

NETTING ANALYSER LIBRARY

23 January 2013

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

Dear Sirs

CCP Opinion in relation to İstanbul Menkul Kıymetler Borsası Takas ve Saklama Bankası A.Ş.

You have asked us to give an opinion in respect of the laws of the Republic of Turkey ("this jurisdiction") as to the effect of certain netting and set-off provisions and collateral arrangements in relation to İstanbul Menkul Kıymetler Borsası Takas ve Saklama Bankası A.Ş. (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 General Regulations and the Model Form Clearing Agreement 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 the provisions of the Netting Provision.
- 1.4 The opinions given in Section 3.7 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) "**Banking Law**" means Banking Law (Law No. 5411) published in the Official Gazette dated 1 November 2005, No. 25983.
- (b) "**BRSA**" means the Banking Regulatory and Supervisory Agency (*Bankacılık Düzenleme ve Denetleme Kurulu*).
- (c) "**Capital Market Law**" means Capital Market Law (Law No. 6362) published in the Official Gazette dated 30 December 2012, No. 28513).
- (d) "**CMB**" means the Capital Markets Board of Turkey (*Sermaye Piyasası Kurulu*).
- (e) "**CRA**" means the Central Registry Agency of this jurisdiction (*Merkezi Kayıt Kuruluşu A.Ş.*)
- (f) "**CRA Communiqué**" means Communiqué" means the Communiqué on the Dematerialised Capital Market Instruments (Serial IV, No: 28) issued by the CMB.
- (g) "**Model Form Clearing Agreement**" means the clearing membership agreement entered into between each Member and the Clearing House in the form of Clearing House's standard membership agreement.
- (h) "**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;
- (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.

(i) **"Clearing Agreement"** means the Model Form Clearing Agreement.

(j) **"Client Account"** has the meaning ascribed to it in the General Regulations, being a segregated account with the Clearing House opened in the name of a Member in which Contracts relating to contracts made by the Member with one or more clients of such Member are registered and to which monies in respect of such Contracts are credited.

(k) **"Civil Code"** means Civil Code (Law No. 4721) published in the Official Gazette dated 22 November 2001, No. 24607.

(l) **"Contract"** means a exchange traded derivative transactions which is registered at the Clearing House where underlying securities are dematerialised securities and traded in ISE.

(m) **"Code of Obligations"** means Code of Obligations (Law No. 6098) published in the Official Gazette dated 4 February 2011, No. 27836.

(n) **"Enforcement and Bankruptcy Law"** means Enforcement and Bankruptcy Law (Law No. 2004) published in the Official Gazette dated 19 June 1932, No 2128.

(o) **"General Regulations"** means each of :

- (i) CRA Communiqué;

- (ii) ISE Regulation;
- (iii) ISE Settlement and Custody Regulation; and
- (iv) ISE Derivative Settlement Exchange Regulation.
- (p) "ISE" means İstanbul Stock Exchange (*İstanbul Menkul Kıymetler Borsası A.Ş.*).
- (q) "**ISE Regulation**" means İstanbul Securities Exchange Regulation (*İstanbul Menkul Kıymetler Borsası Yönetmeliği*) issued by the CMB and published in the Official Gazette dated 19 February 1996, numbered 22559.
- (r) "**ISE Settlement and Custody Regulation**" means İstanbul Securities Exchange Settlement and Custody Centres Regulation (*İstanbul Menkul Kıymetler Borsası Takas ve Saklama Merkezleri Yönetmeliği*) issued by the CMB and published in the Official Gazette dated 19 February 1996, numbered 22559.
- (s) "**ISE Derivatives Exchange Settlement Regulation**" means the Regulation on İstanbul Securities Exchange Derivative Transactions Market Settlement Centre Membership and Transactions (*İstanbul Menkul Kıymetler Borsası Vadeli İşlemler Piyasası Takas Merkezi Üyeliği ve İşlemlerine İlişkin Yönetmelik*) issued by the CMB and published in the Official Gazette dated 19 July 2001, numbered 24467.
- (t) "**Individually Segregated Client Account**" has the meaning ascribed to it in the General Regulations, being a segregated account with the CRA opened in the name of a Member in which securities relating to the Contracts made by the Member with a single client of such Member are registered and to which monies in respect of such Contracts are credited.
- (u) "**Party**" means the Clearing House or the relevant Member.
- (v) "**Private International Law**" means the International Private Law and Procedural Law (Law No. 5718) published in the Official Gazette dated 12 December 2007, No. 26728.
- (w) "**Non-cash Collateral**" means the non-cash collateral provided to the Clearing House as margin under the General Regulations.

