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27 March 2023

Dear Madam, Dear Sir,

Re: Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreements Concerning the Delivery and Acceptance of Electricity and of Natural Gas and its Collateral Arrangements

On behalf of the European Federation of Energy Traders ("**EFET**"), you have asked our advice on certain issues with respect to, *inter alia*, the enforceability under Romanian law of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (the "**EFET General Agreement**") and the validity and enforceability under Romanian law of collateral provided under the EFET Credit Support Annex ("**Collateral**") to the EFET General Agreement (the "**EFET Credit Support Annex**").

As requested, this opinion has been prepared and drafted on the basis of the terms of the instruction letter dated 11 July 2022 ("**EFET Instruction Letter**") which forms part of this opinion.

In addition to the usual netting opinions covering the enforceability of close-out netting in relevant jurisdictions, EFET is also interested in opinions addressing the validity and enforceability of other provisions of the EFET General Agreement, like the Limitation of Liability or the consequences of a Force Majeure ("**General Enforceability**"), in general terms, the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation to be eligible for evidencing a binding Individual Contract ("**Confirmation Practices**"), the validity and enforceability of EFET General Agreement that have been modified by the parties ("**Core Provisions**"), the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**"), the existence of specific licensing requirement or currency or exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("**Regulatory Regime**") and the existence of products other than electricity or natural gas if traded on the basis of Appendices to the General Agreement.

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1. OPINION DOCUMENTS, SCOPE AND EXECUTIVE SUMMARY

1.1. Opinion Documents

For the purpose of this opinion, we have reviewed the following documents:

1.1.1. For Electricity

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

(ii) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000),

(iii) 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),

(iv) 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),

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

(vi) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 6.1, published 4 November 2021),

(vii) EFET French Capacity Certificates Appendix, (Version 1.0, published March 2013),

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

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

(x) EFET EECS Certificate & National Scheme Certificate Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.1 (b), published 4 November 2021),

(xi) UK ETS Allowances Appendix (Power) (Version 1.0, published July 29, 2021),

1.1.2. For Natural Gas:

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

(ii) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 6 January 2003),

(iii) EFET Sample Amendment Agreement to § 14 (VAT and Taxes), the definition of "Other Tax" and "Zero-Rated" in Annex 1, and the Election Sheet to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published July 2007),

(iv) EFET Sample Amendment Agreement to § 8 (Remedies for Failure to Deliver and Accept the Contract Quantity) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published October 2005),

(v) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 16 December 2013),

(vi) EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0 (a)/May 11, 2007 (Version 5.1, published 4 November 2021),

(vii) EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0(a)/May 11, 2007 (Version 4.0 published on 28 February 2018),

(viii) EFET IBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0/4 December 2017),

(ix) EFET PVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 27 March 2020),

(x) Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 20 September 2013),

(xi) Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published September 2022),

(xii) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 26 May 2014),

(xiii) EFET TVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 - 29 May 2020),

(xiv) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/October 2018),

(xv) EFET Polish VP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 14 December 2013),

(xvi) EFET Portuguese VTP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/ June 21, 2021),

(xvii) EFET Ukrainian Customs Warehouse Storage Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/May 2021) (Enclosure 29),

(xviii) EFET Ukrainian Border Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published February 2020),

(xix) EFET Recommended Clauses for use with Ukrainian Counterparties, published February 2020,

(xx) EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 4 December 2017),

(xxi) EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 2016),

(xxii) EFET UK 5:5 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 7 September 2015),

(xxiii) EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 7 September 2015),

(xxiv) Change Letter EFET Trading Hub Europe amendments to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, published 26 July 2021,

(xxv) UK ETS Allowances Appendix (Gas) (Version 1.0, published December 13, 2021),

1.1.3. For Electricity and Natural Gas:

(i) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas Version 2.0/January 6, 2003 and the EFET General Agreement Concerning the Delivery and Acceptance of Electricity Version 2.1/December 20, 2000 (Version 1.0, published 20 November 2005),

(ii) Amendment Agreement IBOR Transition wording for General Agreements, CPPNA, PPA and Appendices, published November 4, 2021,

(iii) EFET Credit Support Annex to the General Agreement (Version 1.0(a), published September, 2005),

(iv) EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010),

(v) EFET Credit Support Annex to the General Agreement (Version 3.1, published November 4, 2021),

(vi) Ratification Letter for Amendments to Covered Principal Agreements governed by English law concerning the giving of notices ("**English Law E-Notice Agreement**") as published by EFET on 13th October 2020, and

(vii) Ratification Letter for Amendments to Covered Principal Agreements governed by German law concerning the giving of notices ("**German Law E-Notice Agreement**") as published by EFET on 13th October 2020 (the English Law E-Notice Agreement together with the German Law E-Notice Agreement, the "**E-Notice Agreement**"),

1.1.4. *For purposes of Part C.V (Confirmation Practices) additionally:* the EFET Electronic Confirmation Agreement (published 20 March 2017),

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

(i) EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005),

(ii) EFET Master Netting Agreement (Version 1.0, published June 2010),

(iii) Cross-Product Master Agreement (Version February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003),

(iv) EFET Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003), and

(v) EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011).

1.2. Scope of the Opinion

This opinion is rendered solely on the basis of Romanian law, as in force as of the date hereof. We have not made any independent investigation and have no knowledge of the laws of any jurisdiction outside Romania.

We shall not be responsible for updating this opinion, unless expressly instructed to do so by you.

As the documents listed in Section 1.1 (*Opinion Documents*) are expressed to be governed by English or German law, Romanian law will only be relevant to the extent that: (i) at least one of the parties is an entity incorporated in Romania, or (ii) jurisdiction is given to Romanian substantive law by Romanian, European or any foreign applicable conflict of law rules or by international treaties to which Romania is a signatory, or (iii) Romanian public policy rules are applicable despite the choice of law made by the parties.

We do not express any opinion as to the recognition or enforceability outside Romania of any decision or judgment obtained before the Romanian courts or of any resolution measure taken by a resolution authority.

This opinion does not address any Romanian tax or accounting issues generally or in respect of any arrangements contemplated hereby.

Capitalized terms used herein, if not otherwise defined and unless the context otherwise requires, shall have the same meanings as given to them in the Instruction Letter or, as the case may be, in the documents listed in Section 1.1 (*Opinion Documents*) above.

1.3. Executive Summary

On the basis of the legal analysis and assumptions and subject to the qualifications set out in this opinion, our conclusions are summarized as follows:

Types of Counterparties *What types of counterparties are covered by the opinion?*	Corporations Banks / Credit Institutions Investment Services Provider / Investment Firms Insurance Companies Investment Fund Management Companies Please also see Assumption 2.2 below	Pages 91-93
Types of Transaction *What types of transaction are eligible for close-out netting?*	Only Individual Contracts which fall under the category of qualified financial contracts are eligible for close-out netting, subject in particular to the recovery and resolution framework under Romanian law. Please see Section 3.1.2.1 (*Romanian Netting Regime*) and 3.1.2.2 (*Eligible Individual Contracts*) below for details.	Pages 12-16
Automatic Early Termination *Does the opinion require or recommend that automatic early termination applies to a counterparty organised in the jurisdictions?*	No.	Pages 21-22
Early termination provision *Is the early termination provision of the agreement enforceable in the jurisdiction?*	The early termination provision of the Agreement is enforceable only with respect to Eligible Individual Contracts.	Pages 22-26
Close-out netting *Is the close-out netting provision of the agreement enforceable in a local insolvency?*	The close-out netting provision of the Agreement is enforceable only with respect to Eligible Individual Contracts.	Pages 27-29
Characterization of collateral *Would laws of jurisdiction characterize transfer of collateral as effecting an unconditional transfer of*	The transfer of collateral should not be re-characterized by a Romanian court as creating a security interest. However, considering that Party A provides Party B with cash collateral in order to collateralize its outstanding obligations,	Pages 48-49

ownership or is there risk of re-characterizing such transfer as creating a security interest?	we cannot completely rule out the risk that such transfer is re-characterized as a security interest.	
Further action required *Is any action required to ensure that ownership title continues to rest with Party B?*	No, unless the transfer of collateral would be re-characterized as creating a security interest.	Pages 49-50
Amendments necessary *Are there any recommended amendments to the standard documents?*	Yes, please see the recommended amendments in Section 3.1.3(A) and in our answers to questions (w), (y) and (dd) below.	Pages 23, 54-58, 60-62 and 66-71
Other remarks *Does the opinion specify issues that you deem to be of specific interest in negotiating an agreement with a counterparty in the jurisdiction?*	No.	-

For the sake of clarity, the above executive summary does not form part of this opinion, as it is given for convenience purposes only. Please see the detailed opinions expressed in Section 3 (*Opinions*) below.

2. GENERAL ASSUMPTIONS

For the purposes of this opinion, we have made the following general assumptions which supplement or amend the assumptions set out in each sub-section of Section 3 (*Opinions*) below, on the basis of which this opinion is also issued:

2.1. Two counterparties enter into an EFET General Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in Romania ("**Party A**"). Neither Party entering into Individual Contracts under an EFET General Agreement is a Multibranch Party[1]. Issues arising when a Party is acting as a Multibranch Party are considered in Section 3.2 (*Multibranch Parties*) of this opinion.

2.2. Party A is a corporation, financial institution or other entity as further described in Annex 1 (*Types of Counterparties*) of this opinion. Notwithstanding the foregoing, for the purposes of Section 3.2.2 (*Romanian Multibranch Party*) of this opinion, we have assumed that Party A is a corporation or a bank as further described in the aforementioned annex. None of the Parties to the EFET General Agreement is acting as a consumer or retail client.

2.3. Each Party to the Agreement is validly incorporated and existing under the laws of its incorporation, is in good standing and validly operating as such under such laws.

[1] A Party is a multibranch party when it operates for the purposes of the EFET General Agreement with two or more branches and in two or more jurisdictions ("**Multibranch Party**").

2.4. The relevant EFET General Agreement is governed by the laws of Germany or England and Wales. With respect to Section 3.1.2. (*Winding-up, Insolvency or Attachment*), Section 3.2. (*Multibranch Parties*) and Section 3.7. (*Governing Law, Arbitration and Jurisdiction*) of this opinion, the assumption is broader in order to cover also EFET General Agreements governed by foreign law.

2.5. Each EFET General Agreement (including each Individual Contract) and document listed in Section 1.1 (*Opinion Documents*) above is (i) legally valid and binding under all applicable laws and enforceable under their applicable laws (other than Romanian law in respect of the issues on which we opine herein), (ii) within each Party's capacity (each party having taken or obtained all necessary corporate, regulatory, administrative approvals or authorizations and other applicable actions to execute, deliver and perform its obligations under the EFET General Agreement and each Individual Contract), (iii) in compliance with each Party's by-laws and in its corporate interest, and (iv) duly authorised, executed and delivered by duly authorized signatories on behalf of each party in accordance with all applicable laws.

2.6. On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Annex 2 (*Transactions under the EFET General Agreement*) of this opinion.[2]

2.7. The Individual Contracts provide for the physical delivery of Commodities[3], green certificates or emission rights in exchange for cash, however, some of them may also provide for cash settlement.

2.8. The provisions of the documents listed in Section 1.1 (*Opinion Documents*) above that are necessary for issuing this opinion have not been varied, altered or waived in any material respects.

2.9. Unless the context otherwise requires, the EFET General Agreement (including all Individual Contracts) and, if applicable, the documents listed in Section 1.1 (*Opinion Documents*) above are entered into, and any payment or delivery thereunder is effected prior to the commencement of any pre-insolvency, insolvency, resolution, financial turnaround, dissolution, liquidation or other analogous proceedings, including the taking of any crisis prevention measures, the application of any resolution tool or power, the commencement of any resolution proceeding (however described under applicable laws) (as detailed in Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion) against either Party or any member of either Party's group. Neither Party at such time is, or can be deemed to be, directly or indirectly, aware that the other Party, or any member of the other Party's group has ceased its payments, faces difficulties that it is not able to overcome and that could lead it to cease its payments or to have any of such above listed proceedings opened against it.

2.10. The EFET General Agreement and each Individual Contract has been entered into or made for legitimate purpose and in particular not with the intention to defraud any third-party creditor's rights against any Party.

2.11. Each Party complies with (i) its contractual obligations under or in connection with the Agreement and each Individual Contract and (ii) all regulatory matters, including without limitation the

[2] Please refer to Section 3.1.2.2 (*Eligible Individual Contracts*) of this opinion on the legal characterization of certain Individual Contracts and in particular of commodity derivatives which, depending *inter alia* on the settlement method, *i.e.*, cash or physical, will either qualify as derivative financial instruments under Romanian law or not.

[3] The term "Commodity" is defined in Annex 2 (*Transactions under the EFET General Agreement*) of this opinion.

obtaining of the necessary authorizations, permissions, licenses, consents and exemptions by or from any governmental, judicial, administrative, supervisory or public bodies or authorities of any country or supra-national organization, the making of the necessary filings, registrations, notifications, disclosures and applicable requirements including under MiFID II[4], MiFIR[5], EMIR[6], REMIT[7] and the Benchmark Regulation[8] and their respective delegated and implementing acts, all applicable requirements regarding public offerings of financial instruments and the solicitation with respect to, or the offering or provision of, banking, insurance, financial or other investment services, and the payment of stamp duties and other documentary taxes and charges. We have also assumed compliance of the documents listed in Section 1.1 (*Opinion Documents*) above with all applicable mandatory provisions of regulatory regimes applicable to each Party.

2.12. No other agreement or instrument, whether in writing or orally, exists between the parties governing the Individual Contracts, which is inconsistent with, or amends, the Agreement and the relevant confirmations, and the EFET General Agreement and all Individual Contracts do not violate any contract, agreement or undertaking to which either Party is a party to.

2.13. The terms of the EFET General Agreement and all Individual Contracts will be agreed on an arm's length basis and all Individual Contracts would be entered into at, or about, the current market values.

2.14. The consent of the signatories of the Agreement was not affected by error, coercion, duress, harm (*leziune*), undue influence.

2.15. The EFET General Agreement and the documents listed in Section 1.1 (*Opinion Documents*) have been executed in writing by the Parties and are the documents effectively used by the Parties to govern their Individual Contracts.

2.16. All obligations under the Agreement are mutual and reciprocal between the Parties in the sense that there are only two Parties; each is personally liable as principal, as regards obligations owing by it and is the sole beneficial owner of obligations owed to it and no third party has any interest in any right of any Party under the Agreement.

2.17. Each Party will perform its obligations under the EFET General Agreement and all Individual Contracts in accordance with their respective terms and all representations, warranties and similar statements set forth in the EFET General Agreement are true and accurate, save where it is assumed below that a Material Reason has occurred (e.g., when we assume that Party A is the defaulting party).

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[4] Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("**MiFID II**").

[5] Regulation (EU) No. 600/2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012 ("**MiFIR**").

[6] Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**").

[7] Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency ("**REMIT**").

[8] Regulation (EU) 2016/1011 of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

3. OPINIONS

Based on the general assumptions set out in Section 2 (*General Assumptions*) above, the additional assumptions set out in each sub-section of this Section 3 (*Opinions*) and subject to the qualifications set out in Section 4 (*Qualifications*) below, we are of the following opinion:

3.1. <u>Enforceability of Close-out Netting</u> (Part C.I. of the EFET Instruction Letter)

3.1.1. Additional Assumptions

For the purpose of answering the questions set out in Section 3.1.2 (*Winding-up, Insolvency or Attachment*) and Section 3.1.3 (*Preventive restructuring frameworks*) below, we have further assumed, as requested in the EFET Instruction Letter, that:

(i) ***Governing Law***. The relevant EFET General Agreement is governed by any law (including English or German law or the laws of Romania);

(ii) ***Pre-insolvency and Insolvency Proceedings***. After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary case under the pre-insolvency and insolvency laws of Romania and, subsequent to the commencement of the (pre-)insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable Individual Contracts for the insolvent counterparty;

3.1.2. Winding-up, Insolvency or Attachment (Part C.I.1. of the EFET Instruction Letter)

Please see Annex 4 (*Romanian Pre-Insolvency and Insolvency Regime*) of this opinion for a short overview of the relevant pre-insolvency and insolvency proceedings which may apply to Party A.

3.1.2.1. Romanian Netting Regime

The enforceability of close-out netting in the context of pre-insolvency and insolvency proceedings is regulated by the provisions of Law no. 85/2014 on pre-insolvency and insolvency proceedings (the "**Insolvency Act**") and the Law no. 312/2015 regarding the recovery and resolution of credit institutions and investment firms (the "**BRR Act**").

The above mentioned enactments set forth a number of derogatory rules to Romanian pre-insolvency and insolvency laws (i.e., "safe harbour" provisions), which apply subject to meeting certain conditions relating to (i) the legal characterization of Individual Contracts entered into under the EFET General Agreement as *qualified financial contracts*, (ii) the legal status of Party A (as identified in Annex 1 (*Types of Counterparties*) of this opinion), and (iii) the conclusion of a *bilateral netting agreement* within the meaning of the Insolvency Act / *netting agreement* within the meaning of the BRR Act, as further explained in Annex 3 (*Romanian Netting Regime*) of this opinion (the "**Romanian Netting Regime**").

As regards the EFET General Agreement and the Individual Contracts meeting all the criteria set out in points (i) to (iii) above (the "**Eligible Individual Contracts**"), the conditions for the applicability of the Romanian Netting Regime would be met and, in the context of the insolvency of Party A, such regime would apply to such Individual Contracts entered into under the EFET General Agreement.

However, if the EFET General Agreement and the Individual Contracts do not meet all the criteria set out in points (i) to (iii) above (the "**Non-Eligible Individual Contracts**"), certain provisions of the Romanian pre-insolvency and insolvency legislation (as detailed in our answer to question (b)(bb) below and in Annex 4 (*Romanian Pre-Insolvency and Insolvency Regime*) of this opinion) may raise a number of legal issues or obstacles to the enforceability of the close-out netting provisions of the EFET General Agreement.

Please refer to Section 3.1.2.2 (*Eligible Individual Contracts*) below for the definition of qualified financial contracts and to see which transactions set out in Annex 2 (*Transactions under the EFET General Agreement*) may not fall under the definition of qualified financial contracts.

3.1.2.2. Eligible Individual Contracts

Under the Insolvency Act, *bilateral netting* may take effect in respect of one or several *qualified financial contracts*. The *qualified financial contracts* within the scope of *bilateral netting* are not defined by listing the types of financial instruments they refer to, but merely as *"(a) any contract covering operations with derivative financial instruments, (b) any repurchase and reverse repurchase agreement, (c) any buy-sellback and sell-buyback agreement and, (d) any securities lending agreements, performed on regulated markets, assimilated markets or over-the-counter markets, as such are regulated by law*"[9].

According to the definition given by Law no. 126/2018 on markets in financial instruments (the "**Markets in Financial Instruments Act**")[10], *derivative financial instruments include*:[11]

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[9] Note that the Insolvency Act does not include a definition for "*derivative financial instruments*", but only a general definition for "*financial instruments*", which does not refer to all types of financial instruments, nor distinguishes between the instruments which qualify as derivative financial instruments and other types of financial instruments. Hence, in order to establish which instruments qualify as derivative financial instruments under Romanian law, one should look at the definitions of financial instruments and derivative financial instruments as set forth under the Markets in Financial Instruments Act. For information purposes, the definition of "*financial instruments*" under the Insolvency Act covers transferable securities, units in collective investment undertakings, money market instruments, futures agreements including cash settled agreements, interest rate forward agreements, interest rate, currency and equity swaps, options on any financial instrument included in these categories including cash settled agreements, as well as currency and interest rate options and derivative financial instruments relating to commodities and any other instrument admitted to trading on a regulated market in a member state or in relation to which a request for admission to trading on such market was made.

[10] The list of **financial instruments** is set forth in Section C of Annex no. 1 of the Markets in Financial Instruments Act and is generally in line with the definition of "*financial instruments*" under MiFID II. "***Derivatives***" are defined under the Markets in Financial Instruments Act by reference to the relevant definition set forth in Article 2(1) point (29) of MiFIR as "*those financial instruments defined in point (44)(c) of Article 4(1) of MiFID II; and referred to in Annex I, Section C (4) to (10) thereto*", being actually the instruments referred to under points (a) to (g) in this Section 3.1.2.2. As regards **commodity derivatives**, there is a minor transposition error under the Markets in Financial Instruments Act, which inaccurately matched the definition of "*commodity derivatives*" under MiFID II with the term "*derivative financial instruments*" under the Markets in Financial Instruments Act. Hence, "***derivative financial instruments***" are defined under the Markets in Financial Instruments Act by reference to the definition of "*commodity derivatives*" set forth in Article 2(1) point (30) of MiFIR as "*those financial instruments defined in point (44)(c) of Article 4(1) of MiFID II; which relate to a commodity or an underlying referred to in Section C (10) of Annex I to MiFID II; or in points (5), (6), (7) and (10) of Section C of Annex I thereto*". The result of this transposition error is that (i) there are two different definitions for derivative financial instruments under the Markets in Financial Instruments Act (i.e., the definition under "*derivatives*" and the one under "*derivative financial instruments*") and (ii) there is no definition for the term "*commodity derivatives*" under such law. We believe that Romanian courts should give precedence to the European laws in this case and consider that the definition for "*derivative financial instruments*" under the Markets in Financial Instruments Act is actually the definition of "*commodity derivatives*" under MiFID II.

[11] Note that Law no. 123/2012 on energy sets out its own definitions as to what constitutes a derivative for the purpose of this legal enactment, as follows: (i) the electricity derivatives' definition reiterates (using an almost identical

"*(a)* *Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;*

(b) *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;*

(c) *Options, futures, swaps, forwards and any other derivative contracts relating to commodities, which can be physically settled, provided that they are traded on a regulated market, a multilateral trading facility* ("**MTF**") *or an organized trading facility* ("**OTF**"), *with the exception of wholesale energy products traded on an OTF which must be settled physically;*

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

(e) *Derivative instruments for the transfer of credit risk;*

(f) *Financial contracts for differences;*

(g) *Options, futures, swaps, forward rate agreements any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics, that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures, not otherwise mentioned in this definition, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, an OTF or an MTF.*[12]"

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wording) the categories of contracts mentioned in points 5, 6 and 7 of Section C of Annex I to the Markets in Financial Instruments Act, and: (ii) the natural gas derivatives' definition consists in a reference to the relevant regulations in force which, in the case at hand, means the provisions of the Markets in Financial Instruments Act.

[12] The general characteristics of "*other derivative financial instruments*" are set forth in Article 7 of Commission Delegated Regulation (EU) No. 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (the "**Commission Delegated Regulation (EU) No. 2017/565**"). Pursuant to Article 7 of Commission Delegated Regulation (EU) No. 2017/565: "*(1) For the purposes of Section C(7) of Annex I to Directive 2014/65/EU, a contract which is not a spot contract in accordance with paragraph 2 and which is not for commercial purposes as laid down in paragraph 4 shall be considered as having the characteristics of other derivative financial instruments where it satisfies the following conditions: (a) it meets one of the following criteria: (i) it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF; (ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue; (iii) it is equivalent to a contract traded on a regulated market, MTF, an OTF or such a third country trading venue, with regards to the price, the lot, the delivery date and other contractual terms; (b) it is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates. […] (3) For the purposes of Section C(10) of Annex I to Directive 2004/39/EC of the European Parliament and of the Council, a derivative contract*

In light of the above, the transaction types listed in Annex 2 (*Transactions under the EFET General Agreement*) of this opinion should fall under the definition of "*qualified financial contracts*", insofar as they are "*transactions on derivative financial instruments*".[13]

Note that the following transactions may not amount to "*transactions on derivative financial instruments*" for the purposes of the EFET General Agreement and therefore such transactions do not benefit from the netting safe harbour afforded to qualified financial contracts under the Insolvency Act:

(a) any transaction (irrespective of the underlying), settled on a "*spot*" or two-day basis[14];

(b) physically settled commodity transactions referred to in point (c) and (d) of the definition above unless:

 (i) the respective commodities are traded on a regulated market, an MTF or an OTF[15];

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relating to an underlying referred to in that Section or in Article 8 of this Regulation shall be considered to have the characteristics of other derivative financial instruments where one of the following conditions is satisfied: (a) it is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event; (b) it is traded on a regulated market, an MTF, an OTF, or a third country trading venue that performs a similar function to a regulated market, MTF or an OTF; (c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.". Moreover, according to Article 8 of the Commission Delegated Regulation (EU) No. 2017/565, "*In addition to derivative contracts expressly referred to in Section C(10) of Annex I to Directive 2014/65/EU, a derivative contract shall be subject to the provisions in that Section where it meets the criteria set out in that Section and in Article 7(3) of this Regulation and it relates to any of the following: […] (c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means with the exception of transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on behalf and in order to allocate the transmission capacity; […]*".

[13] Please note, however, that under Romanian law, the legal characterization of any agreement is at the sole discretionary power of the court.

[14] Pursuant to Article 7 of Commission Delegated Regulation (EU) No. 2017/565 a contract for the sale of a commodity, asset or right shall be considered a spot contract if under its terms delivery is scheduled to be made within the longer of the following periods: (a) 2 trading days; (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period. Article 7 further clarifies that a contract shall not be considered a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the aforementioned period.

[15] It is our view that trades concluded on the centralized markets for electricity or natural gas operated by the entities licensed by ANRE to operate such markets (*e.g.*, OPCOM) do not qualify as "*transactions on derivative financial instruments*", as the markets on which they are concluded do not qualify as "*trading venues*" within the meaning of the Markets in Financial Instruments Act (a view which has also been shared to us by OPCOM by informal means). It is worth noting, however, that there exists a lack of clarity in this respect due to a potential erroneous implementation of Article 2 para. 1 section (14) of Directive (EU) no. 2019/943 of the European Parliament and of the Council (*i.e.*, the definition of the "*energy derivatives*"). Specifically, although the aforementioned text of European law contains a reference to the financial instruments specified in points (5), (6) or (7) of Section C of Annex I to MiFID II, the provision of Law no. 123/2012 of electricity and natural gas which implements the European text does not reference the corresponding provisions of the Markets in Financial Instruments Act. Instead, Article 3 para. 1 section (59) of Law no. 123/2012 of electricity and natural gas sets forth a stand-alone definition for "*electricity derivatives*", which is identical to the texts contained in points (5), (6) or (7) of Section C of Annex I to MiFID II, with the exception of the wording "*provided that they are traded on a regulated market, a MTF, or an OTF*" from point (6) being replaced with the wording "*provided that they are traded on an energy market, a MTF or an OTF, as defined under the special legislation*". This small difference could be erroneously interpreted as recognizing the existence of "*trading venues*" other than the trading venues authorized under the Markets in Financial Instruments Act. It is nevertheless our view

or

(ii) if the conditions under point (i) are not met, they are not for commercial purposes and have the characteristics of other derivative financial instruments.

(c) wholesale energy products traded on an OTF that must be physically settled;

(d) transactions having climatic variables, freight rates, inflation rates, other official economic statistics as underlying that cannot be settled in cash or may not be settled in cash at the option of one of the parties otherwise than by reason of a default or other termination event;

(e) transactions relating to assets, rights, obligations, indices and measures not otherwise mentioned hereinabove, which do not have the characteristics of other derivative financial instruments (having regard to whether, *inter alia*, they are traded on a regulated market, an OTF or an MTF); and

(f) transactions with emission allowances consisting in units recognized as compliant with the requirements of Government Decision no. 780/2006 on the establishment of the trading scheme for emission allowances, as subsequently amended, and of Government emergency Ordinance no. 115/2011 on the establishment of the institutional framework and on the authorization of the Government, through the Ministry of Public Finances, to auction emission allowances attributed to Romania at the level of the European Union, approved by Law no. 163/2012, as subsequently amended[16].

3.1.2.3. Considerations related to Romanian Credit Institutions, Investment Firms and Romanian Insurance/Reinsurance Companies

When the winding-up or reorganization of Party A is contemplated, the applicable Romanian international conflict of laws rules, including those provided for by (i) Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings (the "**EU Insolvency Regulation**"), (ii) Article 312, Article 313 and Article 320 of the Insolvency Act and the BRR Act[17], implementing Article 3 and Article 9 of Directive 2001/24/EC of 4 April 2001 on the reorganization and winding up of credit institutions (the "**Banks Winding-Up Directive**"), (iii) Article 5 and Article 11 of Law

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that such an interpretation would be contrary to the intent of the European legislator and, moreover, it is not supported by other texts of Romanian law. Finally, it is also worth noting that, by contrast to the definition given by Law no. 123/2012 of electricity and natural gas to "*electricity derivatives*", the definition given by the same law to "*natural gas derivatives*" simply refers to the relevant provisions contained in the markets in financial instruments legislation and, therefore, does not raise similar issues.

[16] Such transactions may, however, qualify as transactions in (non-derivative) financial instruments.

[17] In Romania, Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms was transposed under Law no. 312/2015 regarding the recovery and resolution of credit institutions and investment firms, which entered into force on 14 December 2015, except for certain provisions regarding the bail-in tool and the government financial stabilization tools, which entered into force on 1 January 2016. Directive (EU) 2019/879 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC ("**BRRD 2**") was transposed in Romania under Law no. 320/2021 ("**BRR Revision Act**"), which entered into force on 3 January 2022. In this opinion, each reference to the "**Bank Recovery and Resolution Directive**" or "**BRRD**" shall be a reference to Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, as amended by BRRD 2, and each reference to the "**BRR Act**" shall be a reference to the Law no. 312/2015 regarding the recovery and resolution of credit institutions and investment firms, as amended by BRR Revision Act.

no. 503/2004 on the financial turnaround, bankruptcy, voluntary dissolution and liquidation relating to insurance activity and Article 324, Article 325 paragraph (2) and Article 331 of the Insolvency Act, implementing Articles 269 and 273 of Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance ("**Solvency II**")[18] and (iv) 202, 203 para. (2), Article 204 and 210 of the Markets in Financial Instruments Act, implementing, aside MiFID II[19], Article 1 (3) of the Banks Winding-Up Directive[20], designate Romanian law as the applicable *lex concursus*.

However, as regards Romanian Credit Institutions (including their branches in any other Member States of the European Union (the "**EU**")[21]) covered by this opinion, to which the EU Insolvency Regulation does not apply, an exception is set forth in Article 313 paragraph (2) of the Insolvency Act[22] and in Article 618 paragraph (4) of the BRR Act[23] with respect to netting agreements and repurchase agreements, in relation to which *lex contractus* should apply, to the extent it does not prejudice the provisions relating to (i) the exclusion of certain contractual terms in early intervention and resolution and (ii) the powers of the resolution authority to temporarily stay termination rights, as set forth in the relevant legislation regarding the recovery and resolution of

[18] Articles 269 and 273 of Solvency II replaced Articles 4 and 8 of Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings.

[19] The Markets in Financial Instruments Act which transposes MiFID II in Romania was published with the Romanian Official Gazette on 26 June 2018 and is in force as of 6 July 2018 (except for certain provisions regarding CTPs ("consolidated tape providers") which apply as of 3 September 2019).

[20] Article 1(3) of the Banks Winding-Up Directive states that "*This Directive shall also apply to investment firms as defined in point (2) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council and their branches located in Member States other than those in which they have their head offices*".

[21] Although the initial transposition of the Banks Winding-Up Directive in the Government Ordinance no. 10/2004 on the bankruptcy of credit institutions (enactment which was repealed and taken over entirely by the Insolvency Act) reflected the principle that the application of its cross-border insolvency provisions is extended to member states of the European Economic Area (EEA member states), the Insolvency Act, in the form enacted in 2014, made reference only to branches located in other EU Member States. According to the amendments brought in 2015 to the Insolvency Act by the BRR Act, an introductory article was meant to be introduced at the beginning of the chapter dealing with cross-border insolvency with respect to Credit Institutions (this introductory article was however misplaced and included at the end of the previous chapter and not in the chapter dealing with cross-border insolvency with respect to Credit Institutions), whereby certain definitions including the definition of *home member state* and *host member state* are to be read by reference to the same definitions set forth under EU Regulation no. 575/2013 on prudential requirements for credit institutions and amending Regulation (EU) No. 648/2012 ("**EU Regulation no. 575/2013**"), a text which, if it were to apply, has EEA relevance (note that, according to an interpretation issued by the European Banking Authority ("**EBA**") "*the term "Member State" used in EU Regulation no. 575/2013 includes EEA countries as a matter of principle*" (https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2013_233)).

[22] Article 313 paragraph (2) (set out in Chapter VI (Regulation of international private law relations in the field of bankruptcy of credit institutions) of Title III (Cross-border insolvency)) of the Insolvency Act states that "*by exception [to the applicability of Romanian law with respect to the bankruptcy of a Romanian Credit Institution and its EU branches], the law governing certain rights and agreements is determined in accordance with Articles 266–274 of the Banking Act*". In line with the provisions of Article 25 and 26 of the Banks Winding-Up Directive, Article 269 paragraph (2) and Article 271 paragraph (2) of the Banking Act refer to the applicability of *lex contractus* with respect to netting agreements and repurchase agreements, by setting out that the law applicable to netting agreements and repurchase agreements is the law governing the respective agreements, without prejudice to BRR Provisions, and, in relation to repurchase agreements, subject also to the provisions of the law of the Member State where the registry, account or centralised depositing system for securities' registration or transfer is kept or located.

[23] Article 618 paragraph (4) (set out in Chapter I (Romanian credit institution branches established in other Member States) of Title X (Provisions on the cross-border application of resolution proceedings with respect to branches)) of the BRR Act states that "*by exception [to the applicability of Romanian law with respect to the resolution of a Romanian Credit Institution and its EU branches], the law governing certain rights and agreements is determined in accordance with Articles 266–274 of the Banking Act*" (see the above footnote).

credit institutions and investment firms (the "**BRR Provisions**").

Thus, while there is no definition of "*netting agreements*" in the Banks Winding-Up Directive, we are of the opinion that, on the basis of the "*bilateral netting agreement*" definition under the Insolvency Act and of the "*netting agreement*" definition under the BRR Act, a Romanian court should (i) consider, by application of Romanian law, that the EFET General Agreement together with the Eligible Individual Contracts thereunder qualify as "*netting agreements*" or a "*repurchase agreements*"[24] in the meaning of Articles 25 and 26 of the Banks Winding-Up Directive[25] as implemented in Romanian law by Article 313 paragraph (2) of the Insolvency Act and Article 618 paragraph (4) of the BRR Act, and, (ii) without prejudice to the BRR Provisions, apply the *lex contractus* to determine the conditions upon which the provisions of the EFET General Agreement together with the Eligible Individual Contracts thereunder are to be enforced against the relevant insolvent Romanian Credit Institution[26].

The provisions of Article 618 paragraph (4) of the BRR Act also apply to a Romanian Investment Firm which is an in-scope entity of the BRR Act[27]. Furthermore, a similar exception is set forth in Articles 225 and 226 of the Markets in Financial Instruments Act, as regards the reorganization[28] and bankruptcy of a Romanian Investment Firm, with respect to netting agreements and repurchase agreements, in relation to which *lex contractus* should apply, without prejudice to the BRR Provisions.

Finally, as regards Romanian Insurance/Reinsurance Companies, note that Article 325 paragraph (2) of the Insolvency Act[29] expressly sets forth that any bilateral netting agreements shall be governed solely by the law governing the respective agreements, as an exception to the principle

[24] The application of *lex contractus* in relation to repurchase agreements is also subject to the provisions of the law of the Member State where the registry, account or centralised depositing system for securities' registration or transfer is kept or located.

[25] For credit institutions or investment firms incorporated in an EU Member State and subject to the Banks Winding-Up Directive, Article 25 of such directive expressly refers to the law governing the netting agreement (*lex contractus*) to determine the conditions upon which the netting provisions of such a netting agreement are enforceable in case of insolvency of such credit institutions or investment firms. Similarly, Article 26 of the Banks Winding-Up Directive expressly refers to the law governing the repurchase agreement to determine the conditions upon which the provisions of such a repurchase agreement are enforceable in case of insolvency of the credit institutions or investment firms subject to the Banks Winding-Up Directive.

[26] Therefore, without prejudice to the BRR Provisions, the *lex contractus* may be applicable to determine the conditions upon which the close-out netting provisions of the EFET General Agreement are enforceable, in a bankruptcy and resolution scenario, against a Romanian Credit Institution subject to the Banks Winding-Up Directive.

[27] According to the BRR Act, '*investment firm*' means an investment firm as defined in point (22) of Article 4(1) of Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 ("**IFR**"), that is subject to certain initial capital requirements (which may range between the RON equivalent of EUR 75,000 and 750,000, depending on the type of investment services provided or activities performed) in accordance with Article 12 of Law no. 236/2022 (transposing Article 9 of IFD in Romanian law).

[28] According to Article 203 of the Markets in Financial Instruments Act, reorganisation measures are those measures taken by administrative or judicial authorities which are meant to restore the financial status of an investment firm and which may affect pre-existing rights of third parties, including measures entailing the possible suspension of payments or of enforcement proceedings or the reduction of claims; for investment firms within the scope of the BRR Act, reorganisation measures include the resolution tools and measures set forth under the BRR Act.

[29] To date, there are no amendments brought to Article 325 paragraph (2) of the Insolvency Act in light of the entry into force, on 5 November 2015, of Law no. 246/2015 on the recovery and resolution of insurance undertakings (the "**IRR Act**").

that the effects of the opening of bankruptcy proceedings against a Romanian Insurance/Reinsurance Company (including its EU Member State branches) shall be governed by Romanian law.

Therefore, for the context described in this Section 3.1.2.3 of the opinion, the *lex contractus* may be applicable to determine the conditions upon which the close-out netting provisions of the EFET General Agreement together with the Eligible Individual Contracts thereunder are enforceable, in a bankruptcy, reorganization or resolution scenario, against a Romanian Credit Institution or Investment Firm and in a bankruptcy scenario against a Romanian Insurance/Reinsurance Company, including their branches in other EU Member States.[30]

Nonetheless, as a consequence of the implementation of the BRR Provisions (which are likely to impact the enforceability of close-out netting and collateral arrangements, as stated in Section B (*Netting under the BRR Act – Resolution tools, pre-resolution powers, resolution powers and safeguards*) of Annex 3 (*Romanian Netting Regime*) below), the reorganization equivalent measures and the effects thereof in respect of a Romanian Credit Institution and Investment Firm will be governed by Romanian law.

3.1.2.4. Considerations related to Set-Off

Under Law no. 287/2009 on the Civil Code (the "**Romanian Civil Code**"), set-off is regulated as a means to extinguish *mutual* obligations between parties, and occurs as an effect of the law, provided that such obligations are at the same time (i) certain (i.e., uncontested), (ii) liquid (i.e., precisely determined as to the amount they refer to), (iii) due, and (iv) refer to moneys or other fungible assets of the same nature.

