C L I F F O R D

C H A N C E

Clifford Chance Opinion Letter issued in connection with the European Federation of Energy Traders' general agreements concerning the delivery and acceptance of electricity/natural gas

CLIFFORD CHANCE S.L.P. IS A LIMITED LIABILITY COMPANY WITH REGISTERED OFFICE IN MADRID, PASEO DE LA CASTELLANA 110, P.C. 28046, C.I.F. B-80603319 THAT IS REGISTERED AT THE MERCANTILE REGISTRY OF MADRID IN TOME 19.751, BOOK 0, FOLIO 99, SECTION 8, PAGE M-347629

EXECUTIVE SUMMARY[1]

SPAIN

Date: 16 May 2023	**Version: 1**
Prepared by: Clifford Chance, S.L.P.	
Coverage: EFET Gas, EFET Electricity	
Date of opinions: EFET Gas: **16 May 2023**, EFET Electricity: **16 May 2023**	

Summary

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[1] Please note that this Executive Summary does not form part of our Opinion Letter and is given for convenient purposes only.

	proceedings.	
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.	N/A

16 May 2023

To: The European Federation of Energy Traders

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/Natural Gas and its Collateral Arrangements

A. LIMITATIONS OF OPINIONS/SCOPE OF REVIEW

1. TERMS OF REFERENCE

We have been asked, as legal advisers to the European Federation of Energy Traders ("**EFET**"), to give an opinion letter in respect of the laws of the Kingdom of Spain ("**this jurisdiction**") in relation to the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity/ Natural Gas (the "**EFET General Agreement**"), the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement (the "**EFET Credit Support Annex**") and other related issues as outlined below.

2. DEFINED TERMS AND INTERPRETATION

In this opinion letter (the "**Opinion Letter**"), unless otherwise specified, terms defined in the EFET General Agreement have the same meaning in this Opinion Letter and for the purposes of this Opinion Letter:

(a) "**Agreement**" means an agreement on the terms of any of the EFET General Agreement (including its respective Annexes and the Allowances Appendix);

(b) "**BWUD**" has the meaning specified in paragraph 1 of Section C.I.1.1;

(c) "**BWUD Institution**" has the meaning specified in paragraph 1 of Section C.I.1.1;

(d) "**BWUD Netting Agreement**" has the meaning specified in paragraph 1 of Section C.I.1.1;

(e) "**Close-Out Netting Provisions**" means the provisions dealing with discretionary termination rights, close-out netting and the calculation and payment of a Termination Amount under §§ 10.3 and 11 of the EFET General Agreement;

(f) "**COMI**" means, in respect to any Party, the "*centre of main interests*" of such Party, as determined in accordance with Article 3(1) of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast) (the "**Recast EU Insolvency Regulation**") and Article 45 of the Insolvency Law (as defined below) of such entity;

(g) "**Foreign Law Agreement**" means an Agreement which, together with the Individual Contracts made under it, is governed by a law other than Spanish law;

(h) "**Foreign Party**" means a Party other than a Spanish Party;

(i) "**Insolvency Law**" has the meaning set out in Section C.I.1;

(j) "**Insolvency Proceedings**" means any of the procedures identified as such in Section C.I.1 herein;

(k) "**Insolvency Representative**" means an *administrador concursal*, *interventor*, *comisario*, *juez* or analogous or equivalent official in this jurisdiction;

(l) "**Insolvent Party**" means a Spanish Party which is or which becomes subject to an Insolvency Proceeding;

(m) a "**Party**" is a party to an Agreement;

(n) "**PRF Proceedings**" has the meaning specified in paragraph (ii) of Section C.I.2 below;

(o) reference to a "**§**" or "**§§**" are to §§ of the EFET General Agreement and reference to a "**Section**" are to a Section of this Opinion Letter (except where the context otherwise requires);

(p) "**RR Proceedings**" has the meaning specified in paragraph (ii) of Section C.I.2 below;

(q) "**Solvent Party**" means, where a Party is an Insolvent Party, the other Party;

(r) "**Spanish Law Agreement**" means an Agreement which, together with the Individual Contracts made under it, is governed by Spanish law;

(s) a "**Spanish Party**" or "**Party A**" means any of the entities listed in Appendix A hereto and which is a Party to an Agreement; and

(t) headings are for ease of reference only and shall not affect its interpretation.

3. DOCUMENTS REVIEWED

For the purposes of issuing this Opinion Letter we have reviewed the following documents:

For Electricity:

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007),
- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000),
- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16

December 2013),

- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015),
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 2018),
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 6.1, published 4 November 2021),
- EFET French Capacity Certificates Appendix, (Version 1.0, published March 2013),
- EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000)**,**
- GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a) published 21 September 2007) (Version 1.0, published 11 September 2009),
- EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013),
- 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); and
- UK ETS Allowances Appendix (Power) (Version 1.0, published July 29, 2021)

For Natural Gas:

- EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a), published 11 May 2007),
- EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 6 January 2003),
- 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),
- 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),
- 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),
- 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),

- 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),
- 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),
- EFET PVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 27 March 2020),
- EFET Italian Gas Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 24 June 2004),
- Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 20 September 2013),
- EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 26 May 2014),
- EFET TVB Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 - 29 May 2020),
- EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/October 2018),
- EFET Polish VP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 14 December 2013),
- EFET Portuguese VTP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/ June 21, 2021),
- EFET Ukrainian Customs Warehouse Storage Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0/May 2021),
- EFET Ukrainian Border Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published February 2020),
- EFET Recommended Clauses for use with Ukrainian Counterparties, published February 2020,
- EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 4 December 2017),
- EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 2016),
- 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),

- EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 7 September 2015),
- Change Letter EFET Trading Hub Europe amendments to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, published 26 July 2021, and
- UK ETS Allowances Appendix (Gas) (Version 1.0, published December 13, 2021).

For Electricity and Natural Gas:

- 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),
- Amendment Agreement IBOR Transition wording for General Agreement, CPPNA, PPA and Appendices, published November 4, 2021,
- EFET Credit Support Annex to the General Agreement (Version 1.0(a), published September, 2005),
- EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010),
- EFET Credit Support Annex to the General Agreement (Version 3.1, published November 4, 2021,
- Ratification Letter for Amendments to Covered Principal Agreements governed by English law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13th October 2020, and
- Ratification Letter for Amendments to Covered Principal Agreements governed by German law concerning the giving of notices ("E-Notice Agreement") as published by EFET on 13th October 2020.

For the purposes of Section C.V (*Confirmation Practices*) additionally:

- EFET Electronic Confirmation Agreement (published 20 March 2017),

For the purposes of Section C.VI (*Core Provision*s) additionally:

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

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

4. SPANISH LAW AND JURISDICTION

This Opinion Letter relates only to Spanish law as applied by the Spanish courts as at today's date and any reference to any law or regulation is meant to be the version in force as at the date hereof. We express no opinion in this Opinion Letter on the laws of any other jurisdiction, even where, under Spanish law, a foreign law is to be applied.

In this Opinion Letter legal concepts are described in English terms and not by their original Spanish terms. The concepts concerned may not be exactly identical to the concepts described by the same English terms as they exist under the laws of other jurisdictions. This Opinion Letter may, therefore, only be relied upon the express condition that any issues of interpretation or liability arising hereunder will be governed by Spanish law and be brought before a Spanish court.

5. ASSUMPTIONS AND RESERVATIONS

The opinions given in this Opinion Letter are given on the basis of the assumptions set out in Section B below (*Assumptions*) and are subject to the reservations set out in Section D (*Reservations*) to this Opinion Letter. The opinions given in this Opinion Letter are strictly limited to the matters expressly stated in Section C (*Opinions*) and do not extend to any other matters.

6. OPINION COUNTERPARTIES

The opinions in this Opinion Letter are given in respect of all of the types of entities ("**Opinion Counterparties**") listed in Appendix A hereto.

B. ASSUMPTIONS

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

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

2. That each Party has the capacity, power and authority under all applicable law(s) to enter into the EFET General Agreement, the EFET Credit Support Annex and Individual Contracts; to perform its obligations under the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts; and that each Party has taken all necessary steps to execute, deliver and perform the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts.

3. That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts in this jurisdiction.

4. That the EFET General Agreement has been properly executed and the Election Sheet has been properly completed by both Parties, and that no amendments have been made to § 22 of the EFET General Agreement (*Governing Law and Jurisdiction*).

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

6. That the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts thereunder are entered into prior to the formal commencement of any insolvency proceedings or restructuring proceedings against either Party, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

7. That both Parties have all governmental licenses, consents and approvals required by any applicable laws to enter into, and perform its obligations under, the EFET General Agreement and any Individual Contracts and that the EFET General Agreement and any Individual Contracts comply with the electric, gas or other relevant sectors legislation and regulations in all relevant jurisdictions.

8. That the obligations under, or subject of the operation of, the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts are "mutual" between the Parties (in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party).

9. That the COMI of any Spanish Party is (and will always be) located in Spain.

10. That no transfer of Eligible Credit Support is made after the opening of an Insolvency Proceeding.

11. That the Parties have complied with their obligations under Regulation No. 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, in so far as that has an effect on the validity and/or enforceability of the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts thereunder under any applicable laws (including the law of Spain).

12. That any transfer of Eligible Credit Support shall be evidenced in the manner set out in Article 1.5 of the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (the "**FCD**").

13. That all determinations and valuations required for the purposes of the enforcement of the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts thereunder will be made in a commercially reasonable manner.

C. OPINIONS

On the basis of the assumptions and subject to the reservations respectively set out in Section B (*Assumptions*) and Section D (*Reservations*) herein, we are of the opinions set out below.

I. ENFORCEABILITY OF CLOSE-OUT NETTING

For the purposes of this Section C.I, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional factual assumptions:

"*(i) the relevant EFET General Agreement is governed by any law (including English or German law or the laws of Spain); and*

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

I.1 Winding-up, Insolvency or Attachment: Insolvency Proceedings

The general winding-up or insolvency proceeding to which a Party could be subject under the laws of Spain ("**Insolvency Proceedings**") is the so-called *concurso* (bankruptcy proceedings for individuals and legal companies) regulated in the Restated Text of the Insolvency Law (*Texto Refundido de la Ley Concursal*), approved by means of the Royal Legislative Decree 1/2020, of 5 May (the "**Insolvency Law**").

As requested, please see Annex 1 hereto for a short overview of the relevant insolvency proceedings, laws and terminology applicable to Party A.

Moreover, please note that:

(i) certain types of financial institutions (such as, without limitation) Banks, Investment Firms, Insurance Undertakings and Investment Funds) as well as some utilities may also be subject to "administrative intervention proceedings" or "special control measures" in the context of their winding-up or otherwise. However, these proceedings are aimed at the replacement of the Board of Directors of the relevant entity by new directors appointed by the relevant supervision authority or to the appointment by it of an official (*interventor*) to supervise and approve the operations or the winding-up process of the relevant entity and do not affect *per se* the rights and remedies of the creditors of the relevant entity (including any close-out netting or set-off rights). Accordingly, they are not treated as Insolvency Proceedings for the purposes of this Opinion Letter;

(ii) a number of Opinion Counterparties are exempted from the application of the Insolvency Law, there being wide consensus among Spanish counsel that they cannot be subject to any Insolvency Proceedings under the Insolvency Law, including without limitation:

(a) Investment Funds organised as a "fund" (*fondo*), Pension Funds and Securitisation Funds (please note that "funds" are not legal entities but separate pool of assets and liabilities operated by a managing company (*sociedad gestora*)); and

(b) any Public Authorities; and

(iii) Insurance Undertakings may be subject to administrative winding-up proceedings ("*procedimiento de liquidación administrativa*") pursuant to Law 20/2015, of 14 July, on Regulation and Supervision of Private Insurance Undertakings (the "**Insurance Undertakings Law**"). Any reference to Insolvency Proceedings in this Opinion Letter must be read as including these administrative winding-up proceedings.

Finally, we confirm that, in our view, the events described in § 10.5(c) of the EFET General Agreement refer to all Insolvency Proceedings. Please note, however, that where the relevant Agreement is governed by the laws of any jurisdiction other than Spain, such confirmation can only be provided by counsel in the relevant foreign jurisdiction.

I.1.1 Enforceability of Close-Out Netting Provisions: early termination

1. We have been asked to opine of the enforceability of the Close-Out Netting Provisions based on an event that constitutes a Winding-up, Insolvency or Attachment (as defined in § 10.5(c) of the EFET General Agreement). In this respect we have been asked to:

(a) 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 Spain 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?);

(ii) discuss whether the insolvency law provides for a "safe harbour" for certain contract types and/or entities and whether the contract types listed in Appendix B and which of the entities listed in Appendix A would benefit from such provision; and

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

A distinction must be drawn depending on whether the Insolvent Party is either (i) a Credit Institution or an Investment Firm (each a "**BWUD Institution**") or (ii) otherwise.

(A) <u>General response (non-BWUD Institutions)</u>

Where the Insolvent Party is not a BWUD Institution, the Close-Out Netting Provisions related to early termination will be enforceable under the laws of Spain **only** to the extent that the relevant Agreement satisfies each and all of requirements to this effect (the "**Netting Requirements**") set out in Royal Decree-Law 5/2005, of 11 March ("**RDL 5/2005**") which *inter alia*, implements in Spain the provisions of the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (the "**FCD**").

Satisfaction of the Netting Requirements requires that:

(a) at least, one of the parties to the relevant Agreement is:

(i) a public entity ("*entidad pública*");

(ii) the European Central Bank, the Bank of Spain, a central bank of any Member State of the European Union, a central bank of any third states, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund or the European Investment Bank;

(iii) a credit institution, an investment firm, an insurance undertaking, an undertaking for collective investment in transferable securities or a management company thereof, a *fondo de titulización* ("securitisation fund") or a management company thereof, a pension fund, or any other financial institutions as defined in Article 4(5) of Directive 2006/48/EC of the European Parliament and of the Council, of 14 June 2006, relating to the taking up and pursuit of the business of credit institutions (recast); or

(iv) a governing body of a secondary exchange, a governing body of a clearing and settlement system, or a central counterparty, a settlement agent or a clearing house as defined in Law 41/1999, of 12 November, or a similar institution acting in the futures, options and derivatives markets, and the members and participants in all those market infrastructures when dealing in such capacity

(each such entity under (i) through (iv) above a "**Qualifying Party**").

In this respect, please note that:

(1) <u>it is not required for the satisfaction of the Netting Requirements that the Insolvent Party is a Qualifying Party to the extent that the Solvent Party is a Qualifying Party on its own; and</u>

(2) any Agreement (or Qualifying Transactions) entered into between two Corporations and/or Partnerships will not satisfy the Netting Requirements (as none of the Parties thereto would be a Qualifying Party);

(b) each of the Individual Transactions entered into under the relevant Agreement is a transaction of one of the following types:

- securities loans;

- those financial instruments contemplated in paragraphs 2 to 8 of Article 2 of Law 24/1988 (currently set out in paragraphs c) to g) of Article 2 of Law 672023), including credit derivatives, spot FX transactions, commodity derivatives and allowance derivatives, as well as any combination of the foregoing (and irrespective of whether they are physically or cash-settled);

- repurchase transactions and buy and sell back transactions on negotiable securities; and

- spot trades on negotiable securities listed in any Spanish official exchanges or in any EU regulated exchange or multilateral trading system,

(each of them, a "**Qualifying Transaction**").

