as presented in the answers to **question (s)** below, insolvency of Party A would not have an additional impact on the rights of Party B under the Credit Support Annex.

s) Will Party A (or its receiver or 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 counter party 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?

Insolvency officials have statutory powers in relation to transactions existing at the time of the Opening of the Procedure, but must apply to the tribunal/syndic judge (and obtain an order) to have them exercised.

Note that the Insolvency Law institutes a presumption of fraud with respect to these transactions, and the onus to overturn such presumption lies with the debtor or its counterparty, and in practice the judges generally tend to agree with requests for cancellation of the insolvency officials without giving significant consideration to the transactions at hand. Please see our considerations under Schedule A 1.5.4 regarding the possibility of the insolvency official to request the syndic-judge the annulment of transfers to third parties and for the restitution of the assets so transferred or of the value of other performance by the debtor through certain acts.

Note that, as per Article 119 of the Insolvency Law, none of the transactions mentioned in Schedule A, point 1.5.4 can be challenged if entered into by the debtor within the normal course of its business. The Insolvency Law does not specifically define or provide criteria for determining whether a particular transaction has been concluded "in the normal course of its business" and may be interpreted as simply giving discretion to the syndic judge to decide whether to set aside or maintain such transactions based on general principles, rather than clear legal provisions.

In light of the foregoing, it may therefore be possible for the insolvency official to seek annulment of a transfer of cash made under the Credit Support Annex, if interpreted as a form of early repayment or discharge of debt or as the establishment of a security interest, or even on the grounds of lack of consideration or undue imbalance. If such a claim would be successful, it may be possible that the transfer made under the Credit Support Annex not to be considered part of the General Agreement and falling outside of the application of the envisaged netting, thus granting the insolvent Transferor a separate claim against the Transferee for the relevant amount so transferred.

In our view, Eligible Credit Support provided in the form of Letter of Credit should not be affected by the insolvency of Party A (being an independent undertaking of the issuing bank towards Party B). However, it cannot be excluded that, to the extent Early Termination and close-out netting are not recognized as operative, the insolvency official might seek to claw back from Party B the proceeds of such Letter of Credit. The insolvency official may claim that the netting contemplated by §11 of the General Agreement as supplemented by §11 of the Credit Support Annex is not effective and therefore the application of proceeds from the claim under the Letter of Credit has been made against the provisions of the Insolvency Law.

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

In our view the EFET Credit Support Annex is in appropriate form to create the intended outright transfer of ownership in the collateral to Party B, and there are no further requirements to be observed in Romania to ensure validity of such transfer.

u) Do you have any other recommendations on the subject of collateral that EFET and its members need to be aware of? If yes, please provide detailed answer.

None other than as presented in the answer to **question (n)** above.

IV. General Enforceability

v) Is the EFET General Agreement and any of the Annexes (including the EFET Credit Support Annex) enforceable under the laws of Romania in accordance with its own terms? We would like you to specifically discuss, in a detailed and circumstantiated manner, the provisions on (i) non-performance due to Force Majeure (§ 7 of the EFET General Agreement), (ii) remedies for non-performance (§ 8 of the EFET General Agreement)

and (iii) limitation of liability (§ 12 of the EFET General Agreement) and any other provisions which in your opinion need to be commented on according to the law of Romania, including whether these provisions could and/or need to be further expanded and/or strengthened under the laws of Romania. We are especially interested in provisions that you may believe, for example, infringe upon the ordre public in Romania and that may be challenged by the courts in Romania irrespective of the laws that govern the EFET General Agreement.

Based on the assumptions and subject to the qualifications set out in this Legal Opinion and, save as otherwise described herein, we are of the opinion that the EFET General Agreement constitutes a legally binding and valid agreement, enforceable in accordance with its terms.

We have not identified any provisions in the EFET General Agreement or its Annexes which may be deemed as infringing on the *ordre public* in Romania.

1. *Considerations on non-performance due to Force Majeure under Section § 7 of the EFET General Agreement*

The provisions of § 7 of the EFET General Agreement represent an application of the concept of "*force majeure*" accepted by Romanian practice, as further described below. Therefore, the provisions of § 7 of the EFET General Agreement would be enforceable under Romanian law.

1.1. Force majeure

The Civil Code (art. 1351) explicitly regulates the concept of force majeure which has the following characteristics:

(i) It is unforeseeable (at any relevant time and taking into account the benchmark of a prudent and diligent party), exterior (beyond any party’s control) and absolutely unavoidable/irremovable by the contractual party invoking such force majeure or anyone else;

(ii) It makes impossible the performance of one/more contractual obligations.

The occurrence of a force majeure event excludes the liability for the non-performance/faulty performance caused by such event, unless the law/contract provides otherwise.

The above-mentioned legal definition coincides substantially with the definition of the Force Majeure events contemplated -n the Section § 7 of the EFET General Agreement. Therefore, unless otherwise provided in the agreement (e.g. in the Election Sheet), the occurrence of an event of *force majeure* exonerates the party invoking the impossibility to perform the contractual obligations due to *force majeure*.

1.2. Fortuitous case

The Romanian law makes a distinction between fortuitous cases and force majeure cases. The main differences between them is that the force majeure events are absolutely unpredictable and invincible events e.g. earthquakes, wars etc. while fortuitous cases are also unpredictable events but under certain circumstances may be avoided e.g. temporary interruption of utilities which determined impossibility of the party to fulfil its contractual obligations.

The occurrence of a fortuitous case has the same exonerating effects as an event of *force majeure*. If according to the law, the debtor is exonerated from performing its obligation under a fortuitous case, he will also be exonerated as the in case of force majeure.

It is worth mentioning that insolvency or financial difficulties are not construed as representing fortuitous cases, as the occurrence of such events is not unforeseeable.

1.3. Hardship

Under the Civil Code if the contract performance becomes extremely burdensome for one of the parties due to an exceptional change of circumstances which renders the performance of the obligation obviously unfair, upon request of the interested party the court may order (a) either the adjustment of the contract so as to equitably distribute between the parties the losses and benefits arising out of such change of circumstances, or (b) to terminate the contract. A court order remedying the hardship may be requested only if:

(i) the change of circumstances occurred after the conclusion of the contract;

(ii) the change of circumstances and the extent of such change were not and could not have been reasonably taken into account by the debtor at the conclusion of the contract;

(iii) the debtor did not undertake the risk of change in circumstances and could not have been reasonably considered to have undertaken the risk;

(iv) the debtor attempted, within a reasonable time and in good faith, to negotiate a reasonable and fair adjustment of the contract.

The hardship is not applicable to contracts concluded before the entry into force of the Civil Code (October 1, 2011) even if the hardship occurs after such a moment (but please note that in our view it would apply to Individual Contracts concluded after that date under the EFET General Agreement entered into prior to that date).

Taking into consideration the above, our recommendation would be to include in the EFET General Agreement a clause providing that the counterparty undertakes all the risks related to unpredictable changes in circumstances and confirms that it will not have the possibility to claim in court an adjustment of the agreement. This aggravation of liability clause would also be a standard unusual clause which would have to be explicitly and separately accepted by the counterparty in order to be legally binding and effective.

1.4. Impossibility to perform

If the impossibility to perform a contractual obligation existed upon entering into the agreement and it was an absolute one, then such obligation is null and void. In case such obligation cannot be separated from the rest of the agreement, the entire agreement is deemed null and void.

If the impossibility to perform occurs after the entering into the contract, exoneration of liability can be accepted only if the impossibility to perform occurs due to an event of force majeure or fortuitous case (as differentiated above), unless otherwise provided by the contract.

2. *Considerations on remedies for non-performance under § 8 of the EFET General Agreement*

Our opinion is that § 8 of the EFET General Agreement (Remedies for Failure to Deliver and Accept) would be valid and enforceable under Romanian law.