Romanian legal scholars recognise three types of set-off:[31]

(a) *legal set-off*, which operates without the need for an agreement of the parties or a court decision, as soon as the aforementioned conditions of the Romanian Civil Code are met;

(b) *judicial set-off*, which operates as an effect of a court decision in the cases where the obligations are not liquid;

(c) *contractual set-off*, which operates in accordance with the terms agreed between the parties when the conditions for legal set-off are not met.

Therefore, under the provisions of the Romanian Civil Code, set-off between mutual obligations is allowed and applies to the extent of the lowest obligation. Nonetheless, set-off may become inoperable: (a) in case one of the claims subject to set-off arises from a deed made with the intention to prejudice, (b) in case one of the claims refers to an asset placed in deposit or subject to a free use agreement, (c) in case it refers to an asset which may not be seized and (d) in case of attachments (*poprire*) or seizures.

The opening of the insolvency proceedings does not affect the rights of creditors to invoke the *legal set-off* of their claim with that of the debtor, if the conditions for legal set-off are met upon the

[30] In this case, English law or German law as the *lex contractus* of the Agreement, should be reviewed by the readers of this opinion in addition to the Romanian law considerations expressed herein.

[31] Parties may expressly (e.g., by contract) or implicitly waive or limit the right to set-off.

opening of insolvency proceedings.[32] The same applies to mutual claims arising after the opening of insolvency proceedings.

The *judicial set-off* and *contractual set-off* are not permitted after the opening of the insolvency proceedings, as this could impact the mandatory ranking of claims under the Insolvency Act (please see Section C.7 (*Finalization of insolvency proceedings*) of Annex 4 (*Romanian Pre-insolvency and Insolvency Regime*) of this opinion).

In addition to the general set-off regime under the Romanian Civil Code described above, the special provisions of Government Emergency Ordinance no. 77/1999 on certain measures for the prevention of payment failures ("**GEO 77/1999**") impose additional requirements for set-off for companies which are owned in whole or in part by the Romanian State. In this regard, GEO 77/1999 requires State-owned companies to report any outstanding debts older than 30 days through an electronic set-off system[33], in order to perform the set-off of outstanding debts.[34]

Subject to the limitations described above, we believe that the set-off of claims arising under or outside the EFET General Agreement (in the latter case, if contractually provided for in an amendment to the EFET General Agreement) should be enforceable between the Parties to such an agreement.

As regards the set-off of claims between Affiliates or Credit Support Providers of Parties (if contractually provided for in an amendment to the EFET General Agreement), the mutuality of obligations would have to be considered; if the requirements for legal set-off are not met, the said Affiliates or Credit Support Providers of Parties would have to seek the contractual set-off of their claims by entering into an agreement for such purposes.

3.1.2.5. Clawback actions under Romanian law

With respect to possible challenges to the termination of the Agreement, the calculation of the Termination Amount and/or its payment, we refer to our considerations set out in qualification 4.17 (*General clawback action*) and in Section C.4 (*Voidable preference*) of Annex 4 (*Romanian pre-insolvency and insolvency regime*), which describe the general clawback action under the Romanian Civil Code and the special clawback action under the Insolvency Act, as follows:

(i) Under Articles 1562-1565 of the Romanian Civil Code, in case a contracting party has entered into transactions with, or performed payments or deliveries to, third parties with the intention to defraud the contracting party's creditors, such creditors may challenge the transactions, payments and deliveries. Note that the legal conditions for this challenge (*acțiune revocatorie*) to be admissible include the requirement to prove that the third party who received the payments or deliveries was aware that the contracting party thereby causes or increases its state of insolvency (i.e., was aware of the fraudulent intention of the contracting party). Unless otherwise stated by law, the general clawback action may be filed within a year as of the date on which the creditor acknowledged or should have acknowledged the damages caused by the fraudulent act.

[32] The operation of set-off could also be confirmed by the judicial administrator / liquidator.

[33] We refer to the electronic set-off system (SIC) managed by Set-Off Service of the Training Center for Industry Personnel (CPPI), which is a department of the Ministry of Economy.

[34] In accordance with the 2019 Methodological Norms for the implementation of GEO 77/1999 (approved by Government Decision no. 773/2019), entities that do not have the Romanian State in their shareholding structure are not required to use the electronic set-off procedure set out in GEO 77/1999, but may voluntarily apply such procedure.

(ii) According to Article 117 of the Insolvency Act, acts done within a two-years term prior to the opening of insolvency proceedings, including, *inter alia*, gratuitous transactions made by the debtor, arrangements whereby the intention of all the parties involved was to diminish the assets of the insolvent debtor or to prejudice the creditors' rights in any way or transfer deeds entered into or obligations undertaken by the insolvent debtor with the intention to conceal/delay the insolvency status or defraud a creditor are presumed fraudulent and may be annulled.

Similarly, the following transactions concluded within six-months prior to the opening of insolvency proceedings are presumed fraudulent and may be annulled, unless concluded in good faith, in performance of an arrangement between the debtor and its creditors following out-of-court negotiations for the restructuring of debts or within the insolvency prevention proceedings: (a) ownership transfers to a creditor for payment of a prior debt or to the benefit of such a creditor, if the amount the creditor had obtained in the event of the bankruptcy of the debtor would have been lower than the value of the transfer; (b) granting security interests for an unsecured claim, or (c) prepayment of debts, if the debts' due date had been set for after the opening of the insolvency proceedings. In addition, operations whereby the performance of the insolvent debtor is obviously exceeding the consideration received from the other party, if concluded within a six-month term prior to the opening of insolvency proceedings are presumed fraudulent and may be annulled.[35]

However, deeds entered into by the insolvent debtor in its ordinary course of business shall not be voided (except for fraud).

Please note that the suspect period may be extended to cover the implementation period set out in the confirmed restructuring agreement or the period following the opening of the preventive composition proceedings.[36]

3.1.2.6. Questions Relating to Winding-up, Insolvency or Attachment

(a) Automatic Termination

(aa) Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or recommendable to modify the scope of Automatic Termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in §10.5(c)(iv) of the EFET General Agreement?

[35] It is worth noting that, in accordance with Article 272 of the Banking Act (which applies in the case of liquidation of Romanian credit institutions), Romanian legal provisions on the annulment of fraudulent transactions do not apply where the person who benefited from an act detrimental to the creditors provides proof that the transaction is subject to the law of another EU Member State and the law of that Member State does not allow any means of challenging that transaction in the relevant case. These provisions appear to be in line with the provisions of Article 16 of the EU Insolvency Regulation, which apply, *inter alia*, to the cross-border insolvency of Romanian corporations.

[36] For details on restructuring agreements and preventive composition proceedings please see Section B (*The general legal framework for insolvency prevention proceedings*) of Annex 4 (*Romanian Pre-insolvency and Insolvency Regime*) of this opinion.

- ***If you are recommending that a grace period be made applicable in respect of §10.5(c)(iv), what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of your jurisdiction to have that proceeding dismissed or otherwise terminated?***

- ***If you are recommending that Automatic Termination, be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect?***

Please supply specific language for purposes of customizing §10.4 of the EFET General Agreement to implement your recommendation and the optimal termination timing.

We would not 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, as the drawbacks of this election could outweigh its practical benefits.

We note that the election of Automatic Termination implies that the Terminating Party has less control over the designation of the Early Termination Date (which would occur automatically in accordance with the provisions of the EFET General Agreement) and the Terminating Party could also be unaware for a certain period of time of the fact that its EFET General Agreement was terminated following the occurrence of the Material Reason in relation to its counterparty.

In addition, in a pre-insolvency or insolvency scenario, the election of Automatic Termination would be possible only for Eligible Individual Contracts, as the insolvency-related provisions of § 10.5(c) of the EFET General Agreement would be deemed unwritten (i.e., they would not produce any legal effects) for Non-Eligible Individual Contracts, as further described in question (b) below.

(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? Will there be a difference in the treatment of electricity/natural gas and green certificates traded separately or in combination?***

In the case of Eligible Individual Contracts, Romanian insolvency laws do not restrict the rights of the parties to stipulate the conditions for the occurrence of early termination under a *bilateral netting agreement* and, therefore, for the same reasons as mentioned in our answer to question (b)(bb) below and subject to the same limitations applying to Credit Institutions, Investment Firms and Insurance Companies under the recovery and resolution frameworks, we believe that 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 would operate in accordance with their terms.

In the case of Non-Eligible Individual Contracts however, please see our answer to question (b)(bb) below on the legal issues in relation to the enforceability of 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.

(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)?***

For Eligible Individual Contracts, we would recommend adding the following wording in § 10.5(c)(iii) of the EFET General Agreement, upon the occurrence of which the Terminating Party should be entitled to terminate:

> "[makes a general assignment, arrangement or composition with or for the benefit of its creditors] *or proposes a restructuring agreement to its creditors or files for the confirmation of a restructuring agreement or files for the opening of preventive composition proceeding or a preventive composition arrangement is ratified*"

The wording proposed above is meant to cover the insolvency prevention proceedings detailed in Section B (*The general legal framework for insolvency prevention proceedings*) of Annex 4 (*Romanian Pre-insolvency and Insolvency Regime*) of this opinion. Note, however, that the proposed wording is not enforceable under Romanian insolvency laws in the case of Non-Eligible Individual Contracts (for details, please see our considerations on the netting safe harbours in insolvency prevention proceedings, set out in Section A (*Netting under the Insolvency Act*) of Annex 3 (*Romanian Netting Regime*) of this opinion).

(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?***

(A) *Eligible Individual Contracts*

In the case of Eligible Individual Contracts, 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 would be enforceable under the laws of Romania, since the Romanian Netting Regime (as described in Section 3.1.2.1 (*Romanian Netting Regime*) and Annex 3 (*Romanian Netting Regime*) of this opinion):[37]

[37] For the safe harbours in insolvency prevention proceedings, please see Sub-Section A (*Eligible Individual Contracts*) of Section 3.1.3 (*Preventive restructuring frameworks*) below.

(i) covers the termination right, without making any distinction between automatic or non-automatic termination,

(ii) states that "*any transfer, performance of an obligation, exercise of a right, acts or deeds performed on the basis of qualified financial contracts, as well as any bilateral netting agreement, are valid, may be performed and/or enforced against the insolvent counterparty or an insolvent guarantor of the counterparty, in accordance with the terms of the agreement*", and

(iii) states that, except for fraud, "*no power granted by law to the authorities in charge with the insolvency proceedings shall preclude the termination of the qualified financial contract and/or the acceleration of the performance of payment obligations or of obligations to do or of the satisfaction of a right under one or several qualified financial contracts, on the basis of a netting agreement, such powers being confined to the net amount resulting after the performance of the netting agreement*".

With respect to Credit Institutions and Investment Firms within the scope of the BRR Act and Insurance Companies within the scope of the IRR Act, note that certain limitations with respect to their termination rights may apply if the NBR/FSA makes use of the resolution tools, pre-resolution powers, resolution powers and safeguards detailed in Section B (*Netting under the BRR Act – Resolution tools, pre-resolution powers, resolution powers and safeguards*) of Annex 3 (*Romanian Netting Regime*) of this opinion.

If, however, the NBR/FSA takes a crisis prevention measure or a crisis management measure with respect to a Romanian Credit Institution or Investment Firm within the scope of the BRR Act, but has not suspended the exercise of termination rights and has not applied to this institution the bail-in tool, an early termination should be enforceable if it arises as a result of a Material Reason which is not the occurrence of the crisis prevention measure or crisis management measure itself or the occurrence of any event directly linked to the application of such a measure.

If Party A is an Insurance Company to which the FSA applies resolution measures, the counterparty's right to terminate the Transactions is subject to the FSA exercising or not the powers to (i) request the competent court to annul or amend the provisions of an agreement to which the insurer is a party or replace the counterparty- insurer as signatory party and (ii) accelerate any derivative financial contract entered into by the resolved insurer, as of the date of entering into resolution proceedings, for the purposes of applying the bail-in tool.

(B) Non-Eligible Individual Contracts

In the case of Non-Eligible Individual Contracts, certain 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 could be deemed unenforceable under the laws of Romania, as follows:[38]

- ***Prohibition of ipso facto clauses in insolvency proceedings***.[39] Under the Insolvency Act, contractual clauses providing for the termination/acceleration of on-going agreements by reason of the opening of insolvency proceedings are deemed unwritten and therefore do not produce any legal effects.

  This may be the case for the Material Reasons described in § 10.5(c) points (ii), (iii), (iv), (vi), (viii) and (ix) of the EFET General Agreement (where points (viii) and (ix) refer to the acts described at (ii), (iii), (iv) and (vi)).

  For the other Material Reasons described in § 10.5(c), even if such reasons are included in the "*winding-up/insolvency/attachment*" provision of the EFET General Agreement, they should not be considered as contractual termination clauses which are triggered by the opening of insolvency proceedings. Therefore, as there is no express prohibition in the Insolvency Act for the situations described in § 10.5(c) points (i), (v), (vii), (viii) and (ix) of the EFET General Agreement (where points (viii) and (ix) refer to the acts described at (i), (v) and (vii)), such provisions should be enforceable under Romanian law, subject to the cherry-picking powers of the insolvency official described below.

- ***Cherry picking powers of the insolvency official***. The possibility of the Terminating Party to designate the Early Termination Date under the EFET General Agreement may be impaired by the provisions of the Insolvency Act which set out an early termination date for agreements terminated (or deemed terminated) by the judicial administrator / liquidator, as described below.

  As a general rule, ongoing contracts are deemed maintained as of the opening of the insolvency proceedings.

  The judicial administrator / liquidator may unilaterally terminate (*denunța*), within 3 months as of the opening of the insolvency proceedings, any agreement not entirely or substantially performed by the parties in order to maximise the insolvency estate. In this case, the agreement would be terminated as of the judicial administrator / liquidator's notice to terminate.

  The relevant contract may also be deemed terminated upon the expiry of a 30 days term as of the receipt by the judicial administrator / liquidator of a request for termination (*denunțare*) sent by a counterparty of the debtor within the first 3 months as of the opening of the insolvency proceedings, if the judicial administrator / liquidator does not respond to the request during the 30 days term.

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[38] Note that the situations described below refer to the Terminating Party's counterparty and not to Credit Support Providers which have not entered into to the EFET General Agreement. Please also see Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion, for a short overview of the relevant pre-insolvency and insolvency provisions which may apply to Party A.

[39] The prohibition of *ipso facto* clauses in insolvency prevention proceedings is detailed in Sub-Section B (Non-*Eligible Individual Contracts*) of Section 3.1.3 (*Preventive restructuring frameworks*) below.

As regards the powers of the judicial administrator / liquidator to maintain ongoing contracts, the provisions of Article 123 para. (1) of the Insolvency Act could be construed[40] as permitting the insolvency official to refuse any requests for termination (*denunțare*) sent by the debtor's counterparty. In this case, even if the notice is sent during the 3 months term mentioned above, the contract would be deemed maintained.[41]

However, with respect to agreements providing for the successive payment of money (such as credit agreements), the provisions of the Insolvency Act may be construed[42] as prohibiting the judicial administrator / liquidator to maintain such agreements if the creditor requests the acceleration of the debtor's obligations and the termination of the agreement within the 3 months term mentioned above.

If the contract was maintained following the opening of the insolvency proceedings, such contract may be terminated for the debtor's fault (*reziliat*) only if the termination is requested in court and only for material reasons which occur after the opening of the insolvency proceedings. From the interpretation of Article 123 para. (3) of the Insolvency Act, it seems that this rule applies for any type of contract and regardless if such contract sets forth a clause for termination for specific grounds (*pact comisoriu*) which, under the Civil Code, would trigger the termination without the necessity to file a claim in court.

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

Without expressing any view on the validity or enforceability of the E-Notice Agreement itself, we believe that a termination notice given in accordance with the E-Notice Agreement entered into between the Parties would have substantially the same regime as a termination notice in writing sent in accordance with § 23.2 of the EFET General Agreement (*Notices and Communications*).

Therefore, with respect to the recognition and possible challenges by the insolvency officials, please see our answer to question (b)(bb) sub-section B above and questions (x) and (dd) below which should equally apply in the case of the termination notice given in accordance with the E-Notice Agreement.

Article 1326 of the Romanian Civil Code sets out the general provisions for the transmission of unilateral acts (*acte unilaterale*) (such as the decision to terminate an agreement), which may be construed as permitting the delivery of termination notices by any adequate means (i.e., as long as such means allow the possibility for the recipient to

[40] See Grapă, Alin, *Denunţarea unilaterală a contractelor cu executare succesivă. Specificul procedurii insolvenţei*, in *Revista Română de Drept Privat*, no. 3/2018 and Țăndăreanu, Nicoleta, *Codul insolvenței adnotat*, Universul Juridic publishing house, Bucharest, 2014, available online.

[41] Termination may still occur if the termination notice was sent by the debtor's counterparty before the opening of the insolvency proceedings and the early termination date was set in the notice for a date that occurs after the opening of the proceedings (see Grapă, Alin, *Denunţarea unilaterală a contractelor cu executare succesivă. Specificul procedurii insolvenţei*, in *Revista Română de Drept Privat*, no. 3/2018).

[42] Article 123 para. (3) first sentence of the Insolvency Act.

acknowledge the notice and there is proof of delivery of the notice). The notice would become effective as of the moment it arrives to the addressee, even if such addressee did not become aware of the notice for reasons beyond its control.

For evidentiary purposes, in the case of termination notices sent by electronic means, we would recommend using qualified electronic signatures[43] by the Terminating Party on the notice (please also refer to our answer to question (dd)(iii) and (x) below) and to obtain delivery receipts.

(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?

(A) Eligible Individual Contracts

In the case of Eligible Individual Contracts and subject to the valid designation of an Early Termination Date in accordance with the terms of the EFET General Agreement, 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 would be enforceable under Romanian law.

Our opinion is based on the fact that, according to the Romanian Netting Regime (as described in Section 3.1.2.1 (*Romanian Netting Regime*) and Annex 3 (*Romanian Netting Regime*) of this opinion):

(i) *bilateral netting* is to be performed by netting among each other the close-out/market/liquidation/replacement values of obligations and rights under one or several *qualified financial contracts* on the basis of a *bilateral netting agreement*, which results in a single net amount due and payable,

(ii) such single net amount is calculated with respect to the close-out/market/liquidation/replacement values for any of the rights and obligations under one or several *qualified financial contracts*, as such values may be converted into a single currency, and

(iii) except on the ground of fraud, no insolvency officer or, as the case may be, no court may preclude, annul, or decide to undo financial derivatives transactions, including the performance of a netting agreement, carried out on the basis of a *qualified financial contract*.

(B) Non-Eligible Individual Contracts

In the case of Non-Eligible Individual Contracts, the enforceability of § 11 of the EFET General Agreement and the termination mechanism under such agreement (including the designation of the Early Termination Date) would be subject to the limitations set out below.

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[43] We refer to qualified electronic signatures within the meaning of Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (the "**eIDAS Regulation**").

Although there are no specific provisions under the Insolvency Act which deal with such matters, we believe that contractual clauses setting forth the calculation method for the amounts due following the termination of a contract (such as those included in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount) should be given effect by the insolvency courts in the event termination occurs after the opening of the insolvency proceedings.

As mentioned in our answer to question (b)(bb) above, if the contract was maintained following the opening of the insolvency proceedings, such contract may be terminated in case of the debtor's fault (*reziliat*), only if termination is requested in court and only for material reasons which occur after the opening of the insolvency proceedings. In this case, we believe that the general civil law provisions on the termination for breach of contract (Article 1549 *et seq.* of the Romanian Civil Code) should apply and therefore termination should occur in accordance with the terms agreed between the parties. This means that, in case there is a breach of the terms of the EFET General Agreement after the opening of the insolvency proceedings and the Terminating Party requests the termination of the Agreement, a Romanian court should give effect to the provisions of § 11 of the EFET General Agreement for the calculation of the Termination Amount.

However, if the contract is terminated (*denunțat*) by the judicial administrator / liquidator on the basis of the "cherry-picking" powers described in our answer to question (b)(bb) above, we believe that a Romanian court could assess whether the contractual provisions setting forth the calculation method for the Termination Amount is compatible with the "cherry-picking" powers of the judicial administrator / liquidator[44] and the general principle under the Insolvency Act that the insolvency estate takes precedence over the individual interests of creditors.

In accordance with Romanian legal doctrine[45], any damages awarded to the debtor's counterparty following the exercise of the termination rights by the insolvency official are not awarded as full compensation for the losses suffered by the debtor's counterparty, as the purpose of such termination is to maximise the value of the insolvency estate.[46]

[44] It is clear that, insofar as the insolvency official exercises the right to terminate certain Non-Eligible Individual Contracts under the EFET General Agreement, whilst maintaining others which are more favourable to the debtor's estate, the calculation of the Termination Amount would be affected. However, given the single agreement concept, a different interpretation could be that the insolvency official or court would terminate all the Individual Contracts, in order not to alter the original intention of the Parties stated in the EFET General Agreement.

[45] See Tîrnoveanu, Stan, Crăciun, Irina, *Dreptul al practicianului în insolventă cu privire la soarta contractelor debitorului, în curs la data deschiderii procedurii: "corsetul" libertății contractuale. Evaluarea despăgubirilor la care este îndreptățit contractantul debitorului în insolvență în cazul denunțării speciale reglementată de art. 123 din Legea nr 85/2014*, in *Revista Phoenix*, no. 56/57/2016.

[46] Any claims for damages of the Terminating Party following the termination (or deemed termination) by the insolvency official of the Non-Eligible Individual Contracts would have to be requested in court. The damages awarded to the Terminating Party would be paid in accordance with the priority ranking for unsecured claims (please see point (v) of Section C.7 (*Finalization of insolvency proceedings*) of Annex 4 (*Romanian Pre-insolvency and Insolvency Regime*) of this opinion).

Therefore, there is a risk that the calculations set out in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount be disregarded by the insolvency officials or courts in light of the general principles of the Insolvency Act described above.

However, one can argue that the insolvency officials or courts should give prevalence to the parties' contractual agreement set out in § 11 of the EFET General Agreement as the provisions in § 11 are not intended to award the Terminating Party full compensation for the losses suffered by such party, but to reduce the overall risk of loss in the event that one of the parties is unable to fulfil its obligations under the Agreement (for instance, it could be that the Terminating Party is "out of the money" upon the Early Termination Date, and thus such party would owe the net amount to the insolvent party's estate).

In addition, the provisions of § 11 of the EFET General Agreement could also be deemed as liquidated damages clauses (*clauze penale*), which may be limited by the court (for details, please see our answer to question (w)(ii) below).

In the absence of relevant case law on the termination of Individual Contracts under the EFET General Agreement in insolvency proceedings, we cannot exclude the possibility that a Romanian insolvency official or court takes a different view on the matters discussed above.

(d) Do the laws of Romania recognize that the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? 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 Romania, 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.

For the enforceability of the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement, we refer to our answer to questions (b)(bb) and (c) above, where we noted that close-out netting in an insolvency scenario is recognised by the Insolvency Act only with respect to Eligible Individual Contracts. Therefore, our answer to this question (d) is limited to the close-out netting provisions of Eligible Individual Contracts.

As regards the "single agreement" concept, we note that this concept is useful and provides clarity with respect to the intention of the parties to consider all Individual Contracts dependent on each other for the purpose of performing the close-out netting calculation under § 11 of the EFET General Agreement. The Insolvency Act does not provide the judicial administrators / liquidators with powers to unilaterally amend the agreements entered into by the debtor and their powers are limited to maintaining or terminating ongoing agreements in whole and not in part. A court may consider that the parties' intention expressed in § 1.1 of the EFET General Agreement opposes the segregation between Individual Contracts, thus limiting the cherry-picking powers of the insolvency official.

However, due to the lack of legal precedents on such matters we cannot exclude the possibility that an insolvency official or court would have a different view and consider the segregation of the Individual Contracts into separate pools in cases where, for example, the same EFET General Agreement documents both Eligible Individual Contracts and Non-Eligible Individual contracts, or where Individual Contracts for multiple types of products do not appear as connected.

As regards the provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement, a distinction has to be made whether the Partial Close-Out occurred before or after the opening of the insolvency proceedings.

If the Partial Close-Out occurs before the opening of the insolvency proceedings, we believe that such provisions should not impact termination and close out rights generally, nor any subsequent rights to terminate all Individual Contracts remaining under the EFET General Agreement upon the opening of the insolvency proceedings. This is because the Insolvency Act states that "*any transfer, performance of an obligation, exercise of a right, acts or deeds performed* ***on the basis of qualified financial contracts****, as well as any* ***bilateral netting agreement****, are valid, may be performed and/or enforced against the insolvent counterparty or an insolvent guarantor of the counterparty,* ***in accordance with the terms of the agreement***".

With respect to provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement upon or after the opening of insolvency proceedings, there is a certain lack of clarity arising from the provisions of Article 89 para. (2) and (3) and Article 125 of the Insolvency Act[47] with respect to the requirement to have *all* contracts under a master agreement closed out at the same time upon the insolvency of Party A.

Therefore, if a Material Reason as a result of the initiation of pre-insolvency/insolvency proceedings has occurred with respect to Party A, our recommendation for the Terminating Party would be to terminate the Agreement, including *all* Eligible Individual Contracts thereunder, for the reasons stated above.

[47] Article 125 of the Insolvency Act states that "*if a debtor is a party to a contract under a master netting agreement providing for the transfer, at a certain date or within a period of time, of certain commodities, representative titles of commodities or financial assets traded on a regulated market of commodities, services and derivative financial instruments and if the due date occurs or the respective period of time expires after the date of the opening of insolvency proceedings,* ***a bilateral netting with respect to all contracts under the master netting agreement shall be performed and the net amount shall be paid to the debtor's estate****, if positive, and shall be registered with the table of claims, if it results in an obligation of the debtor*". Furthermore, Article 89 para. (2) and (3) of the Insolvency Act states that the close out netting performed under a qualified financial contract should result in a single net obligation/right of one of the parties to such contract : "*The only obligation/right of a party to the contract, if any such obligation/right is provided for therein, as a consequence of the performance of bilateral netting pursuant to the terms of a qualified financial contract, shall be to perform in favor of the counterparty the net obligation / to receive from the counterparty the net right (i.e., the amount of money or the obligation to do something) resulted from the bilateral netting*". Therefore, although close out netting is to be performed in accordance with the terms of the agreement, the Insolvency Act seems to suggest that such close out netting should occur with respect to all contracts under the master agreement so that a single net amount is calculated.

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

We understand that, further to the termination of the Eligible Individual Contracts, a single net termination amount (i.e., the Termination Amount) is obtained, which is denominated in a currency other than RON (i.e., Romanian lei). Such choice made by the parties in the Election Sheet with respect to the foreign currency in which termination amounts should be calculated would be enforceable under Romanian law.[48]

Nonetheless, the parties' choice of a foreign currency for the discharge of their obligations under the Eligible Individual Contracts will no longer be enforceable in the context of Party A's insolvency, if the Termination Amount is due by Party A to the other party.

This is because the actual payments in the case of insolvency proceedings against a Party A are to be made in domestic currency only. According to the Insolvency Act, any claim denominated or consolidated in foreign currency shall be registered with the table of claims in RON, on the basis of the exchange rate of the NBR valid for the opening date of the insolvency proceedings. Therefore, conversion of the Termination Amount into RON would be required for such amount to be provided in Romanian insolvency proceedings.

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

We refer to our answer to question (b)(bb) above, where we noted that with respect to Credit Institutions and Investment Firms within the scope of the BRR Act and Insurance Companies within the scope of the IRR Act, certain limitations may apply to their termination rights under the Eligible Individual Contracts if the NBR/FSA makes use of the resolution tools, pre-resolution powers, resolution powers and safeguards detailed in Section B (*Netting under the BRR Act – Resolution tools, pre-resolution powers, resolution powers and safeguards*) of Annex 3 (*Romanian Netting Regime*) of this opinion.

Apart from the above, there are no other material instances where the termination and close-out rights in insolvency proceedings dependent upon the status of one or more of the concerned parties falling within a particular category of classification of entity.

[48] According to the Insolvency Act, bilateral netting entails one or several of the following operations with respect to one or several qualified financial contracts: (i) termination of a qualified financial contract and/or acceleration of a payment or performance of an obligation or exercise of a right under one or several qualified financial contracts on the basis of a bilateral netting agreement, (ii) calculation or estimation of the close-out/market/liquidation/replacement value for any of the rights and obligations referred to at point (i) above, (iii) *conversion into a single currency of any value calculated pursuant to point (ii) above*, and (iv) determination of a net value by operation of set-off with respect to any value calculated pursuant to point (ii) above *and converted pursuant to point (iii) above*.

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

Insofar as the Parties enter into several Eligible Individual Contracts and subject in particular to our considerations in Section 3.1.2.2 (*Eligible Individual Contracts*) above, the safe harbour provisions of the Romanian Netting Regime should apply to such contracts, regardless of the underlying type of product.

When an EFET General Agreement documents both Eligible Individual Contracts and Non-Eligible Individual Contracts, the co-existence of such contracts under the same EFET General Agreement should not have a material adverse effect on the enforceability of close-out netting with respect to Eligible Individual Contracts.

Note, however, that this question has never, to our knowledge, been tested by a Romanian court which may consider that: (i) the Insolvency Act creates a derogatory regime for insolvency regulations, which are public order rules and should therefore be interpreted restrictively, (ii) the Parties' intention expressed in § 1.1 of the EFET General Agreement opposes to the segregation between Individual Contracts, and (iii) Individual Contracts for multiple types of products do not appear as connected. We therefore recommend Parties to document Non-Eligible Individual Contracts under a separate EFET General Agreement rather than under the same EFET General Agreement.

3.1.3. Preventive restructuring frameworks (Part C.I.2. of the EFET Instruction Letter)

We have included a general presentation of the Romanian insolvency prevention framework (as amended following the transposition into Romanian law of the EU Restructuring Directive[49]), in Section B (*The general legal framework for insolvency prevention proceedings*) of Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion.

The distinction made between Eligible and Non-Eligible Individual Contracts for the issues discussed in Section 3.1.2.6 (*Questions Relating to Winding-up, Insolvency or Attachment*) is also applicable in a pre-insolvency context, as follows:

(A) Eligible Individual Contracts

Bilateral netting is regulated under the Insolvency Act as a safe harbour regime in insolvency prevention proceedings[50].

The provisions of an Eligible Individual Contract 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 would be enforceable under the

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[49] Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

[50] Please see Section A (*Netting under the Insolvency Act*) of Annex 3 (*Romanian Netting Regime*) for the netting safe harbours under the Insolvency Act.

laws of Romania, since the Romanian Netting Regime provides that insolvency prevention proceedings apply without prejudice to qualified financial contracts and close-out netting operations based on a qualified financial contract or a bilateral netting agreement.

In addition, it is expressly stated in the Insolvency Act that contractual clauses providing for the termination or the possibility of the creditor to suspend or refuse performance on the grounds that the debtor is in a state of difficulty are enforceable in the case of qualified financial contracts and close-out netting operations based on a qualified financial contract or a bilateral netting agreement, as detailed in Section A (*Netting under the Insolvency Act*) of Annex 3 (*Romanian Netting Regime*) of this opinion.

As the initiation of insolvency prevention proceedings should be deemed as a Material Reason under an Eligible Individual Contract, we would recommend adding the wording proposed in our answer to question (b)(aa) above, which is specifically meant to cover insolvency prevention proceedings, upon the occurrence of which the Terminating Party should be entitled to terminate.

(B) *Non-Eligible Individual Contracts*

Non-Eligible Individual Contracts are not protected in the same way as Eligible Individual Contracts in insolvency prevention proceedings.

In the absence of netting safe harbours in a pre-insolvency context for Non-Eligible Individual Contracts, certain provisions of the Insolvency Act may affect the enforceability of the relevant EFET General Agreement or the Individual Contracts, as detailed below.

Although we have not identified provisions in the standard form EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) on the grounds that a Party is in a state of difficulty in an insolvency prevention proceeding, we note that contractual clauses providing for the termination or the possibility of the creditor to suspend or refuse performance on the grounds that the debtor is in a state of difficulty in an insolvency prevention proceeding are considered unwritten and therefore do not produce any legal effects.

Similarly, any contractual losses of rights, limitations or interdictions on the grounds that a debtor has reached a state of difficulty are considered unwritten (i.e., they do not produce any legal effects).

In addition, the rights of the creditors may be affected by the opening of the insolvency prevention proceedings, due to the fact that:

- upon the opening of preventive composition proceedings, all pending enforcement actions against the debtor are automatically suspended and new enforcement actions cannot be initiated for a period of up to 4 months (which may be extended to 12 months in certain circumstances), but no later than the date on which a decision regarding the ratification of the restructuring plan is taken by the syndic judge. Following the ratification of the restructuring plan, all enforcement actions concerning affected claims[51] are automatically suspended. Creditors whose claims

[51] An "*unaffected claim*" is defined as a claim that is not directly modified by a restructuring agreement or a preventive composition arrangement; any claim not included in the list of affected claims is an unaffected claim.

are not affected have to notify the debtor if they intend to initiate enforcement actions. Within 30 days as of such notification, the debtor may request the creditors to participate in negotiations on the terms for joining the restructuring plan;

- if a restructuring agreement/plan is confirmed/ratified by the court, the debtor's business would have to be restructured in accordance with its provisions, and the rights of affected creditors would be altered in accordance with the provisions of the confirmed/ratified restructuring agreement/plan. Such agreement/plan is enforceable against all creditors, including against affected creditors which voted against the agreement/plan or did not vote on it.

3.1.4. Non-insolvency related Material Reasons (Part C.I.3. of the EFET Instruction Letter)

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

Outside any pre-insolvency, insolvency or analogous proceedings[52], the rights of the Terminating Party to terminate and close-out the EFET General Agreement would generally be enforceable in accordance with the terms of the EFET General Agreement, on the basis of the mutual agreement of the parties (*mutuus dissensus* principle).

Nonetheless, the following subject matters relating to the termination and close-out netting provisions of the EFET General Agreement should be considered (it being specified that such subject matters are indicative and not exhaustive):

(A) General Considerations on Early Termination

The Romanian Civil Code sets out the general provisions on the termination of agreements under Romanian law. In this regard, the cases when an agreement may terminate prior to its expiry date may generally be classified as follows:

(a) in case of a mutual agreement on termination between the parties (*mutuus dissensus*);

(b) in case of a termination for convenience (*denunțare unilaterală*), if such an option is provided for under the agreement; we note that in the case of agreements entered into for an indefinite term, termination for convenience is possible even if such an option is not expressly provided in the agreement, subject to a reasonable prior notice;

(c) following a breach of a contractual obligation, i.e., termination following an event of default (being either *rezoluțiune* or *reziliere*), where there may be two scenarios:

- the agreement does not include an express clause on termination for breach or the clause is very general.

[52] We refer to any pre-insolvency, insolvency, bankruptcy, recovery, resolution, special administration, liquidation, winding-up, judicial reorganisation or analogous proceedings.

In this scenario, termination for breach by one of the parties of its contractual obligations may be requested in court by the non-defaulting party and the court would rule on termination of the agreement. A court could refuse to terminate an agreement if the breach is not material. However, a court may terminate an agreement even if the breach is not material, provided that it is repetitive.

Generally, the non-defaulting party must send to the defaulting party a prior formal notice requesting that the breach be remedied within a reasonable term. If this formal notice remains without effect, then the agreement may be terminated by the non-defaulting party as described above.

- the agreement includes specific clauses regarding termination for breach.

  Such termination clauses should describe the specific breach triggering their application (*pact comisoriu*) and the conditions for their application.

  A prior formal notice requesting that the breach be remedied within a reasonable term is necessary[53] unless the agreement provides that the breach automatically triggers the non-defaulting party's right to terminate.[54]

(d) in other exceptional cases, such as when the legal conditions for hardship or force majeure are met (please see our answer to question (w) below).

(B) General Considerations on Close-Out Netting

We note that apart from the special provisions relating to the close-out netting in the case of *financial collateral arrangements* entered into between *eligible counterparties* (please see Section C (*Netting under the Collateral Ordinance*) of Annex 3 (*Romanian Netting Regime*) of this opinion), there are no express Romanian law provisions that regulate or prohibit close-out netting outside insolvency proceedings.

The enforceability of close-out netting provisions against Party A would therefore be subject to the general principles of the Romanian Civil Code relating to the set-off of reciprocal obligations, as detailed in Section 3.1.2.3 above.

3.2. <u>Multibranch Parties</u> (Part C.II. of the EFET Instruction Letter)

3.2.1. Additional Assumptions

For the purpose of answering the questions set out in Section 3.2.2 (*Romanian Multibranch Party*) below, we have further assumed, as requested in the EFET Instruction Letter, that:

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[53] Note that a prior formal notice requesting the remedy of breach as a condition for the termination to operate in accordance with the terms of a termination clause is not required in cases where, *inter alia*, (i) the debtor has unequivocally expressed its intention not to perform its obligation or (in the case of an obligation to be performed in a successive manner) when the debtor repeatedly refuses or neglects to perform its obligation or (ii) the obligation to pay an amount of money (which was undertaken in the course of business of an enterprise) has not been performed.
[54] Even in this case, there are Romanian legal scholars that argue that the automatic termination would not be triggered unless the non-defaulting party gives notice to the defaulting party of its decision to terminate the agreement.

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

(ii) Party A is a corporation or a bank as further described in Annex 1 (*Types of Counterparties*) of this opinion.

(iii) After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary case under the pre-insolvency and insolvency laws of Romania and, subsequent to the commencement of the (pre-)insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable Individual Contracts for the insolvent counterparty.

(iv) Party A has entered into 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 a voluntary or involuntary proceeding under the insolvency laws of Romania.

For the purpose of answering the questions set out in Section 3.2.3 (*Foreign Multibranch Party*) below, we have further assumed, as requested in the EFET Instruction Letter, that:

(i) A corporation or a bank ("**Party F**") incorporated, organized or having its centre of main interest 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**").

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

3.2.2. Romanian Multibranch Party (Part C.II.1. of the EFET Instruction Letter)

(i) Would there be any change in your conclusions reached under Section 3.1.2 (*Winding-up, Insolvency or Attachment*) *above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?*

Under Law no. 31/1990 on companies (the "**Romanian Companies Act**"), branches, as opposed to subsidiaries, are not separate legal entities, but only extensions of the legal personality of the relevant company. Thus, where a company enters into a multibranch agreement, such agreement would bind such company for transactions entered into through its branches.

That being said, there are no express Romanian law provisions, or relevant case law dealing with *bilateral netting agreements* or *netting agreements* entered into on a multibranch basis.