In our opinion all contract types listed in Appendix B should be regarded as Qualifying Transactions save for those contracts which either are spot transactions or otherwise lack a "mark-to-market" value as a consequence of the final price being the market price prevailing on the relevant settlement date.

In the event that any Individual Contracts are not Qualifying Transactions there may be two alternative scenarios:

(i) that the relevant court excludes those Individual Contracts from the calculations under the relevant netting provisions; and

(ii) that the relevant court finds that the inclusion into a netting agreement of Individual Contracts which are not Qualifying Transactions ("**Non-Qualifying Transactions**") jeopardises the ability of such agreement (and, therefore, of all Qualifying Transactions entered into thereunder) to satisfy the Netting Requirements.

In this respect we are of the view that, even if the literal wording of the RDL 5/2005 allows for the second of the above two scenarios, both the rationale of the RDL 5/2005 and good practice considerations play in favour of the first scenario. However, we cannot give a conclusive opinion on this issue, since, to the best of our knowledge, no cases have been brought before Spanish courts on this issue.

A clear way to mitigate this risk would be by means of documenting Non-Qualifying Transactions under a different Agreement to that including derivative contracts. Another (although riskier) possibility would consist of using only one Agreement for all Individual Contracts and including in such Agreement a contractual provision providing for the exclusion from the close-out netting calculations of those Individual Contracts which may be deemed by the relevant Court not to comply with the Netting Requirements; and

(c) the relevant Agreement creates a single legal obligation for the purposes of the RDL 5/2005, whose Article 5.1 requires any netting agreement to "*provide for the creation of one single legal obligation which encompasses all of the financial transactions entered into under such agreement and by virtue of which, where there is an early termination, the parties will only have the right to claim the net sum of the terminated transactions*" (the "**Single Agreement Requirement**").

In our opinion, the EFET General Agreement satisfies the Single Agreement Requirement. In this respect, please note, however, as follows:

(i) although the judgment of the Supreme Court of 2 September of 2014 (STS 187/2014) initially confirmed that the RDL 5/2005 was applicable to those netting agreements comprising only one (1) transaction, the judgments of the Supreme Court of 17 and 18 November 2015 (STS 629/2015 and 630/2015, respectively) casted some doubts on this conclusion;

(ii) whilst we believe that the position in the judgement of 2 September of 2014 is the right one, the judgment of the Full Supreme Court (*Pleno del Tribunal Supremo*) dated 24 May 2018 (STS 306/2018) has finally taken the opposite view (based on what we believe to be a wrong understanding of the meaning and practical implications of the concept of "close-out netting" and the full goals purported to be achieved by the RDL 5/2005;

(iii) however, it is worth noting that all of the abovementioned judgments were related to a certain provision in the RDL 5/2005 dealing exclusively with the insolvency ranking of the net termination amount; and

(iv) accordingly, it remains unclear whether an Agreement comprising just one "live" Individual Contract can be early terminated or not on the sole grounds of insolvency of the relevant Spanish Party thereto.

In light of the above, we are of the opinion that the Close-Out Netting Provisions relating to early termination will be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment constituted by the opening of an Insolvency Proceeding **only** where the relevant Agreement satisfies the Netting Requirements.

Conversely, we are of the opinion that, where the relevant Agreement fails to satisfy the Netting Requirements (each, a "**Non-Qualifying Agreement**"), the Close-Out

Netting Provisions relating to early termination will not be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment constituted by the commencement of an Insolvency Proceeding. In this respect, please note as follows:

(1) pursuant to Articles 156, 597 and 618 and of the Insolvency Law, Non-Qualifying Agreements may not be terminated by the Solvent Party merely on the grounds of the opening of Insolvency Proceedings or PRF Proceedings in respect of the other party.

Accordingly, both Parties shall be required to continue to comply with their outstanding obligations under the relevant Transactions, provided that:

(i) pursuant to Article 158 of the Insolvency Law, payment and/or delivery obligations of the Insolvent Party shall be deemed to be debts of the insolvency estate (*créditos contra la masa*) and, accordingly, must be discharged paid by the Insolvency Representatives as they fall due.

The Insolvent Party is not bound to grant any new guarantee or security interest in respect of its outstanding or future obligations under the relevant Non-Qualifying Agreement. This notwithstanding, it shall comply with its obligations to provide collateral (if any) under the EFET Credit Support Annex (and any request for Performance Assurance under § 17 of the Agreement which is not based on an event directly linked to the insolvency or pre-insolvency situation of the Defaulting Party), failing which the Non-Qualifying Agreement could be terminated on the basis of a breach of its obligations, different from the opening of Insolvency Proceedings; and

(ii) Article 165 of the Insolvency Law enables the relevant Court to, upon request of the Insolvency Representatives, order the early termination of any Non-Qualifying Agreements should such termination be necessary or convenient for the interest of the success of the Insolvency Proceeding. Should the parties fail to reach an agreement on that early termination and/or on the relevant compensation for damages, both issues will be decided by the relevant Court, provided that any such compensation will be regarded as a debt of the insolvent party (*crédito concursal*) and, therefore, subject to any write-off or stay provided for in the relevant composition agreement.

Article 620 of the Insolvency Law contains a similar provision in respect of PRF Proceedings.

The question arises as to whether the Insolvency Representatives may "cherry-pick" those Transactions which must be early terminated pursuant to Articles 158 and 620. Whilst we are of the opinion that the better view from a purely technical standpoint is that the characterisation of the Agreement as a "master agreement" and the "single agreement" concept should be respected (so that the Insolvency Representatives would not have a right to “cherry-pick" those Transactions favorable to the Insolvent Party), there is neither scholarship nor case law on this issue and, in light of the general trend of Spanish insolvency courts to favour the debtors' position, we cannot discard that the Spanish Courts may uphold the opposite view; and

(2) notwithstanding the above, the Solvent Party shall be entitled pursuant to Article 161, 598 and 618 of the Insolvency Law to terminate the relevant Non-Qualifying Agreement in the event that the Insolvent Party fails to comply with its obligations after the commencement of the relevant Insolvency Proceeding or PRF Proceeding provided that:

(i) the relevant Termination Amount will be regarded as a debt of the insolvency estate (*crédito contra la masa*) pursuant to Article 163.3 of the Insolvency Law;

(ii) there is not full certainty as to whether Spanish courts would allow Early Termination by reason of the occurrence of a Material Reason other than *Non-Performance* (save for failure to comply any request for Performance Assurance under § 17 of the Agreement which is based on an event directly linked to the insolvency of the Defaulting Party) and *Failure to Deliver or Accept* (although we believe that the better view is that such Early Termination is permitted by the Insolvency Law); and

(iii) pursuant to Article 164 of the Insolvency Law, the relevant insolvency Court may, attending to the interest of the insolvency estate, rule that a defaulted agreement must continue in its terms, in which case any unpaid amounts owed by the Insolvent Party which became payable after the declaration of insolvency shall be paid by the Insolvency Representatives as debt of the insolvency estate (*crédito contra la masa*) within the three following months.

(B) <u>Specific response for BWUD Institutions</u>

Where the Insolvent Party is a BWUD Institution, we are of the opinion that:

(i) where the relevant Agreement is a Spanish Law Agreement, the Close-Out Netting Provisions related to early termination will be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment constituted by the opening of an Insolvency Proceeding **only** where such Agreement satisfies the Netting Requirements; and

(ii) conversely, where the relevant Agreement is a Foreign Law Agreement (any such agreement a "**BWUD Netting Agreement**"), the Closing-out Netting Provisions related to early termination will be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment constituted by the commencement of an Insolvency Proceeding to the extent that they are enforceable under the foreign law (including both contract and insolvency laws) governing that Agreement (and irrespective whether it satisfies the Netting Requirements or otherwise).

This is because, pursuant to Article 8.1.e) of Law 6/2005 (which implements the provisions of Article 25 of the Directive 2001/24/EC of 4 April on the reorganisation and winding up of credit institutions (the "**BWUD**")), the effects on any "netting agreement" of any reorganisation measure and of the opening of an insolvency proceeding in respect of a Spanish BWUD Institution will be governed by the law governing such netting agreement.

Whilst to the best of our knowledge, there is no case law from the EU Court of Justice on this specific issue, it is not required for any "netting agreement" to constitute a "single agreement" in order to benefit from Article 25 of the BWUD, it being sufficient in our view that the relevant agreement contains (as the EFET General Agreement does) a provision pursuant to which, upon the occurrence of a termination event, "*whether through the operation of netting or set-off or otherwise: (a) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or (b) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party*" (the above language replicating the definition of "close-out netting provision" in the FCD).

2. ***We have been asked to discuss whether the laws of Spain will 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?***

The laws of Spain will recognise that the Close-Out Netting Provisions apply to all (not just some) Individual Contracts under the Agreement **only** where the relevant Agreement satisfies the Netting Requirements or is a BWUD Netting Agreement, in which case "cherry-picking" of "profitable" Individual Contracts by the Insolvency Representatives will not be allowed (please see paragraph 3 below).

3. ***We have been asked to discuss whether the single agreement concept is required in order to preserve the enforceability of the termination right and the ability to calculate a net amount and, if so, to elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.***

As discussed in paragraph 1 of this Section C.I.1 above:

(a) the Close-Out Netting Provisions will be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment constituted by the opening of an Insolvency Proceeding **only** where the relevant Agreement either satisfies the Netting Requirements or is a BWUD Netting Agreement; and

(b) in turn, one of the Netting Requirements is the Single Agreement Requirement.

Since neither Spanish law defines the concept of "single legal obligation" nor have the courts formulated any test to this effect, we are of the view that it is uncertain whether Individual Contracts can be severed from the EFET General Agreement while still preserving the single agreement concept, which issues must be analysed on a case-by-case basis in the light of the specific reason triggering the termination of some but not all of the Individual Contracts.

Notwithstanding the above, we are of the opinion that the provisions in §14.8 of the EFET General Agreement (*Termination for New Tax*), which allows the termination of only the affected Individual Contracts, will not jeopardise the enforceability of any subsequent rights to terminate all Individual Contracts remaining under the EFET General Agreement (i.e., the Single Agreement Requirement).

4. ***We have been asked to clarify whether or not there is a distinction in time with respect to a creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected.***

On the assumption that the relevant Agreement either satisfies the Netting Requirements or is a BWUD Netting Agreement (in which regard we kindly refer you to our considerations in Section C.I.1 above), it is immaterial when the Solvent Party exercises its rights under the Close-Out Netting Provisions at any of the abovementioned times.

I.1.2 Enforceability of Close-Out Netting Provisions: calculation of Termination Amount and payment in foreign currency

1. ***We have been asked to discuss whether the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount are enforceable under the laws of Spain or whether there is any risk that such determination could be challenged by a liquidator, receiver or third party?***

Article 16 of the the RDL 5/2005 provides that the net termination amount payable under netting agreements satisfying the Netting Requirements must be always calculated in accordance with the provisions of the relevant netting agreement.

Accordingly and, whilst to the best of our knowledge, no cases have been brought before our Supreme Court relating to the interpretation of Article 16 of RDL 5/2005 (or its predecessors), we believe that the better view is that Article 16 allows for the Termination Amount being calculated in the manner prescribed in § 11 of the EFET General Agreement, *i.e.*, taking into account not only the sum of all Settlement Amounts but also all taking into account other amounts payable between the Parties under the EFET General Agreement and, in particular, any amounts incurred in respect of energy/allowances/gas already delivered (such other amounts being referred to as "**Unpaid Amounts**" herein). This notwithstanding, it should be noted that:

(i) several Spanish minor courts have held that amounts owed by the Insolvent Party which had become due and payable prior to the adjudication of the insolvency cannot be included in the calculation of the net termination amount (although they can be claimed as an ordinary claim) in spite of the provisions of the relevant netting agreement providing otherwise (the position of those courts having been specifically driven by the desire to avoid such Unpaid Amounts becoming a preferential claim against the insolvency estate in certain scenarios).

Please note that, even if such position were to be upheld by our Supreme Court, it would not prevent those Unpaid Amounts from being set-off against the other components of the Termination Amount under, where applicable, the International Set-off Rules (in which respect, we kindly refer you to Section C.I.1.6 below);

(ii) pursuant to the Insolvency Law, interest (either ordinary or default interest) imposed upon a party by any agreement might be held to be irrecoverable to the extent that it accrues on an unsecured debt after the commencement of an Insolvency Proceeding in respect of the party liable to pay such interest.

Therefore, there is a risk that any post-insolvency interest (for instance, default interest accrued on Unpaid Amounts after the declaration of insolvency and prior to the designation of the Early Termination Date) could not be included in the calculations of the Termination Amount; and

(iii) moreover, claims for interest (either ordinary or default interest) accrued prior to the opening of Insolvency Proceedings are subordinated by operation of law.

Therefore, there may be a risk that interest (either ordinary or default interest) accrued prior to the declaration of insolvency cannot be included in the calculation of the Termination Amount and must rather be claimed separately (as a subordinated claim).

2. ***We have been asked whether the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) is enforceable under the laws of Spain or whether the calculation in a foreign currency could be challenged by a liquidator, receiver or third party?***

Pursuant to Article 16 of RDL 5/2005, the Termination Amount determined by the Solvent Party will be recognised in an Insolvency Proceeding to the extent that it has been calculated in accordance with the provisions of the EFET General Agreement. Furthermore, in accordance with Article 1,170.1 of the Spanish Civil Code, a debtor is bound to pay in the agreed currency unless this is legally or factually impossible, in which case it may discharge its obligation by tendering the equivalent amount in the Spanish legal currency.

Notwithstanding the foregoing, Insolvency Proceedings must be conducted in Euro as Article 267.1 of the Insolvency Law provides that all claims will be converted into Euro at the official exchange rate on the date of adjudication of bankruptcy "*for the sole* *purposes of quantifying the liabilities, without such process resulting in a conversion or modification of the claim"* of the Insolvent Party.

In this regard, we are of the opinion that:

(a) the Termination Amount will have further to be converted into Euro in order for the claim to be filed in the relevant Insolvency Proceeding but only for the purposes of quantification of the liabilities of the Insolvent Party; and

(b) therefore, the Termination Amount will have to be paid by Insolvency Representatives, in accordance with the legal order of priority of payments, in the currency originally specified by the Solvent Party.