At practical level, we cannot however exclude actions taken by the Party bound to pay the amounts payable pursuant to § 8 of the EFET General Agreement seeking to have such amounts reduced by a court of law on the grounds that the other Party did not act in a "*commercially reasonable manner*" in negotiating the price when purchasing the undelivered electricity (in respect of a Failure to Deliver) or, respectively selling the unaccepted electricity (in respect of a Failure to Accept) or, similarly on the grounds that any incremental costs included in such amount payable are not "*reasonable and verifiable*".

3. *Considerations on limitation of liability under § 12 of the EFET General Agreement*

3.1. General Enforceability of Exclusion of Liability (§12.2)

Pursuant to Romanian civil law, if a party fails to perform or properly perform its obligations arising from a contract, then such defaulting party is liable to remedy the damage suffered by the other contracting party as a result of such failure.

Under the Civil Code, it is admitted that contracting parties agree upon clauses seeking to limit (or also aggravate) liability, except for actions or omissions caused by wilful misconduct (*e.g.* for intentionally causing damage to the other party) or gross negligence. Clauses seeking to limit liability for wilful misconduct or gross negligence are considered against public order and therefore void and unenforceable.

Wilful misconduct is interpreted as representing the case when a person intentionally commits actions/omissions causing prejudicial consequences.

Gross negligence is generally interpreted as representing the case when the consequences of the actions or omissions are not intentional. The difference between gross and simple negligence is given by the gravity, the gross character of the negligence.

Because both gross negligence and wilful misconduct are psychological attitudes and thus very difficult to be proven, Romanian doctrine and case-law have developed a benchmark of reference to a professional, diligent, prudent type of behaviour that a normal person with the adequate professional background would have in similar circumstances. In addition to the professional-type criterion, Romanian case law takes into account the particular circumstances, the place, the time and any other particularities relevant for the case.

Based on the foregoing, and considering that the provisions of the EFET General Agreement do not seek to limit liability for damages caused by wilful misconduct and gross negligence, but for other types of damages, we are of the opinion that the limitation of liability clauses of the EFET General Agreement are valid and enforceable under Romanian law. However, the limitation liability clause is qualified under Romanian law as a standard <u>unusual clause</u> which according to the Civil Code takes effect only to the extent it is expressly and separately accepted in writing by the counterparty (i.e. the party who may have a claim the extent of which is thus limited). Our recommendation would be (for the cases where Romanian law applies to the Agreement, either by choice or as an application of the principle set out in the Rome I Regulation that mandatory provision of local law would apply where there is no foreign element in the agreement) to include in the Agreement an express and separate acceptance of such clause by the respective counterparty.

3.2. Enforceability of Limitation of Consequential Damages and similar type of liability (§ 12.3, § 12.4)

The concept of "consequential damages" as such is not used in the Romanian legislation. Romanian law is familiar with the following main types of damages:

(i) Effective damages (*damnum emergens*) and loss of profit (*lucrum cessans*)

Effective damages represent the effective losses incurred as a direct consequence of the illicit action or omission of the defaulting contractual party. Loss of profit represents the profit not achieved as a direct consequence of the illicit contractual breach.

Both effective damages and loss of profit are generally recoverable.

(ii) Foreseeable damages and unforeseeable damages

Foreseeable damages can be predicted and evaluated upon execution of the contract, while unforeseeable damages can be predicted only after the breach has occurred.

Foreseeable damages are generally recoverable to the extent they are predictable or have been foreseen upon execution of the agreement. Unforeseeable damages can be recovered only in case of wilful misconduct which is deemed to transfer the liability from contractual to extra-contractual field.

(iii) Direct and indirect damages

Direct damages are considered as a direct consequence of the contractual breach, on the basis of the so-called "cause and effect" relation. If it cannot be determined that the damages represent a consequence of the breach, the damages are deemed to be indirect.

Only direct damages can be claimed in court, irrespective if arising from contractual breaches or extra-contractual illicit actions.

The above description is for illustrative purposes only, as in all cases (save for gross negligence or wilful misconduct) the limitation of liability in §12.3 of the EFET General Agreement would be valid and enforceable, subject to (for the cases where Romanian law applies to the Agreement, either by choice or as an application of the principle set out in the Rome I Regulation that mandatory provision of local law would apply where there is no foreign element in the agreement) express and separate acceptance by the other counterparty.

3.3. Enforceability of Duty to Mitigate (§ 12.5)

The duty to mitigate as set out in the EFET General Agreement is valid and enforceable under Romanian law. However, please note that such duty is not regulated by law, but would be just a contractual covenant which may prove to be difficult to enforce due to the vague character of the undertaking and lack of clear remedies under the General Agreement. Pursuant to the Civil Code, contracting parties are bound by a general duty to act in good faith, which may be deemed to include the duty to mitigate.

As a related matter, Romanian legal doctrine admits that in case the conduct of the injured party has contributed to, or aggravated the prejudice, then the defaulting party may be (on a pro rata basis) exonerated of liability for the damages/part of the damages not attributable to it.

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

In addition to our recommendations on rewording § 10.5 (c) of the EFET General Agreement (please see Section 1.7 (a) above), we present below a brief summary of the main clauses in respect of which we would suggest certain improvements. Note that we have not reiterated in this Section the issues already addressed in other Sections of this legal Opinion with respect to the admissibility of non-written agreements as evidence in court and to potential non-enforceability risks.

§ 3.1 Confirmation of Individual Contracts

As already mentioned above, as a matter of principle, Individual Contracts can be validly concluded in an oral form or via any means of expressing consent. However, as a matter of evidence, it might be difficult to prove the contents or even existence of an orally concluded Individual Contract. Moreover, evidence of consent expressed by other means than in writing may encounter problems in court, as further detailed under Section C.V.2 below. We would therefore recommend that written confirmations be mandatory, not optional under § 3.1 of the EFET General Agreement.

§ 10 Termination

For the cases where Romanian law applies to the Agreement (either by choice or as an application of the principle set out in the Rome I Regulation that mandatory provision of local law would apply where there is no foreign element in the agreement), it would be advisable in order to strengthen the application of the Early Termination to insert a clause in the EFET General Agreement (potentially as a new § 10.6) under which "Early Termination (*in Romanian "reziliere"*), whether under § 10.3 or § 10.4, shall occur by virtue of the law (in Romanian *de drept*) on the Early Termination Date, without any other prior judicial or extra-judicial formality (in Romanian *pact comisoriu*) under art. 1553 of the Civil

Code. A Party shall be considered as being put in default by operation of law (in Romanian *de drept in intarziere*) at the expiry of the term stipulated for the fulfilment of its obligations (or of any notice or grace term provided in the General Agreement) and termination shall operate independently of the putting in default (in Romanian *punerea in intarziere*) of that Party".

§ 10.5 (c) Winding up/Insolvency/Attachment

We would recommend supplementing the list of Material Reasons under § 10.5 (c) of the EFET General Agreement to refer specifically to the two pre-insolvency procedures regulated by the Insolvency Law (namely, the preventive concordat and the *ad hoc* mandate) both of which, although not a clear confirmation of the insolvency of the affected party, are indicative of financial distress at the level of such party which may likely degenerate in insolvency, by amending § 10.5 (c)(ii) as follows: "becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due, including without limitation by becoming subject to a preventive concordat or an *ad hoc* mandate.".

§ 9 Suspension of delivery, § 12 Limitation of Liability, §22 Governing law and Arbitration

As also previously mentioned, such standard clauses are deemed by the Civil Code as <u>unusual clauses</u> which are effective (for the cases where Romanian law applies to the Agreement, either by choice or as an application of the principle set out in the Rome I Regulation that mandatory provision of local law would apply where there is no foreign element in the agreement) only to the extent they are expressly and separately accepted in writing by that counterparty.

In practice, a separate acceptance clause should be inserted making reference to the contractual clauses which are deemed unusual.

