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NETTING ANALYSER LIBRARY

CCP Opinion- Situs version

The Futures and Options Association
2nd Floor
36-38 Botolph Lane
London
EC3R 8DE

Dear Sirs,

Re: CCP Opinion in relation to ATHEX's Transactions Clearing S.A. and the brand name "ATHEXClear"

You have asked us to give an opinion in respect of the laws of Greece ("**this jurisdiction**") as to the effect of certain netting and set-off provisions and collateral arrangements in relation to ATHEX's Transactions Clearing S.A. (the "**Clearing House**") as between the Clearing House and its clearing members (each a "**Member**").

We understand that your requirement is for the enforceability and validity of such netting and set-off provisions and collateral arrangements to be substantiated by a written and reasoned opinion letter.

References herein to "**this opinion**" are to the opinion given in Section 3.

1. TERMS OF REFERENCE

1.1. Except where otherwise defined herein, terms defined in the Rules of the Clearing House have the same meaning in this opinion letter.

1.2. The opinions given in Section 3 are in respect of a Member's powers under the Clearing House Documentation as at the date of this opinion. We express no opinion as any

provisions of the Rules of the Clearing House other than those on which we expressly opine.

1.3. Where Contracts are governed by laws other than the laws of this jurisdiction, the opinions contained in Section 3 are given in respect of only those Contracts which are capable, under their governing laws, of being terminated and liquidated in accordance with their provisions.

1.4. The opinions given in Section 3.5 are given only in relation to Non-cash Collateral comprising securities credited to an account.

1.5. Definitions

In this opinion, unless otherwise indicated:

(a) "**Clearing Agreement**" means a Model Form Clearing Agreement or an Equivalent Clearing Agreement;

(b) "**Equivalent Clearing Agreement**" means any agreement or other document entered into by or on behalf of a Member pursuant to which such Member agrees to be bound by the Rules as a Member but which contains no other provisions which may be relevant to the matters opined on in this opinion letter;

(c) "**Model Form Clearing Agreement**" means the clearing membership agreement entered into between each Member and the Clearing House in the form attached hereto at Annex 1[1];

(d) "**Assessment Liability**" means a liability of a Member to pay an amount to the Clearing House (including a contribution to the assets or capital of the Clearing House, or to any default or similar fund maintained by the Clearing House); but excluding:

(i) any obligations to provide margin or collateral to the Clearing House, where calculated at any time by reference to Contracts open at that time;

(ii) membership fees, fines and charges;

(iii) reimbursement of costs incurred directly or indirectly on behalf of or for the Member or its own clients;

[1] To be noted that Annex I consists of the application to become a member of the Clearing House. Once such application is approved, the applicant becomes a Member of the Clearing House (Rules, Articles 6-7-8. See also the Clearing's House Decision no2 dated 28.06.2012 as amended and in force). Members are presumed having accepted the Rules by submitting the respective application, according to the relevant provision included in the clause of the Rules describing the scope of application of the Rules.

(iv) indemnification for any taxation liabilities;

(v) payment or delivery obligations under Contracts; or

(vi) any payment of damages awarded by a court or regulator for breach of contract, in respect of any tortious liability or for breach of statutory duty.

(e) "**Clearing House Documentation**" means the Clearing Agreement, and Rules;

(f) "**Contract**" means a contract concluded in the Derivatives Market[2] in accordance with the ATHEX Regulation which is registered with the Clearing House;

(g) "**Party**" means the Clearing House or the relevant Member;

(h) "**Non-cash Collateral**" means the non-cash collateral provided to the Clearing House as margin under the Rules;

(i) References to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy;

(j) "**Rules**" means the rules of the Clearing House in force as at the date of this opinion;

(k) References to a "**section**" or to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be).

2. ASSUMPTIONS

We assume the following:

2.1 That, except with regards to the provisions discussed and opined on in this opinion letter, the Clearing House Documentation and the Contracts are legally binding and enforceable against both Parties under their governing laws.

2.2 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Clearing House Documentation and Contracts; to perform its obligations under the Clearing House Documentation and Contracts; and that each Party has taken all necessary steps to execute and deliver and perform the Clearing House Documentation and Contracts.

2.3 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter

[2] Derivatives market means the regulated market of ATHEX of which the object of trades are the derivatives admitted to trading in it.

into and perform its obligations under the Clearing House Documentation and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Clearing House Documentation in this jurisdiction.

2.4 That both Parties have properly executed either a) the Model Form Clearing Agreement, in substantially identical form to that attached at Annex 1 or b) an Equivalent Clearing Agreement.

2.5 That the Clearing House Documentation has been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.

2.6 That each Party acts in accordance with the powers conferred by the Clearing House Documentation and Contracts; and that each Party performs its obligations under the Clearing House Documentation and each Contract in accordance with their respective terms.

2.7 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing House Documentation, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing Agreement.

2.8 That the Member is at all relevant times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.

2.9 That the obligations assumed under the Clearing House Documentation and Contracts are mutual between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it.

2.10 That no provision of the Clearing House Documentation other than an Equivalent Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect.

3. OPINION

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in Section 4 below, we are of the following opinions.