In this regard, please note that there is no case law as to the way in which Article 267.1 must be interpreted. Therefore, we cannot fully discard the risk that Spanish courts may not uphold our interpretation of Article 267.1 (even if supported by scholars) and find that the Termination Amount must be paid in Euro (by using the official exchange rate on the date of adjudication of insolvency).

I.1.3 Enforceability of Close-Out Netting Provisions: Automatic Termination

We have been expressly asked whether we would 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?

No. 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:

(a) application of Automatic Termination usually poses a number of difficult practicalities when, *inter alia*, calculating the Termination Amount (including, for instance, the impossibility to obtain retroactive firm replacement quotations);

(b) in the event that the relevant Agreement either satisfies the Netting Requirements or is a BWUD Netting Agreement, it is not necessary for the Parties to agree to automatic termination, rather than optional, termination, in order for the Close-Out Netting Provisions to be enforceable upon the opening of an Insolvency Proceeding (without there being any need for the Parties to be faced to the abovementioned difficult practicalities); and

(c) in the event that the relevant Agreement neither satisfies the Netting Requirements nor is a BWUD Netting Agreement, the Close-Out Netting Provisions will not be enforceable upon the opening of an Insolvency Proceeding irrespective of the choice of Automatic Termination as:

  (i) pursuant to Article 156 of the Insolvency Law the declaration of insolvency is not a valid ground for the early termination of any contract and those contractual provisions providing for the early termination of a contract upon the insolvency of either of the parties are null and void;

(ii) parties are not allowed to contract out Article 156 prohibition, including by designating a time immediately before the opening of Insolvency Proceedings; and

(iii) although, to the best of our knowledge, there is no case law on this issue, we are persuaded that the choice of Automatic Termination will be deemed by Spanish courts to amount to a fraudulent circumvention of Article 156 of the Insolvency Law and, accordingly, therefore null and void.

We have also been expressly asked to address whether, should we 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:

a) 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)?

As discussed in Section C.I.2 below, it may be advisable that an express reference to both PRF Proceedings and RR proceedings is included in § 10.5(c) of the EFET General Agreement.

b) 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 Spain) enforceable under the laws of Spain 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?

As discussed in paragraph 1 of Section C.I.1.1 above, 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 would be enforceable under the laws of Spain only to the extent that the relevant Agreement either satisfies the Netting Requirements or is a BWUD Netting Agreement. In all other cases, such provisions will not be enforceable.

c) 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?

Any such termination notice will be generally valid and admissible as evidence before the Spanish courts (without prejudice to any other evidence available to the relevant court).

However, the provisions in the E-Notice Agreement stating that the deemed receipt and the effectiveness of a notice, declaration or other communication sent by e-mail shall remain unaffected regardless of any evidence to the contrary are illegal, not binding under Spanish law and will not be enforced by Spanish courts.

I.1.4 Voidability of Individual Contracts: Suspect Period

Pursuant to Articles 226 *et seq.* of the Insolvency Law (in connection, where relevant, with Article 16.3 of RDL 5/2005), the courts of this jurisdiction can set aside any acts (including, therefore, any Agreement and/or Individual Contract) made by the Insolvent before the adjudication of the bankruptcy and within the two-year period preceding the relevant petition of bankruptcy (the "**Suspect Period**") if the Insolvency Representatives can prove that those acts were "detrimental" to the insolvency estate.

Moreover, the courts of Spain can also set aside any such "detrimental" acts made within the two-year period preceding the date on which negotiations with creditors in order to achieve a restructuring plan (or the intention to commence such negotiations) were communicated to the Court if: (a) following such communication, no restructuring plan is agreed (or, if agreed, fails to be approved by the relevant court) and (b) the relevant debtor is declared to be insolvent within the year following the expiry of the effects arising from the above communication (initially three months, unless extended).

Furthermore, under Articles 1,111 and 1,291-1.299 of the Spanish Civil Code, the courts of this jurisdiction may, on the application of any creditor of a debtor, set aside a fraudulent transaction entered into by that debtor within the 4-year period preceding the application.

In this regard, please note that:

(a) the Spanish legislation does not provide for a definition of "detrimental" to this effect nor has the Supreme Court formulated yet a really helpful test for this purpose.

Notwithstanding this, it is clear that both transactions at an undervalue and transactions intended to constitute a fraudulent preference fall within the scope of Articles 226 *et seq.* of the Insolvency Law.

Moreover, transactions entered into at an arm's length and at the then prevailing market rates are unlikely to constitute "detrimental" transactions. However, the matters referred to in the last sentence are a question of fact in each case; and

(b) conversely, Article 230.1º of the Insolvency Law prevents the courts of this jurisdiction from setting aside any transactions/acts entered into/made by the insolvent party within the Suspect Period in the ordinary course of its business and under normal conditions.

Notwithstanding the above, it should be noted in respect of Foreign Law Agreements that, in accordance with Article 730 of the Insolvency Law (following Article 16 of the Recast EU Insolvency Regulation), no act governed by a foreign law can be set aside pursuant to the abovementioned Spanish legal provisions where the beneficiary of that act proves that such foreign law (including contract and insolvency laws) does not allow any means of challenging that act in the case in point (provided that reference above to Article 730 of the Insolvency Law and Article 16 of the Recast EU Insolvency Regulation must be read as a reference: (a) in respect to BWUD Institutions, to Article 8.1.g) of Law 6/2005 and Article 30 of the BWUD, respectively and (b) in respect of Spanish Insurance Companies, to Article 167.5.g) of the Insurance Undertakings Law and to to Article 290 of the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance ("**Solvency II**"), respectively).

Finally, please note that that the successful avoidance of any Individual Contracts pursuant to the abovementioned provisions may result in, without limitation, a retroactive recalculation of the Termination Amount.

I.1.5 Publicity of insolvency

We have been asked to discuss whether there is publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g., financial statements, corporate actions, etc.).

The declaration of insolvency of a Spanish Party or the Spanish branch of a Foreign Party will be published:

(i) in the Spanish Official Gazette (*Boletín Oficial del Estado*) at www.boe.es; and

(ii) in the Insolvency Public Registry (*Registro Público Concursal)*, which can be accessed on-line at www.publicidadconcursal.es).

Moreover, most of the procedural steps in any Insolvency Proceeding (including any relevant court resolution) shall also be published in the Insolvency Public Registry.

I.1.6 Set-off

We have been asked to provide a general description of limitations in Spain, if any, applicable to set- off (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise): (a) between Parties of claims arising under the EFET General Agreement; (b) between Parties of claims arising outside the General Agreement if contractually provided for in an amendment to the EFET General Agreement; and (c) between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the EFET General Agreement.

(A) Set-off in an insolvency scenario

(a) Set-off of claims between Parties arising under the EFET General Agreement:

Without prejudice to the enforceability of the Close-Out Netting Provisions of Agreements satisfying the Netting Requirements, Article 153 of the Insolvency

Law provides that no set-off (which is a concept different from close-out netting) can take place in relation to claims owed to and by an insolvent party unless the requirements in order for set-off to operate have been met prior to the adjudication of the bankruptcy or the relevant claims arise from the same legal relationship.

Pursuant to the Spanish Civil Code, the requirements in order for two claims to be set-off against each other "by operation of law" (*compensación legal*) are as follows:

(i) both claims must be mutual;

(ii) both claims must be homogeneous;

This means that both debts must be either cash claims or claims for the redelivery of the same type of fungible assets;

(iii) both claims must be due and payable (i.e., matured); and

(iv) both claims must be liquid (*líquidas*).

This means that the amount of both claims must be certain. The Spanish Civil Code does not specify what are the requirements for the amount of a claim being deemed to be certain, i.e., whether the calculations made by the relevant creditor are sufficient or whether obtaining a prior judgement from a court is required. However, according to the Spanish Civil Proceedings Act dated 7 January 2000 (*Ley de Enjuiciamiento Civil de 7 de enero de 2000*), the determination made by a creditor is not sufficient for the amount claimed by it being deemed to be liquid and certain unless such amount is clearly established in the relevant agreement (e.g., the principal of a loan) or can be calculated pursuant to a simple mathematical operation in accordance with the provisions of the relevant agreement (e.g., the fixed-rate interest accrued under a loan); otherwise, a debt judgement must be previously obtained from a court or, if Article 572 of the Spanish Civil Proceedings Act applies (*i.e.*, only if, *inter alia*, the relevant Agreement and any Individual Contract thereunder have been duly notarised, as further explained below), a notarial certificate of the accuracy of the calculations made by the creditor must be obtained from a Spanish Notary. In turn and in order for Article 572 to apply, the following requirements must be satisfied:

- the relevant claims must arise from an agreement executed before to a Spanish Notary Public;
- the relevant debtor must have been served prior notice of the amount claimed by the creditor; and
- the parties must expressly provide for the application of Article 572 in the relevant agreement.

Notwithstanding the above, parties may freely agree to contractual provisions waiving any of the requirements provided for in the Spanish Civil Code in order for set-off by operation of law to apply. In such a case, the relevant requirements for the purposes of the application of Article of the Insolvency Law are likely to be only those agreed by the parties but only to the extent that such parties have provided for contractual set-off to operate automatically or, otherwise, a set-off notice has been served prior to the opening of the relevant Insolvency Proceeding (and provided that the opening of the relevant Insolvency proceeding is not the event contractually triggering such set-off).

(b) Set-off of claims between Parties arising outside the EFET General Agreement:

We are of the opinion that set-off of claims arising outside the EFET General Agreement will only be enforceable in an insolvency scenario where:

(i) in accordance with Article 153 of the Insolvency Law, the requirements in order for set-off to operate have been met prior to the adjudication of the bankruptcy (in which regard we kindly refer you to our considerations in paragraph (A)(a) immediately above); or

(ii) such set-off is permitted under the relevant International Set-off Rules.

"**International Set-off Rules**" means, as applicable, Article 9 of the Recast EU Insolvency Regulation and Article 727 of the Insolvency Law, Article 8.2.c) of Law 6/2005 and Article 23 of the BWUD, and Article 167.5.e) of the Insurance Undertakings Law and Article 288 of Solvency II, pursuant to which the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

In this respect, please note that, as far as we are aware, no cases on the application of Article 9 of the Recast EU Insolvency Regulation (or Article 6 in the initial version thereof) have been brought before the Spanish courts or the EU Court of Justice and that according to the Virgos/Schmit commentary on the EU Insolvency Regulation (which is of persuasive and not determinative authority in interpreting the EU Insolvency Regulation), "*Article 6 covers only rights of set-off arising in respect of* ***mutual claims incurred prior to the opening of the insolvency proceeding***". Accordingly:

(a) if the relevant claims are not "mutual" between the Parties (in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party) they will not be eligible for inclusion in a set-off pursuant to the International Set-off Rules; and

(b) amounts arising from claims which are incurred after Insolvency Proceedings have commenced in relation to a Party might not be capable of inclusion in a set-off pursuant to the International Set-off Rules.

Moreover, please note that, in the absence of any judgment to the contrary from the EU Court of Justice, there is a risk that Spanish courts may find that:

(a) amounts arising from purely contingent claims are not capable of inclusion in a set-off pursuant to the International Set-off Rules; and

(b) amounts owed by the Client which qualify as subordinated claims by operation of Article 281 of the Insolvency Law (including, *inter alios*, claims related to interest amounts accrued prior to the opening of the Insolvency Proceeding) are not capable of inclusion in a set-off pursuant to the International Set-off Rules.

(c) Set-off between Affiliates or Credit Support Providers:

We are of the opinion that any contractual provision whereby the amount payable to the Insolvent Party can be reduced by its set-off against any amounts payable to the Solvent Party or any Affiliate or Credit Support Provider of the Solvent Party by the Insolvent Party or any Affiliate or Credit Support Provider of the Insolvent Party will never be enforceable in Spain in an insolvency scenario (as, *inter alia*, only "mutual claims" may benefit from the application of any International Set-off Rules).

(B) Set-off in a non-insolvency scenario

(a) Set-off of claims between Parties arising under the EFET General Agreement:

The provisions in an Agreement providing for set-off between Parties of claims arising out of such Agreement (including the provisions in § 13.3 of the General Agreement) will be valid and enforceable in a non-insolvency scenario.

(b) Set-off of claims between Parties arising outside the EFET General Agreement:

The provisions in an Agreement providing for set-off between Parties of claims arising outside such Agreement will be valid and enforceable in a non-insolvency scenario.

(c) Set-off between Affiliates or Credit Support Providers:

We are of the opinion that any contractual provision whereby the amount payable by one of the parties (the "**Payer**") to the other party (the "**Payee**") can be reduced by its set-off against any amounts payable to the Payer by any Affiliate or Credit Support Provider of the Payee will be enforceable in Spain in a non-insolvency scenario.

Conversely, any contractual provision whereby the amount payable to the Payee under the Agreement can be reduced by its set-off against any amounts payable by the Payee to any Affiliate or Credit Support Provider of the Payer will be valid and enforceable in a non-insolvency scenario only to the extent that the relevant Affiliates and/or Credit Support Providers have given their consent to such provision.

I.2 Winding-up, Insolvency or Attachment: pre-insolvency proceedings

There are different types of pre-insolvency proceeding depending on the nature of the relevant debtor, as discussed below:

(i) regular companies are subject to the pre-insolvency procedures and measures set out in the Insolvency Law (the "**PRF Proceedings**") in line with the provisions on preventive resolution framework set out in of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 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 (the "**Restructuring Directive**");

(ii) conversely, BWUD Institutions are subject to the recovery and resolution proceedings set out in Law 11/2015 (the "**RR Proceedings**") in line with the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the "**BRRD**"); and

(iii) finally, there are some types of financial institutions which are not subject to either PRF Proceedings under the Insolvency Law or RR Proceedings under Law 11/2015.

As requested, please see Annex 1 for an overview of the abovementioned pre-insolvency proceedings.

Finally, we confirm that, in our view, the events described in § 10.5(c) of the EFET General Agreement refer to both PRF Proceedings and RR Proceedings. Please note, however, that:

(i) interpretation of contractual clauses is ultimately vested on Spanish courts, which may have a different view; and

(ii) where the EFET General Agreement is governed by the laws of any jurisdiction other than Spain, such confirmation can only be provided by counsel in the relevant foreign jurisdiction.

Therefore, <u>it may be advisable (without prejudice, however, to our opinions herein) that an express reference to both PRF Proceedings and RR proceedings is included in § 10.5(c)(iv) of the EFET General Agreement, along the following lines:</u>

"(iv) institutes or has instituted against it a proceeding seeking a judgement of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights (including, without limitation, (1) any preventive resolution frameworks, procedures and measures set out in of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 and (2) any procedures and measures contemplated in Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms), or a petition is presented for its winding-up or liquidation and, if specified in the Election Sheet, is not withdrawn, dismissed, discharged, stayed or restrained within such period as specified in the Election Sheet".

