The European Federation of Energy Traders

Keizersgracht 62-64

1015 CS Amsterdam

The Netherlands

29th March 2022

Dear Sirs,

Legal Opinion Regarding Master Netting and related Cross-Product Credit Support Documentation - Spain

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 a consolidated and updated opinion letter in respect of the laws of the Kingdom of Spain ("**this jurisdiction**") in relation to a number of issues and questions raised by EFET as detailed in the instruction letter (the "**Instruction Letter**") sent on October 2020 in respect of, amongst others, the enforceability of the close-out netting and collateral provisions of the following documents (the "**Opinion**"):

1. The Cross Product Master Agreement published in February 2000 by The Bond Market Association (the "**CPMA Form**"), as further modified by the European Commodities Schedule published by EFET and the International Energy Credit Association ("**IECA**") on 23 June 2003 (the "**Schedule**") (collectively, the CPMA Form, as modified by the Schedule is referred to as the Cross Product Master Agreement (the "**CPMA**");

2. The Cross-Product Credit Support Annex (the "**CPMA CSA**") to the CPMA published by EFET on 23 June 2003;

3. The Master Netting Agreement published by EFET in June 2010 (the "**MNA**") (collectively, the CPMA and the MNA are referred to as the "**Master Agreements**"); and

Av. Pau Casals, 22, 4ª – 08021 Barcelona – Tel 34 93 611 92 32
Paseo de la Castellana, 8, 5º - 28046 Madrid – Tel 34 91 061 24 50

4. The Credit Support Annex to the MNA published by EFET in February 2011 (the "**MNA CSA**") (collectively, the CPMA CSA and the MNA CSA are referred to as the Credit Support Annexes, "**CSAs**").

The Master Agreements and the CSAs are together referred to as the "**Agreements**".

2. DEFINED TERMS AND INTERPRETATION

Capitalised terms used in this Opinion and not otherwise defined herein shall have the meaning ascribed to them in:

(a) the relevant Agreement; or

(b) in the Instruction Letter (in particular, Underlying Agreement, Uncovered Transactions / Additional Netted Agreement and Close-Out Events) which, for the purposes herein, forms part of this Opinion.

3. SCOPE OF REVIEW

We have been asked to opine:

(a) with respect to (i) each Master Agreement; (ii) each CSA; and (iii) each Master Agreement combined with the relevant CSA;

(b) with respect only to those issues identified below relating to the enforceability of close-out netting under each Master Agreement (and application of Eligible Credit Support to such netting process under each CSA) in the context of a party insolvency;

(c) assuming either a choice of English or German law as governing such documents; and

(d) against an entity organized and existing in, and subject to the insolvency courts of, this jurisdiction.

4. DOCUMENTS REVIEWED

For the purposes of issuing this Opinion, we have reviewed:

(a) the Cross-Product Master Agreement (Version 1), published by The Bond Market Association (TBMA) on 16 February 2000;

(b) the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (version 1.0. published on 23 June 2003);

(c) the Guidelines (version 1.0. published on 23 June 2003);

(d) the EFET Cross-Product Credit Support Annex to the Cross-Product Master Agreement (version 1.0, published on 23 June 2003);

(e) The Master Netting Agreement (Version 1) published by EFET on 1 June 2010;

(f) the Election Sheet to the EFET Master Netting Agreement (version 1.0, published on 1 June 2010);

(g) the Guidance Notes to the EFET Master Netting Agreement (version 1.0, published on 1 June 2010); and

(h) the EFET Credit Support Annex to the EFET Master Netting Agreement (version 1.0, published on 1 February 2011).

5. SPANISH LAW AND JURISDICTION

This Opinion relates only to Spanish law as applied by the Spanish courts as of the date stated herein above. We express no opinion on the laws of any other jurisdiction, even where, under Spanish law, a foreign law falls to be applied.

In this Opinion, legal terms 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 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.

6. ASSUMPTIONS AND RESERVATIONS

The opinions given in this Opinion 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*) of this Opinion. The opinions herein are strictly limited to the matters expressly stated in Section C (*Opinions*) and do not extend to any other matters.

7. POTENTIAL PARTIES

The opinions herein are given in respect of:

(a) partnerships or companies formed and registered under either the Commercial Code 1885, or the Spanish Royal Legislative Decree 1/2010, dated 2 July, on Limited Liability Companies (*Ley de Sociedades de Capital*) (or one of their predecessors), having its registered office in Spain and classified as professional clients in Article 4(1) of EU Directive 2014/65 ("**MiFID II**");

(b) Spanish credit institutions as defined in Article 4(1) of EU Regulation 575/2013, on prudential requirements for credit institutions;

(c) Spanish investment firms as defined under Article 4(1) of EU Directive 2014/65 ("**MiFID II**");

(d) Spanish insurance undertakings as defined under Article 13(1) of 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);

(e) Spanish mutual funds (*instituciones de inversión colectiva*) and Spanish investment fund management companies (*sociedades gestoras de instituciones de inversion colectiva*) acting on behalf of such schemes;

(f) publicly-owned companies (*sociedades mercantiles públicas*) classified as professional clients under Article 4(1) of EU Directive 2014/65 ("**MiFID II**"); and

(g) quasi-governmental entities (*organismos autónomos and entidades públicas empresariales*).

Spanish municipalities (*ayuntamientos*) and provinces (*provincias*) can enter into derivative transactions for the specific purpose of hedging interest rate risk and exchange rate risk (as per Article 48 of the Revised Text of the Law on Local Finance, approved by Royal Legislative Decree 2/2004, dated 5 March). Although we are of the (untested) view that Spanish municipalities and provinces can also enter into any derivative transactions for hedging purposes related to any other risks they are exposed to (inflation, for instance), we have not considered the possibility of Spanish municipalities or provinces acting as counterparties since, as a matter of fact, they are unlikely to be exposed to any of the risks that may be hedged by an Underlying Agreement or any Uncovered Transaction / Additional Netted Agreement. Likewise, no mentions are made to the Spanish and regional governments entering into an Underlying Agreement or any Uncovered Transaction / Additional Netted Agreement.

As regards publicly-owned companies and quasi-governmental entities, it is worth noting that:

(a) publicly-owned companies (*sociedades mercantiles públicas*) are treated in the same way as ordinary corporations, so that our conclusions in this Opinion would not change if a Spanish party was a publicly-owned company;

(b) as for quasi-governmental entities (*organismos autónomos* and *entidades públicas empresariales*) please note that, as a matter of Spanish law, they cannot be subject to insolvency proceedings and can only be dissolved by means of a law. Therefore, our conclusions in Section C would not apply where a quasi-governmental entity is a party to a Master Agreement. Whilst the obligations of quasi-governmental entities might be affected by a moratorium or standstill, it is not possible to determine the effects of such moratorium on the relevant Master Agreement as such moratorium must be declared or imposed by means of a specific law, which will regulate those effects on a case-by-case basis; and

(c) finally, there are no hard and fast rules on status and authority of publicly-owned companies (*sociedades mercantiles públicas*) and quasi-governmental entities (*organismos autónomos* and *entidades públicas empresariales*).

In principle, publicly-owned companies (*sociedades mercantiles públicas*) are treated in the same way as ordinary corporates. However, it must be noted that most of them are created by means of a law, such laws sometimes providing for specific rules on authority.

As for quasi-governmental entity (*organismos autónomos* and *entidades públicas empresariales*), they are always created by means of a law, its status and authority being specifically tailored in such laws. There are, however, some general rules, including, *inter alia*, the following ones:

(a) those assets of any quasi-governmental entity (*organismos autónomos* and *entidades públicas empresariales*) which are linked to the provision of public services or public functions together with shareholdings in publicly-owned companies (*sociedades mercantiles públicas*) enjoy immunity from attachment; and

(b) submission by *organismos autónomos* to foreign law, jurisdiction of foreign courts or arbitration in connection with financial contracts will usually require the relevant agreement to be executed by the Chairman (*Presidente*) pursuant the internal resolutions of the relevant entity.

B. ASSUMPTIONS

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

1. That the relevant Master Agreement provides for the inclusion of some of or all the Underlying Agreements; each Underlying Agreement being a Principal Agreement / Netted Agreement. Only those designated Underlying Agreements and the commodities / financial instruments commonly traded thereunder will be covered by the relevant Master Agreement.

2. That on the basis of the terms and conditions of the relevant Master Agreement, the relevant Underlying Agreement (if applicable) and other relevant factors, and acting in a manner consistent with the intentions stated in the relevant Master Agreement and the relevant Underlying Agreement (if applicable), the Parties may over time enter into a number of transactions that are intended to be governed by the relevant Master Agreement either as transactions entered into under the relevant Underlying Agreement or as Uncovered Transactions / Additional Netted Agreements (where such Uncovered Transactions / Additional Netted Agreements will only include long

form confirmations incorporating, in substantially their original form, the terms and conditions of the Underlying Agreements in either Division 1, Part 1, Section A of the Template Default Elections of the CPMA or in the Additional Netted Agreement Rider at Part III of the MNA Election Sheet).

3. That each of the Underlying Agreements and each Uncovered Transaction / Additional Netted Agreement is valid, binding and enforceable in accordance with its own respective terms and conditions except as otherwise indicated below.

4. That each Close-Out Event specified as applicable pursuant to: (i) in respect of the CPMA, the Election for Division 1, Part II, Section A of the model Schedule; or (ii) in respect of the MNA, the Election for Section 3.1, Part I of the Election Sheet is an effective and valid Event of Default under the applicable Underlying Agreement.

5. **CSA assumptions**: That each CSA only contemplates the use of cash or letters of credit as Eligible Credit Support and the scope of this Opinion is therefore limited accordingly. When addressing any questions relating to the rights of a transferor to retrieve collateral from an insolvent entity, the transferor is incorporated or organized under the laws of this jurisdiction. For questions relating to the rights of a transferee to hold collateral and apply and use that collateral in a close-out netting event, the transferee is incorporated or organized under the laws of a jurisdiction other than this jurisdiction. The cash collateral is denominated in a freely convertible currency and is held under the control of the transferee.

6. Each CSA and Master Agreement are entered into by two entities, one of which is a corporation (including a bank or other similar financial institution) duly incorporated or organized under the laws of this jurisdiction.

7. **Multi-branch assumptions.** For the purposes of addressing the multi-branch issues in Section D.1 below, we have assumed: (i) that a counterparty is incorporated or organized in this jurisdiction, but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered overseas offices in other jurisdictions; and (ii) for the purposes of Sections D.2 and 3 below, that an overseas counterparty is incorporated or organized outside this jurisdiction but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered offices in this jurisdiction.

