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EFET'S GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY - DANISH LAW

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Dear Sirs,

We have been asked to provide a legal opinion in respect of matters of Danish law in connection with specific questions detailed in your e-mail dated 23 August 2017 and the thereto attached instruction letter regarding enforceability of close-out netting and the validity and enforceability of collateral arrangements and other related issues under the EFET General Agreement Concerning the Delivery and Acceptance of Electricity.

This opinion incorporates the new Danish Act on Capital Markets (*Lov om kapitalmarkeder*) which entered into force on 3 January 2018. The Act on Capital Markets was adopted by the Danish Parliament on 8 June 2017 and includes *inter alia* provisions implementing MiFID II (as defined below) and changes to the scope of financial obligations which can be included in close-out netting under Danish law. Due to the Danish close-out netting rules being inserted in a new act there will in this opinion be changes to all references to these rules previously regulated in the Danish Securities Trading Act, even though there are only minor other changes than the MiFID II-implementation and the amended close-out netting scope, as mentioned.

This opinion is limited to law applicable in Denmark excluding Greenland and the Faroe Islands.

The specific questions you have asked us to address are set out in section 3 below in italics followed by our analysis, conclusions and any specific assumptions and qualifications. In addition, we have made the general assumptions set out in section 2 below and our opinion is subject to the general qualifications set out in section 4 below.

We have not considered any tax, VAT or duty issues.

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1. INTRODUCTION

1.1 Scope of Review and Summary

1.1.1 Scope of Review

We have reviewed the following documents (printed from www.efet.org or received from EFET):

(a) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (version 2.1(a), dated 21 September 2007) (the "**Agreement**").

(b) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (version 2.1, dated 20 December 2000).

(c) EFET Credit Support Annex to the General Agreement (Version published 5 April 2002) (the "**Credit Support Annex**").

(d) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published 3 April 2012) (the "**Allowances Appendix**").

(e) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 3.0, published June 20, 2008).

(f) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 20 July 2005).

(g) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005).

(h) EFET GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (version 1.0, published 11 September 2009).

(The Agreement, the Credit Support Annex, the Allowances Appendix, the other documents listed above, and the Individual Contracts are hereinafter referred to together as the "**Documents**".)

For purposes of section 3.8.3 (Core Provisions) only:

(i) EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005).

(j) EFET Master Netting Agreement (Version 1.0, published 25 June 2010) (the "**Master Netting Agreement**").

(k) CPMA Cross-Product Master Agreement (Version 1.0, published 16 February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003).

(l) EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Mater Agreement (Version 1.0, published 23 June 2003), and

(m) EFET Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011).

1.1.2 Summary

This summary does not form part of the opinion and is given for the purposes of convenience only.

Pursuant to the Capital Markets Act contracting parties can agree, with legal and binding effect for third parties (including a bankruptcy estate and other creditors), that financial obligations under the Agreement can be close-out netted upon the occurrence of an enforcement event. An "enforcement event" may be an event of default or other event agreed between the parties which gives a party the right to close-out net. Such event can be the commencement of insolvency proceedings of a party. The meaning of "financial obligations", which is the key term for the type of obligations which can be close-out netted, is set out in the Capital Markets Act and depends on the type of parties to the Agreement.

When two parties, each being a Financial Entity or a Non-Financial Entity, have entered into the Agreement, the scope of "financial obligations" includes the following categories with relevance for this opinion and as further described in this opinion:

- claims originating from trading in "financial instruments", and
- "claims originating from agreements on energy products"

(defined together as "Relevant Financial Obligations" in this opinion).

Accordingly, claims under the Agreement which are Relevant Financial Obligations may be subject to close-out netting under the Capital Markets Act.

Therefore, based on the assumptions and subject to the qualifications set out in this opinion, our conclusion is that in respect of an Agreement between a Counterparty (being either a Financial Entity or a Non-Financial Entity) and a Danish Party, the early termination, the close-out netting, and the calculation and payment of one termination amount pursuant to the Agreement will in our view be enforceable against a bankruptcy estate of a Danish Party in respect of obligations which are Relevant Financial Obligations, and a choice of Automatic Termination will not change this conclusion.

1.2 Definitions

Terms defined in the Agreement have the same meaning when used in this opinion, unless otherwise stated herein. In section 3.4 (Collateral) below, in addition to the terms in the Agreement or as stated herein, the capitalized terms shall have the same meaning as in the Credit Support Annex.

In addition the following definitions are used in this opinion:

"**Bankruptcy Act**" means the Danish Bankruptcy Act (*konkursloven*), Consolidated Act no. 11 of 6 January 2014 as amended;

"**Capital Markets Act**" means the Danish Act on Capital Market (*lov om kapitalmarkeder*), Consolidated Act no. 12 of 8 January 2018;

"**Collateral Directive**" means Directive 2002/47/EC of 6 June 2002 on Financial Collateral Arrangements as amended;

"**Commodity**" has the meaning set forth in section 1.4(e);

"**Commodity Spot**" has the meaning set forth in section 1.4(d);

"**Commodity Transaction**" has the meaning set forth in section 1.4;

"**Counterparty**" means the Danish Party's counterparty to the Agreement;

"**Danish BRRD-rules**" means the Danish Act no. 333 of 31 March 2015 on restructuring and resolution of certain financial institutions (*lov om restrukturering og afvikling af visse finansielle virksomheder*) as amended (implementing Directive 2014/59/EU);

"**Danish Insolvency Proceedings**" means bankruptcy (*konkurs*) and formal restructuring proceedings (*rekonstruktion*) regulated by the Bankruptcy Act and as described in section 1.5.1;

"**Danish Party**" has the meaning set forth in Appendix A;

"**Documents**" has the meaning set forth in section 1.1.1;

"**Eligible Danish Collateral**" has the meaning set forth in section 3.4.2;

"**Emission Allowances**" means in accordance with MiFID II, Annex I, Section C, no. 11, emissions allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).

"**Financial Business Act**" means the Danish Financial Business Act (*lov om finansiel virksomhed*), Consolidated Act no. 1140 of 26 September 2017 as amended;

"**Financial Entity**" has the meaning set forth in section 1.5.2.1;

"**FSA**" means the Danish Financial Supervisory Authority (*Finanstilsynet*);

"**Limitation Day**" means the limitation day (*fristdagen*) as set forth in Section 1 of the Bankruptcy Act, which for the purpose of this opinion is the date of filing a petition for bankruptcy or formal restructuring proceedings with a bankruptcy court (*skifteretten*), or in respect of credit institutions or certain investment firms that has been subject to resolution measures (*afviklingsforanstaltninger*) under the Danish BRRD-rules the date of initiation of such proceedings or the date where such undertaking satisfy the resolution conditions of the Danish BRRD-rules, provided that the bankruptcy or formal restructuring proceedings have been initiated within 3 months;

"**MiFID II**" means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, as amended;

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"**MiFID II Regulation**" means Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, as amended;

"**MiFIR**" means Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, as amended;

"**MTF**" means a multilateral trading facility (*multilateral handelsfacilitet or (MHF)*) as defined in Section 3, no. 3 in the Capital Markets Act, implementing Article 4(1)(22) of MiFID II;

"**Non-Financial Entity**" has the meaning set forth in section 1.5.2.1;

"**OTF**" means an organised trading facility (*organiseret handelsfacilitet or (OHF)*) as defined in Section 3, no. 4 in the Capital Markets Act, implementing Article 4(1)(23) of MiFID II;

"**Parties**" means the Danish Party and the Counterparty together;

"**Regulated Market**" means a regulated market as defined in Section 3, no. 2 in the Capital Markets Act, implementing Article 4(1)(21) of MiFID II; and

"**Relevant Financial Obligations**" has the meaning set forth in section 1.5.2.2.

1.3 Types of Danish Parties

This opinion covers Danish Parties which are listed in Appendix A hereto.

With respect to Danish branches of foreign legal entities, see section 3.3.2 below.

Except as specifically stated, this opinion would not change if the Danish Party was a publicly owned Danish legal entity or a Danish public authority, provided that such entity enters into the Agreement in a commercial capacity, but no opinion is rendered on Danish procurement law.

No opinion is rendered in respect of individuals.

The opinion in section 3.4 on Collateral does not cover a Danish Party which is designated as a retail client (as defined in MiFID II, Article 4(1)(11)).

1.4 Product Coverage

This opinion covers the following types of Individual Contracts (litra (a)-(d) in respect of a Commodity (litra (e)) (the quoted text in litra (a)-(e) below is as described in the instruction letter):

(a) "Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a Commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the Commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement."

(b) "Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price."

(c) "Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the Commodity."

(d) "Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for the actual delivery on one or more dates."

We assume that a "Physical Commodity Transaction" may potentially be a spot transaction or it could be a forward, swap or option with physical settlement.

There is no general statutory definition of a "spot transaction" under Danish law. However, Article 7(2) of the MiFID II Regulation excludes "spot contracts" from Article 7(1) (which relates to the transactions in C(7) of Annex I to MiFID II), and for these purpose defines a "spot contract" as "a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods: (a) two trading days; (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period". However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period mentioned in (a) and (b). Accordingly, we are of the view that contracts for the delivery of a Commodity, which under this test would qualify as spot contracts (for purposes of this opinion, a "**Commodity Spot**"), will not constitute a derivative under the Capital Markets Act.

(Commodity Forward, Commodity Option, Commodity Swap, and Physical Commodity Transaction are hereinafter referred to together as "**Commodity Transactions**").

(e) ""Commodity" means electricity, allowances or capacity rights."

The term "commodity" is not defined in the Capital Markets Act, but the term is defined in the MiFID II Regulation, Article 2(6), as "any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity".

Accordingly, in our view "electricity" will be covered by the term "commodity" as used in the list of financial instruments in Section 4 of the Capital Markets Act and certain Commodity Transactions relating to electricity may be covered by such provisions relating to financial instruments, see below section 1.5.2.3 and/or relating to agreements on energy products, see below section 1.5.2.4.

We assume that "allowances" as stated above will be either (i) Emission Allowances or (ii) other allowances (than Emission Allowances) comprised by Article 8(d) of the MiFID II Regulation. Accordingly, certain Commodity Transactions relating to such "allowances" may be covered by Section 4 of the Capital Markets Act relating to financial instruments, see below section 1.5.2.3 and/or provisions relating to agreements on energy products, see below section 1.5.2.4.

We assume that "capacity rights" as stated above will be either (i) commodity storage capacity or (ii) transmission or transportation capacity relating to commodities comprised by the MiFID II Regulation, Article 8(b) and (c), respectively. Accordingly, certain Commodity Transactions relating to such "capacity rights" may be covered by Section 4 of the Capital Markets Act relating to financial instruments, see below section 1.5.2.3, and/or provisions relating to agreements on energy products, see below section 1.5.2.4.