1.2.1 Enforceability of Close-Out Netting Provisions: early termination

A distinction must be made as follows:

(A) RR Proceedings (BWUD Institutions)

Article 66.1 of Law 11/2015 (in line with Articles 68.1 and 3 of the BRRD) provides that a crisis prevention measure or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, shall not, *per se*, make it possible for anyone to, *inter alia*, exercise any termination, suspension, modification, netting or set-off rights of any contracts entered into by the relevant entity, provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed (and without prejudice to the right of the counterparty to terminate the relevant contract 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).

This means that the Close-Out Netting Provisions relating to early termination will be not enforceable upon the occurrence of a Winding-up, Insolvency or Attachment constituted by the commencement of an RR Proceeding.

Accordingly, all of our responses in this Section C.I.2 below are exclusively related to PRF Proceedings (unless otherwise expressly specified).

(B) PRF Proceedings (non-BWUD Institutions)

Pursuant to Articles 599.1 and 619.1 of the Insolvency Law, where a Spanish Party is subject to PRF Proceedings, the Close-Out Netting Provisions relating to early termination will be enforceable upon the occurrence of a Winding-up, Insolvency or Attachment constituted by the commencement of an PRF Proceeding **only** to the extent that the relevant Agreement satisfies the Netting Requirements (in which issue we kindly refer you to our analysis in paragraph 1 of Section C.I.1.1 above).

2. We have been asked to discuss whether the laws of Spain will 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?

Our response in paragraph 2 of Section C.I.1.1 above in relation to a Winding-up, Insolvency or Attachment constituted by the opening of Insolvency Proceedings is also applicable to a Winding-up, Insolvency or Attachment constituted by the commencement of PRF Proceedings.

3. ***We have been asked to discuss whether the single agreement concept is required in order to preserve the enforceability of the termination right and the ability to calculate a net amount and, if so, to 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.***

Our response in paragraph 3 of Section C.I.1.1 above in relation to a Winding-up, Insolvency or Attachment constituted by the opening of Insolvency Proceedings is also applicable to a Winding-up, Insolvency or Attachment constituted by the commencement of PRF Proceedings.

4. ***We have been asked to clarify whether or not there is a distinction in time with respect to a creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected.***

Our response in paragraph 4 of Section C.I.1.1 above in relation to a Winding-up, Insolvency or Attachment constituted by the opening of Insolvency Proceedings is also applicable *mutatis mutandis* to a Winding-up, Insolvency or Attachment constituted by the commencement of PRF Proceedings.

I.2.2 Enforceability of Close-Out Netting Provisions: calculation of Termination Amount and payment in foreign currency

1. ***We have been asked to discuss whether the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount are enforceable under the laws of Spain or whether there is any risk that such determination could be challenged by a liquidator, receiver or third party?***

Our response in paragraph 1 of Section C.I.1.2 above in relation to a Winding-up, Insolvency or Attachment constituted by the opening of Insolvency Proceedings is also applicable to a Winding-up, Insolvency or Attachment constituted by the commencement of PRF Proceedings.

2. ***We have been asked whether the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) is enforceable under the laws of Spain or whether the calculation in a foreign currency could be challenged by a liquidator, receiver or third party?***

Our response in paragraph 2 of Section C.I.1.2 above in relation to a Winding-up, Insolvency or Attachment constituted by the opening of Insolvency Proceedings is also applicable *mutatis mutandis* to a Winding-up, Insolvency or Attachment constituted by the commencement of PRF Proceedings.

I.2.3 Enforceability of Close-Out Netting Provisions: Automatic Termination

Our response in Section C.I.1.3 above in relation to a Winding-up, Insolvency or Attachment constituted by the opening of Insolvency Proceedings is also applicable *mutatis mutandis* to a Winding-up, Insolvency or Attachment constituted by the commencement of PRF Proceedings and RR Proceedings.

I.2.4 Voidability of Individual Contracts: Suspect Period

The claw-back provisions set out in Article 226 *et seq.* of the Insolvency Law do not apply in either RFP proceedings or RR Proceedings.

Notwithstanding this, and as discussed in Section C.I.1.4 above, the opening of RFP Proceedings in respect to a Party may have the effect of extending the length of the Suspect Period.

I.2.5 Publicity of insolvency

We have been asked to discuss whether there is publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g., financial statements, corporate actions, etc.).

Most of the procedural steps relating to RFP proceedings must be filed by the competent court with the Insolvency Public Registry (including the presentation and court approval of any restructuring plan). As an exception, a debtor may request that its communication of the beginning of negotiations with creditors remains secret in accordance with Article 591 of the Insolvency Law (which request shall be automatically accepted).

As for RR Proceedings, Article 69 of Law 11/2015 (in connection with Article 32 of Royal Decree 1012/2015 developing Law 11/2015) provides for the publication of any early intervention or resolution measures taken by the FROB in its official website or the website of the relevant BWUD Institution (and in some cases in the Spanish Official Gazette), provided that such publication may be exempted in certain cases.

I.2.6 Set-off

We have been asked to provide a general description of limitations in Spain, if any, applicable to set- off (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise): (a) between Parties of claims arising under the EFET General Agreement; (b) between Parties of claims arising outside the General Agreement if contractually provided for in an amendment to the EFET General Agreement; and (c) between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the EFET General Agreement.

(A) PRF Proceedings:

The commencement of PRF proceedings should be treated as a non-insolvency scenario to which our analysis in Section C.I.6.(B) applies.

(B) RR Proceedings:

The commencement of RR Proceedings should be treated as a non-insolvency scenario to which our analysis in Section C.I.6.(B) applies (subject to considerations in Section C. I.3.2.(B) below).

I. 3 Non-insolvency related Material Reasons

I.3.1 Enforceability of Close-Out Netting Provisions for a non-insolvency related Material Reason in a non-insolvency scenario

<u>The Close-Out Netting Provisions will be enforceable upon the occurrence of a non-insolvency related Material Reason subject to the following considerations:</u>

(i) with respect to *Non-Performance* and *Failure to Deliver or Accept*:

Spanish courts have ruled that a party to a contract is not entitled to terminate it upon default by the other party of obligations, covenants or undertakings unless such default materially affects an essential obligation (and not an ancillary or complementary obligation which does not prevent the creditor, due to its non-materiality, from achieving the economic purpose of the agreement); and

(ii) with respect to *Breach of Representation or Warranty*:

Spanish courts enjoy a discretionary power in order to evaluate whether an incorrect or misleading representation or warranty shall entail, on the basis of its significance, the early termination of an agreement.

In this respect, please also note that in this scenario:

(i) compliance with the Netting Requirement (including, for the avoidance of doubt, the Single Agreement Requirement) is not required for the enforceability of the Close-out Netting Provisions: and

(i) the obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) will always be enforceable under the laws of Spain.

I.3.2 Enforceability of Close-Out Netting Provisions for a non-insolvency related Material Reason in a insolvency (or pre-insolvency) scenario

We have been asked to advise as to whether 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 will be enforceable <u>irrespective of the insolvency of Party A.</u>

A distinction must be made as follows:

(A) After the opening of an Insolvency Proceeding:

The Close-Out Netting Provisions and the related rights of the Terminating Party will be generally enforceable upon the occurrence of a non-insolvency related Material Reason subject to the following considerations:

(i) the considerations made in Section C.I.3.1 above in respect of *Non-Performance* and *Failure to Deliver or Accept*, and *Breach of Representation or Warranty*;

(ii) there is not full certainty as to whether Spanish courts would allow Early Termination by reason of the occurrence of a Material Reason other than *Non-Performance* (save for failure to comply any request for Performance Assurance under § 17 of the Agreement which is based on an event directly linked to the insolvency of the Defaulting Party) and *Failure to Deliver or Accept* (although we believe that the better view is that such Early Termination is permitted by the Insolvency Law); and

(iii) pursuant to Article 164 of the Insolvency Law, the insolvency court may, attending to the interest of the bankruptcy, rule that a defaulted agreement must continue in its terms, in which case any amounts owed by the Insolvent Party which became payable after the declaration of insolvency must be paid by the insolvency estate within the three following months.

(B) After the opening of RPF Proceeding:

The Close-Out Netting Provisions and the related rights of the Terminating Party will be generally enforceable upon the occurrence of a non-insolvency related Material Reason subject to the following considerations:

(i) the considerations made in Section C.I.3.1 above in respect of *Non-Performance* and *Failure to Deliver or Accept*, and *Breach of Representation or Warranty*;

(ii) there is not full certainty as to whether Spanish courts would allow Early Termination by reason of the occurrence of a Material Reason other than *Non-Performance* (save for failure to comply any request for Performance Assurance under § 17 of the Agreement which is based on an event directly linked to the pre-insolvency situation of the Defaulting Party) and *Failure to Deliver or Accept* (although we believe that the better view is that such Early Termination is permitted by the Insolvency Law).

(C) After the opening of RR Proceedings:

The Close-Out Netting Provisions and the related rights of the Terminating Party will be generally enforceable upon the occurrence of a non-insolvency related Material Reason subject to the following considerations:

(i) the considerations made in Section C.I.3.1 above in respect of *Non-Performance*, *Failure to Deliver or Accept* and *Breach of Representation or Warranty*;

(ii) there is not full certainty as to whether Spanish courts would allow Early Termination by reason of the occurrence of a Material Reason other than *Non-Performance* (save for failure to comply any request for Performance Assurance under § 17 of the Agreement which is based on an event directly linked to the insolvency of the Defaulting Party) and *Failure to Deliver or Accept* (although we believe that the better view is that such Early Termination is permitted by Law 11/2015); and

(iii) enforcement of the Close-Out Netting provisions may be limited or restricted by the exercise by the *Fondo de Reestructuración Ordenada Bancaria* ("**FROB**"), the Spanish resolution authority (*autoridad de resolución ejecutiva*), of any of the powers granted to it by Law 11/2015, as follows below.

(1) *Power to suspend certain obligations*

Pursuant to Articles 70 and 70 *bis* to Article 70 (in line with Article 69 of the BRRD), the FROB has the power to suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension until midnight at the end of the business day following that publication.

Moreover, pursuant to Article 70 *ter* (which follows Article 33.a) of the BRRD), the FROB has the power, subject to satisfaction of certain conditions and requirements, to suspend any payment or delivery obligations pursuant to any contract to which an institution is a party prior to the opening of RR Proceedings in respect of that institution.

(2) *Power to restrict the enforcement of security interests*

Pursuant to Articles 70 and *70 bis* (in line with Article 69 of the BRRD), the FROB has the power to restrict secured creditors of an institution under resolution from enforcing security interests (including in our view transfer of title by way of security) in relation to any assets of that institution from the publication of a notice of the suspension until midnight at the end of the business day following that publication.

(3) *Power to temporarily suspend termination rights*

Pursuant to Articles 70 and 70 *bis* (in line with Article 71.1 of the BRRD), the FROB has the power to suspend the termination rights of any counterparty under a contract with a failing institution (provided that the payment and delivery obligations and the provision of collateral continue to be performed) from the publication of the exercise of the power until no later than midnight on the business day following that publication, provided that a person may exercise a termination right under a contract before the end of the suspension period if that person receives notice from the FROB that the rights and liabilities covered by the contract shall neither be transferred to another entity nor subject to write-down or conversion on the application of the bail-in tool (a "Notice"), and further provided that where the FROB exercises the above mentioned suspension power to suspend termination rights any person who has not received a Notice from the resolution authority may exercise its termination rights on the expiry of the suspension period only (a) if the rights and liabilities covered by the contract have been transferred to another entity and on the occurrence of any continuing or subsequent enforcement event by the recipient entity; or (b) if the rights and liabilities covered by the contract remain with the failing entity and the FROB has not applied the Bail-in Tool (as defined below) to liabilities arising from the respective contracts.

(4) *Partial property transfer*

Pursuant to Article 67 of Law 11/2015 the Spanish resolution authorities may cause the transfer of property of a failing institution, to another person. A property transfer may apply to only part of a failing institution's assets and liabilities (any such transfer being referred to as a "**partial property transfer**"). This may be the case because the property transfer expressly applies to only part of the failing institution's business or because it is ineffective in relation to foreign property so as to cause the transfer of some, but not all, of the property, rights and/or liabilities of the relevant Party.

Notwithstanding the above, Article 67.1 of Law 11/2015 (implementing Article 76.2 of the BRRD) requires the Spanish resolution authorities to ensure that a partial property transfer does not jeopardise the effectiveness of any security arrangements, title transfer financial collateral arrangements, set-off arrangements and netting agreements within the scope of the RDL 5/2005.

(5) *Bail-in*

Law 11/2015 confers the FROB certain write-down or conversion powers in respect of the liabilities of a failing entity (the "**Bail-in Tool**"), although Article 43.1 thereof, in line with Article 44.3 of the BRRD, allows the FROB to exclude or partially exclude certain liabilities from the application of the Bail-in Tool in certain scenarios.

Article 42 of Law 11/2015 (in line with Article 44.1 of the BRRD) provides for several exclusions from the scope of the Bail-in Tool of certain liabilities which notably include (subject to other conditions set forth in Law 11/2015) secured liabilities.

Moreover, pursuant to Article 48.4 of Law 11/2015 (in line with Article 49.2 of the BRRD), the FROB shall exercise the write-down and conversion powers in relation to a liability arising from a derivative only upon or after closing-out the derivatives, the FROB being entitled to terminate and close out any derivative contract for that purpose upon entry into resolution.

Pursuant to Article 48.4 of Law 11/2015, in line with Article 49.3 of the BRRD, where derivative transactions are subject to a netting agreement, the resolution authority or an independent valuer shall determine the value of the liability arising from those transactions on a net basis in accordance with the terms of the agreement.

II. MULTIBRANCH PARTIES

II.1 Spanish Multibranch Party

For the purposes of this Section C.II.1, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional factual assumptions:

"*Party A has entered into Individual Contracts under the EFET General Agreement through offices in Spain 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 Spain*".

We have been asked to address the following questions:

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

No, there would be no change in the conclusions reached under Section C.I.1 above.

(b) Would the EFET General Agreement be treated as a single unified agreement by the Spain receiver under the laws of Spain, 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")?

As a matter of Spanish law, the scope of any separate proceedings in respect of any foreign branch of Party A (a "**Foreign Branch**") will be generally limited to the assets of the Foreign Branch, whilst, however, encompassing all of the liabilities of Party A.

In this respect, it must be noted that claims owing to the Foreign Branch under "profitable" Individual Contracts will not amount to "assets" of the Foreign Branch for Spanish law purposes, unless the COMI of the counterparty of Party A under the relevant Agreement is located in the same jurisdiction as the relevant Foreign Branch (as Article 2(9) of the Recast EU Insolvency Regulation specifies that claims against third parties are deemed to be situated in the Member State within the territory of which the third party has its COMI).