8. **Elections**: (i) in the case of the CPMA, Division 1 of the Schedule; and (ii) in the case of the MNA, the Election Sheet, enables industry participants to tailor the Master Agreement to their own unique commercial, credit and treasury requirements. We assume that no amendments have been made to the Schedule / Election Sheet template. In addition, the Master Agreements necessarily cross-reference certain provisions found in their underlying master agreements (such as close-out and netting

provisions). For such purposes, we cite and rely upon relevant industry opinions regarding the Underlying Agreements.

In addition, we have made the following assumptions which supplement or amend those listed above and based on which this Opinion is also rendered:

9. That transactions as referred to in 2 above will include any of or all the transactions listed in Annex A to the Instruction Letter.

10. That the relevant Master Agreement will incorporate the elections of the model Master Agreement referred to in the Instruction Letter.

11. That the relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA are legally binding and enforceable against both Parties under the laws by which they are expressed to be governed if not subject to 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.

12. That each party has the capacity, power and authority under all applicable law(s) to enter into the relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA; to perform its obligations under the relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA; and that each party has taken all necessary steps to execute, deliver and perform the relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA.

13. 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 relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA and to ensure the legality, validity, enforceability or admissibility in evidence of the relevant Master Agreement, any transactions entered into thereunder and the relevant CSA in this jurisdiction.

14. That each Underlying Agreement, Uncovered Transaction or Additional Netted Agreement is capable of being terminated and closed out in the manner envisaged by the relevant Master Agreement and a Settlement Amount can be determined; and that all Settlement Amounts falling to be determined under the Underlying Agreement, Uncovered Transaction or Additional Netted Agreement are duly determined in accordance with the relevant provisions thereof.

15. That each Underlying Agreement, Uncovered Transaction or Additional Netted Agreement can be amended in the manner envisaged by the Master Agreements.

16. That there is no other agreement, instrument or other arrangement between or affecting the parties to the relevant Master Agreements which conflicts with, overrides, amends, modifies or supersedes the relevant Master Agreement or any Underlying Agreement, Uncovered Transaction or Additional Netted Agreement (save for any such agreement or arrangement in relation to any Underlying Agreement, Uncovered Transaction or Additional Netted Agreement which is effected under the terms of the relevant Master Agreement).

17. That the Election Sheet to the MNA and the Schedule to the CPMA has been properly completed by both Parties; and that each Close-Out Event specified as applicable pursuant to the elections made under Section 3 of Part I of the Election Sheet to the MNA or under Division 1, Part II, Section A of the Schedule to the CPMA is an effective and valid Event of Default under the applicable underlying Netted Agreement, Principal Agreement or Uncovered Transaction.

18. That the relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA are entered into prior to the formal commencement of any Insolvency Proceedings against either Party, for bona fide commercial reasons and on arms' length terms.

19. That both Parties have all governmental licenses, consents and approvals required by any applicable laws to enter into, and perform its obligations under, the relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA and that the relevant Master Agreement, any transactions entered into thereunder and the relevant CSA comply with the relevant sectors legislation and regulations in all relevant jurisdictions.

20. That the relevant Master Agreement, the Underlying Agreements, any transactions entered into thereunder and the relevant CSA are mutual between the Parties. "Mutuality" generally exists where each Party is personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in respect of which a Party has a joint interest (including partnership) or in respect of which a Party's rights or obligations or any interest therein have been assigned, charged, or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law.

21. That the "centre of the main interest" (within the meaning in the EU Parliament and Council Regulation No. 2015/848 of 20 May 2017 (the "**EU Insolvency Regulation**") and in Royal Decree Legislative 1/2020, of 5 May, approving the consolidated text of the insolvency law (the "**Insolvency Law**")) of any Spanish party other than a credit institution or insurance undertaking is located in Spain.

22. That no transfer of Eligible Credit Support is made after the opening of an insolvency proceeding.

23. That the relevant CSA has been entered into simultaneously to the execution of the relevant Master Agreement and the first transaction thereunder.

C. OPINIONS

On the basis of the assumptions and subject to the reservations respectively set out in Section B and Section F herein, we are of the following opinions:

A. Netting / Set-off Absent an Insolvency

Model CPMA / Model MNA

1. Your opinion on whether a transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement would be validly included in each model Master Agreement, assuming either a choice of English or German law as governing such documents (save of the trading terms and conditions of the 2015 NBP Master which is governed by English law). Please elaborate if your analysis depends on whether or not the relevant transaction: (i) was concluded before or after the execution of each Master Agreement; or (ii) makes explicit reference to a Master Agreement or the relevant Underlying Agreement.

Assuming a valid choice of English or German law, a transaction entered into under an Underlying Agreement, or an Uncovered Transaction / Additional Netted Agreement would be validly included in each model Master Agreement where:

(a) the transaction is entered into simultaneously or after the execution of the relevant Master Agreement (including a deemed Master Agreement under a long form confirmation, where such long form confirmation incorporates, in substantially their original form, the terms and conditions of the Underlying Agreements in either Division 1, Part 1, Section A of the Template Default Elections of the CPMA or in the Additional Netted Agreement Rider at Part III of the MNA Election Sheet); and

(b) the transaction makes explicit reference to the relevant Master Agreement or the relevant Underlying Agreement.

2. Your opinion regarding the legality, validity and enforceability of each model Master Agreement (absent an insolvency of either party) to the netting and set-off of obligations due between the parties:

a. under one or more physically settling transactions involving the same commodity or product,

b. under one or more physically settling energy transactions involving two or more different classes or types of commodities or products, and

c. **under a combination of physically and cash settling transactions (transacted under two or more Agreements).**

The close-out netting and set-off of the obligations due between the parties under each model Master Agreement would be generally valid and enforceable in a non-insolvency scenario, as detailed below.

(a) Close-out netting in a non-insolvency scenario

Close-out netting rights under each model Master Agreement will be generally valid and enforceable following a valid early termination for non-insolvency related material reasons, subject to the following considerations:

(i) with respect to non-performance, 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 which are merely accessory or ancillary to the main payment and/or delivery obligations under the relevant contract; and

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

b) Set-off in a non-insolvency scenario

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 reciprocal;

(ii) both claims must be homogeneous (i.e., 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 liquidated (i.e., the due amount must be certain).

The Spanish Civil Code does not specify what are the requirements for the due amount being deemed certain. However, according to the Spanish Civil Proceedings Act dated 7 January 2000 (the "**Spanish Civil Proceedings Act**"), the determination made by a creditor is not sufficient for the amount claimed by it being deemed liquidated 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, a notarial certificate of the accuracy of the calculations made by the creditor must be obtained from a Spanish Notary. The application of Article 572 is subject to the following requirements:

- the due amount must arise out of an agreement executed before to a Spanish public notary;

- the creditor must serve a prior notice stating the due amount on the debtor; and

- such agreement must expressly provide for the application of said Article 572.

Notwithstanding the foregoing, parties may freely agree to contractual provisions waiving any of the requirements provided for in the Spanish Civil Code in respect of statutory set-off. In such case, the relevant requirements for the purposes of the application of Article 153 of the Insolvency Law are likely to be only those agreed by the parties (to the extent that such parties have provided for contractual set-off to operate automatically or, otherwise, a set-off notice be served prior to the opening of the relevant Insolvency Proceeding).

Please find below an analysis of the potential set-off scenarios:

(a) Set-off of claims between parties arising out under a model Master Agreement:

The provisions in a model Master Agreement providing for set-off between parties of claims arising out of such model Master Agreement will be valid and enforceable.

(b) Set-off of claims between parties arising out outside a model Master Agreement:

The provisions in a model Master Agreement providing for set-off between parties of claims arising out outside such model Master Agreement will be valid and enforceable.

(c) Set-off between affiliates or credit support providers:

Any contractual provision in a model Master Agreement 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, provided the Payee assumes the corresponding payment vis-à-vis the relevant affiliate or credit support provider.

Conversely, any contractual provision whereby the amount payable to the Payee under a model Master 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 only to the extent that the relevant affiliates and/or credit support providers have given their consent to such provision.

3. An analysis and your opinion regarding the necessity or efficacy of performing any due diligence (i.e., lien searches, filings etc.) prior to a party entering into each model Master Agreement.

Prior to entering into a model Master Agreement, it would be advisable to check whether a Spanish party is not insolvent. Said can be done by checking the places where insolvency is due to be published, i.e.:

(a) the Spanish Official Gazette (*Boletín Oficial del Estado*) which can be freely accessed on-line at www.boe.es); and

(b) the Public Registry on Bankruptcy (*Registro Público de Resoluciones Concursales*, which can be freely accessed on-line at www.publicidadconcursal.es).

In addition, once the declaration of insolvency is registered at the Mercantile Registry, in retrieving an extract of an entity from the Mercantile Registry such declaration of insolvency should appear.

4. A general discussion of, and your opinion regarding, this jurisdiction's laws relevant to the concepts of close-out netting and set-off of claims between parties, combinations of accounts or such other terminology as is employed in this jurisdiction to address such issues.

Whilst from a scholar standpoint it can be debated whether close-out netting and set-off are similar rights, the laws of this jurisdiction make a distinction between the concepts of close-out netting and set-off, close-out netting encompassing three different phases: (i) termination of the relevant transactions (close-out); (ii) determination of the market values of the terminated transactions; and (iii) set-off of said market values, even including unsettled due amounts. Besides, Law 6/2005 deals with close-out netting and set-off in different provisions.

In addition, whilst pursuant to Article 7.2(e) of the EU Insolvency Regulation the law of the State of the opening of the proceedings shall determine "*the effects of insolvency proceedings on current contracts to which the debtor is a party*", Article 9.1 of the EU Insolvency Regulation provides that "*the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim*". Article 727 of the Insolvency Law has transposed, with *erga omnes* effects, Article 9.1 of the EU Insolvency Regulation.

It has been largely debated whether or not the set-off protection in Article 9 of the EU Insolvency Regulation (and, accordingly, in Article 727 of the Insolvency Law) can be interpreted to encompass close-out netting. We are of the view that, unless the European Court of Justice were to find that Article 9 of the EU Insolvency Regulation encompasses close-out netting, the Spanish courts are likely to interpret that Article 727 of the Insolvency Law does not cover close-out netting as the term set-off (*compensación*) does not encompass the first phase of the full process of close-out netting (i.e., the termination of the relevant transactions).

CPMA CSA / MNA CSA

5. Your opinion on whether the laws of this jurisdiction characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that such transfer would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under each CSA. If so, please opine on whether there is any way to minimize such risk and the consequences of such a re-characterization to ensure the valid transfer of each type of Eligible Credit Support created by the providing party under each CSA.