- (x) "**Official Gazette**" means the Official Gazette (*resmi gazete*) of this jurisdiction.
- (y) "**SDIF**" means Saving Deposit Insurance Fund (*Tasarruf Mevduatı Sigorta Fonu*).
- (z) 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.
- (aa) a reference to "**FSMA**" is to the UK Financial Services and Markets Act 2000.
- (bb) "**Rules**" means the rules of the Clearing House in force as at the date of this opinion.
- (cc) 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 Contracts and the Model Form Clearing Agreement 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 Contracts and the Model Form Clearing Agreement; to perform its obligations under the Contracts; and that each Party has taken all necessary steps to execute and deliver and perform the Contracts and the Model Form Clearing Agreement.
- 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 Contracts and the Model Form Clearing Agreement and to ensure the legality, validity, enforceability or admissibility in evidence of the Contracts and the Model Form Clearing Agreement in this jurisdiction.

- 2.4 That no provision of the Model Form Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect.
- 2.5 That the obligations expressed to be assumed by the Parties under the Contracts will constitute their legal, valid and binding obligations under their governing laws.
- 2.6 That the Contracts have been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of Clearing House or any equivalent applicable insolvency proceeding in respect of the other Party.
- 2.7 That each Party acts in accordance with the powers conferred by the Contracts; and that each Party performs its obligations under each Contract in accordance with their respective terms.
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the General Regulations, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Contracts and/or the Model Form Clearing Agreement.
- 2.9 That the Member is at all relevant times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.
- 2.10 That the obligations assumed under the 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.

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:

- (a) bankruptcy (*iflas*);
- (b) postponement of bankruptcy (*iflasın ertelenmesi*);

- (c) reorganisation by way of abandonment of the debtor's assets (*malvarlığının terki suretiyle konkordato*);
- (d) restructuring of capital stock companies by way of conciliation (*sermaye şirketlerinin uzlaşma yoluyla yeniden yapılandırılması*); and,
- (e) ordinary compositions of debts (*adi konkordato*)

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

The legislation applicable to Insolvency Proceedings is Enforcement and Bankruptcy Law.

3.2 Special provisions of law

The following special provisions of law apply to Contracts by virtue of the fact that the Contracts are, or relate to, exchange-traded derivative products and are cleared through the Clearing House:

- (a) Pursuant to the provisions of the CRA Communiqué the Contracts settled through the settlement system managed by the Clearing House. Accordingly, the Clearing House's pool account ("**Clearing Account**") at the CRA are used for the Settlement of Contracts. The clearing process is made through an integrated system between the CRA and the Clearing House. After, ISE send daily transaction information to the Clearing House, the Clearing House makes netting of the Contracts between the Members. Netted transactions data is then sent to the CRA on the same night of the clearing of the Contracts. Based on such data the CRA and the Member make the transfers in the form of book-entry securities to the Client Account;
- (b) Pursuant to second paragraph of Article 5 of the CRA Communiqué, records with respect to the Clearing House in order to ensure the safety of clearing transactions are maintained through a link with the Member's accounts at the CRA .
- (c) According to Article 80/3 of the Capital Market Law, CRA is the central custodian for the securities registered in the CRA and titles over such assets shall be determined in accordance with the records maintained by the CRA. CRA records do not show the Clearing House as title owner of the securities settled through the settlement system managed by the Clearing House.

(d) Pursuant to Article 73/2 of the Capital Market Law, collaterals maintained at the ISE and the Clearing House in accordance with the General Regulations for the purpose of eliminating clearing risks, are immune from attachment, pledge or injunction and those collaterals cannot be part of a bankruptcy estate of a Member or the Clearing House.

3.3 **Recognition of choice of law**

There is no choice of law provisions in the regulations and policies applicable to operations Clearing House as settlement agent. However, according to Article 21 of Private International Law *in rem* rights (such a security interests created under a pledge) on assets are subject to the laws where such assets are located (*lex loci situs*). Pursuant to Article 939 of the Civil Code, in order to perfect security interest on cash or securities, their possession must be transferred to the pledgee or its agent. Security interest on dematerialised securities are perfected by registration of relevant security interest at institutions where such dematerialised securities are registered. Accordingly, entitlement to dematerialised securities held in book entry form and traded at ISE will be subject to Turkish law where those securities are registered at the account of the Member held in the CRA.

3.4 **Netting and Set-off: General**

3.4.1 Upon the occurrence of an Insolvency Proceedings in relation to the Clearing House, if a Member will serve a termination and set off notice to the Clearing House:

- (a) Member would be entitled to receive or be obliged to pay only the net sum of the positive and negative mark-to-market values of the included individual Contracts,
- (b) any and all amounts owed by the Member to the Clearing House would be set off against any such amounts owed by the Clearing House to the Member.