1.5 Background - Relevant Danish Law

1.5.1 Danish Insolvency Proceedings

Under the Bankruptcy Act, a Danish Party may be subject to the following main insolvency proceedings in Denmark:

(a) Bankruptcy proceedings (*konkurs*). Bankruptcy proceedings are initiated by the debtor or a creditor filing a petition with a bankruptcy court. Upon receipt of the petition, the court sets a hearing date and notifies the debtor and any petitioning creditor. If the court is satisfied that the petitioning creditor has a valid claim against the debtor (applies only if a creditor has filed the petition) and the debtor is "insolvent" (i.e. that the debtor is unable to satisfy its obligations as they fall due, unless the inability to pay is of a temporary nature only) the court will issue a bankruptcy order (*konkursdekret*) against the debtor. The bankruptcy order will be made public by an announcement in the Danish Official Gazette (*Statstidende*). The court will then appoint a bankruptcy trustee (*kurator*) to manage the estate. The bankruptcy estate will consist of the assets that belong to the debtor at the time the bankruptcy order is issued, together with any assets that accrue during the bankruptcy proceedings. The assets are realised and the proceeds are distributed among the creditors according to an order of priority set out in the Bankruptcy Act. Secured creditors are not part of this order of priority. Bankruptcy proceedings under Danish law are designed to ensure a high degree of equality of treatment of all creditors, enabling the estate to set aside/avoid (*omstøde*) certain pre-bankruptcy transactions.

(b) Formal restructuring proceedings (*rekonstruktion*). With effect from 1 April 2011 rules on restructuring replaced the rules on compulsory composition proceedings and suspension of payments. Formal restructuring proceedings are initiated by the debtor or a creditor filing for restructuring with a bankruptcy court and are regulated by the Bankruptcy Act. Before the bankruptcy court can initiate formal restructuring proceedings it is required that the debtor is "insolvent" (i.e. that the debtor is unable to satisfy its obligations as they fall due, unless the inability to pay is of a temporary nature only). The main purpose of the restructuring proceedings is to secure an otherwise healthy debtor's survival through a period of insolvency by way of:

1. a transfer of the debtor's business,

2. a compulsory composition[1] (*tvangsakkord*), or
3. a combination of 1 and 2.

Once initiated, the formal restructuring proceedings cannot be recalled or otherwise annulled. If the restructuring proceedings do not result in an outcome as described in 1-3 above, adopted by the creditors, the bankruptcy court will immediately commence bankruptcy proceedings over the assets of the debtor. This is the case if a restructuring plan or proposition is voted against by the creditors, and also if the bankruptcy court decides to stop the restructuring proceedings, e.g. due to the debtor's failure to cooperate in good faith or if the restructuring proceedings for some reason prove to be pointless. The restructuring proceedings, however, will seize if the debtor becomes solvent during the proceedings.

When restructuring proceedings are initiated the bankruptcy court immediately appoints a restructuring administrator (*rekonstruktør*) and an accountant (*regnskabskyndig tillidsmand*) to oversee and administrate the restructuring proceedings, to work out the restructuring plan and final restructuring proposal and to present these to the creditors.

The bankruptcy court will then announce the restructuring of the debtor in the Danish Official Gazette (*Statstidende*) making the restructuring official. The restructuring administrator encourages all creditors to file their claims in order to build a foundation for the potential restructuring of the debtor. The claims will then be ranked in the same way as in the case of a bankruptcy.

Under Danish law, bankruptcy proceedings may be initiated in Denmark in respect of the assets in Denmark of a legal entity incorporated in Denmark. Under Danish law, assets outside Denmark of such Danish entity may also be included, although, in practice whether it is possible to collect such assets will depend on whether the Danish bankruptcy proceedings are recognised in the relevant jurisdiction.

A legal entity incorporated outside Denmark, which does not conduct business from a place in Denmark, cannot be subject to insolvency proceedings in Denmark. If such foreign legal entity has a Danish subsidiary, such Danish subsidiary may be declared bankrupt in Denmark. Under Danish law, a Danish branch of a foreign legal entity does not constitute a separate legal entity, and cannot (as the main rule) be declared bankrupt in Denmark.

The Bankruptcy Act applies to all types of Danish legal entities, including financial institutions. Financial institutions regulated by the Financial Business Act, are subject to certain supplementary provisions, which ensure that the FSA will be involved during insolvency proceedings related to financial institutions. The FSA is entitled to file a petition for bankruptcy in respect of a financial institution if it becomes insolvent.

Danish BRRD-rules. In addition, failing banks and other credit institutions and certain investment firms may be subject to various recovery and resolution measures pursuant to the Danish BRRD-rules which includes transfer of assets and liabilities to the Danish Financial Stability Company (*Finansiel Stabilitet* - an independent public company) or a subsidiary of the Danish Financial Stability Company), bail-in etc. The implementation of measures pursuant to the Danish BRRD-rules does not qualify as insolvency proceedings as a matter of law and may not qualify as an enforcement event under Section 206 of the Capital Markets Act provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of

[1] A compulsory composition entails that all general claims either are reduced pro rata or annulled. A compulsory composition may furthermore include a suspension of payments.

collateral, continue to be performed. Accordingly, the implementation of such measures will not per se entitle a counterparty to terminate, carry out close-out netting, enforce collateral etc.

The Danish Financial Stability Company is under the Danish BRRD-rules granted various additional rights such as rights to terminate or amend terms in contracts of the undertaking subject to resolutions measures if necessary to ensure such measures. Further, the Danish Financial Stability Company may suspend payment and delivery obligations which are due, suspend enforcement in respect of collateral granted, and suspend termination rights under contracts, all valid from the time of publication of such suspensions until the end of the following business day.

If a Danish Party (i.e. a Danish bank or other credit institution, or certain investment firms) becomes subject to measures under the Danish BRRD-rules, this will influence on the Counterparty's rights to terminate and close-out, as such rights may be suspended and/or set aside.

If a credit institution or an investment firm is subject to resolution measures under the Danish BRRD-rules the FSA must consent to insolvency proceedings being initiated.

The EU Insolvency Regulation no. 848/2015, as amended, does not apply in Denmark.[2] Under Danish law the only cross-border regulation relevant to consider on a general level is the Nordic Bankruptcy Convention.[3]

Under Danish choice of law rules the application of the law of a foreign jurisdiction to a contractual relationship in case of a Danish bankruptcy depends on whether Danish choice of law rules point to such law or whether the application of such law has been validly agreed. However, it is generally recognised that Danish law aimed at protecting the creditors and/or preserving the debtor's assets, including the mandatory provisions in the Bankruptcy Act concerning set-off/close-out netting and early termination, will prevail over the parties' choice of law.

Accordingly, if a Danish Party[4] (which becomes subject to Danish Insolvency Proceedings in Denmark), has entered into an Agreement governed by the laws of another jurisdiction, the choice of law will in our opinion most likely not be binding for the Danish Party's bankruptcy estate in respect of set-off/close-out netting and early termination, and the Danish Party's bankruptcy estate may modify the laws of the relevant jurisdiction with mandatory creditor protection rules in the Bankruptcy Act or other relevant law. In a recent court case, the High Court of Eastern Denmark (*Østre Landsret*) did come to this conclusion in a specific case[5] and set aside a governing law clause appointing English law as the applicable law, and the claim raised by the bankruptcy estate in the Danish court is now being subject to substantive proceedings in Denmark.

Denmark has implemented the Banks Winding-up Directive[6] by Executive Order (*bekendtgørelse*) no. 721 of 30 May 2017 (the "Winding-up Order"), which applies to winding-up of an EU based bank or other credit institutions. Section 17 of the Winding-up Order provides that as the general rule netting agreements will be gov-

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[2] See preamble 88 of the EU Insolvency Regulation.
[3] Order (*anordning*) no. 251 of 1 September 1934 as amended.
[4] In this context Danish Party does not include banks and other credit institutions subject to the Banks Winding-up Directive, see footnote 6, or insurance companies subject to Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast),as amended and the choice of law shall be interpreted in the context of those Directives and the Danish implementing executive orders.
[5] U.2017.1940Ø.
[6] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions, as amended.

erned by the agreed choice of law. We are not aware of any Danish authority concerning the scope of this provision in the Winding-up Order. In our view, it is not certain that this choice of law provision in Section 17 of the Winding-up Order would be overruling and conclusive for a Danish Party's bankruptcy estate in a situation where applying mandatory Danish bankruptcy provisions would lead to a result which is different from the law of the netting agreement.

1.5.2 Danish Rules on Close-out Netting and Financial Collateral Arrangements

The Collateral Directive was implemented into Danish law by Act No. 1171 of 19 December 2003 amending the rules on bilateral netting in the Danish Securities Trading Act (*værdipapirhandelsloven*) for agreements entered into on or after 1 January 2004. This Act was replaced by the Capital Markets Act as of 3 January 2018. The rules on bilateral netting in the Capital Markets Act are contained in Chapter 36 (Sections 196 to 209).

The main close–out netting provision (Section 206, Subsection 1 of the Capital Markets Act) provides that parties can agree, with legal effect for third parties (including a bankruptcy estate), that financial obligations under an agreement may be close-out netted upon the occurrence of an enforcement event. An enforcement event (*fyldestgørelsesgrund*) is an event of default or other event agreed by the parties, which gives a party the right to close-out net (Section 5, no. 6 of the Capital Markets Act). Such event can be the commencement of insolvency proceedings (*insolvensbehandling*)[7] of a party (irrespective of the jurisdiction in which such insolvency proceedings take place).

Chapter 36 also contains the Danish rules on financial collateral arrangements implementing the Collateral Directive. These rules are described below in section 3.4.

It is a requirement that the close-out netting agreement and financial collateral arrangement be in writing or be capable of being documented in another manner legally similar thereto (see Section 198, Subsection 1 of the Capital Markets Act).

1.5.2.1 Financial Entities and Non-Financial Entities

Both Financial Entities and Non-Financial Entities may be subject to the Danish rules on close-out netting and financial collateral arrangements.

For the purpose of this opinion the following entities are Financial Entities (each a "**Financial Entity**")[8] :

(a) a public authority (excluding publicly guaranteed undertakings unless they, inter alia, fall under (b) to (e) below) including:

1. public bodies in European Union Member States and countries that the EU has entered into a financial agreement with, which are responsible for, or assist, in public debt management, and
2. public bodies in European Union Member States and countries that the EU has entered into a financial agreement with, which are authorised to keep accounts for clients;

[7] As set forth in Section 5, no. 7 of the Capital Markets Act, "insolvency proceedings" include *inter alia* bankruptcy, formal restructuring proceedings as well as other Danish or foreign types of liquidation, winding up or reorganisation measures caused by a debtor's insolvency. It does not as a matter of law per se include resolution measures of banks and other credit institutions or certain investment firms or Danish branches of such undertakings under the Danish BRRD-rules, see Section 1, Subsection 12 of the Capital Markets Act.
[8] See Section 196, nos. 1-5 of the Capital Markets Act.