Accordingly, as a matter of Spanish law:

(i) the jurisdiction of the courts of any Foreign Branch in respect of the claims arising from "profitable" Individual Contracts in favour of such Foreign Branch (and Party A) will only be recognised by the Spanish courts to the extent that the COMI of the relevant counterparty is located in the same jurisdiction as that Foreign Branch; and

(ii) as a general rule, the Spanish Insolvency Representatives would be required to defer to the jurisdiction of the insolvency officer appointed in the jurisdiction of the Foreign Branch the claims arising from "profitable" Individual Contracts in favour of such Foreign Branch (and Party A) against a counterparty whose COMI is located in the same jurisdiction as that Foreign Branch.

However, although this issue has not been tested before the Spanish courts, we are of the opinion (which, to the best of our knowledge, is shared by other leading derivative practitioners) that the Spanish courts will respect the characterisation of the relevant EFET General Agreement as a "single agreement", so that they would not defer to the courts of the jurisdiction of the Foreign Branch any claim in favour thereof which should be included in the relevant single "close-out netting" calculations (without prejudice to their ability to defer to the courts of the jurisdiction of the relevant Foreign Branch, for its inclusion in the relevant secondary proceeding, the Termination Amount or the *pro rata* portion thereof arising from the operation of the Close-Out Netting Provisions).

Finally, please note that we express no opinion on the enforceability and/or recognition in any jurisdiction other than Spain of any possible actions that could be taken by an insolvency official or court in one or more Non-Netting Jurisdictions.

II.2 Foreign Multibranch party

For the purposes of this Section C.II.2, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional factual assumptions:

"*(i) a corporation, a bank, an investment services provider, an insurance undertaking, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than Spain 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 Spain (the "**Spanish 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; and*

(iii) *the COMI of Party F is (and will always be) in Country H*".

We have been asked to address the following questions:

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

A distinction must be drawn as follows:

(A) where Party F is a BWUD Institution or an Insurance Undertaking **and** Country H is an EEA Member State:

in this case, there may be ***no*** separate proceedings in Spain pursuant to the provisions of Law 6/2005 and the Insurance Law (as interpreted in light of the BWUD and of Solvency II respectively); and

(B) otherwise:

in this case, there may be separate proceedings (*concurso territorial*) in Spain which may be initiated in Spain by, without limitation, any creditors of Party F or of the Spanish Branch thereof and by the insolvency officials of Party F in Country H.

In this regard, please note that claims owing to the Spanish Branch under "profitable" Individual Contracts will not amount to assets of the Spanish Branch for Spanish law purposes, unless the COMI of the relevant counterparty is located in Spain. Accordingly, as a matter of Spanish law, the courts of Spain will have jurisdiction in respect of the claims arising from the "profitable Individual Contracts" of the Spanish Branch (or Party F) only to the extent that the COMI of the counterparty is located in Spain.

Moreover, it is worth noting that both the Recast EU Insolvency regulation and the Insolvency Law provides the insolvency officials in the main insolvency proceeding with a mechanism to try to avoid the opening of secondary insolvency proceedings in other EU Member States (although it is ultimately subject to approval by the majority of local creditors and by the relevant local court).

(ii) ***If there were separate proceedings in Spain with respect to the assets and liabilities of the Spanish Branch, would the receiver or liquidator in Spain and the Spanish 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 Spain and, if so, would the receiver or liquidator and the Spanish 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 Spanish receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Spanish Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Spanish Branch to the liquidator or receiver of the Spanish 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.

Whilst there is no legal, judicial or academic guidance as to the effects of any secondary insolvency proceeding on a netting agreement encompassing transactions entered into by branches, we believe that the better view is that the Spanish Insolvency Representatives would respect the characterisation of the EFET General Agreement as a "single agreement" and would not include any Individual Contracts entered into thereunder in the scope of the Spanish separate proceeding but would rather differ this issue to the relevant insolvency court of Party F in Country H.

Moreover, please note that, even in the scenario where the Spanish courts were to include in the Spanish separate insolvency proceeding those claims arising from the "profitable" Individual Contracts of the Spanish Branch (or Party F) against a counterparty with its COMI in Spain, they should also include the claims in favour of such counterparty under any other Individual Contracts (even if booked in other branches or in the head office of Party F) if so requested by that counterparty.

(iii) Assume that Party F has no branch located in Spain, but has assets in Spain.

The jurisdiction of Spanish courts to open secondary proceedings is limited to those scenarios where the relevant debtor (Party F) has an "establishment", as defined in the EUIR and the Insolvency Law (*i.e.* any place of operations where a debtor carries out a non-transitory economic activity with human means and assets), in Spain.

Therefore, secondary proceedings may be opened in Spain **only** where Party F is found to have (or, where applicable, have had in the 3-month period prior to the request to open main insolvency proceedings in Country H) an establishment in Spain, even if such establishment has not been formally organized as a branch.

If no such place of operations exists in Spain, then there can be no separate proceedings in Spain.

III. COLLATERAL

For the purposes of this Section C.III, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional assumptions:

(i) "*that the Spanish Party (Party A) is at all times the Transferor under the EFET Credit Support Annex and the collateral is owned by the Spanish Party or the Spanish Party is authorized and empowered to transfer ownership in the collateral*"; *and*

(ii) "*that Eligible Credit Support will only include Letters of Credit 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 (the* ***"Cash Account")***".

In this regard, we also assume that any Letter of Credit or Parent Company Guarantee which is to be used as Eligible Credit Support will be issued directly to the Transferee (as opposed to being issued to the Transferor and then transferred or pledged to the Transferee). Therefore, there is no need to address a "transfer" of a Letter of Credit or Parent Company Guarantee and, accordingly, the term "Eligible Credit Support" or "Collateral" as used below in this Opinion Letter is limited to Cash.

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

Pursuant to Article 10.1 of the Spanish Civil Code, proprietary rights (*derechos reales*) including those *in rem* aspects of a security interest are governed by the law where the relevant asset is located (or deemed to be located) (*i.e.*, the so-called "*lex situs*" or "*lex rei sitae*").

In rem (or proprietary) aspects comprise the following matters:

(i) the legal nature and proprietary effects of the security interest or collateral arrangement;

(ii) the requirements for perfecting the relevant security interest or collateral arrangement and the provision of collateral thereunder and, more generally, the completion of the steps necessary to render such a security interest, collateral arrangement and provision effective against third parties;

(iii) whether a person's title to or interest in such collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred; and

(iv) the steps required for the realisation of the collateral following the occurrence of an enforcement event.

Accordingly, <u>pursuant to the Spanish conflict of law rules the law governing the proprietary aspects of a security interest or transfer of title collateral arrangement is governed the relevant *lex situs*</u> ("**Lex Situs**").

Spanish law does not provide for rules determining generally the location of cash. However, in our opinion, which is mainly driven by Article 2(9)(iii) of the Recast EU Insolvency Regulation (pursuant to which "*cash held in accounts with a credit institution, the Member State indicated in the account's IBAN, or, for cash held in accounts with a credit institution which does not have an IBAN, the Member State in which the credit institution holding the account has its central administration or, where the account is held with a branch, agency or other establishment, the Member State in which the branch, agency or other establishment is located*"), Cash Collateral must be deemed to be located in the country where the relevant Cash Account is opened.

Notwithstanding the above, please note that some Spanish commentators are of the opinion that Cash Collateral must be deemed to be located in the jurisdiction of the law contractually governing the relevant Cash Account Agreement, this view is based on the extension to Cash Collateral of the conflict of laws rule provided for in Article 17.3 of RDL 5/2005 (pursuant to which the enforceability against third party of collateral arrangements on loan receivables will be governed by the law governing the relevant loan agreement). As this issue has not been tested before the Supreme Court, we cannot fully discard the possibility that Spanish courts might upheld their view.

III.2 ***Would the laws of Spain 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?***

A distinction must be made as follows:

(i) Cash Collateral located in a foreign jurisdiction:

This issue will be governed by the relevant Lex Situs.

(ii) Cash Collateral located in Spain:

The laws of Spain will characterise each transfer of Eligible Credit Support under a EFET Credit Support Annex as effecting an unconditional transfer of ownership only to the extent that such EFET Credit Support Annex satisfies the requirements set out to this effect in the RDL 5/2005 (the "**FCA Requirements**", any EFET Credit Support Annex that satisfies them being a "**Financial Collateral Arrangement**").

The FCA Requirements are as follows below:

(a) that either of the Parties is a Qualifying Party (in which respect we kindly refer you to paragraph 1 of Section C.I.1.1 above).

Pease note that it is not required for the satisfaction of the FCA Requirements that the Insolvent Spanish Party is a Qualifying Party if the Solvent Party is a Qualifying Party on its own.

Accordingly, no EFET Credit Support Agreement entered into between two Corporations and/or Partnerships will satisfy the FCA Requirements (as none of the Parties thereto would be a Qualifying Party);

(b) that neither the Transferor nor the Transferee are individuals;

(c) that the Collateral is either: (i) cash, (ii) negotiable securities ("*valores negociables*") or other financial instruments as defined in the Restated Text of Law 24/1988) and/or or (iii) certain loan claims.

Cash Collateral will satisfy this requirement; and

(d) that the relevant Collateral is in the "possession" or "control" (as such terms are used in the RDL 5/2005) of the collateral taker.

Conversely, whilst case law is not fully consistent and, therefore, there might be some room for arguing otherwise, <u>our opinion is that any EFET Credit Support Annex failing to meet the FCA Requirements would be recharacterised as a security interest.</u>

In such a case, the validity and enforceability of that so recharacterised security interest will depend on, *inter alia*, compliance with the requirements for creation and perfection security interests under Spanish law). Accordingly, no such so recharacterised security interest would be recognized as valid and enforceable by the Spanish courts unless, at least, the relevant EFET Credit Support Agreement and, possibly, each transfer of Cash Collateral has been duly evidenced before a Spanish Notary. On balance, we believe that, as a matter of practice, the likelihood in practice of any such recognition is negligible and, accordingly, our responses below are based on the assumption that an EFET Credit Support Annex failing to meet the FCA Requirements would be recharacterised as a non-recognised security interest.

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

A distinction must be made as follows:

(i) Cash Collateral located in a foreign jurisdiction:

This issue will be governed by the relevant Lex Situs.

(ii) Cash Collateral located in Spain:

On the assumption that the relevant EFET Credit Support Annex satisfies the FCA Requirements (in which we kindly refer you to our opinions in Section C.III.1 above), we are of the opinion that:

(a) there is no need to take any subsequent action to ensure that its title in the Eligible Credit Support continues, except that any transfer of Cash Collateral as Credit Eligible Support under the EFET Credit Support Annex must be evidenced in writing (or by electronic means); and

(b) there are no requirements in Spain necessary (including any filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval together with any 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.

In the event that the relevant EFET Credit Support Annex does not satisfy the FCA Requirements, it could only be recognised as valid and enforceable by the Spanish courts to the extent that the relevant EFET Credit Support Agreement and, possibly, each transfer of Cash Collateral has been duly evidenced before a Spanish Notary.

III.4 What is the effect, if any, under the laws of Spain 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?

A distinction must be made as follows:

(i) Collateral located in a foreign jurisdiction:

This issue will be governed by the relevant Lex Situs.

(ii) Collateral located in Spain:

Substitution of Eligible Credit Support under §6 of any EFET Credit Support Annex will be valid and enforceable in Spain to the extent that the relevant EFET Credit Support Annex satisfies the FCA Requirements (in which we kindly refer you to our opinions in Section C.III.1 above).

In the event that the relevant EFET Credit Support Annex does not satisfy the FCA Requirements, we believe that such substitution could only be recognised as valid and enforceable by the Spanish courts to the extent that it has been duly evidenced before a Spanish Notary.

Does the presence or absence of consent to substitution by Party B have any bearing on this question?

Please note that approval from the Transferee (Party B) will be always required as provided by § 6 of the EFET Credit Support Annex.

III.5 ***Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement***

together with §11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Spain 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"?

As far as Spanish law is concerned, the provisions in § 11 of the EFET Credit Support Annex <u>will be valid and enforceable to the extent that the relevant EFET Credit Support Annex satisfies the FCA Requirements</u> (even if they provide for the value of the collateral provided and not yet transferred back to the Transferor) to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable").

Where the relevant EFET Credit Support Annex does not satisfy the FCA Requirements, a distinction must be made as follows:

(i) if the Collateral is located in a foreign jurisdiction, this issue will be governed by the relevant Lex Situs; and

(ii) if the Collateral is located in Spain, then the insolvency estate of the Transferor will have a claim against the Transferee for the return of any posted Collateral (such claim being governed by Spanish law).

III.6 ***Are the rights of Party B enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, <u>irrespective of the insolvency of Party A?</u>***

As far as Spanish law is concerned, the rights of Party B would be valid and enforceable in Spain irrespective of the insolvency of Party A, to the extent that the relevant EFET Credit Support Annex satisfies the FCA Requirements.

Where the relevant EFET Credit Support Annex does not satisfy the FCA Requirements, a distinction must be made as follows:

(i) if the Collateral is located in a foreign jurisdiction, this issue will be governed by the relevant Lex Situs; and

(ii) if the Collateral is located in Spain, then the insolvency estate of the Transferor will have a claim against the Transferee for the return of any posted Collateral (such claim being governed by Spanish law).

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

As discussed in in Section C.I.1.4 above:

(i) pursuant to Articles 226 *et seq.* of the Insolvency Law the courts of this jurisdiction can set aside any acts (including the entering into the EFET Credit Support Annex or any transfer of collateral thereunder) made by the insolvent Spanish Party within the Suspect Period if the Insolvency Representatives can prove that those acts were "detrimental" (*perjudiciales*) to the insolvency estate; and

(ii) under Articles 1,111 and 1,291-1,299 of the Spanish Civil Code, the courts of this jurisdiction may, on the application of any creditor of a debtor, set aside a fraudulent transaction entered into by that debtor within the 4-year period preceding the application.

However, it must be noted that Financial Collateral Arrangements (which concept, for the avoidance of doubt, does not include Letters of Credit and Parent Guarantees) benefit from a more favourable treatment as:

(i) pursuant to Article 15,5 of the RDL 5/2005, <u>transfers of Collateral made within the Suspect Period under a Financial Collateral Arrangement can be set aside **only** where the Insolvency Representatives are able to prove that they were "fraudulent"</u> (rather than merely "detrimental" to the insolvency estate);

(ii) Article 15.2 of RDL 5/2005 (implementing Article 8.2 of the FCD) provides that where a Financial Collateral Arrangement has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of, Insolvency Proceedings, it shall be legally enforceable and binding on third parties if the collateral taker (the Transferee) can prove that it was not aware, nor should have been aware, of the commencement of such Insolvency Proceeding; and

(iii) Article 10 of the RDL 5/2005 (in line with Article 8.3(a) of the FCD) allows the Parties to a Financial Collateral Arrangement to agree that the collateral provider shall be under the obligation to provide additional Collateral in order to take account of changes in the value of the Collateral or in the amount of the relevant secured obligations. Moreover, it also specifies that any such additional Collateral will be treated as if it would have been delivered at the same time as the initial collateral was first provided.