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which the Clearing House could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are:

Pursuant to the Greek Bankruptcy Code (Greek law 3588/2007, published in the Government's Gazette bulletin 153A/10.07.2007, hereinafter referred to as the **Bankruptcy Code**), which entered into force on September 16, 2007 and applies to proceedings commencing after that date (article 180 of the Bankruptcy Code), the only insolvency proceedings to which the Clearing House would be subject in Greece are the following:

- **Bankruptcy proceedings** under articles 1-98 and 107-177 of the Bankruptcy Code, which replaced the provisions of articles 525-707 of the Greek Commercial Law. The Bankruptcy Proceedings apply to all corporate entities, including investment companies and insurance undertakings, partnerships and natural persons who are considered to be merchants under the Bankruptcy Code, in all cases either having the centre of their main interests in Greece or outside Greece maintaining though a secondary permanent establishment in Greece. Pursuant to article 68 of Greek Law 3601/2007 (as amended by Greek law 4021/2011), Bankruptcy Proceedings cannot apply to Greek credit institutions; Bankruptcy Proceedings can be initiated either by the insolvent company (i.e. the Clearing House) itself or by its creditors (including the Members to the extent that they are the Clearing House's creditors) who have a legal interest to request its bankruptcy or by the general attorney of the court of first instance if the initiation of Bankruptcy Proceedings would be justified by public policy reasons (article 5 of Bankruptcy Code).

- **Special Liquidation Proceedings** in accordance with the provisions of article 106(ia) of the Bankruptcy Code, as amended by Greek law 4013/2011 and in force[3].
- **Reorganization Proceedings** in accordance with the articles 99-106(j) of Greek Bankruptcy Code on reorganization measures applicable to all corporate entities, partnerships and natural persons as amended by Greek law 4013/2011 and in force ("**General Reorganization Measures**")[4]. Under the Reorganization Proceedings, the insolvent debtor and its creditors may reach an agreement[5] on the restructuring of the assets and liabilities of the former (the "**Reorganization Plan**") which is further ratified by the competent bankruptcy court and becomes binding on all creditors (even on those who did not participate in the agreement of the Reorganisation Plan)[6]. An application to initiate Reorganization proceedings can be filed by the insolvent company (i.e. the Clearing House).

These procedures are together called "**Insolvency Proceedings**".

The following may apply under the Insolvency Proceedings:

Bankruptcy Proceedings –General rules

The objective pre-condition for a debtor to be declared bankrupt is being in a state of cessation of payments. According to article 3 of the Bankruptcy Code[7] the cessation of payments is either actual or constructive. An actual cessation of payments is deemed to exist if the debtor fails to pay due to an inability of a permanent nature all or a significant proportion of its due and payable monetary obligations that derive from its commercial business. A constructive cessation of payments exists if the debtor continues to make payments "through destructive means", i.e. through a distress sale of assets, through borrowing at exorbitant rates etc.

Under the Bankruptcy Proceedings rules:

- the bankruptcy official in charge of the insolvent entity ("*syndikos*" in Greek) has a cherry-picking right as to which pending contracts will be performed by the insolvent entity

[3] The special liquidation of article 106(ia) of the Bankruptcy Code is applicable to all corporate entities, partnerships and natural persons. In order for an entity to be subject to special liquidation, two of the following three economical criteria have to be met: (i) total balance sheet of €2.500.000, (ii) net turnover of €5.000.000, (iii) average employed personnel during the last financial year of 50 persons.

[4] Reorganization measures do not apply to article 68 of law 3601/2007, as amended and in force credit institutions.

[5] For such an agreement a majority of 60% of the claims of the creditors participating in the relevant meeting, including at least 40% of the existing secured claims is required.

[6] The Reorganization Plan may provide for any kind of restructuring including in particular the following: (i) amendment of the terms of the debtor's obligations (e.g. change of duration, change of payable interest rate, replacement of security rights etc.); (ii) debt to equity swaps; (iii) modification of the inter-creditor relationships following execution of the Agreement, in their capacity either as creditors or as potential shareholders of the debtor. In particular, the Reorganization Plan may indicatively provide that a class of creditors is not entitled to payment of its claims before another class of creditors has been fully satisfied; (iv) haircuts; (v) disposal of debtor's assets; (vi) outsourcing of the debtor's management to a third party;(vii) full or partial transfer of the debtor's business to a third party; (viii) suspension of individual creditors' enforcement rights following execution of the Reorganization Plan. In case of dissenting creditors such suspension can be only imposed for a period which does not exceed 6 months; (ix) appointment of a person acting as observer in order to safeguard the implementation of the terms of the Reorganization Plan.

[7] Article 3 of the Bankruptcy Code repeated the existing definition given to the cessation of payments by the previous law as interpreted by the Greek case law and legal writing.

according to article 29 of the Bankruptcy Code. Such right, however, does not apply to rights and obligations arising under a single contract[8];

- bankruptcy is validly agreed by the contracting parties as a termination event according to article 32 of the Bankruptcy Code;
- the declaration of bankruptcy does not affect the creditor's right to set-off its claim against the claims of the bankrupt debtor, provided that the pre-conditions for a valid and enforceable set-off claim existed before the bankruptcy declaration (e.g. if Greek law were applicable, according to article 440 of the Greek Civil Code, only reciprocal, due and payable obligations could have been set-off). Furthermore, in article 36 of the Bankruptcy Code it is explicitly provided (as opposed to the abolished provisions of the Greek Commercial Law) that the set-off of claims deriving from OTC derivatives transactions or in accordance with close-out netting provisions under financial collateral arrangements will be regulated by the relevant special legislation in force (i.e. under Greek law, by Greek law 3156/2003 (the "**Bond Loan Law**") and Greek law 3301/2004 (the "**Collateral Law**"). Please also note that the enforcement of close-out netting provisions under Greek law are also indirectly secured by Regulation 1346/2000 (the **Insolvency Regulation**),
- articles 41 and 42(c) and 42(d) of the Bankruptcy Code provide, among other things, for the obligatory revocation of:
  (i) the payment of claims which are not yet due and payable,
  (ii) and the provision of collateral, in order for the insolvent entity to secure pre-existing claims for which the insolvent entity had not assumed such obligation *ab initio* or in order to secure new claims assumed by the insolvent entity in replacement of those pre-existing, in both cases where the payment, or the provision of the collateral, respectively, were performed within the suspect period[9] (the suspect period commences on the date of cessation of payments, which is defined by the court order declaring bankruptcy and ends the date on which the entity is declared bankrupt). Such payment and/ or provision of collateral are deemed to be to the detriment of the insolvent entity's creditors.

