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6 March 2013

Dear Sirs

### NETTING ANALYSER LIBRARY

You have asked us to give an opinion in respect of the laws of Spain ("this jurisdiction") as to certain issues in relation to MEFF Sociedad Rectora de Productos Derivados, S.A.U. ("MEFF") (the "Clearing House") as between the Clearing House and its clearing members (*Miembros Liquidadores*) (each a "Clearing Member").

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 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 The opinions given in Section 3.4 are given only in relation to Non-cash Collateral comprising securities credited to an account.

#### 1.4 Definitions

In this opinion, unless otherwise indicated:

- (a) "Security Documentation" means the security documents entered into between each Clearing Member and the Clearing House pursuant to the Rules;

- (b) "**Assessment Liability**" means a liability of a Clearing 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;
  - (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.
- (c) "**Clearing House Documentation**" means the Security Documentation and the Rules;
- (d) "**Contract**" means a contract (*Contrato*) which is registered at the Clearing House in accordance with the Rules;
- (e) "**Party**" means the Clearing House or the relevant Clearing Member;
- (f) "**Non-cash Collateral**" means the non-cash collateral provided to the Clearing House as margin under the Security Documentation;
- (g) "**Rules**" means the rules of the Clearing House in force as at the date of this opinion, including, without limitation, its *Reglamento* approved by Resolution (*Resolución*) of the *Comisión Nacional del Mercado de Valores* (the Spanish securities exchanges regulator) of 21 December 2010 (the "**MEFF Regulation**"); and
- (h) 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 Security Documentation and 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 Security Documentation and Contracts; to perform its obligations under the Security Documentation and Contracts; and that each Party has taken all necessary steps to execute and deliver and perform the Security 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 into and perform its obligations under the Security Documentation and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence thereof in this jurisdiction.
- 2.4 That the Clearing Member is at all relevant times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.

## 3. OPINION

On the basis of the foregoing terms of reference and assumptions, 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, is *concurso* (bankruptcy proceedings for individuals and companies).

This procedure is called "**Insolvency Proceedings**".

The legislation applicable to Insolvency Proceedings is Law 22/2003, of 9 July (the "**Insolvency Law**") as amended and/or superseded by the Specific Provisions (as defined in paragraph 3.2 below).

### 3.2 Special provisions of law

The following special provisions of law, *inter alios*, (the "Specific Provisions") apply to Collateral provided by Clearing Members by virtue of the fact that such Collateral is, or relates to, exchange-traded derivative products and is cleared through the Clearing House:

- Article 44 ter of Law 24/1988, of 28 July, dealing with central counterparties;
- Article 58 of Law 24/1988, of 28 July, dealing with the Spanish official secondary derivative exchanges; and
- Regulations developing the abovementioned special provisions, including without limitation, Royal Decree 1282/2010, of 15 October ("RD 1282/2010").

### 3.3 Cash Collateral

The general position under Spanish law is that transfer of title collateral arrangements effect an absolute transfer of title to the relevant collateral asset in favour of the transferee so that: (i) the transferee becomes the full legal and beneficial owner of that collateral asset and that (ii) accordingly, the transferor does not enjoy any segregation rights (*derecho de separación*) upon the insolvency of the transferee but it is an unsecured creditor of the transferee for the value of the relevant collateral asset.

Notwithstanding the above, collateral granted to the Clearing House is subject to the specific rules governing the Clearing House.

The sixth paragraph of Article 44 ter of Law 24/1988 provides that the collateral delivered by members of central counterparties in accordance with the rules thereof in connection with any transactions as such members can only be enforced by the beneficiary of the collateral and only in respect of the obligations arising for those members vis-a-vis the central counterparty by reason of those transactions or of their condition as members (*"las garantías que los miembros [...] constituyan de conformidad con el régimen contenido en el Reglamento de la entidad de contrapartida central y en relación con cualesquiera operaciones realizadas en el ámbito de su actividad sólo responderán frente a las entidades en cuyo favor se constituyeron y únicamente por las obligaciones derivadas tanto de tales operaciones para con la entidad de contrapartida central [...] como por la condición de miembro de la entidad de contrapartida central"*).

Article 59.8 of Law 24/1988 provides that the collateral delivered by members of derivatives exchanges in connection with any trades therein and in accordance with

the rules thereof can only be enforced by the beneficiary of the collateral and only in respect of the obligations arising for those members vis-a-vis the Governing Body of the exchange by reason of those trades (*"las garantías que los miembros del correspondiente mercdo (...) constituyan de conformidad con el régimen contenido en su respectivo Reglamento y en relación a cualesquiera operaciones realizadas en el ámbito de actividad de los mercados de futuros y opciones solo responderán frente a las entidades en cuyo favor se constituyeron y únicamente por las obligaciones que de tales operaciones deriven para con la sociedad rectora"*).