As a rule, Spanish law does not recognise the enforceability of transfer of title by way of security. Notwithstanding the foregoing, the laws of Spain will characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred (and there will be no risk that such transfers would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under the CSA) to the extent that transfers of cash as Eligible Credit Support meet the requirements set forth in Royal Decree Law 5/2005, of 11 March ("**RDL 5/2005**"), which implements in Spain the Directive 2002/47/EC of the European Parliament and of the Counsel, of 6 June 2002, on financial collateral arrangements.

Those requirements are as follows:

(a) at least one of the parties to the relevant CSA is a Qualifying Party (in which regard we kindly refer you to Section C.B.1 below);

(b) Eligible Credit Support consists only of cash and / or securities (“*valores negociables*”) and other financial instruments, as defined these terms are defined in Annex to RDLeg 4/2015 (together, the “**Qualifying Collateral**”).

In this regard, we assume that a letter of credit 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 and, accordingly, the term "Eligible Credit Support" as used in this Opinion is limited to cash.

Consequently, the point is whether an agreement providing for a type of Eligible Credit Support other than Qualifying Collateral (i.e., characterizing letters of credit as Eligible Credit Support) may benefit from RDL 5/2005 safe harbour provisions. In this regard, we only envisage two potential scenarios:

(i) that the relevant court considers that posting collateral other than Qualifying Collateral by third parties pursuant to a collateral agreement does not jeopardise the application of RDL 5/2005 to Qualifying Collateral; or

(ii) that posting collateral other than Qualifying Collateral results in a recharacterization of the collateral agreement that would prevent the application of RDL 5/2005.

In our opinion, although the literal wording of RDL 5/2005 is better aligned to the second scenario, both the rationality of RDL 5/2005 and good practice considerations play in favour of the first scenario. However, we cannot give a conclusive opinion on this issue, as no cases have been brought before Spanish courts relating to the interpretation of RDL 5/2005 (or former equivalent legal provisions) in this regard.

(c) that the relevant CSA is evidenced in writing;

(d) that Eligible Credit Support is posted under or in connection with a close-out netting agreement (the "**Underlying Netting Agreement**") which "*provides 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*" (in which regard we kindly refer you to Section C.B.1 below);

(e) that each of the transactions entered into under or in connection with the relevant Underlying Netting Agreement is a Qualifying Transaction (in which regard we kindly refer you to Section C.B.1 below).

Please note that, as per Article 30 quinquies of Royal Decree 217/2008, credit institutions and investment firms are barred to accept security interest based on a title transfer over cash or securities belonging to retail clients. Although it is arguable that such prohibition may result in the nullity of the CSA, there are no precedents in this regard, and we cannot provide you a clear opinion on this matter.

Notwithstanding the foregoing, it must be noted that pursuant to Article 8.1 of the EU Insolvency Regulation and Article 730 of the Insolvency Law, the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. Said effects shall be governed by the laws of the Member State where such assets are located. The *in rem* rights referred to in Article 8.1 are as follows:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; and

(d) a right in rem to the beneficial use of assets.

In this regard, it may well happen that, where cash collateral has been transferred by the Spanish insolvent party to a foreign account in the name of a foreign solvent party, the Spanish court conducting the relevant insolvency proceeding may apply the relevant foreign law to decide this issue, irrespective whether the relevant Master Agreement falls or not within the scope of RDL 5/2005.

6. Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, your opinion on whether it will need to take any subsequent action to ensure that its title in the Eligible Credit Support continues. Your opinion should include whether there are any requirements in this jurisdiction necessary or advisable, including any filing registration, notification, stamping, notarization or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval 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.

If the relevant CSA meets the requirements set forth in order for RDL 5/2005 to apply (in which we kindly refer you to our opinions in Section C.A.5 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 as Eligible Credit Support under the CSA 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, except that transfers of Eligible Credit Support which take the form of cash exceeding EUR 3,000,000 made by a foreign party into a Spanish account held by a Spanish party (unless the Spanish party is a credit institution) require the prior obtaining from the Bank of Spain of a Financial Transaction Number ("*Número de Operación Financiera*" or "*NOF*").

Moreover, as discussed in Section C.A.5 above, it may well happen that, where cash collateral has been transferred by the Spanish insolvent party to a foreign account in the name of a foreign solvent party, the Spanish court conducting the relevant insolvency proceeding may apply the relevant foreign law to decide this issue, irrespective whether the relevant Master Agreement falls or not within the scope of RDL 5/2005.

7. Your opinion on the effect, if any, under the laws of this jurisdiction of the right to a providing party incorporated or otherwise organized under this jurisdiction to exchange Eligible Credit Support (for example, by swapping cash for a letter of credit) pursuant to Section 6 of each CSA. Does the presence of consent to substitution by the receiving party have any bearing on this question.

Substitution of Eligible Credit Support under Section 6 of each CSA will be valid and enforceable in Spain to the extent that it meets the requirements in order for RDL 5/2005 to apply (in which we kindly refer you to our opinions in Section C.A.5 above). Notwithstanding the foregoing, posting a Letter of Credit as Eligible Credit Support will result in a recharacterization issue, since Letters of Credit are deemed personal obligations under Spanish law that cannot be Qualifying Collateral (the only admitted exception are some loan obligations pursuant to Article 7(c) of RDL 5/2005). In this regard, it is worth to mention that Letters of Credit would not be affected by the opening of insolvency unless the wording of the relevant Letter of Credit provides otherwise as per Article 399 of RDLeg 1/2020. However, it is highly advisable that the Letter of Credit expressly covers all and any obligations arising out of or otherwise connected to close-out netting, since close-out netting is a type of novation that causes the termination of existing transactions and consequently the Letter of Credit's scope may be a matter of discussion if limited to the affected transactions.

Please note that the transferee's consent will always be required as provided by Section 6 of the CSAs.

8. Your opinion on whether the parties' agreement on the governing law of each CSA and their submission to jurisdiction would be upheld in this jurisdiction, and what would be the consequences if they were not.

Provided that each CSA expressly sets forth that is a part of and is subject to the related relevant Master Agreement, 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 each CSA 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**") provided that each CSA is of international nature. Such choice of law is restricted to contractual issues, provided that no mention is made to non-contractual obligations as allowed by Article 14 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (**"Rome II"**).

When applying the substantive law of the Federal Republic of Germany, the law of England or the law of any jurisdiction other than Spain as the law governing the CSA, 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 CSA have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the CSA 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 relating to insolvency proceedings shall be considered as mandatory rules irrespective of the law otherwise applicable to the CSA;

(c) may refuse to apply German law, English law or the law of any other jurisdiction other than Spain in relation to the CSA 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 CSA is *prima facie* manifestly incompatible with the Spanish public policy, except for:

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

    (ii) those provisions in the CSA (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 non-defaulting party as a result of the default in question;

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

    (iv) those provisions in the CSA (if any) which provide that, in the event of any invalidity, illegality or unenforceability of any provision of such CSA, the remaining provisions thereof shall not be affected or impaired;

(v) any provision of the CSA which allows any party to terminate such CSA as a result of technical defaults which do not materially affect the interests of such party or which violates Article 156 of the Insolvency Law; and

(vi) any provision in the CSA stating that any representation or communication shall be deemed to have been made or 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.

Spanish courts may require evidence of the English or, as applicable, German law in accordance with Article 281 of the Spanish Civil Proceedings Act.

Finally, we are also of the opinion that the submission to jurisdiction and the arbitration provisions of the CSA will be recognised in this jurisdiction. As a general rule and as of the date this Opinion is rendered, jurisdiction clauses related to English courts would be submitted to the Hague Convention of 30 June 2005 on Choice of Court Agreements and those related to German courts, to Regulation (EU) No 1215/2012 of the European Parliament and of the Council, of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Likewise, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and the European Convention on International Commercial Arbitration are in force in Spain.

Notwithstanding the foregoing, it would be highly advisable to be more precise regarding such clauses' scope, provided that:

(a) As per the Spanish Supreme Court judgement dated as of 27 June 2017 (case 409/2017), the framework agreements jurisdiction and arbitration clauses' scope does not include the future transactions if this consequence is not expressly set forth. Since the CSAs are mere annexes of the Master Agreements, this precedent should not be applicable in our untested opinion, but it may be a matter of discussion.

(b) It is uncertain that non-contractual claims may be covered by the present wording of the governing law and jurisdiction clauses.

9. Your opinion as to whether under local law of this jurisdiction, each CSA complies with any mandatory margining requirements applicable under the laws of this jurisdiction.

Each CSA will comply with any mandatory margining requirements applicable under the laws of this jurisdiction to the extent that, in connection with cash posted as Eligible Credit Support, it meets the requirements in order for RDL 5/2005 to apply (in which we kindly refer you to our opinions in Section C.A.5 above).

This opinion is made without prejudice of the application of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as amended and supplemented from time to time, to transactions entered into between FCs and / or NFC^{+}s.

10. Your opinion on whether there are any other local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a providing party incorporated or otherwise organized under this jurisdiction.

There are no other local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a providing party incorporated or otherwise organized under this jurisdiction.

Model CPMA combined with the CPMA CSA / Model MNA combined with the Model CSA.

11. The transferee's right in relation to the transferred Eligible Credit Support upon the occurrence of a Close-Out Event will be governed by: (i) in the case of the CPMA, Section 4 of the CPMA (see Section 11 of the CPMA CSA); and (ii) in the case of the MNA, Section 8 of the MNA (see Section 12 of the MNA CSA). Assuming that Section 4 of the CPMA / Section 8 of the MNA is valid and enforceable in this jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount by either party on the termination of Underlying Agreements, your opinion on whether Section 11 of the CPMA CSA / Section 12 of the MNA CSA is also valid to the extent that it provides for the Base Currency Equivalent of all the Eligible Credit Support provided under each CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount. In other words, whether, contractually, the right of a party to apply collateral to a Settlement Amount is enforceable.

Assuming that Section 4 of the CPMA / Section 8 of the MNA is valid and enforceable in this jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount by either party on the termination of Underlying Agreements, Section 11 of the CPMA CSA / Section 12 of the MNA CSA will be also valid to the extent that it provides for the Base Currency Equivalent of all the Eligible Credit Support provided under each CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount. Notwithstanding the foregoing, the Valuation Agent have to use objective data (i.e., the last official exchange rate published by the European Central Bank) or a benchmark agreed by the parties to validly proceed to such a conversion.

Please note that, in an insolvency scenario, the relevant Master Agreement have to meet the requirements set forth in RDL 5/2005.

12. Your opinion on whether the opinions that you have expressed on: (i) the CPMA and the CPMA CSA; and (ii) the MNA and MNA CSA would change in the event that the parties agree to place the Eligible Credit Support with an independent third-party collateral agent rather than a party to each Master Agreement and relevant CSA.

As discussed in Section C.A.5 above, it may well happen that, where cash collateral has been transferred by the Spanish insolvent party to a foreign account in the name of a foreign solvent party, the Spanish court conducting the relevant insolvency proceeding may apply the relevant foreign law to decide, irrespective whether the relevant Master Agreement falls or not within the scope of RDL 5/2005.