However, according to article 45 of the Bankruptcy Code acts of the insolvent creditor that are explicitly exempted by law from the aforementioned absolute prohibition are not revoked and are valid and enforceable.

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[8] We are of the view that the Clearing House Documentation and the Contract with a specific Member, including any transaction made between such member and the Clearing House thereunder (not all of the Contracts with all Members) should be considered as a single contract under Greek law for this purpose.

[9] According to article 7 of the Bankruptcy Code, the duration of the suspect period is defined by the court order declaring bankruptcy. Such period shall not exceed 2 years from the date on which the entity is declared bankrupt. The said article reiterates the respective provisions applicable under the previous regime.

Bankruptcy of the Clearing House and close-out netting (including set-off) provisions

The Rules include no provision for the effects of the default/insolvency of the Clearing House. Also, there is no other legislative provision which provides for the performance of a close-out netting in case of the Clearing House's insolvency, i.e. that in case of the Clearing House's insolvency, its Members would have the right to terminate the contract[10] and to set-off[11] their mutual obligations and claims (**close-out netting**). This means that in case of the Clearing House's insolvency/default, generally applicable laws, as referred to above and described in details herein below, would apply.

In relation to the right to terminate the contract due to the Clearing House's insolvency, article 31 of the Bankruptcy Code provides that contracts of permanent nature remain into force, unless otherwise provided for in the law or in the contract in question. Since, as mentioned above, there is no such provision in the Rules or in the generally applicable legislation, the Clearing House's insolvency should not *per se* constitute a grounds of termination of the relevant arrangement.

As to the right of the counterparty of the bankrupt Clearing House to set-off its outstanding obligations against the obligations of the latter, article 36 paragraph 1 of the Bankruptcy Code[12] provides that the creditor (i.e. the counterparty of the bankrupt Clearing House) may exercise its right to set-off its claims against its counterparty's reciprocal claims, if the requirements for set-off have been fulfilled prior to the declaration of bankruptcy. On the basis that the Rules are governed by Greek law and article 17 of Regulation 593/2008 [13] of the European Parliament and of the Council f 17 June 2008 on the law applicable to contractual obligations (the **Rome I Regulation**), such set-off would be governed by Greek law.[14] According to article 440 of the Greek Civil Code in order for claims to be set-off, they need to be (i) reciprocal, (ii) of the same kind and (iii) due and payable. In absence of a contractual or legal close-out netting provision applying in case of the Clearing House's insolvency, it is doubtful whether all the above requirements, particularly the third requirement referring to claims being due and payable

[10] As mentioned herein above, the parties may validly agree on bankruptcy / insolvency as a termination event of an agreement entered into between them according to article 32 paragraph 2 of the Bankruptcy Code.

[11] Netting could be considered under Greek law implying the performance (even as an accounting and not an actual act) of a set-off between claims owed.

[12] To be noted that before the introduction of the Bankruptcy Code and the special provisions analysed below, there was uncertainty as to the enforceability of a set-off of the parties' obligations and different opinions were expressed as to the enforceability of set-off in the case of insolvency.

[13] According to article 17 of the Rome I Regulation, where the right to set-off is not agreed by the parties, (which is the case with the Rules, as they do not include any set off provision referring to the case of insolvency), set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

[14] The same result applies by applying article 8 of Greek law 2789/2000 on finality of settlement in payment systems and securities settlement systems.

before declaration of bankruptcy, can be considered fulfilled and whether, therefore, the Member would have the right to set-off its claims against the claims of the Clearing House.

Based on the above, in absence of an applicable general or special, legislative or contractual close-out netting provision to the Clearing Agreement, a Member cannot terminate the Clearing Agreement solely on grounds of the insolvency of the Clearing House nor it can set-off all claims arising from the Clearing Agreement, unless such claims have become due and payable already before the declaration of bankruptcy.

Article 6 of Regulation 1346/2000 (the Insolvency Regulation)

According to the scope of application of Regulation 1346/2000 (the **Insolvency Regulation**), the latter applies, *inter alia*, to persons having their centre of main interests within the European Community. In our opinion, the Clearing House should fall within the scope of application of the Insolvency Regulation. The provisions of the Insolvency Regulation have under the European Constitutional Law a direct effect and, thus, prevail over, *inter alia*, article 36 paragraph 1 of the Bankruptcy Code.

According to article 6 of the Insolvency Regulation, even if set-off (netting) is not permitted by the law governing insolvency (which, in this case, would be Greek law) it is still enforceable, if it is permitted by the law governing the insolvent debtor's claim. As to the law which would govern the insolvent debtor's claim, according to article 8 of Greek law 2789/2000 on finality of settlement in payment systems and securities settlement systems, as currently applicable,[15] in the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system. In this case, the system referred to in article 8 of Greek law 2789/2000 is governed by Greek law, thus, any relevant claim should be governed by Greek law.