(b) central banks, the European Central Bank, the Bank for International Settlements, any multilateral development bank, the International Monetary Fund and the European Investment Bank;

(c) financial institutions subject to supervision, including:

1. credit institutions as defined in Article 3(1)(1) of Directive 2013/36/EU,
2. investment firms as defined in Article 4(1)(1) of Directive 2014/65/EU,
3. financial institutions as defined in Article 4(1)(26) of Directive 2013/36/EU,
4. insurance undertakings as defined in Article 1(a) of Council Directive 92/49/EEC as amended and a life assurance undertaking as defined in Article 1(a) of Directive 2002/83/EC,
5. undertakings for collective investment in transferable securities (UCITS) with an authorisation under Article 5 of Directive 2009/65/EC,
6. management companies, and
7. alternative investment fund managers;

(d) central counterparties (CCPs), settlement agents and clearing houses, as defined respectively in Article 2(c)-(e) of Directive 98/26/EC as amended or similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by such Directive; and

(e) legal persons, who act in a trust or representative capacity on behalf of any one or more persons, including bondholders or holders of other forms of securitised debt, or any authority or entity as defined in (a) to (d) above.

For the purpose of this opinion entities (legal persons) which are not a Financial Entity as set out in (a) to (e) above are Non-Financial Entities (each a "**Non-Financial Entity**")[9].

The types of Danish Parties listed in Appendix A will be either a Financial Entity or a Non-Financial Entity.

1.5.2.2 Scope of Financial Obligations

It must be clear from the close-out netting agreement which of the present, future, actual or contingent or prospective "financial obligations" are covered by the agreement (see Section 198, Subsection 2 of the Capital Markets Act).

The term "financial obligations" is defined in Section 5, no. 2 of the Capital Markets Act. For the purpose of this opinion the relevant definitions are in (i) Section 5, no. 2, first sentence, which applies to close-out netting agreements where one or both parties are a Financial Entity, and (ii) Section 5, no. 2, second sentence, which applies if both parties to a close-out netting agreement is a Non-Financial Entity. In the first case (Section 5, no. 2, first sentence) which has the broadest scope the term "financial obligations" includes obligations giving the party a right to cash settlement or delivery of "financial instruments" and "claims originating from agreements on energy products". In the latter case (Section 5, no. 2, second sentence) the scope is narrowed and the term "financial obligations" includes claims originating from foreign exchange trading, trading in "financial instruments", trading on commodities exchanges, "claims originating from agreements on energy products", and deposits and advances.

[9] See Section 196, no. 6 of the Capital Markets Act.

For the purpose of this opinion we will focus on the scope in Section 5, no. 2, second sentence, since all claims covered hereby will also be covered by Section 5, no. 2, first sentence. Accordingly, the scope of "Relevant Financial Obligations" (i.e. "financial obligations" which may be subject to close-out netting and financial collateral arrangement under Danish law) which we define below will apply irrespective of whether or not a Financial Entity is a party to the Agreement.

We assume that the Agreement will not be used for foreign exchange trading, trading on commodities exchanges, and deposits and advances. Thus, for the purpose of this opinion determining the scope of "financial obligations" will relate to

- claims originating from trading in "financial instruments"; and
- "claims originating from agreements on energy products"

(together the "**Relevant Financial Obligations**").

Thus, below we first address claims originating from trading in "financial instruments" (see section 1.5.2.3 below) and then we address "claims originating from agreements on energy products" (see section 1.5.2.4 below).

1.5.2.3 Claims Originating from Trading in Financial Instruments

"Claims originating from trading in "financial instruments"" may cover various claims arising from the trading relationship between the parties. Financial instruments are defined in the Capital Markets Act (implementing MiFID II, Annex I, Section C) and comprise *inter alia* the instruments described below. The term "financial instrument" as used in the Capital Markets Act is supplemented by the MiFID II Regulation.

In respect of Commodity Transactions (excluding Commodity Spot), the definition of "financial instrument" in Section 4, Subsection 1, nos. 4, 5, 6, 7 and 10 of the Capital Markets Act may be relevant. In respect of Commodity Spot relating to Emission Allowances the definition of "financial instrument" in Section 4, Subsection 1, no. 11 of the Capital Markets Act is relevant.

<u>Section 4, Subsection 1, no. 4 of the Capital Markets Act</u>
Pursuant to Section 4, Subsection 1, no. 4 of the Capital Markets Act, any derivative contract including, *inter alia*, futures, options and swaps relating to securities, currencies, interest rates or yields, or emission allowances as the underlying asset that may be settled in cash or physically qualify as a "financial instrument" under the Capital Markets Act. This provision may be relevant for Commodity Transactions (excluding Commodity Spot) relating to Emission Allowances.

<u>Section 4, Subsection 1, no. 5 of the Capital Markets Act</u>
Pursuant to Section 4, Subsection 1, no. 5 of the Capital Markets Act, any derivative contract including, *inter alia*, futures, options and swaps with a commodity[10] as the underlying asset that must be settled in cash or may be settled in cash at the option of one of the parties (other than by reason of a default or other termination

[10] As mentioned in section 1.4(e) the tern "commodity" is not defined in the Capital Markets Act. The term is, however, defined in Article 2(6) of the MiFID II Regulation as *"any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity"*, and accordingly, in our view electricity is comprised by this term as used in Section 4, Subsection 1, nos. 5, 6 and 7 of the Capital Markets Act.

event) qualify as a "financial instrument" under the Capital Markets Act. Accordingly, to the extent any Commodity Transactions (excluding Commodity Spot) relating to electricity may be considered cash settled in accordance with this test, it will qualify as a "financial instrument" under the Capital Markets Act.

Section 4, Subsection 1, no. 6 of the Capital Markets Act
Pursuant to Section 4, Subsection 1, no. 6 of the Capital Markets Act, options, futures, swaps, and any other derivative contracts relating to commodities[11] that can be physically settled provided that they are traded on a Regulated Market, an MTF or an OTF (except for wholesale energy products[12] traded on an OTF that must be physically settled) qualify as a "financial instrument" under the Capital Markets Act. This provision may be relevant for Commodity Transactions (excluding Commodity Spot) relating to electricity.

The criteria and requirements for wholesale energy products' physical settlement have been further detailed in Article 5(1) of the MiFID II Regulation.

The delivery methods for the contracts being considered as "physically settled" shall, according to Article 5(7) of the MiFID II Regulation, include at least:

(a) physical delivery of the relevant commodities themselves;

(b) delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned;

(c) other methods of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of goods without physically delivering them, including notification, scheduling or nomination to the operator of an energy supply network, that entitles the recipient to the relevant quantity of the goods.

Section 4, Subsection 1, no. 7 of the Capital Markets Act
Pursuant to Section 4, Subsection 1, no. 7 of the Capital Markets Act, options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in no. 6 (mentioned above) and not being for commercial purposes, which have the characteristics of other derivative financial instruments, qualify as a "financial instrument" under the Capital Markets Act. This provision may be relevant for Commodity Transactions (excluding Commodity Spot) relating to electricity.

In order for a physically settled derivative contract to qualify as a "financial instrument" under this section it must not be "*for commercial purposes*" and must "*have the characteristics of other derivative financial instruments*". These criteria have been further detailed in Article 7(1) and (4) of the MiFID II Regulation.

Section 4, Subsection 1, no. 10 of the Capital Markets Act
Pursuant to Section 4, Subsection 1, no. 10 of the Capital Markets Act options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of

[11] Includes electricity, see footnote 10.

[12] The definition of wholesale energy products includes, amongst others, electricity as an underlying commodity as set out in Article 6(3) of the MiFID II Regulation.

the parties other than by reason of a default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this section (i.e. Section 4 of the Capital Markets Act), which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a Regulated Market, an OTF or an MTF, qualify as a "financial instrument" under the Capital Markets Act.

In order for a physically settled derivative contract to qualify as a "financial instrument" under this section it must not be "*for commercial purposes*" and must "*have the characteristics of other derivative financial instruments*". These criteria have been further detailed in Article 7(3) and (4) of the MiFID II Regulation.

According to Article 8 of the MiFID II Regulation, a derivative contract will be included under the provisions in Section 4, Subsection 1, no. 10 of the Capital Markets Act, *inter alia* where it relates to any of the following:

1) commodity storage capacity;

2) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means with the exception of transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on their behalf and in order to allocate the transmission capacity;

3) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources, except where the contract is already within the scope of Section C of Annex I to Directive 2014/65/EU.

This provision may be relevant for Commodity Transactions (excluding Commodity Spot) relating to capacity rights and allowances other than Emission Allowances.

<u>Section 4, Subsection 1, no. 11 of the Capital Markets Act</u>
Pursuant to Section 4, Subsection 1, no. 11 of the Capital Markets Act emission allowances consisting of any units recognised for compliance with the requirements of Commission Regulation (EU) no. 1031/2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community qualify as a "financial instrument" under the Capital Markets Act.

This provision may be relevant for Commodity Spot relating to Emission Allowances.

1.5.2.4 Claims Originating from Agreements on Energy Products

"Claims originating from agreements on energy products" means according to Section 5, no. 3 of the Capital Markets Act, claims originating from the following contracts and derivatives, including master agreements or close-out netting agreements, irrespective of where and how they are traded, and irrespective of whether they may only be cash-settled by reason of a default or other termination event: Contracts for the supply of or derivatives relating to natural gas, electricity, coal, oil or biofuel or transportation thereof, and CO2 allowances and certificates for energy based on renewable energy (*VE-beviser*).

The scope of these types of financial obligations was introduced in the Capital Markets Act and is a Danish law addition to the scope set out above in section 1.5.2.3 which comes from the Collateral Directive. The scope of financial obligations in Danish law was expanded to cover various contracts related to energy trading. Based on its wording the following criteria should be noted to assess the claims which in our view will be covered:

- claims, i.e. payment of money, and not claims for physical delivery of an energy product,
- the claims may arise from a contract relating to delivery of a physical energy product, either in the ongoing trading relationship or in case of a close-out due to an event of default or other termination event (by notice or by automatic termination),
- such contract may relate to delivery of a physical energy product or be a derivative,
- the traded contract can be part of a master agreement or (other) close-out netting agreement,
- it is not relevant where and how the contract is entered into, and accordingly it can be traded OTC, via broker and/or on a market place,
- the contract relates to one of the following energy products: natural gas, electricity, coal, oil or biofuel or transportation thereof, or CO2 allowances or certificates for energy based on renewable energy (*VE-beviser*), and
- the scope is not directly linked to any EU rules and may as such be interpreted under Danish law.