B. Netting / Set-off in the Context of an Insolvency

For the purposes of this Section C.B, we have made the following additional assumptions:

(a) after entering into a transaction and prior to its maturity, an entity incorporated in this jurisdiction becomes the subject of voluntary or involuntary insolvency proceedings in this jurisdiction; and

(b) subsequent to the commencement of the insolvency proceedings, either that entity or an insolvency official seeks to assume the confirmations representing profitable transactions for the insolvent party and reject the conformations representing unprofitable transactions for the insolvent party.

Model CPMA / Model MNA

1. Assuming the parties <u>have not selected</u> Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section e of the Schedule to the CPMA / Section 6.1 of the MNA Election Sheet) and/or none of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in this jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions /Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of this jurisdiction.

The close-out netting and set-off of obligations due between the parties under each model Master Agreement would be generally valid and enforceable in an insolvency scenario where the parties have not selected Automatic Close-Out, as detailed below.

(a) Close-out netting in an insolvency scenario

Where the Parties have not selected Automatic Close-Out of each Underlying Agreement and/or none of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in this jurisdiction, the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions /Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of this jurisdiction provided the relevant Master Agreement meets the requirements set forth in RDL 5/2005.

In this regard, it should be noted that Article 16 of RDL 5/2005 provides that:

"*The declaration of early termination, rescission, cancellation, enforcement or equivalent effect of the financial transactions entered into under a contractual netting agreement or in relation to it, shall not be limited, restricted or affected in any manner by the opening of bankruptcy proceedings or administrative winding-up proceedings (…).*"

"*In the event that one of the parties of the relevant contractual netting agreement is subject to a bankruptcy proceeding or an administrative liquidation proceeding, only the net sum of the transactions entered into thereunder, calculated in accordance with the provisions of such agreement, will be included, as a claim or, as applicable, as a debt in the estate of such party.*"

As a consequence, the solvent Party is even entitled to terminate or accelerate all the Underlying Agreements (including Uncovered Transactions /Additional Netted Agreements, if applicable), but not some of them, pursuant to the opening of insolvency proceedings, without the insolvency representatives being entitled to challenge or object such acceleration.

It should be noted that Article 16 only applies to financial transactions entered into under or in relation to a contractual netting agreement which meets the requirements set forth in Articles 4 and 5 of RDL 5/2005.

Such requirements are as follows:

(1) that one of the parties to the relevant contractual netting agreements is either:

(i) a public entity;

(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 and the European Investment Bank;

(iii) a credit institution, an investment firm, an insurance undertaking, an undertaking for collective investment scheme or a management company thereof, a securitization fund (*fondo de titulización*) 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, on payment and securities settlement systems, or a similar institution acting in the futures, options and derivatives markets and the members and participants of those markets infrastructures where acting in such capacity;

(together, the "**Qualifying Parties**")

(2) that the relevant netting agreement "*provides 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*".

In this regard, we are of the opinion (based on the assumptions made in Section B herein) that the Master Agreements satisfy this requirement.

It is worth noting, however, that some counsels have raised the argument that "cross-bridge" agreements such as the Master Agreements (i.e. an agreement intended to net the close-out netting amounts related to different Underlying Agreements) cannot be characterized as a "single legal obligation" since the final net amount is calculated in a second tier once the transactions entered under different framework agreements are replaced by two or more first tier net amounts. Moreover, the bridged close-out netting agreements will be usually connected to unrelated underlying assets and/or financial instruments (contracts for differences, repos, stock loans, etc.). Accordingly, the receivers of the Spanish Party may well persuade the competent Court that the Master Agreement cannot embrace all the Underlying Agreements (and, where applicable, Uncovered Transactions and Additional Netted Agreements) and replace them by a "single legal obligation". In this regard, whilst there is no case law at all relating to the RDL 5/2005 or to the concept of "single legal obligation", we are of the opinion that such argumentation should not reasonably succeed as: (i) transactions entered into under or in relation to a sole standard close-out netting agreement (for instance, the ISDA Master Agreement or the EFET Agreement) may also be related to different underlying assets (currency, interest rate, commodities, etc.), and (ii) this fact has never hindered the application of such close-out netting agreements on the basis that the "single obligation requirement" is not met (as shown by their recognition by the different European banking regulators for the purposes of counterparty risk reduction).

In any case, it is essential for the CPMA to satisfy this requirement that the parties have elected to apply Section 10.6 (Single Agreement) in the EFET/IECA Commodities Schedule to the CPMA and that, by amending the CPMA in the manner provided for in the last paragraph of Division 1, Part I, Section C of the Schedule (Global Close-Out) or otherwise, the Close-Out (whether automatic or otherwise) of any Principal Agreement and/or Uncovered Transaction results in the Close-Out (whether automatic or otherwise) of all the Underlying Agreements (and, where applicable, Uncovered Transactions and Additional Netted Agreements).

(3) that each of the transactions entered into under the relevant netting agreement is a transaction of one of the following types (the "**Qualifying Transactions**"):

(i) Securities lending transactions;

(ii) spot sales of negotiable securities listed in an EU exchange or multilateral trading facility;

(iii) the derivative financial instruments set forth in Annex of RDLeg 4/2015, such as credit derivatives, commodity derivatives (including bullion derivatives), interest rates derivatives, spot FX transactions, allowance derivatives or any combination of them, irrespective of whether they are cash settled or physically settled; and

(iv) repurchase transactions and buy and sell back transactions.

Three types of commodity derivative transactions are mentioned in limbs (e) to (g) of the above referred Annex. These legal definitions must be construed in line with the criteria set forth in Articles 5 to 7 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. As a rule, the characterization of commodity transactions as OTC derivatives may be a matter of discussion barely only when the contract (without prejudice of the specific regulations applicable to wholesale energy products) must be physically settled, is bilaterally negotiated (i.e, out of a trading venue) and entered into for commercial purposes.

(b) Set-off in an insolvency scenario

Without prejudice to the enforceability of the close-out netting agreements meeting the requirements set forth in Articles 4 and 5 of RDL 5/2005, as per Article 153 of the Insolvency Law no set-off can take place in relation to claims owed to and by an insolvent party unless:

(i) all requirements in order for set-off to operate have been met prior to the adjudication of the insolvency, or (ii) the reciprocal claims subject to set-off arise out of the same relationship.

Said this, we must make a sharp distinction between the law governing set-off and the law regulating the effects of the opening of insolvency proceedings over set-off. The first matter is regulated in Art. 17 of Rome I and the law applicable will be: (i) the law chosen by the parties, or (ii) if no law is elected by the parties in connection with set-off, the law applicable to the claim against which the right to set-off is asserted.

The second question involves the extraterritorial application of insolvency laws. As a general rule, as per Article 9 of the Insolvency Regulation and Article 727 of the Insolvency Law, 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 the event of insolvency proceedings in respect of credit institutions, as per Article 8.1 of Law 6/2005 and Article 23 of the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, the adoption of reorganisation measures or the opening of winding-up proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the credit institution, where such a set-off is permitted by the law applicable to the credit institution's claim. Finally, in respect of the liquidation of insurance undertakings, as per Article 167.5.(e) of Law 20/2015, the admissibility of set-off is subject to the law governing such liquidation process.

Provided the admissibility of set-off is subject to Spanish law, please find below an analysis of the potential set-off scenarios:

(i) *Set-off of claims between parties arising out under a model Master Agreement:*

Set-off of claims between parties arising under a model Master Agreement will be enforceable in an insolvency scenario since the reciprocal claims arise out of the same relationship as per Article 153(2) of the Insolvency Law.

(ii) *Set-off of claims between parties arising out from different contracts:*

Set-off of such reciprocal claims will only be enforceable in an insolvency scenario if, as per Article 153 of the Insolvency Law, the requirements in order for set-off to operate have been met prior to the opening of the insolvency proceedings.

(c) *Set-off of claims between affiliates or credit support providers*:

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 not be enforceable in Spain in an insolvency scenario.

2. **Assuming the parties <u>have selected</u> Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule / Section 6.1 of the MNA Election Sheet) and/or all of the Underlying Agreements provide for automatic early termination upon certain insolvency events to app1y to the entity incorporated in this jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defau1ting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of this jurisdiction.**

Our considerations in Section C.B.1 above will also apply where the parties have selected Automatic Close-Out of each Underlying Agreement and/or all of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in this jurisdiction, since (as discussed above) pursuant to Article 156 of the Insolvency Law those contractual provisions providing for the automatic termination of a contract upon the insolvency of either of the parties are null and void (which nullity will, however, affect only the Automatic Close-Out or automatic early termination provision).

Accordingly, two scenarios shall be distinguished:

(a) where the relevant Master Agreement falls within the scope of RDL 5/2005 (in which regard we kindly refer you to Section C.B.1 above), it is not necessary for the parties to agree to an automatic, rather than an optional, termination. Therefore, if Automatic Close-Out of each Underlying Agreement is not specified as applying and/or all of the Underlying Agreements do not provide for automatic early termination, the solvent party would still be able to terminate all Underlying Agreements (including Uncovered Transactions/Additional Netted Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty and such termination would be enforceable under the laws of this jurisdiction.

(b) where the relevant Master Agreement does not fall within the scope of RDL 5/2005, the specification of Automatic Close-Out of each Underlying Agreement as applying and/or all of the Underlying Agreements provide for automatic early termination will be found by a Spanish insolvency court to be null and void pursuant to Article 156 of the Insolvency Law.

3. **Your opinion on whether the provisions of each model Master Agreement provide for the calculation of a single Final Net Settlement Amount (see Sections 3 and 4 of the CPMA / Section 7 and 8 of the MNA) upon the insolvency of a counterparty would be enforceable in an insolvency of a party that is organized under the laws of this jurisdiction.**

The provisions of each model Master Agreement which provide for the calculation of a single Final Net Settlement Amount (see Sections 3 and 4 of the CPMA / Section 7 and 8 of the MNA) upon the insolvency of a counterparty would be enforceable in an insolvency of a party that is organized under the laws of this jurisdiction where the relevant Master Agreement meet the requirements set forth in Articles 4 and 5 of RDL 5/2005 (in which regard we kindly refer you to Section C.B.1 above).

4. Your opinion on whether or not early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are voidable, challengeable or in any way vulnerable to deletion by a liquidator or any third party if insolvency procedures are later opened against a party that is organized under the laws of this jurisdiction.