V. Confirmation Practices

Our opinions as expressed in this Section V are based on the additional assumptions set out in Section C, point V of the Instruction Letter.

1. *Binding Individual Contract*

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

Under Romanian law, as a general rule, the consent of the contracting parties to an agreement is both necessary and sufficient for an agreement to be validly concluded, irrespective of the form of such agreement (except for specific types of contracts *e.g.* contracts regarding the transfer of immovable property where written and notarized form is required as a condition of validity of the agreement, but this formality is not applicable to the EFET General Agreement). This is an application of the so-called "principle of the freedom of contractual form". However, please see our analysis with respect to means of evidence and recommendation under the answer to question ***(bb)*** under the *Means of Evidence* section below.

y) At what point in time does an Individual Contract agreed upon orally becomes legally binding or enforceable under the laws of Romania?

Unless a written form is required for validity purposes (which, as mentioned above, does not apply to the operations envisaged under the EFET General Agreement), the contract is deemed validly concluded and enforceable when the mutual consent of the contracting parties is met (orally or otherwise).

However, should one of the parties challenge the existence of the contract itself, or the moment when the consent of the parties was granted, or the very content of the agreement reached between the parties, then the provisions of the written evidence of the contract (if any) would be decisive, subject to rules of interpretation applicable in the case of disputed or ambiguous contractual clauses including the following:

- Contractual clauses must be interpreted in such a way so as to afford the ambiguous/unclear provision an effect (rather than none);
- Ambiguous/unclear provisions in a contract shall be interpreted in favour of the person undertaking an obligation thereby (*in dubio, pro reo*).

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

As the contract is generally deemed concluded at the moment the consent of the parties is granted, a Confirmation different from the terms and conditions previously agreed upon would constitute an offer to amend the verbally concluded contract.

A contract cannot be unilaterally amended and, as such, the consent of both parties is necessary for this purpose. Failure of the receiving party to object does not constitute tacit acceptance of the amendment offer, unless otherwise expressly provided for in the contract to be amended, or unless the receiving party commences execution of its obligations under such amended Confirmation.

There is no specific period of time to respond to a Confirmation, but doctrine and case law have stated that in order to communicate acceptance to an offer which does not provide for an acceptance deadline, the time elapsed from the receipt of the offer must be "reasonable". It would be within the power of a court of law to decide what would be considered reasonable in the case at hand.

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

Provided that the EFET General Agreement in itself has been validly concluded between the parties, we deemed that a reference to such EFET General Agreement in the Individual Contract should be sufficient to mark the inclusion of the Individual Contract in the Agreement.

Notwithstanding the above, and given both the potential cherry picking powers of the insolvency official, as well as the lack of legislative clarity as to the ability to apply the close-out netting provisions to all Individual Contracts concluded under the EFET General Agreement, we would advise that the Individual Contracts specifically indicate that the EFET General Agreement governs the parties relations and that all the Individual Contracts concluded under the EFET General Agreement should be treated as one single agreement.

2. *Means of Evidence*

bb) Assumed there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in court: (i) taped recording; (ii) witness' statement; (iii) e-mail or other electronic message or transaction entry system; and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

As already mentioned above, parties are free to choose the form of execution of their agreement and the contract is validly concluded even if consent has been granted in oral form or via electronic means of communication. Nevertheless, in the event of a dispute as to the existence, content or intent of the parties' consent to the formation of the agreement, other corroborative means of evidence may come into play to establish the existence and content of the parties' agreement. While possibly none of the means of evidence discussed below can individually and conclusively contribute to the final determination of the matter in dispute, the corroboration of such evidence may bring about such effect.

Under law no. 506/2004 regarding the processing of personal data and the protection of private life in the field of electronic communications, telephone recordings are generally prohibited unless made by the participants or with the written consent thereof or in other cases provided by law. Moreover, the legislation provides for the possibility of telephone recordings when such recordings are carried out within the limits of a licit professional practice, for the purposes of preserving evidence related to a commercial agreement.

Insofar as witnesses are concerned, the Civil Procedure Code stipulates that witness testimony is not allowed if the value of the agreement exceeds 250 Lei. However, the witness testimony is allowed to prove any agreement against a business professional (i.e. anyone who carries out a business undertaking), regardless of its value, if it was made during the exercise of its activity, excepting the cases where the law requests the written form of the agreement as a condition of validity.

In any event, please note that witness testimony must be approved in advance by the court, which may choose to reject or limit the number of witnesses proposed by the parties.

If a Confirmation is sent via facsimile, e-mail or other electronic means of communication (but not signed with an electronic signature in accordance with legal requirements, as further detailed below), such evidence may be acceptable at the discretion of the court, but would not enjoy the status of a document "in writing" (except for means of electronic communication that reproduce the signature, such as facsimile or scanned copies). Note that e-mail transmissions, for instance, are more likely to be challenged due to the fact that technically they may be easily altered or faked.

An electronic confirmation of a Transaction is valid and enforceable under Romanian law and enjoys the same legal force as a written document if an "extended electronic signature" certified by a special authorized provider is used. According to Romanian law, the extended electronic signature represents an electronic signature which meets the following cumulative conditions: (i) it is uniquely linked to the signatory; (ii) it is capable of identifying the signatory; (iii) it is created using means that the signatory can maintain under his sole control; (iv) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable. A detailed description of the legal regime applicable to electronic signature exceeds the scope of this legal Opinion, but we would be happy to provide additional information if necessary.

Lastly, with respect to contracts executed via facsimile or scanned copy sent via e-mail (which affords the ability of reproducing both the document and the signature), we deem that such facsimile evidence should be considered by a court of law in the category of documents "in writing", which would therefore be admissible before a court of law.

For these reasons, we would recommend that written confirmations be implemented as a matter of practice, even if made via scanned copies.

VI. Core Provisions

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

Other than as stated in this Opinion with respect to our recommendations in relation to automatic termination, amendments to §10.5(c) of the General Agreement and single agreement concept, the elections contemplated by the EFET General Agreement do not appear to change the substance of our conclusions.

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

1. *General remarks*

Due to the fact that the General Agreement may be modified in multiple ways by selecting from the optional provisions or by inserting specifically negotiated changes in the Election Sheet, it is impossible to render an exhaustive and final legal opinion that would cover all possible alterations to the General Agreement.

This legal Opinion must, therefore, be strictly limited to the issues addressed herein, which we have reviewed in accordance with your instructions and which we have deemed important and necessary to fit the purpose of this Opinion regarding the standard form of the General Agreement.

Even a material alteration of the General Agreement does not necessarily imply that the conclusions reached in our legal Opinion are inapplicable to such altered contracts. Whether or not alterations to the General Agreement would affect the conclusions in this legal Opinion can only be assessed taking into account the individual modifications proposed.

2. *Core provisions*

We have been asked to identify any provisions of the General Agreement that we regard as so essential to the General Agreement that a material alteration thereof (or any other arrangement that could have the effect of modifying such provision) could affect the conclusions reached in this Opinion (each such a provision and such provisions together a "**Core Provision**").

We have been asked to confirm that any modification to any provision of the General Agreement that is not a Core Provision would not affect our conclusions reached in this Opinion (each such provision and such provisions together a "**Modifiable Provision**").

We assume that any change to any Modifiable Provision would not have the effect of modifying any Core Provision.

We believe that the following provisions contained in the General Agreement are Core Provisions: § 1.1, § 10.3(a), § 10.4, § 10.5(c) (as amended in accordance with our recommendations above), and § 11.

Subject to the caveat under General Matters above, we believe that modifications to any Modifiable Provision would not affect our conclusions reached in this Opinion, so long as the modifications would not have the effect of modifying any Core Provision.