As mentioned above, Greek law (specifically, article 440 of the Greek Civil Code in conjunction with article 36 paragraph 1 of the Bankruptcy Code) permits in the case of commencement of Bankruptcy Proceedings only the set-off of claims that were already due and payable before the declaration of bankruptcy.

[15] According to article 10 paragraph 2 of Greek law 2789/2000 provides that in order for it to apply to a system, it should either be governed by Greek law or operate in Greece.

Greek law provisions securing the enforceability of close-out netting provisions irrespective of the commencement of Insolvency Proceedings

Setting the above general rules aside, there are specific Greek law provisions that would apply to the set-off of the Member's claims and would under certain circumstances guarantee the enforceability of the close-out netting provisions, if such provisions were to exist in the Rules or in the legislation applying to the Clearing House.

As mentioned herein above, according to article 36 paragraphs 2 and 3 and article 46 of the Bankruptcy Code, the set-off of claims deriving from any OTC transaction in derivatives (**A**), or under a close-out netting provision within the framework of a financial collateral arrangement (**B**) or from transfer orders on settlement of payments and financial instruments systems (**C**), shall be performed in accordance with such special legislation.

A) Article 16 of Greek law 3156/2003 on Bond loans, securitisation of claims and claims from real estate and other provisions (the "Bond Loan Law")

Article 16 of the Bond Loan Law provides as follows:

"SET-OFF AND OTC DERIVATIVE PRODUCTS

In the case of insolvency or other collective measures or procedures, which have the effect of prohibiting or restricting the disposal [of assets], the set-off of reciprocal claims, including multilateral set-off and close out netting, which derives from transactions of any kind, as well as [including] set-off of claims deriving from transactions, in OTC derivatives between parties, one at least of which is an institution in the sense of paragraph 5 article 2 of law 2396/1996[16] (government gazette facsimile 73 A) or the State, is valid and enforceable and may be opposed against all creditors provided that it is governed by a contract between the creditors of the claims being set-off concluded through a document of certain date, [which is] prior to the declaration of insolvency or the commencement of the collective measure or procedure."

[16] Articles 1 to 31 of Greek law 2396/1996 were abolished by Greek law 3606/2007, which implemented Directive 2004/39/ EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID). According to the abolished article 2 of law 2396/1996 and for the purposes thereof, an institution meant either an investment services firm or a credit institution and in our view, taking into account the definitions of credit institution and investment services firm set out in article 2 of L. 3606/2007, the Greek courts would interpret the specific references to include credit institutions and investment services firms as defined in that article. Namely, investment services firms shall mean every legal entity whose regular occupation or business is the provision of one or more investment services to third parties and shall also include natural persons who have obtained a relevant license by another Member State in accordance with MiFID. Accordingly, a credit institution is defined as an undertaking the business activity of which is the taking of deposits or other refundable funds from the public and the provision of loans or other forms of credit or the issuing of electronic money, if licensed in Greece and as an undertaking whose business is the one described in the banking Directive 2006/48/EC if licensed in the EU. It should be accepted that the term investment services firm and credit institution include entities authorised to act as such in EU or EEA member state as well as non-EU entities licensed to undertake the above activities.

The definition of a document of certain date[17] is contained in article 446 of the Greek Code of Civil Procedure, which provides as follows:

"A private document acquires a certain date as to third parties only if it is certified [as to the date] by a public notary or by another public servant having such authority according to law, or if one of those signing it has died, or if its material contents are referred to in a public document, or if there is another event that creates certainty as to the date in an analogous manner. The certification is effected through a notation on the document of the word "certified" and of the date." The certain date must precede the date of the declaration of Insolvency or the commencement of the collective measure or procedure.

It should be noted that the provisions of article 16 of the Bond Loan Law apply to the agreements that were in place on the date it entered into force, as well as those executed after such effective date, provided the Insolvency or Reorganization Proceedings commenced after such date.

In conclusion, it is clear that, according to the Bond Loan Law, set-off of claims between a Party, which becomes insolvent, and another Party deriving from the Transactions under an agreement is valid, provided the agreement has a certain date which is prior to the declaration of insolvency or the commencement of the collective measure or procedure akin to insolvency (Reorganization Proceedings) and at least one of the parties is an institution in the sense of law 2396/1996, article 2 paragraph 5.
However, in the absence of any close-out netting clause in the Rules the Bond Loan Law shall not apply.

B) Greek Law 3301/2004 on Financial collateral agreements, application of International Financial Reporting Standards and other provisions

Greek law 3301/2004 as amended and in force (the '**Collateral Law**'), transposed into Greek law Directive 2002/47/EC as amended by Directive 2009/44/EC on financial collateral arrangements (the **Collateral Directive**), which provides that within its scope close out netting provisions have to be recognized and given effect in the case of insolvency. As the Collateral Directive contains no condition corresponding to the date certification, after the issuance of the aforementioned law, close out netting provisions falling within its scope are recognised without

[17] The most practical way to create a certain date is to have a court bailiff to serve a copy of the relevant document to one of the parties. A foreign notary or public authority can also perform the certification provided that it will be possible immediately or a later stage (i.e. even after the declaration of insolvency) to attach Apostille on such certification, in accordance with the Hague Convention of 1961.

the requirement that the relevant agreements have a certain date. The Collateral Law prevails over all previous laws in its field of application, including all general and specific insolvency law provisions.

Even though there is no express provision regarding the application of the Collateral Law to existing close-out netting agreements, it is our reasoned opinion that the Collateral Law applies to close-out netting agreements, which existed when it entered into force, provided Insolvency Proceedings commence after its entry into force.