Nonetheless, the Romanian legislator's intention, expressed in one of the fundamental principles of the Insolvency Act, is to limit credit risk and systemic risk by recognizing the benefits of close-out netting both in insolvency and in pre-insolvency. This is an argument supporting the view that a *bilateral netting agreement* (such as the EFET General Agreement and any Eligible Individual Contracts thereunder), even if entered into on a multibranch basis, may also benefit from the Romanian Netting Regime (as described in Section 3.1.2 (*Winding-up, Insolvency or Attachment*) and Annex 3 (*Romanian Netting Regime*) of this opinion).

Therefore, we believe that, should Party A become insolvent, a Romanian court / the NBR should take a universal approach regarding the patrimony of Party A and would treat Party A and all of its branches as a single legal entity. The insolvency official / the NBR should give effect to the terms of the EFET General Agreement, even as regards the Eligible Individual Contracts entered into by a foreign branch of Party A and a Romanian court should require the insolvency official to give effect to the provisions of the EFET General Agreement not only as between the head office of Party A and its counterparty, but also as between Party A and its various branches, on the one hand, and the counterparty, on the other hand.

Hence, subject to all our considerations set out in Section 3.1.2 (*Winding-up, Insolvency or Attachment*) above, there should be no change to our conclusions reached under Section 3.1.2 (*Winding-up, Insolvency or Attachment*) above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency.

(j) *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 (a "**Non-Netting Jurisdiction**")?*

In case Party A is subject to insolvency proceedings in Romania and has booked Eligible Individual Contracts through its home office and one or more branches located in Non-Netting Jurisdictions (the "**Non-Netting Branches**"), a Romanian insolvency official should treat the EFET General Agreement as a single unified agreement in accordance with the single agreement principle, even if some of the Eligible Individual Contracts were entered into through one or more Non-Netting Branches.

This is because, we are not aware of any Romanian law provisions that would require a Romanian insolvency official or court to verify the enforceability of the close-out netting provisions of the EFET General Agreement under the laws of a foreign jurisdiction where Eligible Individual Contracts through a Non-Netting Branch were booked.

At the same time, we cannot rule out the possibility for an insolvency official in a Non-Netting Jurisdiction to obtain, under certain circumstances, recognition and enforcement in Romania of a foreign judgment with respect to the Non-Netting Branch, which would impact on the treatment of the EFET General Agreement as a single, unified agreement. Nonetheless, Romanian courts may refuse the recognition and enforcement of a foreign judgment to the extent that such judgement breaches Romanian law provisions.[55]

Note, however, that we are not aware of any precedent on cross-border netting in Romania that would provide guidance on how Romanian courts would treat these matters and may not exclude the possibility that a Romanian insolvency official or court takes a different view on these matters.

[55] Article 278 of the Insolvency Act and Article 519 of the BRR Act.

3.2.3. Foreign Multibranch Party (Part C.II.2. of the EFET Instruction Letter)

(k) *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?*

The answers to these questions depend on whether Party F is a corporation or a bank and whether it is established in an EU Member State or outside the EU:

(A) If Party F is a corporation with a Romanian Branch

(i) In case Party F is established in another EU Member State, the provisions of the EU Insolvency Regulation would apply.

Under the EU Insolvency Regulation, courts of the EU Member State within the territory of which the centre of debtor's main interests[56] is situated have jurisdiction to open insolvency proceedings ("main insolvency proceedings") according to the laws of that EU Member State[57].

The insolvency proceedings opened against Party F in Country H (an EU Member State) would be recognized in Romania without the need of any additional formalities[58] and, subject to the below, the assets and liabilities of the Romanian Branch[59] would be handled as part of the proceedings for Party F in Country H.

Note that pursuant to Article 3 (*International jurisdiction*) para. (2) of the EU Insolvency Regulation, where the centre of the debtor's main interests is situated within the territory of an EU Member State, the courts of another EU Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other EU Member State, and the effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter EU Member State.[60]

[56] The centre of main interests (COMI) is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office is presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption applies only if the registered office has not been moved to another EU Member State within the 3-month period prior to the request for the opening of insolvency proceedings. We note that a similar definition is also provided in Article 5 pt. 7 of the Insolvency Act, in the case of cross-border insolvency proceedings.

[57] Article 7 (*Applicable law*) para. (1) of the EU Insolvency Regulation sets out the general rule (the so-called *lex concursus* or *lex fori concursus*) that the law applicable to insolvency proceedings and their effects shall be that of the EU Member State within the territory of which such proceedings are opened.

[58] Article 19 para. (1) of the EU Insolvency Regulation.

[59] Note that, from a Romanian law perspective, the assets and liabilities of the branch are actually the assets and liabilities of the parent company.

[60] We note that such territorial insolvency proceedings may only be opened prior to the opening of main insolvency proceedings where: (a) the main insolvency proceedings cannot be opened because of the conditions laid down by the law of the EU Member State within the territory of which the centre of the debtor's main interests is situated; or (b) the opening of territorial insolvency proceedings is requested by: (i) a creditor whose claim arises from or is in

Consequently, if the main insolvency proceedings are opened against Party F in Country H (an EU Member State) and Party F also has a Romanian Branch, Romanian courts would have jurisdiction to open separate insolvency proceedings according to Romanian law ("secondary insolvency proceedings") against Party F. In this case, the secondary insolvency proceedings would be limited to the assets of Party F situated in the territory of Romania.

The opening of such secondary insolvency proceedings may be requested by:

(a) the insolvency practitioner in the main insolvency proceedings;

(b) any other person or authority empowered to request the opening of insolvency proceedings under Romanian law (please see Section C.2 (*Opening of insolvency proceedings*) of Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion).[61]

On this basis, the local creditors of the Romanian Branch could initiate separate proceedings in Romania even if the relevant authorities in Romania did not do so.

(ii) In case Party F is not established in another EU Member State, the cross-border insolvency of Party F is subject to the general conflict of laws rules set forth in the Romanian Civil Procedure Code and Chapter II (*Relations with third party states*) of Title III (*Cross-border insolvency*) of the Insolvency Act.[62]

The insolvency proceedings opened against Party F in Country H (a non-EU Member State) may be recognized in Romania, subject to the fulfilment of the conditions set out in Article 289 of the Insolvency Act, which includes the condition of reciprocity with respect to the effects of the foreign judgments between Romania and Country H.

Romanian courts may refuse the recognition and enforcement of a foreign judgment to the extent that such judgement breaches Romanian law provisions.[63]

As per Articles 276 letter A, 283 and 300 of the Insolvency Act, the Romanian Branch of Party F could be subject to separate proceedings in Romania and Romanian courts and authorities may find themselves entitled to rule in local insolvency proceedings against the Romanian Branch. The jurisdiction of the Romanian courts is granted by the fact that Party F has an establishment (*i.e.*, the Romanian Branch) in Romania.

connection with the operation of an establishment situated within the territory of the EU Member State where the opening of territorial proceedings is requested; or (ii) a public authority which, under the law of the EU Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings. When the main insolvency proceedings are opened, the *territorial* insolvency proceedings become *secondary* insolvency proceedings.

[61] As per Article 37 (*Right to request the opening of secondary insolvency proceedings*) para. (1) of the EU Insolvency Regulation.

[62] Article 1065 of the Romanian Civil Procedure Code, Articles 276 letter A, 283 and 300 of the Insolvency Act.

[63] Article 278 of the Insolvency Act.

The opening of the separate insolvency proceedings in Romania may be requested by, *inter alia*, a local creditor of the Romanian Branch of Party F (please see Section C.2 (*Opening of insolvency proceedings*) of Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion). The effects of the separate insolvency proceedings in Romania would be limited to the assets located on the territory of the Romania and, to the extent necessary to ensure cooperation with the foreign courts and representatives, other assets of the debtor, which, according to Romanian law, must be managed under the separate Romanian insolvency proceedings.

The above-mentioned considerations are subject to the provisions of any international treaty, convention or any other form of bilateral or multilateral agreement to which Romania is a party, which, according to Chapter II (*Relations with third party states*) of Title III (*Cross-border insolvency*) of the Insolvency Act, apply with priority.

(B) If Party F is a bank with a Romanian Branch

(i) In case Party F is established in another EU Member State, the provisions of Chapter IV (*Regulation of international private law relations with respect to the bankruptcy of credit institutions*) of Title III (*Cross-border insolvency*) of the Insolvency Act, set forth the principle according to which the authorities in charge of the proceedings in the home EU Member State of the credit institution have exclusive jurisdiction in respect of the insolvency of its branches located in other EU Member States, in accordance with the laws of the home EU Member State. The same principle is set forth under Title X (*Cross-border resolution proceedings with respect to branches*) of the BRR Act, according to which the application of the resolution tools and the exercise of the resolution powers are performed by the resolution authorities of the home EU Member State, including as regards Romanian branches of the EU credit institution.

These provisions transpose the principle of universality and unity of insolvency proceedings set forth in the Banks Winding-Up Directive, the application of which is twofold and entails: (i) the exclusive jurisdiction of the courts or administrative authorities of the home Member State over the reorganization proceedings or bankruptcy proceedings against an EU Member State credit institution, and (ii) the prohibition to open separate proceedings in other EU Member States.

Therefore, an exclusive jurisdiction of the courts of the home Member State is instituted with respect to insolvency proceedings[64] concerning Party F, including the assets and liabilities of its Romanian branch and a separate insolvency proceeding may not be opened in Romania with respect to the Romanian Branch of Party F.

[64] Insolvency proceedings include *reorganisation measures* and *winding-up/liquidation proceedings*, the definitions of which as set out in Article 320 para. (3)-(4) the Insolvency Act are fully aligned with the definitions set out in the Banks Winding-Up Directive, as recently amended by the BRRD. Accordingly, *reorganisation measures* are defined as measures which are intended to preserve or restore the financial situation of a credit institution or an investment firm as defined in Article 4(1), point (2) of Regulation (EU) No 575/2013 and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims; those measures include the application of the resolution tools and the exercise of resolution powers provided for in the BRR Act, and *winding-up proceedings* mean collective proceedings opened and monitored by the administrative or judicial authorities with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure.

The insolvency proceedings opened in Country H against Party F, which also carries on business in Romania, will be automatically recognized in Romania without any formalities and will be enforceable in accordance with the conditions and as of the date provided by the laws of Country H.

Furthermore, the Insolvency Act states that the provisions of Article 313 paragraph (2) referring to the provisions of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy (the "**Banking Act**") according to which *the law applicable to netting agreements and repurchase agreements is the law governing the respective agreements, without prejudice to BRR Provisions, and, in relation to repurchase agreements, subject also to the provisions of the law of the Member State where the registry, account or centralised depositing system for securities' registration or transfer is kept or located*, also apply to Romanian branches of EU credit institutions.

(ii) In case Party F is not established in another EU Member State, the cross-border insolvency of Party F is subject to the general conflict of laws rules set forth in the Romanian Civil Procedure Code, Chapter II (*Relations with third party states*) of Title III (*Cross-border insolvency*) of the Insolvency Act[65] and Chapter IV (*Romanian branches of third countries' entities*) of Title X (*Cross-border resolution proceedings with respect to branches*) of the BRR Act[66].

In light of these legal texts[67], the Romanian Branch of Party F could be subject to separate proceedings in Romania and Romanian courts and authorities may find themselves entitled to rule in local insolvency proceedings against the Romanian Branch. The jurisdiction of the Romanian courts is granted by the fact that Party F has an establishment (*i.e.*, the Romanian Branch) in Romania.

Furthermore, Romanian creditors of the Romanian Branch should be able to initiate separate bankruptcy proceedings in Romania, only subject to NBR's approval and, in case the Romanian Branch is or may be subject to resolution proceedings, bankruptcy proceedings should only be opened by the NBR, as resolution authority[68].

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[65] These provisions apply in case a bankruptcy proceeding is opened against a Romanian Branch of a third country' credit institution (according to Article 322 of the Insolvency Act).

[66] These provisions apply in case resolution proceedings are applied with respect to the Romanian branch of a third country' credit institution (according to Articles 627 and 628 of the BRR Act).

[67] Article 1065 of the Romanian Civil Procedure Code, Articles 276 letter A, 283, 300 and 322 of the Insolvency Act and Articles 1, 522, 627 and 628 of the BRR Act.

[68] Article 219^1 of the Insolvency Act, according to which: *(1) Without prejudice to any measure the NBR, as resolution authority, intends to take, in accordance with the recovery and resolution framework, bankruptcy proceedings may be opened at the request of the credit institution or its creditors only subject to NBR's approval, as resolution authority, and, in case the credit institution is subject to resolution proceedings or fulfils the conditions for the opening of resolution proceedings, bankruptcy proceedings may only be opened on the basis of a request made by the NBR, as resolution authority. (2) For the purposes of paragraph (1) above, the syndic-judge notifies immediately the NBR, as resolution authority, with respect to any request for the opening of bankruptcy proceedings made by the credit institution or its creditors, regardless of whether the credit institution is subject to resolution proceedings or not or if a decision in accordance with the recovery and resolution framework was made public or not. (3) The request for the opening of bankruptcy proceedings may be approved only if the notification mentioned in paragraph (2) above was made and, either the NBR, as resolution authority, communicated to the syndic-judge, further to the receipt of the*

The above-mentioned considerations are subject to the provisions of any international treaty, convention or any other form of bilateral or multilateral agreement to which Romania is a party, which, according to Chapter II (*Relations with third party states*) of Title III (*Cross-border insolvency*) of the Insolvency Act, apply with priority.

Similarly, in line with the BRRD, the BRR Act makes reference to the priority of EU agreements with third countries regarding the means of cooperation between the resolution authorities and the relevant third country authorities and bilateral agreements that Romania may enter into with third countries until the entry into force of the above-mentioned EU agreements.

(l) *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.*

As a preliminary remark, note that, as stated in our answer to question (k) above, separate insolvency proceedings in Romania with respect to the assets and liabilities of a local branch may be opened, in summary: (i) in accordance with the provisions of the EU Insolvency Regulation in the case of EU corporations and (ii) in accordance with the provisions of the Insolvency Act and BRR Act in the case of non-EU corporations and credit institutions.

Should separate insolvency proceedings be opened in Romania, such proceedings would only be directed to the winding-up/liquidation of the assets of the Romanian Branch[69] which are located in Romania and, to the extent necessary to ensure cooperation with non-EU courts and representatives, other assets of the debtor, which, according to Romanian law, must be managed under the separate Romanian insolvency proceedings.

We believe that the Romanian insolvency official and courts should include Party F's position under the EFET General Agreement in whole among the assets of the Romanian Branch, based on the reasoning and subject to the limitations set out below:

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notification, that it does not intend to take any resolution actions against the respective credit institution, or a 7-day term as of the date the notification was received has lapsed.

[69] The concept of "debtor's assets" is defined under the Insolvency Act as comprising "*all assets and rights of a patrimonial nature, including those acquired during insolvency proceedings and which may be subject to enforcement pursuant to the provisions of the Romanian Civil Procedure Code*".

- Party F's position under the EFET General Agreement (which could be translated as claims of and against Party F in insolvency proceedings) could be assessed from the perspective of (i) Article 2 (*Definitions*) para. (9) of the EU Insolvency Regulation, which sets out that the EU Member State in which assets are situated means, in the case of claims against third parties, the EU Member State within the territory of which the third party required to meet the claims has the centre of its main interests; and (ii) similarly, in the case of cross-border insolvency proceedings which are not covered by the EU Insolvency Regulation, Article 5 pt. 64 of the Insolvency Act, which sets out that the State in which an asset is situated (in the case of claims) is the State within the territory of which the debtor of the claim has the centre of its main interests. On this basis, Party F's claims under the EFET General Agreement entered into with Romanian counterparties could be considered as being assets situated within the territory of Romania;

- subject to the law of Country H (the law of the organic status of Party F), Romanian insolvency officials and courts will recognize and give effect to the Romanian law principle according to which Party F and all of its branches form one single legal entity;

- on the basis of the Romanian Netting Regime (as described in Section 3.1.2.1 (*Romanian Netting Regime*) and Annex 3 (*Romanian Netting Regime*) of this opinion), Romanian insolvency officials and courts should recognize and comply with the close-out netting provisions under the Eligible Individual Contracts entered into by Party F on a multibranch basis in accordance with their terms;

- in the context of Romanian secondary insolvency proceedings, the counterparty of Party F would be entitled to file a claim for the net amount payable under the Eligible Individual Contracts entered into on a multibranch basis, as the Romanian insolvency official and courts would give effect to the close-out netting provisions of the Eligible Individual Contracts entered into by Party F on a multibranch basis. Note in this context that, the counterparty's claim is enforceable and thus payable under Romanian insolvency proceedings only to the extent it is filed within the time limit set forth in the Insolvency Act (please refer to Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion).

The above considerations remain subject to the provisions of any bilateral agreement between Romania and Country H.

Note, however, that we are not aware of any precedent on cross-border *netting* in Romania that would provide guidance on how Romanian courts would treat these matters and may not exclude the possibility that a Romanian insolvency official or court takes a different view on these matters.

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

In case Party F is a corporation established in another EU Member State and has no Romanian Branch, pursuant to Article 3 (*International jurisdiction*) para. (2) of the EU Insolvency Regulation, Romanian courts would not have jurisdiction to open separate insolvency proceedings and all the assets and liabilities of Party F located in Romania would be handled as part of the main proceedings for Party F in Country H (an EU Member State).

The same principle would apply in case Party F is a bank established in another EU Member State and has no Romanian Branch, as territorial and secondary insolvency proceedings are excluded for such entities under Romanian law.

If the debtor is a corporation undergoing main insolvency proceedings abroad and has its centre of main interests outside the EU and only assets situated in Romania, the Insolvency Act seems to suggest that secondary insolvency proceedings may not be opened in Romania, given that the company does not have an establishment in Romania. However, if the main insolvency proceedings are recognized in Romania, then the assets located in Romania may be handled as part of the main insolvency proceedings for Party F in Country H (a non-EU Member State).

The same principle would apply in case Party F is a bank established outside the EU, having only assets in Romania and undergoing bankruptcy or resolution proceedings.[70]

The above considerations remain subject to the provisions of any bilateral agreement between Romania and Country H.[71]

3.3. Collateral (Part C.III. of the EFET Instruction Letter)

3.3.1. Additional Assumptions

For the purpose of answering the questions set out in Section 3.3.3 (*Questions Relating to Collateral*) below, we have further assumed that:

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

(ii) The counterparties agree that Eligible Credit Support will include cash, Letters of Credit[72] and Parent Company Guarantee (PCG). Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

(iii) Both parties to a financial collateral arrangement fall within the categories listed under Article 3 of the Government Ordinance no. 9/2004 on financial collateral agreements (the "**Collateral Ordinance**") (transposing Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements (the "**Collateral Directive**")) as eligible counterparties, as follows:

[70] Articles 300 and 322 of the Insolvency Act and Articles 523, 514 para. 1 letter b) and 516 letter a) of the BRR Act.
[71] Article 513 of the BRR Act and Article 275 of the Insolvency Act.
[72] According to the EFET Credit Support Annex, a Letter of Credit is defined as a standby letter of credit, bank guarantee or similar document in a format acceptable to Party B, denominated in the base currency or an eligible currency issued irrevocably by a leading commercial bank with a credit rating of at least A- from Standard & Poor's Rating Group or A3 by Moody's Investors Services, Inc. which obliges the bank to pay the amount guaranteed therein upon first demand of Party B.

"*The collateral taker and the collateral provider must each belong to one of the following categories:*

(a) a public authority (excluding publicly guaranteed undertakings unless they fall under points (b) to (d) below) including:

1. public sector bodies of Romania and of member states, charged with or intervening in the management of public debt, and

2. public sector bodies of Romania and of member states, authorized to hold accounts for customers;

(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund and the European Investment Bank;

(c) a financial institution subject to prudential supervision including:

(i) a credit institution, as defined in the Banking Act;

(ii) an investment firm, as defined in the Banking Act;

(iii) a financial institution, as defined in the Banking Act;

(iv) *an insurance company, an insurance-reinsurance company, a reinsurance company and insurance brokers, as defined by Law no. 32/2000 regarding the insurance activity and insurance supervision, as subsequently amended and supplemented*[73];

(v) an undertaking for collective investment in transferable securities (UCITS), as defined in Law no. 297/2004 regarding the capital market, as subsequently amended and supplemented (the "**Capital Market Act**");

(vi) an investment management company, as defined in the Capital Market Act;

(d) *a central counterparty, a settlement agent or a clearing house, as such is defined by law, and a legal person or an entity with no legal personality (with the exception of individuals) who acts in the name or on behalf of any one or more persons that include any bondholders or holders of other forms of debt instruments or any other institution as defined in points (a) to (d)*."

(iv) Transfers under each EFET Credit Support Annex would not be re-characterized as creating a form of security interest by a court having jurisdiction to rule over such transfer (except where Romanian courts are the relevant courts), provided that the relevant EFET

[73] As of 1 January 2016, Law no. 32/2000 only regulated the activity and supervision of insurance and reinsurance brokers and as of 1 October 2018 it was repealed by Law 236/2018 on insurance distribution. As regards the activity of insurance and reinsurance companies, a new law was enacted in October 2015 and is in force as of 1 January 2016, namely Law no. 237/2015 regarding the authorisation and supervision of insurance and reinsurance activity (the "**Insurance Act**").

Credit Support Annex was not amended in any material way and provided further that the Parties by their conduct did not otherwise clearly evidence an intention to create a security interest in the transferred Eligible Credit Support.

(v) All transfers of title are created and perfected in compliance with all applicable laws and regulations.

3.3.2. Considerations on Collateral

The Collateral Ordinance addresses the enforceability of close-out netting in the context of insolvency, as well as outside insolvency proceedings, by setting out a special regime with netting safe-harbours for *financial collateral arrangements* entered into between *eligible counterparties*.

Please refer to Section C (*Netting under the Collateral Ordinance*) of Annex 3 (*Romanian Netting Regime*) of this opinion for an overview of the Romanian financial collateral regime.

In the event an EFET Credit Support Annex and the transfer of Eligible Credit Support do not qualify for any reason as a valid financial collateral arrangement satisfying all the conditions set forth under the Collateral Ordinance[74], the special regime provided under the Collateral Ordinance will not apply and transfer of Eligible Credit Support under the EFET Credit Support Annex could be qualified as security interests or operations assimilated by law to security interests[75], as regulated by the Romanian Civil Code, in either case the following rules becoming applicable (it being specified that such adverse rules are indicative and not exhaustive):

1) <u>Validity Requirements</u>

- a security agreement over movable assets must be executed in writing[76] under the sanction of absolute nullity (at the choice of the parties, either as notarized or as private instruments);

- a security interest in movable assets is effective as of the date the secured obligation arises and the collateral provider gains rights over the collateral;

- a security agreement may guarantee any type of obligations, including future or conditional obligations;

- under the sanction of nullity, a security agreement over movable assets must (i) specify the secured amount or include provisions whereby the secured amount can be reasonably determined (a maximum secured amount is usually specified; according to the law, the secured amount must necessarily be determined <u>on the basis of the mortgage agreement</u>), (ii) identify the collateral provider and the secured party, (iii) evidence the cause of the secured obligation, and (iv) describe the mortgaged asset in a sufficiently precise manner;

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[74] Note that Romania decided to apply the corporate opt-out permitted by Article 1 paragraph (3) of the Collateral Directive.

[75] According to the Romanian Civil Code, contracts whereby a right over an asset is created or maintained in order to secure the performance of an obligation are deemed operations assimilated to security interests.

[76] The condition is fulfilled by execution of the relevant agreement in hard copy by the parties, or by the creation of an electronic document to which qualified electronic signatures of both parties are attached, as set forth under Law no. 455/2001 (the "**E-Signatures Law**") on the electronic signature and eIDAS Regulation.

- in case of collateral consisting in cash standing to the credit of a bank account, the respective bank account must be identified in the security agreement;

2) *Perfection Requirements/Priority*

- a security interest is perfected when (i) it becomes effective and (ii) it is registered with an on-line register - the National Registry of Movable Property and, in the case of cash in a bank account, publicity is satisfied through the control of the account and registration with the National Registry of Movable Property;

- a security interest takes priority as of the moment of perfection;

- a secured creditor is deemed to have control over the account if:

    - the secured creditor is itself the bank where the account is open; or

    - the collateral provider, the bank and the secured creditor enter into an account agreement whereby the bank, undertakes to follow the instructions of the secured creditor; or

    - it becomes the holder of the account.

- the security interest of a creditor having control over the account is preferred in rank to the security interest of a creditor who does not have the control over the account;

3) *Continuation*

- the perfection of a security interest with the National Registry of Movable Property is valid for 5 years and renewable, provided that, in all cases, the renewal application is filed prior to the expiry of the 5-year validity term;

4) *Disposal of Collateral*

- a security interest never entails a transfer of ownership in the collateral from the security provider to the security taker; consequently, the collateral taker does not have the right to dispose of the collateral; if the debtor fails to fulfill the secured obligation, then, the security interest becomes enforceable and the creditor is entitled to enforce the security interest either pursuant to the rules set out in the Romanian Civil Code or the Romanian Civil Procedure Code;

- the security provider may create subsequent security interests in favor of other creditors and even transfer the collateral to third parties;

5) *Substitution of Collateral*

- new collateral substituting the initially charged collateral is usually documented under an amendment to the security agreement, followed by the fulfillment of the relevant perfection requirements in respect of the new collateral;

6) <u>Enforcement</u>

- the security agreement is qualified by law as a writ of execution *per se*;

The Collateral Ordinance defines financial collateral as cash, financial instruments and / or credit claims aimed to guarantee financial obligations. Parent company guarantees and letters of credit fall outside the scope of the Collateral Ordinance.

Under Romanian law, letters of credit are regulated as letters of bank guarantee, which are defined under the Romanian Civil Code[77] as irrevocable and unconditional commitments according to which the issuer undertakes, at the request of another party, i.e. the applicant, in consideration of an underlying relationship, but independent of such relationship, to pay a sum of money to a beneficiary, in accordance with the terms of the commitment. Unless otherwise provided, such commitment is enforced upon the first and simple demand of the beneficiary. The issuer may not claim against the beneficiary the exceptions arising from the underlying relationship and may not be required to pay to the beneficiary in case of abuse or obvious fraud. The issuer that performed the payment has a right of recourse against the applicant. Unless otherwise provided, the letter of bank guarantee is not transferable together with the transfer of the rights and/or obligations arising from the underlying relationship. If expressly provided under the letter of bank guarantee, its beneficiary may transfer the right to claim payment under the letter of bank guarantee. Unless otherwise provided, the letter of bank guarantee becomes effective as of its issuance and its validity ends on the date indicated therein, irrespective of the delivery of the original of the letter of bank guarantee.

For the purposes of the answers below, when referring to "letters of credit", we refer to letters of bank guarantee as regulated under the Romanian law.

The definition of "letters of credit" under the EFET Credit Support Annex includes a general reference to any "*(…) similar document in a format acceptable to Party B (…)*". Considering that such reference is broad and may imply various types of instruments under Romanian law, the answers provided below do not take into account such documents.

3.3.3. Questions Relating to Collateral

(n) 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, with the exceptions described in our answer to question (hh)(A) below.

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

We assume that the question only refers to the cash collateral, considering that the letter of credit and parent company guarantee would not *per se* imply any transfer of ownership.

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[77] As provided under Article 2321 of the Romanian Civil Code.

The characterization of a transfer of cash collateral as an unconditional transfer of ownership in the assets transferred is determined by the law governing the legal nature and the proprietary aspects of the transfer of the cash collateral.

If the transfer of cash collateral has been perfected in compliance with a foreign law, we believe that a Romanian court should not re-characterize such transfer as a security interest, assuming that the EFET Credit Support Annex has not been amended in any material way and provided that the parties do not otherwise clearly evidence by their conduct the intention to create a security interest in the transferred cash collateral.

Where Romanian law governed the legal nature and the proprietary aspects of the transfer of the cash collateral:

(i) if the transfer of cash collateral falls within the scope of the Collateral Ordinance, we do not believe that there is a material risk that any such transfer would be re-characterized by a Romanian court as creating a security interest, provided that the EFET Credit Support Annex and the transfers of cash collateral qualify as a financial collateral arrangement satisfying the conditions set forth under the Collateral Ordinance.[78]

(ii) if the transfer of cash collateral falls outside the Collateral Ordinance, the EFET Credit Support Annex should be interpreted in accordance with the will of the parties[79], and, therefore, in principle, it should not be re-characterized by a Romanian court as creating a security interest. However, considering that Party A provides Party B with cash collateral in order to collateralize its outstanding obligations, we cannot completely rule out the risk that such transfer is re-characterized as a security interest. Should such re-characterization occur, the EFET Credit Support Annex may not meet the validity requirements (described in Section 3.3.2 (*Considerations on Collateral*) above) to qualify as a valid security agreement under Romanian law, which may trigger the invalidation of the transfer of cash collateral and thus the return of the cash collateral to Party A.

(p) *Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Romania necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?*

We assume that the question only refers to the cash collateral considering the letter of credit and parent company guarantee would not *per se* imply any transfer of ownership.

According to Romanian law, if Party B receives absolute ownership in the collateral, no further action has to be taken to ensure the relevant title. The same applies also if the cash collateral is granted under an arrangement with an eligible counterparty under the Collateral

[78] As provided under Article 2 (1) letters d) and e) of the Collateral Ordinance.
[79] According to § 7 para. 1 of the EFET Credit Support Annex, the parties to the EFET Credit Support Annex intend a full title transfer of Eligible Credit Support.

Ordinance and ownership is transferred. Other than the written evidence[80] of (i) the transfer, (ii) the financial collateral and (iii) the secured obligations, no other requirement needs to be complied with[81].

However, to the extent the transfer is re-characterized as a security interest (please refer to Section 3.3.2 (*Considerations on Collateral*) above), additional formalities should be carried out – for instance, it would have to be registered in the National Registry for Movable Publicity, in order to be *perfected*[82] (i.e., to gain enforceability against third parties and ranking).

Where the Eligible Credit Support is located outside Romania, to the extent a transfer of title has been validly perfected under the law of the jurisdiction where the Eligible Credit Support is located, Romanian law would recognize its validity and its effectiveness towards Party B. No particular act or procedural step is to be taken in Romania by Party B to establish, perfect, continue or enforce such ownership interest.

(q) *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?*

Party A's right to substitute collateral should be valid, subject to Party B's consent that would have to transfer back the Eligible Credit Support or release the issuer of the Letter of Credit or parent company guarantee upon substitution.

Substitution of collateral is equivalent to the creation of new collateral.

In case the Eligible Credit Support provided in substitution of the initial Eligible Credit Support is of a higher value than the initial Eligible Credit Support, it may be subject to a claw-back action (for details, please see Annex 4 *Romanian Pre-insolvency and Insolvency Regime*, Section C.4 *Main effects of the initial judgment*, Section *Voidable preference*).

If the EFET Credit Support Annex qualifies as a valid financial collateral arrangement satisfying all the conditions set forth under the Collateral Ordinance, any right of substitution of financial collateral in favor of Party A will not prejudice the financial collateral having been provided to Party B.[83] Such substitution should however be evidenced in writing[84].

Whilst providing for the possibility to include in a financial collateral arrangement Party A's right of substitution, Romanian law states only that, in exchange of the substituted collateral, Party A should provide collateral of substantially the same value and remains silent as regards the type of collateral which Party B should give back to Party A as a consequence of exercising the substitution right. A possible interpretation, although based

[80] The condition is fulfilled by execution of the agreement in hard copy by the parties, or by the creation of an electronic document to which qualified electronic signatures of both parties are attached, as set forth under the E-Signatures Law and eIDAS Regulation.
[81] As provided under Article 1 (2), Article 4 (2), Article 5(1) and Article 6 (3) of the Collateral Ordinance;
[82] As provided under Articles 2413 and 2409-2412 Romanian Civil code.
[83] As provided under Article 4(1) and Article 12 (1) (b) of the Collateral Ordinance;
[84] As provided under Article 1 (3) of the Collateral Ordinance. The condition is fulfilled by execution of a substitution confirmation in hard copy by the parties, or by the creation of an electronic confirmation document to which qualified electronic signatures of both parties are attached, as set forth under the E-Signatures Law and eIDAS Regulation.

on a provision of the Collateral Ordinance referring to close-out netting of collateral and not to the right of substitution, could be that Party B should return to Party A *equivalent collateral*[85], which is defined under the Collateral Ordinance in relation to cash as a payment of the same amount and in the same currency.

Under the Collateral Ordinance, the consequences of the presence or absence of consent to substitution by Party B are not expressly regulated. However, Party B should not be prevented from consenting in advance to the substitution of Eligible Credit Support in a Credit Support Annex, it being specified, nonetheless, that such agreement should not affect or limit Party B's absolute ownership right in the transferred Eligible Credit Support.

For the purpose of possible claw-back actions, the Collateral Ordinance expressly provides that: "*the provision of financial collateral, additional financial collateral or replacement financial collateral under such an obligation or right shall not be treated as invalid or reversed or declared void on the sole basis that: (a) such provision was made on the day of the commencement of reorganisation measures or winding-up proceedings, but prior to the order or decree making that commencement or in a prescribed period prior to the commencement of reorganisation measures or winding-up proceedings, as such period is defined by the laws regulating such reorganisation measures or winding-up proceedings by reference to such date or to the making of any order or decree or the taking of any other action in relation to such measures or proceedings or in the course of such measures or proceedings; (b) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral*".

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

§ 11 of the EFET Credit Support Annex provides that Eligible Credit Support in the form of Letters of Credit shall not be considered by the Valuation Agent in the determination of the Base Currency Equivalent of all Eligible Credit Support in the event of Early Termination of the Agreement. However, the EFET Credit Support Annex provides that the obligations Party A shall be discharged in an amount equal to the amounts drawn under the Letters of Credit by Party B and that such amount shall be part of "other amounts payable" by Party B under § 11 of the EFET General Agreement. To the extent Party B returns the value of the collateral transferred which exceeds the underlying debt, § 11 of the EFET Credit Support Annex should be valid under the laws of Romania.

[85] As provided under Article 8 of the Collateral Ordinance.

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

The rights of Party B may be affected in the event of insolvency of Party A (for details, please see Annex 4 *Romanian Pre-insolvency and Insolvency Regime*, Section C.4 *Main effects of the initial judgment*, Section *Voidable preference* and Section 3.1.2.5 *(Clawback actions under Romanian law) above*, as well as the answer to question (t) below).

This answer is also subject to our comments in point ii) of the answer to question (o) above.

If the EFET Credit Support Annex qualifies as a valid financial collateral arrangement satisfying all the conditions set forth under the Collateral Ordinance, subject to any restrictions imposed by virtue of the provisions of the BRR Act and IRR Act[86], the rights of Party B would be enforceable in accordance with the terms of the Credit Support Annex, irrespective of the insolvency of Party A, if each EFET Credit Support Annex and the provision of Eligible Credit Support qualified as a financial collateral arrangement satisfying the conditions set forth under the Collateral Ordinance[87].

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

Under the Insolvency Act, the insolvency official may file actions with the syndic judge for annulling certain acts done within a "suspect period" prior to the opening of insolvency proceedings to the detriment of the creditors' rights. For details, please see Annex 4 *Romanian Pre-insolvency and Insolvency Regime*, Section C.4 *Main effects of the initial judgment*, Section *Voidable preference* and Section 3.1.2.5 *(Clawback actions under Romanian law)* above.

However, acts entered into by the insolvent debtor in its ordinary course of business may not be voided[88] (except for fraud).

Therefore, we cannot rule out that the insolvency official and, subsequently, the syndic judge would consider that a transfer of Eligible Credit Support (under the form of cash) under the EFET Credit Support Annex falls within the scope of one of the claw back situations described in Section 3.1.2.5 *(Clawback actions under Romanian law)* above, such as transferring ownership to a creditor for payment of a prior debt, granting security

[86] As provided under Article 14 (1^1) of the Collateral Ordinance; please also refer to Section B (*Netting under the BRR Act – Resolution tools, pre-resolution powers, resolution powers and safeguards*) of Annex 3 (*Romanian Netting Regime*) and Section F.3 (*Recovery and Resolution (IRR Act)*) of Annex 4 (*Romanian Pre-insolvency and Insolvency Regime*) of this opinion.
[87] As provided under Article 6 (5), Article 9(1) and Article 10 of the Collateral Ordinance.
[88] As provided under Article 119 of the Collateral Ordinance.

interests for an unsecured claim or carrying out operations whereby the performance of the insolvent debtor is obviously exceeding the consideration received from the other party.

Substitution of collateral by a counterparty during such period, as well as transferring additional collateral, would be deemed separate legal acts and thus the related collateral would be deemed provided as of the date of substitution / transfer of additional collateral. As a result, in case such separate legal acts fall within the suspect period, the provisions mentioned above shall apply.

If the EFET Credit Support Annex qualifies as a valid financial collateral arrangement satisfying all the conditions set forth under the Collateral Ordinance, in an insolvency scenario, Party A (or its receiver or other similar official) will not be able to recover any Eligible Credit Support provided to Party B under the EFET Credit Support Annex during a suspect period if the Eligible Credit Support was provided prior to the order or decree making the commencement of reorganization measures or winding-up proceedings[89]. Furthermore, where a financial collateral arrangement has been entered into or a relevant financial obligation has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of, reorganization measures or winding-up proceedings, it shall be legally enforceable and binding on third parties if Party B can prove that it was not aware, nor should have been aware, of the commencement of such measures or proceedings[90].

Such provisions would however not prevent a competent Romanian court from annulling, on grounds of fraud, any transfer of Eligible Credit Support perfected pursuant to the Credit Support Annex.

The safe harbor regime set forth under the Collateral Ordinance would apply to substitutions or additions of collateral, provided they are not fraudulent[91].

(u) *Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in 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 p) above?*

In general terms, the EFET Credit Support Annex is an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support under the form of cash collateral to Party B.

If the EFET Credit Support Annex qualifies as a valid financial collateral arrangement satisfying all the conditions set forth under the Collateral Ordinance, given the relatively recent introduction of financial collateral provisions under Romanian law, financial contracts and financial collateral in Romania, it would be advisable to insert a wording under the EFET Credit Support Annex along the following lines:

"*This EFET Credit Support Annex and the transfers of Eligible Credit Support hereunder are intended to create a financial collateral arrangement as recognized under Romanian*

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[89] As provided under Article 11 (1) of the Collateral Ordinance.
[90] As provided under Article 11 (2) of the Collateral Ordinance.
[91] As provided under Article 12 of the Collateral Ordinance.

Government Ordinance no. 9/2004 regarding financial collateral arrangements, as further amended".

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

Apart from the recommendations included in this Section 3.3.3 (*Questions Relating to Collateral*), we have no other specific recommendations on the subject of collateral.