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

In our view the inclusion of the General Agreement in the EFET Cross-Product Payment Netting Agreement or in the CPMA Cross-Product Master Agreement would not, by itself, materially change the substance of our conclusions or invalidate the agreement. However, an opinion in this respect can be given only on specific cases, with analysis of the other agreements involved, as such inclusion may lead to additional complications with respect to qualification of the various agreements as qualified financial contracts, applicability of set-off rights, or calculations of various termination and netting amounts, which are difficult to assess due to the potential multitude of variables involved (in particular if it is sought to perform close-out netting under the EFET Cross-Product Payment Netting Agreement or the CPMA Cross-Product Master Agreement as part of an insolvency proceeding).

VII. Governing Law, Arbitration and Jurisdiction

Our opinions as expressed in this Section VII are based on the additional assumption as mentioned in Section C, point VII of the Instruction Letter.

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

1. *Governing law issues*

According to the Civil Code, the governing law for an agreement will be the law chosen by the contracting parties and expressly stipulated in their agreement.

Doctrine and case law are contradictory as to whether the above-mentioned provision applies only to contractual relationships already including a foreign element (e.g. nationality, place where contractual obligations are performed etc.) or whether it also applies when there is no foreign element included in the contractual relationship.

We note that the Romanian Supreme Court of Justice stated in a decision rendered in 2007 that in absence of a foreign element, the choice of a foreign law in a contract between Romanian counterparties is null and void. Although the Romanian legal system is not based on precedent, it was the only guideline on the matter.

After EU accession in January 2007, Romania is bound by Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), according to which, contracts concluded between EU based parties can be governed by any law chosen by the contracting parties, unless prohibited by "overriding mandatory provisions" of domestic legislation involved. The Regulation entered into force in 2009. In our view, the entry into force of the Rome I Regulation overturns the view expressed by the Supreme Court on the choice of law, coupled with the provisions of the Romanian constitution which give priority to the EU legislation over Romanian internal regulations, it is our view that the parties are free to choose the law governing their contractual obligations, even if there is no foreign element involved. We note however that in this case, if all relevant elements would otherwise point to Romanian law, all imperative provisions of Romanian law would continue to apply to the contract.

The choice of a foreign law as per the above may raise some difficulties from a practical point of view, e.g. where a Romanian court would be in the position to render a decision, based on a foreign law chosen by the parties. Under such circumstances, the court would have to establish the content of the chosen foreign law. Pursuant to the Civil Code the content of the foreign law may be established by the court by: (i) certifications from the competent authorities of the state that enacted the law, (ii) opinion of an expert or (iii) any other appropriate means. The party which invokes the foreign law may be obliged by the court to prove the content of the foreign law. In case of impossibility to prove the content of the foreign law, within a reasonable term, Romanian law becomes applicable.

Regardless of whether or not there is a foreign element, the choice of a foreign law may not be recognized (and Romanian law would apply instead) if such choice of law would breach the "Romanian public order of international private law". We have not identified any provisions in the General Agreement which would be in breach of the "Romanian public order of international private law" or any "overriding mandatory rules" of Romanian legislation and which would not allow the choice of a foreign governing law (but please note that these concepts are not fully crystallized in doctrine or case law).

2. *Jurisdiction issues*

With respect to the submission of potential disputes under the General Agreement to Romanian or foreign arbitration (which is contemplated in the General Agreement), under the Romanian Civil Procedure Code, referral of disputes to arbitral courts instead of ordinary courts is generally accepted, except for certain limited disputes referring to real estate ownership, family relations etc. The potential disputes contemplated under the General Agreement would not fall under the exclusive jurisdiction of Romanian courts. Therefore, the referral to international or local arbitration would be valid. However, please note that ordinary courts may still judge the case if the defendant does not challenge this in formulating his defence, or in case the arbitral tribunal cannot be constituted because of the conduct of the defendant. Furthermore, ordinary courts may take provisional urgent matters in the interest of the claimant or when attachment of assets located in Romania is concerned.

VIII. Regulatory Regime

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

1. *Capacity to enter into the General Agreement*

1.1. *General principles*

The Civil Code establishes the principle that a company can have all civil rights and obligations, except for those which by their nature or according to the law can be held/incumbent only to natural persons.

Notwithstanding the above, we are of the opinion that regulated entities (such as: credit institutions, insurance undertakings etc.) may not in principle exceed the powers granted to them in their licences. We note that Romanian Company Law no. 31/1990 provides that a company is bound by the acts of its representatives even when they exceed the scope of business, unless the counterparty was or should have been aware of this fact; however it is not clear whether this provision of the Company Law has prevalence over the limitations imposed by the special regulations and the license applicable to regulated entities.

1.2. *Banks, financial institutions, insurance companies and other similar regulated entities*

Regulated entities, such as banks, financial institutions, insurance undertakings etc are bound by law to perform only activities included in their license. In respect of such regulated entities the law imposes either the condition of a sole business object, or specifically indicates what activities may be included in the secondary object of activity of such entity.

Therefore, such entities would be precluded from directly engaging into electricity transactions envisaged by the EFET General Agreement if such transactions would not be covered by their license. It is possible that, to the extent certain transactions contemplated under the General Agreement are also financial instruments (*e.g.* are considered as commodities derivatives), some of these entities would be permitted to perform such transactions (but also depending on their statutes, licenses, prudential requirements etc).

1.3. *Municipalities, public institutions and authorities*

Municipalities, public institutions and authorities can generally undertake activities destined to satisfy the public utility interests/needs that they service. To the extent the purpose of engaging in the electricity transactions envisaged by the EFET General Agreement is to satisfy such public utility needs, then such entities would be deemed to have the capacity to enter into the EFET General Agreement (in some cases, based on public procurement requirements).

In our view, such entities cannot enter into transactions as traders, but only as purchasers for their own needs. We mention that this may prove difficult to check from a practical perspective, but if such entities would act as traders they would need a license, and for the time being this is an unlikely scenario for a Romanian municipality. In addition, we consider that this may be addressed by way of representations and warranties customized in the election sheet to the General Agreement (§21(m) should apply and §21(l) should not). However, nothing prevents them from participating in electricity trading companies.

Also, please note that, in case the counterparty is a public entity, enforcement of receivables against a public entity may be significantly impaired by special legal provisions seeking to limit the rights of the creditors to foreclose on cash accounts or on certain types of public assets. Please note that, as a consequence, other provisions of the EFET General Agreement may be unenforceable.

1.4. *State-owned companies*

The legal regime applicable to State-owned companies is the same as for any other privately-owned company. However, the company must act within the confines of any authorization or license by which it is held to abide.

We note that some of these companies have special requirements with respect to internal or external approval processes, and may be subject to public procurement requirements.

2. *Requirement to have an establishment in Romania*

In order to be allowed to trade electricity or gas in Romania, an entity must be organized either as (i) a Romanian company or (ii) as a secondary presence of a foreign entity, such as a branch, a representative office etc or, in case of an EU entity, (iii) through acknowledgement by ANRE of the electricity trading license obtained in the home state. For details, please see below.

2.1. Legal situation with respect to EU entities

In 2014 the European Commission established[4] that OPCOM had abused its dominant position by requiring all participants on the Day-Ahead and Intraday Markets of the power exchange to have a Romanian VAT registration and consequently to establish business premises in Romania (even though foreign traders already have a VAT registration in their home country). As a result of this decision, the Romanian National Energy Regulatory Authority (ANRE) eliminated the requirement of having permanent establishment in Romania as a pre-condition to obtain the supply/trading license. Notwithstanding the above, the requirement to maintain an establishment in Romania for the entire validity period of the electricity trading license remains applicable for non-EU electricity traders.