The Collateral Law lays down the regime applicable to financial collateral arrangements and to the provision of financial collateral. For the purpose of this law the term "financial collateral arrangement" means, according to article 2 paragraph 1 of the Collateral Law "*a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or general terms and conditions*".

In order to fall within the scope of the Collateral Law, according to article 1 paragraph 5 of the Collateral Law, the financial collateral itself as well as the provision of the financial collateral under such arrangement must be evidenced in writing or in a legally equivalent manner.

The wording of the aforementioned provision resolves the issue as to whether the Collateral Law, and in particular its provisions on netting, apply in cases where a collateral agreement has been signed, but no collateral has been provided, since paragraph 5 of article 1 of the Collateral Law renders such law applicable to collateral arrangements irrespective of the actual provision of collateral, to the extent that such collateral arrangement is entered with the serious intention to provide collateral in the future and not simply as a technique to cause the Collateral Law to apply to the netting provisions of an agreement. However, in cases where no collateral has been actually provided, an argument could be made, in particular circumstances, that the collateral document was only executed, in order to circumvent the provisions of the Bond Loan Law. Since there is no case-law and limited legal writing on the Collateral Law it is difficult to quantify the risk of courts accepting such argument. Therefore, in cases where no collateral is provided, it may be prudent to also comply with the provisions of the Bond Loan Law (i.e. certification of date).

Furthermore, according to article 1 paragraph 3 of the Collateral Law the financial collateral to be provided must consist of cash, financial instruments or credit claims.

Article 1 paragraph 2 of the Collateral Law lists the entities to the collateral transactions of which it applies, as follows:

(a) *"(a) a public authority (excluding publicly guaranteed undertakings unless they fall under points (b) to (e)) including:*

(i) public sector bodies of Member States charged with or intervening in the management of public debt, and

(ii) public sector bodies of Member States authorised to hold accounts for customers;

(b) *a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as defined in the Act of the Governor of the Bank of Greece no 2588/2007,, as well as in Annex VI of the Directive 2006/48/EC, the International Monetary Fund and the European Investment Bank;*

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

(i) a credit institution as defined in Article 2 paragraph 1 of the law 3601/2007, as it is currently in force;

(ii) an investment firm as defined in Article 2 paragraph 1 of the law 3606/2007;

(iii) a financial institution as defined in Article 2 paragraph 11 of the law 3601/2007;

(iv) an insurance undertaking as defined in Article 2a(a) of the Legislative Decree 400/1970 (FEK 10 A'), and a life assurance undertaking as defined in the same provision of the aforementioned law;

(v) an undertaking for collective investment in transferable securities (UCITS) as defined in law 3283/2004;

(vi) a leasing company as defined in law 1665/1986;

(d) *a central counterparty, settlement agent or clearing house, as defined respectively in Article 1 paragraph 4 (c),(d), and (e) of law 2789/2000, as well as in Article 2(c), (d) and (e) of Directive 98/26/EC as transposed into the national legislation of other member states, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by that Directive, and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or any institution as defined in points (a) to (d);*

(e) *a legal person, including unincorporated firms and partnerships, provided that the other party is an institution as defined in points (a) to (d)."*

It is obvious that collateral taken by a foreign legal entity falling under (e) above, against a Greek merchant shall not fall within the scope of Collateral law.

According to article 2 paragraph 1 of the Collateral Law and for the purpose of this law, "close out netting provision" is defined, as "*a provision of a financial collateral arrangement, or of an*

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

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

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

According to article 7 of the Collateral Law, a close-out netting provision can take effect in accordance with its terms:

(a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider and/or the collateral taker; and/or

(b) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

As is the case with the Bond law, the respective provisions of the Collateral Law shall not apply in the case of insolvency of the Clearing House, since there is no close-out netting provision either under the Rules or in the legislation.

C) Article 3 of Greek law 2789/2000 on settlement finality in payment and securities settlement systems

Article 3 of Greek law 2789/2000, which transposed into Greek law Directive 98/26/EC on settlement finality in payment and securities settlement systems and its amending directive thereof, respectively provides as follows:

"Article 3

1. The Transfer Orders and the Set-Off are valid and binding on any third party even in the event of Insolvency Proceedings against a participant (in the system), provided that these Transfer Orders were entered into the system before the commencement of the Insolvency Proceedings, as this is defined in article 5 of the law[18].

If the Transfer Orders are entered in the system after the commencement of the Insolvency Proceedings and provided that their settlement begins on the day of commencement of the

[18] According to article 5 of Greek law 2789/2000, the commencement of the Insolvency Proceedings occurs when the respective decision of the competent court or the administrative authority is published.

Insolvency Proceedings, these Transfer Orders are valid and binding on any third party, under the condition that the Administrator of the system (a settlement agent or a central counterparty or a clearing house) proves that it had no knowledge of the commencement of the Insolvency Proceedings, in accordance with article 6 of the law[19].

2. The validity of the Set-Off is not challenged by provisions that provide for the annulment of legal actions/ deeds that have been concluded before the commencement of the Insolvency Proceedings, as this is defined in article 5 of the law.

3. National Systems are subject to rules that determine the time of entering of a Transfer Order in the System, as well as the time after which this Order cannot be revoked neither by the participant nor by any other third party."

A transfer order may not be revoked by a participant in a system, nor by a third party, from the moment defined by the rules of that system.

In the case of interoperable systems, each system determines in its own rules the moment of irrevocability, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, one system's rules on the moment of irrevocability shall not be affected by any rules of the other systems with which it is interoperable.