Provided that Spanish law is applicable to the relevant insolvency proceedings, the effectiveness of early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement may be affected where the relevant Master Agreement or any transaction thereunder (including, where applicable, any Uncovered Transaction or Additional Netted Agreement) constitutes a transaction "detrimental to the insolvency estate" and can be avoided under Article 15.5 of RDL 5/2005 in connection with Article 226 of the Insolvency Law or could otherwise be rescinded under the Civil Code as follows:

(a) Suspect Period

Under Article 15.5 of RDL 5/2005 in connection with Article 226 of the Insolvency Law, the courts can set aside any acts (including payments) made by the insolvent party within the two-years period preceding the adjudication of the bankruptcy (the "**Suspect Period**") if the insolvency representatives can prove that such transaction was “detrimental to creditors” and made with fraud to the creditors.

In this regard, it should be noted that:

- the Spanish legislation does not provide for a concept of “detrimental” to this effect nor have the Spanish Supreme Court formulated yet a test for this purpose. However, it is clear that both transactions at an undervalue and transactions intended to constitute a preference fall within the scope of Article 15.5 of RDL 5/2005 in connection with Article 226 of the Insolvency Law; and
- conversely, Article 230 of the Insolvency Law prevents the insolvency courts from setting aside any transactions entered into by the insolvent party within the suspect period in the ordinary course of its business and on normal conditions.

(b) Rescission under the Civil Code

Pursuant to Articles 1111, 1291 and 1297 of the Spanish Civil Code, the courts may, on the application of any creditor of a company (even if the company is not subject to an insolvency proceeding), set aside a fraudulent transaction entered into by the company within the 4 years period preceding the application. Transactions entered into on arm's length terms and at the then prevailing market rates are unlikely to constitute fraudulent transactions. However, the matters referred to in the last sentence are questions of fact in each case.

Finally, notwithstanding the above, it should be noted that as per Article 16 of the EU Insolvency Regulation and Article 8.1.(g) of Law 6/2005 in connection with credit entities, no act can be set aside pursuant to Article 15.5 of RDL 5/2005 and Article 226 of the Insolvency Law if the relevant foreign law does not allow any means of challenging it. Likewise, as per Art. 230 of the Insolvency Law, no measures adopted pursuant to Law 11/2015 in respect of the recovery and resolution proceedings of financial entities and investment firms can be set aside.

5. "Cross Category Netting" - since the model Master Agreements contemplates the inclusion of various types of master agreements and other trading documentation covering both physical and financial trading, your opinion on any applicable issues that need to be considered as to the enforceability of netting between physical and financial transactions or various categories of physical products (see Annex A for potential categories).

Your opinion should include a discussion of this jurisdiction's insolvency laws as they would apply to the close-out and netting via each model Master Agreement of obligations under different categories or types of traded products, and

a. if any distinctions are applicable based on whether these products are traded under one or more Underlying Agreements,

b. if any distinctions are applicable when attempting to use a model Master Agreement to net / set-off physically settled transactions when these involve the purchase, sale and/or optioning of different commodity types or categories (e.g., the netting obligations related to gas, power and coal trading) ("Cross Product Netting"), and

c. if any distinctions are applicable based on whether both financially settled swaps, swaptions and derivative transactions and physically settled forwards and options are traded under one or more Underlying Agreements with respect to each Master Agreement.

Please see our considerations in Section C.B.1(i)(2) above.

In addition, it should be noted that there is no certainty that commodity transactions which are spot trades (as this term is defined under Article 7 of Regulation Commission Delegated Regulation (EU) 2017/565) fall within the concept of commodity derivatives for the purposes of RDL 5/2005. If any transaction (in particular, spot trades) is characterised as a commercial trade instead of being deemed a financial instrument for the purposes of RDL 5/2005, there may be two main scenarios to consider:

(a) the relevant court excludes those transactions from the netting under the Master Agreements; or

(b) the relevant court finds that the inclusion into a Master Agreement of transactions outside the scope of RDL 5/2005 jeopardises the ability of such Master Agreement to benefit from RDL 5/2005.

In our opinion, even if the literal wording of RDL 5/2005 allows for the second of the above two scenarios, both the rationality of RDL 5/2005 and good practice considerations play in favour of the first scenario. However, we cannot give a conclusive opinion on this issue, as no cases have been brought before Spanish courts relating to the interpretation of RDL 5/2005 (or former equivalent legal provisions).

A practical way to mitigate this risk would be to document spot trades under a Master Agreement limited to such spot transactions. Another (although riskier) possibility would consist of using only one Master Agreement for both spot and forward trades and including in such Master Agreement a contractual provision providing for the exclusion from the close-out netting calculations of those transactions which be deemed by the relevant court to fall outside the scope of RDL 5/2005.

6. **Assuming that the parties have selected a Base Currency (Division 1, Part VI of the CPMA Schedule and section 8.3(C) of the MNA Election Sheet) other than the legal currency of this jurisdiction in which the insolvent party is organized, your opinion on whether payment of the Final Net Settlement Amount in that currency would be enforceable under the laws of this jurisdiction.**

Pursuant to Article 16 of RDL 5/2005, the Final Net Settlement Amount determined by the solvent party will be recognised in a Spanish insolvency proceeding to the extent that it has been calculated in accordance with the provisions of the Master Agreements. Furthermore, in accordance with Article 1170.1 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 per Article 267.1 of the Insolvency Law. Accordingly, all claims in foreign currencies will be converted into Euros 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) Article 267.1 of the Insolvency Law will not affect the conversion of all due amounts into the Base Currency made by the solvent party using a reasonable exchange rate for the purposes of calculating the Final Net Settlement Amount, provided that such calculations are made as set forth in the relevant contractual provisions and such provisions are valid and enforceable under the contract's governing law.

(b) If the Base Currency is a currency other than the Euro, the Final Net Settlement Amount will be converted into Euro in order for it to be included in the relevant insolvency proceeding with the sole purposes of quantifying the insolvent Party's liabilities.

(c) The Final Net Settlement Amount will have to be paid by insolvency representatives, in accordance with the legal order of payments priority, in the currency originally agreed by the Parties.

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

7. Your opinion on whether the rights of a party are enforceable in accordance with the terms of each model Master Agreement, irrespective of the insolvency of the entity incorporated in this jurisdiction.

Discretionary termination rights, close-out netting and the calculation and payment of a Final Net Settlement Amount under each model Master Agreement will be generally enforceable in Spain following a valid termination event, subject to:

(a) those considerations made in Section C.B.1 above; and

(b) the fact that pursuant to Article 164 of the Insolvency Law, the bankruptcy court may, attending to the interest of the bankruptcy, rule that the agreement must continue in its terms, amounts owing by the bankruptcy estate being classified as "*créditos contra la masa*".

8. Your opinion on whether the parties' agreement on governing law of each model Master Agreement and submission to jurisdiction will be upheld in this jurisdiction, and 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 Master Agreements will be recognised in this jurisdiction subject to, and in accordance with Rome I, provided that the Master Agreements are of international nature.

Please note that such choice of law is limited to contractual issues, provided that no mention is made to non-contractual obligations as allowed by Rome II.

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 Master 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 Master Agreement have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the Master 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 relating to insolvency proceedings shall be considered as mandatory rules irrespective of the law otherwise applicable to the Master Agreement;

(c) may refuse to apply English, German law or the law of any other jurisdiction other than Spain in relation to the Master 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 Master Agreement is *prima facie* manifestly incompatible with the Spanish public policy, except for:

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

    (ii) those provisions in the Master 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 such default;

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

    (iv) those provisions in the Master 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;

    (v) any provision of the Master Agreement which allows any party to terminate such Agreement as a result of technical defaults which do not materially affect the interests of such party or which violates Article 157 of the Spanish Insolvency Law (in which we kindly refer you to Section C.I.1.3 above); and

(vi) any provision in the Master Agreement stating that any representation or communication shall be deemed to have been made or 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.

Spanish courts may require evidence of the English or, as applicable, German law in accordance with Article 281 of the Spanish Civil Proceedings Act.

Finally, we are also of the opinion that the submission to jurisdiction and arbitration provisions of the Master Agreement will be recognised in this jurisdiction.

For the rest, we refer to our responses to question C.A.8.

9. Your opinion on whether, pursuant to the EU Insolvency Regulation most provisions of which became directly applicable in all Member States as from 26 June 2017, a bankruptcy court in this jurisdiction would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement if they differ from the analogous insolvency laws of this jurisdiction (please see paragraph C.B.l8.c below where this topic is to be discussed at greater length). In addition, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, your opinion on whether the close-out netting and/or set-off provisions under each Master Agreement would nevertheless become valid by operation of the EU Insolvency Regulation.

Please see our considerations in Section C.A and B above.

In addition, please note that, where the Master Agreement, an Underlying Agreement, an Uncovered Transaction or an Additional Netted Agreement is subject to English Law, said agreement or transaction will not benefit from the protections granted by European laws for agreements and transactions governed by the laws of a Member State of the European Union, including those foreseen in the EU Insolvency Regulation. However, the Spanish Insolvency Law makes no distinction in respect of set-off.

10. A general discussion of, and your opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of the model Master Agreement.

Two different scenarios must be distinguished depending on the inclusion of the relevant Master Agreement within the scope of Article 16 of RDL 5/2005. Besides this, foreign contracts where the Insolvent Party is a Spanish credit institution merit specific consideration:

(a) *Where the model Master Agreement falls within the scope of RDL 5/2005*:

Article 16 of RDL 5/2005 provides that:

"The declaration of early termination, rescission, cancellation, enforcement or equivalent effect of the financial transactions entered into under a contractual netting agreement or in relation to it, shall not be limited, restricted or affected in any manner by the opening of bankruptcy proceedings or administrative winding-up proceedings"; and that

"In the event that one of the parties of the relevant contractual netting agreement is subject to a bankruptcy proceeding or an administrative liquidation proceeding, only the net sum of the transactions entered into thereunder, calculated in accordance with the provisions of such agreement, will be included, as a claim or, as applicable, as a debt in the estate of such party."

The above amounts to recognising the validity and enforceability of the acceleration of any payment and/or delivery obligation of either party following the institution of a insolvency proceeding with respect to the other party, without the insolvency representatives being entitled to challenge or object such acceleration.

It should be noted that Article 16 only applies to financial transactions entered into under or in connection with a contractual netting agreement which meets the requirements set forth in Articles 4 and 5 of RDL 5/2005.

(b) *Where the model Master Agreement falls outside the scope of RDL 5/2005*:

Where a relevant Master Agreement falls out of the scope of RDL 5/2005, the exercise of termination rights by the solvent party is subject to the Insolvency Law´s general provisions.

Pursuant to Article 165 of the Insolvency Law, bilateral agreements which are yet to be performed, in whole or in part, by both parties cannot be terminated by the solvent party upon the insolvency of the other party, it being for the receivers of the insolvent party (and not for the solvent party) to decide on the termination or continuation of such agreements. In this vein, as per Article 156 of the Insolvency Law, those contractual provisions providing for the automatic termination of a contract or for the right of the solvent party to terminate a contract upon the insolvency of the other party will be null and void (which nullity will affect, however, only the Automatic Termination provision).