The scope of "claims originating from agreements on energy products" will in particular be relevant to the extent that a Commodity Transaction does not qualify under "claims originating from trading in "financial instruments"" described above; however, claims from certain contracts may be covered by both terms.

For the purpose of this opinion we note that in our view the following may be Relevant Financial Obligations due to qualifying as "claims originating from agreements on energy products":

- claims (i.e. payment of money) originating from a Commodity Transaction, including a Commodity Spot, relating to electricity may qualify as a Relevant Financial Obligation under this provision, irrespective of whether it relates to a contract for physical delivery or for cash settlement;

- claims (i.e. payment of money) originating from a Commodity Transaction, including a Commodity Spot, relating to Emission Allowances[13], may qualify as a Relevant Financial Obligation under this provision, irrespective of whether it relates to a contract for physical delivery or for cash settlement; and

- claims (i.e. payment of money) originating from a Commodity Transaction, including a Commodity Spot, relating to transportation capacity of electricity may qualify as a Relevant Financial Obligation under this provision, irrespective of whether it relates to a contract for physical capacity or for cash settlement.

[13] Section 5, no. 3 of the Capital Markets Act uses the term CO2 allowances (*CO2 kvoter*) and not the term emission allowances (*emissionskvoter*) as used in the list of financial instruments in Section 4 of the Capital Markets Act. The scope of the term CO2 allowances may potentially be broader than emission allowances, but it is not possible to make this determination only based on the wording of the provision and it is not explained in the preparatory works, but in our interpretation CO2 allowances will at least include Emission Allowances for purposes of this opinion.

1.5.2.5 Notice of Termination

Section 206, Subsection 2 of the Capital Markets Act provides that it can be agreed with legal effect towards a bankruptcy estate and creditors that upon the occurrence of an event of default or other enforcement event, close-out netting of financial obligations shall occur when the non-defaulting party gives notice to this effect to the defaulting party. The said section further provides that if insolvency proceedings are commenced against the defaulting party, such party may require that close-out netting of financial obligations be effected so that the parties are placed in a position as if close-out netting had occurred without undue delay after such time when the non-defaulting party became, or should have become, aware that insolvency proceedings were commenced against the defaulting party.

1.5.2.6 Restrictions on Close-out Netting

Sections 207 and 208 of the Capital Markets Act set out certain restrictions as to the financial obligations, which may be included in a close-out netting.

According to the Capital Markets Act, Section 207:

- Subsection 1: Close-out netting, which is carried out after the defaulting Danish Party has commenced formal restructuring proceedings, may include financial obligations that arose before the time when the non-defaulting party knew, or should have known, the circumstances occasioning the Limitation Day (*fristdagen*).
- Subsection 2: Close-out netting, which is carried out after the defaulting Danish Party has been declared bankrupt, may include financial obligations that arose before the time when the non-defaulting party knew, or should have known, the circumstances occasioning the Limitation Day (*fristdagen*). A close-out netting balance may not include financial obligations which came into existence after the day the bankruptcy of the Danish Party was announced in the Danish Official Gazette (*Statstidende*).

According to the Capital Markets Act, Section 208:

- Subsection 1: A financial obligation covered by Section 42, Subsections 3 and 4 of the Bankruptcy Act may be included in a close-out netting unless the non-defaulting party knew, or ought to have known, that the defaulting Danish Party was insolvent when the claim against such defaulting Danish Party was acquired or came into existence.
- Subsection 2: A close-out netting may only be voidable pursuant to Section 69 of the Bankruptcy Act, if the close-out netting covered claims, which could not have been included in an agreed close-out netting in case of the Danish Party's bankruptcy, see Section 208, Subsection 1 and Section 207, Subsection 2.

2. ASSUMPTIONS

This opinion is based on the following assumptions and those additional assumptions set out in section 3 below:

(a) Two Parties enter into the Agreement and at least one of the Parties is incorporated or organised in Denmark (i.e. the Danish Party);

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(b) the Danish Party is a corporation, financial institution or other entity as further described in Appendix A;

(c) the Agreement is governed by the laws of Germany or England and Wales;

(d) on the basis of the terms and conditions of the Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Agreement, the Parties over time enter into a number of Individual Contracts which may include all of the Commodity Transactions;

(e) the Individual Contracts provide for the physical delivery of a Commodity, including allowances, in exchange for cash, however, some of them may also provide for cash settlement;

(f) that each of the Agreement and any of the Annexes set out in section 1.1.1 (including the Credit Support Annex) is legal, valid, binding and enforceable under the laws of any jurisdiction;

(g) to the extent that any obligation arising under the Documents will be performed in a jurisdiction outside Denmark, that its performance will not be illegal or ineffective under the laws of such jurisdiction;

(h) that each of the Parties is duly incorporated or organised and validly existing under the laws of its jurisdiction of incorporation and its place of business;

(i) that each of the Parties has the capacity, power and authority and has obtained all applicable authorisations and licences under all applicable laws, to enter into and to exercise its rights and to trade and perform its obligations under the Documents and the transactions thereunder, and the Documents are duly authorised, executed and delivered and properly completed by or on behalf of each of the Parties under its constitutional documents and the laws of its jurisdiction of incorporation and its place of business;

(j) that no agreement, including the Documents, when entered into between the parties will avoid, rescind, render unenforceable or make contrary to public policy any provision of any (other) Document;

(k) that the Documents are entered into prior to the commencement of any insolvency proceedings in respect of the Parties and that none of the Parties is or, as at the date of execution or the effective date of the Agreement or any Individual Contract, will be, or, as a result of the transactions effected pursuant to any of the Documents or any Individual Contract, will become, or will be deemed to be, insolvent or unable to pay its debts under any applicable law, statute, decree, rule, or regulation;

(l) that each Party is acting as principal and not as agent in relation to its rights and obligations under the Documents and no third party has any right to, or interest in, or claim on any Party's rights or obligations under the Documents;

(m) that the Documents have been or will be entered into for *bona fide* commercial reasons and on arms-length terms and in good faith by each of the Parties thereto, that no Party has entered into the Documents under duress or on the basis of fraud, and that the terms of the Documents are entered into at arms' length, and involve no element of gift or undervalue from the Danish Party to the Counterparty;

(n) that the Documents do not provide for liquidated damages, which are not a genuine estimate of the loss likely to be suffered;

(o) that the Documents, including the transactions entered into thereunder, are entered into on or after 3 January 2018, or the parties have otherwise agreed in writing that the close-out netting and financial collateral arrangement rules in the Capital Markets Act shall apply;

(p) save for elections or required specifications made in the applicable Election Sheet, Annex or Appendix, as applicable, no substantive modifications have been made to any of the Documents; and

(q) that no law (other than Danish law) and no terms or deviations from the standard terms of the Documents agreed between the Parties affect the conclusions in this opinion.

3. OPINION AND SPECIFIC QUESTIONS

Our opinions and answers to the specific questions you have asked us to address in this section 3 are based on the assumptions set out in section 2 and subject to the general qualifications set out below and in section 4.

3.1 Insolvency/Close-out Netting/Early Termination

3.1.1 Short overview of Danish Insolvency Proceedings

We refer to section 1.5.1 above.

3.1.2 Assuming the Parties have not specified that Automatic Termination (as defined in § 10.4 of the EFET General Agreement) applies, are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of Denmark or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by an administrator, receiver or third party?

The Early Termination rights in § 10.3 of the Agreement operable as the result of an insolvency based Material Reason listed in § 10.5(c) of the Agreement[14] (whether by automatic or active termination) will in our view be enforceable against a Danish Party subject to Danish Insolvency Proceedings in respect of Relevant Financial Obligations under the Agreement and the Individual Contracts, and subject to the qualifications below.

Under Section 206, Subsection 1 of the Capital Markets Act, if close-out netting is agreed in the Agreement and relates to Relevant Financial Obligations, the Individual Contracts and the Agreement need not be deemed a single agreement in order to preserve the enforceability of Early Termination rights and the ability to close-out net under the Agreement.

If a Danish Party (i.e. Danish credit institutions or certain Danish investment firms) is subject to measures under the Danish BRRD-rules, this will influence on the enforceability of the Counterparty's Early Termination rights, see section 1.5.1 above.

In addition, the general voidability rules of the Bankruptcy Act apply. Accordingly, the entering into of the Agreement (or an amendment thereto) or any Individual Contract or any other action taken in connection therewith may be subject to challenge under (i) Section 72 of the Bankruptcy Act (if such action is taken after the Limitation Day) or (ii) Section 74 of the Bankruptcy Act (if such action is deemed an improper transaction and the Danish Party was, or became, insolvent as a result of the transaction, and the Counterparty knew, or ought to have known, of both the insolvency and of the circumstances which rendered the transaction improper).

[14] Under Danish law only the reasons listed in (i) and (v) of § 10.5(c) of the Agreement will in our view not per se be deemed insolvency based reasons as a liquidation may not necessarily be caused by an insolvency related event or result in insolvency proceedings being commenced.

3.1.3 *Assuming the Parties have elected Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of Denmark or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party?*

The choice of Automatic Termination would not change the opinion provided in section 3.1.2 above.

3.1.4 *Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? Would it be necessary or recommendable to modify the scope of Automatic Termination (e.g., by adding other Material Reasons upon the occurrence of which Automatic Termination should also apply) or to specify, or to refrain from specifying, a certain grace period as contemplated in § 10.5(c)(iv) of the EFET General Agreement.*

We do not make any recommendation from a legal perspective whether the Parties should agree to make Automatic Termination operative vis-à-vis a Danish Party as the choice of Automatic Termination would not change the opinion provided above in section 3.1.2. Accordingly, it is in our view a commercial consideration whether to include a provision on Automatic Termination which could be triggered without the Terminating Party's knowledge under an Automatic Termination scenario.

3.1.5 *Are the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Denmark or is there a risk that such determination could be challenged by a liquidator, receiver or third party?*

Subject to the qualifications set out below, the close-out netting and the calculation and payment of a Termination Amount under § 11 of the Agreement arising as the result of an insolvency of the Danish Party will, in our view, be enforceable under Danish law in accordance with its terms in respect of claims which are Relevant Financial Obligations.

Assuming the Parties have not elected Automatic Termination, Section 206, Subsection 2 of the Capital Markets Act provides that, with legal effect towards the Danish Party's bankruptcy estate and creditors, it may be agreed that upon the occurrence of an event of default or other enforcement event, close-out netting shall occur with respect to Relevant Financial Obligations when the Counterparty gives notice to this effect to the Danish Party. Section 206, Subsection 2 further provides that, if insolvency proceedings are commenced against the defaulting Danish Party, such Party may require that close-out netting be effected so that the Parties are placed in a position as if the close-out netting had occurred without undue delay after such time when the Counterparty became, or should have become, aware that insolvency proceedings were commenced against the Danish Party.