4. In the case of interoperable systems, each system determines in its own rules the moment of entry into its system, in such a way as to ensure, to the extent possible, that the rules of all interoperable systems concerned are coordinated in this regard. Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, one system's rules on the moment of entry shall not be affected by any rules of the other systems with which it is interoperable.

Since, as already referred, the Clearing House is governed by Greek law 2789/2000 (article 2, paragraph e), the set-off[20] would be valid and binding on any third party even in the event of insolvency proceedings[21] against a participant (in the system), provided that such transfer orders were entered into the system before the commencement of the Insolvency Proceedings. **The set-off referred to in article 3 of Greek law 2789/2000 refers to the clearing/settlement of the transfer orders made in accordance with the Rules and should**

[19] According to article 6 of Greek law 2789/2000, Bank of Greece notifies immediately to the national systems the commencement of Insolvency Proceedings of a participant (in the system).

[20] For the needs of this law, set off means, the conversion into one claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed.

[21] For the needs of this law, insolvency proceedings shall mean, any collective measure provided for in the law of a Member State, or a third country, either to wind up the participant or to reorganise it, where such measure involves the suspending of, or imposing limitations on, transfers or payments.

not, therefore, be considered as covering close-out netting provisions, since such provisions are not included in the Rules.

Conclusion

In light of all the above described under section 3.1, a Member does not have the right neither under the terms of the Clearing Agreement nor under the provisions of any generally or specially applicable legal provision (i) to terminate the Clearing Agreement due to the commencement of Insolvency Proceedings and/or (ii) to set-off the entirety of its claims under the Clearing Agreement against the Clearing House, irrespective of whether such claims were due and payable before the declaration of bankruptcy against the Clearing House.

In our opinion, such a right can only be acknowledged to the Member by applying the generally applicable principle of Greek civil law to terminate a contract on significant grounds (*σπουδαίος λόγος*, in Greek). Even in such a case, the Member would not be able to set-off claims against the rule of article 36 paragraph 1 of the Bankruptcy Code (i.e. which are not due and payable before the declaration of Bankruptcy Proceedings)[22].
The same as above conclusion applies to the application of any of the proceedings defined herein above as Insolvency Proceedings.

3.2 Special provisions of law

As already described under section 3.1. above, the following special provisions of Greek law apply to Contracts by virtue of the fact that the Contracts are, or relate to, exchange-traded derivative products and are cleared through a central counterparty:

1) Greek law 2789/2000 which transposed into Greek law Directive 98/26/EC on settlement finality in payment and securities settlement systems;
2) Greek law 3301/2004 as amended and in force, which transposed into Greek law Directive 2002/47/EC as amended by Directive 2009/44/EC on financial collateral arrangements (the **Collateral Directive**);

[22] In our opinion it is unlikely that a bankruptcy application be filed against the Clearing House or an application to commence Reorganisation Proceedings against it or to subject it to the Special Liquidation Proceedings of article 106(k) of the Bankruptcy Code, without the Hellenic Capital Market Commission (the **HCMC**) revoking the license of the Clearing House to pursue the relevant business activities. In this sense, the Clearing House would be rendered unable to perform the services provided for in the Clearing Agreement, thus, providing, a significant ground to the Member to terminate the Clearing Agreement. Irrespective of the involvement of the HCMC, in the aforementioned cases, it is our reasoned opinion that any of those should constitute significant grounds to terminate the Clearing Agreement.

3) Greek law 3606/2007 (Articles 72-85) which transposed into Greek Law Directive 2004/39/EC on markets in financial instruments[23];

4) ATHEXClear Rules (The Rules) and the respective decisions of the BoD of ATHEXClear , as amended and currently applicable;

5) Article 16 of Greek law 3156/2003 (Bond loans, securitisation of claims and claims from real estate and other provisions);

6) ATHEX Regulation, i.e. the regulation of the only regulated market in Greece currently in force, in accordance with article 43 of Greek law 3606/2007 (Government Gazette A/195/17.8.2007) and the approving decision of the Hellenic Capital Market Commission dated 1.7.2008 (Government Gazette B/1456/24.7.2008), as amended and currently applicable.

3.3 Recognition of choice of law

Choice of law provisions that could be included in the Clearing House Documentation (kindly note that no such clauses exist in the Clearing House Documentation) would be recognised under the laws of this jurisdiction in accordance with article 3 paragraph 1 of the Rome Convention and Rome I Regulation, as the case may be, irrespective of whether the Member is not incorporated, domiciled or established in this jurisdiction[24], subject to any other applicable laws to (i) rights *in rem* (ii) Greek public order (article 16 of the Rome Convention or article 21 of Rome I Regulation, as the case may be); and (iii) Greek or foreign overriding mandatory provisions in the sense of article 7 of the Rome Convention or article 9 of Rome I Regulation, as the case may be.

Furthermore, according to article 3 paragraph 3 of the Rome Convention or the Rome I Regulation, as the case may be, if the parties chose the law of a country, other than the country where all the other elements relevant to the situation at the time of the choice are connected, the Greek courts will apply the law chosen by the parties, but without prejudice to the application of rules of the law of that country which cannot be derogated from by contract. To the same effect, paragraph 4 of article 3 of the Rome I Regulation provides that where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the

[23] See also Regulation No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

[24] To be noted that for a Member to have the right to participate in the ATHEXClear system it must be a credit institution or an investment firm (EPEI) which lawfully operates in Greece or a System or System operator which operates on a remote basis.

Member State of the forum, which cannot be derogated from by agreement (i.e. "mandatory rules").