3.4. General Enforceability (Part C.IV. of the EFET Instruction Letter)

(w) *Is the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit Support Annex) and Appendices 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 your jurisdiction. 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 governs the EFET General Agreement.*

On the basis of the assumptions and subject to our considerations and the qualifications set out in this opinion, we believe that the EFET General Agreement should generally be enforceable under the laws of Romania in accordance with its own terms.

Save as otherwise stated in this opinion, we are not aware of any *ordre public* principles in Romania that would be contradicted by the EFET General Agreement, although it should be noted that it is not possible to express a precise and definitive view of the exact scope of Romanian public policy at any particular time.

(i) *Non-Performance Due to Force Majeure (§ 7 of the EFET General Agreement)*

The Romanian Civil Code defines **force majeure** (*forţă majoră*) as an external, unpredictable and absolutely invincible and inevitable event. Unless otherwise stated by law or contract, the party affected by force majeure is released from liability whenever damages are incurred by the other party as a result of force majeure.

Parties to an agreement may nominate specific events that would qualify as force majeure (e.g., earthquakes, wars etc.) for the purposes of their agreement and also establish limits with respect to the operation and effects of force majeure (e.g., parties may agree that liability is not entirely removed).

In light of the above, the provisions of § 7 of the EFET General Agreement (*Non-Performance Due to Force Majeure*) which set out the definition of force majeure, its effects and the conditions under which the Parties may be released from their obligations would be enforceable under Romanian law.

Note that the Romanian Civil Code also defines the **unforeseeable event** (*caz fortuit*) as being an event that may not be foreseen nor prevented by the party which would have been liable should that event had not arisen. Its legal effect is the same with that of force majeure.

In addition, in accordance with Article 1557 of the Romanian Civil Code, a contract is automatically terminated by law as of the time when a fortuitous event arose if, following the occurrence of such fortuitous event, the performance of a material contractual obligation becomes completely and irreversibly impossible. If such impossibility to perform is only temporary, the creditor of that obligation is entitled to either suspend the performance of its own obligations or to request the termination of the contract.

Note however that, according to Article 1634 para. (6) of the Civil Code, the debtor of an obligation carrying over generic (fungible) goods may not invoke a fortuitous impossibility to perform and would be bound to perform its obligations.

(ii) *Remedies for Non-Performance (§ 8 of the EFET General Agreement)*

Subject to our considerations below, the provisions of § 8 of the EFET General Agreement (*Remedies for Failure to Deliver and Accept*) would be enforceable under Romanian law.

Such provisions could be deemed as either a liquidated damages clause (*clauză penală*) as regulated under Articles 1538-1541 of the Romanian Civil Code or an exercise of the direct enforcement rights of the seller/buyer under Article 1726 of the Romanian Civil Code.

Under a liquidated damages clause, the debtor is bound to a penalty if it defaults on the main obligation. In the event of non-performance, the creditor may demand either the specific performance of the main obligation or the penalty (e.g., the payment of a pre-agreed compensation).

The penalty may be limited by Romanian courts when the main obligation was performed in part and such partial performance benefited the creditor or when such penalty is deemed excessive by reference to the loss that could have been foreseen by the parties at the time of execution of the agreement.

In addition, the penalty may not be requested if the performance of the obligation has become impossible through no fault of the debtor.

As regards the direct enforcement rights of the seller/buyer[92], in accordance with the Romanian Civil Code (i) the seller may use an authorised intermediary to sell the movable assets by auction or at market price (if there is a market price or price set by law), in case the buyer fails to pay or accept the movable assets sold and (ii) the buyer may use an authorised intermediary to buy assets of the same kind at the

[92] We note that § 1.1 of the EFET General Agreement (*Subject of Agreement*) includes the purchase and sale of electricity or natural gas.

seller's expense, in case the seller fails to deliver the assets[93]. When the assets are thus sold or purchased again, the seller or the buyer are entitled to receive the difference (if any) between the agreed price and the price obtained, in addition to damages.

The Romanian Civil Code requires the party that wishes to exercise the above-mentioned direct enforcement rights to immediately inform its counterpart of its intention.

Therefore, in relation to § 8 of the EFET General Agreement (*Remedies for Failure to Deliver and Accept*), we would recommend the Delivering Party / the Accepting Party to inform its counterparty before exercising the remedies for Failure to Deliver and Accept.

(iii) Limitation of Liability (§ 12 of the EFET General Agreement)

We believe that the provisions of § 12 of the EFET General Agreement (*Limitation of Liability*) would be enforceable under Romanian law.

As regards contractual liability, the general rule under the Romanian Civil Code is that parties are bound to perform their obligations in accordance with the terms of their contract and, in case of unjustified default, the defaulting party is liable for the losses caused to the non-defaulting party and the defaulting party has to remedy such losses in accordance with the law.

Parties are generally allowed to set out the terms of their contractual liability by limiting, aggravating or excluding their liability under an agreement, although it should be noted that in case of wilful misconduct[94] or gross negligence[95], any contractual limitation or exclusion of liability would be unenforceable under Romanian law. The provisions of § 12.2, § 12.3(b) and § 12.4 of the EFET General Agreement (*Limitation of Liability*) would therefore appear to be in line with such principles.

[93] In this case, the assets sold would have to be fungible and have a market price or price set by law.

[94] With respect to wilful misconduct (i.e., intentional default), Article 16 para. (2) of the Romanian Civil Code sets out that a deed is committed with intent when the author foresees the result of the deed and either (i) pursues the production of the result by committing the deed (*intenție directă*), or, (ii) although the author does not pursue the production of the result by committing the deed, accepts the possibility that the result may be produced (*intenție indirectă*).

[95] In accordance with Article 16 para. (3) of the Romanian Civil Code, a deed is committed with negligence when the author either (i) foresees the result of the deed, but does not accept it, considering without basis that the result will not happen, or (ii) does not foresee the result of the deed, although the author should have foreseen it. Gross negligence is when the author acted with such a negligence or imprudence that even the most unskilled person would not have shown in relation to its own interests. Determining the degree of negligence (i.e., if the negligence is simple or gross) is an assessment done on a case-by-case basis. In accordance with legal doctrine and precedent, this assessment could be made by taking into account (i) the concrete subjective, internal particularities of the author (e.g., experience, know-how, own usual degree of prudence) (ii) a unique abstract model, represented by an individual with an average level of diligence, prudence and understanding of the reality or (iii) the abstract model described at point (ii), but adapted according to the objective particularities of the author (e.g., the professional capacity in which it acted, the specific context, the particular obstacles external to that individual).

With respect to § 12.3(a) of the EFET General Agreement (*Consequential Damages and Limitation of Liability*), we note that there is no reference to, or definition of, the term "*consequential loss*" in the Romanian Civil Code.

In the event of a breach of contractual obligations, Article 1530 of the Romanian Civil Code provides a "creditor" (i.e., the non-defaulting party) with an entitlement to damages that compensate it for losses caused by the "debtor" (i.e., the defaulting party). In establishing whether a loss is caused by a breach, Article 1530 confirms that the creditor is only entitled to damages for such losses that are "*the direct and necessary consequence*" of the breach.

With respect to the types of damages that may be recovered, Articles 1531 and 1532 of the Romanian Civil Code provide in essence that:

- the creditor is entitled to a "*full remedy*" for the loss suffered as a result of the relevant breach;

- any loss (*prejudiciu*) includes the effective loss suffered (*damnum emergens*); as well as the deprived benefit (*lucrum cessans*)[96];

- the creditor is also entitled to the full remedy of any non-pecuniary damages;

- when they are certain, future damages shall also be taken into account; damages in connection with a "*loss of opportunity*" arising out of a breach may also be recoverable to a certain extent.

In addition, in connection with all types of loss and damage, Article 1533 of the Romanian Civil Code provides that a debtor is only liable for damages that could have been foreseen as a result of the relevant breach at the time the relevant contract was executed. By way of exception, a debtor is also liable for unforeseen damages where the relevant breach was due to wilful misconduct or gross negligence. Nevertheless, such damages still need to be "*the direct and necessary consequence*" of the relevant breach, in accordance with Article 1530, in order to be recoverable.

With respect to § 12.5 of the EFET General Agreement (*Duty to Mitigate Losses*), the following principles of the Romanian Civil Code may apply:

- each contracting party is bound to observe the principle of good faith set out in Article 1170 of the Romanian Civil Code, which states that contracting parties have a general obligation to act in good faith during the negotiation, execution and performance of the agreement. This principle should include the duty to mitigate losses by the contracting parties.

  We also note that, in case an event occurs that leads to the impossibility to perform (such as a force majeure or unforeseeable event), the debtor (i.e., the defaulting party) has to notify the creditor (i.e., the non-defaulting party) of

[96] Such deprived benefit may include, but is not necessarily limited to, loss of profit. When determining the extent of the damages, the expenses incurred by the creditor, within a reasonable limit, to avoid or limit the losses are also taken into account.

the existence of such event. If the notification does not reach the creditor within a reasonable period of time from the moment when the debtor knew or should have known about the impossibility to perform, the debtor is liable for the losses so caused to the creditor.

- if the creditor is partly responsible for the losses incurred, any compensation owed by the debtor would be reduced accordingly, as per Article 1534 para. (1) of the Romanian Civil Code. Moreover, the debtor does not owe compensation for losses that the creditor could have avoided with a minimum diligence. This means that the legal standard for the creditor is to act at least with a minimum diligence to avoid the losses.

(iv) Other provisions of the EFET General Agreement that could be further 'expanded' and/or 'strengthened'

We would recommend the following:

- as regards § 1.1 of the EFET General Agreement (*Subject of Agreement*), to amend the wording in the second sentence in order to strengthen the "*single agreement*" concept, as follows:

  "*Each Individual Contract is entered into in reliance on the fact that this General Agreement and all Individual Contracts form a single agreement between the parties (collectively referred to as the "Agreement"), and the parties would not otherwise enter into any Individual Contracts*".

  The wording proposed above emphasises that, *inter alia*, if the insolvency official wishes to exercise its cherry-picking powers with respect to certain Individual Contracts, this would have the effect of amending the original understanding between the parties, which is not permitted in insolvency proceedings.

- as regards § 3.1 of the EFET General Agreement (*Conclusion of Individual Contracts*), to execute the Individual Contracts in writing, as detailed in our answer to question (dd) below;

- as regards § 10.3 and § 10.4 of the EFET General Agreement (*Termination for Material Reason; Automatic Termination*), to specify that no notice of payment or delivery delay is required from the other party ("*se va afla de drept în întârziere*") for termination to occur; moreover, the parties to the EFET General Agreement should state that Early Termination occurs automatically, without the need of further formalities (such as notices) or court intervention;

- as regards § 21 of the EFET General Agreement (*Representations and Warranties*), to specify that each party acknowledges that the representations and warranties made by each party to the Agreement are essential in the other party's entering into the Agreement and any and each Individual Contract; in addition, wording tailored to the specific status of the parties should be inserted as an additional representation (e.g., if one of the parties is an insurance company, an additional representation that the Individual Contracts are carried out with the observance of any rules regarding its technical reserves and the legislation on the authorisation and supervision of insurance and reinsurance companies).

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

Without expressing any view on the validity or enforceability of the E-Notice Agreement itself, we believe that a notice, declaration or other communication given in accordance with the E-Notice Agreement should generally be recognised as valid.

Under Romanian law, such notices may be sent by any adequate means, i.e., as long as the means of communication allow the possibility for the recipient to acknowledge the notice and there is proof of delivery of the notice. The notice would become effective as of the moment it arrives to the addressee, even if such addressee did not become aware of the notice for reasons beyond its control.

As recommended in our answer to question (b)(cc) above, the Parties should sign all electronic notices and communications in connection with the Agreement with qualified electronic signatures[97] and obtain delivery receipts for evidentiary purposes. This would mitigate the risks arising from possible challenges of the recipient that the notices were not signed by authorised representatives or that there is no proof as regards the transmission of the notice (please also refer to our answer to question (dd)(iii) below).

As regards the burden of proof, the general rule under the Romanian Civil Procedure Code is that the party making a claim in a legal proceeding would also have to prove that claim, unless otherwise provided by law. In particular, we note that the Romanian Civil Procedure Code sets out in Articles 304 – 308 a procedure for denouncing, verifying and reporting falsified documents to the competent authorities. In summary:

- if one of the parties to a dispute declares that a document provided by the opposing party has been falsified, the former would be required to state the reasons for its allegations;

- after verifying the document, the court would then ask the party that provided the document (if present) if it still wishes to use it in the legal proceedings; if such party fails to appear in court, refuses to answer or declares that it no longer wishes to use the document, then the document will be excluded from evidence; on the contrary, if the party making the allegations fails to appear in court, refuses to answer or recants its statements, then the document would be deemed recognised by such party;

- in case the party that provided the document insists on using such document in the legal proceedings and the opposing party does not recant its statements, the court may suspend the legal proceedings if the author of the forgery or its accomplice is known; the court would then submit the document to the prosecutor's office, which will carry out the investigation into the forgery; if criminal proceedings cannot be initiated or cannot continue, the civil court would investigate the forgery allegations by administering any means of evidence.

[97] We refer to qualified electronic signatures within the meaning of the eIDAS Regulation.

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

There are certain mandatory provisions of Romanian law that should be considered for the purpose of ensuring the enforceability of the provisions of the EFET General Agreement and its Credit Support Annex, such as the ones detailed below:

(A) *Financial Collateral Form Requirements*

In order for the Eligible Credit Support in the form of cash collateral to benefit from the protective regime under the Collateral Ordinance (for details please see Section 3.3.2. (*Considerations on Collateral*) above), a financial collateral arrangement must, *inter alia*, (a) be evidenced in writing (whereby references to "*writing*" include recording by electronic means and any other durable medium, equivalent to a written document under the law) and (b) refer to financial collateral, the provision of which to the beneficiary can be evidenced in writing, provided that such evidencing allows for the identification of the financial collateral to which it applies.

Therefore, in order to satisfy the validity requirements under points (a) and (b) above in accordance with the provisions of Romanian law, the EFET General Agreement and its Credit Support Annex and the confirmations thereunder should be executed:

(i) either as hard copy originals, bearing both parties' signatures (i.e., signed by hand), or

(ii) as electronic documents to which valid electronic signatures are attached, in accordance with the E-Signatures Law.

In addition to executing the EFET General Agreement and its Credit Support Annex by complying with the form requirements as set out above, we recommend including additional wording in the EFET General Agreement and its Credit Support Annex to ensure that such form requirements are observed by the parties when executing confirmations of Individual Contracts.

(B) *Unusual Clauses*

According to Article 1203 (*Unusual Clauses*) of the Romanian Civil Code, standard clauses providing "*A) in favour of the party proposing such clause (i) limitations of liability, (ii) the right to unilaterally terminate the agreement, (iii) the right to suspend the performance of their obligations or B) to the detriment of the other party (i) the loss of rights, (ii) the loss of benefit of term, (iii) the limitation of the right to raise exceptions, (iv) the limitation of the right to contract with third parties, (v) the applicable law, (vi) provisions derogating from competent courts' jurisdiction rules are not enforceable unless expressly accepted in writing by the disadvantaged party*".

A party's consent to an agreement should be submitted to the law governing the agreement to which such party consents (in our case, the laws of Germany or England and Wales). This principle is reflected in Article 10 para. (1) of Regulation

(EC) No. 593/2008 on the law applicable to contractual obligations ("**Rome I Regulation**"). However, according to Article 10 para. (2) of Rome I Regulation, "*a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in [Article 10 para. (1)]*".

Given the above, one may not rule out the risk that Party A may avail itself of the provisions of Article 10 para. (2), by arguing that, under Romanian law (i.e., the law of its habitual residence), it would not be reasonable to rely on the provisions of the laws of Germany or England and Wales in determining whether it has validly consented to any unusual clauses set forth in the EFET General Agreement.

Therefore, our recommendation would be to add a specific wording in the EFET General Agreement, along the following lines:

"*Each party hereby expressly confirms that each and every provision of this Agreement was negotiated and that it had the opportunity to propose changes thereto and further confirms and expressly acknowledges that it has read, understood and accepted each and every provision of this Agreement. In particular, in accordance with Article 1203 of the Romanian Civil Code, each party hereby expressly acknowledges each and every provision of this Agreement providing: A) in favour of one party (i) limitations of liability, (ii) the right to unilaterally terminate (in Romanian: denunțare unilaterală) the Agreement, (iii) the right to suspend the performance of their obligations or B) to the detriment of the other party (i) the loss of rights (in Romanian: decădere din drepturi), (ii) the loss of benefit of term (in Romanian: decăderea din beneficiul termenului), (iii) the limitation of the right to raise exceptions (in Romanian: dreptul de a opune excepții), (iv) the limitation of the right to contract with third parties, (v) the tacit renewal of the agreement, (vi) the applicable law, or clauses derogating from the rules of court jurisdiction, including, without limitation, § 9 (Suspension of Delivery), § 12 (Limitation of Liability) and § 22 (Governing law and Arbitration) of this Agreement*".

We would also advise to include similar wording in each Individual Contract (please see our considerations under question (dd) below, where we recommend the execution of the Individual Contracts in writing), by referencing the EFET General Agreement which governs the Individual Contracts.

(C) *Hardship (impreviziune)*

According to Romanian civil law, the parties to an agreement must perform the obligations they have undertaken even if the performance thereof becomes more cumbersome due to an increase in the costs of the obligation or a reduction in the value of the counterparty's obligation.

Nonetheless, if the performance of the Agreement becomes excessively onerous on Party A due to an exceptional change of circumstances making performance by the contracting party obviously unjust, the hardship mechanism may be applied by asking the court to order either the amendment or the termination of such agreements.

The above-mentioned mechanism may only be applied if the following cumulative conditions are met:

(a) the change in circumstances occurs after the contract is entered into;

(b) the change in circumstances and its scope were not and could not have been reasonably foreseen by the debtor at the time the contract was entered into;

(c) the debtor has not undertaken the risk of the change in circumstances, and one cannot reasonably deem that the debtor has undertaken such risk; and

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

In light of the above, we propose the insertion of an additional paragraph to the EFET General Agreement as follows:

"*Each Party hereby expressly declares and irrevocably agrees to bear the risk of any change in the circumstances existing on the execution date of this Agreement and, consequently, acknowledges that it shall be bound to observe its obligations under this Agreement and any of the transactions hereunder, irrespective of whether such change in circumstances would result in its respective obligations becoming excessively burdensome*".

(D) Assignment (§ 19 of the EFET General Agreement)

The following general rules set out in the Romanian Civil Code apply to the assignment of claims:

- contractual provisions which limit or forbid the assignment are not enforceable with respect to claims for the payment of moneys; however, the assignor remains liable towards the other party (the assigned debtor) for breaching such contractual provisions;

- the assignment of claims is inoperable in respect of claims which are declared by law not transmissible; in this regard, claims which do not consist in sums of money may be assigned if such an assignment does not render the performance of the assigned debtor substantially more onerous;

- assignment of future claims requires for the assignment agreement to include elements which allow identification of the assigned claims;

- claims are considered transferred from the time of the entry into the assignment agreement; as a general rule, in case of sale of future assets, the buyer acquires ownership from the moment when the asset comes into existence;

- claims are assignable by agreement of the assignor and assignee, without the notification of the assigned debtor; the assigned debtor's consent is only required if the claim is essentially and personally linked to the assignor (*i.e.*, to the creditor of such claim).

3.5. <u>Confirmation Practices</u> (Part C.V. of the EFET Instruction Letter)

3.5.1. Additional Assumptions

For the purpose of answering the questions set out in Section 3.5.2 (*Binding Individual Contract*) and Section 3.5.3 (*Means of Evidence*) below, we have further assumed that:

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

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

(iii) Personal data relating to natural persons that are protected under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ("**GDPR**") would be processed in accordance with the GDPR.

3.5.2. Binding Individual Contract (Part C.V.1. of the EFET Instruction Letter)

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

Romanian law does not set out formal validity requirements for parties to enter into agreements, unless such requirements are specifically imposed by law for certain agreements.

Therefore, as a general rule, the key element for the formation of any contract under Romanian law is the choice of the parties to enter into such contract (the principle of *consensualism*), regardless of the form of the contract (either verbal, written or electronic).

As there are no specific form requirements imposed by law with respect to Individual Contracts[98], such contracts do not require any formal act in order for them to be legally binding and enforceable under Romanian law. Nevertheless, in order to prove the existence of the Individual Contracts and their content, the rules of evidence referred to in question dd) below would have to be observed.

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[98] We are not aware of any general requirement to execute Individual Contracts in a specific form, although it should be noted that transactions pertaining to financial collateral arrangements must be evidenced in writing in accordance with the financial collateral legislation (for details, please see our answer to question (y)(A) above). In addition, there may be instances where certain Romanian counterparties are required under their specific regulatory regime to execute Individual Contracts in written form (either in paper or electronic form) for formal validity purposes; this should be checked on a case-by-case basis.

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

If the terms and conditions of an Individual Contract are proposed[99] orally by a Party (i.e., the offeror) to the other Party (i.e., the offeree), such Individual Contract would become legally binding and enforceable under the laws of Romania when the acceptance of the essential terms and conditions by the offeree reaches the offeror.

This conclusion is based on the provisions of Article 1186 para. (1) of the Romanian Civil Code which state that an agreement is deemed to be entered into when the acceptance of an offer to conclude the agreement reaches the offeror. Note that, even in cases where the offeror is not notified, an agreement may also be deemed concluded when the recipient of an offer commits an act or conclusive deed which may be considered as an acceptance[100].

It is sufficient for the parties to agree on the essential terms and conditions of the contract, even if they leave some of the less material elements to be agreed at a later stage. If during negotiations a party insists on reaching an agreement on certain terms and conditions or on a certain form, the contract is not concluded until such an agreement is reached.

Please note however that, if an oral agreement has been subsequently documented in writing, only in very limited circumstances witnesses could be used to prove what was said before, during or after the agreement was drawn up (please see our answer to question (dd) below).

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

As regards the legal effects of the failure to object to incorrect terms in a received Confirmation, we believe that this should be assessed from the perspective of the governing law of the Agreement.

If Romanian law were to apply for any reason to the Agreement, it should be noted that at the time when the Confirmation is sent in accordance with § 3.2 of the EFET General Agreement (*Confirmations*), the verbally agreed upon Individual Contract would have already been concluded, as explained in our answer to question (aa) above.

This means that the Confirmation could be deemed as an offer to amend the Individual Contract. In this context, the failure to object to the terms of the received Confirmation should not amount to an acceptance of such terms, but please note that the silence of the recipient of the offer could be assessed in accordance with the provisions of Articles 1186 para. (2) and 1196 para. (2) of the Romanian Civil Code, which state that:

[99] In accordance with Article 1188 para. (1) of the Romanian Civil Code, a proposal represents an offer to enter into an agreement if it contains sufficient elements for the formation of the agreement and expresses the offeror's intention to be bound in the event of its acceptance by the recipient of the offer.
[100] Article 1186 para. (2) of the Romanian Civil Code. This applies when acceptance is made in this manner according to the offer, the established practice between the parties, customs or the nature of the business.

- an agreement is considered concluded when the recipient of the offer performs an act or a conclusive fact, without notifying the offeror, if, based on the offer, the established practices between the parties, customs or according to the nature of the business, acceptance may be done in this manner; and

- the silence or inaction of the recipient of the offer may not amount to an acceptance of such offer, unless the acceptance results from the law, the agreement of the parties, the established practices between them, customs or from other circumstances (e.g., the recipient of the offer performs its obligations in accordance with the received Confirmation).

If an offer is made and there is no term set out for its acceptance, such offer is rendered without effect if it is not accepted immediately. This applies to face-to-face discussions as well as telephone or other similar remote communication methods.

Although there is no specific time period set out under law to respond to a Confirmation, any objection to incorrect terms in a received Confirmation should be done without delay, in accordance with § 3.3 of the EFET General Agreement (*Objections to Confirmations*).

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

Under Romanian law, parties are bound by the external clauses to which their contract refers, unless otherwise provided by law.

As the Individual Contracts do not require any formal act in order for them to be legally binding and enforceable under Romanian law, it results that, in principle, the reference to the relevant EFET General Agreement made in the relevant written confirmation exchanged (post trade) between the parties should be sufficient for the inclusion of the Individual Contract in the EFET General Agreement.

However, we refer to our considerations under question (dd) below, where we recommend executing the Individual Contracts in writing for evidentiary purposes. The Individual Contracts thus executed should include a provision stating that such contracts are governed by the same EFET General Agreement and an express acceptance of the unusual clauses set out in the EFET General Agreement (please see our answer to question (y) above).

In the absence of Individual Contracts executed in writing between the Parties, we cannot exclude the possibility that an insolvency official would challenge the post trade Confirmation executed by one of the Parties[101] and sent to the other Party, on the grounds that such Confirmation is not sufficient proof as regards the existence, date and content of the Individual Contract or on the basis of the powers conferred to such insolvency officials during insolvency proceedings (please see our answer to question (b)(bb) above).

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[101] We note that the standard form of the Confirmations attached to the EFET General Agreement as Annex 2 a – d sets out that such Confirmations are to be executed by only one of the Parties.

3.5.3. Means of Evidence (Part C.V.2. of the EFET Instruction Letter)

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

As a preliminary remark, please note that our general recommendation is to have the EFET General Agreement and the related Individual Contracts executed in writing and signed by the Parties with wet ink signatures or, if executed by electronic means, signed with qualified electronic signatures, within the meaning of the eIDAS Regulation.

In the absence of a written agreement and in case of a dispute between the Parties, other means of proof would have to be used and corroborated in order to prove the existence and the terms and conditions of an Individual Contract. This could make the burden of proof more difficult and there may be situations when the use of other means of evidence could be limited, deemed insufficient or inadmissible by a court of law.

(i) *Taped Recordings*

Taped recordings are generally admissible[102] in legal proceedings and are considered material means of proof (*mijloace materiale de probă*) within the meaning of Article 341 of the Romanian Civil Procedure Code. This means that taped recordings have no predefined evidentiary value (*forța probantă*) and would be assessed depending on the particularities of the case by Romanian courts.

We note that, in accordance with § 23.1 of the EFET General Agreement (*Recording Telephone Conversations*), each Party has given its prior consent with respect to the recording of telephone conversations and the use of the same as evidence.

Article 256 of the Romanian Civil Procedure Code allows conventions as to the means of evidence applicable between the parties, as well as with respect to the object and the burden of proof. Such contractual rules of evidence are possible in all cases, to the extent that (i) they do not refer to rights of the parties which cannot be disposed of, (ii) they do not render the proof of legal facts or acts more difficult or even impossible, or (iii) they do not breach public policy or morality.

In light of the above, § 23.1 of the EFET General Agreement (*Recording Telephone Conversations*) should be considered as a convention as to the means of evidence

[102] As per the provisions of Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector, the recording of telephone conversations is allowed insofar as it is made with the consent of the parties and within legal professional practices, in order to provide proof of a commercial act or a communication made for commercial purposes (i.e., in a business context). In addition, it should be noted that the recording of telephone conversations is even a regulatory requirement for certain counterparty types, e.g., investment firms are required under the Markets in Financial Instruments Act to keep certain records, including the recording of telephone conversations or electronic communications relating to concluded transactions.

applicable between the Parties in order to facilitate the proof of the existence or the terms and conditions of an Individual Contract.

That being said, we would recommend that the Parties specify in § 23.1 of the EFET General Agreement (*Recording Telephone Conversations*) that the recording of the telephone conversations shall serve as full evidence between the Parties with respect to the existence or the terms and conditions of the Individual Contract entered into between them.[103]

(ii) Witness' Statement

As a general rule, an agreement may not be proven with witnesses, if its value exceeds RON 250 (i.e., approx. EUR 50).

Witnesses may be used to prove an agreement (regardless of its value) against a professional[104], if such agreement was drawn up during its course of business and the written form of the agreement is not required by law for validity purposes[105].

In addition, witness statements may never be used as evidence against or in addition to what is set out in an agreement, nor used to prove what was said before, during or after the agreement was drawn up. Nevertheless, witness statements may be used when:

(a) the party was in a material (i.e., physical) or moral impossibility to draw up the agreement in writing;

(b) there is a commencement of proof (*început de dovadă scrisă*)[106] within the meaning of Article 310 of the Romanian Civil Procedure Code;

(c) the party lost the written document due to an unforeseeable event or force majeure;

(d) the parties agree, even tacitly, to use witness statements as evidence, but only with regard to the rights they can dispose of;

(e) the agreement is challenged for fraud, error, deception, duress or for an illegal or immoral cause, as the case may be;

(f) witness statements are used to clarify the provisions of the agreement.

[103] Although controversial, certain Romanian legal writers incline toward an interpretation of the provisions of Article 256 of the Romanian Civil Procedure Code that would allow the parties to an agreement to increase the evidentiary value of certain means of evidence, in order to facilitate the proof of legal facts or acts between them.

[104] According to Article 3 of the Romanian Civil Code, "*professional*" is any person (legal entity or individual) who operates an undertaking, namely who systematically carries out an organized activity consisting in the manufacturing, administration or sale of goods or in the provision of services, irrespective of whether the organized activity is a profit-making activity. The term "*professional*" includes the categories of trader, entrepreneur, economic operator, as well as any other person authorized to carry out economic or professional activities.

[105] If the written form of an agreement is required by law for validity purposes, such agreement may never be proven using witnesses.

[106] A commencement of proof or *prima facie* written evidence may be any written document, even if unsigned and undated, that originates from a person to whom it is opposed, if such document makes the alleged fact credible.

(iii) E-Mail or Other Electronic Message or Transaction Entry System

If the terms and conditions of an Individual Contract are sent by email (or other electronic message or transaction entry system) and signed by the Parties with qualified electronic signatures within the meaning of the eIDAS Regulation ("**QES**"), then such a document would be deemed as a private deed[107] under Romanian law.

This is supported by Article 5 of the E-Signatures Law: "*the electronic document, to which an extended electronic signature based on an unsuspended or unrevoked qualified certificate at that time was attached, incorporated or logically associated and which is generated by a secure electronic signature creation device, is assimilated to a private deed, in terms of its conditions and effects*".[108]

A private deed which is recognised by the opposing party or deemed recognised under law[109] represents eligible proof between the parties, until proven otherwise.

Article 46 of the eIDAS Regulation sets out that an electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form.

In line with Article 46 of the eIDAS Regulation, the Romanian Civil Procedure Code sets out provisions which refer to electronic documents, by using two terms: documents on computer media (in Romanian, "*înscrisurile pe suport informatic*") and documents in electronic form (in Romanian, "*înscrisurile în formă electronică*"). The two terms are often used interchangeably[110], but there are legal writings that support the idea that these two terms refer to different concepts[111]. Romanian courts also have diverging views on the treatment in legal proceedings of documents on computer media and documents in electronic form.

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[107] The private deed (*înscris sub semnătură privată*) is a document that bears the signature of the parties, regardless of its material support (form).

[108] In light of the definitions set out in the E-Signatures Law and eIDAS Regulation, the "*extended electronic signature based on a qualified certificate and created by a secure electronic signature creation device*" under the E-Signatures Law could be construed as being the QES under the eIDAS Regulation. The QES has the equivalent legal effect of a handwritten signature.

[109] The recognition of the private deed may be explicit or implicit (e.g., when there is no objection by the opposing party or such party uses the document or a part of it). In addition, the private deed is considered recognised either in the document verification procedure or in the forgery procedure, if the court finds that the private deed is admissible into evidence.

[110] Legal scholars have noted that the legislator did not seek to establish a difference between these two terms, because, from a technical point of view, "*all electronically generated documents are stored on computer media*" (Boroi, Gabriel, the collective, *The New Civil Procedure Code. Commentary on articles. Vol. I. Articles 1 – 526*, Hamangiu publishing house, Bucharest, 2016).

[111] Legal scholars have argued that from a technical perspective, "*the electronic document represents the binary code of 1 and 0, and the computer support is the recipient of the binary code*" so that "*the data collection viewed individually may represent a document in electronic form while the data collection and the computer media on which it is stored, taken as a whole, is a document on computer media*" (Băbuș, Paul, Stanciu, Marius, *Signing contracts in counterparts, from the perspective of Romanian material and procedural law*, published online on 2 March 2017). We also note in this context that the "*electronic document*" is defined under in Article 3 pt. 35 of the eIDAS Regulation as "*any content stored in electronic form, in particular text or sound, visual or audiovisual recording*" and therefore is not limited to text form.

Unless recognised by the opposing party in a dispute[112], the acceptance of the terms of an Individual Contract by email (without the use of QES) may produce limited legal effects and would not be deemed by Romanian courts as a private deed, but either as (i) a commencement of proof within the meaning of Article 310 of the Romanian Civil Procedure Code, (ii) material means of proof (*mijloace materiale de probă*) within the meaning of Article 341 of the Romanian Civil Procedure Code and/or (iii) documents on computer media (*înscrisuri pe suport informatic*) within the meaning of Article 266 of the Romanian Civil Procedure Code.

A document on computer media is admissible as evidence under the same conditions as documents on paper, if such a document meets the conditions provided by law; in this regard, the provisions of Articles 282 – 284 of the Romanian Civil Procedure Code set out in essence that:

- when data is read from computer media, the document containing the data may serve as evidence if it is **intelligible** (i.e., it can be accessed and read) and there are **sufficiently serious warranties**[113] with respect to its content and the identity of the person from whom it originates; in order to assess the quality of the document, Romanian courts would have to take into account the circumstances in which the data was recorded and the document used to read such data;

- unless otherwise stated by law or until proven otherwise, a document on computer media will serve as full evidence between the parties with respect to the data recorded; if the computer media or the technology used for drafting the document on computer media does not warrant its **integrity**, that document might serve, as the case may be, as material means of proof or as commencement of proof, which would have to be corroborated with other means of evidence (such as witnesses or technical expertise).

For documents in electronic form, the Romanian Civil Procedure Code sets out that such documents are subject to the provisions of the special legislation (i.e., the E-Signatures Law).

Additional requirements may apply depending on the specifics of the electronic messaging system and the applicable regulatory regime.

Parties wishing to electronically execute Individual Contracts (including by email or other electronic message or transaction entry system) should also consider the provisions of Article 1203 (*Unusual Clauses*) of the Romanian Civil Code, which state that standard clauses providing (a) "*in favour of the party proposing such*

[112] Insofar as it is recognised by the opposing party, a document in electronic form bearing an electronic signature has the same legal effect as an authentic document between the signatories and those who represented their rights.

[113] The recording of data on computer media is presumed to offer sufficient serious warranties if it is done systematically and without gaps and when the data recorded is protected against alterations and counterfeit, so that the integrity of the document is fully ensured. Legal scholars have noted that documents signed with extended electronic signatures may benefit from this presumption (Bereanu Madalina Diana, *Înscrisul pe suport informatic și înscrisul în formă electronică. Divergență sau unitate?*, in the Romanian Private Law Gazette no. 2/2021). This presumption is also provided in favour of third parties, for recordings made by professionals.

clause (i) limitations of liability, (ii) the right to unilaterally terminate the agreement, (iii) the right to suspend the performance of their obligations" or (b) "*to the detriment of the other party (i) the loss of rights, (ii) the loss of benefit of term, (iii) the limitation of the right to raise exceptions (defences), (iv) the limitation of the right to contract with third parties, (v) the tacit renewal of the agreement (vi) the applicable law, (vii) arbitration clauses or provisions derogating from competent courts' jurisdiction rules*" are not enforceable unless expressly accepted in writing by the parties (for details, please see our answer to question (y) above).

(iv) *Facsimile*

If a document is physically executed (using wet-ink signatures) and exchanged electronically (e.g., via facsimile or the signed document is scanned and then sent as a PDF by email), then that document would not be deemed as an original but as a copy of the original document.

Copies of original documents are generally admissible in court and their legal treatment is set out in Articles 286 and 287 of the Romanian Civil Procedure Code (which describe the legal treatment of copies and their evidentiary value), which provide in essence that:

- a copy of an authentic document or private deed may serve as proof only with respect to the content of the original document; in this case, the opposing party in a dispute may request a comparison of the copy with the original document and the party who filed the copy is required to present the original of the document if so ordered by the court, otherwise the document would not be accepted as evidence;

- if the data set out in an authentic document or private deed is reproduced in accordance with specific provisions of the law (i.e., in an institutionalised and organised manner[114]) on microfilm and other accessible electronic data processing media, then such data has the same evidentiary value as the documents on the basis of which they were reproduced.

Therefore, if physically executed, a party to an Agreement should always retain an original counterpart signed by its counterparty.[115]

[114] Legal doctrine and case law suggest that the copies referred to herein are the ones made by public authorities and institutions in accordance with specific provisions of the law and therefore not all copies made empirically on computer media may have the same evidentiary value as the documents on the basis of which they were reproduced.

[115] We note that, in accordance with Article 293 of the Romanian Civil Procedure Code, when a party to a dispute proves that the opposing party has in its possession a document relating to the dispute (e.g., a contract executed in physical format), the court may order the opposing party to present that document. The request to present such document in court would be approved, if the document is common to the parties in the dispute, if the opposing party itself referred to the document in the dispute or if, according to the law, the opposing party is required to present the document in court.

We would also recommend Parties to include in their Agreement[116] a clause on the admissibility into evidence of electronic records, in order to establish the method for electronically executing Individual Contracts and Confirmations. Such a clause could set out that the parties may execute Individual Contracts by using wet ink signatures and exchange them electronically via facsimile or by email as PDFs.

3.6. <u>Core provisions</u> (Part C.VI. of the EFET Instruction Letter)

3.6.1. Additional Assumptions

For the purpose of answering the questions set out in Section 3.6.2 (*Questions Relating to Core Provisions*) below, we have further assumed, as requested in the EFET Instruction Letter, that:

(i) The relevant EFET General Agreement is governed by any law (including English or German law or the laws of Romania);

(ii) After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary case under the pre-insolvency and insolvency laws of Romania and, subsequent to the commencement of the (pre-)insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable Individual Contracts for the insolvent counterparty;

(iii) Party A has entered into 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 a voluntary or involuntary proceeding under the insolvency laws of Romania;

(iv) Party F incorporated, organized or having its centre of main interest in Country H 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 Romanian Branch; and

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

3.6.2. Questions Relating to Core Provisions

(ee) Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) and Appendices 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.

Subject to all our considerations under this opinion, the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit

[116] In this case, however, we would recommend having at least the EFET General Agreement containing the means of evidence clause executed by the Parties in wet ink or with QES. Note that transactions pertaining to financial collateral arrangements must be evidenced in writing in accordance with the financial collateral legislation.

Support Annex) and Appendices should not change the substance of our conclusions reached under Part C.I. or C.II. (*Enforceability of Close-Out Netting*) above.