Pursuant to ANRE secondary legislation[5], an EU legal entity which intends to trade in Romania and which is properly authorised in its home member state to do so, would, instead of applying for a new electricity trading license in Romania, be able to be registered on the Romanian electricity markets after acknowledgement by the ANRE of the electricity trading license obtained in its home state. In order to obtain ANRE's acknowledgement/confirmation of the electricity trading license obtained by an operator in its home state, the applicant should submit with ANRE a set of documents to include the following: (i) a request containing data and information mentioned in the sample attached to the procedure, (ii) copy of the license or other similar document issued by the competent authorities in the applicant's home state to prove that the applicant has the right to trade electricity, (iii) a notarized affidavit in the form of the sample attached to the procedure as to its undertaking to comply with Romanian law provisions regulating electricity markets in Romania, (iv) estimated turnover for the activity to be performed in Romania, (v) the unique identification code allocated in the European Register of market participants as per Article 12(2) of the Commission Implementing Regulation (EU) No. 1348/2014 of 17 December 2014 on data reporting implementing Article 8 (2) and Article 8(6) of REMIT (information requested as of 7 October 2015), (vi) proof of payment of ANRE analysis tariff. The ANRE acknowledgement decision should be issued within 60 days as of the date the request submitted by the applicant is complete.

2.2. Legal situation with respect to non-EU entities

[4] http://ec.europa.eu/competition/antitrust/cases/dec_docs/39984/39984_861_5.pdf

[5] ANRE Order no. 91/2015 approving the Procedure for the acknowledgment of the right of foreign legal entities registered in EU member states to participate on the Romanian electricity markets (published in the Official Gazette no. 458 dated 25June 2015)

A non-EU entity wishing to be allowed to trade electricity in Romania, must (i) have a secondary presence, such as a branch, a representative office etc. in Romania, and (ii) be granted an electricity trading license by ANRE.

The documentation to be submitted by the applicant to ANRE in order to obtain an electricity trading license is rather complex and the applicant must generally be in a position to demonstrate that it has the technical and financial resources to carry out such trading activities.

Electricity trading licenses are issued for a maximum 10-year term and are subject to certain conditions associated with the license (*e.g.* reporting obligations, payment of contributions and taxes to ANRE and elsewhere).

If, in addition to trading in electricity, an entity also carries out electricity generation, transmission or distribution activities, other specific licenses are required from ANRE.

IX. Other provisions

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

No other recommendations than as otherwise included in the other Sections of this legal Opinion.

D. RESERVATIONS

We would like to draw your attention to the following limitations of this Opinion:

(i) The views expressed in this Opinion are based upon the laws of Romania as at the date hereof, and any change in such laws may affect these views. Unless otherwise stated, we assume no obligation to advise you of any changes concerning any matter discussed in this Opinion, whether or not material, of which we may become aware on or after the date of this Opinion;

(ii) We have made no investigation of the laws of any country or jurisdiction other than Romania and as Romanian lawyers we are not qualified to assess the validity and enforceability of the Agreement under any law other than Romanian law;

(iii) This Opinion is limited to the matters stated herein, and does not extend to and is not to be read as extending by implication to any other matter in connection with the Agreement, or to any other document of a similar nature issued and endorsed by EFET;

(iv) We express no opinion as to matters of taxation, accounting, commercial or any other non-legal matters;

(v) The Civil Code enacted in 2011 has new and sometimes ambiguous or conflicting provisions, which have not yet been interpreted or tested in practice;

(vi) The local practice on the interpretation and application of the MiFI Law is almost inexistent given the novelty of this piece of legislation, thus having the potential of being subject to contradictory views;

(vii) In this Opinion, Romanian legal concepts are expressed in English and not in their original Romanian language. The concepts concerned may not be identical to the concepts described by the same English language terms, as they exist under the laws of other jurisdictions. This opinion may, therefore, only be relied upon under the express condition that any issues of interpretation arising in connection with this Opinion will be governed by Romanian law and be brought before a Romanian court;

(viii) Romania has no rule or precedent upon which one can rely in reviewing or opining on such matters relating to the law, and there is an appreciable likelihood of varying opinions, decisions and interpretations on the same issue of the law by different courts. Thus, rendering of opinions on the law in Romania is less certain by nature than in a jurisdiction which adopts the principle of precedent. Also, court cases are not always published or generally available in public sources;

(ix) As used in this Opinion, the term "enforceable" means that the Agreement is of a type and form that may be enforced by the Romanian courts. It does not mean that each obligation of the Parties contained in the Agreement will be enforced in accordance with their respective terms or in every circumstance, or in foreign jurisdictions or by or against third parties, or that any particular remedy will be available. In particular:

    (a) Enforcement may be limited with respect to specific performance, which may not be available where damages are considered to be an adequate remedy;

    (b) Claims may become barred by prescription, or may be or become subject to set-off or counterclaim;

    (c) A contractual provision that a party will pay certain costs, charges and expenses may not cover costs unreasonably incurred or unreasonable in amount, nor override the court's or arbitral tribunal's discretion to award costs connected with proceedings. A Romanian court or arbitral tribunal may set aside a determination or the exercise of a power or discretion, which has been made or exercised unreasonably or on a basis that is incorrect. This is so even if it is expressly provided that a relevant determination or certificate would be conclusive;

(d) Enforcement may be limited by general principles of equity. In our view, the provisions of the Agreement do not conflict with such principles of equity, although we cannot exclude the possibility that a court or arbitral tribunal may take a different view; and

(e) Enforcement may be limited if any of the terms of the Agreement violate important public policy of Romania; in this respect, unless otherwise described in this Opinion, we are not aware of any principle of public policy or legal order in Romania that would be contradicted by the General Agreement, although it should be noted that in the absence of any legal definition of the term "public policy" or "legal order" and a clear-cut interpretation of those terms stemming from either court decisions or legal doctrine, it is not possible to express a precise and definite view of the exact scope of Romanian "public policy".

(x) It is not possible to predict with certainty how a Romanian court or arbitral tribunal would interpret the Agreement and the rights and obligations of the parties thereunder, because the participants in the court system in Romania, and in particular, many judges, are unfamiliar with, and inexperienced in, the application of the terminology and concepts used in the Agreement and the legal framework governing the Agreement is insufficiently developed and there is no conclusive case law, doctrine or market practice available. It should be noted that market practice with respect to insolvency matters is only now beginning to crystallize in Romania in the context of general economic downturn and that there is no case law, or official guidance and no prevailing opinion among the scholars regarding many of the issues set out in this Opinion.

E. ADRESSEES

This Opinion is for the sole benefit of EFET, its Legal Committee members and any other subscribing entities, may not be relied upon by, or disclosed to, any other person or legal entity without EFET's or Eversheds Lina & Guia's prior written approval, but may be made available by EFET members to the appropriate regulatory authorities.

Yours faithfully,

Eversheds Lina & Guia SCA

SCHEDULE A

1.1. *Overview of Romanian pre-insolvency arrangements for restructuring of debts*

The Insolvency Law regulates certain pre-insolvency alternatives available to an undertaking in financial distress (but not yet in insolvency) aimed at restoring the undertaking's financial situation and, respectively, at reaching an agreement with the creditors on a viable reorganization plan. The only such alternative which appears relevant for the purposes of this opinion is the preventive concordat. Without going into the details of the procedure itself, we outline below a few relevant aspects:

(i) Any company (i.e. debtor) may file with the competent tribunal in the jurisdiction of which it is headquartered a request for the opening of a concordat procedure, nominating at the same time a mediator (from the list of qualified insolvency practitioners);

(ii) Pending the entry into force of the concordat agreement (the homologation by the judge) or, as the case may be, the rejection of the concordat, the debtor may request a temporary suspension on all enforcements; however the court is not obliged to grant such suspension;

(iii) The mediator and the debtor's management shall draft together a concordat offer to be approved by the creditors, as registered in the debtor's books. The concordat offer is essentially a business plan concerning the recovery of the debtor;

(iv) In order for the concordat to enter into force it needs to be approved by the creditors representing 75% of the total undisputed receivables, provided that no more than 25% of the total receivables are in dispute. The approval is expressed through the acceptance of the concordat offer;

(v) Once the concordat has entered into force, the approving creditors may terminate the concordat only by the adoption of a collective decision in this respect (which would require at least 50% + 1 votes based on value of the receivables of the approving creditors);

(vi) Upon entry into force of the concordat, a moratorium will arise in respect of all enforcements concerning the debtor and in respect of the prescription term of the right to request the enforcement of the creditors' receivables against such debtor. The accrual of interest, penalties as well as any debt related expenses shall not be suspended, excepting the cases when the creditors having approved the concordat granted their written consent in this respect. We note that the concordat and the moratorium are binding only on the creditors having approved the concordat, although the provisions of the law are unclear to a certain extent in this respect;

(vii) At the request of the mediator and subject to the granting of adequate security by the debtor to the creditors, the syndic-judge may impose, with respect to the receivables of the non-approving creditors, a maximum 18 months maturity postponement term, period during which no interest, penalties or debt related expenses shall accrue with respect to such receivables. However, provisions regarding postponement are not applicable to qualified financial contracts or to netting operations performed under a qualified financial contract or a netting arrangement. The law further (rather confusingly) stipulates that the title referring to pre-insolvency procedures does not apply to qualified financial contracts or to netting operations performed under a qualified financial contract or a netting arrangement.