The provisions mentioned above can be read as providing that cash collateral provided to the Clearing House as margin can only be used by the Clearing House for enforcement purposes so that, upon the insolvency of the Clearing House, it should not be treated as the property of the Clearing House available to its creditors generally and could not be used by the Insolvency Representatives to pay any debts of the Clearing House but must be ultimately redelivered to the relevant Members (who should, therefore, ultimately enjoy segregation rights in respect of thereof).

It is worth noting, however, that the literal wording of those provisions allows room for different interpretations and that the effectiveness of any segregation rights requires in practice that the cash collateral is not commingled with any other cash of the Clearing House. In this respect, Article 27.2 of RD 1282/2010 provides that:

- (a) the management of collateral provided by members and clients will be carried out "in the name and on behalf of them" ("*en nombre y por cuenta de los mismos*"); and that
- (b) the Governing Body shall monitor properly the investment of the relevant funds, by using segregated accounts.

These legal statements do not fit well with the features of ordinary transfer of title collateral arrangements, where (i) the transferee is legally entitled to use or dispose of the collateral at its sole discretion and (ii) has no obligation to segregate collateral received from its other assets.

Therefore, we are of the opinion that the better view is that the effect of the abovementioned legal provisions is vesting on Clearing Members a right of segregation in respect of the cash margin posted by them to the Clearing House upon the insolvency thereof, so that such cash collateral will not be part of the insolvency estate of the Clearing House and could only be used by the Insolvency Representatives of the Clearing House to discharge the relevant Clearing Member's

obligations against the Clearing House in the manner provided for in the MEFF Regulation.

Please note, however, that: (i) since, *inter alios*, RD 1282/2010 is not a piece of law enacted by the Parliament but a regulation approved by the Government (regulations being not capable to deviate from the provisions in a law), there may be room for arguing that Article 27.2 of RD 1282/2010 cannot be used for interpreting the provisions in Articles 44 ter and 58.9 of Law 24/1988, and that (ii) our opinion above has been not tested before the Courts, there being no scholarship on this issue.

Should our interpretation not be upheld by Spanish courts, then:

- (i) payments made by a Clearing Member to the Clearing House as cash margin constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the Clearing House, such cash would be treated as the property of the Clearing House available to its creditors generally; and
- (ii) however, the amount of cash so provided would constitute a debt owed by the Clearing House to the Clearing Member as principal.

### 3.4 Non-cash Collateral

As fully discussed in paragraph 3.3 above, we are of the opinion that the better view is that Clearing Members enjoy a right of segregation of any collateral posted by them to the Clearing House upon the insolvency thereof, so that it will not be part of the insolvency estate of the Clearing House available to its creditors generally but can only be used by the Insolvency Representatives thereof to discharge the relevant Clearing Member's obligations against the Clearing House in the manner provided for in the MEFF Regulation.

Please note, however, that, as discussed in paragraph 3.3 above, our opinion above has been not tested before the Courts, there being no scholarship on this issue. Should our opinion not be upheld by Spanish courts, then:

- (i) any securities provided to the Clearing House as cover for margin and constituting Non-cash Collateral would be treated as the property of the Clearing House and would not be returnable to the Clearing Member in the event of Insolvency Proceedings relating to the Clearing House; and
- (ii) however, the value of the Non-cash Collateral provided would constitute a debt owed by the Clearing House to the Clearing Member as principal.

### 3.5 Members' Assessment Liabilities

A Clearing Member's Assessment Liability is as follows.

Pursuant to Article 22 of the MEFF Regulation, Clearing Members are required to make contributions to the Default Fund (*Garantía Colectiva*), the purposes of such Default Fund being to cover those debit balances, if any, arising from the default settlement procedures in the event of default by a Clearing Member. Contributions to the Default Fund are dealt with in Article 22.5 of the MEFF Regulation, which reads as follows:

#### **"5. Contribution to the Default Fund**

- A. Clearing Members shall be obliged to contribute to the Default Fund.*
- B. The purpose of the Default Fund is to cover debit balances, if any, which may result from managing the Default of a Clearing Member, which are not covered by the amounts corresponding to the sum of Initial Margins, Extraordinary Margins, the Individual Guarantee and the contribution to the Default Fund of the Defaulting Member, and MEFF's guarantee, in the terms provided in article 34 hereof.*
- C. A Circular shall set forth the minimum amount of the total contribution to the Default Fund for each Contract Group, consisting of the sum of the different minimum contributions for each Contract Group of the Clearing Members, depending on their category. The Circular corresponding to each Contract Group may set forth criteria to require contributions additional to the minimum contribution, as a function of the relative risk of each Clearing Member within the Contract Group in question.*
- D. A Circular shall set forth the form of calculation; the regularity of the recalculations, which shall be at least quarterly; if any, the minimum amount of the contribution to the Default Fund corresponding to each Clearing Member for each Contract Group; the time allowed to make the contributions; and the regime to update and replenish the contributions.*