Please also note that please in connection with Foreign Law Agreements that, in accordance with Article 730 of the Insolvency Law (following Article 16 of the Recast EU Insolvency Regulation) no act governed by a foreign law can be set aside pursuant to the abovementioned Spanish legal provisions where the beneficiary of that act proves that such foreign law (including contract and insolvency laws) does not allow any means of challenging that act in the relevant case (provided that reference above to Article 730 of the Insolvency Law and Article 16 of the Recast EU Insolvency Regulation must be read as a reference: (a) in respect to BWUD Institutions, to Article 8.1.g) of Law 6/2005 and Article 30 of the BWUD, respectively and (b) in respect of Spanish Insurance Companies, to Article 167.5.g) of the Insurance Undertakings Law and to Article 290 of Solvency II).

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?

A distinction must be made depending on whether the relevant EFET Credit Support Annex amounts to a Financial Collateral Arrangement or otherwise, as follows:

(a) Financial Collateral Arrangements:

As discussed above, Article 10 of the RDL 5/2005 allows the Parties to a Financial Collateral Arrangement to agree that the collateral provider (Party A as Transferor) shall be under the obligation to provide additional Collateral in order to take account of changes in the value of the Collateral or in the amount of the relevant secured obligations. Moreover, it also specifies that any such additional Collateral will be treated as if it would have been delivered at the same time as the initial collateral was first provided.

Accordingly, in this scenario (and assuming that the first transfer of collateral took place prior to the Suspect Period), no transfers of Eligible Credit Support made within the Suspect Period in accordance with the provisions of the EFET Credit Support Annex could be recovered by the Insolvency Representative of Party A on the grounds of Article 15.5 of RDL 5/2005 (as pursuant to Article 10 of RDL 5/2005, those transfers will be deemed for these purposes to have been made prior to the Suspect Period).

Notwithstanding the above, please note that additional Collateral posted for any reasons other than changes in the value of the collateral or in the amount of the relevant secured obligations (such as, for instance, rating triggers) will not be treated as if delivered at the same time as the initial Collateral was first provided; and

(b) non-Financial Collateral Arrangements:

Article 228.2º of the Insolvency Law provides that the provision of Collateral in respect of pre-existing obligations will be presumed to be detrimental to the insolvency estate unless otherwise proved by the relevant secured creditor (including, for these purposes, any Transferee under an EFET Credit Support Annex), it being unclear, due to the inconsistency of the scarce judgments rendered on this issue, whether the fact that additional Collateral has been provided in accordance with a pre-existing contractual provision is sufficient for the purposes of rebutting such presumption.

Please also note that, as stated above, in accordance with Article 730 of the Insolvency Law (following Article 16 of the Recast EU Insolvency Regulation) no act governed by a foreign law can be set aside pursuant to the abovementioned Spanish legal provisions where the beneficiary of that act proves that such foreign law (including contract and insolvency laws) does not allow any means of challenging that act in the relevant case (provided that reference above to Article 730 of the Insolvency Law and Article 16 of the Recast EU Insolvency Regulation must be read as a reference: (a) in respect to BWUD Institutions, to Article 8.1.g) of Law 6/2005 and Article 30 of the BWUD, respectively and (b) in respect of Spanish Insurance Companies, to Article 167.5.g) of the Insurance Undertakings Law and to Article 290 of Solvency II**,** respectively).

We analyse separately the risk of successful voidability in the following scenarios:

(1) transfer of Cash Collateral effected during the Suspect Period pursuant to an EFET Credit Support Agreement entered into before the Suspect Period:

(a) Financial Collateral Arrangements:

No such transfer could be deemed "fraudulent" (and, therefore, voidable) unless the EFET Credit Support Agreement itself could be found to be "fraudulent".

As a general rule, there should be no sound reason for any EFET Credit Support Agreement to be regarded as "fraudulent" to the extent that it has been entered into at an arm's length (which issue is ultimately a matter of fact); and

(b) Non-Financial Collateral Arrangements:

No such transfer could be deemed "prejudicial" (and, therefore, voidable) unless the EFET Credit Support Agreement itself could be found to be "prejudicial".

As a general rule, there should be no sound reason for any EFET Credit Support Agreement to be regarded as "prejudicial" to the extent that it has been entered into at an arm's length (which issue is ultimately a matter of fact);

(2) conclusion of the EFET Credit Support Agreement after the conclusion of the first Individual Contract:

there is a clear risk that the relevant EFET Credit Support Agreement (irrespective whether it amounts to a Financial Collateral Arrangement or otherwise) can be found to be a "fraudulent preference" unless the Transferee may evidence the existence of a sound business reason for the Transferor having agreed to enter into the relevant EFET Credit Support Agreement; and

(3) transfer of Cash Collateral pursuant to a EFET Credit Support Agreement entered into during the Suspect Period:

(a) Financial Collateral Arrangements:

No such transfer will be voidable unless the relevant EFET Credit Support Agreement may be found to be "fraudulent". As a general rule, there should be no sound reason for any EFET Credit Support Agreement to be regarded as "fraudulent" to the extent that it has been entered into at an arm's length (which issue is ultimately a matter of fact); and

(b) Non-Financial Collateral Arrangements:

No such transfer will be voidable unless the relevant EFET Credit Support Annex may be found to be "prejudicial". As a general rule, there should be no sound reason for any EFET Credit Support Agreement to be regarded as "prejudicial" to the extent that it has been entered into at an arm's length (which issue is ultimately a matter of fact).

III.7 ***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 Spain 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?***

Please see our considerations in Sections C.III.1, 2 and 3 above.

III.8 ***Any other specific recommendations on the subject of collateral that EFET and its members need to be aware of?***

There are no specific Spanish law recommendations to be considered when taking Collateral other than those arising from the general recommendation to check the capacity and authority of the relevant Transferor to do so.

On the other hand, it seems reasonable to conclude that, as a general rule:

(i) using an EFET Credit Support Agreement with only Letters of Credit should be preferred to using an EFET Credit Support Annex with Cash Collateral located in Spain if the relevant EFET Credit Support Agreement does not meet the FCA Requirements (as an EFET Credit Support Annex with Cash Collateral located in Spain failing to satisfy the FCA Requirements will not be enforceable as discussed in Section III.2 above); and

(ii) as an alternative where the relevant EFET Credit Support Agreement does not satisfy the FCA Requirements, having the Cash Collateral located outside Spain may help to remove or mitigate some of the Spanish law issues identified above (which will ultimately depend on the contents of the relevant Lex Situs).

IV. GENERAL ENFORCEABILITY

IV.1 ***Is the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit Support Annex) and Appendices enforceable under the laws of Spain in accordance with its own terms?***

Subject to the assumptions, qualifications and other comments of this Opinion Letter, <u>the EFET General Agreement, the Annexes and the EFET Credit Support Annex will be legal, valid, binding and enforceable under the laws of Spain</u>.

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)

(i) Non-performance due to Force Majeure:

we are of the opinion that § 7 of the EFET General Agreement (*Non-Performance Due to Force Majeure*) is valid and enforceable under Spanish law (and will not infringe the Spanish public policy for the purposes of Rome I).

This is because "force majeure" (*fuerza mayor*) is contemplated by Article 1,105 of the Civil Code, pursuant to which, unless the parties otherwise agree, no party to a contract shall be liable to the other party for failing to perform its obligations due to the occurrence of an event which it could not have reasonably avoided or overcome and which makes it impossible for such party to comply with its contractual obligations.

Moreover, pursuant to case-law, frustration of a contract may occur where there is an unexpected and fundamental change of circumstances which strikes at the root of a contract. In the event of frustration, outstanding obligations may be terminated.

(ii) Remedies for non-performance:

We are of the opinion that § 8 of the EFET General Agreement (*Remedies for Failure to Deliver and Accept*) is valid and enforceable under Spanish law (and will not infringe the Spanish public policy for the purposes of Rome I).

(iii) Limitation of liability:

(a) Enforceability of Exclusion of Liability (§ 12.2)

Article 1,102 of the Spanish Civil Code provides that liability arising from wilful misconduct (*dolo*) cannot be excluded by contract, being null and void the waiver of the right to enforce it. This notwithstanding, most scholars take the view that the same rule applies to liability based on gross negligence (*culpa grave*) and therefore they consider null and void any waiver of the right to enforce the liability arising from gross negligence. With the abovementioned exceptions, contractual exclusion of liabilities provisions are valid and enforceable.

Since the EFET General Agreement does not exclude in § 12.2 (*Limitation of Liability*) liability arising from wilful misconduct or gross negligence, we are of the opinion that it is valid and enforceable under Spanish law (and will not infringe the Spanish public policy for the purposes of Rome I).

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

The limitation of consequential damages and similar types of liabilities will be enforceable in accordance with its terms unless the relevant liability arises from wilful misconduct or gross negligence.

(c) Enforceability of Duty to Mitigate (§ 12.5)

Pursuant to Article 1,255 of the Spanish Civil Code, parties are free to enter into any contractual agreement with any other party, unless such agreement is contrary to any legal provision or to the general concept of public policy.

As the Duty to Mitigate cannot be found to be contrary to any law or the general concept of public policy, we are of the opinion that § 12.5 of the EFET General Agreement will be valid and enforceable under Spanish law (so that failure by the non-defaulting party to comply with such a duty should give rise to a reduction in the compensation for losses and damages to be awarded by the Spanish courts to the non-defaulting party).

Discuss any other provisions which need to be commented on according to the law of Spain including whether these provisions could and/or need to be further 'expanded' and/or 'strengthened' under the laws of Spain (especially provisions that may infringe upon the ordre public/public policy in Spain and that may be challenged by the courts in Spain irrespective of the laws that governs the EFET General Agreement.

The limitations set out in § 12 of the EFET General Agreement are already very wide and consistent with the Spanish public policy (*ordre public*). We do not envisage any manner in which it could be expanded or strengthened materially.

IV.2 ***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?***

All such notices and communications are generally valid and admissible as evidence before the Spanish courts (without prejudice to any other evidence available to the relevant court).

However, <u>the provisions in the E-Notice Agreement stating that the deemed receipt and the effectiveness of a notice, declaration or other communication sent by e-mail shall remain unaffected by any deviating evidence of receipt or non-receipt of the respective e-mail and/or of any attached legal notice or declaration are not legal and binding under Spanish law</u> and will not be enforced by Spanish courts.

Moreover, in the case of any dispute, it will be for the sender to prove that the relevant notice or communication was actually received by the recipient thereof.

On the other hand, the receiver can *prima facie* rely on the authenticity of an attachment to an e-mail sent from an authorised e-mail address, without prejudice to the rights of the sender to prove that the attachment has been forged.

IV.3 ***Please indicate any recommendations EFET and its members need to be made aware of regarding the general enforceability, from a legal stand point, of the EFET General Agreement and its Credit Support Annex.***

We do not have any such recommendations.

V. CONFIRMATION PRACTICES

For the purposes of this Section C.VI., and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional assumptions:

"(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, electronic confirmation or position matching service or other means of electronic transmission); and

(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."

V.1 General

We have been asked to make a distinction between (1) the formal requirements and procedure in the formation of a legally binding and enforceable Individual Contract and its inclusion in the EFET General Agreement and (2) the formal requirements a Confirmation should comply with under the laws of Spain in order to be sufficient for all purposes to evidence a binding Individual Contract and its inclusion in the EFET General Agreement.

(i) Perfection

As a general rule, Spanish contract law does not require any written confirmation as a perfection requirement for any contract, so long as the essential terms of the relevant transaction have been agreed. Accordingly, Individual Contracts agreed upon over the telephone will be fully binding on the parties and enforceable against them, even if a written confirmation is not subsequently issued by either party.

(ii) Evidence

Electronically transmitted confirmations will be admissible as evidence before the Spanish courts for the purpose of determining the existence and/or terms of Individual Contracts (without prejudice to any other evidence available to the relevant court).

V.2 Binding Individual Contract

V.2.1 ***Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization) under the laws of Spain?***

There is no formal requirement for a signature, registration or notarisation in order to create a binding Individual Contract under the laws of this jurisdiction. However, a signature (electronic or otherwise) may help to demonstrate the authenticity and integrity of a Confirmation in respect of an Individual Contract and it is admissible in evidence in this respect (without prejudice to any other evidences available to the relevant court).

V.2.2 ***At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of Spain?***

In accordance with the principles set out in Section C.V.1 above, Individual Contracts agreed upon over the telephone will be fully binding on the Parties and enforceable against them as from the time at which a verbal agreement was reached.

V.2.3 ***Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of Spain? If so, is there a relevant time period per the laws of Spain that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?***

In principle, failure to object to incorrect terms in a received confirmation will not constitute acceptance of those terms. However, this matter will always be assessed by the courts on a case-by-case basis in light of all relevant circumstances, there being neither hard and fast rules on this nor a specific time period.

V.2.4 ***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?***

Yes, it is sufficient (on the assumption that no party disputes such written confirmation).

V.3 Means of Evidence

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 Spain: 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?

(i) Taped Recording:

Legal telephone conversation recordings will be admissible as evidence before the Spanish courts.

(ii) Witness Statement:

Witness statements will be admissible as evidence before the Spanish courts.

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

Pursuant to Article 24 of Law 34/2002, of 11 July, on Services of the Information Society and E-Commerce (*Ley de Servicios de la Sociedad de la Información y Comercio Electrónico*) agreements entered into by electronic means will be admissible as evidence before the Spanish courts for the purpose of determining the existence and/or terms of the relevant agreement (without prejudice to any other evidence available to the relevant court).

It is worth noting that the Regulation (EU) No 910/2014 has been developed in Spain by means of Law 6/2020, dated 11 November.

(iv) Facsimile:

Facsimile will be admissible as evidence before the Spanish courts for the purpose of determining the existence and/or terms of the relevant agreement (without prejudice to any other evidence available to the relevant court).

VI. CORE PROVISIONS

VI.1 ***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 our conclusions reached under Sections C.I or C.II. (Enforceability of Close- out Netting) above? As far as the EFET Credit Support Annex is concerned, discuss the effect of electing to allow substitution with or without consent.***

Under the laws of this jurisdiction none of the elections contemplated under the EFET General Agreement or any of the Annexes (including the EFET Credit Support Annex) would change the substance of our conclusions in Sections C.I and C.II above.

As far as the EFET Credit Support Annex is concerned, discuss the effect of electing to allow substitution with or without consent.

As regards the effect of electing in the EFET Credit Support Annex to allow substitution with or without consent, it should be noted that Spanish law provides that substitution shall be expressly provided for in the relevant agreement. Whilst it could be argued that no right has been provided for where exercise of such right is subject to consent by the other party, <u>we are of the view that such argument is not right and that accordingly there is no difference electing to allow substitution with or without consent.</u>

VI.2 ***Considering the conclusions reached under Section C.I or C.II (Enforceability of Close- out Netting) above, what are the provisions of the EFET General Agreement regarded as so essential that a material alteration thereof could affect the conclusions reached in that Section C.I or C.II (each such provision a "Core Provision)?***

The following provisions are Core Provisions:

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

VI.3 ***Would the inclusion of the EFET 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 the conclusions reached under Section C.I or C.II?***

No, any such inclusion would not change the substance of the conclusions reached under Sections C.I or C.II.