3.4.2 We are of this opinion because although there is no Netting or Set-Off provisions in the Rules and the Model Form Clearing Agreement with respect to an Insolvency Event in relation to the Clearing House, Turkish general law allows a Member to set off against any such amounts owed by the Clearing House to the relevant Member. According to Article 950 of the Civil Code, Articles 139 and 142 of the Code of Obligations, Article 90 of the Commercial Code and Article 200 of the Enforcement and Bankruptcy Law, close out

netting is a consequence of set off granted by law and having the effect of terminating the debt to the extent of the counter claim. Pursuant to Article 139 of the Code Obligations, requirements for application of set off are:

- (i) the parties must have mutual claims of the same kind,
- (ii) both mutual claims must be due,
- (iii) the parties must not have waived their set off rights,
- (iv) the party exercising set off must make a declaration to that effect.

In order to offset a cash claim against a fungible asset or vice versa, the fungible asset is first required to be cashed in, which can be done without the consent or involvement of the counterparty or legal proceeding. As explained above the Code of Obligations contains and recognises statutory set off as a way of liquidating claims.

Pursuant to Article 142 of the Code of Obligations, in the event of bankruptcy of the Clearing House, the right of set off can be exercised, even if the claims are contingent or not due and payable. However, according to Article 200 of the Enforcement and Bankruptcy Law, close out netting shall not be enforced for:

- (i) the credits assumed by a debtor of the insolvent Party after the insolvent Party's bankruptcy is declared by competent court,
- (ii) the debt assumed by a creditor of the insolvent Party after the insolvent Party's bankruptcy is declared by competent court, and,
- (iii) in any event, the credits of a creditor evidenced with a bearer negotiable instrument, such as a bill of exchange or a promissory note, after its bankruptcy is declared by competent court irrespective of whether such negotiable instrument being issued before, on or after the bankruptcy.

3.5 Netting and Set-Off: Clearing Accounts and Client Accounts

Where a Member has exercised its of statutory Netting and Set-Off rights, as explained in paragraph 3.4.2 above, an amount payable to any of the type of accounts listed below would be aggregated with or netted against an amount payable on any types of the other type of account listed below:

- (a) Client Account,
- (b) Clearing Account.

This is because the effect of Article 15 of the CRA Communiqué is to create a single entitlement for all clients of a Member collectively. Accordingly, both Clearing Account and Client Account would be considered to be mutual for the purpose of statutory Netting and Set-Off rights.

3.6 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 relating to the Clearing House, such cash should not be treated as the property of the Clearing House available to its creditors generally. However, given the fungible nature of cash margin deposited in Clearing House's pool cash account, segregation of such amount from sums paid by other Members may not be possible and therefore such cash could be treated as the property of the Clearing House available to its creditors generally.

However, the amount of cash so provided would constitute a debt owed by the Clearing House to the Member as principal.

3.7 Non-cash Collateral

Any securities provided to the Clearing House as cover for margin and constituting Non-cash Collateral would not be treated as the property of the Clearing House and would be returnable to the Member if the clearing would not be completed, even in the event of Insolvency Proceedings relating to the Clearing House, subject to the Member satisfying its obligations to the Clearing House.

This is because Enforcement and Bankruptcy Law generally recognise property rights existing prior to the onset of insolvency, and as a result only the assets of the debtor company are available to its creditors. Additionally, pursuant to Article 73/2 and 80/3 of the Capital Market Law, securities provided to the Clearing House as cover for margin and constituting Non-cash Collateral cannot be used or disposed for any purpose other than the completion of the relevant clearing transaction. Accordingly, property rights over securities provided to the Clearing House as cover for margin and constituting Non-cash Collateral will be determined in accordance with the records maintained at the CRA as central custodian pursuant to Article 80/3 of the Capital Market Law and such Non-cash Collateral cannot be attached, pledged, injuncted or become part of a bankruptcy estate pursuant to 73/2 of the Capital Market Law,

securities provided to the Clearing House as cover for margin and constituting Non-cash Collateral would not be part of its bankruptcy estate.

3.8 Members' Assessment Liabilities

A Member's Assessment Liability is as follow:

- (i) a Member's obligation to contribute to guarantee fund established by the ISE pursuant to Article 34 of the ISE Regulation;
- (ii) a Member's obligation to provide cash collateral to the Clearing House under Article 13, 15 and 16 of ISE Settlement and Custody Regulation for its obligations towards the Clearing House;
- (iii) pursuant to Article 22 of ISE Settlement and Custody Regulations ISE may request additional collaterals from Members for emergency situations.