E. *In the event that the Default Fund should need to be used, in the terms provided in article 34 hereof, the amount withdrawn shall be allocated proportionally to the Clearing Members, depending on the amount of the contributions made by each of them for each Contract Group in the most recent recalculation or replenishment. Clearing Members shall be obliged to restore their contributions until they cover the minimum amounts provided in section D for each Contract Group, following the procedures and within the periods provided pursuant to a Circular.<sup>11</sup>*

The provisions of Article 22.5 of the MEFF Regulation are developed in the following MEFF Circulars:

- Circular C-DF-27/2012, of 20 July 2012, in respect of the Financial Derivatives Contracts Group;
- Circular C-ENE-05/2012, of 20 July 2012, in respect of the Energy Contracts Group;
- Circular C-VRF-04/2012, of 27 November 2012, in respect of the Fixed Income Securities Contracts Group; and
- Circular C-GEN-11/2012, of 26 November 2012, relating to the daily calculation of the Risk under Stress Test ("Riesgo en situación de Stress Test") for each Contract Group, which calculation is, *inter alios*, the basis for the calculation of the contributions to be made by Clearing Members to the Default Fund,

(together the "**Default Fund Circulars**").

The main features of the contents of the Default Fund Circulars can be broadly summarised as follows:

- (i) both the amount of the Default Fund and of the Clearing Members' contributions thereto are calculated separately for each Contract Group, there being three of such Contract Groups: Financial Derivatives Contracts Group, Fixed Income Securities Contracts Group and Energy Contracts Group (so that there is ultimately a Default Fund for each Contract Group).

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<sup>1</sup> Translation published in MEFF web-site.

Moreover, each Clearing Member is obliged to contribute **only** to the Default Fund of each Contract Group in relation to which it acts as Clearing Member;

- (ii) the amount of any Default Fund (the "**Requested Amount**") must cover 110% of the Risk under Stress Test of the Clearing Member with the highest Risk under Stress Test, subject to the following floors and caps:
  - Financial Derivatives Contracts Group: EUR 25 mn and EUR 50 mn;
  - Energy Contracts Group: EUR 1.5 mn and EUR 3 mn; and
  - Fixed Income Securities Contracts Group: EUR 25 mn and EUR 50 mn;
- (iii) the amount of the contribution that each Clearing Member is required to make to the relevant Default Fund is made up of (a) a minimum fixed amount and (b) additional amounts (if any).

The minimum amount depends on the Clearing Member's type (either a General Clearing Member or an Individual Clearing Member) and on whether the Clearing Member only clears a Proprietary Account or also clears Clients and Non-Clearing Members' positions as fully detailed in the relevant Default Fund Circular.

Additional contributions on top of the abovementioned minimum fixed amount shall be required where the sum of the minimum fixed amounts of all of the Clearing Members is below the Requested Amount for the relevant Default Fund, the shortfall being then allocated among the Clearing Members, *pro rata* the amount of the Initial Margin (*Garantía por Posición*) posted by each of them, in accordance with the allocation procedures detailed in the relevant Default Fund Circular;

- (iv) the Requested Amount for the Default Fund is updated on a quarterly basis (or, in the case of the Energy Contracts Group, on a monthly basis); and
- (v) In the event that any Default Fund has to be applied in accordance with the waterfall provided for in Article 34 of the MEFF Regulation<sup>2</sup>, the Default

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<sup>2</sup> The waterfall broadly provides for the Default Fund being applied *after* application of any Margin and credit balance of the defaulting Clearing Member and of the MEFF Fund (*Garantía de MEFF*), any remaining shortfall being then borne by the Clearing House, provided that neither the MEFF Fund nor the Default Fund in respect of any Contract Group in which the defaulting Clearing Member does not hold

Fund must be replenished within five Business Days by the Clearing Members *pro rata* the amount of their respective contributions to the Default Fund prior to the relevant default.

Notwithstanding the above, should more than 50% of the Default Fund be applied once or should the relevant Default Fund (irrespective of the amount thereof being applied) be applied more than once within three consecutive months, then the following measures shall be taken for a period of not less than three months (without prejudice to the Clearing Members being required to comply with their replenishment obligations):

- (i) the amount of the relevant MEFF's Fund will be doubled in accordance with the provisions of MEFF Circular C-CEN-11/2011, of 19 October 2010, on the MEFF Fund<sup>3</sup>; and
- (ii) the Initial Margins (*Garantías por Posición*) will be calculated using the same parameters applying for the calculation of the Risk Stress Test.

