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ATTORNEYS AT LAW

To:
European Federation of Energy Traders (EFET)
Amstelveenseweg 998
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The Netherlands

Attn. Dr. Jan Haizmann, Chairman EFET Legal Committee

Re. Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas and its Collateral Arrangements.

Sofia, 13 December 2018

Dear Dr. Haizmann,

Further to your instruction letter dated 2 July 2018 and the confirmation we received on 2 August 2018 by which you assigned Kambourov & Partners to update the legal opinion on the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a)/11 May 2007) (the **General Agreement**), the Allowances Appendix to the General Agreement (Version 4.0/3 April 2012 and Version 5.0/28 February 2018) (the **Allowances Appendix**) and the EFET Credit Support Annex to the General Agreement (Version 2.0/May, 2010) (the **Credit Support Annex; CSA**), as well as all the other documents to be considered, listed in EFET's instruction letter and available on the EFET website (the **Documents**), we express the following Legal Opinion (the **Opinion**):

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Executive Summary

This Executive Summary has the purpose to provide a summary of the key conclusions set out in Part C of this Opinion. It does not purport to be complete and must be read in conjunction with Part C and the other parts of this Opinion. It should not be relied upon without referring to the other parts of this Opinion because it is given for the purposes of convenience only.

I. Enforceability of Close Out-Netting

1. The Early Termination mechanism (§ 10.3 of the General Agreement) is generally compliant with Bulgarian law. Although some of its elements are unusual in Bulgarian commercial practices, its general admissibility could be grounded with **(a)** the principle of contractual freedom and **(b)** the subsidiary application of the commercial customs to matters not regulated by the Commerce Act and Bulgarian civil legislation.

However, when active Early Termination is due to an insolvency based Material Reason (§10.5(c)), it is disputable whether the close-out netting and the calculation of the Settlement Amount resulting therefrom are permissible and enforceable under Bulgarian law. Other creditors may argue that these actions are detrimental to them and try to challenge the actions. Therefore, it is recommendable the Automatic Termination to be specified as applying in the Election Sheet in order to reduce the potential risk of successful challenging of the set-off (respectively, of the close-out netting). It is further important that the Early Termination Date coincides with the moment of occurring of the Material Reason under §10.5(c)(iv) and is not later than this moment.

The Automatic Termination and the related close-out netting should be generally permissible and enforceable under Bulgarian insolvency law. If the insolvency proceedings have been already opened, the set-off statement has to be directed to the insolvency receiver.

The above conclusion is however not indisputable (at least for the reason that there is no relevant court practice).

2. Some legal concerns exist in our view as regards the understanding in the light of Bulgarian law of the close-out netting mechanism under the General Agreement and in particular the calculation of the Settlement Amounts and the Termination Amount by the Terminating Party.

The mechanism under § 11 of the General Agreement of calculation of gains, costs and losses in case of termination of a contractual relationship is not known in Bulgarian law and could give ground for various interpretations. Furthermore, the Terminating Party has certain discretion to determine the Termination Amount (it is restricted merely by the requirement to do this in a '*commercially reasonable manner*', which requirement of course can be interpreted in various ways and does not create sufficiently stable legal ground for the calculation of the Settlement Amounts) which might lead to objections on the part of the other Party and, in case of insolvency proceedings, on the part of the insolvency receiver and/or the other creditors, respectively.

A possible approach to reduce the related risks and to create more legal clarity would be a kind of reference basis for the calculation of the Termination Amount to be agreed in advance between the Parties.

With a view to all the above it cannot be predicted what the courts' position in regard to the Termination Amount calculated by the Terminating Party would be. We believe that in any case the Terminating Party has to be prepared to prove the exact amount of the damages suffered (i.e. the Termination Amount, the Settlement Amounts and all their elements – Costs, Gains and Losses, as defined under §11). This is so, of course, also with regard to the proving of the pre-conditions for a valid set-off/ close-out netting and in particular of the requirement the claim(s) of the setting-off party (the Terminating Party) to be due and payable and its grounds and amount to be determined.

3. Provided there are no guarantees and securities under the General Agreement (§16 and §17) for the claims of the Terminating Party, and insolvency proceedings are opened against the other Party, the Terminating Party will not have any privilege for the residual amount resulting from the settlement under §11 (i.e. for the Termination Amount) but will have the right to be satisfied *pari passu* together with the other creditors in accordance with the general rules of the Commerce Act.

4. We believe that the Single Agreement concept is necessary in order for the enforceability under Bulgarian law of Early Termination rights and the ability to close out net to be preserved.