Accordingly, close-out netting provisions are not generally enforceable in Spain, since such provisions are deemed to be contrary to the general principle of treating all creditors on an equal foot-basis. Although Article 153 of the Insolvency Law admits the application of set-off to reciprocal claims arising out of the same relationship even if the requirements in order for set-off to operate have not been met prior to the adjudication of the bankruptcy, this exception must be discarded in respect of close-out netting. In Spanish law set-off is a way to discharge pending obligations, whereas close-out is a novation based on the termination of one or more existing transactions with the intention to replace them by a new single payment obligation.

In light of the above, we are of the opinion that discretionary termination rights, close-out netting and the calculation and payment of a Settlement Amount under the Master Agreements will be not enforceable upon the occurrence of a winding-up, insolvency or attachment where the relevant Master Agreement fails to meet the requirements set forth in Articles 4 and 5 of RDL 5/2005.

(c) *Where one of the Parties of the model Master Agreement is a Spanish credit institution:*

As per Article 8.1.g) of Law 6/2005, the effects of insolvency proceedings on close-out netting agreements entered into by a Spanish credit institution shall be determined in accordance with the law applicable to that agreement.

Although Law 6/2005 does not define the term "netting agreement", we are of the opinion that:

(i) the relevant definition can, however, be found in Article 5 of RDL 5/2005, pursuant to which a "netting agreement" is defined as "any agreement which provides for the creation of a single legal relationship comprising all transactions entered into thereunder and by virtue of which, upon the occurrence of a termination event the parties will only have the right to claim the net sum arising from the acceleration or termination of those terminated transactions"; and

(ii) any model Master Agreement is, therefore, a netting agreement for the purposes of Law 6/2005.

In light of the above, it may well be argued that close-out rights under a model Master Agreement must be enforceable upon the insolvency of the Spanish credit institution to the extent that they are enforceable under the foreign law governing such agreement, regardless of being the relevant Master Agreement within the scope of RDL 5/2005.

It must be however noted that there may be also room to argue that Article 8.1.g) of Law 6/2005 shall only apply to those netting agreements relating to instruments referred to in section C of Annex I to Directive 2004/39/EC, no cases having yet been brought before the European Court of Justice or the Spanish courts in relation to questions of interpretation of, respectively, the Directive 2001/24/EC or Article 8.1.g) of Law 6/2005.

11. An analysis and your opinion regarding the advisability in this jurisdiction of using each Agreement to impose uniform default events across all types and categories of trades (effectively superseding the default terms of underlying master

agreements or deal documentation) as opposed to allowing such underlying default provisions to operate for their respective categories of trades even if to do so might permit close-out and set-off of some trades governed by the relevant Master Agreement, but not others.

In line with our considerations in Section C.B.1 above, it would be advisable in this jurisdiction of using each Agreement to impose uniform default events across all types and categories of trades (effectively superseding the default terms of underlying master agreements or deal documentation), in order to avoid close-out and set-off of some trades governed by the relevant Master Agreement but not all.

CPMA CSA / MNA CSA

12. **Your opinion on whether an entity duly organized or incorporated under the laws of this jurisdiction (or its administrator, provisional liquidator, receiver, trustee or other similar official) will be able to recover any transfer of Eligible Credit Support made to the transferee during a certain "suspect period" preceding the date of the insolvency that makes the recovery vulnerable to being treated as preferential or otherwise suspect (or other similar treatment) by such official and therefore subject to avoidance. If such a "suspect period" exists, please give your opinion on whether the substitution of Eligible Credit Support by a counterparty during this period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing. Please also include an analysis of the relevant time-period(s) surrounding the insolvency.**

The question whether any transfers of Eligible Credit Support made by the Spanish party within the Suspect Period can be recovered by the insolvency representatives under Article 15.5 of RDL 5/2005 in connection with 226 of the Insolvency Law must be analysed by distinguishing two different scenarios:

(a) *where the CSA has been entered into and the first transfer of Eligible Credit Support has been made on a date prior to the commencement of the Suspect Period:*

Pursuant to Article 10 of RDL 5/2005, the transfer of additional collateral shall be deemed to have been made on the date on which the first transfer of collateral was made where such additional collateral has been posted in order to take account of changes in the value of the collateral or in the amount of the secured obligations.

Accordingly, in this scenario no transfers of Eligible Credit Support made by the Spanish Party within the Suspect Period in accordance with the provisions of the CSA can be recovered by the insolvency representative on the grounds of Article 15.5 of RDL 5/2005 in connection with 226 of the Insolvency Law (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)

(b) *where the CSA has been entered into within the Suspect Period:*

In this scenario, transfers of Eligible Credit Support (including the transfer of Eligible Credit Support representing the Independent Amount) made within the Suspect Period can be recovered by the insolvency representative on the grounds of Article 15.5 of RDL 5/2005 in connection with 226 of the Insolvency Law only if the insolvency representative can prove that such transfers were detrimental to creditors.

In this regard, and on the assumption that the underlying transactions are neither detrimental to the insolvency estate nor fraudulent, we do not envisage any sound argument allowing for the courts of this jurisdiction to find that those transfers were detrimental to creditors where the Eligible Credit Support consists only of cash.

Finally, please note that under Articles 1111, 1291 and 1297 of the Spanish Civil Code, the courts of Spain may, on the application of any creditor of a company (even if the company is not subject to an insolvency proceeding), set aside a fraudulent transaction entered into by the company within the 4-years period preceding the application. Notwithstanding the foregoing, pursuant to Article 16 of the EU Insolvency Regulation, transfers of Eligible Credit Support cannot be set aside pursuant to Article 15.5 of RDL 5/2005 and Article 226 of the Insolvency Law if the relevant foreign law does not allow any means of challenging it.

13. Your opinion on whether the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each CSA during any applicable "suspect period" described above is subject to avoidance, either because it will be considered to relate to an antecedent or pre-existing obligation or for some other reason.

Please see our considerations in Section C.B.12 above.

14. A general discussion of, and your opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of each CSA.

Please see our considerations in Section C.B.12 above.

15. An analysis of local law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in this jurisdiction, with the provider of the Eligible Credit Support being an entity based outside this jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in this jurisdiction can bolster or re- characterize the nature of the providing party's rights to that Eligible Credit Support.

a. What rights does the providing party have against such an asset located in your local jurisdiction upon the insolvency of the recipient party?

b. **Are there other steps that the providing party should be taking to minimize its risk and best protect such an asset?**

Please see our considerations in Section C.A.5 above.

16. **An analysis of the rights and obligations of an insolvent party organized in this jurisdiction with respect to Eligible Credit Support held by a recipient party organized outside this jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in this jurisdiction can undermine or re-characterize the nature of the recipient's rights to that Eligible Credit Support**

Please see our considerations in Section C.A.5 above.

Model CPMA combined with the CPMA CSA / Model MNA combined with the MNA CSA

17. **Your opinion on whether the rights of the transferee of Eligible Credit Support would be enforceable in accordance with the terms of: (i) the model CPMA and the CPMA CSA; and (ii) the model MNA and the MNA CSA, irrespective of the insolvency of the providing party incorporated or otherwise organized under this jurisdiction.**

Provided that posting cash as Eligible Credit Support is in fact one of the transactions included within the scope of close-out netting agreements as per RDL 5/2005, we refer to our responses to questions C.B.1 and C.B.4.

18. **A general discussion of, and your opinion regarding, this jurisdiction's insolvency laws, and any relevant terminology with an emphasis on law and precedent applicable to the concepts of close-out netting and set-off of claims between parties, and:**

    a. **how generally applicable statutory or common law set-off (or similar) rights could interact with the contractual netting and set-off rights contained in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA;**

    b. **applicable law which might have an impact on the respective priorities assigned to such rights by a court in this jurisdiction; and**

    c. **specifically, whether the EU Insolvency Regulation affects local jurisdiction conflict of law rules such as overruling local jurisdiction insolvency laws if the parties to the Master Agreement have opted for a jurisdiction other than the jurisdiction relevant to the insolvent party. In particular, your opinion on whether or not a bankruptcy court in this jurisdiction would apply the EU Insolvency Regulation to close-out netting and/or set-off such that it would**

apply the governing law of the Master Agreement or CSA as the law applicable to close-out netting and/or set-off or whether it would seek to apply local law in its stead;

d. **whether, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, the close-out netting and/or set-off provisions under each Master Agreement when combined with the relevant CSA would nevertheless become valid by operation of the EU Insolvency Regulation; and**

e. **whether the laws of this jurisdiction consider set-off and close-out netting as separate or similar rights.**

In connection with limb a., we refer to our responses to question C.B.10.

In connection with limb b., as per Article 7 of the EU Insolvency Proceedings, this matter is subject to the insolvency proceedings law, except in connection with the creditor's rights arising out of a territorial or secondary insolvency proceeding.

In connection with limb c., as we said, there is a sharp distinction between the law applicable to set-off and the law regulating the effects of the opening of insolvency proceedings over set-off. Article 19 of the EU Insolvency Regulation is dealing only with the second issue, whereas the law applicable to set-off is regulated in Art. 17 of Rome I. Nevertheless, provided that the law governing the Master Agreements covers all contractual aspects arising out of them, including set-off, the application of this jurisdiction's law will be replaced by the *lex contractus* in both regards. Close-out netting agreements are covered in Article 8.1 of Law 6/2005, whose scope is limited to their effects in insolvency proceedings opened in Spain. Since close-out agreements are governed by the *lex contractus*, the solution would be the same. However, in the event that the *lex contractus* election be declared null and void, then the court of justice should determine such law in accordance with Article 4 of Rome I, and this may drive to the eventual application of Spanish law.

In connection with limb d., we refer to our responses to question C.B.5.

In connection with limb e., Spanish case law on close-out netting is limited to three judgements rendered by the Supreme Court in 2014 and 2015, which are not consistent among them. Therefore, they are not conclusive. In principle, it is possible to mention two opposed conceptions regarding the legal characterization of close-out netting. Most authors consider close-out netting as a sort of contractual set-off different of statutory set-off. Although this approach is convenient to assert the validity and enforceability of close-out netting in non-insolvency scenarios, will result in severe limitations in respect of proceedings based on the Insolvency Law and beyond the scope of RDL 5/2005. Alternatively, some authors characterize close-out netting as a novation, since such arrangements are intended to replace existing claims and transactions by a single new payment obligation of one Party against the other Party. However, if the relevant agreement is not backed by specific statutory provisions (e.g., RDL 5/2005), it is banned by the Insolvency Law and then not enforceable.