Please note, however, that we are not providing any opinion on the enforceability 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).

VII. GOVERNING LAW, ARBITRATION AND JURISDICTION

For the purposes of this Section C.VII, and as per the Instruction Letter, we have made in addition to the assumptions made in Section B above (*Assumptions*), the following additional assumption:

"*That the relevant EFET General Agreement is governed by the laws of a jurisdiction other than Spain (including English or German law)*".

We have been asked to discuss in detail and advise on whether the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in Spain, and what would be the consequences if it were not.

We are of the opinion that the choice of the substantive law of the Federal Republic of Germany, of the law of England or of the law of any other jurisdiction other than Spain to govern the relevant EFET General Agreement will be recognised in this jurisdiction subject to, and in accordance with, Regulation (EC) NO 593/2008 of the European Parliament and the Council, dated 17 June 2008 on the law applicable to contractual obligations ("**Rome I**").

When applying the substantive law of the Federal Republic of Germany, the law of England or the law of any other jurisdiction other than Spain as the law governing the EFET General Agreement, the courts of competent jurisdiction of Spain, if any, by virtue of Rome I:

(a) may give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the EFET General Agreement have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the EFET General Agreement unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application;

(b) will apply the overriding mandatory provisions of the law of Spain.

Provisions of Spanish laws and regulations specified in Section VIII as well as those relating to Insolvency Proceedings, PRF Proceedings and RR Proceedings shall be considered as mandatory rules irrespective of the law otherwise applicable to the EFET General Agreement;

(c) may refuse to apply English, German law or the law of any other jurisdiction other than Spain in relation to the EFET General Agreement if such application is manifestly incompatible with the public policy (*orden público*) of Spain.

In this regard, we are of the view that none of the provisions set out in the EFET General Agreement is prima facie manifestly incompatible with the Spanish public policy, except for:

(i) those provisions in the EFET General Agreement (if any) to the effect that any unilateral calculation, determination or certification will be conclusive and binding;

(ii) those provisions in the EFET General Agreement (if any) which require any defaulting party thereto to pay any penalty which does not constitute a genuine and reasonable pre-estimate of the damage likely to be suffered by the other party as a result of the default in question;

(iii) any indemnity in the EFET General Agreement for legal costs incurred by an unsuccessful litigant;

(iv) those provisions in the Agreement (if any) which provide that, in the event of any invalidity, illegality or unenforceability of any provision of such Agreement, the remaining provisions thereof shall not be affected or impaired (since, as a matter of Spanish public policy, this issue shall always be assessed on a case-by-case basis by the relevant Court which will decide on the merits of the specific case whether the remaining provisions will be affected or otherwise);

(v) any provision of the EFET General Agreement which allows any party to terminate such Agreement as a result of technical defaults which does not prevent the creditor, due to its non-materiality, from achieving the economic purpose of the agreement; and

(vi) any provision in the Agreement stating that any communication shall be deemed to have been delivered (if the relevant communication has not not been actually delivered);

(d) shall have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance;

(e) where all the elements relevant to the situation at the time an agreement was entered into are connected with one country only, the parties' choice of the law governing such agreement will not prejudice the application of rules of law of that country which cannot be derogated from by agreement; and

(f) where all the elements relevant to the situation at the time an agreement was entered into are connected with one or more Member States, the parties' choice of the law governing such agreement will not prejudice the application of provisions of European Union law, where appropriate as implemented in Spain, which cannot be derogated from by agreement.

Finally, we are also of the opinion that the arbitration provisions of § 22.2 will be recognised in this jurisdiction.

VIII. REGULATORY REGIME

VIII.1 *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?*

Electricity

Please note that:

(a) An exchange contract (which, in our view, includes the EFET General Agreement and any Individual Contract under the EFET General Agreement) is unenforceable in this jurisdiction if (i) it involves the currency of any member of the International Monetary Fund and (ii) it is contrary to the exchange control regulations of any member of the International Monetary Fund maintained or imposed consistently with the International Monetary Fund Agreement. In our opinion the EFET General Agreement is not contrary to any exchange control regulations maintained or imposed by this jurisdiction.

(b) A Party intending to trade electricity and/or allowances with a counterparty organised in this jurisdiction will be subject to the following:

(i) Licenses, permit and approvals for Individual Contracts relating to <u>electricity</u>

Law 24/2013 contains certain mandatory provisions applying to any agreements for the purchase and sales of electricity where such electricity must be physically delivered to or from Spain, no matter the place of incorporation of the relevant parties.

Those provisions can be summarised as follows:

(a) "Imports" of electricity into Spain:

Pursuant to Article 11 of Law 24/2013, imports of electricity from European Union or third countries are subject to the following requirements:

(i) the purchaser must be either a generator, a direct consumer in the market (*consumidor directo en mercado*) or an energy trader (*comercializador*): and

(ii) the purchase agreement must fall within any of the types of contracts set forth in the regulations implementing Law 24/2013; and

(iii) where electricity is not imported from a European Union country, import is subject to prior authorisation of the Ministry for the Energy Transition and Demographic Challenge; and

(b) "Exports" of electricity from Spain:

Pursuant to Article 11 of Law 24/2013, sales of electricity to European Union or third countries are subject to the following requirements:

(1) the seller must be either a generator, an energy trader, or a direct consumer in the market;

(2) where electricity is not exported into an European Union country, export is subject to prior authorisation of the Ministry for the Energy Transition and Demographic Challenge; and

(3) electricity export is subject to prior notification to the System Operator, which may deny the sale where it would put the national supply at risk.

(c) Becoming an energy trader in Spain requires the relevant company to:

(i) be a validly incorporated company with the capacity to sale and purchase electricity with no restrictions at all for the development of such activity;

(ii) adhere to the operating regulations and instructions of the Spanish electricity market (and provide a guarantee in favour of the System Operator, a guarantee in favour of the Market Operator, and, whenever the access to the distribution network is directly contracted by the trader on behalf of the consumers, a guarantee in favour of the distribution companies); and

(iii) submit before the Spanish Ministry for the Energy Transition and Demographic Challenge, and, where the trading activity would be rendered in just one or several Autonomous Communities, before the competent regional Authorities, a communication in the format legally established notifying its will to initiate the electricity trading activity, together with a statement of liability on the fulfilment of the requirements established for the development of such activity.

(ii) Licenses, permit and approvals for Individual Contracts relating to <u>emission rights</u>

Pursuant to Article 11.1 of Law 1/2005, allowances may be transferred between: (i) persons (both individuals and legal entities) within the European Union and (ii) persons within the European Union and person in third countries, subject to the allowances mutual recognition mechanism provided for in Article 25 of Directive 2003/87/EC, of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC).

In accordance with articles 2.d) and 11.4 and 5 of Law 1/2005, transfer of allowances takes place when the contract from which the transfer of allowances arises is recorded at the Spanish section of the European Union Registry for allowances, without the need for a prior licence, authorisation or regulatory approval. Likewise, the ownership published by that Registry is assumed to be legitimate and the third party acquiring an allowance from a person recorded at the same for consideration and in good faith without gross negligence will not be subject to adverse claims.

In accordance with Law 1/2005 and Royal Decree 1264/2005, dated 21 October, which regulates the organisation and operation of the Spanish section of the European Union Registry, it is worth noting that:

(a) pursuant to Article 25.4 of Law 1/2005 and Article 4 of Royal Decree 1264/2005, the Spanish section of the European Union Registry should contain at least the following trading accounts (*cuentas de haberes*): (i) a trading account for each facility, in the owner's name; (ii) a trading account for each group of facilities, in the nominee agent's name, and (iii) a trading account for each individual or legal entity with address within the European Union that is party to a transfer of rights;

(b) pursuant to Articles 11.2 and 3 of Law 1/2005, in order for the owner of a facility to which allowances had been assigned under the Spanish National Allocation Plan to be able to transfer the allowances to a third party, such owner must have recorded such allowances in its name in a trading account at the Spanish section of the European Union Registry. In turn, the acquisition of allowances by an individual or legal entity that is not an owner of a facility will require the prior opening of a trading account at the Spanish section of the European Union Registry, provided such individual or legal entity does not hold an account in the national allowance registry of another Member State of the European Union (or in the allowance registry of a third country with a reduction or limitation commitment under the Kyoto Protocol, provided there has been a prior acknowledgement of the same in an international instrument);

(c) where the central administrator appointed by the European Commission detects irregularities in relation to a transaction involving the transfer of allowances and informs the Spanish section of the European Union Registry of this, that Registry will temporarily suspend the registration of that transaction and any other in which the corresponding allowances are involved until the irregularities are resolved (Article 28 of Law 1/2005); and

(d) any suspensions of the entitlement to transfer allowances must be recorded at the Spanish section of the European Union Registry (Article 25.4 of Law 1/2005).

Natural Gas:

Please note that:

(a) An exchange contract (which in our view, includes the EFET General Agreement and any Individual Contract the EFET General Agreement) is unenforceable in this jurisdiction if (i) it involves the currency of any member of the International Monetary Fund and (ii) it is contrary to the exchange control regulations of any member of the International Monetary Fund maintained or imposed consistently with the International Monetary Fund Agreement. In our opinion the General Agreement is not contrary to any exchange control regulations maintained or imposed by this jurisdiction.

(b) A Party intending to trade natural gas with a counterparty organised in this jurisdiction will be subject to the following:

A distinction must be drawn between gas purchases and gas sales by Parties incorporated in Spain.

(i) Sales of gas by Spanish Parties:

Gas sales by Spanish counterparties to purchasers located outside Spain are not subject to any license, permit or approval. Notwithstanding this, Article 101 of Law 34/1998 entitles the government to require prior administrative consent for gas exportations where there is a gas shortage or the safety of the gas installations and network is at risk.

Conversely, gas sales by Spanish counterparties to purchasers located in Spain amount to carrying out gas trading activities in Spain which are subject to the prior communication of the initiation of the gas trading activity to the competent Administration (Article 80 of Law 34/1998). Once the relevant communication has been made, no further license, permit or approval is required in order to enter into any Individual Contract.

(ii) Purchase of gas by Spanish Parties:

According to Article 61 of Law 34/1998, natural gas may only be incorporated into the gas system by: (a) gas traders; (b) gas direct consumers in the market (*consumidores directos en mercado*) for their own consumption; (c) transmission operators for the minimum LNG filling level, transmission gas pipelines, storage and distribution networks, and for all other functions determined by the Government that do not have gas supply as final purpose; (d) the technical system operator, for all functions determined by the Government that do not have gas supply as final purpose; and (e) the Spanish oil stockholding agency (CORES, for *Corporación de Reservas Estratégicas de Productos Petrolíferos*). Please note that gas trading by a Spanish or a EU entity is subject to the prior communication before initiating the trading activity for the first time (Article 80 of Law 34/1998). Once the relevant communication has been made, no further license, permit or approval is required in order to enter into any Individual Contract.

As for purchases of gas by Spanish parties in order for the gas to be on-sold outside Spain, they are not subject to any license, permit or approval.

D. RESERVATIONS

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

1. ENFORCEABILITY OF CLAIMS

1.1 The terms "enforceable", "enforceability", "valid", "legal", "binding" and "effective" (or any combination thereof) where used in section III above, mean that the obligations assumed by the Parties to the relevant EFET General Agreement are of a type which Spanish law generally recognises and enforces. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the relevant Agreement. In particular, enforcement before the courts of Spain will in any event be subject to:

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

(b) the general principle of good faith. Courts may not grant enforcement in the event they take the view that a right has not been exercised in good faith or that it has been exercised in such a manner as to constitute an abuse of rights (*abuso de derecho*); and

(c) the availability of defences such as, without limitation, fraud, duress, error, *force majeure*, unforeseen circumstances, misrepresentation, undue influence, fraud, abatement, frustration, counterclaim or statutory limitations.

1.2 The counterparty (i.e. *adherente*) of the party proposing a standardised agreement (i.e. *predisponente*) is protected by Law 7/1998, dated 13 April, on *Condiciones Generales de la Contratación* (i.e. Standard Terms Act), even if the counterparty is not a consumer. Pursuant to such Law 7/1998, any lack of clarity in the standard form shall be interpreted in favour of the counterparty; contradictions amongst general and particular conditions shall be solved by making prevail the most favourable for the counterparty, and stipulations contrary to mandatory provisions shall be void. Notwithstanding this, Law 7/1998 shall only apply where one of the parties was prevented *de facto* (due to its weak bargaining position) from negotiating the terms and conditions of the EFET General Agreement.

1.3 Under the laws of this jurisdiction, where any Party is vested with a discretion or may determine a matter, the laws of this jurisdiction may require that such discretion is exercised or determination made reasonably. Any provision in the EFET General Agreement, the EFET Credit Support Annex or any Individual Contracts providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any Party thereto. The courts of this jurisdiction may regard any calculation, determination or certification as no more than prima facie evidence of the matter calculated, determined or certified.

1.4 Under the laws of this jurisdiction, a party to an agreement is not entitled to terminate it upon default by the other party of obligations, covenants or undertakings unless such default materially affects an essential obligation (and not an ancillary or complementary obligation which does not prevent the creditor, due to its non-materiality, from achieving the economic purpose of the agreement)

2. INSOLVENCY LAWS

2.1 General

Unless otherwise expressly specified in this Opinion Letter, the validity and enforceability of the obligations of the Parties under the EFET General Agreement are subject to the laws governing insolvency or liquidation proceedings and to other laws of general application relating to or affecting the enforcement of creditors' rights and remedies.

2.2 Disposals after insolvency

Pursuant to Article 106 of the Insolvency Law, any disposition of property made or agreements entered by a party subject to Insolvency Proceedings after the declaration of insolvency without the consent or the cooperation of the Insolvency Representatives or, where applicable, the insolvency court are voidable and can be nullified.

Therefor, Individual Contracts entered into or transfers of Collateral after the opening of the Insolvency Proceeding without the consent or approval of the Insolvency Representatives can be avoided and, accordingly, might not be capable of inclusion in the netting calculations under the Close-Out Netting Provisions but this would not impair the effectiveness of the Close-Out Netting Provisions in respect of Individual Contracts entered into, or transfers of Collateral made, before the opening of such Insolvency Proceedings or otherwise authorised and approved by the Insolvency Representatives.

Moreover, as discussed above, Article 15.2 of RDL 5/2005 (implementing Article 8.2 of the FCD) provides that where a Financial Collateral Arrangement has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of, Insolvency Proceedings, it shall be legally enforceable and binding on third parties if the Collateral Taker can prove that it was not aware, nor should have been aware, of the commencement of such Insolvency Proceeding.