5. From 1 January 2008 a new Commercial Register system functions in Bulgaria which is on-line based and guarantees a high degree of transparency. All more important acts of the court (judgements, rulings) in the insolvency proceedings are subject to publication in the electronic Commercial Register. The first act in the insolvency proceedings to be published on the webpage of the Commercial Register is the judgement on opening of these proceedings. An exception from this rule occurs in the hypothesis of appointment of a temporary receiver as a preliminary security measure before the court's judgement regarding the request on opening of insolvency proceedings, which appointment is also published on the Commercial Register's webpage.

6. The insolvency set-off is generally permissible provided that prior to the date of the judgement for institution of the insolvency proceedings both debts have existed and were counter and of the same kind and the creditor's claim was outstanding.

The set-off may be challenged and declared null and void with respect to the insolvency creditors by the court, in case the creditor has acquired the claim and the debt to the debtor prior to the date of the judgement for institution of the insolvency proceedings, but he knew as at the time of acquiring the claim or debt that inability to pay debts, respectively over-indebtedness, has occurred in respect of the debtor or that a petition for opening of insolvency proceedings has been filed.

It is therefore of crucial importance to determine what is the time of acquiring by the Terminating Party of the claims under the General Agreement (i.e. under the Individual Contracts) subject of set-off (close-out netting).

7. Bulgarian law contains a definition of close-out netting which is relevant only in respect of financial collateral arrangements. Therefore, the legal nature of the close-out netting should be scrutinized in the light of more traditional legal terms, such as the set-off and the novation. The necessary pre-conditions for the set-off are: identity of the parties to the claims subject of the set-off; the claims to be monetary or for replaceable commodities of one and the same kind; the claim of the setting-off party to be due and payable; its grounds and amount to be determined. The set-off is effected by a unilateral statement of the setting-off party.

It can be therefore concluded that the close-out netting derives from the set-off, but has some additional elements and is not a synonym of set-off: event of default or any other event made equal by the parties to an agreement to non-performance under this agreement; upon the occurrence of this event the agreement is usually terminated and the obligations of the defaulting party become due and payable (or are transformed in monetary obligations, which are also due and payable); the setting-off party (the Terminating Party under the General Agreement) calculates its gains and losses and sets-off its claims against the defaulting party's claims; if there is a difference (Termination Amount) the setting-off party requires from the other party payment of the residual amount.

Such an approach should be generally permissible under Bulgarian law also out of the context of the financial collateral arrangements.

It should be underlined that close-out netting is not well known in Bulgarian court practice and legal doctrine which makes the analysis of the practical aspects of close-out netting very difficult and the position of Bulgarian courts in respect of close-out netting provisions in case of potential lawsuits unpredictable.

Furthermore, it is not fully clear whether the set-off element of the close-out netting under the General Agreement occurs automatically or not. The principle under Bulgarian law is that the set-off is effected by a unilateral statement of the party setting-off its claim(s). The wording of § 10.3(b) and § 10.4 might lead to the conclusion that the set-off effect of the close-out netting clause occurs automatically (§ 10.3(b) – *‘With effect from the Early Termination Date ...’*; § 10.4 – *‘... upon the occurrence of a Material Reason ...’*). Of course, one could argue that such an approach is permissible based on the principle of contractual freedom. Nevertheless, this ambiguity could lead to additional difficulties in the application and interpretation of the close-out netting mechanism under the General Agreement.

8. In a scenario in which a foreign bank enters into a General Agreement plus a CSA with a Bulgarian electricity/gas company, and both exchange cash as collateral, Art. 10(2) of the FCAA would protect the contractually agreed close-out netting. Of course, it has always to be kept in mind that the Bulgarian market is for the time being only at a stage where physical electricity/gas is traded between classical energy companies (and EFET CSAs are not very wide-spread either), but far from having developed sophisticated derivatives instruments which banks would require to hedge any physical positions they take.

9. Since one of the necessary pre-conditions for set-off under Bulgarian law is the identity of the parties to the claims subject of set-off, even if the Parties generally agree also claims between their Affiliates or Credit Support Providers to be set-off, these entities have to become creditors, respectively debtors under the claims to be set-off. This can be achieved by virtue of a contract for assignment of claims or by a contract for assumption of debts.