It must also be noted that Greek law 2789/2000 (article 1, paragraph 1(ii)), which transposed into Greek law Directive 98/26/EC on settlement finality in payment and securities settlement systems, provides that the system may be governed by the law of a Member State chosen by the participants but the participants may only choose the law of a Member State in which at least one of them has its head office. Bearing in mind that the clearing system of ATHEXClear is expressly classified as a system for the needs of law 2789/2000 (article 2, paragraph e), the above provision would need to be also respected.

As mentioned above the Rules do not include an explicit provision as to which law will govern the Rules and the transactions in the system, thereof. However, there is an explicit reference in the provision describing the scope of application of the Rules to the interpretation of the latter in accordance with the generally applicable principles of the Greek Civil Code. Such cross reference should be interpreted as a cross reference to the civil laws of Greece. Also, as far as the contractual relationships between the system and its members are concerned it appears that they as well would be governed by Greek law as the law governing the operation of the system (Rome I Regulation, article 4 paragraph h). Proprietary aspects of the transactions in the system would be governed by the applicable *lex rei sitae* rule[25].

3.4 Cash Collateral

Payments made by a Member to the Clearing House as cash margin do not constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings against the Clearing House, such cash would not be treated as the property of the Clearing House available to its creditors in general and the satisfaction of their claims thereof.

However, the amount of cash so provided would not constitute a debt owed by the Clearing House to the Member as principal. This is because according to article 77 of law 3606/2007, which transposed into Greek law the Directive 2004/39/EC and according to the Rules (article

[25] Under the Greek conflict of laws rules and taking into account the types of collateral that can be provided by a Member, the applicable *lex rei sitae* may be:

- in case of securities in paper form held either directly by the collateral taker or by an intermediary, the law of the location of the collateral taker or the intermediary, respectively;
- in case of securities in dematerialized form held in the name of the collateral provider / taker, the law governing the electronic registry in which such dematerialized securities are registered. If such securities are indirectly held by the collateral provider / taker through the use of various Intermediaries, other laws may apply, such as the law of the agreement between the collateral taker and the main custodian.
- in case of cash, the law governing the agreement under which the specific bank account (to which the cash collateral has been credited) was opened and is operated.

31a)[26], cash or other financial instruments provided by the Members to the Clearing House as cash margin, are given by way of a pledge. This effectively means that the pledgee (in this case, the Clearing House) merely acquires a claim to use and dispose of the cash collateral provided in order for the Clearing House to be satisfied in case of default of the Member (article 31b of the Rules); ownership of the pledged object remains with the pledgor, i.e. with the Member. In case, therefore, of bankruptcy proceedings against the Clearing House, such cash collateral should not be considered as being included in the bankruptcy estate of the Clearing House. According to article 37 of the Bankruptcy Code anyone who claims that he has either a personal or a proprietary right over an object which does not belong to the bankrupt debtor has the right to request from the bankruptcy official the separation of such object from the bankruptcy estate and its delivery to him[27]. In the above context, the Member who owns the cash provided as collateral by way of a pledge must claim the separation and delivery of the same. In case the collateral provided for by article 77 of Greek law 3606/2007 is provided as a title transfer collateral, the above will not apply; i.e. such cash will be considered as being included in the bankruptcy estate of the Clearing House.

The Collateral law applies to payments made by a Member to the Clearing House as margin according to article 77 of Greek law 3606/2007.

3.5 Non-cash Collateral

The same as above under 3.4. applies also to Non-Cash Collateral.

3.6 Members' Assessment Liabilities

A Member's Assessment Liability is as follows:

- In accordance with article 30 of the Rules, each Member has the obligation to provide collateral, in order to ensure that the Members of the Clearing House will comply to their obligations towards the Clearing House. The Clearing House is entitled to use, at any time,

[26] Article 77 of Greek law 3606/2007 provides that such cash margin can be given as an absolute transfer of cash, if so provided in the Rules. However, Rules do not include such a provision.

[27] The separation from the bankruptcy estate claim of the Member is not filed within the Bankruptcy Proceedings process, i.e. it does not render the Member a bankruptcy creditor regarding such claim. In particular, the owner of the object which should be separated from the bankruptcy estate files an application with the bankruptcy trustee who will in turn order the separation of such object, subject to the court's (the competent judge's) permission. Such procedure is independent from the procedure for the satisfaction of the bankrupt entity's creditors, i.e. the owner of the above object can immediately upon the initiation of Bankruptcy Proceedings and at any time thereof ask for the separation of the said object and for its delivery to him. Only if the separation of the object in accordance with the above is not possible the owner of the object will qualify as a creditor of the bankrupt entity and will take part in the liquidation of the bankruptcy estate in this capacity (Bankruptcy Code, article 27 paragraph 3).

the collaterals provided by a Member in order to satisfy its payable claims against the Member.

- The following collateral is provided:

  a. *Initial Collateral*: The minimum, as valued by the Clearing House from time to time, value of collateral required by it from Clearing House Members for their active involvement on the clearing of trades. The initial Collateral that must be provided in favour of the Clearing House is €500.000 for Direct Clearing Members of the Clearing House (i.e. members that have the right to clear exclusively trades effected on own account in their capacity of Members of ATHEX) and €3.000.000 for General Clearing Members of the Clearing House (i.e. members that have the right to clear trades on all classes of derivative products which have been concluded by any Member of ATHEX).

  b. *Minimum Collateral*: The minimum, as valued by the Clearing House from time to time, value of collateral required by it from the Clearing House, as the relevant value results from the Clearing House's calculations. In any case minimum collateral may not be less than the Initial Collateral.