2.3 Scope of application of Law 6/2005: Banks

The scope of application of Law 6/2005 in respect of Banks is not fully clear as follows.

Article 2.1.a) of Law 6/2005 provides that it shall apply to Spanish Banks which either have a branch in other Member State or provide services on a cross-border basis in other Member State, so that Spanish Banks which do not provide services abroad should fall beyond the scope of Law 6/2005.

However, Article 1.1 of the BWUD provides that it applies to credit institutions and their branches set up in Member States other than those in which they have their head offices.

Therefore, and taking into account the so-called "principle of consistent interpretation" built by the EU Court of Justice (*Marleasing* case among others), our opinion is that the conflict of law rules set out in Law 6/2005 (including Articles 8.1.e) and 8.1.(g)) should apply to any Insolvency Proceeding in respect of any Spanish Bank.

2.4 Scope of application of Law 6/2005: Investment Firms

Pursuant to Article 1(3) of the BWUD, the BWUD applies to any 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 ("**CRR Investment Firms**") and to their branches located in Member States other than those in which they have their head offices.

In turn, point (2) of Article 4(1) of Regulation 575/2013 excludes from the definition of CRR Investment Firms those investment firms "*which are not authorised to provide the ancillary service referred to in point (1) of Section B of Annex I to Directive 2004/39/EC, which provide only one or more of the investment services and activities listed in points 1, 2, 4 and 5 of Section A of Annex I to that Directive, and which are not permitted to hold money or securities belonging to their clients and which for that reason may not at any time place themselves in debt with those clients*" (the "**CRR Excluded Investment Firms**").

Law 6/2005 is intended to implement the BWUD. However, its scope of application is not expressly limited to the CRR Investment Firms, so that, in our view (which has not been tested before the Spanish courts), it should apply to any "investment firms" as defined in Directive 2004/39/EC (including, therefore, the CRR Excluded Investment Firms).

2.5 Supply Agreements

Pursuant to Articles 599.3 and 619.3 of the Insolvency Law (in line with Article 7.6 of the Restructuring Directive), any 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 cannot be validly terminated by reason of the occurrence of a Winding-up, Insolvency or Attachment constituted by the opening of a PRF Proceeding.

2.6 Public Authorities

Insolvency Law is not applicable to Public Authorities, without Spanish laws contemplating the liquidation or winding-up of public authorities. Moreover, they do not provide either for any general moratorium or standstill applying to the liabilities of Public Authorities.

However, if a Public Authority becomes *de facto* insolvent, a law (or equivalent instrument) might be passed by the relevant bodies (for instance, the Spanish Parliament in relation to Public Authorities created by the Kingdom of Spain) providing for a specific proceeding for the liquidation thereof, including rules relating to the realisation of its assets and the payment or write-down of their outstanding liabilities.

Furthermore, the relevant bodies might rather approve a law (or equivalent instrument) providing for a moratorium or standstill of the liabilities of the insolvent Public Authority.

The impact (if any) of any such law (or equivalent instrument) on the enforceability of the Close-Out Netting Provisions will depend on the specific scope and contents of the relevant legal instrument, which in turn will be determined on a case-by-case basis by the relevant body passing it.

3. PROCEDURAL LAW

3.1 Any enforcement of the EFET General Agreement, the EFET Credit Support Annex and any Individual Contracts thereunder before the Spanish courts will be subject to the rules of civil procedure as applied by the Spanish courts. In this respect, please note, without limitation, that in accordance with such rules:

(i) foreign language documents must be translated into the Spanish language;

(ii) the rules of evidence in any judicial proceeding cannot be modified by agreement of the parties, and consequently any provisions of any agreement in which calculations and/or determinations made by the parties thereto are to be deemed conclusive in the absence of manifest error, may not be upheld by Spanish courts;

(iii) Spanish courts may require evidence of the foreign law in accordance with Article 281.2 of the Spanish Civil Proceedings Act and may apply Spanish law in exceptional circumstances where the relevant foreign law has not been evidenced pursuant to Article 33 of Law 29/2015 on international legal cooperation in civil matters (*Ley de cooperación jurídica internacional en materia civil de 30 de julio de 2015*);

(iv) service of process for any proceedings before the Spanish Courts must be performed in accordance with Spanish laws of civil procedure;

(v) the taking of concurrent proceedings in more than one jurisdiction in which the Regulation (EU) No. 1215/2012 of the European Parliament and the Council, of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgements on Civil and Commercial matters (recast) is applicable may be precluded by the provisions of that Regulation; and

(vi) as regards jurisdiction generally, the Courts have powers to stay proceedings if concurrent proceedings are brought elsewhere.

4. DEFAULT INTEREST AND INDEMNITIES BETWEEN PARTIES

4.1 There is some possibility that a Spanish court would hold that a judgment on an Agreement would supersede such Agreement so that any obligations relating to the payment of interest after judgment would not be held to survive judgment.

4.2 Any provision of an Agreement (or any communication issued pursuant thereto) purporting to require a Party to indemnify another person against the costs or expenses of proceedings in the Spanish courts is subject to the discretion of the court to decide whether and to what extent a party to such proceedings should be awarded the costs or expenses incurred by it in connection therewith.

5. COLLATERAL TRANSFERRED BY PUBLIC ADMINISTRATIONS

Pursuant to the second paragraph of Article 135.1 of the Spanish Constitution, payment of interest and principal of "public debt of the Administrations" will enjoy absolute priority (hereinafter, the holders of any such public debt will be referred to as "**Priority Creditors**").

Whilst there is not full consensus as to the meaning of the term "public debt" for these purposes, it is likely that it does not comprise claims under the Agreement, so that the Solvent Party would not be regarded as a Priority Creditor. Should the Solvent Party not be treated as a Priority Creditor, the transfer of Cash as Eligible Credit Support would be contrary to Article 135 of the Spanish Constitution, it being unclear whether it would be either fully null and void or, conversely, merely unenforceable against any Priority Creditors. Moreover, even if the Solvent Party were to be treated as a Priority Creditor, it is debatable whether Article 135 of the Spanish Constitution is intended or not to provide for a *pari passu* rule among all of the Priority Creditors, there being theoretical arguments to support both positions.

6. OTHER QUALIFICATIONS

6.1 We express no opinion as to matters of fact.

6.2 We express no opinion as to the validity and enforceability of any provisions of the EFET General Agreement other than those to which express reference is made in this opinion.

6.3 The opinions expressed in this Opinion Letter are subject to the effects of any United Nations, European Union or Spanish sanctions or other similar measures implemented or effective in Spain with respect to any Party to an Agreement which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted other similar measures apply, or is otherwise the target of any such sanction or other similar measures.

This Opinion Letter (i) is for the sole benefit of EFET and its members, (ii) may not be relied upon by, or disclosed to, any other person or legal entity without EFET's or our prior written approval but (iii) may be made available by EFET members to the appropriate regulatory authorities.

Yours faithfully,

José Manuel Cuenca Miranda
Clifford Chance, S.L.P.

Appendix A

Types of Opinion Counterparties

1. "**Corporations**" (limited liability companies or stock corporations) (*sociedades de responsabilidad limitada* or *sociedades anónimas*, respectively), including publicly-owned Corporations.

2. "**Partnerships**" (*sociedades mercantiles* other than Corporations).

2. "**Banks**" (*Entidades de Crédito*)

3. "**Investment Firms**" (*Empresas de Servicios de Inversión*)

4. "**Insurance Undertakings**" (*Entidades Aseguradoras*)

5. "**Investment Funds**" (*Instituciones de Inversión Colectiva*)

6. "**Pension Funds**" (*Fondos de Pensiones*)

7. Any other financial institutions as defined in Article 4(5) of Directive 2006/48/EC of the European Parliament and of the Council, of 14 June 2006, relating to the taking up and pursuit of the business of credit institutions (recast);

8. "**Public Authorities**", including the Kingdom of Spain, any Regional Authority (*Comunidades Autónomas*), any Local Authorities (including Municipalities and associations of Municipalities) and any "Quasi Governmental entities" (*i.e.*, entities which have been incorporated by any other Public Authority under public law as opposed to those incorporated as Corporations, including *organismos autónomos* and *entidades públicas empresariales*).

Appendix B

Transactions under the EFET General Agreement

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 1

INSOLVENCY AND PRE-INSOLVENCY PROCEEDINGS

1. Insolvency proceedings

The general insolvency proceeding to which a Party could be subject under the laws of Spain is the so-called *concurso* (bankruptcy proceedings for individuals and legal companies) regulated in the Restated Text of the Insolvency Law (*Texto Refundido de la Ley Concursal*), approved by means of the Royal Legislative Decree 1/2020, of 5 May (the "**Insolvency Law**"), the founding principle of the Insolvency Law being the preservation (to the extent possible) of the continuation of the business and, therefore, composition between creditors and debtor being favoured.

The application for Insolvency Proceedings may be filed either by the debtor or by its creditors. The directors of a company are legally obliged to file for insolvency when it becomes insolvent, i.e., where it fails to meet its current outstanding obligations on a regular basis. This obligation must be fulfilled within the two months following the date on which debtor became, or should have become, aware of the insolvency situation. Furthermore, directors are entitled (but not required) to apply for Insolvency Procedures to be commenced when they expect that the company will be unable to meet its payment obligations on a regular basis within the next three months.

Once (and if) the application has been accepted by the relevant court, it will issue an order declaring the insolvency of the company. Such order shall also specify:

(i) the identity of the receiver appointed by the court; and

(ii) the scope of the restrictions imposed on the debtor. The general rule is that, in the case of voluntary Insolvency Proceedings, the receiver supervises the company's activities, authorising (or refusing to authorise) any payment or transaction. In the case of compulsory Insolvency Procedures, the debtor will cease to manage its estate and the court receiver will take control of the company being in charge of all further decisions.

Once the insolvency has been formally declared, the first stage of the proceeding will consist in the identification and classification of all of the creditors by the court receiver.

The second stage may lead either to (a) a composition between the debtor and its creditors or (b) the liquidation of the debtor's assets:

(a) a composition (*convenio*) involving a moratorium and/or a partial reduction of debts may be entered into between the debtor and the Creditors Meeting. The majority required for approval of a composition is 50% of ordinary claims for compositions involving a debt reduction of 50% (or less) or a moratorium of 5 years (or less) and 65% otherwise (i.e., any higher reduction or longer moratorium).

The composition is not effective until approved by the court, which can refuse such approval in a number of cases (including where there the composition has been unduly approved by the Creditors Meeting because of a wrong calculation of the relevant majority or it is proven that the debtor will not be able to comply with the arrangement); and

(b) if no composition is reached (or, when after being approved, it cannot be fulfilled by the debtor), the company will be wound-up and the court receiver shall liquidate the debtor's assets by selling them in order to distribute the money obtained among the creditors according to their ranking.

2. Pre-insolvency proceedings

2.1 PRF Proceedings

The Insolvency Law has been reformed in September 2022 in order to bring it in line with the provisions of the Restructuring Directive.

After the reform, the Insolvency law contemplates a full regulation of:

(i) the procedures to be conducted for the approval of preventing restructuring plans (*planes de reestructuración*) (that are regulated Articles 614 to 684); and

(ii) the measures intended to facilitate negotiations on preventive restructuring plans (*comunicación de apertura de negociaciones con los acreedores*) (that are regulated in Articles 585 to 613),

(together, the "**PRF Proceedings**").

It is worth noting that PRF Proceedings do not apply to:

(a) insurance undertakings or reinsurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC;

(b) credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;

(c) investment firms or collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013;

(d) central counter parties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;

(e) central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014;

(f) other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU; and

(g) Public Authorities.

2.2 RR Proceedings

Banks (other than the *Instituto de Crédito Oficial*) and Investment Firms may generally be subject to recovery and resolution proceedings ("**RR Proceedings**") under Law 11/2015, which implements Spain the provisions set out in the BRRD.

Law 11/2015 applies to:

(a) any BWUD Institutions except for those Investment Firms which are not subject to the initial capital requirement of EUR 730,000 (set forth in Article 28.2 of the Directive 2013/36/EU) or which: (a) provide only one or more of the following investment services: the reception and transmission of investors' orders for financial instruments, the execution of investors' orders for financial instruments, the management of individual portfolios of investments in financial instruments and investment advice, (b) are not authorised to provide custody services and (c) do not hold client money or securities[2] (the "**BRRD Excluded Investment Firms**");

(b) financial institutions that are established in Spain when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in point (c) or (d), and is covered by the supervision of the 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 established in Spain;

(d) parent financial holding companies and parent mixed financial holding companies in other EU Member States, whose supervision on a consolidated basis corresponds to the Spanish banking or securities regulators; and

(e) branches of BWUD Institutions that are established outside the EU in accordance with the specific conditions laid down in that Law.

The BRRD has created a new framework for the resolution of failing credit institutions and investment firms across the European Union. As this was introduced in the form of a European Union directive, it was necessary for the BRRD to be implemented into national law; in Spain this was achieved pursuant to Law 11/2015.

In addition to the BRRD, Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 ("**SRMR**") sets out uniform rules and procedures for

[2] Please note that such exclusion comes from the original exclusion set out in the original text of BRRD. Pursuant to such text, BRRD did not apply to: (i) Investment Firms that were not subject to the initial capital requirement laid down in Article 28(2) of Directive 2013/36/EU and to (ii) Investment Firms which are not authorised to provide the ancillary service referred to in point (1) of Section B of Annex I to Directive 2004/39/EC, which provide only one or more of the investment services and activities listed in points 1, 2, 4 and 5 of Section A of Annex I to that Directive, and which are not permitted to hold money or securities belonging to their clients and which for that reason may not at any time place themselves in debt with those clients.

However, BRRD was amended in 2019 to the effect that BRRD currently applies to any Investment Firms other than those that are not subject to the initial capital requirement of EUR 750,000 laid down in Article 9(1) of Directive (EU) 2019/2034 of the European Parliament and of the Council. This notwithstanding, such amendment has not yet been implemented in Spain.

the resolution of those credit institutions and certain investment firms which are established in member states of the European Union participating in the "single supervisory mechanism"[3] established under Regulation (EU) No. 1024/2013 of the European Parliament and of the Council of 15 October 2013 (the "**SSM**" and the "**SSM Regulation**", respectively) (that is, member states within the Eurozone) and groups of companies containing such a credit institution or investment firm. Since the SRMR is a European Union regulation, it was not necessary to implement this into national law.

Spanish Credit Institutions regarded as being "significant" (within the meaning given to such term in Article 6 of the SSM Regulation) will be subject to the SRM in the SRMR. Accordingly, the decision to open a resolution proceeding under the BRRD will be made by the single resolution board established under the SRMR (the "**SRB**") (instead of the relevant national authorities) in the first place, whist the implementation of measures deriving therefrom will be within the responsibility of the FROB under the aegis of the SRB.

[3] As defined in Article 2(9) of the SSM Regulation.