As regards the effect of electing to allow substitution with or without consent in the EFET Credit Support Annex, we refer to our answer to question (q) above.

(ff) *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 Annex 1 to the EFET General Agreement.*

We assume that any alteration of the provisions of the EFET General Agreement that are not Core Provisions do not have the effect of materially modifying any Core Provisions.

Considering our conclusions reached under Part C.I. or C.II. (*Enforceability of Close-Out Netting*) above, we believe that the following provisions set out in the EFET General Agreement are Core Provisions:

(i) § 1.1 (*Subject of Agreement*),

(ii) § 10.3 (*Termination for Material Reason*), § 10.4 (*Automatic Termination*), § 10.5 (*Definition of Material Reason*),

(iii) § 11 (*Calculation of the Termination Amount*),

(iv) § 13.2 (*Payment*), § 13.3 (*Payment Netting*) and

(v) the related definitions contained Annex 1 to the EFET General Agreement.

(gg) *Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the 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.?*

Without expressing any view on the validity or enforceability of the provisions of the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or the Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) themselves, we believe that the inclusion of the General Agreement in such agreements should not, by itself, materially change the substance of our conclusions reached under Part C.I. or C.II. (*Enforceability of Close-Out Netting*) above.

3.7. <u>Governing Law, Arbitration and Jurisdiction</u> (Part C.VII. of the EFET Instruction Letter)

3.7.1. Additional Assumptions

For the purpose of answering the questions set out in Section 3.7.2 (*Questions Relating to Governing Law, Arbitration and Jurisdiction*) below, we have further assumed, as requested in the EFET Instruction Letter, that the relevant EFET General Agreement is governed by the laws of a jurisdiction other than Romania (including English or German law).

3.7.2. Questions Relating to Governing Law, Arbitration and Jurisdiction

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

(A) Choice of Governing Law

As a general rule, Romanian courts would uphold the choice of governing law under § 22.1 of the EFET General Agreement (*Governing Law*), subject to and in accordance with Rome I Regulation.

Romanian law allows the parties to a contract to freely elect the law which shall govern their agreement in situations involving a conflict of laws. Therefore, to the extent the Agreement involves a foreign element (e.g., one of the parties to the Agreement is located outside Romania), such agreements may be governed by their stated foreign governing laws, according to the parties' choice, provided nonetheless that:

- the parties' choice of law may not concern matters related to the status or legal capacity of a legal entity (such as questions governed by the law of companies and other bodies, corporate or unincorporated, *e.g.*, the creation, by registration or otherwise, the legal capacity, the internal organization or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body);

- where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement;

- where all other elements relevant to the situation at the time of the choice are located in one or more EU Member States, the parties' choice of a governing law other than the law of an EU Member State shall not prejudice the application of provisions of EU law, where appropriate as implemented in the legal system of Romania, as EU Member State of the forum, which cannot be derogated from by agreement;

- the law chosen by the parties (i) does not restrict the application of overriding mandatory provisions of Romanian law[117] and (ii) is not manifestly incompatible with Romanian public policy (*ordine publică*), as determined and interpreted by Romanian courts; and

- Romanian courts may give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the agreement have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the agreement unlawful. Furthermore, in relation to the manner of performance and the steps to be taken in the event of defective performance under an agreement, Romanian courts shall have regard to the law of the country in which performance takes place.

If the Agreement does not involve a foreign element and all elements concerning such Agreement (save for the choice of law provision) are located in Romania, we believe that the choice of a foreign governing law would still be upheld, provided that such choice does not prejudice the application of provisions of Romanian law which cannot be derogated from by agreement.

In addition, the choice of the foreign governing law would not be upheld if it breaches the public policy of Romanian private international law or if it is made to defraud Romanian law. If the foreign governing law is not upheld, Romanian law would apply.

In accordance with Article 2564 para. (2) of the Romanian Civil Code, the application of the law of a different country may infringe upon Romanian public policy insofar as such application may lead to an outcome that is incompatible with the fundamental principles of Romanian law or of EU law or the fundamental human rights.

In the absence of relevant case law or official interpretations concerning EFET General Agreements and Individual Contracts, the ambit of "public policy" cannot be determined with a reasonable degree of certainty and domestic courts will have exclusive competence to rule on what is to be regarded as public policy in Romania.

(B) *Submission to Arbitration*

We note that, as per the provisions of § 22.2 of the EFET General Agreement (*Arbitration*), disputes arising in connection with the Agreement are either submitted to the jurisdiction of the German Institution of Arbitration (DSI) or to the London Court of International Arbitration.

Such arbitration clauses would generally be upheld by Romanian courts in accordance with the provisions of the Romanian Civil Procedure Code.

[117] According to the Rome I Regulation, "*overriding mandatory provisions*" are defined as "*provisions the respect of which is regarded as crucial by a Country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation*".

A foreign arbitral award is enforceable in Romania provided that the conditions of the Romanian Civil Procedure Code on the recognition and enforcement of foreign arbitral awards having direct and mandatory effect in Romania are met.

Note that Romania has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**1958 New York Convention**") and therefore the recognition and enforcement of an arbitral award rendered under the provisions of the EFET General Agreement would be carried out in accordance with the 1958 New York Convention.

If the 1958 New York Convention does not apply, an arbitral award rendered under the provisions of the EFET General Agreement would be enforceable in accordance with the conditions of the Romanian Civil Procedure Code which provide that foreign arbitral awards may be recognised and enforced in Romania, without review of the merits of the case[118], if the dispute may be settled by arbitration in Romania and the arbitral award does not include provisions contrary to the public order of Romanian private international law.

Recognition and enforcement of a foreign arbitral award may be refused by Romanian courts if: (a) the parties did not have the capacity to conclude the arbitration agreement according to the law applicable to each of them, as established according to the law of the state where the arbitral award was rendered; (b) the arbitration agreement was not valid according to the law chosen by the parties or, in the absence of such choice, according to the law of the state in which the arbitral award was rendered; (c) the party against whom the arbitral award is invoked was not properly informed about the appointment of arbitrators or about the arbitration procedure or was unable to avail itself of its own defence in the arbitration process; (d) the establishment of the arbitral tribunal or the arbitral procedure did not comply with the agreement of the parties or, in the absence of such agreement, with the law of the place where the arbitration took place; (e) the arbitral award concerns a dispute not provided for in the arbitration agreement or outside the limits set by it or includes provisions that exceed the terms of the arbitration agreement; however, if the provisions of the arbitral award relating to matters subject to arbitration may be separated from those relating to matters not subject to arbitration, the former may be recognised and declared enforceable; (f) the arbitral award has not yet become binding on the parties or has been annulled or suspended by a competent authority of the state in which or according to the law of which it was rendered.

3.8. <u>Regulatory Regime</u> (Part C.VIII. of the EFET Instruction Letter)

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

(A) Foreign exchange laws

All foreign exchange transactions can be carried on freely between residents and non-residents, both in foreign currency and in RON.

[118] Articles 1125 and 1133 of the Romanian Civil Procedure Code.

However, according to NBR Regulation no. 4/2005 on the foreign exchange regime ("**Forex Regulation**"), the NBR benefits from certain safeguarding measures which it can activate whenever short-term capital inflows of a significant magnitude exercise massive pressure on the forex market or severely disturb the central bank's currency or foreign exchange policies, resulting in significant variations of the internal liquidity and in material imbalances in the foreign exchange account.

The measures need to be notified to the European Commission and the other EU Member States and cannot extend over more than six (6) months.

These measures are potentially applicable to the following foreign exchange transactions: (i) transactions with financial instruments usually traded on the money market; (ii) transactions with units in UCITS; (iii) short term financial loans (iv) current and deposit accounts operations; (v) personal transfer of capital (loans); (vi) physical import and export of financial assets (equity, bonds and other negotiable titles/payment instruments) and (vii) other capital movements (which cannot be classified among the categories of short term capital foreign exchange operations provided by the Forex Regulation).

The safeguarding measures which may be applied by the NBR are the following:

(i) the residents' and non-residents' obligation to notify the NBR, 10 days in advance, of their intention to enter into short term capital foreign exchange transactions;

(ii) establishing ceilings and other limitations for short term capital foreign exchange transactions generating inflows or outflows of capitals from residents and non-residents;

(iii) retaining in the NBR's account, for an undetermined period of time, a part of the foreign or domestic currency amounts arising from short term capital foreign exchange transactions and generating inflows or outflows of capitals from residents and non-residents;

(iv) applying a commission upon initiation of transactions on the inter-bank foreign exchange market for the purpose of entering into capital foreign exchange transactions for the buying or selling of foreign currency;

(v) establishing higher minimum reserve requirements for the amounts representing short term capital inflows held by residents and non-residents with credit institutions;

(vi) imposing maturity restrictions for certain short term capital foreign exchange transactions;

(vii) introducing restrictions regarding the initiation of new short term capital foreign exchange transactions;

(viii) introducing additional measures for the monitoring of capital foreign exchange transactions and/or of foreign exchange measures.

To the best of our knowledge, the NBR has never made use of the above-mentioned safeguarding measures and there is no information available indicating that the NBR would contemplate applying such measures in the near future.

Please also note that there may be certain sanctions in place (such as the EU sanctions against the Russian Federation) that may affect the enforceability of the relevant EFET General Agreement or the Individual Contracts (please see qualification 4.15 (*Sanctions*) of this opinion).

(B) General considerations on license requirements

According to Article 206 para. (1) of the Romanian Civil Code, a Romanian legal person may have any rights and assume any obligations, except for the rights and obligations which, according to their nature or pursuant to legal restrictions, can only be held / undertaken by an individual.

A legal person may conduct those activities that are subject to prior authorisation only as of the date the respective authorisation is issued, under the sanction of absolute nullity of any transactions entered into without the observance of such principle.

Therefore, insofar as the prior authorisation is obtained and within the limits of such authorisation and authorised business purpose, there are no general restrictions on any Romanian credit institutions[119], investment firms, insurance companies and investment fund management companies to enter into the EFET General Agreement and the Individual Contract thereunder.

Please note that a Party A's capacity to enter into the Individual Contracts might be restricted by any limitations set forth in its articles of incorporation, as approved by the NBR or the FSA, as the case may be.

(C) Energy law

This section considers the main relevant requirements for the trading of the categories of Commodities (i.e., electricity and natural gas ("**energy**"), emission allowances (certificates), green certificates and capacity rights). Each category of Commodity is subject to a specific legal regime, as described separately below.

As regards procedural matters, please be aware of the recent approval of *Government Emergency Ordinance no. 140/2022*, which sets forth the main legal framework for the issuing of unique licenses for certain activities that are subject to licensing requirements. The scope of this emergency ordinance covers, *inter alia*, activities

[119] Romanian banks benefit from a general capacity to trade in financial instruments, including derivative financial instruments and securities. According to the Banking Act, Romanian banks may, *inter alia*, subject to an authorisation granted by NBR, perform, *inter alia*, (i) transactions on their own account and/or on the account of their clients with (a) securities and (b) other financial instruments, including derivative financial instruments, as well as (ii) any other activities or services, provided they may be included in the financial sector, in compliance with the special legal provisions regulating such activities.

such as the trade of electricity[120] and the trade of gas through mains[121]. The licensing framework described by the emergency ordinance is currently in the course of being set-up and, once it becomes operational, the licensing procedures covered by the scope of the emergency ordinance will take place through a centralized office (rather than, for example, through the National Authority for Energy Regulations).

(C.1) Requirements related to the trading of electricity and/or natural gas:

In Romania, the electricity and the natural gas sectors are subject to separate legal frameworks (although similarities do exist between them). The main legal enactment is Law no. 123/2012 (the "**Energy Law**")[122], which is supplemented by secondary legislation enacted by the Romanian Government, as well as by tertiary legislation enacted by the independent energy regulator (or by other authorities).

The National Authority for Energy Regulations ("**ANRE**") acts as the independent national regulator in both the electricity and in the natural gas sectors. ANRE is competent, *inter alia*, to issue the licenses required in order to carry out certain activities (e.g., trading) in the electricity and natural gas sectors.

(i) The requirement to be licensed in order to trade electricity:

As a rule, a license issued by ANRE is required in order to carry out activities such as the production, the supply and the trading[123] of electricity.

In certain exceptional cases[124], these activities may be carried out without the relevant license. Nevertheless, persons exempted from the requirement to hold a valid license are subject to the same obligations and benefit from the same rights as those that are licensed to carry out the corresponding activity. The list of exceptions from the requirement to hold a valid license includes: (a) the right to trade electricity without a trading license if the trader already holds a license for the production or for the supply of electricity (in other words, the right to carry out trading is included in the production/supply licenses); (b) the right to exploit electricity production capacities without holding a production license if their total electrical power is less than 1 MW; (c) the right of foreign persons established in member states of the European Union to trade or supply electricity in Romania without obtaining a license issued by ANRE, provided that each foreign person: (c.1) holds a valid license (or a similar document) issued in the member state of establishment and entitling it to trade electricity in such member state and: (c.2) solemnly states that it will comply with the Romanian technical and commercial norms applicable to the supply/trading of electricity and: (c.3) its right to participate in the Romanian electricity markets is confirmed by ANRE[125].

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[120] The activity listed under NACE Rev. 2 Code 35.14.
[121] The activity listed under NACE Rev. 2 Code 35.23.
[122] Which implements into Romanian law Directive 2019/944/EU and Directive 2009/73/EC.
[123] The trading of electricity is defined by the Energy Law as the sale and/or the purchase of electricity strictly on the wholesale market, as well as for import and/or export. Trading does not include selling electricity to end customers – a distinct activity, for which a supply license is required.
[124] Set out in the Energy Law and in the annex to ANRE's Order no. 12/2015.
[125] In accordance with the procedure set out in the annex to ANRE's Order no. 91/2015.

Licenses can be issued to any Romanian or foreign person (with the exception of natural persons from outside of the European Union). Foreign persons from outside of the European Union are required to have an established secondary office in Romania for the entire validity period of the license.

The conditions that must be fulfilled and the documents that must be submitted to ANRE in order to obtain licensing vary depending on the type of license applied for and are set out in detail in a regulation enacted by ANRE[126].

If judicial reorganization proceedings or bankruptcy proceedings are initiated with respect to a person, such person cannot be licensed by ANRE unless: (a) at the time of the licensing request's submission, the applicant already carries out, on the basis of another license, the activity for which it requests licensing or: (b) the license's issuing is necessary in order to ensure: (b.1) the continuity in the supply of electricity (or of cogenerated electricity and thermal energy) to end customers or (b.2) the finalization of works/the carrying out of activities decided in the court-approved judicial reorganization plan. ANRE revokes the license if the license holder undergoes bankruptcy or is wound-up.

(ii) The requirement to be licensed in order to trade natural gas:

As a rule, a license issued by ANRE is necessary in order to carry out activities such as the supply and the trading[127] of natural gas.

In certain exceptional cases[128], these activities may be carried out without the relevant license: (a) the right to trade natural gas without a trading license if the trader already holds a license for the supply of natural gas (in other words, the right to carry out trading is included in the supply licenses); (b) the right of foreign persons established in member states of the European Union to trade or supply natural gas in Romania without obtaining a license issued by ANRE, provided that each foreign person: (b.1) holds a valid license (or a similar document) issued in the member state of establishment and entitling it to trade natural gas in such member state and: (b.2) solemnly states that it will comply with the Romanian technical and commercial norms applicable to the supply/trading of natural gas and: (b.3) its right to participate to the Romanian natural gas markets is confirmed by ANRE[129].

Licenses can be issued to any Romanian or foreign person. Foreign persons from outside of the European Union are required to have an established secondary office in Romania for the entire validity period of the license.

[126] The annex to ANRE's Order no. 12/2015.
[127] The trading of natural gas, as understood under the Energy Law, consists in the sale and/or the purchase of natural gas strictly on the wholesale market. The trading activity does not include the selling of natural gas to end customers – an activity for which a supply license is required. The scope of the supply license is broader and includes the right to trade natural gas.
[128] In the Energy Law and in the annex to ANRE's Order no. 199/2020.
[129] In accordance with the procedure set out in the annex to ANRE's Order no. 91/2015.

The conditions that must be fulfilled and the documents that must be submitted to ANRE in order to obtain licensing vary depending on the type of license being applied for and are set out in detail in a regulation enacted by ANRE[130].

Licenses cannot be issued to applicants undergoing bankruptcy proceedings.

(iii) Other requirements related to the trading of electricity and natural gas:

Participants to the Romanian electricity and/or natural gas wholesale markets must be registered with the *European register of wholesale energy market participants*. Registration can be obtained: (a) in Romania, in which case the registration procedure is carried out through ANRE, in accordance with a specific procedure[131], or: (b) in another member state of the European Union, in which case additional registration in Romania is not required. Persons registered in another member state of the European Union must nevertheless provide ANRE[132] with a confirmation of their registration in the *European register of wholesale energy market participants* prior to entering into a transaction on the Romanian wholesale energy market if the transaction in question requires reporting under REMIT[133].

All active participants on the Romanian electricity market have the obligation to undertake balancing responsibilities with respect to the electricity that they produce, purchase, sell, import, export and/or consume. For this purpose, they must be assigned Energy Identification Codes ("**EICs**") and register with the *National Electricity Transmission Company*[134] ("**Transelectrica**") as parties responsible for balancing. The EIC must be obtained prior to applying for registration as a party responsible for balancing. Although registration as a party responsible for balancing is mandatory, it is possible to delegate one's balancing responsibility to another market participant. Both the registration procedure and the procedure for delegating one's balancing responsibility are regulated by ANRE[135].

Natural gas trades must be notified in the "virtual transaction point" operated by the *National Natural Gas Transport Company*[136] ("**Transgaz**"). Access to the "virtual transaction point" requires entering into a model contract with Transgaz[137]. Failure to conclude the model contract (or the termination thereof) entails the inability to trade natural gas.

Trading electricity or natural gas on the centralized energy markets requires registration with each market's operator[138]. The conditions for participating and the trading rules vary from market to market and are detailed in ANRE's

[130] The annex to ANRE's Order no. 199/2020.
[131] The annex to ANRE's Order no. 1/2015.
[132] By e-mail, at the address *REMIT@anre.ro*.
[133] *Regulation (EU) no. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency*.
[134] The company licensed by ANRE to operate the Romanian electricity transmission network.
[135] Annex no. 2 to ANRE's Order no. 127/2021.
[136] The company licensed by ANRE to operate the Romanian natural gas transport system.
[137] The model contract is set out in the annex no. 1^3 to the annex to ANRE's Order no. 16/2013.
[138] The registration procedures include entering into participation conventions with each market's operator.

regulations. Market operators also adopt specific market rules and procedures detailing the aforementioned regulations, which are reviewed and approved by ANRE and published on each operator's website[139].

(C.2) Requirements applicable to the trading of green certificates:

As a preliminary remark, note that, under Romanian law, "green certificates"[140] are separate from "guarantees of origin"[141] and are subject to different legal frameworks. Green certificates are issued to producers of electricity from renewable sources as part of an aid scheme approved by the European Commission[142], whereas guarantees of origin are used in order to prove the source of the electricity supplied to end customers. Guarantees of origin are discussed separately in Section (C.5) below.

The main legal framework governing green certificates consists of Law no. 220/2008 (the "**Renewables Law**") and Government Emergency Ordinance no. 24/2017, supplemented by secondary and tertiary legislation.

Green certificates can be sold only by producers of electricity from renewable sources, they can be purchased only by electricity producers and suppliers[143] and each green certificate can be traded only once. As an exception to this rule, producers of electricity from renewable sources that are unable to fulfil the contracted quantities of green certificates may purchase green certificates from the market, strictly in order to cover their shortage.

As a rule, green certificates can be traded only on the centralized markets for green certificates operated by the *Operator of the Electricity and Natural Gas Market S.A.* ("**OPCOM**")[144]. Participation to these markets requires registration with OPCOM[145]. Trading rules vary from market to market and are detailed in ANRE's regulations[146].

OPCOM operates the following markets where green certificates can be traded: (a) an anonymous market for the trading of green certificates independently from the renewable electricity in relation to which such green

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[139] In the case of the "intra-day" and of the "day-ahead" electricity markets, which function on the basis of a coupling mechanism with the corresponding markets from other European Union member states, market rules must be aligned with the relevant enactments adopted at the European Union level (notably, *Regulation (EU) no. 2015/1222 of 24 July 2014 establishing a guideline on capacity allocation and congestion management*).
[140] In Romanian: *certificate verzi.*
[141] In Romanian: *garanții de origine.*
[142] The European Commission approved the green certificates aid scheme in 2011 (further information is available at the following weblink: https://ec.europa.eu/competition/state_aid/cases/240906/240906_1239907_192_2.pdf). Some amendments to the aid scheme were also approved in 2016 (further information is available at the following weblink: https://ec.europa.eu/competition/state_aid/cases/267045/267045_1865665_81_2.pdf).
[143] The Renewables Law sets out a list of market participants with the obligation to purchase green certificates. Such list includes, notably: (a) electricity suppliers (for the electricity that they consume themselves and for the electricity supplied to end customers); (b) electricity producers (for the electricity that they consume themselves, with certain exceptions, and for the electricity supplied to end customers connected directly to such producers' installations).
[144] OPCOM benefits from a legal monopoly in this respect.
[145] The registration procedures include entering into participation conventions with OPCOM.
[146] The annex to ANRE's Order no. 77/2017 and the annex to ANRE's Order no. 160/2019.

certificates were issued; this market has two components: (a.1) a spot market, where green certificates are traded based on transaction confirmations and invoices and: (a.2) a forward market, were green certificates are traded based on a standard contract imposed by ANRE[147]; and: (b) a market for the trading of green certificates together with the renewable electricity in relation to which such green certificates were issued (on this market, the contract is proposed by the offer's initiator and must comply with OPCOM's framework contract[148]).

As an exception from the rule requiring that green certificates be traded on the centralized markets operated by OPCOM, producers of renewable electricity and public authorities that own renewable electricity production capacities with installed powers of no more than 3 MW per producer can negotiate and conclude contracts directly with electricity suppliers for the sale of the green certificates issued in relation to the electricity produced in such capacities.

Regardless of the market on which they are traded, green certificates can only be traded at values between 29,4 EUR and 35 EUR per certificate.

According to Article 2 letter h) of the Renewables Law, **green certificates are not financial instruments**. Therefore, transactions with green certificates do not amount to "*transactions on derivative financial instruments*" and fall under the category of Non-Eligible Individual Contracts for the purpose of the discussion made in Section 3.1.2.2 (*Eligible Individual Contracts*). However, derivative financial instruments defined in the Markets in Financial Instruments Act which have green certificates as underlying (e.g., options having green certificates as an underlying asset) should amount to "*transactions on derivative financial instruments*" and should fall under the category of Eligible Individual Contracts.

(C.3) Requirements applicable to the trading of emission allowances:

The main legal enactment governing emission allowances at the national level is Government Decision no. 780/2006[149].

Emission allowances are allocated to economic operators or auctioned[150]. Only the persons mentioned in Article 18 of the Commission's Regulation (EU) no. 1031/2010 are eligible to request admission to auctions. Under Romanian law, ANRE is competent to authorize suppliers of electricity and

[147] The standard contract is set forth in annex to ANRE's Order no. 77/2017.
[148] The contract proposed by the party initiating the offer can supplement the framework contract only with clauses concerning the payment deadlines, the means of payment, the guarantees and the penalties of a financial nature. Clauses stipulating the right to unilateral termination are strictly forbidden. Specific clauses for the later modification (either by agreement between the parties or on the basis of addenda) of the clauses that are known at the time of the tender (such as, but not limited to, modifications concerning the established price, the delivery period, the quantity per settlement interval/the delivery profile, the inclusion of additional services) are also forbidden.
[149] Which implements Directive 2003/87/EC into Romanian law and is supplemented, at the European Union level, by Commission Delegated Regulation (EU) no. 2019/1122.
[150] Such auctions are governed by Commission's Regulation (EU) no. 1031/2010 and by Government Emergency Ordinance no. 115/2011 (which implement, partially, the provisions of Directive 2003/87/EC).

natural gas to participate in auctions for emission allowances[151] (either in the suppliers' own names or in the name of their clients from the electricity or natural gas sectors that fall under the scope of the emission allowances trading scheme). Once allocated or auctioned, allowances can be traded on the secondary market.

Any person can trade emission allowances on the secondary market, provided that they open a trading account in the *European Union Registry of emission allowances*. Each member state must designate a national administrator for the accounts placed under its jurisdiction. In Romania, the national administrator is the National Agency for Environmental Protection[152]. Emission allowances can be traded: (a) between Romanian persons and persons from other member states of the European Community; (b) between Romanian persons and persons from third countries (other than the member states of the European Community, provided that the emission allowances are mutually recognized, on the basis of international treaties concluded by the European Community with other counties mentioned under annex B of the Kyoto Protocol). Further rules may apply if the allowances are traded on a centralized market.

There are no restrictions in place as regards the nationality of the designated trader accounts' representatives. However, at least one representative must be a direct employee of the organization.

(C.4) Requirements applicable to the trading of capacity rights:

(i) The trading of capacity rights in the electricity sector:

Network users can reserve capacity rights in cross-zonal interconnectors (i.e., the points of connection with electricity systems from neighboring countries). The rules applicable to the transfer of allocated capacity rights differ based on whether the neighboring country is a member of the European Union or not.

As regards capacity in interconnection points with neighboring countries that are members of the European Union (i.e., Hungary and Bulgaria), the relevant rules are included in legal enactments adopted at the European Union level. Registration with the Joint Allocation Office is required in order to be eligible to receive and to trade allocated capacity. Long-term capacity rights can be traded in accordance with the *Harmonized allocation rules for long-term transmission rights*[153]. Trading is done by means of an electronic platform maintained by the Joint Allocation Office. In the case of short-term capacity rights (i.e., intraday and day-ahead), capacity allocation is implicit.

As regards capacity in interconnection points with neighboring countries that are not members of the European Union (i.e., Ukraine, Serbia and Moldova),

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[151] The authorization procedure and the conditions are set out in the annex to ANRE's Order no. 2/2013.
[152] According to the Minister of Environment's Order no. 668/2022. According to this order, the documents required to open an account in Romania must be published on the National Agency for Environmental Protection's website.
[153] Annex I to Decision no. 14/2019 of the European Union Agency for the Cooperation of Energy Regulators, adopted in accordance with the *Commission's Regulation (EU) no. 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation*.

a set of general rules has already been adopted by ANRE[154] and additional rules are expected to be adopted. According to these rules, registration with Transelectrica is required in order to be eligible to receive and to trade allocated capacity[155]. Short-term capacity rights (i.e., intraday and day-ahead) cannot be traded. Long-term capacity rights can be traded (in whole or in part) between electricity market participants, provided that: (a) the transferred capacity is 1 MW or a multiple of 1 MW, (b) the volume of the transferred capacity does not exceed the transferor's capacity rights obtained further to their auctioning, (c) the transfer is designated at least 3 calendar days prior to the use of the transferred capacity (no later than 12:00 CET), and (d) the capacity rights' seller has paid Transelectrica's invoice relative to the period for which the capacity rights are being transferred. The transfer can be carried out per each day of a given month. Trading is done by means of an electronic platform maintained by Transelectrica.

(ii) *The trading of capacity rights in the natural gas sector:*

The Romanian natural gas transport system is operated by Transgaz. Capacity can be reserved by the transport system's users[156] in the system's entry points and/or in its exit points. The reservation and transfer of capacity take place in accordance with a set of rules adopted by ANRE[157]. Special rules apply for the reservation and trading of capacity in the Romanian natural gas transport system's interconnection points with transport systems from neighbouring countries[158].

According to ANRE's general rules, reserved capacity[159] can be traded on the secondary capacity market. Buyers may purchase: (a) only the right to use the capacity reserved by the seller or: (b) all of the rights and obligations related to the capacity (or a portion thereof) reserved by the seller. Trades can be made for annual, quarterly and/or monthly capacity products. The interruptible or firm nature of a capacity product cannot change as a result of the trade.

If only the right to use the capacity is being traded, the buyer undertakes all of the rights and obligations arising from the right of use's transfer, except for the obligation to pay for the transferred capacity (for which the seller remains

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[154] The annex to ANRE's Order no. 16/2022. These general rules are supplemented (and, in case of any discrepancy, replaced) by the specific rules adopted with respect to each non-EU neighboring country. The most recent specific rules are contained in the annexes to ANRE's Decision no. 1692/2022 (for the Republic of Moldova) and to ANRE's Decision no. 1877/2022 (for Serbia). A draft decision concerning the adoption of similar specific rules with respect to the Ukraine interconnectors has been published recently by ANRE but has yet to be adopted.
[155] The registration procedure is set out in the annex to ANRE's Order no. 16/2022.
[156] The reservation of capacity involves the conclusion of a natural gas transport contract with Transgaz. The transport contract's conclusion is subject to: (i) the requirements set out in Article 27 of the annex to ANRE's Order no. 16/2013 (these requirements concern, *inter alia*, the network user's financial and technical capacity) and to: (ii) the existence of a contract for access to the "virtual transaction point" concluded between the network user and Transgaz (the model of which is set out in the annex no. 1^3 to the annex to ANRE's Order no. 16/2013). These conditions also apply to network users who purchase capacity rights on the secondary capacity market.
[157] In ANRE's Orders no. 16/2013, no. 34/2016, no. 158/2019 and no. 130/2020.
[158] Such as the rules of the regional platform operated by Földgázszállító Zártkörűen Működő Részvénytársaság Ltd.
[159] Except for the capacity reserved in the virtual points of entry from production perimeters.

responsible). The trade must be confirmed by Transgaz S.A., based on a set of information submitted by both the seller and the buyer.

If the buyer purchases all of the rights and obligations related to the capacity (or a portion thereof) reserved by the seller (including the obligation to pay for such capacity), then the transport contracts concluded by the parties with Transgaz S.A. must be amended accordingly. For this purpose, the trade must be approved by Transgaz S.A., based on a set of information to be submitted by both the seller and the buyer.

(C.5) Requirements applicable to the trading of guarantees of origin for electricity obtained from renewable sources:

The main legal enactments governing guarantees of origin at the national level are Government Emergency Ordinance no. 163/2022[160] (primary legislation adopted in December 2022) and Government Decision no. 1232/2011 (secondary legislation). G.D. no. 1232/2011 is currently set for revision in order to align its clauses with those of the more recently adopted G.E.O. no. 163/2022[161].

Electricity suppliers must label the electricity supplied to their end customers. The purpose of the label is to inform end customers on the structure, origin, characteristics and environmental impact of the electricity supplied to them. Guarantees of origin are electronic documents with which electricity suppliers prove to their end customers (at the latter's request) the accuracy of the information contained in the electricity label (more specifically, that the electricity or a proportion thereof from the supplier's energy mix was actually obtained from renewable sources).

The national electronic register for guarantees of origin is managed by ANRE. ANRE issues guarantees of origin (at the request of producers) for each MWh of electricity obtained from renewable sources and delivered into the electrical grid[162]. Each guarantee of origin is valid for a period of 1 year starting from the date on which the corresponding electricity was produced. Each guarantee of origin may be traded multiple times, by a producer to another producer, by a producer to a supplier or by a supplier to another supplier. In each case, the guarantee of origin's transfer is effective only upon its registration by ANRE in the electronic register (at the seller's request).

At present, the Romanian register for guarantees of origin is not yet connected to the corresponding registers from the other member states of the European energy community. As a result, the transfer of guarantees of origin from the register operated by ANRE to the other European registers is currently not possible. Note however that, according to information available on the website

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[160] Which implements into Romanian law Directive 2018/2001/EU (also known as "**RED II**").

[161] According to Government Emergency Ordinance no. 163/2022, the provisions of Government Decision no. 1232/2011 must be aligned with the primary law no later than 06 June 2023. Note, however, that such deadlines are not always complied with by the authorities.

[162] If the renewable electricity is supported through the green certificates aid scheme, the guarantees of origin relative to such electricity are annulled and then distributed proportionally to national electricity suppliers.

of the Association of Issuing Bodies (AIB)[163], Romania is in the process of joining this association, following which such transfers should become possible.

3.9. <u>Other Provisions</u> (Part C.IX. of the EFET Instruction Letter)

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

There are no other general recommendations that we consider relevant to the matters raised in this opinion, but EFET members are advised to consult with their Romanian counsels before entering into any particular Individual Contracts to derive a more precise conclusion on the applicable requirements under Romanian law for each specific case.

4. QUALIFICATIONS

This opinion is subject to the following qualifications:

4.1. ***Other pre-insolvency and reorganization equivalent measures - investment firms and insurance companies***. FSA has certain powers to take special administration measures against investment firms (other than investment firms within the scope of the BRR Act) in accordance with the Markets in Financial Instruments Act (in particular Section 1 (*Special administration and liquidation)* of Chapter I (*Special administration, liquidation and insolvency regarding certain entities*) of Title VII (*Special administration measures, liquidation and insolvency*) of the Markets in Financial Instruments Act) or reorganization equivalent measures against insurance companies in accordance with Law no. 503/2004 on the financial turnaround, bankruptcy, voluntary dissolution and liquidation relating to insurance activity, which may affect the carrying out of the Individual Contracts (please refer to Sections E (*Special provisions on the pre-insolvency and insolvency of Investment Firms*) and F (*Special provisions on the insolvency of Insurance/Reinsurance Companies*) of Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion, in particular to the measures that may be taken by a special administrator nominated by the FSA for the purpose of preserving the assets and collecting the receivables of an entity subject to special administration and FSA's power to prevent the performance of certain investments of an insurance company, which may affect the Individual Contracts). Note that we are not aware of any precedent that could provide guidance on this matter.

4.2. ***No case law. No official interpretations.*** Given the relatively recent introduction of netting and financial collateral provisions under Romanian laws, to the best of our knowledge, neither the netting and collateral regime referred to, nor the situations contemplated herein, have been subject to any case law or any official interpretation by the authorities. Therefore, no opinion is expressed as to the exact interpretation that would be placed upon any particular case by a Romanian court, authority or any third party.

[163] https://www.aib-net.org/facts/aib-member-countries-regions

4.3. ***Settlement-clearing systems and rules of exchanges***. The processing of the Individual Contracts may be subject to specific rules of the various settlement or clearing systems and to the laws and regulations applicable to the various exchanges (such as, for example, the centralized markets for electricity, natural gas, green certificates etc.), the operation and functioning of which are not addressed in this opinion.

4.4. ***Romanian public order rules relating to contractual obligations***. Under Romanian law, the validity of any agreement is subject to the general rules of public order relating to the absence of breach of consent (including specific consent for unusual or standard clauses), certainty of object, legality of cause, absence of fraud and the negotiation, execution and performance of a contract in good faith.

4.5. ***Interest and other accessories in insolvency***. The accrual of any interest, penalties or any type of expense is, as a matter of principle, prohibited under the Insolvency Act as of the opening of the insolvency proceedings.

4.6. ***Compound interest***. As a general principle, the capitalization of default interest is not enforceable under Romanian law. Interest rates have to be agreed upon in writing, otherwise only the legal interest rate is due.

4.7. ***Undetermined and potestative obligations***. Any obligation under the Agreement, the performance of which depends on a single party or in relation to any provision of the Agreement, which entitles one of the parties to determine the object of the contractual obligations at its sole discretion may be challenged.

4.8. ***Enforceability of obligations performed outside Romania***. Where any obligations of any person are to be performed in jurisdictions outside Romania, such obligations may not be enforceable under Romanian law to the extent that such performance thereof would be illegal or contrary to public policy under the laws of such jurisdiction.

4.9. ***Effects of Romanian law or proceedings outside Romania***. We express no opinion on the effects of the Romanian law or proceedings (including any insolvency proceedings) in any jurisdiction other than Romania.

4.10. ***Writ of execution***. Under Romanian law, the Agreements would not be treated as a writ of execution *per se*; consequently, the obligation to pay the Termination Amount would be enforceable against the defaulting debtor opposing the payment on the basis of a court decision award on the merits of the claim subject to exequatur in Romania.

4.11. ***Qualifications relating to the powers of a Romanian court***:

(i) Under Romanian law, the enforceability of an agreement may be affected by the principle that rights must be exercised in good faith and in a reasonable manner. Without limiting the generality of the foregoing, a Romanian court might not treat as conclusive those certifications and determinations made discretionarily by one party, which the Agreement states are to be so treated. Any clause providing that any calculation or certification will be conclusive and binding will not be effective if such calculation or certification is fraudulent and will not necessarily prevent judicial enquiry into the merits of any claim by any person;

(ii) Romanian courts, in their sole discretion, are competent to determine, upon recognition and enforcement of a foreign judgement any matters of public policy under Romanian private international law;

(iii) Any indemnity provision entitling one party to recover its legal and other enforcement costs and expenses from the other party may be limited in respect of the recovery of the legal counsel's fees, as Romanian courts deem appropriate; furthermore, the amount of a penalty or indemnity may be limited by Romanian courts when the main obligation was partly fulfilled and such fulfilment benefited the creditor or when such penalty or indemnity is deemed excessive in relation to the damages that could have been foreseen by the parties at the time of execution of the agreement.

(iv) Romanian courts may decline to give effect to a contractual provision stipulating that the invalidity of any provision of an agreement will not invalidate any other provisions thereof, if the courts find that the invalid provision is an essential provision of that agreement.

(v) The effectiveness of any claim brought by a party before a Romanian court against the other party in relation to the Agreement or any Transaction may be limited by the application of the statutory provisions relating to the limitation of action (prescription).

(vi) A Romanian court will apply Romanian procedural rules in any proceedings taken before it.

4.12. ***Romanian language***. Any document which is not originally drafted, issued and executed in the Romanian language must be translated into Romanian by a sworn translator in order to be submitted as evidence in any actions or proceedings before a Romanian court or certain Romanian public bodies.

4.13. ***Romanian law concepts***. Romanian law concepts are expressed herein in English terms and not in original Romanian terms and therefore such concepts may not be identical to the concepts described by the same English terms, as they exist under the laws of other jurisdictions.

4.14. ***Legislative inconsistencies***. In many cases and especially further to Romania's accession to the EU, Romanian laws, regulations, norms and orders, may frequently be vague, inconsistent or unclear, and may be subject to change.

4.15. ***Sanctions***. We express no opinion as to the effect on the Agreement or on any of our opinions herein, of a Party to the Agreement being (a) itself, or being controlled by or otherwise connected with a person (or itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations or European Union sanctions implemented or effective in Romania, or (b) otherwise the target of any such sanctions.

4.16. ***Enforceable***. This opinion is not to be taken to imply that any obligation would necessarily be capable of enforcement in all circumstances in accordance with its terms. Furthermore, this opinion does not address the extent to which a judgment obtained in a court outside Romania would be enforceable in Romania. The term "*enforceable*" as used in this opinion (and, correspondingly, the term "*unenforceable*") means that the obligations assumed by Parties under the Agreements are of a type which the Romanian courts should enforce. It does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms.