4. QUALIFICATIONS

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

4.1 Limitations arising from Insolvency Laws

- (a) With respect to bankruptcy, insolvency proceedings, Turkish law may require that all claims or debts are converted into Turkish Lira at an exchange rate determined by the court at a related date, such as the date of bankruptcy judgment.
- (c) The insolvency representative and other creditors of the insolvent Party may, by commencing an avoidance action procedure in a commercial court, challenge certain arrangements or dispositions made by the insolvent Party during the period preceding any relevant bankruptcy judgment. Accordingly, pursuant to Article 278 of the Enforcement and Bankruptcy Law, donations and disposals without due consideration and made within the 2 (two) years preceding the bankruptcy date may be cancelled by an avoidance action. Additionally, pursuant to Article 279 of the Enforcement and Bankruptcy Law, transactions of an insolvent debtor involving (i) the posting of collateral for an existing but unsecured obligation with no pre-existing undertaking to post collateral for such transaction; (ii) settlement of a monetary claim other than in cash or commonly used payment means; (iii) settlement of a claim before its maturity date; and (iv) annotations registered in a land registry to

strengthen personal rights, may be subject to an avoidance if such a transaction was concluded within the 1 (one) year preceding the bankruptcy date. Finally, pursuant to Article 280 of the Enforcement and Bankruptcy Law, all transactions carried out by an insolvent debtor in the 5 (five) years preceding the bankruptcy date with the intention of fraudulent conveyance or favouring certain creditors are voidable.

- (c) If composition, restructuring or postponement of bankruptcy of the Clearing House will be adjudicated, a moratorium will be in place so that the Clearing House cannot be subject to any enforcement proceedings and all the enforcement proceedings initiated before would cease. Accordingly, secured creditors of the Clearing House can start proceedings for the enforcement of the relevant security interest, however, they are not allowed to foreclose relevant security interest during the composition, restructuring or postponement of bankruptcy period. While the security interest may not be foreclosed during such period, the exercise of early termination and set off rights, are not, in our view, stayed. The termination and set-off rights provisions would only constitute contractual remedies.
- (d) Any provision in the Contracts which confers, purports to confer or waives a right of set-off or similar right may be ineffective against a bankruptcy administrator, liquidator or creditor.

4.2. Other Qualifications

- (a) An obligation may cease to exist if the obligor and the creditor of such obligation is the same person.
- (b) Pursuant to Article 950 of Civil Code, the Clearing House may have a lien over Member's assets held in custody or settlement accounts in the event that the client fails to comply with its payment obligations, if any, towards the Clearing House.
- (c) The Clearing House is an investment bank (*yatırım bankası*) incorporated in this jurisdiction. The Banking Law sets out a detailed regime governing the insolvency and bankruptcy of banks in Turkey. The Banking Law grants broad powers to the BRSA and the SDIF. The BRSA has the authority to implement protective measures in cases of justified concern over a bank's insolvency.

- (d) In the event: (a) the aforementioned protective measures are not (in whole or in part) taken by that bank within a period of time set forth by the BRSA or in any case within 12 (twelve) months, (b) the financial structure of such bank cannot be strengthened despite having taken actions or the financial structure of such bank has become so weak that it could not be strengthened even action were taken, (c) the continuation of the activities of such bank would jeopardise the rights of the depositors, the participation fund owners and the security and stability of the financial system, (d) such bank cannot cover its liabilities as they become due, (e) the total amount of the liabilities of such bank exceeds the total amount of its assets, or (f) the controlling shareholders of such bank are found to have made use of that bank's resources for their own interests, directly or indirectly or fraudulently, in a manner that jeopardized the secure functioning of the bank or caused such bank to sustain a loss as a result of such misuse, then the BRSA, with the affirmative vote of at least five of its board members, may revoke the license of such bank to engage in banking operations and/or to accept deposits and transfer the management, supervision and control of the privileges of shareholders (excluding dividends) of such bank to the SDIF.
- (e) If the licence of a bank to engage in banking operations and/or to accept deposits is revoked, then the relevant bank's management and audit will be taken over by the SDIF. Any and all enforcement and bankruptcy proceedings (including any preliminary injunction) against the bank would be stayed as from the date on which revocation of such bank's licence is published in the Official Gazette. From the date of revocation of the banking licence, the creditors of the bank may not assign their rights or take any action that could result in an assignment of their receivables and rights. The SDIF must take measures for the protection of the rights of depositors and other creditors of the bank. The SDIF is also required and entitled to initiate bankruptcy proceedings against any bank whose banking license is revoked. Upon bankruptcy declaration of the relevant bank by a competent commercial court, the SDIF shall act as statutory receiver of the bankruptcy estate.

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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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.

Yours faithfully,