We note that the applicability in practice of the pre-insolvency procedures is reduced and consequently, the real effects of such procedures over undertakings facing financial distress are not very clear.

1.2. *General overview of Romanian insolvency proceedings, laws and terminology applicable to Corporations, Partnerships and Publicly-owned Corporations*

1.2.1. General

The current Insolvency Law (Law no. 85/2014) entered into force in June 2014 and it consolidates all pre-insolvency and the majority of the insolvency provisions under Romanian legislation in relation to companies, groups of companies, credit institutions, insurance and reinsurance companies, as well as cross-border insolvency proceedings. The law applies to insolvency proceedings commenced after its entrance into force, any pending procedures being regulated by the former insolvency law (Law no. 85/2006).

The Insolvency Law regulates two types of insolvency procedures:

(i) General insolvency procedure, applicable to all business professionals (i.e. anyone who carries out a business), excepting those who exercise liberal professions or who are subject to special regulations. In the case of the general insolvency procedure the debtor enters after the observation period, successively in the reorganisation procedure and, in case of failure of the reorganisation, into the bankruptcy procedure or, separately, only judicial reorganisation or only bankruptcy procedure.

(ii) Simplified insolvency procedure, applicable to: (a) business professionals natural persons which are subject to the registration in the Trade Registry, (b) family associations, (c) debtors mentioned at (i) above and which fulfil at least one of the following conditions: have no asset in their patrimony, their articles of association or accounting documents cannot be found, their director cannot be found, their headquarters no longer exist or no longer corresponds to the address mentioned in the Trade Registry, (d) legal persons that have been subject to voluntary dissolution prior to the submission of the request to open the insolvency procedure, even if the judicial liquidator has not been appointed or if appointed, his appointment was not registered with the Trade Registry, (e) debtors that have declared in the claim their intention to enter the bankruptcy procedure, (f) any person which performs business activities and who has not obtained the authorisation required by the law for carrying out a business and is not registered with the special publicity registries. In this case, the entities mentioned above enter directly into the bankruptcy procedure or the bankruptcy procedure shall be instated after a 20 days observation period.

The description of the procedure in this Schedule should not be taken as exhaustive, but only as an indication of the provisions that we have considered to be more relevant, reflecting a background against which the conclusions of the Opinion have been set.

1.2.2. Participants to the insolvency procedure

Other than the debtor, the following participants are involved in the insolvency procedure:

1.2.2.1. Courts of law

The tribunal in whose circumscription the insolvent debtor had its headquarter for at least 6 months is competent in respect of all insolvency procedures, except for the appeal against the decisions rendered by the syndic judge (for which the Court of Appeal is competent). The tribunal which renders the decision on the Opening of the Procedure remains competent irrespective of any changes to the insolvent debtor's headquarters during the insolvency procedure. Each insolvency procedure is allocated to a syndic judge from amongst the judges of the tribunal.

1.2.2.2. Creditors' assembly and creditors' committee

Creditors registered in the panel of receivables make up the creditors' assembly. Amongst the most important prerogatives of the creditors' assembly lies the appointment, confirmation or replacement of the insolvency official and voting on the proposed reorganization plan of the debtor.

The creditors' committee may be (but is not mandatory) appointed from amongst the most important (by value) secured and non-secured creditors, and has the following main prerogatives:

(i) Analysing the debtor's economic situation and making recommendations to the creditors' assembly as to a potential continuation of the debtor's activity and the proposed reorganization plan;

(ii) Requesting that the debtor's right of administration be lifted;

(iii) Filing actions for the annulment of fraudulent acts and other patrimonial transfers entered into by the debtor prior to the Opening of the Procedure, if such actions have not been initiated by the insolvency official.

1.2.2.3. The special administrator

After the Opening of the Procedure, the competent corporate body of the insolvent debtor (usually the general meeting of shareholders) appoints a special administrator to manage its interests during the insolvency procedure and participate therein on its behalf. If the debtor's right of administration is lifted, the special administrator's powers shall be limited to representing the interests of the debtor's shareholders. The main prerogatives of the special administrator are:

(i) Participating in the judgment of certain actions relevant to the debtor;

(ii) Proposing a reorganization plan;

(iii) Managing the debtor's activity, under the supervision of the judicial administrator, after confirmation of the reorganization plan;

(iv) After the Opening of the Bankruptcy Procedure, taking part in the elaboration of the inventory of the debtor's assets.

1.2.2.4. The judicial administrator

The judicial administrator is appointed by the syndic judge through the resolution approving the Opening of the Procedure (and may be accepted or replaced by the creditors' assembly). The main prerogatives of the judicial administrator are:

(i) Examining the debtor's economic situation and reporting on the causes which lead to its insolvency, and analysing the possibility of an efficient reorganization of its activities;

(ii) Drafting the reorganization plan;

(iii) Supervising the administration of the debtor's estate (if the debtor's right of administration has not been lifted) or managing the debtor's activity as such (if the debtor's right of administration has been lifted);

(iv) Filing actions for the annulment of fraudulent acts and other patrimonial transfers undertaken by the debtor prior to the Opening of the Procedure;

(v) Maintaining or terminating certain contracts concluded by the insolvent debtor;

(vi) Verifying the receivables claimed by the creditors and drafting the panel of receivables.

1.2.2.5. The liquidator

The liquidator is appointed by the syndic judge through the resolution approving the Opening of the Bankruptcy Procedure. The main attributions of the liquidator are:

(i) Managing the debtor's activity during the bankruptcy procedure;

(ii) Filing actions for the annulment of fraudulent acts and patrimonial transfers, and of other commercial operations entered into by the insolvent debtor prior to the Opening of the Procedure and which are detrimental to the creditors' rights;

(iii) Applying seals and making the inventory of the debtor's assets and taking any conservation measures in respect thereof;

(iv) Verifying the receivables claimed by the creditors and drafting the panel of receivables in the bankruptcy procedure;

(v) Receiving payments on behalf of the debtor;

(vi) Selling the debtor's assets within the liquidation procedure and distributing the proceeds to the creditors in the order of preference provided by law.