In addition, Section 201 of the Capital Markets Act, cf. Section 206, Subsection 3, provides that the valuation of financial obligations by a non-defaulting party in a close-out netting scenario must be on commercially reasonable terms.

Section 40, Subsection 2 of the Bankruptcy Act provides that any money claims in foreign currency filed in Danish bankruptcy or under formal restructuring proceedings must be converted into Danish Kroner at the exchange rate on the date of the order of such Danish Insolvency Proceedings. There is no public authority on how Section 40, Subsection 2 of the Bankruptcy Act shall be applied in respect of claims under the Agreement. In our view the requirement for conversion will only relate to the net amount to be filed with the bankruptcy estate or under formal restructuring proceedings (i.e. after close-out netting has been effected).

Provisions in § 11 of the Agreement providing that certain calculations or determinations will be final, conclusive and binding may not be effective, if such calculations or determinations are incorrect and such provisions will not necessarily prevent judicial inquiry into the merits of such calculations or determinations.

The close-out netting and the calculation and payment of a Termination Amount under § 11 of the Agreement may be suspended or set aside for a Danish Party (i.e. Danish credit institutions and certain Danish investment firms) subject to measures pursuant to the Danish BRRD-rules (see section 1.5.1 above).

Restrictions on close-out netting

As set out in section 1.5.2.6 above, a close-out netting or the subsequent calculation and payment of the Termination Amount related thereto is voidable or challengeable, should Danish Insolvency Proceedings be commenced in respect of a Danish Party, to the extent:

- A close-out netting, which is carried out after the Danish Party has commenced formal restructuring proceedings, includes financial obligations that did not arise before the time when the non-defaulting party knew, or should have known, the circumstances occasioning the Limitation Day (*fristdagen*), see Section 207, Subsection 1 of the Capital Markets Act;
- A close-out netting, which is carried out after the Danish Party has been declared bankrupt, includes financial obligations that did not arise before the time when the non-defaulting party knew, or should have known, the circumstances occasioning the Limitation Day (*fristdagen*), see Section 207, Subsection 2, first sentence of the Capital Markets Act;
- A close-out netting includes financial obligations which came into existence after the day the bankruptcy was announced in the Danish Official Gazette (*Statstidende*), see Section 207, Subsection 2, of the Capital Markets; or
- The Counterparty acquired a claim against the Danish Party within 3 months of the Limitation Day and the Counterparty knew, or ought to have known, that the Danish Party was insolvent when the claim against the Danish Party was acquired or came into existence, see Section 208, Subsection 1 of the Capital Markets Act.

3.1.6 *Do the laws of Denmark recognize that the close-out netting provisions in section §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount?*

For Relevant Financial Obligations arising from the Individual Contracts and the Agreement, a liquidator, receiver or third party cannot challenge the inclusion of such claims in a close-out netting unless the financial obligations or claims fall within the restrictions set out in Section 3.1.5 above. However, the close-out netting rights may be suspended or set aside for a Danish Party, which is a Danish credit institution or a certain Danish investment firm if it becomes subject to measures pursuant to the Danish BRRD-rules (see section 1.5.1 above).

In our opinion, the single agreement concept is not required in order to preserve the enforceability of the Early Termination right and the ability to calculate a net amount under Danish law as the enforceability of these rights as agreed in the Agreement will under Danish law follow from Section 206 of the Capital Markets Act. In addition, there is limited Danish authority on whether parties can agree with binding effect for third parties that two or more transactions are a single agreement with the consequence that a bankruptcy estate be prevented from cherry picking among them. In our view, a single agreement concept in itself is likely not to be upheld in case of a Danish bankruptcy estate, if this concept is the only basis for claiming termination and netting rights. Accordingly, under Danish law it is important that such rights are explicitly agreed in §§ 10 and 11 of the Agreement.

Danish legal literature assumes that a close-out netting must always include all transactions covered by the netting agreement in question. This is assumed in order to avoid arbitrary selection among transactions by the parties to the detriment of third parties. However, in our view it must be possible to agree under Danish law that a specific type of Individual Contracts, for example, such as transactions in Emission Allowances (subject to the Allowances Appendix) can be closed-out and netted even though the remaining Individual Contracts between the Parties are not closed-out and netted. We base this on the reasoning that the Parties are free to enter into one Agreement under which for example only Emission Allowances are traded and another Agreement under which no Emission Allowances are traded. Under such circumstances, a "Partial Close-Out" of only the Agreement under which Emission Allowances are traded would be the main rule if only that Agreement had been defaulted. As we believe that Danish law will not distinguish between whether there is one or two Agreements so long as it is clear and objective which type of Individual Contracts can be subject to a Partial Close-Out (e.g. such that only Emission Allowances under the Allowances Appendix are closed-out if only Emission Allowances have been defaulted due to non-performance or breach of warranty or misrepresentation concerning only one or more Emission Allowances), we are of the view that a Partial Close-Out is possible under Danish law, provided that the Individual Contracts subject to Partial Close-Out are an objectively defined group and that the Parties are not vested with any discretion to choose which Individual Contracts to make subject to such Partial Close-Out.

We note that there are to our knowledge no legal precedents in respect of this question, and as such the question remains subject to legal uncertainty under Danish law.

3.1.7 *Is the insolvent counterparty's (i.e. the Danish Party's) obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Denmark or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?*

The enforceability of claims and court decisions ordering the payment of money in a currency other than Danish Kroner against a Danish Party subject to Danish bankruptcy proceedings is subject to the Bankruptcy Act which in general provides for the conversion of such foreign currency debt into Danish Kroner on the date of the commencement of such bankruptcy proceedings (*dekretdag*) or the initiation of formal restructuring proceedings.

There is to our knowledge no Danish legal authority on this point, but in our view the purpose of the close-out netting provisions of the Capital Markets Act, including the fact that the Capital Markets Act explicitly states that a bankruptcy estate of a Danish Party is bound by a close-out netting agreement (as further discussed under section 3.1.2 above) points to the conclusion that a close-out netting would be completed based on such agreed currency and only if the resulting net balance was in favour of the Counterparty, would the Counterparty have to file its claim for such net payment in the bankruptcy estate of the Danish Party in Danish Kroner calculated on the date of the commencement of such bankruptcy proceedings (*dekretdag*). In our view, a similar principle will apply in case of initiation of formal restructuring proceedings, cf. Section 12g of the Bankruptcy Act.

3.2 Non-Insolvency related Material Reasons

3.2.1 Please discuss on the issues outlined above under sections 3.1.5, 3.1.6 and 3.1.7 in the context of non-insolvency related Material Reasons, as well as the following question: Are the rights of the Terminating Party to terminate and close-out the Agreement enforceable in accordance with the terms of the EFET General Agreement, irrespective of the insolvency of Party A?

Subject to the qualification below, Early Termination for Material Reasons (§ 10.5(a), (b), (d), (e) and (f) of the Agreement) and close-out netting (§ 10.3 in connection with § 11 of the Agreement) other than due to insolvency based events are enforceable inter partes under Danish law. In respect of enforceability against a bankruptcy estate of a Danish Party, reference is made to section 3.1 above.

Provisions in § 11 of the Agreement providing that certain calculations or determinations will be final, conclusive and binding may not be effective, if such calculations or determinations are incorrect and such provisions will not necessarily prevent judicial inquiry into the merits of such calculations or determinations.

3.3 Multibranch Parties

3.3.1 Danish Multibranch Party

Our opinion in this section is based on the following additional assumption:

- The Danish Party has entered into Individual Contracts under the EFET General Agreement through offices in Denmark as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, the Danish Party becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Denmark.

3.3.1.1 Would there be any change in your conclusions reached under sections 3.1 above based upon the fact that the Danish Party has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?

No, as Danish law does not consider a branch as a separate legal entity, and consequently, Danish bankruptcy proceedings would cover all assets of a Danish Party notwithstanding whether it has entered into Individual Contracts under the EFET General Agreement on a multibranch basis prior to its insolvency or not.

3.3.1.2 Would the EFET General Agreement be treated as a single unified agreement by the Danish receiver under the laws of Denmark, regardless of the treatment of the EFET General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?

A bankruptcy estate of a Danish Party would in our opinion be bound by the provisions on close-out netting of the Capital Markets Act as outlined under section 3.1 above, irrespective of any insolvency proceedings against one or more branches of such Danish Party in other jurisdictions, including jurisdictions where close-out netting is unenforceable.

Accordingly, in our opinion, the Agreement would be treated in accordance with our opinions under section 3.1 above in this scenario.

3.3.2 Foreign Multibranch Party

Our opinion in this section is based on the following additional assumptions:

- A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("Party F") incorporated, organized or having its centre of main interest in a country ("Country H") other than Denmark has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Denmark (the "Danish Branch").
- After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

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

A legal entity incorporated outside Denmark cannot be subject to insolvency proceedings in Denmark, unless it is deemed to have its actual place of business in Denmark. In this context, the Danish courts will look to whether the management of the legal entity has its de facto seat in Denmark (notwithstanding the formal registration hereof). If such foreign legal entity has a Danish subsidiary, such Danish subsidiary may be declared bankrupt in Denmark. Under Danish law, a Danish branch of a foreign legal entity does not constitute a separate legal entity, and cannot (as the main rule) be declared bankrupt in Denmark.

Consequently, Danish law would in our opinion defer to the proceedings in Country H, so that the assets and liabilities of the Danish Branch would be handled as part of the proceedings for Party F in Country H.

3.3.2.2 If there were separate proceedings in Denmark with respect to the assets and liabilities of the Danish Branch, would the receiver or liquidator in Denmark and the Danish courts, based on the facts above, include Party F's position under the EFET General Agreement, in whole or in part, among the assets of the Danish Branch and, if so, would the receiver or liquidator and the Danish courts recognize the close-out netting provisions of the EFET General Agreement in accordance with their terms? The most significant problem arising would be if a Danish receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Danish Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Danish Branch to the liquidator or receiver of the Danish Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F *under the same EFET General Agreement. In considering this issue, please assume that close-out netting under the EFET General Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.*

N/A as there would in our view not be separate proceedings in Denmark, see our answer to question 3.3.2.1 above.

Please also see section 3.3.2.1 above, concerning the situation where a legal entity has its actual place of business in Denmark.

3.3.2.3 *Please consider your answer to your question assuming instead that Party F has no branch located in Denmark, but has assets in Denmark.*

A legal entity incorporated outside Denmark cannot (as the main rule) be subject to insolvency proceedings exclusively on the basis of assets located in Denmark.