4.17. ***General clawback action***. Under the Romanian law, in case a counterparty to an agreement has entered into transactions with, or performed payments or deliveries to, third parties with the intention to defraud its creditors, such creditors may challenge the transactions, payments and deliveries. Note that the legal conditions for this challenge (*acțiune revocatorie*) to be admissible include the requirement to prove that the third party who received the payments or deliveries was aware that the counterparty thereby causes or increases its state of insolvency (i.e., was aware of the fraudulent intention of the counterparty).

4.18. ***Recovery and resolution framework under the BRR Act and IRR Act***. If Party A (i) is a Credit Institution, Investment Firm or other financial institution or entity which is an in-scope entity under the BRR Act or an Insurance/Reinsurance Company regulated by the Insurance Act and the IRR Act and (ii) becomes subject to any measure or proceeding under the BRR Act or IRR Act (as applicable), our opinions herein are subject to the considerations set out in Section B (*Netting under the BRR Act – Resolution tools, pre-resolution powers, resolution powers and safeguards*) of Annex 3 (*Romanian Netting Regime*) and Section F.3 (*Recovery and Resolution (IRR Act)*) of Annex 4 (*Romanian Pre-insolvency and Insolvency Regime*) of this opinion.

4.19. ***Novelty of recovery and resolution legislation and of the legislation transposing MiFID II***. The recovery and resolution issues as well as the issues relating to the Markets in Financial Instruments Act transposing MiFID II in Romania set forth in this opinion are very recently implemented in Romania and therefore the relevant Romanian laws, regulations, norms and orders may frequently be incomplete, inconsistent, vague, or unclear and may be subject to future developments and further changes.

4.20. ***Contractual recognition of resolution stay powers***. Romanian counterparties which qualify as Credit Institutions and Investment Firms within the scope of the BRR Act are required to include in any financial contract which they enter into and which is governed by third-country law, terms by which the parties recognise that the financial contract may be subject to the exercise of powers by the NBR / the FSA to suspend or restrict rights and obligations under Articles 186^{1}-186^{10} (i.e., the power to suspend certain obligations prior to the initiation of resolution proceedings), 406-409^{1} (i.e., the power to suspend certain obligations), 410-412 (i.e., the power to restrict the enforcement of security interests) and 413-419 (i.e., the power to temporarily suspend termination rights) of the BRR Act and recognise that they are bound by the requirements of Articles 400-405 of the BRR Act (referring to the exclusion of certain contractual terms in early intervention and resolution).

Such requirement applies to any such financial contract which:

(a) creates a new obligation, or materially amends an existing obligation after the entry into force of the BRR Revision Act;

(b) provides for the exercise of one or more termination rights or rights to enforce security interests to which Articles 186^{1}-186^{10}, 400-405, 406-409^{1}, 410-412 or 413-419 of the BRR Act would apply if the financial contract were governed by the laws of a Member State.

Romanian parent undertakings have to ensure that their third-country subsidiaries include, in such financial contracts they are a party to, terms to exclude that the exercise of the power of the NBR / the FSA to suspend or restrict rights and obligations of the EU parent undertaking, in accordance with Article 419^{1} of the BRR Act, constitutes a valid ground for early termination, suspension, modification, netting, exercise of set-off rights or enforcement of security interests on those contracts. This requirement may apply in respect of third-country subsidiaries which are: (a) credit institutions; (b) investment firms (or which would be investment firms if they had a head office in Romania); or (c) financial institutions.

The content of the contractual terms on recognition of resolution stay powers is set out under the Commission Delegated Regulation (EU) 2021/1340 of 22 April 2021

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This opinion is given to you solely and for the sole benefit of your members. This opinion may, however, be shown by you or your members to a competent regulatory or supervisory authority or your members' professional advisers, for information purposes only, on the basis that we assume no responsibility to such authority or any other person as a result, or otherwise.

It may not be relied upon by any other person than you and your members, unless we otherwise specifically agree with that person in writing.

Its purpose is to assist your members in understanding the issues referred to in EFET's Instruction Letter under Romanian law. It is not designed to be used as the sole basis for entering into any Individual Contract, making an investment or subscription decision or taking any financial or other undertaking.

As we have not reviewed any particular Individual Contract, we do not assume any liability under this opinion with respect to the enforceability of any particular Individual Contract or Individual Contracts, or the enforceability of the EFET General Agreement when applied to any particular Individual Contract or Individual Contracts.

We shall have no liability to inform the addressees of this opinion, nor any other person, of any event, including any change in Romanian law or in the legal condition of the parties to the EFET General Agreement or the Individual Contracts, occurring after the issue date of this opinion.

Any dispute relating to, without limitation, the interpretation of this opinion shall be subject to Romanian law and to the jurisdiction of the competent courts of Bucharest, Romania.

Yours sincerely,

Leroy şi Asociaţii

ANNEX 1

Types of Counterparties

(Appendix A to EFET's Instruction Letter)

This opinion is given in respect of potential counterparties to the EFET General Agreement that are incorporated, organised, established or have their centre of main interest in Romania and are:

(i) Corporations

All legal entities which have legal personality and are regulated under Law no. 31/1990 on companies (the "**Romanian Companies Act**") as limited liability companies (*societate cu răspundere limitată* – S.R.L.) or joint stock companies (*societate pe acţiuni* – S.A.).[164]

(ii) Banks/Credit Institutions

Credit institutions regulated under the Government Emergency Ordinance no. 99/2006, as approved, amended and supplemented by Law no. 227/2007, and as subsequently amended and supplemented (the "**Banking Act**") under the following forms[165]: banks (*bănci*); cooperative credit organizations (*organizaţii cooperatiste de credit*); home savings and credit banks (*bănci de economisire şi creditare în domeniul locativ*) and mortgage banks (*bănci de credit ipotecar*).

Credit institutions must be incorporated as joint stock companies (*societate pe acţiuni* – S.A.) (please also refer to point (i) above) and authorised by the National Bank of Romania ("**NBR**").[166]

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[164] This category includes publicly-owned corporations, i.e., entities wholly or majority-owned by the Romanian State, which are active entirely in the private sector without any specific public duties. Note that State-owned companies may have limitations in their by-laws that need to be verified on a case-by-case basis and may be subject to the public procurement legislation.

[165] Article 3 of the Banking Act.

[166] According to the Banking Act, the terms credit institution, investment firm and financial institution have the meanings set forth in Article 4 paragraph (1) of EU Regulation no. 575/2013. According to Art. 4 (1) of EU Regulation no. 575/2013: "*credit institution*" means an undertaking the business of which consists of any of the following: (a) to take deposits or other repayable funds from the public and to grant credits for its own account (b) to carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to MiFID II , where one of the conditions set out in Art. 4 (1)(b) of EU Regulation no. 575/2013 applies, but the undertaking is not a commodity and emission allowance dealer, a collective investment undertaking or an insurance undertaking; "*investment firm*" means a person as defined in point (1) of Article 4(1) of MiFID II (*i.e*. "*any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis*"), which is authorised under that Directive but excludes credit institutions; and "*financial institution*" means an undertaking other than an institution and other than a pure industrial holding company, the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36/EU, including an investment firm, a financial holding company, a mixed financial holding company, an investment holding company, a payment institution within the meaning of Directive (EU) 2015/2366 on payment services in the internal market and an asset management company, but excluding insurance holding companies and mixed-activity insurance holding companies as defined in points (f) and (g) of Article 212(1) of Directive 2009/138/EC.

(iii) Investment Services Provider/Investment Firms

Investment Firms (*societăți de servicii de investiții financiare* – S.S.I.F.) regulated under the Markets in Financial Instruments Act[167] and Law no. 236/2022 on the prudential supervision of investment firms ("**Law no. 236/2022**")[168]. Investment Firms must have legal personality and be established as joint stock companies (*societate pe acțiuni* – S.A.) (please also refer to point (i) above) and authorised by the FSA[169].

(iv) Insurance Companies

Insurance/Reinsurance Companies regulated under the Insurance Act and incorporated as joint stock companies (*societate pe acțiuni* – S.A.) (please also refer to point (i) above)[170], *i.e.*: insurance companies (*societate de asigurare* or *asigurător*), reinsurance companies (*societate de reasigurare* or *reasigurător*); and mixed insurance companies (*asigurător mixt*).

Insurance/Reinsurance Companies must be authorized by the FSA.

(v) Investment Fund Management Companies

Investment Fund Management Companies regulated as:

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[167] Article 3 para (1) point 74 of the Markets in Financial Instruments Act.

[168] Transposing the provisions of Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU ("**IFD**") in Romania.

[169] According to Article 10 of the Markets in Financial Instruments Act, investment firms (*societăți de servicii de investiții financiare* or *S.S.I.F.*) are legal entities providing on a professional basis *investment services and activities and ancillary services, as well as other activities in accordance with FSA regulations and with the provisions of the Romanian Civil Code regulating fiduciary services.* The following investment services and activities are regulated under the Markets in Financial Instruments Act: *a) reception and transmission of orders in relation to one or several financial instruments, b) execution of orders on behalf of clients, c) dealing on own account, d) portfolio management, e) investment advice, f) underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis, g) placing of financial instruments without a firm commitment basis, h) operation of an MTF, and i) operation of an OTF.* The following ancillary services are regulated under the Markets in Financial Instruments Act: *a) safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding providing and maintaining securities accounts at the top tier level ('central maintenance service') referred to in point (2) of Section A of the Annex to the Regulation (EU) No 909/2014, b) granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction, c) Advice to undertakings on capital structure, industrial strategy and related issues, and advice and services relating to mergers and the purchase of undertakings, d) foreign exchange services where these are connected to the provision of investment services, e) investment research and financial analysis or other forms of general recommendation related to transactions on financial instruments, f) services related to underwriting, and g) investment services and activities as well as ancillary services of the type included under the definition of investment services and activities or ancillary services related to the underlying of the derivatives included under* points (b), (c), (d) and (g) of Section 3.1.2.2 (*Eligible Individual Contracts*) of this opinion, *where these are connected to the provision of investment or ancillary services*.

[170] Article 1 of the Insurance Act. Insurance/reinsurance companies may also be incorporated as mutual undertakings, European companies regulated by Regulation (EC) no. 2.157/2001 and European cooperative societies regulated by Regulation (EC) no. 1.435/2003. Although covered by the Insolvency Act, insolvency matters related to these legal forms of insurance/reinsurance companies require further analysis.

- investment management companies (*societăți de administrare a investițiilor* – S.A.I.) specializing in the administration of undertakings for collective investment in transferable securities ("**UCITS**"), authorised by the FSA in accordance with Government Emergency Ordinance no. 32/2012 on undertakings for collective investment in transferable securities and investment management companies ("**Government Emergency Ordinance no. 32/2012**") and set up as joint stock companies (*societate pe acțiuni* – S.A.) (please also refer to point (i) above); and

- alternative investment fund managers (*administratori de fonduri de investiții alternative* – A.F.I.A.)[171], whose main business purpose is the management of one or more alternative investment funds ("**AIFs**"), authorised by the FSA in accordance with Law no. 74/2015 on alternative investment fund managers.

For the sake of clarity, this opinion does not contemplate EFET General Agreements and Individual Contracts entered into with Romanian counterparties which are: investment funds; entities without legal personality; international organisations Romania is a member of; non-commercial private entities (such as associations, foundations or individuals); entities entirely or partially governed by public law (such as public establishments – "*institutii publice*" or national companies – "*regii autonome*" or "*societati nationale*"), municipalities, counties (such as "*orase*", "*comune*", "*judete*"), local public authorities, central public authorities, the National Bank of Romania or the State itself.

[171] Transposing Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers ("**AIFMs**") into Romanian law.

ANNEX 2

Transactions under the EFET General Agreement

(Appendix B to EFET's Instruction Letter)

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a Commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the Commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

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

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.

"Commodity" means electricity, natural gas, emissions allowances, (green) certificates or capacity rights.

ANNEX 3

Romanian Netting Regime

A) Netting under the Insolvency Act

The entry into force, on 28 June 2014, of the Insolvency Act marks significant progress for Romanian legislation, as part of the larger project undertaken by Romania in connection with the reform of its judicial system. Aside from certain measures which remain regulated by special laws governing the activity of certain financial institutions, the Insolvency Act encompasses all existing pre-insolvency and insolvency legislation applicable to ordinary corporations and to various types of financial institutions.

The process of systematizing and correlating the various pieces of Romanian legislation on pre-insolvency and insolvency was quite a long and difficult process and has led to certain miscorrelations and inconsistencies, that are to be addressed by the legislator on the occasion of the next revision of the Insolvency Act. Certain miscorrelations relate to the close-out netting regime, but should not, in our view, materially and adversely affect the conclusions reached in this opinion.

The Insolvency Act[172] sets forth the general legal framework on pre-insolvency and insolvency proceedings and, with certain exceptions[173], it applies to any **professional** *i.e., any person who operates an undertaking, namely who systematically carries out an organized activity consisting in the manufacturing, administration or sale of goods or in the provision of services, irrespective of whether the organized activity is a profit-making activity*[174]. The term "*professional*" includes the categories of trader, entrepreneur, economic operator, as well as any other person authorized to carry out economic or professional activities[175].

Furthermore, the Insolvency Act covers the bankruptcy of Credit Institutions and the bankruptcy of Insurance/Reinsurance Companies, it being specified that reorganization-equivalent measures for Credit Institutions and Insurance/Reinsurance Companies and pre-insolvency measures for certain Investment Firms/Investment Funds are governed by special laws, *i.e.*:

(i) the BRR Act with respect to the recovery and resolution of Credit Institutions and Investment Firms (as defined by EU Regulation no. 575/2013[176]),

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[172] Please refer to Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion for a brief presentation of the main steps and proceedings entailed by the Insolvency Act.

[173] Such exceptions include professionals in respect of which special provisions regarding their pre-insolvency or insolvency regime are set forth under law. In the case of persons exercising liberal professions (such as lawyers, tax consultants, accountants etc.), the provisions of the Insolvency Act apply without prejudice to their professional status. Furthermore, the Insolvency Act expressly states that it does not apply to (i) units and institutions of pre-university and university education, or (ii) public units and institutions included in the national system of research and development. Such entities are not covered by this opinion.

[174] The definition of "*professional*" is set forth under Article 3 of the Romanian Civil Code.

[175] Article 8 paragraph (1) of Law no. 71/2011 for the implementation of the Romanian Civil Code.

[176] According to the BRR Act, 'investment firm' means an investment firm as defined in point (22) of Article 4(1) of the IFR, that is subject to certain initial capital requirements (which may range between the RON equivalent of EUR 75,000 and 750,000, depending on the type of investment services provided or activities performed) in accordance with Article 12 of Law no. 236/2022 (transposing Article 9 of the IFD into Romanian law); according to Art. 4 (1) point 22 of the IFR, "*investment firm*" means a person as defined in point (1) of Article 4(1) of MiFID II (*i.e.* "*any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis*").

(ii) the Markets in Financial Instruments Act with respect to the special administration of Investment Firms (other than Investment Firms within the scope of the BRR Act), market operators, investment management companies, AIFMs and self-managed AIFs,

(iii) Law no. 503/2004 on the financial turnaround, bankruptcy, voluntary dissolution and liquidation relating to insurance activity, with respect to Insurance/Reinsurance Companies, and

(iv) the IRR Act with respect to Insurance Companies[177] (please refer to Annex 5 of this opinion).

Finally, the Insolvency Act includes general rules on cross-border insolvency proceedings (other than those regulated under the EU Insolvency Regulation).

In line with the UNIDROIT Principles on the Operation of Close-out Netting Provisions, the Insolvency Act recognizes as one of its fundamental principles, ***the need of reducing credit risk and systemic risk associated with financial derivatives transactions by recognizing the enforceability of close-out netting provisions in the context of the counterparty's pre-insolvency and insolvency, having as a consequence the reduction of the credit risk to a net amount due between the parties, or even to zero where collateral has been transferred to cover the net exposure***.

When addressing the concept of close-out netting, the Insolvency Act refers to, and defines, the terms "*bilateral netting*" (*operațiune de compensare bilaterală*) and "*bilateral netting agreement*" (*acord de compensare bilaterală*).

Furthermore, the Insolvency Act states that *bilateral netting* applies in relation to any "***qualified financial contract***" *i.e.* "***(a) any contract covering operations with derivative financial instruments, (b) any repurchase and reverse repurchase agreement, (c) any buy-sellback and sell-buyback agreement, as well as (d) any securities lending agreements, performed on regulated markets, assimilated markets or over-the-counter markets, as such are regulated by law***".

According to the Insolvency Act, *bilateral netting* entails one or several of the following operations with respect to one or several *qualified financial contracts*: (i) termination of a *qualified financial contract* and/or acceleration of a payment or performance of an obligation or exercise of a right under one or several *qualified financial contracts* on the basis of a *bilateral netting agreement*, (ii) calculation or estimation of the close-out/market/liquidation/replacement value for any of the rights and obligations referred to at point (i) above, (iii) conversion into a single currency of any value calculated pursuant to point (ii) above, and (iv) determination of a net value by operation of set-off with respect to any value calculated pursuant to point (ii) above and converted pursuant to point (iii) above.

Furthermore, the Insolvency Act provides that a *bilateral netting agreement* covers (i) master netting agreements, (ii) master-master netting agreements, and (iii) collateral arrangements in relation to one or several master netting agreements[178].

[177] Note that reinsurers are not covered by the IRR Act.
[178] According to the definitions of the *bilateral netting agreement* and *collateral arrangements* set forth in the Insolvency Act, (a) *a master netting agreement* designates any agreement or clause under a qualified financial contract

Bilateral netting is regulated as a safe harbour regime both in a pre-insolvency and in an insolvency context[179], as follows:

(a) with respect to the measures that may be taken during **insolvency prevention proceedings** (for details please see section B (*The general legal framework for insolvency prevention proceedings*) of Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion), the Insolvency Act sets out that:

(i) with respect to insolvency prevention proceedings, such proceedings shall apply without prejudice to qualified financial contracts and close-out netting operations based on a qualified financial contract or a bilateral netting agreement. However, a claim against a debtor arising as a result of the operation of close-out netting operations based on a qualified financial contract or a bilateral netting agreement (i.e., any net amounts), may be an affected claim and may be included in a restructuring agreement or restructuring plan[180];

(ii) similarly, the insolvency prevention proceedings shall apply without prejudice to financial collateral arrangements satisfying all the conditions set forth under the Collateral Ordinance[181];

(iii) the stay of individual enforcement actions shall not apply to bilateral netting agreements, but shall apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting agreement (i.e., the stay shall apply to the net amount). In addition, the stay shall apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value[182];

(iv) as regards contractual clauses providing for the termination or the possibility of the creditor to suspend or refuse performance on the grounds that the debtor is in a state of difficulty[183] in an insolvency prevention proceeding, such clauses are considered unwritten and therefore do not produce any legal effects. However, this limitation does not apply to qualified financial contracts and close-out netting

between two parties providing for the netting of certain payments, the fulfilment of certain obligations or the enforcement of certain present and future rights, arising from or in connection with one or several qualified financial contracts, (b) a *master-master netting agreement* designates any master netting agreement between two parties providing for the netting between two or several master netting agreements, and (c) a *collateral arrangement* designates, in relation to one or several master netting agreements, any contract/instrument securing a bilateral netting agreement or a qualified financial contract, including movable security interests, letters of guarantee and other similar instruments.

[179] Please see Annex 4 (*Romanian pre-insolvency and insolvency regime*) for a short overview of the relevant pre-insolvency and insolvency proceedings.

[180] Article 9^8 paragraph (3) of the Insolvency Act.

[181] Article 9^8 paragraph (1) of the Insolvency Act.

[182] Article 25^1 of the Insolvency Act. These provisions are in line with the provisions of Article 7 para. (6) of the EU Restructuring Directive.

[183] The term "*difficulty*" is defined under the Insolvency Act as the state generated by any circumstance which causes a temporary impairment of the debtor's business that gives rise to a real and serious threat to the debtor's future ability to pay its debts when due, if adequate measures are not taken; the debtor in difficulty is able to perform its obligations as they become due.

operations based on a qualified financial contract or a bilateral netting agreement, with the exception of contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value[184].

(b) with respect to the measures that may be taken during the **insolvency** (for details please see section C (*The general legal framework for insolvency proceedings*) of Annex 4 (*Romanian pre-insolvency and insolvency regime*) of this opinion), protection is ensured by:

(i) setting forth in Article 89 of the Insolvency Act the principles of *bilateral netting* (general close-out netting regime);

(ii) specifically exempting *qualified financial contracts* and *bilateral netting* from:

- cherry picking,

- voidable preference,

- provisions stating that *ongoing agreements are deemed maintained as of the opening of insolvency proceedings* and that *contractual clauses providing for the termination/acceleration of on-going agreements by reason of the opening of insolvency proceedings are deemed unwritten*[185],

- provisions stating that *pecuniary debts of the bankrupt debtor become automatically due as of the date of the opening of bankruptcy proceedings*[186]; and

(iii) stating that if the debtor is a party to an agreement under a master netting agreement providing for the transfer, at a certain date or within a period of time, of certain commodities, representative titles of commodities or financial assets traded on a regulated market of commodities, services and derivative financial instruments and if the due date occurs or the respective period of time expires after the date of the opening of insolvency proceedings, a bilateral netting with respect to all agreements under the master netting agreement shall be performed and the net

[184] Article 9^5 of the Insolvency Act. We note that the provisions of Article 6^3 of the Insolvency Act set out, *inter alia*, that "*Any losses of rights, limitations or interdictions set out under law for the debtor reaching a state of difficulty within the meaning of this law are not applicable, and the contractual provisions in this regard are considered unwritten*"; such provisions have to be corroborated with the provisions of Articles 9^5, 9^8, and 25^1 of the Insolvency Act, which set out the netting safe harbours for qualified financial contracts and netting operations.
[185] Article 123 paragraph (1) of the Insolvency Act. We note that a minor miscorrelation occurred following the entry into force on 17 July 2022 of Law no. 216/2022 for the amendment of the Insolvency Act: the previous form of Article 123 paragraph (1) of the Insolvency Act provided the general rule that contractual clauses on the termination/acceleration of ongoing agreements by reason of the opening of insolvency proceedings were null and void, and the current wording of this article deems such contractual clauses unwritten. The exception for qualified financial contracts and bilateral netting in this case however still refers to the "*null and void*" general rule and not to the newer form of the sanction, i.e., "*unwritten*". We believe that, although the references in Article 123 paragraph (1) of the Insolvency Act are made to two separate sanctions, the spirit of the article is to exempt qualified financial contracts and bilateral netting from the general provisions that prohibit termination/acceleration of ongoing agreements by reason of the opening of insolvency proceedings.
[186] Article 150 paragraph (4) of the Insolvency Act.

> amount shall be paid to the debtor's estate, if positive, and shall be registered with the table of claims, if it results in an obligation of the debtor[187].

The general close-out netting regime is given by **Article 89 of the Insolvency Act** stating that:

> "*(1) Any transfer, performance of an obligation, exercise of a right, deed or act performed on the basis of qualified financial contracts, as well as any bilateral netting agreement, are valid, may be performed and/or enforced against an insolvent counterparty or insolvent guarantor of a counterparty, in accordance with the terms of the agreement and do qualify as evidence for registration of the creditor's claim in case of the insolvency proceedings regulated by law.*
>
> *(2) The only obligation of a party to the contract, if any such obligation is provided for therein, as a consequence of the performance of bilateral netting pursuant to the terms of a qualified financial contract, shall be to perform in favour of the counterparty the net obligation (i.e., the amount of money or the obligation to do something) resulted from the bilateral netting.*
>
> *(3) The only right of a party to the contract, if any such right is provided for therein, as a consequence of the performance of bilateral netting pursuant to the terms of a qualified financial contract, shall be to receive from the counterparty the net right (i.e. the amount of money or the obligation to do something) resulted from the bilateral netting.*
>
> *(4) No power granted by law to the authorities in charge with the insolvency proceedings shall preclude the termination of the qualified financial contract and/or the acceleration of the payment obligations or the performance of obligations to do or the satisfaction of a right under one or several qualified financial contracts, on the basis of a netting agreement, such powers being limited to the net amount resulted after the performance of the netting agreement.*
>
> *(5) Subject to proven fraudulent intention of the insolvent debtor, as set forth in Article 117 paragraph (2) letter (g), the judicial administrator/liquidator or, as the case may be, the court may not preclude, annul, or decide to undo financial derivatives transactions, including the performance of a netting agreement, carried out on the basis of a qualified financial contract.*"

The inability of an insolvency official to undo or annul financial derivatives transactions under a qualified financial contract is however subject to the proven fraudulent intention of the insolvent debtor. According to Article 117 paragraph (2) letter (g) of the Insolvency Act, the judicial administrator/liquidator may file for the annulment of "*transfer deeds entered into or obligations undertaken by the insolvent debtor during the last **two (2) years before the opening of the insolvency proceedings**, with the intention to conceal/delay the insolvency status or defraud a creditor*" and for the return of the transferred assets or of the value of other performed obligations.

B) Netting under the BRR Act – Resolution tools, pre-resolution powers, resolution powers and safeguards

The BRR Act applies to (a) credit institutions and investment firms, which are Romanian legal entities, (b) financial institutions, Romanian legal entities, which are subsidiaries of a credit

[187] Article 125 of the Insolvency Act.

institution or investment firm, or of a company of the types referred to in point (c) or (d), which is a Romanian or an EU legal person and are covered by the supervision of the Romanian or EU parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013, (c) financial holding companies, mixed financial holding companies and mixed-activity holding companies, that are Romanian legal entities; (d) parent financial holding companies in Romania, Union parent financial holding companies, parent mixed financial holding companies in Romania, Union parent mixed financial holding companies, that are Romanian legal entities; (e) Romanian branches of credit institutions and investment firms that are established in third countries.

According to the BRR Act, three tools are to be used in order to manage a financial crisis, namely *preparation*, *early intervention* and *resolution*. Furthermore, the BRR Act regulates the following resolution tools: (i) *the sale of business tool* (shares or other instruments of ownership issued by the relevant institution <u>or all or part of its assets, rights or liabilities are transferred to a purchaser that is not a bridge institution</u>), (ii) *the bridge institution tool* (the <u>business is entirely or partly transferred to an institution</u> which is wholly or partially owned by one or more public authorities), (iii) *the asset separation tool* (<u>assets, rights or liabilities of an institution under resolution or of a bridge institution are transferred to one or more asset management vehicles</u> wholly or partially owned by one or more public authorities) and (iv) *the bail-in tool* (either (i) recapitalising the institution, if its financial stability may be re-established, or (ii) converting into equity or reducing the principal amount of claims or debt instruments that are transferred (x) to a bridge institution or (y) under the sale of business tool or asset separation tool).

Amongst the general principles of resolution tools, the BRR Act sets forth the principle that the provisions of the Insolvency Act relating to the voidability or unenforceability of legal acts detrimental to creditors do not apply to transfers of assets, rights or liabilities from an institution under resolution to another entity by virtue of the application of a resolution tool or exercise of a resolution power, or use of a government financial stabilisation tool.

As regards pre-resolution powers, we note that the BRR Revision Act introduced new powers for the NBR / the FSA to suspend certain obligations prior to the initiation of resolution proceedings (Articles 186^{1}-186^{10} of the BRR Act, which transpose into Romanian law the provisions of Article 33a of the BRRD):

- The NBR / the FSA **may suspend any payment or delivery obligation** under any contract entered into by Romanian counterparties which qualify as Credit Institutions and Investment Firms within the scope of the BRR Act, where all of the following conditions are met:

  (a) a determination that the credit institution or entity is failing or likely to fail has been made under point (a) of Article 180 of the BRR Act[188];

  (b) there is no immediately available private sector measure referred to in point (b) of Article 180 of the BRR Act that would prevent the failure of the credit institution or entity;

  (c) the exercise of the power to suspend is deemed necessary to avoid the further deterioration of the financial conditions of the credit institution or entity; and

[188] Article 180 of the BRR Act refers to the conditions for resolution and transposes into Romanian law the provisions of Article 32 (*Conditions for resolution*) of the BRRD.

(d) the exercise of the power to suspend is either:

   (i) necessary to reach the determination provided for in point (c) of Article 180 of the BRR Act; or

   (ii) necessary to choose the appropriate resolution actions or to ensure the effective application of one or more resolution tools;

- The period of the suspension shall be as short as possible and shall not exceed the minimum period of time that the NBR / the FSA considers necessary for the purposes indicated in points (c) and (d) above and in any event shall not last longer than the period from the publication of a notice of suspension to midnight, official Romanian time, at the end of the business day following the day of the publication;

- When payment or delivery obligations under a contract are suspended, the payment or delivery obligations of any counterparties to that contract shall be suspended for the same period of time. A payment or delivery obligation that would have been due during the period of the suspension shall be due immediately upon expiry of that period;

- The suspension power referred to above shall not apply to payment or delivery obligations to the following: (a) systems and operators of systems designated in accordance with Article 13 of Law no. 253/2004 (transposing Directive 98/26/EC), (b) central counterparties (CPC) authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country CCPs recognised by ESMA pursuant to Article 25 of that Regulation, (c) central banks;

- When the NBR / the FSA decides to apply this suspension, it may also apply, during the suspension period, the powers set forth in Articles 410-412 (i.e., the power to restrict the enforcement of security interests, as further described below) and Articles 413-419 (i.e., the power to temporarily suspend termination rights, as described below) of the BRR Act;

- In the event that, after making a determination that a credit institution or entity is failing or likely to fail pursuant to point (a) of Article 180 of the BRR Act, the NBR / the FSA has exercised the power to suspend payment or delivery obligations in the circumstances set out above, and if resolution action is subsequently taken with respect to that credit institution or entity, the NBR / the FSA shall not exercise its powers to (i) suspend certain obligations under Article 406 para. (1) of the BRR Act, (ii) restrict the enforcement of security interests under Article 410 para. (1) of the BRR Act or (iii) temporarily suspend termination rights under Article 413 of the BRR Act, with respect to that credit institution or entity.

The BRR Act fully transposes the BRRD provisions with respect to the *resolution powers* vested in the resolution authority in order to apply the resolution tools to distressed institutions.

Thus, with respect to Romanian counterparties which qualify as Credit Institutions and Investment Firms within the scope of the BRR Act, the NBR / the FSA as resolution authorities are vested *inter alia* with:

✓ general powers to:

- transfer to another entity, with the consent of that entity, rights, assets or liabilities of an institution under resolution;

- reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of bail-inable liabilities, of an institution under resolution;

- convert bail-inable liabilities of an institution under resolution into ordinary shares or other instruments of ownership of that institution, a relevant parent institution or a bridge institution to which assets, rights or liabilities of the institution are transferred;

- amend or alter the maturity of debt instruments and other bail-inable liabilities issued by an institution under resolution or amend the amount of interest payable under such instruments and other bail-inable liabilities, or the date on which the interest becomes payable, including by suspending payment for a temporary period, except for secured liabilities excluded from bail-in;

- close-out and terminate financial contracts[189] and derivatives contracts for the purposes of applying the bail-in tool;

  Note that, in the context of the bail-in tool, according to the BRR Act, **NBR/FSA shall not exercise the write down or conversion powers in relation to certain liabilities**, amongst which, **secured liabilities** including covered bonds and liabilities in the form of financial instruments used for hedging purposes which form an integral part of the cover pool and which, according to national law, are secured in a way similar to covered bonds and **liabilities to institutions with an original maturity of less than seven days**.

  Hence, under the BRR Act, secured liabilities i.e., "*liabilities where the right of the creditor to payment or other form of performance is secured by a privilege, pledge or other real security agreement or by any other means of securing, regardless of the legal form in which the security is created, including liabilities arising from repurchase transactions or other title transfer collateral arrangements*" are exempted from bail-in.

  As regards derivatives, the implementation of the bail-in tool entails the following:

  (i) the NBR/FSA shall exercise the write-down and conversion powers in relation to a liability arising from a derivative only upon or after closing-out the

[189] According to BRR Act, financial contracts include (a) securities contracts, including contracts for the purchase, sale or loan of a security, a group or index of securities; or options on a security or group or index of securities; or repurchase or reverse repurchase transactions on any such security, group or index; (b) commodities contracts, including contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery; or options on a commodity or group or index of commodities; or repurchase or reverse repurchase transactions on any such commodity, group or index; (c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date; (d) swap agreements, including swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation; total return, credit spread or credit swaps; any agreements or a similar transaction which is the subject of recurrent dealing in the swaps or derivatives markets; (e) inter-bank borrowing agreements where the term of the borrowing is three months or less; (f) master agreements for any of the contracts or agreements referred to in points (a) to (e).

derivatives.

(ii) where a derivative liability has been excluded from the application of the bail-in tool, the NBR/FSA shall not be obliged to terminate or close out the derivative contract.

(iii) **where derivative transactions are subject to a netting agreement, the NBR/FSA, as resolution authority, or an independent person shall determine, as part of the required valuation, the liability arising from those transactions on a net basis in accordance with the terms of the agreement**.

Finally, other provisions regarding the bail-in tool as set forth in the BRR Act include the contractual recognition of bail-in transposing Article 55 of the BRRD.

Thus, according to Article 349 para. (1) of the BRR Act, credit institutions and the other financial institutions covered by the scope of the enactment *must include a contractual term by which the creditor or party to the agreement or instrument creating the liability recognizes that that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by the NBR*, provided that that liability complies with all of the following conditions: (a) the liability is not excluded under Article 286 (i.e. not excluded from the bail-in tool); (b) the liability is not a deposit as referred to in Article 234 point 3 of the Insolvency Act; (c) the agreement is governed by the law of a third country; and (d) the liability is issued or entered into after the date on which the bail-in provisions apply, i.e. 1 January 2016.[190]

Where a credit institution or the other financial institutions covered by the scope of the BRR Act reaches the determination that it is legally or otherwise impracticable[191] to include in the contractual provisions governing a relevant liability a term required in accordance with Article 349 of the BRR Act, such institution or entity has to notify its determination, including the designation of the class of the liability and the justification of that determination, to the NBR/FSA.[192]

Furthermore, according to Article 351 of the BRR Act, where a credit institution or entity referred to in point (b), (c) or (d) of Article 1(1) does not include in the contractual provisions governing a relevant liability which fulfils the conditions under Article 349

[190] The NBR / FSA may decide that the obligation referred to in Article 349 para. (1) of the BRR Act shall not apply to certain institutions or entities, provided that liabilities that meet the conditions referred to in in Article 349 para. (1) of the BRR Act and which do not include the contractual term referred to in that article are not counted towards that requirement.

[191] On the basis of the EU Commission Delegated Regulations, which are adopted pursuant to the third paragraph of Article 55 para. (6) of the BRRD, the NBR / FSA shall decide the class of liability in respect of which credit institutions or the other financial institutions covered by the scope of the BRR Act may determine that the inclusion of the contractual clause provided in Article 349 para. (1) is impracticable.

[192] In the case of such notification, the obligation to include in the contractual provisions a term required in accordance with Article 349 is automatically suspended from the moment of receipt by the NBR/FSA of the notification. In the event that the NBR/FSA concludes that it is not legally or otherwise impracticable to include in the contractual provisions a term required in accordance with Article 349, taking into account the need to ensure the resolvability of the institution or entity, it shall require, within a reasonable timeframe after the notification pursuant to the first subparagraph, the inclusion of such contractual term.

para. (1) of the BRR Act a contractual term required in accordance with Article 349, that shall not prevent the NBR, as resolution authority, from exercising the write down and conversion powers in relation to that liability.

Note that the requirement with respect to the contractual recognition of bail-in should be implemented in accordance with the Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 providing *inter alia* for the liabilities to which such obligation applies and the contents of the contractual term required by Article 55(1) of the BRRD.

✓ *ancillary powers* to:

- cancel or modify the clauses of a contract to which the institution under resolution is a party ("*contractual modification power*") or substitute the resolved institution with a recipient/transferee as contractual party;

- provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred, without prejudice to the safeguard protecting security arrangements; for that purpose, any right of compensation in accordance with the BRR Act shall not be considered to be a liability or an encumbrance;

  Liabilities secured under a security arrangement benefit from appropriate protection so as to prevent one of the following: (a) the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred; (b) the transfer of a secured liability unless the benefit of the security is also transferred; (c) the transfer of the benefit of the security unless the secured liability is also transferred; or (d) the modification or termination of a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured (Article 432(1) of the BRR Act).

  However, by exception to the above safeguard, where necessary in order to ensure availability of the covered deposits NBR/FSA may: (a) transfer covered deposits which are part of any of the arrangements mentioned in the above paragraph without transferring other assets, rights or liabilities that are part of the same arrangement; and (b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits (Article 432(2) of the BRR Act).

✓ *other powers*, including to:

- **exclude certain contractual terms in early intervention and resolution** (Articles 400-405 of the BRR Act) - the prohibition of contracts' termination by reason only of a crisis prevention measure taken in early intervention or a crisis management measure taken during resolution, provided that substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed;

  According to article 402 of the BRR Act, "*Provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed, a crisis prevention measure, a suspension of obligation under Articles 186^{1}-186^{10} or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, shall not,* *per se, make it possible for anyone to: (a) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by a subsidiary, Romanian legal entity, the obligations of which are guaranteed or otherwise supported by a group entity or by any group entity and which include cross-default provisions; (b) obtain possession, exercise control or enforce any security over any property of the institution or any group entity in relation to a contract which includes cross-default provisions; (c) affect any contractual rights of the institution or any group entity in relation to a contract which includes cross-default provisions*".

The suspension or restriction following the exercise of the powers under Articles 186^1-186^{10} (i.e., the power to suspend certain obligations prior to the initiation of resolution proceedings, as detailed above), 406-409^1 (i.e., the power to suspend certain obligations, as detailed below) or 410-412 (i.e., the power to restrict the enforcement of security interests, as detailed below) of the BRR Act shall not constitute non-performance of a contractual obligation for the purposes of Articles 400, 402 and 413.

According to Article 403 of the BRR Act, the above-mentioned provisions shall not affect the right of a person to take an action referred to above where that right arises by virtue of an event other than the crisis prevention measure, the crisis management measure or the occurrence of any event directly linked to the application of such a measure.

- **suspend any payment or delivery obligations** (Articles 406-409^1 of the BRR Act) pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension in accordance with the BRR Act until midnight, official Romanian time, at the end of the business day following that publication;

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

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

  Any suspension decision made as per the above shall not apply to payment and delivery obligations owed to the following: (a) systems and operators of systems designated in accordance with 13 of Law no. 253/2004 (transposing Directive 98/26/EC), (b) central counterparties (CPC) authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country CCPs recognised by ESMA pursuant to Article 25 of that Regulation, (c) central banks.