1.2.3. Impact of the Opening of the Procedure

The Opening of the Procedure may have a significant impact on transactions entered into by the insolvent debtor, many of which could potentially prejudice its contractual partners. Set out below are some examples of key legal rules that apply as of the Opening of the Procedure:

(i) Any judicial or extra-judicial action, as well as any enforcement procedure against the debtor for the realization of claims/receivables against the debtor or its assets shall be suspended by operation of the law (Article 75 of the Insolvency Law) – for such purpose, the decision ruling on the Opening of the Procedure is also communicated automatically to all courts in the jurisdiction of which the debtor's headquarters are located, as well as to all banks where the debtor holds accounts;

(ii) However, a creditor whose receivable is secured by a mortgage, a pledge or other security interest or right of retention of any type may, in certain cases expressly regulated by the law, request that such suspension be lifted with respect to its specific receivable and therefore immediately satisfy the same from the asset constituted as security (Article 78 of the Insolvency Law);

(iii) During the observation period (*i.e.* the period between the Opening of the Procedure and the approval of a reorganization plan, or entering into the bankruptcy procedure, as the case may be) and during the reorganization phase no service provider (*e.g.* utilities provider) is entitled to refuse, change or temporarily suspend provision of the relevant service to the debtor, if the debtor is a captive consumer in respect of such services, as determined in accordance with the law;

(iv) The Opening of the Procedure suspends the lapse of any statute of limitations governing the actions identified in paragraph (i) above;

(v) Receivables existing as at the Opening of the Procedure will cease to accrue any additional interest, default interest or penalties (Article 80 of the Insolvency Law), unless otherwise subsequently agreed in a reorganization plan (and with the exception of secured receivables, which shall be recorded in the final panel of receivables at the value of the security, as determined through an evaluation);

(vi) Receivables expressed or consolidated in foreign currency shall be registered in the panel of receivables in local currency (*lei* or *RON*), having been converted into *lei* at the exchange rate of the National Bank of Romania applicable at the date of the Opening of the Procedure (Article 107 of the Insolvency Law), which in effect means that a currency exchange risk may be assumed by the foreign counterparty – in short, the amount of the receivable owing by an insolvent debtor as at the date of the Opening of the Procedure is converted into *lei* and frozen for all purposes of the insolvency (and the registered amount in *lei* will, absent anything to the contrary in the reorganization plan, then be the formal amount owed to the creditor, which amount will be used for all purposes of distribution in liquidation);

There is therefore a risk not only with respect to Early Termination on or after the Opening of the Procedure for an insolvency based Material Reason, but also with respect to Early Termination for non-insolvency-related Material Reasons occurring prior to the Opening of the Procedure, but for which the Early Termination Date is set on a date which occurs after the Opening of the Procedure, or for which the Termination Amount has not yet been determined and agreed upon.

1.2.4. Impact of the Opening of the Procedure on certain acts of the debtor

Insolvency officials (judicial administrator or liquidator) have statutory powers in relation to transactions existing at the time of the Opening of the Procedure, but must apply to the tribunal/syndic judge (and obtain an order) to have them exercised. As such, the insolvency official may apply before the syndic judge requesting:

(i) the annulment of transactions entered during a period of two years prior to the Opening of the Procedure if such transactions were entered into with the intent to defraud other creditors (Article 117 of the Insolvency Law);

(ii) the annulment of patrimonial transfers to third parties and the restitution of the assets so transferred (or the value of other performance of the debtor through certain acts) – the following operations of the debtor may potentially be annulled:

  (a) gratuitous acts, performed within a period of 2 years prior to the Opening of the Procedure (Article 117(2) letter a) of the Insolvency Law);

  (b) operations whereby the obligations of the debtor in the transactions are deemed to be obviously "disproportionate" par rapport to the "benefits" of the transaction for the debtor, if entered into within a period of 6 months prior to the Opening of the Procedure (Article 117(2) letter b) of the Insolvency Law);

  (c) acts concluded within a period of 2 years prior to the Opening of the Procedure, with the intent of all parties involved to render assets unavailable for pursuit by creditors or to otherwise prejudice creditors' rights (Article 117(2) letter c) of the Insolvency Law);

  (d) transfers of ownership to a creditor for the purposes of discharging a prior debt or otherwise for the benefit of such creditor, if done within a period of 6 months prior to the Opening of the Procedure, if the amount that such creditor would be able to obtain in the event of the debtor's bankruptcy were smaller than the value of the transfer deed (Article 117(2) letter d) of the Insolvency Law);

  (e) setting up security interests for a previously unsecured receivable, within a period of 6 months prior to the Opening of the Procedure (Article 117(2) letter e) of the Insolvency Law);

  (f) early payments made by the debtor within a period of 6 months prior to the Opening of the Procedure, if the due date for such payments had been initially set for a date falling after the Opening of the Procedure (Article 117(2) letter f) of the Insolvency Law);

  (g) acts of transfer or undertaking of obligations performed by the debtor within a period of 2 years prior to the Opening of the Procedure with the intention to hide/delay the state of insolvency or to defraud a creditor.

  (h) operations concluded within a period of two years prior to the Opening of the Procedure with "related parties" if they are detrimental to creditors.

Note that the provisions of Article 117(2) letters d) to f) of the Insolvency Law quoted above do not apply to operations entered into by the debtor in good faith, in the performance of an arrangement concluded following extra-judicial negotiations with the creditors aiming at a restructuring of the debtor's debts, provided that such arrangement may reasonably be deemed to be conducive to the financial redress of the debtor and are not otherwise aimed at prejudicing and/or discriminating other creditors. The exception also applies to arrangements with creditors concluded within an *ad hoc* mandate and preventive concordat procedure. Also, please note that, as per Article 119 of the Insolvency Law, no patrimonial transfer can be challenged if entered into by the debtor "*in the ordinary course of its business*". This provision is not further explained, and may be interpreted as simply giving discretion to the court to decide whether to set transactions aside, or keep such transactions based on general principles, rather than specific and clear provisions within the law.

To the extent such patrimonial transfer is annulled, the third-party acquirer shall be bound to return to the debtor's estate the transferred asset or, if the asset no longer exists, its value at the date of the transfer (as determined through an expert appraisal). The third-party acquirer which has returned the transferred asset to the debtor's estate shall be recorded as holding a receivable against the debtor for the same value, provided that the third-party acquirer had entered into the transaction in good faith and without the intent to prevent, delay or deceive the debtor's creditors (in which case the third-party acquirer is deemed to have forfeited its receivable against the debtor's estate). The third party's bad faith must be proven.

Note that the Insolvency Law provides that, if the conditions set forth by the law in Article 117 (quoted above) are met, then a relative/rebuttable presumption of fraud in the detriment of the creditors is instituted (the presumption is refutable by the debtor and does not extend to the third-party acquirer or subsequent acquirer). The presumption of fraud is maintained even where, by abusing its procedural rights, the debtor has delayed the moment of the Opening of the Procedure so as to facilitate the lapse of the "suspect periods" above.

The following additional rules apply in respect of current contracts entered into by the debtor:

(i) Current contracts are deemed to be maintained in force upon the Opening of the Procedure and any contractual clauses seeking (i) to terminate the contract, (ii) to forfeit benefit of the term or (iii) to declare accelerated maturity on the grounds of the Opening of the Procedure are deemed null and void. The provisions regarding the preservation of the contracts and nullity of contractual provisions seeking termination or acceleration of obligations are not applicable with respect to qualified financial contracts and bilateral set-off based on a qualified financial contract or an agreement for bilateral set-off;

(ii) For the purposes of maximizing the value of the debtor's estate, the insolvency official, within a period of 3 months as of the opening of the procedure, may choose to maintain or terminate any contract, as well as any lease or long-term contract, provided that such contract has not yet been wholly or substantially performed by all the parties involved. Also, for the purposes of maximising the debtor's estate or if a contract cannot be longer executed, the insolvency official may assign the contract, to the extent it has not been concluded *intuitu personae*;

(iii) The insolvency official must respond to a request from the contracting party requesting termination of a contract – the contract is deemed terminated (a) upon the lapse of a 30-day term from receipt by the insolvency official of the notice from the contracting party, if the insolvency official does not respond to the request; or (b) on the date of the termination notice granted by the insolvency official in response to such request;

(iv) If the seller of an asset has retained title over the sold asset until full payment of the price, then the sale will be considered as performed by the seller and shall not be subject to the judicial administrator's powers under (ii) above;