C. Cross-Affiliate Netting and Set-off

Since the versions of the model CPMA and model MNA you are reviewing do not address this topic and are not intended for these purposes, but because this issue may be of use to some EFET members, only to the extent that there is established law in this jurisdiction on the subject, a summary of such law and a review of the different risk considerations involved in choosing to add multiple parties to each model Master Agreement.

Please see our considerations in Section C.B.1 above.

D. Multi-branch Parties

For the purposes of addressing the multi-branch issues under this Section, you have asked us to assume:

(a) for the purposes of addressing question 1 below, that a counterparty is incorporated or organized in this jurisdiction, but has entered into one or more Underlying Agreements or underlying transactions acting through branches or other duly registered offices in other jurisdictions; and

(b) for the purposes of addressing questions 2 and 3 below, that an overseas counterparty (*Party F*) is incorporated or organized outside this jurisdiction and has entered into one or more Underlying Agreements or underlying transactions acting through branches or other duly registered offices in this jurisdiction (*Spanish Branch*).

1. Whether there would be any change in your conclusions expressed in Section C. B above concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA.

Our opinion under Sections C.B above remains unchanged, subject to our considerations set out in question 2 below.

It is worth to mention that Spanish law makes a sharp distinction between principal and territorial insolvency proceedings. As a rule, Spanish Courts are competent over principal insolvency proceedings if the insolvent Party has its centre of principal interest in Spain. Provided the universal character of such proceedings, all assets and contractual obligations pertaining to the Spanish insolvent Party are to be subject to them. Notwithstanding the foregoing, in the event that a Spanish insolvent Party has assets located in foreign jurisdictions, this situation may result in the opening of one or more territorial insolvency proceedings in the corresponding jurisdictions. We express no opinion in connection with potential overseas territorial insolvency proceedings since this is an issue to analyse on a case-by-case basis.

2. Whether separate proceedings could be brought in this jurisdiction with respect to assets and liabilities of the overseas branch located in this jurisdiction of a counterparty organized or incorporated outside this jurisdiction upon the commencement of insolvency proceedings against the counterparty in that outside jurisdiction. Your opinion should include how the relevant authorities in this jurisdiction would treat the proceedings in an outside jurisdiction by, for example, deferring to them so that the assets and liabilities of the branch would be treated as part of the proceedings against the counterparty. Please also include whether or not in your opinion local creditors of the branch would be able to initiate separate proceedings in this jurisdiction even if the relevant authorities did not do so.

In this regard, a distinction must be drawn between EEA credit institutions, EEA investment firms and EEA insurance undertakings, and any other corporates.

<u>Spanish Branches of foreign corporates other than EEA credit institutions, EEA investment firms or EEA insurance undertakings</u>

There can be insolvency proceedings in this jurisdiction with respect to any Party (other than an EEA credit institution or EEA insurance undertaking) whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of that Party. Pursuant to Article 49 of the Insolvency Law, any such insolvency proceeding will be a territorial or secondary proceeding (*procedimiento territorial*), whose scope will be limited to the insolvent debtor's assets and liabilities located in Spain.

In this regard, it is worth noting that:

(a) no legal provision regulates effects of such secondary proceedings, whose scope is limited to the liabilities of the Spanish Branch of a foreign Party; and

(b) there is no legal, judicial or scholar guidance as to the way in which Article 49 must be applied in connection with transactions entered into by the Spanish Branch under a master agreement. Therefore, it is not possible to predict whether the Insolvency Representatives will:

   (i) include only the replacement costs of all those Transactions favourable to Party F (irrespective whether entered into by the Spanish Branch or otherwise); or

   (ii) include only the replacement costs of all those Transactions favourable to Party F and entered into by the Spanish Branch; or

   (iii) include the replacement costs of all Transactions (irrespective whether entered into by the Spanish Branch or otherwise and irrespective whether they are positive or negative); or

   (iv) include only the replacement costs of all those Transactions entered into by the Spanish Branch (irrespective whether they are positive or negative); or

(v) include only the replacement costs of all those Transactions favourable to Party F (whether entered into by the Spanish Branch or otherwise) and the replacement costs of those Transactions non-favourable to Party F entered into by the Spanish Branch; or

(vi) refer all claims under to the courts of the jurisdiction of Party F.

Whilst we are of the view that, on balance, any of the scenarios referred to in (i), (iii) and (vi) above are more likely to happen than those contemplated in (ii), (iv) and (v), no conclusive opinion can be provided on this issue.

Spanish branches of EEA credit institutions, EEA insurance undertakings and EEA investment firms

Pursuant to Law 6/2005 (implementing Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions), Law 20/2015 and Law 11/2015 (implementing 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 BRRD), no insolvency proceedings can be instituted in Spain against any credit institution or insurance undertaking authorised in another EEA State (regardless of the existence of a branch in Spain), the administrative or judicial authorities of such other EEA State having exclusive jurisdiction for the opening of such insolvency proceedings. Regarding EEA investment firms, these entities are within the scope of BRRD, being subject to the competent administrative authority of the Estate of origin in respect of restructuring and resolution proceedings.

3. In the event that proceedings are brought in this jurisdiction with respect to the assets and liabilities of the branch located in this jurisdiction, whether or not the administrator, provisional liquidator, receiver, trustee or other similar official and/or the courts in this jurisdiction would include the counterparty's position under its Underlying Agreements or underlying transactions among the assets of its branch and, if so, recognize their respective close-out and netting provisions in accordance with their terms (you may assume that the close-out netting provisions under the relevant Underlying Agreements or underlying transactions would be enforceable in the proceedings against the counterparty brought outside this jurisdiction).

Please see Section D.2 above.

E. CSA Specific Permutations.

Despite the assumptions made under Section B, you have asked us to confirm whether the conclusions set out in the aforementioned section would be different, assuming instead that:

(a) The providing party is a branch located in this jurisdiction of a bank organised outside this jurisdiction;

(b) The providing party is neither incorporated nor otherwise organised in nor a branch located in this jurisdiction, but has assets in this jurisdiction;

(c) None of the above applies to the providing party (that is, it has no connection with this jurisdiction), but the margin was issued by the government of this jurisdiction or comprises cash in the lawful currency of this jurisdiction.

Our conclusions will remain unchanged, provided that posting cash collateral must be characterized as a money obligation arising out of a contract and any third party can validly settle the payment obligations of a contracting party as per Article 1158 of the Spanish Civil Code. It is also worth to note that the only legal consequences of a third party's payment are limited to the relationship between the debtor and such third party, being this fact irrelevant for the creditor.

F. General Validity of each CPMA and each CSA and the Choice of Law and Jurisdiction

1. Given your above stated assumptions, are the: (i) CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA legal, valid and binding under the laws of this jurisdiction?

Subject to our considerations in Section C.A and C.B above, the (i) CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA are legal, valid and binding under the laws of this jurisdiction, provided that:

(a) each party has obtained all governmental and other consents and has taken all corporate action necessary to enter into a CPMA, a CPMA CSA, a MNA or a MNA CSA, an Underlying Agreement or a Uncovered Transaction / Additional Netted Agreement;

(b) in relation to any of the above referred agreements subject to the laws of country other than Spain, the relevant agreement is legal, valid and binding under the law applicable; and

(c) insofar as any obligation under any of the above referred agreements falls to be performed in a foreign jurisdiction, its performance will not be illegal or unenforceable by virtue of the laws of that jurisdiction.

2. Are there any applicable limitations on the courts in your country with regard to upholding a choice of local law and submission to the jurisdiction of local courts?

There are no applicable limitations on the courts in this jurisdiction with regard to upholding a choice of local law and submission to the jurisdiction of local courts in connection with international contracts.

G. Other Provisions

1. Are there any other provisions of either Master Agreement or either CSA that, given a choice of your local law, either:

(a) need to be revised in order to be enforceable in this jurisdiction; or

(b) the legal efficacy of which could be materially improved upon or optimized with different wording (given such provision's apparent intent)?

Please provide suggested revisions.

In our opinion, it would be extremely convenient cover all issues mention in C.B.8.(c) above. In this regard, we propose to undertake the following steps:

(a) If third parties' data are needed, requesting that all calculations are based on generally accepted benchmarks or in actual market prices.

(b) Deleting all references to indemnities for legal costs and appointment of process agents. In this regard, Spain is subject to several instruments on the service abroad of civil proceedings that should be analysed prior to enter into the Master Agreements.

(c) Deleting all provisions in the Master Agreements on partial invalidity, illegality or unenforceability of any provision.

(d) Limiting the scope of termination events to material defaults.

(e) Setting forth that notifications will be effective after actual delivery.

Furthermore, for the sake of clarity and legal certainty, it would be convenient to replace current applicable law and jurisdiction clauses by a more thorough wording as described above. In this vein, it is worth to note that most courts of justice construe such clauses applying restrictive criteria, what may result in an unexpected application of local law.

D. Recent & Pending Developments

1. Contractual recognition of bail-in and stay measures.

As per Article 28 of RDL 7/2021, implementing BRRD2 as well as other EU Directives, new powers are granted to the FROB, as the Spanish resolution authority, in respect of contractual stay. Among other measures, new Article 70.q of Law 11/2015 imposes the contractual recognition of resolution stays to credit institutions, investment firms and their groups in respect of contracts governed by a non-EU law. This new obligation is in force in respect of new transactions entered into from September 2021 on.

2. Legal exception in respect of payments by netting.

An additional exemption to the general set-off ban has now been established in Article 153(2) of the Insolvency Law in respect of reciprocal claims arising out of the same legal relationship. It must be noted that, although this provision is based on several judgement rendered by the Spanish Supreme Court, its interpretation is a matter of discussion, and no precedents are available for the time being. However, in our opinion this new piece of statutory law is aimed to allow payments by netting, since no termination rights are granted to the parties and its scope is limited to liquidated and due amounts and not related to the value of one or more transactions.

E. Executive Summary

Subject to the qualifications, reservations and limitations expressed herein and without prejudice of the detailed explanations submitted to your attention above:

1. As a rule, the provisions on set-off and close-out netting of the agreements are legal, valid and enforceable in non-insolvency scenarios.

2. Prior to entering into a model Master Agreement, it would be advisable to check whether a Spanish party is not insolvent.

3. The posting of cash as Eligible Credit Support must meet all requirements set forth in RDL 5/2005 to be effective. Consequently, it must: (i) be granted with the participation of at least one Qualifying Party (the other Party should be classified as a counterparty or professional client at least), (ii) consist in Qualifying Collateral (i.e., cash), (iii) be evidenced in writing, (iv) be linked to a Close-out Neeting Agreement, and (v) cover Qualifying Transactions.

4. The substitution of cash by a Letter of Credit as Eligible Credit Support is admissible in non-insolvency scenarios but deemed to be a personal guarantee not subject to RDL 5/2005.