- The minimum collateral is calculated on the basis of specific parameters set by the Rules. In any case, the Clearing House is entitled at any time to:

  a. Change the calculation and valuation of each parameter methods in order to determine the collateral's minimum requirements any eventual market risks and conditions being taken under consideration.

  b. Raise the minimum collateral requirements for individual Members of the Clearing House the open positions of all kinds of clearing accounts kept by its Members and the corresponding risks being taken under consideration.

- Assets that are accepted as collateral are determined in article 31 of the Rules as follows:

Asset type	**Percentage on Market-to Market Value**
Deposits in Euros in a Margin Bank	100%
Deposits In US Dollars in A Margin Bank	95,75%
Letters of credit on first demand	100%
Short term bonds up to 3 years and bonds of variable position rate, irrespective of duration	93%
Medium term bonds expiring from 3 to 9 years	90%
Long term bonds expiring 9 years and beyond	85%

The Clearing House reserves the right to modify the above table from time to time by adding or removing assets or modifying the attributed percentage per asset class.

- The Clearing House has the right to exclude the Member from its participation in the clearing system in case it fails to provide the collateral until the Member fulfils its respective obligations (article 7 paragraph 4 of the Rules). Also, in case of the Member's default[28] regarding obligations arising from contracts on derivatives, the Clearing House is entitled to dispose off the collateral in order to satisfy the outstanding claims it has *vis a vis* the Member (Article 31b of the Rules). In this case, the Clearing House is entitled to set off all kinds of claims it may have against the defaulter even if such claims and counterclaims are not of the same kind or are not payable.
- There are no rules that provide that the Member shall share losses following the default of the Clearing House.

4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications:

(a) This opinion is confined to matters of the laws of Greece in force at the date hereof and no opinion is expressed as to the laws of any other jurisdiction;

(b) We express no opinion on the interpretation that a court or authority of competent jurisdiction other than this jurisdiction would give to any particular wording in any of the documents mentioned herein above;

(c) No opinion is expressed on matters of application of Greek consumer protection laws, Greek data protection laws or of business conduct rules pertaining to non professional clients under the Market in Financial Instruments Directive (the MiFID).

(d) A Greek court may not apply a clause of a foreign (i.e. other than Greek) law governed contractual arrangement and may not enforce a foreign judgment, to the extent that such application or enforcement would be contrary to the Greek public order.

(e) The list of special provisions at paragraphs 3.2 is not an exhaustive list of all Greek law that may apply to Contracts, their interpretation and enforcement which among other things, shall be subject to general principles of Greek contract law and laws particular to individual Members.

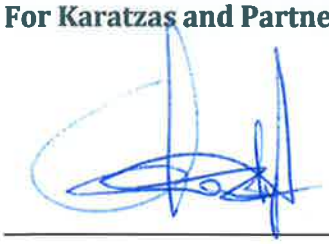
There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention.

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's

[28] That the failure to provide the collateral constitutes an event of default see Articles 33 paragraph 1 of the Rules.

opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

For Karatzas and Partners Law Firm



Alexandra Kondyli

Annex 1: Model Form Clearing Agreement

Προς: **ΕΤ.ΕΚ.**

Τμήμα Εξυπηρέτησης Μελών

Λεωφόρου Αθηνών 110,

Τ.Κ. 104 42, Αθήνα.

Αίτηση

για την απόκτηση της ιδιότητας του Εκκαθαριστικού Μέλους στο Σύστημα Αξιών

Η Ανώνυμη Εταιρία με την επωνυμία: .....

και έδρα: (διεύθυνση) .....

μέσω του νομίμου εκπροσώπου της .....,

όπως προκύπτει από το συνημμένο ΦΕΚ....., κατόχου του ΑΔΤ....., αιτείται με την παρούσα την αποδοχή της ως: (1)

Επιλέξτε μία από τις παρακάτω κατηγορίες:

- ❑ Άμεσο Εκκαθαριστικό Μέλος ΕΤ.ΕΚ.
- ❑ Γενικό Εκκαθαριστικό Μέλος ΕΤ.ΕΚ.

(1) *Σημειώστε Χ στο τετραγωνίδιο που επιλέγετε.*

Για το σκοπό της εξέτασης της αίτησής μας, εσωκλείουμε τα παρακάτω έγγραφα:

1. ΦΕΚ ανακοίνωσης στο ΜΑΕ της άδειας σύστασης της εταιρίας.
2. Επικυρωμένο αντίγραφο του Καταστατικού της εταιρίας, όπως ισχύει κατά το χρόνο υποβολής της αίτησης.
3. ΦΕΚ ή επικυρωμένο αντίγραφο πρακτικού τελευταίας συνεδρίασης του Δ.Σ. της εταιρίας αναφορικά με τη νόμιμη εκπροσώπησή της.
4. Επικυρωμένο αντίγραφο της άδειας παροχής επενδυτικών υπηρεσιών / δραστηριοτήτων εκτέλεσης εντολών ή διαπραγμάτευσης για ίδιο λογαριασμό της εταιρίας.
5. Τους δύο τελευταίους ετήσιους δημοσιευμένους ισολογισμούς
6. Δείγματα υπογραφών των νομίμων εκπροσώπων της εταιρίας.

Για την Εταιρία (Τόπος, Ημερομηνία)

Ο Νόμιμος Εκπρόσωπος Ο Εσωτερικός Ελεγκτής

(Υπογραφή-Σφραγίδα)

.....

(ονοματεπώνυμο) ....,

.....

(ονοματεπώνυμο) ...../...../.....