- **restrict secured creditors of an institution under resolution from enforcing security interests** (Articles 410-412 of the BRR Act) in relation to any assets of that institution under resolution from the publication of a notice of the restriction in accordance with the BRR Act until midnight, official Romanian time, at the end of the business day following that publication;

- **temporarily suspend the termination rights** (Articles 413-419 of the BRR Act) of any party to a contract with an institution under resolution from the publication of the notice pursuant to the BRR Act until midnight, official Romanian time, at the end of the business day following that publication, provided that the payment and delivery obligations and the provision of collateral continue to be performed.

NBR/FSA has also the power to suspend the termination rights of any party to a contract with a subsidiary (Romanian legal entity) of an institution under resolution where:

(a) the obligations under that contract are guaranteed or are otherwise supported by the institution under resolution;

(b) the termination rights under that contract are based solely on the insolvency or financial condition of the institution under resolution; and

(c) in the case of a transfer power that has been or may be exercised by NBR/FSA in relation to the institution under resolution, either:

  (i) all the assets and liabilities of the subsidiary relating to that contract have been or may be transferred to and assumed by the recipient; or

  (ii) NBR/FSA, as resolution authority provides in any other way adequate protection for such obligations.

A contractual party may exercise a termination right under a contract before the end of the period of suspension referred to above, if that party receives a notice from NBR/FSA, as resolution authority, that the rights and liabilities covered by the contract shall not be: (a) transferred to another entity; or (b) subject to write down or conversion on the application of the bail-in tool in accordance with point (a) of Article 282 of the BRR Act.

Such termination rights may however be exercised at the expiry of the period of suspension, subject to the provisions relating to the prohibition of contracts' termination by reason only of a measure taken in early intervention or resolution, as follows:

(a) if the rights and liabilities covered by the contract have been transferred to another entity, a counterparty may exercise termination rights in accordance with the terms of that contract only on the occurrence of any continuing or subsequent enforcement event by the recipient entity triggering termination in accordance with the contract;

(b) if the rights and liabilities covered by the contract remain with the institution under resolution and the NBR/FSA has not applied to this institution the bail-in tool, a counterparty may exercise termination rights in accordance with the terms of that contract on the expiry of the period of suspension mentioned above (Articles 413-419 of the BRR Act).

In accordance with Articles 419^{1}-419^{4} of the BRR Act (transposing in Romanian law the provisions of Article 71a of the BRRD which refer to the **contractual recognition of resolution stay powers**), Romanian counterparties which qualify as Credit Institutions and Investment Firms within the scope of the BRR Act are required to include in any financial contract which they enter into and which is governed by third-country law, terms by which the parties recognise that the financial contract may be subject to the exercise of powers by the NBR / the FSA to suspend or restrict rights and obligations under Articles 186^{1}-186^{10} (i.e., the power to suspend certain obligations prior to the initiation of resolution proceedings), 406-409[1] (i.e., the power to suspend certain obligations), 410-412 (i.e., the power to restrict the enforcement of security interests) and 413-419 (i.e., the power to temporarily suspend termination rights) of the BRR Act and recognise that they are bound by the requirements of Articles 400-405 of the BRR Act (referring to the exclusion of certain contractual terms in early intervention and resolution).

Such requirement applies to any such financial contract which:

(a) creates a new obligation, or materially amends an existing obligation after the entry into force of the BRR Revision Act;

(b) provides for the exercise of one or more termination rights or rights to enforce security interests to which Articles 186[1]-186[10], 400-405, 406-409[1], 410-412 or 413-419 of the BRR Act would apply if the financial contract were governed by the laws of a Member State.

Romanian parent undertakings have to ensure that their third-country subsidiaries include, in such financial contracts they are a party to, terms to exclude that the exercise of the power of the NBR / the FSA to suspend or restrict rights and obligations of the EU parent undertaking, in accordance with Article 419[1] of the BRR Act, constitutes a valid ground for early termination, suspension, modification, netting, exercise of set-off rights or enforcement of security interests on those contracts. This requirement may apply in respect of third-country subsidiaries which are: (a) credit institutions; (b) investment firms (or which would be investment firms if they had a head office in Romania); or (c) financial institutions.

The content of the contractual terms on recognition of resolution stay powers is set out under the Commission Delegated Regulation (EU) 2021/1340 of 22 April 2021.

- if necessary for the effective application of the resolution tools and powers and without prejudice to any restriction on the enforcement of security interests imposed pursuant to Articles 410-412 of the BRR Act, request the court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which an institution under resolution is or becomes a party (Article 456 of the BRR Act).

Furthermore, in line with the BRRD, the BRR Act provides that, where one or more resolution tools have been applied by the resolution authority, ***appropriate safeguards*** should also be implemented in relation to such tools, it being specified that, both in the case of partial transfers and in the case of the bail-in tool, the shareholders and those creditors whose claims have not been transferred / the shareholders and creditors whose claims have been written down or converted to equity, respectively, *shall not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings* (Article 423 of the BRR Act).

It is expressly stated that the protections set forth in the chapter regulating the safeguards under the BRR Act apply in the following circumstances: (a) a resolution authority transfers some but not all of the assets, rights or liabilities of an institution under resolution to another entity or, in the exercise of a resolution tool, from a bridge institution or asset management vehicle to another person; (b) a resolution authority exercises the powers specified in point (f) of Article 385 (1) (i.e. the contractual modification power) (Article 428 of the BRR Act).

In particular, the BRR Act states that, **subject to BRR Provisions (*i.e.* provisions relating to (i) *the exclusion of certain contractual terms in early intervention and resolution* and (ii) *the powers of the resolution authority to temporarily suspend termination rights*), *title transfer financial collateral arrangements, set-off and netting agreements* <u>benefit from appropriate protection</u> in order to prevent the transfer of some, but not all, of the rights and liabilities under a title transfer financial collateral arrangement, a set-off agreement or a netting agreement between the institution in resolution and another person and the modification or termination of such protected rights and liabilities by exercise of an ancillary power by the NBR/FSA**. For such purposes***, the rights and liabilities are deemed protected under such arrangements if the parties have the right to set-off or net such rights and liabilities*** (Articles 429(1)(c) and (d) and 430 of the BRR Act).

Notwithstanding the provisions of Article 430, where necessary in order to ensure availability of the covered deposits NBR/FSA may:

(a) transfer covered deposits which are part of any of the arrangements mentioned in Article 430 without transferring other assets, rights or liabilities that are part of the same arrangement; and

(b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits (Article 431 of the BRR Act). Note that, according to the BRR Act (i) the *netting agreement* is defined as any arrangement or clause under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined), the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim; the following are assimilated to a netting agreement: '*close-out netting provisions*' as defined in the Collateral Ordinance or the legislation of another Member State transposing the Collateral Directive and '*netting*' as defined in Law no. 253/2004 on settlement finality in payment and securities settlement systems or the legislation of another Member State transposing Directive 98/26/EC, and (ii) the *title transfer financial collateral arrangement* is defined by reference to the relevant definition under the Collateral Ordinance or the legislation of another Member State transposing the Collateral Directive.

Furthermore, the Commission Delegated Regulation (EU) 2017/867 of 7 February 2017 on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council has clarified that set-off arrangements and contractual netting agreements (as defined in Article 295 of EU Regulation no. 575/2013) which relate to rights and liabilities arising under financial contracts or derivatives qualify as set-off arrangements and netting arrangements pursuant to Article 76 of the BRRD and hence benefit from appropriate protection during a partial property transfer of assets, rights and liabilities of an institution under resolution.

C) Netting under the Collateral Ordinance

The Collateral Ordinance addresses the enforceability of close-out netting in the context of insolvency, as well as outside insolvency proceedings, in the case of *financial collateral arrangements* entered into between *eligible counterparties*.

Ratione personae, the Collateral Ordinance applies only to contractual relationships between the following types of *eligible counterparties*[193]: (i) public authorities; (ii) central banks, the European Central Bank, the Party For International Settlements, multilateral development banks, the International Monetary Fund and the European Investment Bank; (iii) a financial institution subject to prudential supervision, including (1) credit institutions as defined under the Banking Act, (2) financial institutions as defined under the Banking Act, (3) investment firms as defined under the Banking Act[194], (4) insurance companies, insurance-reinsurance companies, reinsurance companies and insurance brokers as defined under Law no. 32/2000 regarding the insurance activity and insurance supervision, as amended[195], (5) UCITS as defined under the Capital Market Act[196], (6) investment management companies as defined under the Capital Market Act[197]; (iv) central counterparties, settlement agents or clearing houses and entities with or without legal personality (except for individuals) acting in the name, or on behalf, of any one or more persons that include any bondholders or holders of other forms of debt instruments or any institution defined hereinabove.

Ratione materiae, the Collateral Ordinance refers to *financial collateral arrangements* defined as title transfer or security agreements securing *financial obligations*, whether or not these are covered by a master agreement or general terms and conditions.

Financial obligations that may be secured under *financial collateral arrangements* are payment obligations and/or obligations to transfer ownership in financial instruments and may consist of or include: a) present or future, actual or contingent or prospective obligations, including such obligations arising under a master agreement or similar arrangement; b) obligations owed to the collateral taker by a person other than the collateral provider; or c) obligations of a specified class or kind arising from time to time.

Financial collateral may consist of cash, *financial instruments*[198] and/or credit claims[199], with the exception of: collateral provider's own shares, shares held by the collateral provider in affiliated undertakings or in undertakings whose exclusive purpose is to own means of production that are essential for the collateral provider's business or to own real estate.

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[193] Romania decided to apply the corporate opt-out permitted by Article 1 paragraph (3) of the Collateral Directive.

[194] According to the Banking Act, the terms credit institution, financial institution and investment firm have the meanings set forth in Article 4 paragraph (1) of EU Regulation No 575/2013 (please see footnote 9 above).

[195] As of 1 January 2016, Law no. 32/2000 only regulated the activity and supervision of insurance and reinsurance brokers and as of 1 October 2018 it was repealed by Law 236/2018 on insurance distribution. As regards the activity of insurance and reinsurance companies, a new law was enacted in October 2015 and is in force as of 1 January 2016, namely the Insurance Act.

[196] Note that, although in the past UCITS were regulated by the Capital Market Act, currently they are regulated by Government Emergency Ordinance no. 32/2012.

[197] Note that, although in the past investment management companies were regulated by the Capital Market Act, currently they are regulated by Government Emergency Ordinance no. 32/2012.

[198] Financial instruments to which the Collateral Ordinance refers to are "*shares in companies and other securities equivalent to shares in companies, bonds and other forms of debt instruments, if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities, by subscription, purchase or exchange or which give the right to a cash settlement, including units in collective investment undertakings, money market instruments and any claims/rights in or in respect of any of the foregoing*".

[199] As regards financial collateral consisting in credit claims, note that, according to the Collateral Ordinance, a close-out netting provision, as described in Article 9 of the Collateral Ordinance does not apply with respect to credit claims. According to Article 9 of the Collateral Ordinance, *close-out netting is enforceable notwithstanding the commencement or continuation of reorganisation measures or winding-up proceedings against the collateral provider and/or the collateral taker and notwithstanding any assignment, seizure, garnishment, judicial or other attachment or other disposition of or in respect of such rights*.

The Collateral Ordinance recognizes the close-out netting provided for in a financial collateral arrangement irrespective of the insolvency of the collateral provider, without the need of a special procedure.

The effect of close-out netting is that, following any event of default or event assimilated thereto, account is taken of the parties' obligations towards each other and the party owing the higher amount shall be obliged to pay its debt, less the amount owed to it by the other party. Set-off of the collateral with the amount of the secured financial obligation is permitted as a method of enforcement and without any notice, if not otherwise provided for in the arrangement.

According to the provisions of the Collateral Ordinance, upon an enforcement event and as an effect of the occurrence of set-off or otherwise, alternatively or cumulatively: (i) the obligations of the parties become immediately due and expressed as an obligation to pay an amount representing their estimated current value, calculated as of that moment, or are terminated and replaced by an obligation to pay such an amount; and (ii) account is taken of what is due from each party to the other in respect of such obligations, even in case the collateral provider is different from the principal debtor, further to which a net sum equal to the balance of the debts is payable by the party from whom the larger amount is due to the other party.

It is expressly stated that close-out netting is enforceable notwithstanding the commencement or continuation of reorganization measures or winding-up proceedings against the collateral provider and/or the collateral taker. Furthermore, the Collateral Ordinance recognizes the application of such provisions "*notwithstanding any assignment, seizure, garnishment, judicial or other attachment or other disposition of or in respect of such rights*".

Subject to fraud, the Collateral Ordinance provides that financial collateral arrangements may not be voided on the sole basis that they were entered into during the suspect periods defined as such under the relevant insolvency laws, by stating that "*A financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or with no legal effects on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided:*

(a) *on the day of the commencement of reorganization measures or winding-up proceedings against the collateral provider or the debtor of the secured financial obligation, but prior to the order or decree making that commencement;*

(b) *in a prescribed period prior to the commencement of reorganization measures or winding-up proceedings against the collateral provider or the debtor of the secured financial obligation, as such period is defined by the laws regulating such measures/proceedings by reference to such date or to the making of any order or decree or the taking of any other action in relation to such measures or proceedings or in the course of such measures or proceedings*".

Moreover, the Collateral Ordinance provides that "*where a financial collateral arrangement has been entered into or a relevant financial obligation has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of, reorganization measures or winding-up proceedings, it shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor should have been aware, of the commencement of such measures or proceedings*".

Finally, in accordance with the amendments brought by the BRR Act and in line with the amendments brought by the BRRD to the Collateral Directive, it is expressly stated that the Collateral Ordinance shall be without prejudice *inter alia* to the provisions included in the legislation regarding the recovery and resolution of credit institutions and investment firms.

Furthermore, the Collateral Ordinance states[200] that the provisions of Articles 6-10 of the Collateral Ordinance[201] shall not apply to any restriction on the enforcement of financial collateral arrangements or any restriction on the effect of a security financial collateral arrangement, any close out netting or set-off provision that is imposed by virtue of the provisions relating to government financial stabilisation tools[202] and write down of capital instruments set out in the legislation relating to the recovery and resolution of credit institutions and investment firms, or to any such restriction that is imposed by virtue of similar powers in the law of a Member State to facilitate the orderly resolution of any entity referred to in article 3 letter c) point 4 and letter d) of the Collateral Ordinance[203] which is subject to safeguards at least equivalent to those set out in the legislation relating to the recovery and resolution of credit institutions and investment firms.

[200] Article 14 para. (1^1) of the Collateral Ordinance, transposing the provisions of Article 1 para. (6) of the Collateral Directive in Romania. Note that Article 1 para. (6) of the Collateral Directive was amended on 12 August 2022 by Regulation (EU) 2021/23 on a framework for the recovery and resolution of central counterparties and amending (*inter alia*) the Collateral Directive (the "**CCP Recovery and Resolution Regulation**") and currently reads: "*Articles 4 to 7 of* [the Collateral Directive] *shall not apply to any restriction on the enforcement of financial collateral arrangements or any restriction on the effect of a security financial collateral arrangement, any close out netting or set-off provision that is imposed by virtue of Title IV, Chapter V or VI of* [the BRRD]*, or of Title V, Chapter III, Section 3, or Chapter IV of* [the CCP Recovery and Resolution Regulation] *or to any such restriction that is imposed by virtue of similar powers in the law of a Member State to facilitate the orderly resolution of any entity referred to in point (c)(iv) or (d) of paragraph 2 of this Article which is subject to safeguards at least equivalent to those set out in Title IV, Chapter VII of* [the BRRD] *or in Title V, Chapter V of* [the CCP Recovery and Resolution Regulation]".

[201] Articles 6-10 of the Collateral Ordinance refer to: (a) the enforcement of financial collateral arrangements; (b) the right of use of financial collateral under security financial collateral arrangements; (c) the recognition of title transfer financial collateral arrangements; and (d) the recognition of close-out netting provisions;

[202] We note that the general scope of the amendments brought by the BRRD to the Collateral Directive was to give precedence to the provisions relating to (i) the write down of capital instruments and (ii) resolution powers as set out in Chapters V and VI of Title IV of the BRRD over the provisions relating to (a) the enforcement of financial collateral arrangements, (b) the right of use of financial collateral under security financial collateral arrangements, (c) the recognition of title transfer financial collateral arrangements and (d) the recognition of close-out netting provisions, which are set out in the Collateral Directive. However, the transposition of such amendments into Romanian law is not entirely accurate, since the Collateral Ordinance sets out that the provisions relating to (i) the write down of capital instruments and *(ii) government financial stabilisation tools* set out in the legislation relating to the recovery and resolution of credit institutions and investment firms take precedence over the provisions (a)-(d) above.

[203] Reference is made to in particular to insurance/reinsurance undertakings, insurance brokers as well as central counterparties, settlement agents or clearing houses, as such are defined by law.

ANNEX 4

Romanian Pre-insolvency and Insolvency Regime

A. General Remarks on the Insolvency Act

The Insolvency Act sets forth the general legal framework on pre-insolvency and insolvency proceedings instituted against professionals (legal entities or individuals carrying on a business) and its objective is to establish a collective procedure for covering the liabilities of the debtor, by also granting, when possible, a chance for the recovery of its business.

According to Article 3 of the Romanian Civil Code, "*professional*" is any person (legal entity or individual) who operates an undertaking, namely who systematically carries out an organized activity consisting in the manufacturing, administration or sale of goods or in the provision of services, irrespective of whether the organized activity is a profit-making activity. The term "*professional*" includes the categories of trader, entrepreneur, economic operator, as well as any other person authorized to carry out economic or professional activities.[204]

The Insolvency Act applies to professionals, except for those for which special provisions regarding their pre-insolvency or insolvency regime are set forth under law. In the case of persons exercising liberal professions (such as lawyers, tax consultants, accountants etc.), the provisions of the Insolvency Act apply without prejudice to their professional status. The Insolvency Act expressly states that it is not applicable to (i) units and institutions of pre-university and university education, or (ii) public units and institutions included in the national system of research and development.

As regards its structure, the Insolvency Act comprises the general legal framework for pre-insolvency and insolvency of professionals, special provisions regarding the insolvency of groups of companies and special provisions regarding the bankruptcy of Credit Institutions and Insurance/Reinsurance Companies, and, finally, general rules on cross-border insolvency proceedings (other than those regulated under the EU Insolvency Regulation).

B. The general legal framework for insolvency prevention proceedings (Title I of the Insolvency Act)

Following the entry into force of the EU Restructuring Directive, the Insolvency Act was amended on 17 July 2022 in order to align its provisions on insolvency prevention proceedings with the provisions of the EU Restructuring Directive[205].

The Insolvency Act recognises two types of insolvency prevention proceedings: (i) the *restructuring agreement* and (ii) the *preventive composition*, as further described in Sections B.1 and B.2 below.

Insolvency prevention proceedings may apply to debtors which are in a state of *difficulty*, and not in a state of insolvency. The term "*difficulty*" is defined under the Insolvency Act as the state generated by any circumstance which causes a temporary impairment of the debtor's business that

[204] Article 8 paragraph (1) of Law no. 71/2011 for the implementation of the Romanian Civil Code.

[205] The amendments to the Insolvency Act occurred following the entry into force of Law no. 216/2022 for the amendment of the Insolvency Act and of other enactments, transposing the provisions of the EU Restructuring Directive into Romanian law.

gives rise to a real and serious threat to the debtor's future ability to pay its debts when due, if adequate measures are not taken; the debtor in difficulty is able to perform its obligations as they become due.[206]

In line with the second paragraph of Article 1 (*Subject matter and scope*) of the EU Restructuring Directive, the Insolvency Act sets out that the insolvency prevention proceedings do not apply to:

- Credit Institutions, Investment Firms and other financial institutions and entities which are in-scope entities of the BRR Act;

- undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs), as defined under Romanian law;

- Insurance/Reinsurance Companies regulated by the Insurance Act and the IRR Act;

- central counter parties (CCPs) as defined in point (1) of Article 2 of Regulation (EU) No 648/2012; and

- central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014.

In order to protect the business of the debtor in a state of difficulty, the Insolvency Act sets out that any losses of rights, limitations or interdictions provided by law for the debtor that is in a state of difficulty are not applicable, and any contractual provisions in this regard are considered unwritten (i.e., they do not produce any legal effects).[207]

Furthermore, contractual clauses providing for the termination or the possibility of the creditor to suspend or refuse performance on the grounds that the debtor is in a state of difficulty in an insolvency prevention proceeding are considered unwritten. However, this does not apply to qualified financial contracts and close-out netting operations based on a qualified financial contract or a bilateral netting agreement (with certain exceptions set out in Article 9^5 of the Insolvency Act detailed in Section A (*Netting under the Insolvency Act*) of Annex 3 (*Romanian Netting Regime*)).

In case insolvency proceedings are opened against the debtor following the pre-insolvency proceedings, the following provisions apply:

- any new financing[208] included in the restructuring agreement or in the restructuring plan, as well as any interim financing[209], cannot be annulled except where there is evidence that such financing is fraudulent;

[206] We note that, under Romanian law, companies are required to file annual financial statements with the Ministry of Finance. An excerpt of the main economic indicators set out in the company's annual financial statements may be obtained for free at mfinante.gov.ro. Additional information on corporate actions may be obtained from the Trade Registry.
[207] Such provisions have to be corroborated with the provisions of Articles 9^5, 9^8, and 25^1 of the Insolvency Act, which set out the netting safe harbours for qualified financial contracts and netting operations (please see Section A (*Netting under the Insolvency Act*) of Annex 3 (*Romanian Netting Regime*) of this opinion).
[208] New financing means any financing, including the provision of guarantees, supplier credit with a payment term of more than 90 days, granted by an existing creditor or a new creditor, in order to implement a restructuring agreement/ plan or reorganisation plan, that is included in such agreement/plan.
[209] Interim financing means any financing, including the provision of guarantees, supplier credit with a payment term of more than 90 days, granted by an existing creditor or a new creditor, during the stay of individual enforcements, in

- in the case of new and/or interim financing granted in pre-insolvency, such are secured by a privilege which is established over all movable and immovable assets of the debtor, free of any encumbrances at the time of establishment;

- deeds and operations that are reasonable and immediately necessary for the continuation of the debtor's business until the preventive composition arrangement is ratified cannot be annulled, except where there is evidence that such deeds and operations are fraudulent;

- deeds and operations carried out in accordance with the confirmed restructuring agreement or the ratified preventive composition arrangement, as well as those reasonable and immediately necessary for their implementation concluded during the restructuring period in the normal course of business, cannot be annulled;

- the suspect period may be extended to cover the implementation period set out in the confirmed restructuring agreement or the period following the opening of the preventive composition proceedings.

B.1 Restructuring Agreement Proceedings

The restructuring agreement proceeding is an insolvency prevention proceeding where the debtor requests a syndic judge to confirm the restructuring agreement negotiated with and approved by the creditors whose claims are affected by such agreement. The aim of the restructuring agreement is for the debtor to recover its business and pay in whole or in part the affected claims in the timeframe set out in the restructuring agreement.

The restructuring agreement proposed by the debtor is sent by the restructuring administrator to the creditors whose claims are affected, in order to invite such creditors to negotiations and to cast their vote on the restructuring agreement (the out-of-court phase). Creditors whose claims are unaffected[210] by the restructuring agreement do not have a right to vote.

For the purpose of approving the restructuring agreement, the affected creditors' claims are grouped into the following classes which may vote separately: a) secured creditor claims; b) salary claims; c) claims of indispensable creditors, if applicable; d) budgetary claims; and e) other claims. A restructuring agreement is considered approved by a class of claims if it is approved by an absolute majority of the value of the claims in that class.

The restructuring agreement thus approved by the affected creditors would have to be confirmed by a syndic judge. The confirmation procedure is confidential but the confirmed restructuring agreement is notified to both affected and unaffected creditors.

Note in this context that the *cross-class cram-down* confirmation concept set out under the EU Restructuring Directive has been implemented in the Insolvency Act. In summary, the *cross-class cram-down* may be applied by the syndic judge where there is no absolute majority for each separate class of claims to approve the restructuring agreement and implies the approval of such

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preventive composition proceedings, and during the observation period, in insolvency proceedings. Such financing has to be reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business.

[210] An "*unaffected claim*" is defined as a claim that is not directly modified by a restructuring agreement or a preventive composition arrangement; any claim not included in the list of affected claims is an unaffected claim.

agreement by (i) the majority of classes of claims, provided that at least one of these classes is a class that benefits from preferential rights or has priority rank over the “other claims” class; or, otherwise, (ii) at least one class of claims with voting rights, other than a class which, following an assessment of the debtor’s assets, would not receive any payment in the event of bankruptcy. Nevertheless, the restructuring agreement would have to be voted by at least 30% of the total amount of affected claims.

If a restructuring agreement is confirmed by the court, the debtor’s business would have to be restructured in accordance with its provisions, and the rights of affected creditors would be altered in accordance with the provisions of the confirmed restructuring agreement.

Note that a confirmed restructuring agreement is enforceable against all creditors, including against affected creditors which voted against the restructuring agreement or did not vote on such agreement. A confirmed restructuring agreement will not produce any effects in relation to unaffected creditors.

Following the confirmation of the restructuring agreement and until the end the procedure, insolvency proceedings cannot be initiated at the request of an affected creditor.

B.2 Preventive Composition Proceedings

The preventive composition proceeding is a judicial insolvency prevention proceeding aimed at recovering the debtor’s business, where the debtor pays the affected claims in whole or in part on the basis of a restructuring plan voted by the affected creditors and ratified by the syndic judge. One of the main effects triggered by the opening of preventive composition proceedings is the stay of enforcement actions.

Unlike restructuring agreement proceedings, there is no initial out-of-court negotiation and voting phase. A debtor in a state of difficulty (or one or more creditors with the debtor’s prior consent) may request in court the opening of preventive composition proceedings.

Upon the opening of preventive composition proceedings, all pending enforcement actions against the debtor are automatically suspended and new enforcement actions cannot be initiated for a period of up to 4 months (which may be extended to 12 months in certain circumstances), but no later than the date on which a decision regarding the ratification of the restructuring plan is taken by the syndic judge. Insolvency proceedings cannot be initiated during the stay of enforcement actions.[211]

Until the restructuring plan is ratified by the syndic-judge, creditors whose claims came into existence prior to the stay and have not been paid by the debtor are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential ongoing contracts[212],

[211] The stay of individual enforcement actions shall not apply to bilateral netting agreements, but shall apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting agreement (for details, please see Section A (*Netting under the Insolvency Act*) of Annex 3 (*Romanian Netting Regime*) of this opinion).

[212] Ongoing contracts are defined under the Insolvency Act as those contracts that have not been fully or substantially performed by all parties on the date of confirmation of the restructuring agreement or, as the case may be, on the date of the opening of the of preventive composition or insolvency proceedings. Essential ongoing contracts are those necessary for the continuation of the business, including contracts for the supply of goods or services, the suspension of which would lead to a business interruption, including but not limited to leasing, license, franchise and long-term supply contracts, such as electricity, water, telecommunications, gas, etc.

provided that the debtor complies with its obligations under such contracts which fall due during the stay.

The restructuring plan drawn up by the preventive composition administrator together with the debtor after the opening of the preventive composition proceeding would have to be negotiated and voted by the affected creditors and ratified by the syndic-judge.

The provisions regulating the voting classes and cross-class cram-down system for the approval and ratification of the restructuring plan are similar to the ones set out for restructuring agreements.

The hearings for the ratification of the restructuring plan are carried out only in the presence of the debtor, the preventive composition administrator and, as the case may be, the creditors which requested the opening of the proceedings. The opening of the preventive composition proceedings, the submission and notification of the restructuring plan and the approval and ratification of the restructuring plan are registered with the Trade Registry. The ratified restructuring plan is notified to both affected and unaffected creditors.

If a restructuring plan is ratified by the court, the debtor's business would have to be restructured in accordance with its provisions, and the rights of affected creditors would be altered in accordance with the provisions of the ratified restructuring plan.

Note that a ratified restructuring plan is enforceable against all creditors, including against affected creditors which voted against the restructuring plan or did not vote on such plan. A confirmed restructuring agreement will not produce any effects in relation to unaffected creditors.

Following the ratification of the restructuring plan, all enforcement actions concerning affected claims are automatically suspended. Creditors whose claims are not affected have to notify the debtor if they intend to initiate enforcement actions. Within 30 days as of such notification, the debtor may request the creditors to participate in negotiations on the terms for joining the restructuring plan.

Until the end the preventive composition proceedings, insolvency proceedings cannot be initiated at the request of an affected creditor.

C. The general legal framework for insolvency proceedings (Title II, Chapter I of the Insolvency Act)

C.1 Concept

Insolvency is defined under the Insolvency Act as the "*status of the debtor's patrimony characterized by the insufficiency of available funds to cover outstanding liabilities and which is presumed when, after 60 days as of the due date, the debtor has not paid its debt towards the creditor; this presumption is relative*".

Insolvency, if declared judicially, may lead either to (i) ***judicial reorganization*** (*reorganizare judiciară*), aimed at saving the business while at the same time satisfying the claims of creditors in accordance with an agreed schedule of payments, and, in case of failure thereof, to bankruptcy or (ii) ***bankruptcy*** (*faliment*), aimed at liquidating the debtor's assets and applying the proceeds towards the satisfaction of creditors' claims in accordance with the statutory priority order.

C.2 Opening of insolvency proceedings

The proceedings are opened on the basis of a petition presented in court by the debtor itself or its creditor(s) or by the persons or institutions expressly provided for by law.[213] The competent court is the tribunal in whose jurisdiction the debtor had its registered office at least six months prior to the filing of the petition for the opening of the insolvency proceedings.

The petition must refer to one or several undisputed claims, the amount of which is determined and is of at least RON 50,000 (approximately EUR 10,000) and overdue for at least 60 days.

After the registration of the petition, the court will appoint a *syndic-judge* in charge with opening and ruling on the proceedings.

C.3 Initial judgment

In case the syndic-judge concludes that the petition meets the conditions set forth by law, he will open the insolvency proceedings based on an *initial judgment***.**

In the initial judgment the syndic-judge will nominate the *judicial administrator*[214] and will indicate whether or not and the conditions under which the debtor itself is allowed to run its business. The debtor's right to run its business would automatically cease upon commencement of bankruptcy proceedings aiming at the sale of assets, collection of receivables, payment of debts and dissolution of the debtor.

Following the opening of the insolvency proceedings, the judicial administrator notifies all known creditors, the debtor and the trade registry (or, as the case may be, the register of agricultural companies or other registers where the debtor is registered) in order to perform the necessary registrations. This notice will also be published in the Insolvency Proceedings Bulletin (*Buletinul Procedurilor de Insolvență*)[215] as well as in a largely circulated newspaper.

During bankruptcy, the debtor's business will be conducted by a *liquidator*.

C.4 Main effects of the initial judgment

Stay of individual proceedings

Upon the opening of insolvency proceedings, all judicial and extrajudicial actions or enforcement measures seeking the realization of creditors' claims against the debtor's assets are stayed and the

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[213] An online database of court cases may be accessed free of charge at portal.just.ro. This database (which is managed by the Romanian Ministry of Justice) could be used to search for insolvency petitions filed against the debtor, but note that any information published in this database may not be updated and should be treated only as an indication that an insolvency petition has been filed or not.

[214] Such designation is in place until the judicial administrator/liquidator is confirmed or replaced by the creditors' assembly.

[215] The Insolvency Proceedings Bulletin is published electronically by the National Trade Registry Office contains all procedural acts issued by the courts and insolvency administrators/liquidators in the course of insolvency proceedings, namely: summonses, communications, notices, notices of meetings, judgments and other procedural documents required by law (reports issued by the insolvency administrator/liquidator, judicial reorganisation plans, announcements). Online services in connection with the Insolvency Proceedings Bulletin may be accessed at the National Trade Registry Office's website (portal.onrc.ro), subject to the payment of a subscription fee.

creditors shall recover their claims only within the insolvency proceedings. There are three main exceptions to this principle:

(i) a secured creditor may request the syndic-judge to lift the stay as regards the realization of its collateral, under the specific conditions set forth in the Insolvency Act;

(ii) a creditor may request the set-off of its claims against the debtor with the debtor's claims against the creditor, provided that the conditions of the legal set-off are met[216];

(iii) a secured creditor benefiting from a mortgage over the accounts or a cash collateral may request and obtain the distribution, by the judicial administrator or liquidator, of the amounts existing as of the date of the opening of insolvency proceedings on such mortgaged accounts as well as of cash collateral amounts, within 5 days from such creditor's request[217].

After the date of the initial judgment, no interest, increase, penalty or any other charge whatsoever may accrue to the creditors' claims which are prior to the opening of the proceedings. An exception to this principle is provided in respect of secured claims[218]. Unless performed under the supervision/direction of the judicial administrator, all deeds, transactions and payments made by the insolvent debtor are null and void.

In order to implement the stay, the initial judgement is sent to the relevant trade register, to all banks where the debtor has open accounts as well as to the courts in whose jurisdiction the registered office of the debtor is located.

The period of time between the opening date of the insolvency proceedings and ending on the date the reorganization plan is confirmed (or on the opening date of the bankruptcy proceedings, as the case may be) is called the observation period.

Cherry picking

Ongoing contracts are deemed maintained as of the opening of the proceedings. However, for the purpose of maximizing the value of the debtor's assets, the judicial administrator / liquidator may unilaterally terminate, within 3 months as of the opening of the insolvency proceedings, any contract not entirely or substantially performed by the parties. Furthermore, if the judicial administrator / liquidator does not reply within 30 days to a request for termination sent by a

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[216] Legal set-off is regulated by the Romanian Civil Code and operates by virtue of law, provided that the claims subject to it are at the same time (i) certain (uncontested), (ii) liquid (precisely determined as to the amount they refer to), (iii) due, and (iv) refer to moneys or other fungible assets.

[217] Article 75 paragraph (7) of the Insolvency Act. Furthermore, Article 75 paragraph (9) of the Insolvency Act provides for an exception to the rule set forth in Article 75 paragraph (7) of the Insolvency Act, by stating that in case the amounts existing in the mortgaged accounts / the cash collateral amounts are necessary for the ongoing business of the debtor during the observation period, the judicial administrator may use such amounts for the debtor's business, subject however to the creditor's agreement or, absent such creditor's agreement, to the authorization of the syndic-judge. Such authorization may be given by the syndic-judge only by granting adequate protection to the creditor in accordance with article 87 paragraph (3) of the Insolvency Act.

[218] According to the Insolvency Act, secured claims are to be registered with the final list of registered claims at the entire market value of the collateral, established pursuant to the evaluation requested by the judicial administrator or the liquidator. If the proceeds obtained from the liquidation/sale of the collateral exceed the amount of the claim registered in the final list of registered claims, the balance will be also channelled to the secured creditor (even if parts of its claim were initially registered as unsecured), for the satisfaction of the entire principal plus its accessories (*e.g.*, interest, fees, commissions) calculated until the date of the liquidation/sale of the collateral.

counterparty of the debtor within 3 months as of the opening of the insolvency proceedings, the relevant contract is deemed terminated upon the expiry of the 30 days term as of the receipt of the counterparty's request by the judicial administrator / liquidator.

Voidable preference

According to Article 117 of the Insolvency Act, acts done within a two-years term prior to the opening of insolvency proceedings, including, *inter alia*, gratuitous transactions made by the debtor, arrangements whereby the intention of all the parties involved was to diminish the assets of the insolvent debtor or to prejudice the creditors' rights in any way or transfer deeds entered into or obligations undertaken by the insolvent debtor with the intention to conceal/delay the insolvency status or defraud a creditor are presumed fraudulent and may be annulled.

Similarly, the following transactions concluded within six-months prior to the opening of insolvency proceedings are presumed fraudulent and may be annulled, unless concluded in good faith, in performance of an arrangement between the debtor and its creditors following out-of-court negotiations for the restructuring of debts or within the insolvency prevention proceedings: (a) ownership transfers to a creditor for payment of a prior debt or to the benefit of such a creditor, if the amount the creditor had obtained in the event of the bankruptcy of the debtor would have been lower than the value of the transfer; (b) granting security interests for an unsecured claim, or (c) prepayment of debts, if the debts' due date had been set for after the opening of the insolvency proceedings. In addition, operations whereby the performance of the insolvent debtor is obviously exceeding the consideration received from the other party, if concluded within a six-month term prior to the opening of insolvency proceedings are presumed fraudulent and may be annulled.

However, deeds entered into by the insolvent debtor in its ordinary course of business shall not be voided (except for fraud).

Please note that the suspect period may be extended to cover the implementation period set out in the confirmed restructuring agreement or the period following the opening of the preventive composition proceedings.[219]

Filing of claims

Creditors shall be notified by the judicial administrator in order to file their claims (the time limit for filing claims may not exceed 45 days from the opening of the proceedings). The claims shall be checked by the judicial administrator and may be challenged by any interested person. After the syndic-judge rules on the challenges, the judicial administrator / liquidator shall draw and make public the final list of registered claims (*tabelul definitiv al creanţelor*). No creditors may be paid unless their claims have been registered with such list.

C.5 Judicial reorganization proceedings

For the purpose of saving the debtor's business, the judicial administrator, the debtor and/or the creditors are entitled to propose reorganization plans which are subject to acceptance by the creditors' assembly and confirmation by the syndic-judge. The plan must address specific methods of recovery and/or the liquidation of certain assets for the purpose of discharging the registered

[219] For details on restructuring agreements and preventive composition proceedings please see Section B (*The general legal framework for insolvency prevention proceedings*) of this Annex 4 (*Romanian Pre-insolvency and Insolvency Regime*).

claims. The plan may establish, *inter alia*: extensions of maturity, amendments of interest rates, penalties or any other contractual clauses, modifications or releases of security interests. The carrying out of the reorganization plan for legal persons may not go beyond 4 years from the confirmation of the plan by the syndic-judge.

C.6 Bankruptcy proceedings

Bankruptcy proceedings will be commenced in the event no reorganization plan was proposed or confirmed, or the reorganization plan was unsuccessful.

Bankruptcy proceedings may involve drawing an additional list of claims related to debts incurred by the bankrupt debtor during reorganization proceedings (if any), performing an inventory and establishing an attachment with respect to existing assets, evaluating and selling the assets and collecting the debtor's receivables. The discharge of registered claims shall be made according to the mandatory order of distribution, as provided below.

C.7 Finalization of insolvency proceedings

The insolvency proceedings shall be closed by the syndic-judge as soon as the debtor's assets have been liquidated (sold) or the creditors' claims have been satisfied or their payment has been rescheduled after the proceedings are closed.