3.4 Collateral

3.4.1 Background - Danish law relating to financial collateral arrangements

As mentioned in section 1.5.2 above the Collateral Directive, including the provisions relating to financial collateral arrangements, was implemented into Danish law as of 1 January 2004.

Section 1, Subsection 11 of the Capital Markets Act states that the provisions of Chapter 36 of the Capital Markets Act apply to financial collateral arrangements and to financial collateral after such financial collateral has been provided. Financial collateral shall be regarded as having been provided when the relevant act of perfection has been carried out.

A financial collateral arrangement is an agreement between parties covered by Section 196 of the Capital Markets Act (which includes Danish Parties covered by section 1.3) on the posting of collateral for financial obligations (cf. Section 5, no. 2 and sections 1.5.2.2-1.5.2.4 above) in the form of collateral covered by Section 197 of the Capital Markets Act, see below. Pursuant to Section 196, Subsection 2, a retail client (as defined in MiFID II, Article 4(1)(11)) cannot be part in a title transfer financial collateral arrangement.

A "financial collateral agreement" can be an agreement on provision of financial collateral in the form of transfer of title (*overdragelse af ejendomsret*) or in the form of charges/pledges (*pant*), cf. Section 5, no.1 of the Capital Markets Act. According to § 7 of the Credit Support Annex it is contemplated that collateralisation is made by transfer of title.

According to Section 198, Subsection 2 of the Capital Markets Act, it must appear from a financial collateral agreement which of the parties' financial obligations are covered by the agreement.

The parties may agree that the value of financial collateral posted under an agreement may be included in a close-out amount calculation in accordance with the provisions on realisation in Section 203 of the Capital

Markets Act. In addition, Section 201 of the Capital Markets Act provides that realisation or valuation of financial collateral by a non-defaulting party in a close-out netting scenario to cover financial obligations must be on commercially reasonable terms.

3.4.2 Type of collateral

In the Credit Support Annex it is contemplated that the Eligible Credit Support to be posted will be Cash or Letters of Credit.

Only the following types of collateral are eligible as financial collateral under Section 197, cf. Section 4, Subsection 1, nos. 1-3 of the Capital Markets Act (together "**Eligible Danish Collateral**"):

1. Cash standing to the credit of an account;
2. Transferable securities (with the exception of instruments of payment (*betalingsinstrumenter*)) which are negotiable on the capital market, including:
   (a) shares in companies and other securities equivalent to shares in companies, partnerships and other entities, and depositary receipts in respect of shares;
   (b) bonds and other forms of securitised debt, including depositary receipts in respect of such securities; and
   (c) any other securities giving the right to acquire or sell such securities as listed under items (a) or (b) hereof or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;
3. Money-market instruments, including treasury bills, certificates of deposit and commercial papers, excluding instruments of payment;
4. Units in collective investment undertakings; and
5. Credit claims (*gældsfordringer*), as defined in no. 4 of Section 5 of the Capital Markets Act, provided both parties are covered by Section 196, Subsection 1, nos. 1-5 of the Capital Markets Act;

except cash deposits which cannot be made subject to legal proceedings, for example client accounts and certain pensions, cf. Section 197, Subsection 3.

Cash received and credited to the Transferee's account is a type of financial collateral which qualifies as Eligible Danish Collateral.

A letter of credit is not in itself covered by the definition of Eligible Danish Collateral. We have not reviewed any specific Letter of Credit for the purpose of providing this opinion. A Letter of Credit is in accordance with its definition in the Credit Support Annex a standby letter of credit, bank guarantee or similar document issued irrevocably by a commercial bank, and we assume that the Transferee may draw upon each such Letter of Credit in one or more drawings in an aggregate amount (up to the face amount for which the Letter of Credit has been issued) that is equal to all amounts that are due and payable by the Transferor but have not been paid to the Transferee within the time allowed for such payments under the Agreement (including any notice or grace period). We assume that the Letters of Credit will in accordance with their terms serve as Eligible Credit Support, but in respect of this opinion, the Letters of Credit will not be considered Eligible Danish Collateral and cannot be included in the calculation of one close-out net amount pursuant to the Capital Markets Act. Furthermore, we assume that the Letter of Credit will be issued by the relevant commercial bank to the Transferee directly and accordingly there is no title transfer. Since the questions contained in this section 3.4 relate to financial collateral and title transfer we do not express any view in our responses below in relation to Letters of Credit.

3.4.3 Questions

For the purposes of the opinions relating to section 3.4.3 we have made the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A (i.e. the Danish Party) is at all times Transferor under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorised and empowered to transfer ownership in the collateral.
- The Parties agree that Eligible Credit Support will include cash and Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B as Transferee maintained in the jurisdiction of the relevant currency.
- Party A, when transferring Eligible Danish Collateral under the Agreement, will have full legal title to such Eligible Danish Collateral at the time of transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of Party A or of any third person and that no secondary pledge or similar security interest over the Eligible Danish Collateral will subsequently be created by Party A or by operation of law or otherwise.

3.4.3.1 Under the laws of Denmark, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?

In Denmark questions regarding choice of law in contractual relationships are governed by the Rome Convention of 19 June 1980 incorporated into Danish law by Act No. 188 of 9 May 1984 (now Consolidated Act no. 139 of 17 February 2014). Consequently, the parties are in general free to decide on the choice of law in their interpartes relationship (subject to ordre public).

However, the Convention does not apply to the relationship vis-à-vis third parties. Thus, it is necessary to apply principles of private international law when deciding on the applicable law governing, inter alia, the required act of perfection.

Under Danish private international law the general rule is the principle of lex rei sitae, i.e. that the law of the country where the subject matter is situated at the time of the establishment of the proprietary interest applies. This means as the general rule that a proprietary interest (including transfer of title) in Danish Eligible Collateral[15] located in Denmark will normally be governed by Danish law.

In relation to Cash credited to a bank account under the control of Party B (i.e. the Transferee, which can be a Danish or a foreign party) maintained in the jurisdiction of the relevant currency, we note that under Danish law, such cash is generally considered a receivable against the bank in question. However, the position under

[15] For dematerialised securities Section 210 of the Capital Markets Act, implementing *inter alia* Article 9 of the Collateral Directive, provides that certain issues, including proprietary issues, regarding the dematerialised security shall be governed by the legislation in the country where the account is maintained.

Danish private international law in respect of applicable law with regard to proprietary interests in receivables is unclear. We believe that the prevailing view is that the law of the debtor applies although there is precedent of the Danish High Court pursuant to which the law of the domicile of the creditor was applied. Although, it remains uncertain which law will apply vis-à-vis third parties in cases where a proprietary interest is granted over contractual rights in receivables, we believe that the prevailing view under Danish law is that Cash credited to a bank account is deemed located at the place of incorporation of the bank holding the account and consequently will be governed by the laws of that jurisdiction.

3.4.3.2 *Would the laws of Denmark characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?*

Under general Danish law, a transfer of title in lieu of the creation of a normal security interest (e.g. a pledge) risks being re-characterised as a pledge where the act of perfection has not been performed (i.e. general Danish law does not generally recognise transfer of title as a way of posting collateral).

However, in respect of financial collateral arrangements, Section 205 of the Capital Markets Act recognises that such arrangements may include transfer of title as a valid form of posting financial collateral in relation to act of perfection and realisation of the collateral. Accordingly, pursuant to Section 205 of the Capital Markets Act a financial collateral arrangement in respect of Eligible Danish Collateral, e.g. Cash credited to an account, under the control of Party B (the Transferee) in the form of title transfer is effective in accordance with the terms of the arrangement in relation to the act of perfection and realisation of the collateral.

We are of the view that § 3 of the Credit Support Annex where delivery of Cash as Eligible Credit Support shall be done by "transferring Cash to the account of the Transferee" provided absolute ownership is thereby transferred will constitute a transfer of title under Section 205 of the Capital Markets Act and the act of perfection has been carried out when Cash has been credited to the account of Party B (the Transferee).

In relation to the rules on voidability (*omstødelse*) in the Bankruptcy Act, we note that the preparatory works state that Section 205 does not apply in relation to such voidability rules. Accordingly, if a financial collateral arrangement in the form of title transfer is in its substance creating a security interest, it will be characterised as a security interest in respect of the voidability rules. Based on the wording used in the Credit Support Annex, it is our view that Eligible Credit Support provided under the Credit Support Annex will be characterised as being a security interest in substance under Danish law, and therefore will each transfer of Eligible Credit Support be considered a security interest in respect of the voidability rules, see further below in section 3.4.3.7.

3.4.3.3 *Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Denmark necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?*

A financial collateral arrangement must be in writing or be evidenced in an equivalent way in order to be governed by the provisions of Chapter 36, see Section 198, Subsection 1 of the Capital Markets Act. In our view, this requirement has been satisfied if the parties have entered into the Credit Support Annex.

Assuming that Party B (the Transferee) has received absolute ownership in the Cash held in an account under the control of Party B (the Transferee) no further actions or requirements is necessary to ensure its title therein pursuant to Danish law.

3.4.3.4 *What is the effect, if any, under the laws of Denmark of the right to substitute collateral pursuant to § 6 of the EFET Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this question?*

Pursuant to Section 202, Subsection 1, it is possible for the Transferor, upon agreement with the Transferee, to substitute Eligible Danish Collateral with other financial collateral, and according to the preparatory works it is a requirement that the substitution collateral is of substantially the same value as the substituted collateral. If such substitution collateral is provided no later than at the same time as the Transferor regains possession of the substituted collateral, the substitution collateral may only be avoided if the substituted collateral was avoidable, see below section 3.4.3.7.

Accordingly, the right of Party A (the Transferor) to substitute Cash pursuant to § 6 of the Credit Support Annex does not affect the validity under Danish law of the unconditional transfer of ownership contemplated by § 7 of the Credit Support Annex. Any substitution Cash shall be provided to Party B (the Transferee) no later than at the same time as Party A (the Transferor) regains possession of the substituted Cash. If the value of the substituted Cash is higher than "substantially the same value" as the substitution Cash such excess collateral may be voidable pursuant to the Bankruptcy Act.

As mentioned above, Section 202, Subsection 1 requires that the substitution takes place "upon agreement". We are not aware of any guidance under Danish law when such "agreement" shall be made, i.e. whether it is sufficient that there is an agreement from the outset allowing substitution from time to time without further consent or whether there must be a specific consent prior to each substitution. In our view there is a risk that it could be considered contrary to a title of transfer security interest under Danish law if the transferor could dispose over the transferred assets at its sole discretion, and therefore we would generally advise that consent shall be given in respect of each substitution request in order to be certain that there has been an effective transfer of title security interest.