(v) If a movable asset, which was sold to the debtor but not yet paid by the latter, was in transit at the date of the Opening of the Procedure and the asset is not yet in the possession of the debtor and no other third parties have acquired any rights over the same, then the seller shall be entitled to take the asset back (in this case, the seller shall bear all costs associated with this and shall reimburse the debtor any advance payment of the price) – if the insolvency official permits delivery, the creditor shall be able to recover the price within the general insolvency procedure (by registering its receivable in the panel of receivables);

(vi) If the debtor is subject to a contract included in a master netting agreement providing for the transfer of particular commodities, representative titles of commodities, financial assets listed on a regulated commodities market, services and derivative financial instruments, on a certain date or within a determined period of time, and the due date thereof occurs or the relevant period of time expires after the Opening of the Procedure, a bilateral set off of all contracts included in the master netting agreement shall occur, and the resulting balance shall be paid to the debtor's estate, if positive and, respectively, shall be included in the panel of receivables, if negative;

(vii) Obligations deriving from a pre sale-purchase agreement with a certain date prior to the Opening of the Procedure, whereby the promissory seller is subject to an insolvency procedure, shall be performed by the insolvency official upon request of the promissory buyer if (a) the contract price has been wholly paid or may be paid at the date of the request and the asset is in the possession of the promissory buyer; (b) the price is not under market price (c) the asset does not bear material importance for the success of a reorganization plan and (d) in case of immovable assets, the promise to sell has to be noted in the Land Book.

1.2.5. Publicly available information on insolvency proceedings

Pursuant to the Insolvency Law, following the Opening of the Procedure, the insolvency official shall notify all known creditors (as included in the list of creditors drafted by the debtor), as well as the Trade Registry where the debtor is incorporated or, as the case may be, the Registry of Agricultural Companies and any other public registers where the debtor is registered/incorporated.

Such notice shall also be published – at the debtor's expense – in a largely circulated newspaper and in the Bulletin of Insolvency Proceedings (*Buletinul Procedurilor de Insolventa*).

Following the Opening of the Procedure all other notices or communications required during the insolvency procedure shall be performed through the Bulleting of Insolvency Proceedings. We note that the Bulletin of Insolvency Proceedings is not a free of charge publication and – especially where the debtor's list of existing creditors is incomplete (and therefore direct notification of the creditor by the judicial administrator is not possible) – this method of publicity of the debtor's state of insolvency is potentially prejudicial to creditors, which may see their rights deemed forfeited by the lapse of mandatory terms publicized only in the Bulleting of Insolvency Proceedings.

Also, any petition for insolvency (as with any other court action) is registered by the local tribunal in which the debtor's headquarters are located and made public via the online portal of Romanian courts (http://portal.just.ro) – note however that the system is not wholly centralized and the online records are not always accurate or updated in real time.

Once the insolvency procedure is opened, the syndic judge also orders that the decision on the Opening of the Procedure be communicated to all authorities or institutions maintaining centralized registries in which the debtor's assets are registered (*e.g.* immovable assets are registered in the Land Book).

With respect to the general transparency under Romanian law as to the financial status of companies and corporations, we would note that all companies are required to file their annual financial statements with the Ministry of Finance and, under certain circumstances, with the Trade Registry. On the basis of a simple request, any interested party may obtain a copy of any document submitted with the Trade Registry, while the short form financial statements of the companies can also be viewed on the web page of the National Tax Administration (ANAF) at www.anaf.ro.

1.3. Brief considerations on specific Romanian insolvency regulations as applicable to Banks/Credit Institutions and Insurance Companies

The Insolvency Law contains a special chapter regarding the insolvency of credit institutions. Note that while Insolvency Law deals specifically and expressly only with the bankruptcy of credit institutions, specific pre-bankruptcy special supervision and/or administration procedures may be instituted in relation to banks on the basis of specific legislation (Law no. 312/2015). However, also please note that these pre-bankruptcy procedures are not equivalent to judicial reorganization procedures within the meaning of general insolvency law.

Consequently, a credit institution may undergo certain specific pre-bankruptcy procedures (i.e. special supervision and special administration) in case of financial distress (although note that it is possible for a credit institution to enter bankruptcy directly, without going through the pre-bankruptcy procedures set forth by the specific legislation).

The Insolvency law also regulates the bankruptcy procedure applicable to insurance companies, thus repealing the bankruptcy related provisions of Law no. 503/2004 regarding the reorganization and bankruptcy of insurance undertakings. This law however continues to regulate insurance companies pre-bankruptcy procedures (i.e. *reorganization of insurance undertakings on the basis of a financial redress plan and reorganization of insurance undertakings through special administration)* aimed at restoring a financially distressed insurance undertaking which may be applied by the Romanian Financial Supervisory Authority.

While largely similar to the provisions of the Insolvency Law regulating the insolvency procedure, the bankruptcy of credit institutions and insurance companies is subject to some specific regulations aimed at accommodating the particularities of credit institutions/insurance companies and the specialized regulatory regime applicable thereto.

Generally, the Insolvency Law has unified the regime of close-out netting and qualified financial contracts - the same regime as for unregulated undertakings now applies to insurance companies and credit institutions undergoing the procedure (there were somehow different provisions governing close-out netting in the special legislation relating to these two types of companies).

1.4. Brief considerations on specific Romanian regulations as applicable to Investment Services Provider/Investment Firms/Investment Fund Management Companies

Pursuant to the Romanian Law 126/2018 on financial instruments markets ("**MiFI Law**") which transposes and implements in Romania MiFID 2, the Romanian Financial Supervisory Authority is entitled to impose special administration measures in respect of any authorized entities (including therefore the entities analysed under this Section), if such entities are bordering insolvency for redressing the financial situation of the authorized entity.

If the Romanian Financial Supervisory Authority determines, based on the report of the special administrator, that the entity subject to special administration has not succeeded in redressing the financial situation, it revokes the operating authorization and either rules on the administrative liquidation of the company (subject to the general legal regime of liquidation of companies) or (if the entity is insolvent) upon the filing of a request with the relevant court of law for the bankruptcy of such entity.

1.5. Brief considerations on specific Romanian insolvency regulations as applicable to Municipalities or Counties

The municipalities and counties are subject to special insolvency proceedings enacted by Government Emergency Ordinance no. 46/2013. In addition, certain provisions regarding the insolvency of municipalities/counties were previously instituted by Law no. 273/2006 on local public finances. The aforementioned regulations deal with two particular types of financial distress at the municipality level, namely (i) the financial crisis and (ii) the insolvency of municipalities or counties.

Insolvency of municipalities/counties is deemed to have occurred when: (i) the local municipality is unable to discharge due and payable debts, for a period of more than 120 days after they become due, to the extent the value of such outstanding receivables is in excess of 50% of the annual budget (not taking into account any disputed/litigated debts); (ii) the municipality is unable to pay any salary and related rights provided in the income and expense budget for a period exceeding 120 days from the due date.

Any creditor or group of creditors holding individually or in the aggregate one or more receivables which are certain, liquid and payable against the municipality, with an aggregate value in excess of 50% of the municipality's annual budget, to the extent such receivables have been outstanding for more than 120 consecutive days, may file with the tribunal in whose jurisdiction the municipality is located a request for the opening of insolvency of the respective municipality.

The request may also be filed by the legal representative of the municipality/county (*i.e.* the mayor), who has an obligation to file for insolvency within a 15 day term from ascertaining its state of insolvency.

The commencement and closing of the insolvency proceeding are registered with the local registry of insolvency cases. The Ministry of Public Finances keeps a separate national registry of financial cases to record relevant information regarding recovery proceedings.

We mention that Government Emergency Ordinance no. 46/2013 is silent when it comes to the regime of close-out netting and qualified financial contracts. In our view, in the absence of a special reference to the general insolvency regime, it is doubtful that the provisions of the Insolvency Law would apply in this case (and our view is that they would not apply).