The proceeds obtained from the liquidation of the assets subject to security interests will be distributed to the secured creditor for the satisfaction of its secured claims, only after the following amounts have been deducted from such proceeds:

(a) all taxes, stamp duties and other expenses related to the sale of the assets, including expenses for the conservation and administration of such assets, as well as the expenses advanced by the creditor within the enforcement proceedings, the claims of the utilities providers contracted after the opening of the insolvency proceedings, the remuneration of the judicial administrator/liquidator and of other persons employed for the common benefit of the creditors, which shall be borne *pro rata* to the value of all the debtor's assets;

(b) all claims of secured creditors relating to obligations contracted by the debtor during the insolvency proceedings, including interest and other accessories, as the case may be (such claims benefit from a "*super-priority*").

If the amounts remaining after the satisfaction of claims under points (i) and (ii) above are insufficient to repay the entire value of its secured claims, the secured creditor will have for the difference an unsecured claim against the debtor, ranking *pari passu* with all the other unsecured claims of the creditors of the insolvent debtor.

In this case, the secured creditor's claims against the debtor will be satisfied only after the payment of the following claims:

(i) all taxes, stamp duties and other expenses related to the insolvency proceedings, including expenses for the conservation and administration of the debtor's assets, expenses for the continuation of the debtor's business, as well as expenses for the remuneration of the judicial administrator/liquidator and of other persons employed for the benefit of the insolvency proceedings;

(ii) all claims arising from interim financings granted to the debtor and financings granted for the fulfilment of the reorganization plan;

(iii) all claims arising from financings granted in insolvency prevention proceedings, as well as the insolvency practitioner' fees for such proceedings;

(iv) all claims arising from employment relations;

(v) all claims arising from the continuation of the debtor's business after the opening of the insolvency proceedings, claims of the debtor's contractual counterparties whose contracts were terminated (or deemed terminated) by the judicial administrator, claims of the third-party good faith acquirers of the debtor's assets or of the sub-acquirers who were compelled to return the acquired goods or their counter value to the debtor;

(vi) all State budget claims;

(vii) all claims of third parties in relation to obligations to make subsistence payments or to pay allocations to minors or other periodic payments ensuring the means of subsistence, if the debtor is an individual;

(viii) all amounts set by the syndic-judge for the subsistence of the debtor and of its family, if the debtor is an individual; and

(ix) claims deriving from banking loans, along with interest and fees, claims deriving from the delivery of goods, the performance of services or works, rents and certain claims arising from the financial leasing agreements terminated after the opening of the insolvency proceedings, provided that the leasing company recovered the leased asset, as well as the bonds.

Should the amounts be insufficient to cover all claims having the same priority ranking, creditors of the same class shall be entitled to an *insolvency quota* representing the percentage of each of their claims in the respective category of claims.

D. Special provisions on the insolvency of Credit Institutions

D.1 Principles

The insolvency of a Credit Institution is defined by the Insolvency Act as "*the state of the credit institution consisting in: (i) the obvious incapacity to pay its outstanding liabilities out of available funds; (ii) the decrease of its solvency ratio below 2%; (iii) the withdrawal of its license, following the failure of its financial recovery*".

Except for the provisions on judicial reorganization, the general legal framework on insolvency set forth by the Insolvency Act also applies to the bankruptcy of Credit Institutions (and of their branches located abroad), with certain derogations and additions provided for in a special chapter of the Insolvency Act. In the case of Credit Institutions, the equivalent of the reorganization measures set out in the Insolvency Act are regulated under the BRR Act, which repealed the reorganization-equivalent measures previously set forth under the Banking Act (i.e., ***special supervision, special administration*** and ***stabilization measures***).

D.2 Reorganization equivalent measures – recovery and resolution (BRR Act)

The BRR Act applies to (a) credit institutions and investment firms, which are Romanian legal entities, (b) financial institutions, Romanian legal entities, which are subsidiaries of a credit institution or investment firm, or of a company of the types referred to in point (c) or (d), which is a Romanian or an EU legal person and are covered by the supervision of the Romanian or EU parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013, (c) financial holding companies, mixed financial holding companies and mixed-activity holding companies, that are Romanian legal entities; (d) parent financial holding companies in Romania, Union parent financial holding companies, parent mixed financial holding companies in Romania, Union parent mixed financial holding companies, that are Romanian legal entities; (e) Romanian branches of credit institutions and investment firms that are established in third countries.

In line with the BRRD, the BRR Act sets forth the following tools to be used in order to manage a financial crisis:

A) **preparation** - entailing the drafting of recovery plans and resolution plans;

B) **early intervention** - entailing the supervisory authority's rights to intervene and require *inter alia* the implementation by the institution's management body of one or more of the measures set out in the recovery plan or the appointment of one or more temporary administrators to the institution; and

C) **resolution** - entailing the resolution authority's right to apply the following resolution tools in the scenario where a distressed institution continues to fail:

(i) *the sale of business tool* – such sale is to be performed without the consent of the shareholders and without complying with the regular procedure;

(ii) *the bridge institution tool* – the business is entirely or partly transferred to an institution which is wholly or partially owned by one or more public authorities and which maintains critical functions with a view to further selling the business;

(iii) *the asset separation tool* – the transfer of assets and liabilities to an asset management vehicle wholly or partially owned by one or more public authorities with a view to maximizing their value through eventual sale or orderly wind down; and

(iv) *the bail-in tool* – which entails (i) recapitalising the institution, if its financial stability may be re-established, or (ii) converting into equity or reducing the principal amount of claims or debt instruments that are transferred (x) to a bridge institution with a view to providing capital for that bridge institution or (y) under the sale of business tool or asset separation tool.

Within resolution, the NBR/FSA may appoint a special manager to replace the management body of the institution under resolution.

As regards pre-resolution powers, we note that the BRR Revision Act introduced new powers for the NBR / the FSA **to suspend certain obligations** prior to the initiation of resolution proceedings (Articles 186^1-186^{10} of the BRR Act, which transpose into Romanian law the provisions of Article 33a of the BRRD):

- The NBR / the FSA may suspend any payment or delivery obligation under any contract entered into by Romanian counterparties which qualify as Credit Institutions and Investment Firms within the scope of the BRR Act, where all of the following conditions are met:

  (a) a determination that the credit institution or entity is failing or likely to fail has been made under point (a) of Article 180 of the BRR Act[220];

  (b) there is no immediately available private sector measure referred to in point (b) of Article 180 of the BRR Act that would prevent the failure of the credit institution or entity;

  (c) the exercise of the power to suspend is deemed necessary to avoid the further deterioration of the financial conditions of the credit institution or entity; and

  (d) the exercise of the power to suspend is either:

    (i) necessary to reach the determination provided for in point (c) of Article 180 of the BRR Act; or

    (ii) necessary to choose the appropriate resolution actions or to ensure the effective application of one or more resolution tools;

- The period of the suspension shall be as short as possible and shall not exceed the minimum period of time that the NBR / the FSA considers necessary for the purposes indicated in points (c) and (d) above and in any event shall not last longer than the period from the publication of a notice of suspension to midnight, official Romanian time, at the end of the business day following the day of the publication;

- When payment or delivery obligations under a contract are suspended, the payment or delivery obligations of any counterparties to that contract shall be suspended for the same period of time. A payment or delivery obligation that would have been due during the period of the suspension shall be due immediately upon expiry of that period;

- The suspension power referred to above shall not apply to payment or delivery obligations to the following: (a) systems and operators of systems designated in accordance with Article 13 of Law no. 253/2004 (transposing Directive 98/26/EC), (b) central counterparties (CPC) authorised in the Union pursuant to Article 14 of Regulation (EU) No 648/2012 and third-country CCPs recognised by ESMA pursuant to Article 25 of that Regulation, (c) central banks;

- When the NBR / the FSA decides to apply this suspension, it may also apply, during the suspension period, the powers set forth in Articles 410-412 (i.e., the power to restrict the enforcement of security interests, as further described below) and Articles 413-419 (i.e., the power to temporarily suspend termination rights, as described below) of the BRR Act;

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[220] Article 180 of the BRR Act refers to the conditions for resolution and transposes into Romanian law the provisions of Article 32 (*Conditions for resolution*) of the BRRD.

- In the event that, after making a determination that a credit institution or entity is failing or likely to fail pursuant to point (a) of Article 180 of the BRR Act, the NBR / the FSA has exercised the power to suspend payment or delivery obligations in the circumstances set out above, and if resolution action is subsequently taken with respect to that credit institution or entity, the NBR / the FSA shall not exercise its powers to (i) suspend certain obligations under Article 406 para. (1) of the BRR Act, (ii) restrict the enforcement of security interests under Article 410 para. (1) of the BRR Act or (iii) temporarily suspend termination rights under Article 413 of the BRR Act, with respect to that credit institution or entity.

Furthermore, the BRR Act fully transposes the BRRD provisions with respect to the *resolution powers* vested in the resolution authority in order to apply the resolution tools to distressed institutions.

Thus, with respect to Romanian Credit Institutions and Investment Firms, the NBR / the FSA as resolution authorities are vested *inter alia* with:

✓ *general powers* to:

- transfer to another entity, with the consent of that entity, rights, assets or liabilities of an institution under resolution;

- reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of bail-inable liabilities, of an institution under resolution;

- convert bail-inable liabilities of an institution under resolution into ordinary shares or other instruments of ownership of that institution, a relevant parent institution or a bridge institution to which assets, rights or liabilities of the institution are transferred;

- amend or alter the maturity of debt instruments and other bail-inable liabilities issued by an institution under resolution or amend the amount of interest payable under such instruments and other bail-inable liabilities, or the date on which the interest becomes payable, including by suspending payment for a temporary period, except for secured liabilities excluded from bail-in;

- close-out and terminate financial contracts and derivatives contracts for the purposes of applying the bail-in tool;

✓ *ancillary powers* to:

- cancel or modify the clauses of a contract to which the institution under resolution is a party (“contractual modification power”) or substitute the resolved institution with a recipient/transferee as contractual party;

- provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred, without prejudice to the safeguard protecting security arrangements; for that purpose, any right of compensation in accordance with the BRR Act shall not be considered to be a liability or an encumbrance;

✓ *other powers*, including to:

- exclude certain contractual terms in early intervention and resolution - the prohibition of contracts' termination by reason only of a crisis prevention measure taken in early intervention or a crisis management measure taken during resolution, provided that substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed;

- suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension in accordance with the BRR Act until midnight, official Romanian time, at the end of the business day following that publication;

- restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution under resolution from the publication of a notice of the restriction in accordance with the BRR Act until midnight, official Romanian time, at the end of the business day following that publication;

- temporarily suspend the termination rights of any party to a contract with an institution under resolution from the publication of the notice pursuant to the BRR Act until midnight, official Romanian time, at the end of the business day following that publication, provided that the payment and delivery obligations and the provision of collateral continue to be performed. A contractual party may exercise a termination right under a contract before the end of the period of suspension referred to above, if that party receives a notice from NBR/FSA, as resolution authority, that the rights and liabilities covered by the contract shall not be: (a) transferred to another entity; or (b) subject to write down or conversion on the application of the bail-in tool in accordance with point (a) of Article 282 of the BRR Act. Such termination rights may however be exercised at the expiry of the period of suspension, subject to the provisions relating to the prohibition of contracts' termination by reason only of a measure taken in early intervention or resolution, as follows:

  (a) if the rights and liabilities covered by the contract have been transferred to another entity, a counterparty may exercise termination rights in accordance with the terms of that contract only on the occurrence of any continuing or subsequent enforcement event by the recipient entity triggering termination in accordance with the contract;

  (b) if the rights and liabilities covered by the contract remain with the institution under resolution and the NBR/FSA has not applied to this institution the bail-in tool, a counterparty may exercise termination rights in accordance with the terms of that contract on the expiry of the period of suspension mentioned above.

- if necessary for the effective application of the resolution tools and powers and without prejudice to any restriction on the enforcement of security interests imposed pursuant to Articles 410-412 of the BRR Act, request the court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which an institution under resolution is or becomes a party.

Furthermore, in line with the BRRD, the BRR Act provides that, where one or more resolution tools have been applied by the resolution authority, ***appropriate safeguards*** should also be implemented in relation to such tools, it being specified that, both in the case of partial transfers and in the case of the bail-in tool, the shareholders and those creditors whose claims have not been transferred / the shareholders and creditors whose claims have been written down or converted to equity, respectively, *shall not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings*.

In particular, the BRR Act states that, subject to BRR Provisions (*i.e*. provisions relating to (i) *the exclusion of certain contractual terms in early intervention and resolution* and (ii) *the powers of the resolution authority to temporarily suspend termination rights*), ***title transfer financial collateral arrangements, set-off and netting agreements*** **benefit from appropriate protection** in order to prevent the transfer of some, but not all, of the rights and liabilities under a title transfer financial collateral arrangement, a set-off agreement or a netting agreement between the institution in resolution and another person and the modification or termination of such protected rights and liabilities by exercise of an ancillary power by the NBR/FSA. For such purposes***, the rights and liabilities are deemed protected under such arrangements if the parties have the right to set-off or net such rights and liabilities***.

D.3 Bankruptcy of Credit Institutions (Title II, Chapter III of the Insolvency Act)

If the NBR considers that the financial situation of the Credit Institution is beyond improvement or that the financial recovery measures have failed, it may withdraw its license and file the necessary actions for the commencement of bankruptcy proceedings.

Aside the NBR, the Credit Institution itself or any creditor holding an undisputed, due claim and the amount of which is determined, may file a petition for bankruptcy. The commencement of bankruptcy proceedings upon the request of the Credit Institution or its creditors may occur only with the consent of the NBR. If the Credit Institution is an institution subject to resolution proceedings or with respect to which it was determined that the conditions for initiating resolution proceedings are met, the bankruptcy proceedings may be initiated only on the basis of a request submitted by the NBR, in its capacity as resolution authority.

As a particularity of the bankruptcy proceedings applying to Credit Institutions, a part or all of the assets and liabilities of the bankrupt Credit Institution may be undertaken by an eligible Credit Institution acting as buyer. If bankruptcy proceedings are opened against a Credit Institution, the transfers of assets, rights or liabilities from the insolvent Credit Institution are not affected by the legal provisions regarding the annulment or unenforceability of certain acts affecting the rights of creditors. Furthermore, any proceedings should have regard to maintaining the continuous provision of services by the insolvent entity and to NBR's/FSA's requests regarding measures imposed by them as resolution authorities.

The mandatory distribution order for secured claims, as set forth under the general legal framework of the Insolvency Act, also applies in the case of bankrupt Credit Institutions. As regards the mandatory distribution order for the unsecured claims/part of the claims against the Credit Institution, the creditors' claims will be satisfied only after the payment of the following claims:[221]

(i) all taxes, stamp duties and other expenses related to the bankruptcy proceedings, including expenses for the conservation and administration of the Credit Institution's assets, as well as expenses for the remuneration of the judicial liquidator and of other persons employed according to the law;

(ii) all claims resulting from guaranteed deposits, including claims of the Bank Deposits Guarantee Fund or resulting from the financing of the resolution measures applied to the bankrupt Credit Institution and claims arising from employment relations in the last six months prior to the opening of the bankruptcy proceedings;

(iii) all claims representing that part of the eligible deposits of individuals, SMEs and SEs exceeding the covered threshold, in accordance with the law, which would have qualified as eligible deposits if they were not entered into through third country branches of EU institutions;

(iv) all claims arising from the activity of the Credit Institution after the opening of the bankruptcy proceedings;

(v) all State budget claims, claims of the Bank Deposits Guarantee Fund, other than the claims indicated under point (ii) above, and claims deriving from loans granted to the bankrupt Credit Institution by the NBR;

(vi) claims arising from treasury, interbank, client, title and other banking operations and claims arising from rents or the provision of services and works and other unsecured claims;

(vii) claims arising from gratuitous acts;

(viii) unsecured claims arising from debt instruments[222] which (i) have an original contractual maturity of at least one year, (ii) are not derivatives themselves within the meaning of the Markets in Financial Instruments Act and do not contain embedded derivatives[223], and (iii) the relevant contractual documentation and, where applicable, the prospectus explicitly refer to their lower ranking compared to unsecured claims provided under points (i)-(vii) above;

(ix) claims arising from debt instruments and loans, based on conventions which contain a subordination clause according to which, in case of liquidation or bankruptcy of the credit institution, such claims are to be paid after the claims of all non-subordinated unsecured creditors and, as the case may be, of other subordinated unsecured creditors; within this

[221] In line with the provisions of the BRRD, all claims resulting from own funds items have a lower priority ranking than any claim that does not result from an own funds item. The Insolvency Act states that, to the extent that an instrument is only partly recognised as an own funds item, the whole instrument shall be treated as a claim resulting from an own funds item and shall rank lower than any claim that does not result from an own funds item.

[222] Debt instruments are defined under the Insolvency Act as bonds and other forms of transferrable debt and instruments creating or acknowledging debt and which cumulatively meet the conditions referred to in this point (viii).

[223] Debt instruments with variable interest derived from a broadly used reference rate and debt instruments not denominated in the domestic currency of the issuer, provided that principal, repayment and interest are denominated in the same currency, shall not be considered to be debt instruments containing embedded derivatives solely because of those features.

category of claims, the payment shall be made in compliance with the order of preference established by the subordination clause related to each claim; and

(x) claims of the shareholders of the Credit Institution.

Should the amounts be insufficient to cover all claims having the same priority ranking, the relevant creditors shall be entitled to an *insolvency quota* representing the percentage of each of their claims in the respective category of claims.

D.4 EU cross-border insolvency of Credit Institutions

The Insolvency Act contains special provisions regarding the EU cross-border insolvency proceedings, which are applicable in case Romania is the home or the host Member State of the insolvent Credit Institution. The principle of the cross-border insolvency set forth in the Insolvency Act provides that the administrative authorities and the courts in the home Member State would be the only ones entitled to rule in the case of insolvency proceedings (reorganization and bankruptcy) against a Credit Institution established under the jurisdiction of that Member State, including the branches of the Credit Institution which are located in other Member States.

The proceedings are also subject to the law of the home Member State, except for certain aspects, including the *netting agreements* and *repurchase agreements*, to which, without prejudice to BRR Provisions and, as regards repurchase agreement, the provisions of the law of the Member State where the registry, account or centralised depositing system for securities' registration or transfer is kept or located, the law governing such contracts should apply.

The liquidator in the home Member State would be entitled to exercise its powers according to the law of the home Member State on the territory of the host Member States where the branches of the bankrupt Credit Institutions are located. The liquidator would have to observe, however, the law of the host Member State, particularly in respect of the procedure for liquidating the assets.

The claims of creditors having the domicile/residence or the registered office outside the territory of Romania shall be treated the same way and shall benefit from the same priority as the claims of the same class of creditors having the domicile/residence or the registered office on the territory of Romania.

Furthermore, the bankruptcy proceedings opened against a Romanian branch of a Credit Institution established in a third country, are subject to the Romanian law, as set forth in the Title III (*Cross-border insolvency*) of the Insolvency Act. If the Credit Institution has branches established at least in one other Member State, the Romanian court, shall inform, through NBR, the competent authorities of the respective host Member States about the opening of bankruptcy proceedings against the Romanian branch and the practical effects thereof.

D.5 Cross-border resolution of Credit Institutions

BRR Act includes special provisions regarding EU cross-border resolution proceedings, which are applicable in case Romania is the home or the host Member State of the Credit Institution, as well as provisions regarding resolution proceedings for third-country branches of Romanian Credit Institutions and Romanian branches of third-country credit institutions.

Regarding the Credit Institutions established under Romanian jurisdiction and their branches located in host Member States, BRR Act states that NBR is the only authority competent to apply the resolution tools and exercise the resolution powers. NBR's decision is applicable and effective in the EU as of the date it becomes applicable and is effective in Romania. The applicability of the resolution tools and the resolution powers are subject to Romanian law. As an exception, certain rights and contracts are subject to specific laws, as provided in the Banking Act (including the applicability of *lex contractus* for netting agreements and repurchase agreements, without prejudice to BRR Provisions and, as regards repurchase agreements, subject also to the provisions of the law of the Member State where the registry, account or centralised depositing system for securities' registration or transfer is kept or located).

The application of resolution tools and the exercise of resolution powers with respect to the credit institutions located in other Member States and their branches located in Romania are subject to the law of the home Member State. If NBR considers necessary to carry on resolution measures in Romania, it informs the competent authority of the home Member State.

Resolution proceedings opened against third country branches of Romanian Credit Institutions are governed by Romanian law, subject to bilateral treaties entered into between Romania and the respective third country, until the entry into force of an agreement concluded between the EU and the respective third country.

The application of resolution tools and the exercise of resolution powers with respect to Romanian branches of third-country credit institutions are subject to bilateral treaties entered into between Romania and the respective third country, until the date of entering into force of an agreement concluded between EU and the respective third country. Until this date, NBR may participate in a European resolution college in order to decide upon the recognition of the third country resolution proceedings relating to a third-country institution or a parent undertaking that: a) has Union subsidiaries established in, or Union branches located in and regarded as significant by, two or more Member States; or b) has assets, rights or liabilities located in two or more Member States or are governed by the law of those Member States.

In the absence of a joint decision between the resolution authorities participating in the European resolution college, or in the absence of a European resolution college, the NBR may decide on its own upon the recognition of the third country resolution proceedings, it being specified that the NBR, as resolution authority, may *inter alia* exercise resolution powers including to (i) *temporarily suspend the termination rights of any party to a contract with an institution under resolution for 2 business days, provided that the payment and delivery obligations and the provision of collateral continue to be performed, where such powers are necessary in order to enforce third-country resolution proceedings* and (ii) *render unenforceable any right to terminate, liquidate or accelerate contracts, or affect the contractual rights, of entities referred to above and other group entities, where such a right arises from resolution action taken in respect of the third-country institution, parent undertaking of such entities or other group entities, whether by the third-country resolution authority itself or otherwise pursuant to legal or regulatory requirements as to resolution arrangements in that country, provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed*.

If the recognition of third-country resolution proceedings is refused or the third-country credit institution is not subject to resolution proceedings in the third country, but the branch located in Romania meets the conditions for taking resolution actions in accordance with the BRR Act, the NBR may, where necessary in the public interest, exercise its competences to take independent resolution measures against the respective Romanian branch. The provisions of Articles 400-405 of the BRR Act regarding *the prohibition of contracts' termination by reason only of a crisis prevention measure taken in early intervention or a crisis management measure taken during* *resolution, provided that substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed* correspondingly apply.

E. Special provisions on the pre-insolvency and insolvency of Investment Firms

E.1 Principles

In case of Investment Firms (other than Investment Firms within the scope of the BRR Act), market operators, investment management companies, AIFMs and AIFs, the *special administration measures*, as regulated under the Markets in Financial Instruments Act may be taken by the FSA[224].

Furthermore, according to Article 200 of the Markets in Financial Instruments Act, the insolvency regime applicable to Investment Firms, market operators, investment management companies, AIFMs and self-managed AIFs, is the general insolvency regime set forth in the Insolvency Act (as described in Section C (*The general legal framework for insolvency proceedings*) above and, as regards the mandatory priority ranking of claims following bankruptcy of Investment Firms within the scope of the BRR Act, in Section E.3 (*Insolvency of Investment Firms*) below), with the exception of reorganization provisions which do not apply to Investment Firms within the scope of the BRR Act[225] (to which the recovery and resolution proceedings under the BRR Act apply (please refer to D.2 (*Reorganization equivalent measures – recovery and resolution (BRR Act)*) above)).

The insolvency of the above-mentioned entities is defined by the Markets in Financial Instruments Act as "*the state of the above entity consisting in: (i) the insolvency status within the meaning of the Insolvency Act*[226]*; (ii) the failure of the financial recovery of the entity subject to special administration*".

E.2 Special administration measures

FSA may decide to take special administration measures against Investment Firms (other than Investment Firms within the scope of the BRR Act), market operators, investment management companies, AIFMs and self-managed AIFs, if such entities are likely to become insolvent within the meaning of the Insolvency Act or if any of their directors, managers or auditors (i) have breached the provisions of the Market in Financial Instruments Act and the regulations issued by the FSA, which leads or may lead to important damages or jeopardizes the proper functioning of the capital market, or (ii) have breached the conditions or restrictions set forth in the business license.

FSA will designate a special administrator who may take measures for the purpose of preserving the assets and collecting the receivables of the entity under special administration in the interest of investors and other creditors.

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[224] See Article 192 of the Markets in Financial Instruments Act.

[225] According to the BRR Act, '*investment firm*' means an investment firm as defined in point (22) of Article 4(1) of the IFR, that is subject to certain initial capital requirements (which may range between the RON equivalent of EUR 75,000 and 750,000, depending on the type of investment services provided or activities performed) in accordance with Article 12 of Law no. 236/2022 (transposing Article 9 of the IFD into Romanian law).

[226] According to the Insolvency Act insolvency is the "*status of the debtor's patrimony characterized by the insufficiency of available funds to cover outstanding liabilities and which is presumed when, after 60 days as of the due date, the debtor has not paid its debt towards the creditor; this presumption is relative*".

If the entity under special administration fails to recover or to meet the prudential requirements, FSA may withdraw its business license and may decide the opening of the administrative liquidation procedure or may file for the opening of the insolvency proceedings in court.

E.3 Insolvency of Investment Firms

As per our considerations in Section E.1 (*Principles*) above, in relation to the insolvency of Investment Firms, market operators, investment management companies, AIFMs and self-managed AIFs, please refer to the general insolvency regime set forth in the Insolvency Act, as described in Section C (*The general legal framework for insolvency proceedings*) above (except for Investment Firms within the scope of the BRR Act, to which (i) the recovery and resolution proceedings under the BRR Act apply (please refer to D.2 (*Reorganization equivalent measures – recovery and resolution (BRR Act)*) above) instead of the reorganization provisions set forth under the Insolvency Act and (ii) a special mandatory priority ranking of claims set forth herein below applies within bankruptcy proceedings).

With respect to the bankruptcy of Investment Firms within the scope of the BRR Act[227], the Insolvency Act sets out the following mandatory priority ranking for claims:

(i) all taxes, stamp duties and other expenses related to the insolvency proceedings, including expenses for the conservation and administration of the debtor's assets, expenses for the continuation of the debtor's business, as well as expenses for the remuneration of the judicial administrator/liquidator and of other persons employed for the benefit of the insolvency proceedings;

(ii) all claims arising from financings granted to the debtor within the observation period of the insolvency proceedings, in order to carry on its ordinary business;

(iii) all claims arising from employment relations;

(iv) all claims arising from the continuation of the debtor's business after the opening of the insolvency proceedings, the claims of the debtor's contractual counterparties whose contracts were unilaterally terminated by the judicial administrator, the claims of the third-party good faith acquirers of the debtor's assets or of the sub-acquirers who were compelled to return the acquired goods or their counter value to the debtor;

(v) all State budget claims;

(vi) claims deriving from banking loans, along with interest and fees, claims deriving from the delivery of goods, the performance of services or works, rents and certain claims arising from the financial leasing agreements terminated after the opening of the insolvency proceedings, provided that the leasing company recovered the leased asset, as well as the bonds;

[227] More specifically, with respect to entities within the scope of the BRR Act (please see D.2 (*Reorganisation equivalent measures – recovery and resolution (BRR Act)*) above), with the exception of (i) credit institutions and (ii) Romanian branches of credit institutions and investment firms that are established in third countries. In line with the provisions of the BRRD, all claims resulting from own funds items have a lower priority ranking than any claim that does not result from an own funds item. The Insolvency Act states that, to the extent that an instrument is only partly recognised as an own funds item, the whole instrument shall be treated as a claim resulting from an own funds item and shall rank lower than any claim that does not result from an own funds item.

(vii) other unsecured claims which do not fall under points (viii)-(xii) below;

(viii) unsecured claims arising from debt instruments[228] which (i) have an original contractual maturity of at least one year, (ii) are not derivatives themselves within the meaning of the Markets in Financial Instruments Act and do not contain embedded derivatives[229], and (iii) the relevant contractual documentation and, where applicable, the prospectus explicitly refer to their lower ranking compared to unsecured claims provided under points (i)-(vii) above;

(ix) certain claims of third parties which acted in bad faith when acquiring assets from the debtor;

(x) claims arising from gratuitous acts;

(xi) claims arising from debt instruments and loans, based on conventions which contain a subordination clause according to which, in case of liquidation or bankruptcy of the debtor, such claims are to be paid after the claims of all non-subordinated unsecured creditors and, as the case may be, of other subordinated unsecured creditors; within this category of claims, the payment shall be made in compliance with the order of preference established by the subordination clause related to each claim; and

(xii) claims of the shareholders of the debtor, deriving from the residual right associated with their capacity, according to the legal and statutory provisions.

F. Special provisions on the insolvency of Insurance/Reinsurance Companies

F.1 Principles

The insolvency of an Insurance/Reinsurance Company is defined by the Insolvency Act as "*the state of an insurance/reinsurance company characterized by any of the following circumstances: (i) the obvious incapacity to pay its outstanding liabilities out of available funds; (ii) the removal of its business license further to the failure to comply with the solvency capital requirement (for Solvency II companies according to part I "Solvency II Supervision" of the Insurance Act) or as a result of the value of the available solvency ratio falling below half of the minimum limit applicable to the safety fund (for companies supervised according to part II "National Supervision Regime" of the Insurance Act) during financial recovery proceedings; or (iii) the removal of the business license for the insurer resulting further to resolution proceedings, according to article 71 of the IRR Act*".

Except for the provisions on judicial reorganization, the general legal framework on insolvency set forth by the Insolvency Act also applies to the bankruptcy of Romanian Insurance/Reinsurance Companies (and of their branches located abroad, as well as of the Romanian branches and subsidiaries of insurance companies from third countries), with certain derogations provided for in a special chapter of the Insolvency Act. In the case of Insurance/Reinsurance Companies, the

[228] Debt instruments are defined under the Insolvency Act as bonds and other forms of transferrable debt and instruments creating or acknowledging debt and which cumulatively meet the conditions referred to in this point (viii).
[229] Debt instruments with variable interest derived from a broadly used reference rate and debt instruments not denominated in the domestic currency of the issuer, provided that principal, repayment and interest are denominated in the same currency, shall not be considered to be debt instruments containing embedded derivatives solely because of those features.

equivalent of the reorganization measures set out in the Insolvency Act are regulated under Law no. 503/2004 on the financial turnaround, bankruptcy, voluntary dissolution and liquidation relating to insurance activity, as *financial turnaround proceedings*. Furthermore, a framework for the recovery and resolution of Insurance Companies is regulated under the IRR Act[230].

F.2 Financial turnaround

FSA is the only institution competent to apply measures for the financial turnaround of an Insurance/Reinsurance Company.

If the FSA finds that (i) an Insurance/Reinsurance Company breaches its obligation to communicate to the FSA, within 48 hours, the information requested by the FSA according to the law, or breaches any other legal provisions related to the insurance activity and thus jeopardizes the performance of its obligations towards the creditors of insurances, or (ii) the value of the available solvency ratio falls below the mandatory minimum solvency ratio, the FSA may decide the opening of financial turnaround proceedings in respect of the Insurance/Reinsurance Company in any of the following forms: (i) financial turnaround based on a financial turnaround plan or (ii) financial turnaround by special administration. The Insurance/Reinsurance Company may also undergo financial turnaround proceedings should the value of the available solvency ratio fall below the mandatory minimum limit applicable to the safety fund.

In either case, the FSA may *inter alia*: (i) prevent the performance of certain investments by the Insurance/Reinsurance Company, (ii) take measures in respect of any assets of the Insurance/Reinsurance Company by way of identifying and preserving them throughout the whole period of the financial turnaround proceedings and by way of restricting or prohibiting the free disposal of such assets, (iii) take any other prudential measures necessary for the financial recovery of the Insurance/Reinsurance Company with a view to guaranteeing the protection of the rights and legitimate interests of the creditors of insurances, (iv) request the competent court to take provisional measures with respect to the assets of the Insurance/Reinsurance Company.

F.3 Recovery and Resolution (IRR Act)

The IRR Act (which implements principles similar to the BRRD and the BRR Act) sets forth the following tools to be used in order to manage a financial crisis:

A) **preparation -** entailing the drafting of recovery plans and resolution plans;

B) **early intervention -** entailing the supervisory authority's rights to intervene and require inter alia the implementation by the institution's management body of one or more of the measures set out in the recovery plan or the appointment of one or more temporary administrators to the institution; and

C) **resolution -** entailing the resolution authority's right to apply the following resolution tools in the scenario where a distressed institution continues to fail:

(i) the sale of business and portfolio,
(ii) the bridge institution tool,
(iii) the asset separation tool, and
(iv) the power to reduce the value of outstanding amounts due by the institution.

[230] Note that reinsurers are not covered by the IRR Act.

The IRR Act provides that, where one or more resolution tools have been applied by the FSA, especially in case of partial transfers, the shareholders and those creditors whose claims have not been transferred, *shall not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings*.

Furthermore, the FSA, as resolution authority, may (a) *in the preparation stage (resolution planning)*, in order to eliminate obstacles to a viable resolution, take alternative measures requiring the insurer *inter alia* to limit or terminate certain ongoing or proposed activities or change the legal structures relating to contractual or operational arrangements of the insurer so as to reduce complexity and ensure the separation, from a legal and operational standpoint, of critical functions from other functions of the insurer, when applying resolution tools and (b) *in the resolution stage*, apply resolution tools and take resolution measures which should be subject to *safeguards* against FSA's powers to (i) exercise a partial property transfer, and (ii) request the competent court to annul or amend the provisions of an agreement to which an insurer is a party or replace the counterparty-insurer as signatory party.

According to FSA Norm no. 8/2016 enacted to provide for the types of contracts covered by the safeguards and the terms on which such safeguards are to be applied, the protection against partial property transfers applies *inter alia* to financial contracts (defined by the IRR Act in line with the relevant definition set forth in the BRRD and BRR Act)[231] and financial collateral arrangements as defined under the Collateral Ordinance. Nonetheless, FSA Norm no. 8/2016 simply states that the protection regarding financial contracts and financial collateral arrangements (i) refers to the fact that the assets of the resolved insurer which are affected or encumbered may not be made subject to the *sale of business and portfolio tool* set forth in the IRR Act, and (ii) may only apply until the date of the opening of bankruptcy proceedings and leaves unaddressed the matters set out below.

A number of issues should be noted with respect to the above mentioned safeguards, as follows: (i) the safeguards do not refer to the parties' right to set-off or net the rights and liabilities arising from financial contracts and financial collateral arrangements in the context of each relevant resolution tool and power, (ii) the safeguards refer only to one of the resolution tools that may be applied by the FSA, namely the sale of business and portfolio tool, leaving uncovered the scenarios where the assets of the resolved insurer would be subject to other resolution tools, and (iii) under FSA Norm no. 8/2016, no protection is provided against FSA's powers to request the competent court to annul or amend the provisions of an agreement to which the insurer is a party or replace the counterparty-insurer as signatory party, although the IRR Act states that this power should be subject to appropriate protection.

[231] According to IRR Act, financial contracts include (a) securities contracts, including: (i) contracts for the purchase, sale or loan of a security, a group or index of securities; (ii) options on a security or group or index of securities; (iii) repurchase or reverse repurchase transactions on any such security, group or index; (b) commodities contracts, including: (i) contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery; (ii) options on a commodity or group or index of commodities; (iii) repurchase or reverse repurchase transactions on any such commodity, group or index; (c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date; (d) swap agreements, including: (i) swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation; (ii) total return, credit spread or credit swaps; (iii) any agreements or transactions that are similar to an agreement referred to in point (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets; (e) master agreements for any of the contracts or agreements referred to in points (a) to (e).

According to FSA Norm no. 11/2016, the FSA, as resolution authority, has the power to reduce the value of, or convert the outstanding amounts due by a resolved insurer under a derivative financial instrument only on the due date or after the termination by the FSA of the derivative financial contract entered into by the resolved insurer.

The FSA may, as of the date of entering into resolution proceedings, accelerate any derivative financial contract entered into by a resolved insurer. Nonetheless, before exercising the power to reduce the value of, or convert the liabilities of the insurer, the FSA notifies the decision to accelerate the derivative financial contracts to the relevant counterparties under the derivative financial contracts of the resolved insurer. Such FSA decision may be implemented immediately after sending the above-mentioned notification or at a subsequent date and shall include the specific timing when the counterparties under the derivative financial contracts are supposed to provide proof as regards the commercial transactions with which the accelerated derivative financial contracts are reasonably replaced. Furthermore, each relevant counterparty must provide the FSA with a summary of all replacement transactions, such information received from the relevant counterparties being further provided by the FSA to the financial auditor for valuation purposes.

With respect to financial derivatives subject to a netting agreement, the financial auditor shall determine, as part of the required valuation, the resolved insurer's liability or claim arising from the terminated transactions on a net basis.

Note that the IRR Act does not provide for any bail-in exemptions.

F.4 Bankruptcy of Insurance/Reinsurance Companies (Title II, Chapter IV of the Insolvency Act)

If the FSA considers that the financial turnaround measures have failed and the financial situation of the Insurance/Reinsurance Company is beyond improvement, the FSA may decide to close the financial turnaround/resolution proceedings, withdraw the license of the Insurance/Reinsurance Company and file the necessary actions with the competent court for the commencement of bankruptcy proceedings.

Aside the FSA, the Insurance/Reinsurance Company itself or any creditors of the Insurance/Reinsurance Company, other than creditors of insurances which are paid out from the Guarantee Fund for Insurances, may file a petition for bankruptcy in court, provided that they had also filed the petition with the FSA. The opening of the bankruptcy proceedings depends on whether the Insurance/Reinsurance Company is in one of the circumstances described under the definition of an insurance/reinsurance company's insolvency, as set forth under the Insolvency Act.

The Guarantee Fund for Insurances may file, throughout the entire term of the bankruptcy proceedings, claims for the recovery of any amounts paid to the creditors of insurances.

As regards the mandatory distribution order for unsecured claims/part of the claims, the claims of the creditors of insurances (regardless of when such claims have arisen) and of the Guarantee Fund for Insurances have an absolute priority against any other claims, in respect of the assets admitted to represent the technical reserves of the bankrupt Insurance/Reinsurance Company, such claims being payable immediately after the payment of all costs and taxes related to the bankruptcy proceedings as well as the claims of secured creditors relating to obligations contracted by the debtor during the insolvency proceedings, including interest and other accessories, as the case may be. By exception, the amounts resulting from the liquidation of the assets admitted to represent the technical reserves of the bankrupt Insurance/Reinsurance Company shall be fully distributed to cover the claims of the Guarantee Fund for Insurances as a result of payments made to the creditors of insurances.