3.4.3.5 *Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with § 11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Denmark insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred (i.e. returned to Transferor) to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?*

For the purposes of this question we assume that a Material Reason has occurred and is continuing in respect of one of the parties (but that such party is not subject to measures under the Danish BRRD-rules), that the other party has terminated the Agreement in accordance with § 10 of the Agreement, that the Terminating

Party is calculating the Termination Amount in accordance with § 11, that § 11 of the Agreement is valid and enforceable in Denmark insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, and that Party B (the Transferee) has received and not yet returned Cash as Eligible Credit Support in accordance with the Credit Support Annex.

Pursuant to Section 203, Subsection 3 of the Capital Markets Act, on collateralisation in the form of cash, realisation may be effected through setting off the value of such financial collateral against the collateralised liabilities or through repayment of said liabilities.

We also note that pursuant to Section 205, Subsection 2, it is possible to agree that in case of an enforcement event, an obligation to deliver equivalent collateral, which has not been performed by the defaulting party prior to the enforcement event, can be included in a close-out netting balance.

Accordingly, in our view, it is possible under Danish law to agree that Cash provided as Eligible Credit Support shall in the event of an Early Termination constitute an amount owing from the Transferee to the Transferor to be included in the determination of a final settlement amount in accordance with the close-out netting provisions of the Capital Markets Act described in section 1.5.1 above. Provided that any conversion of Cash into the Base Currency is effected on commercially reasonable terms, we are of the view that § 11 of the Credit Support Annex is valid to the extent that the wording thereof will be read and construed as providing for the value of the Cash provided to Party B (the Transferee) and not yet returned to Party A (the Transferor) to be included in calculation of a net amount payable under § 11 of the Agreement as "other amounts payable".

3.4.3.6 *Are the rights of Party B enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A?*

In respect of enforceability of the rights of Party B under the Agreement, including if Party A as the defaulting party is insolvent, reference is made to other parts of this opinion.

In our view, a financial collateral arrangement which is properly entered into in accordance with the provisions of Chapter 36 of the Capital Markets Act described in other parts of this section 3.4 is binding on Party A and is also binding on a bankruptcy estate of Party A, provided Party A is not a credit institution or an investment firm subject to the Danish BRRD-rules.

3.4.3.7 *Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" pre-ceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?*

The voidability rules of the Bankruptcy Act apply generally, also to financial collateral arrangements, unless exceptions are specifically set out in Chapter 36 of the Capital Markets Act.

Of particular relevance in respect of provision of security is Section 70 of the Bankruptcy Act which states that if security (i) is not created prior to or simultaneously with the establishment of the debt which it is securing (i.e. it is securing old debt), or (ii) is not perfected without undue delay after the creation of such debt, such security may be voidable (*omstødelig*) if Danish Insolvency Proceedings are commenced against the Danish Party during the three-month period starting from the date of the act of perfection of such Eligible Danish Collateral. According to case law and legal literature, the terms "simultaneously" and "without undue delay" must be strictly interpreted but taking into account the concrete circumstances relating to the relevant action required for perfection. As we have noted above in section 3.4.3.2, we are of the view that the title transfer arrangement under the Credit Support Annex will be characterised as being a security interest in substance, and therefore each transfer of Eligible Credit Support will be considered a security interest in respect of the voidability rules, including Section 70 of the Bankruptcy Act.

Notwithstanding the above, according to Section 202, Subsection 2 of the Capital Markets Act a financial collateral arrangement may include a provision to the effect (and therefore not be voidable under Sections 70 or 72 of the Bankruptcy Act, however, in case of the latter unless such provision of financial collateral does not appear ordinary) that the parties are obliged to provide financial collateral or additional financial collateral in order to take account of changes in the value of the collateral or amount of the claims covered by the agreement, provided that the changes have occurred after the agreement was entered into, and provided that the changes were caused by circumstances relating to market conditions, and subject to certain further conditions.

In respect of substitution and voidability, reference is made to section 3.4.3.4 above.

Section 72 and Section 74 of the Bankruptcy Act also apply generally, including in respect of financial collateral arrangement, but do not have any particular relevance for such collateral arrangement. Reference is made to the general description in section 3.1.2

3.4.3.8 *Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Denmark in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under section 3.4.3.2 above?*

In our view the Agreement together with the Credit Support Annex constitute a financial collateral arrangement for the purpose of Chapter 36 of the Capital Markets Act in respect of financial obligations (see section sections 1.5.2.2-1.5.2.4 above), and accordingly, in our view, under Danish law the Agreement together with the Credit Support Annex is in an appropriate form to create a financial collateral arrangement in the form of transfer of title to Cash credited to the account of Party B (the Transferee) for financial obligations.

3.5 General Enforceability

3.5.1 *Is the EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) enforceable under the laws of Denmark in accordance with its own terms? We would like you to specifically discuss the provisions on (i) non-performance due to Force Majeure (§ 7 of the EFET General Agreement) and (ii) limitation of liability (§ 12 of the EFET General Agreement) and any other provisions which need to be commented on according to the law of Denmark. We are especially interested in provisions that you may believe infringe upon the ordre public in Denmark and that may be challenged by the courts in Denmark irrespective of the laws that governs the Agreement.*

We are of the opinion that § 7 of the Agreement is enforceable in accordance with its terms.

Under Danish law, professional parties to a contract may agree on a force majeure provision, including the scope of force majeure events and the consequences of their occurrence.

We are of the opinion that each of §§ 12.2, 12.3, 12.4 and 12.5 of the Agreement are enforceable in accordance with its terms, except that a Danish court may find that § 12.3 of the Agreement is not enforceable in case of gross negligence (which is not generally exempted pursuant to § 12.4 of the Agreement as is the case with intentional default and fraud).

Please note that in general, the validity and enforceability of an agreement may be affected by generally applicable principles of "reasonableness and fairness" (*urimeligt eller i strid med redelig handlemåde*) as set out in Section 36 of the Danish Contracts Act (*aftaleloven*)[16] and "breach of expectations" (*bristede forudsætninger*), but such principles are rarely used on agreements between professional parties.

3.6 Confirmation Practices

Below, we have based our opinion on the following additional assumptions:

- As far as the Confirmation practice is concerned, when entering into an Individual Contract, the parties in each case (i) make oral reference to the EFET General Agreement when concluding the relevant Individual Contract over the phone or (ii) refer to the EFET General Agreement when subsequently exchanging confirmations (in whichever form, including telex, fax, SWIFT or other means of electronic transmission).
- Parties may or may not use the EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations.

3.6.1 Binding Individual Contract

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

As a general rule under Danish law the conclusion of an agreement is not subject to formal requirements. Under Danish law an oral agreement is generally valid and binding, even if not recorded. However, for evidence reasons it is advisable to have promises and agreements in writing. A written agreement is only required if statutory law, trade usage or custom requires such formality.

Under the assumption that no such trade usage or custom exists in the market for Commodity Transactions, we are of the opinion that a verbal agreement is sufficient under Danish law to form a legally binding Individual Contract. It should be noted that under Danish law, agreements on close-out netting (*slutafregning*) pursuant to Section 206 of the Capital Markets Act have to be in writing or be evidenced in an equivalent way, see Section 198, Subsection 1 of the Capital Markets Act. The Agreement contains provisions on close-out netting, and we consider these provisions to be sufficient for the purposes of Section 198, Subsection 1 of the Capital Markets Act provided the Individual Contracts clearly refer to the Agreement.

[16] Consolidated Act no. 193 of 2 March 2016.

As outlined above, the general rule under Danish law is that there are no requirements as to form in connection with the formation of a contract, and, in principle, an agreement can be entered into by electronic exchange of data provided there is a binding and valid offer and acceptance. However, it is a condition that the contract is the outcome of a declaration of intent by the parties.

Where the electronic confirmation matching system reflects the intention of both Parties and the Parties act in accordance therewith, in our view the use of such electronic systems in the ordinary course of business implies that agreements made thereby are binding on the Parties.

Under Danish law the principle of freedom to submit evidence prevails. Consequently, most digital evidence is admissible but the weight of such evidence is solely at the discretion of the Danish courts.

3.6.1.2 At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable?

Under Danish law, an Individual Contract agreed upon orally becomes legally binding and enforceable at the time of the oral acceptance.

We note that according to Article 12 of Commission Delegated Regulation (EU) No 149/2013, as amended, issued pursuant to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (as amended) (the "**EMIR Regulation**") certain deadlines apply for exchanging confirmations for OTC derivative contracts (as defined in the EMIR Regulation). In accordance with the publication from the European Commission "EMIR: Frequently Asked Questions", latest update on 10 July 2014, we do not believe that breach of such deadlines, to the extent applicable, will influence on the transactions being legally binding and enforceable under Danish law.

3.6.1.3 Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?

As mentioned above, an oral agreement is legally binding. The written Confirmation will in this respect merely serve the purpose of evidencing the oral agreement, and, in principle, one party cannot unilaterally amend the oral agreement by including new terms in a Confirmation.

However, where two professional parties have entered into an oral agreement, a party who receives a confirmation of the agreement (made in good faith by the other party), which contains incorrect terms, should react in order not to risk being deemed bound by the revised terms through passivity. When a party should react depends on the circumstances, but generally a notification without undue delay will be sufficient in order not to be bound. Accordingly, if a Confirmation contains terms, which do not reflect the oral agreement, the recipient should, without undue delay, notify the other party of such discrepancies to avoid risking being deemed bound by the revised terms through passivity.

3.6.1.4 Is the reference to the relevant EFET General Agreement sufficient for the inclusion of the Individual Contract in the Agreement?

Under circumstances where express reference has been made to the Agreement when entering into an Individual Contract, in our opinion the Agreement will be part of the contractual relationship relating to that Individual Contract.

If the Parties orally enter into an Individual Contract without any reference to the General Agreement between them, but subsequently confirm the Individual Contract in writing the Agreement has in principle not been made part of the contractual relationship of the Individual Contract as such. However, if it can be proven that it was the intention of the Parties to impliedly make the terms of the Agreement part of the Individual Contract, e.g. by pointing to a trade usage in the market or between the Parties in question, we are of the opinion that the Agreement will be part of the contractual relationship relating to the Individual Contract. Although Danish law recognizes that the acceptance of contractual terms may be impliedly agreed, in practice, it may be uncertain whether such intention can be proven in case of a dispute.

The exchange of a subsequent Confirmation referring to the Agreement (which the other party does not object to) may be an indication of the intention of the Parties, but if the other party can argue that this was not the intention, it may be possible that a Danish court will find that the terms of the Agreement have not been validly included as part of the Individual Contract in question.

We express no view on any specific Confirmation, including through EFET eCM.

3.7 Means of Evidence

3.7.1 Assumed there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, would a (i) taped recording, (ii) witness' statement, (iii) e-mail or other electronic message, or (iv) facsimile be eligible for rendering evidence in court?