5. The application of the law governing the Agreements may be limited on the grounds of public policy or overridden by mandatory laws. Furthermore, the elected *lex contractus* does not cover non-contractual aspects.

6. No mandatory margining requirements are applicable other than those set forth in Regulation (EU) No 648/2012.

7. The conversion of due amounts into the Base Currency Equivalent may be challenged if not based on public and generally accepted benchmarks, such as the official exchange rate usually applied in Spain. In the event that the Base Currency is a currency other than Euro, the due amounts will be converted into Euro in insolvency proceedings only for operational reasons. Accordingly, the payment in foreign currency is to remain unchanged.

8. Under Spanish law and in connection with insolvency scenarios, the selection of Automatic Close-Out must be discarded and, as a rule, close-out netting will be admissible as far as RDL is applicable or, regarding credit institutions, pursuant to Law 6/2005.

9. Under Spanish law, in insolvency scenarios, set-off is admitted if (i) all requirements in order for set-off to operate have been met prior to the adjudication of the insolvency, or (ii) the reciprocal credits subject to set-off arise out of the same relationship, without prejudice of Article 9 of the Insolvency Regulation and Article 727 of the Insolvency Law exceptions.

10. Without prejudice to rescission actions available under Spanish law, if set-off and close-out netting are admitted by the *lex contractus* in insolvency scenarios and in accordance with the terms described above, Spanish prohibitions may be lifted.

11. Regarding multi-branch agreements, insolvency proceedings of credit institutions, investment firms and insurance undertakings from the EEA will be administered by the competent authority of the country of incorporation. No general conclusions can be attained in connection with territorial proceedings, although insolvency proceedings are of a universal nature as a rule.

12. As per new Article 153(2) of the Insolvency Law, payment by netting is admitted under Spanish Law, although we must mention the lack of any case law in this regard.

13. In all agreements entered into with credit institutions as well as investment firms, it is mandatory to include a contractual recognition of both bail-in and set-off in the event that the contract law governing does not pertain to a EU Member State.

F. RESERVATIONS

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

1. INSOLVENCY LAWS

1.1 The validity and enforceability of the obligations of the Parties under the Master Agreements 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.

1.2 In an insolvency proceeding under the laws of this jurisdiction, any dispositions of the insolvent party's property made after the opening of insolvency proceeding can be avoided under Article 106 of the Insolvency Law unless it has been approved or authorised by the insolvency representatives. Transactions validly entered into after the opening of an insolvency proceeding will be included in the netting calculations under the close-out netting provisions (to the extent that the close-out netting provisions are enforceable in this jurisdiction as to which we kindly refer you to Section C.B above). Conversely, transactions entered into after the opening of the insolvency proceeding without the consent or approval of the insolvency representatives can be avoided and, accordingly, might not be included 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 transactions entered into before the opening of such insolvency proceedings or otherwise authorised and approved by the insolvency representatives.

1.3 The Spanish insolvency representatives would be required to defer to the jurisdiction of the insolvency officer appointed in another state in certain circumstances, because the claims of the solvent party against the insolvent party arising under the Master Agreement would be deemed under the EU Insolvency Regulation and the Insolvency Law to be situated outside the jurisdiction of the Spanish insolvency representatives. The circumstances referred to are where:

(a) the centre of main interests of the insolvent Party is in Spain, the centre of main interests of the solvent party is in another country, and there are secondary proceedings under the EU Insolvency Regulation or the Insolvency Law in respect of the insolvent party in that third country; or

(b) the centre of main interests of the insolvent party is in a third country, and the centre of main interests of the solvent party is not in Spain.

1.4 The Law 11/2015: suspension of enforcement of security interest and bail-in

1.4.1. Article 70.1 of Law 11/2015 (which follows Article 70 of the BRRD Directive) grants the Spanish resolution authorities the power to restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution from the publication of the exercise of the power until midnight on the business day following that publication.

1.4.2. Pursuant to Article 48.4 of Law 11 /2015 (implementing the provisions in Article 49 of the BRRD Directive) due close-out netting amounts connected to the termination of derivative transactions can be subject to the write-down and conversion powers of the Spanish resolution authorities, provided that: (i) upon entry into resolution, the Spanish resolution authorities shall be empowered to terminate and close out all (as a cherry-picking prevention measure) outstanding derivative transactions for that purpose and (ii) where derivative transactions are subject to a netting agreement, the Spanish resolution authorities or an independent valuer shall determine as part of the valuation under Article 5 the liability arising from those transactions on a net basis in accordance with the terms of the agreement.

1.5. Application of Article 8 of the Law 6/2005. Pursuant to the literal wording of Article 2 thereof, the Law 6/2005 is only applicable to those credit institutions which provide services in other EU Member State either by means of an establishment or on a purely cross-border basis. This notwithstanding, we believe that: (i) such principle is actually intended to apply only in relation to those provisions in the Law 6/2005 dealing with issues relating to mutual recognition of reorganization measures and insolvency proceedings and the related communications between EU authorities, and that (ii) the better view is that the conflict of law rules set out in Article 8 of the Law 6/2005 are applicable in any Insolvency Proceedings in respect of any credit institution irrespective whether it provides or not services in other EU Member State (although please note that this view has not been tested before the Spanish courts).

1.6. Insurance undertakings. Pursuant to Article 179.1 of Law 20/2015: "the claims of the insured, beneficiaries and third injured parties referred to in Article 73 of Law 50/1980, of 8 October, on Insurance Contract, will have absolute priority over any other claims against the insurance undertaking with respect to the assets which, representing technical provisions, are recorded into the investment registry". While there is a wide consensus among Spanish scholars that such priority right should not prevail over the close-out netting right foreseen in the RDL 5/2005, no full certainty can be provided on this issue as there is no case law in this regard.

1.7. Application of the RDL 5/2005 to Underlying Agreements with a single transaction. Enforceability of the close-out netting provisions in any Underlying Agreement requires it to benefit from the application of the RDL 5/2005. Although the judgment of the Supreme Court of 2 September 2014 confirmed that the RDL 5/2005 is applicable to these close-out netting master agreements comprising only one (1) transaction, the judgment of the Supreme Court of 18 November 2015 has cast some doubts on this conclusion. Whilst we believe that the position in the judgement of 2 September 2014 is the correct one, we cannot fully discard the risk of the Supreme Court taking an opposite view in the future. Notwithstanding the foregoing, such doubts are mostly related to transactions entered into by retail clients.

2. PROCEDURAL LAW

2.1 In accordance with general principles of Spanish procedural law, the rules of evidence in any judicial proceeding cannot be modified by agreement of the parties, and consequently any provisions of a Master Agreement in which determinations made by the Parties are to be deemed conclusive in the absence of manifest error, may not be upheld by Spanish courts.

2.2 Any enforcement of a Master Agreement before the Spanish Courts will be subject to the rules of civil procedure as applied by the Spanish Courts, which may require the translation of any foreign language documents into the Spanish language; service of process for any proceedings before the Spanish Courts must be performed in accordance with Spanish laws of civil procedure; 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; as regards jurisdiction generally, the Courts have powers to stay proceedings if concurrent proceedings are brought elsewhere.

2.3 Spanish courts may render judgments in the same currency in which the initial obligation has been undertaken, but article 1170 of the Spanish Civil Code allows payment in Euro in the event that payment in the currency in which the judgement was made is not possible. In addition, please note that in accordance with article 577 of Law 1/2000, (i) all expenses, interest accrued due to procedural delays and legal fees ("*costas*") will be payable in Euro and that (ii) for the purposes of attaching assets in relation to a judgment rendered in a foreign currency, the foreign currency debt will need to be converted into Euro at the date the enforcement resolution is issued by the competent court. The conversion of foreign currency which has an official exchange rate with the Euro published by the European Central Bank will effectively be a mere mathematical operation but conversion into Euro of a currency which has no official exchange rate will be carried out by the court, on the basis of documents presented by the parties, and applying their own reasonable criteria.

2.4 The initiation by any party of criminal proceedings in Spain will halt the enforcement of the Master Agreement until the relevant criminal court issues a final resolution of such proceedings.

3. ENFORCEABILITY OF CLAIMS

3.1 In this Opinion, "enforceable" means that each obligation or document is of a type and form enforced by the Spanish courts. The term does not address the extent to which a judgement obtained in a court outside Spain will be enforceable in Spain. Nor does it mean that such obligations will be enforced in all circumstances in accordance with the terms of the relevant Master Agreement. In particular:

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

(b) the power of a Spanish court to order specific performance of an obligation or other equitable remedy is discretionary and accordingly, a Spanish court might make an award of damages where specific performance of an obligation is sought;

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

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

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

3.3 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 Master Agreements 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.

3.4 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 or covenants which are merely accessory or complementary to the main payment and/or delivery obligations or upon the occurrence in respect of the other party of any event other than an event which may adversely and materially affect the creditworthiness of such other party or its ability to comply with its obligations under the relevant agreement.

4. DEFAULT INTEREST AND INDEMNITIES BETWEEN PARTIES

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

4.2 Under Spanish law, interest imposed upon a party by a Master 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.

4.3 Any provision of a Master 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 Master Agreements, 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, 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.

Please note that Article 135 of the Spanish Constitution does not apply to all Public Authorities but only to those which are within the scope of the term "Administraciones Públicas". Such term comprises:

i. the Kingdom of Spain;

ii. the Spanish Regional Governments (*Comunidades Autónomas*);

iii. any Spanish municipalities (*ayuntamientos*) and provinces (*provincias*); and

iv. legal entities incorporated by any of the foregoing as a public body under Public Law within the scope of Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts.

CASES & LACAMBRA

6. OTHER QUALIFICATIONS

(i) We are giving this Opinion as Spanish advisors. This Opinion is limited to matters under Spanish law, in effect on this date and based on the precedent case law applicable to each issue in this Opinion. We express no opinion regarding the law of any other jurisdiction.

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

(iii) We express no opinion as to the validity and enforceability of any provisions of the Agreements other than those to which express reference is made in this Opinion.

(iv) If a Party to a Master Agreement is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Union or Spanish sanctions implemented or effective in Spain, or is otherwise the target of any such sanctions, then the obligations of the other Party to that Party under the Agreements may be unenforceable or void.

(v) This Opinion expresses and describes certain Spanish legal concepts in English and not in their original Spanish terms; therefore, this Opinion is issued and may be only relied upon on the express condition that it shall be governed by, and that all words and expressions used herein shall be construed and interpreted in accordance with, the laws of Spain.

This Opinion is addressed exclusively to EFET and its members who have subscribed to the EFET Legal Module, is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other persons without EFET's and Cases & Lacambra's prior written approval.

Yours faithfully,

Dr. Claudi Rossell	Mr. Toni Barios