Failure by a Clearing Member to make any contribution required from it pursuant to the Rules shall amount to an Event of Default (*causa de Incumplimiento*) in respect of such Clearing Member (Article 27.1 of the MEFF Regulation). In accordance with Article 28.1 of the MEFF Regulation, the following measures may be taken following the occurrence of an Event of Default in respect of a Clearing Member:

- "A) Temporary suspension of the Member, with respect to the capacities of the Member in those Contract Groups where Default has occurred or where such Default should be considered relevant.
- B) Declaration of Default of the Member.
- C) Loss of the condition of Member."

In turn, the declaration of Default of the Clearing Member by the Clearing House will allow the Clearing House to take any of the actions contemplated in Article 31.1 of the MEFF Regulation, pursuant to which:

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Positions or the close-out balance of which is favourable to such defaulting Clearing Member shall be applied for these purposes.

<sup>3</sup> The "initial" amount of the MEFF Fund is EUR 3mn for the Financial Derivatives Contracts Group, EUR 1mn for the Energy Contracts Group and EUR 2mn for the Fixed Income Securities Contracts Group.

"1. Upon declaration of Default of a [...] Member, [...] MEFF [...] may adopt any of the following measures in connection with the Defaulting [...] Member, on behalf of the defaulter:

- A. To suspend the Member [...], or to maintain any suspension resolved, as the case may be, in application of article 29 above.
- B. To immediately restrict Registration of new Trades of the Defaulting [...] Member.
- C. To undertake any Trades as may be necessary, including trades over financial instruments, whether or not traded on MEFF, for the purpose of reducing unhedged risks, until total coverage thereof.
- D. To close the Defaulting [...] Member's Positions, in accordance with the provisions of article 32 below.
- E. To close or transfer to another Member, as applicable, the Individual Clients Accounts, the Segregated and Non-Segregated Clients Accounts and the corresponding Segregated and Non-Segregated Accounts, [...] in accordance with the provisions of article 32 below.
- F. MEFF may sell off, in whole or in part, the Collateral of any kind posted in favour of MEFF.

[...]

- I. To obtain, on behalf and at the expense of the Defaulting [...] Member, any kind of professional advice or assistance which [...] MEFF [...], may reasonably require in connection with the management of the Default, including a mandate to manage the closing of the Positions to another entity.
- J. Any other measure required by the exceptional circumstances resulting from the Default and which [...] MEFF [...] consider necessary, even if not expressly contemplated herein, informing the Competent Authorities thereof"<sup>4</sup>.

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<sup>4</sup> Translation published in MEFF web-site.

All costs and expenses arising for the Clearing House from the Default of a Clearing Member shall be borne by the defaulting Clearing Member pursuant to Article 34.1 of the MEFF Regulation.

Furthermore, it is worth noting that Article 2.7 of the MEEF Regulation entitles the Clearing House to impose "surcharges to commissions, damage compensations, and other economic penalties in the terms set forth in the relevant Circular". We are not, however, of any Circular dealing with the imposition of penalties to Clearing Members failing to make any required contributions to the Default Fund having been approved by the Clearing House up to date.

Finally, in relation to the Clearing House's power to increase the amount of Member's contributions, please note that:

- (i) the Default Fund Circulars may be amended or superseded at any time by any new MEFF Circulars;
- (ii) pursuant to Article 2.4 of the MEFF Regulation, MEFF Circulars must "be approved by the Board of Directors of MEFF, and shall be published at least five Business Days before their effective date, except when, for reason of urgency, they must be effective in a shorter time after publication. Circulars must be communicated to the Comisión Nacional del Mercado de Valores within twenty-four hours following their adoption. The Comisión Nacional del Mercado de Valores may suspend or invalidate any Circular if considered to be in violation of the Securities Markets legislation or detrimental to the correctness and transparency of the price formation process or the protection of investors"<sup>5</sup>.

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

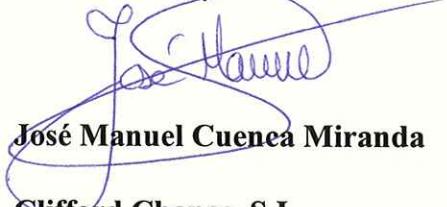
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<sup>5</sup> Translation published in MEFF web-site.

authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

Yours faithfully

  
**José Manuel Cuenea Miranda**  
**Clifford Chance, S.L.**