As a general matter, any of the above means of evidence are admissible in a Danish court. However, Danish courts will decide on a case-by-case basis the value that it will attribute to any evidence, based on the specific circumstances. Also, a Danish court will not be bound by an agreement to the effect that a specific means of evidence shall be conclusive proof between the Parties, if the evidence is contested in good faith by one of the Parties.

3.8 Core Provisions

We have based our opinion in the following section on the additional assumptions outlined under sections 3.1 and 3.3 above.

3.8.1 Would any of the selections contemplated by the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under sections 3.1 - 3.3 (Enforceability of Close-out Netting)? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

In our opinion, none of the elections contemplated by the Agreement or any of the Annexes listed in Section 1.1.1 (including the Credit Support Annex) will change the substance of the conclusions reached under sections 3.1 - 3.3 in relation to the enforceability of the close-out netting provisions of the Agreement.

In respect of substitution with or without consent under the Credit Support Annex, we refer to section 3.4.3.4.

3.8.2 *Considering your conclusions reached under sections 3.1 - 3.3 (Enforceability of Close-out Netting), what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that sections 3.1 - 3.3 (each such provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained in Annex 1 to the EFET General Agreement.*

To the extent that the Capital Markets Act permits close-out netting of financial obligations, we consider the following provisions so essential to the Agreement (i.e. to be Core Provisions) that a material alteration thereof could affect the conclusions reached regarding close-out netting in respect of financial obligations which may be subject to close-out netting, see sections 3.1 - 3.3: § 1, § 10.3(a), second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv) and § 11, and the related Defined Terms contained in Annex 1 to the Agreement.

3.8.3 *Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "CPMA") change the substance of your conclusions reached under sections 3.1 - 3.3?*

In our opinion and based on the assumption that the Core Provisions (see section 3.8.2) in the Agreement have not been changed, inclusion of the Agreement in the EFET Cross Product Payment Netting Agreement, in the CPMA or in the Master Netting Agreement does not change the substance of the conclusions reached under sections 3.1 - 3.3 in relation to the close-out netting provisions of the Agreement. We do not express any opinion on any provisions, including the payment netting, close-out netting and/or set-off provisions, in the EFET Cross Payment Netting Agreement, the CPMA or the Master Netting Agreement.

3.9 Governing Law, Arbitration and Jurisdiction

We have based our opinion in this section on the following additional assumption:

- The relevant EFET General Agreement is governed by the laws of a jurisdiction other than Denmark (including English or German law) and is legal, valid, binding and enforceable under the laws of the jurisdiction which it is governed by.

3.9.1 Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in Denmark, and what would be the consequence if it were not?

Based on the foregoing assumptions (in section 2 and above) and subject to the qualifications (in section 4 below), we are of the opinion that:

- The express choice of either German or English law to govern the Agreement is a valid choice of law subject to Danish public policy and the mandatory rules of the laws of any country with which the transaction has a significant connection, if and in so far as under the laws of that country those rules must be applied notwithstanding the choice of law, cf. Article 3 (3), Article 7 and Article 16 of the Convention on the Law Applicable to Contractual Obligations dated 19 June 1980 (the Rome Convention) as implemented in Denmark by Danish Consolidated Act No. 139 of 17 February 2014, and the submission by the Danish Party to the jurisdiction of the courts of Germany or England, respectively, is valid and binding upon the Danish Party.

- An express choice of either German or English law to govern non-contractual obligations arising out of or in connection with the Agreement may not be upheld by the courts of Denmark as (i) where applicable, Regulation (EC) No. 864/2007 of 11 July 2007 (the "**Rome II-Regulation**") does not apply to Denmark (on account of the general Danish opt-out, (cf. The European Council's Edinburgh Decision of 12 December 1992 and the Protocol to the Treaty of Amsterdam on the position of Denmark)) and (ii) according to Danish principles of private international law, a choice of law agreement in respect of non-contractual obligations entered into before the event giving rise to the damage has occurred may not be enforceable.
- A final judgment of a German or an English court, respectively, against the Danish Party in respect of any suit, action or proceeding arising out of or relating to the Agreement will be recognised and enforced by the courts of Denmark, subject to and in accordance with the provisions of Council Regulation (EC) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 12 December 2012 (the "**Brussels I-Regulation**") and the bilateral agreement in relation thereto between Denmark and the European Community of 19 October 2005 (and any protocol and accession convention in respect thereof) and Danish Act No. 1563 of 20 December 2006 as amended, implementing the Brussels I-Regulation and such bilateral agreement in Denmark.
- Subject to the compliance with the 10 June 1958 New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards, an arbitral award obtained against a Danish Party in an arbitration proceeding pursuant to the provisions of the Agreement will be enforced by Danish courts without re-examination or re-litigation of the matters thereby adjudicated.

3.10 Regulatory Regime

3.10.1 Are there any exchange control laws or license requirements (under, e.g., any banking, securities trading or energy law) that may affect the enforceability of the relevant EFET General Agreement or of the Individual Contracts?

There are no exchange control laws or license requirements under Danish law that would affect the enforceability of the Agreement or the Individual Contracts.

4. QUALIFICATIONS

This opinion is subject to the following additional qualifications:

4.1 This opinion is limited to the issues addressed herein and speaks only as of its date. In particular, it is noted that no opinion is expressed as to the validity and enforceability of any provisions of the Documents other than those to which express reference is made herein.

4.2 This opinion is limited to matters of the laws of Denmark as in effect today and we express no opinion with respect to the laws of any other jurisdiction (including provisions that refer to such laws), nor have we made any investigation as to any laws other than the laws of Denmark.

4.3 This opinion does not result in any obligation on our part to inform you of any changes in law or other developments after the date of this opinion, which would result in an amendment to this opinion.

4.4 The term "enforceable" or "enforceable in accordance with its terms" as used in this opinion means that the obligations referred to are of a type normally recognised and enforced by the courts of Denmark. It does not mean that the obligations will be enforced in all circumstances or that any particular remedy will be available.

4.5 Certain rights and obligations may be qualified or limited by, inter alia, the nature of the remedies available in Danish courts (the availability of the remedies of injunctions and specific performance may be limited), the acceptance by such courts of jurisdiction, the power of such courts to stay proceedings, or Danish public order.

4.6 Claims may become barred under Danish statutes of limitation or principles of passivity or may be or become subject to set-off or counterclaim.

4.7 Enforcement may be limited by insolvency, bankruptcy, formal restructuring proceedings (*rekonstruktion*) or other laws affecting creditors' rights in general pursuant to the Bankruptcy Act, which includes claw back provisions (*omstødelige dispositioner*) which may be used if a creditor has received an otherwise preferential position in the period up to the insolvency proceeding, or pursuant to the Danish BRRD-rules. Reference is also made to section 1.5.1.

4.8 According to Section 201 in the Capital Markets Act, the realisation and valuation of the financial collateral or financial obligations, which are being close-out netted, must be conducted in a commercially reasonable manner.

4.9 With regard to jurisdiction, a Danish court may stay or - if appropriate - dismiss proceedings inter alia if concurrent proceedings involving the same cause of action and between the same parties are instituted before the courts of another EU/EEA member state, if related actions are pending in the courts of another EU/EEA member state or if the action comes within the exclusive jurisdiction of another court in each case in accordance with the provisions of the Brussels I-Regulation or the Hague Convention.

4.10 With regard to the choice of foreign law, if a Danish court is called upon to interpret or decide a matter in accordance with a foreign law, the parties must provide the court with adequate proof of the relevant contents of such law and if they fail to do so, the Danish courts may apply Danish law instead. In addition, the parties may be required to prepare translations into Danish of the relevant documents and foreign law.

4.11 A Danish court may a deliver judgment in a foreign currency, but such judgment can generally only be enforced in Denmark by a Danish enforcement court in Danish Kroner calculated at the rate of exchange as at the date of enforcement.

4.12 The enforceability of claims and court decisions ordering the payment of money in a currency other than Danish Kroner is subject to the Bankruptcy Act which provides for the conversion of such foreign currency debt into Danish Kroner on the date of the commencement of such bankruptcy proceedings (*dekretdag*) or the initiation of formal restructuring proceedings.

4.13 Any claim against a Danish Party on interest accrued after the insolvency order in respect of Danish Insolvency Proceedings regarding the Danish Party will be a deferred claim in Danish Insolvency Proceedings.

4.14 Provisions in the Documents providing that certain calculations or certificates will be conclusive and binding (or prima facie evidence) may not be effective, if such calculations or certificates are incorrect and such provisions will not necessarily prevent juridical inquiry into the merits of such calculations or certificates.

4.15 There may be circumstances where Danish law will not give effect to provisions in the Documents (i) according to which a Party is vested with discretion or may determine a matter in its opinion or (ii) which may be considered to be unreasonable and/or contrary to principles of fair dealing (e.g. where a party has waived its rights to put forward any and all defences whatsoever against a claim under an agreement).

4.16 A Danish court may refuse to give effect to undertakings contained in the Documents pursuant to which a party is obligated to pay another party's legal expenses and costs in respect of any action before the Danish courts.

4.17 Any provision in the Documents providing that the terms of the Documents may be amended or varied only by an instrument in writing may be held by a Danish court not to be effective.

4.18 This opinion expresses and describes Danish legal concepts in the English language and not in their original Danish terms; consequently this opinion may only be relied upon on the express condition that the opinion shall be governed by and that all words and expressions used herein shall be construed and interpreted in accordance with Danish law and be subject to the exclusive jurisdiction of the Danish courts, and we express no opinion as to the exact interpretation which would be placed upon any particular wording in the Documents by a court.

This opinion is addressed exclusively to EFET and (i) is for the sole benefit of EFET and its members; (ii) may not be relied upon by, or disclosed to, any other person or legal entity without EFET's and our prior written approval; but (iii) may be made available by EFET members to the appropriate regulatory authorities upon their request, provided that (A) such disclosure is for information purposes only and we do not assume any duty or liability to the recipient, and (B) none of such persons to whom this opinion is disclosed may rely on this opinion for its own benefit or for that of any other person.

We are qualified to practise law in the Kingdom of Denmark.

Yours faithfully,
Kromann Reumert

Susanne Schjølin Larsen
Partner

Appendix A

Types of Danish Parties

A Danish Party is a party to the Agreement which is incorporated or organised in Denmark (excluding Greenland and the Faroe Islands) and is a:

- Danish public limited company (*aktieselskab*);
- Danish private limited company (*anpartsselskab*);
- Danish limited partnership (*kommanditselskab*);
- Danish partnership (*interessentskab*); or
- Danish association (*forening*);

  including any of the following

- Danish financial institution (including banks and other credit institutions, investment firms, insurance companies, investment funds, investment fund management companies, and pension funds).