II. Multibranch Parties

1. In case of a Bulgarian Multibranch Party A (i.e. having its COMI in Bulgaria) the main conclusions reached above could be supported. The EU Insolvency Regulation shall apply and Bulgarian courts will be competent to pass a judgement on opening of the main insolvency proceedings against Party A and Bulgarian law shall apply in respect of those proceedings. Unless secondary proceedings are opened, Bulgarian law shall apply also with respect to the Individual Contracts entered into by the branches of Party A (i.e. the single agreement concept, the Automatic Termination and the close-out netting/set-off should be permissible, subject to our comments and reservations expressed above). Party A's counterparty under the General Agreement has to lodge its claims against Party A in the main insolvency proceedings in Bulgaria.

The courts of the other state(s) where Party A has branches will have the jurisdiction (upon request filed by the receiver in the main proceedings or by local creditors) to open secondary insolvency proceedings against Party A, where the effect of those proceedings will be restricted to the assets of the debtor situated in this state. For these territorial proceedings the respective local law would apply.

2. In case the Multibranch Party has only an establishment in Bulgaria in the form of a branch, secondary insolvency proceedings under the EU Insolvency Regulation may be commenced in Bulgaria upon the start of the main insolvency proceedings in the country where this Party has its COMI. The debtor's insolvency declared in the course of the main insolvency proceedings may not and must not be re-established under the secondary proceedings in Bulgaria. For these territorial proceedings Bulgarian insolvency law would apply.

III. Collateral

1. The transfer of ownership in collateral is not permitted under Bulgarian law outside the context of the financial collateral arrangements. Therefore it can be concluded that the transfer of ownership in the Cash under the Credit Support Annex (which is made by a payment of the Cash onto an account of Party B (and not, for example, onto an escrow account)) is null and void.

Whether the practical consequences of such nullity are so crucial for Party B is another question (for example, if Party A has a claim against Party B for reimbursement of the invalidly transferred Cash and Party B has an outstanding claim against Party A arising out of their contractual relations, Party B may set-off both claims and thus the collateral effect of the transferred Cash would be achieved, despite of the invalidity of this transfer).

2. The transfer of the Letter of Credit, i.e. its delivery to the Transferee, is a sufficient condition for its enforceability (subject of course to the particular conditions of the Letter of Credit – e.g. deadline in which the demand for payment may be made, etc.).

3. Parent Company Guarantee (PCG)

Since the unilateral statement PCG is not explicitly envisaged in Bulgarian law, there is a risk Bulgarian courts to take the view that it is not valid and not enforceable under Bulgarian law (despite the fact that PCG's are a popular instrument in Bulgaria which is used as a security *inter alia* in transactions with electricity and gas). Therefore, it is recommendable that the following measures are undertaken in advance in order to mitigate the related risks, such as:

(i) the applicable law in the PCG should be explicitly stated to be the laws of a State (and not Bulgarian laws) in which the PCG's are explicitly regulated as a legal instrument and in which State the PCG is enforceable.

(ii) The PCG should be countersigned by an authorised representative of the Beneficiary (and not only by the Guarantor) - thus it could be argued that this is not a unilateral statement (a PCG) but a contract (a guarantee agreement *or* an entering into debt agreement) and that the rules of OCA should be applicable to it. Also a text could be added at the end of the PCG (before the Beneficiary's signature) that the Beneficiary accepts the guarantorship / entering into debt, as well as that that this is a guarantee agreement within the meaning of Art. 138 - 148 OCA *or* an entering into debt agreement within the meaning of Art. 101 OCA.

In addition, it is recommendable that the Guarantor's and the Beneficiary's signatures are verified by a Notary Public, as this may permit use of the PCG as a ground for obtaining an order for immediate enforcement and a writ of execution in the Bulgarian Courts.

(iii) The Guarantor and the Beneficiary to enter into an explicit guarantee agreement within the meaning of Art. 138 - 148 OCA *or* into an entering into debt agreement within the meaning of Art. 101 OCA (this proposal is to have a separate agreement instead of the PCG).

Important note: Art. 147 of OCA provides that the obligation of the guarantor remains valid after the maturity of the obligation of the Principal Obligor only if the creditor (the Beneficiary) institutes proceedings (files a claim) against the debtor within 6 (six) months from maturity. This could be seen as an advantage of the entering into debt compared to the guarantee agreement.

IV. General Enforceability

1. Non-performance due to Force Majeure (§ 7 of the General Agreement)

We believe that § 7 of the General Agreement would be enforceable under Bulgarian law.

2. Remedies for non-performance (§ 8 of the General Agreement)

We believe that § 8 of the General Agreement would be enforceable under Bulgarian law.

3. Limitation of Liability under Bulgarian law (§ 12 of the General Agreement)

3.1. In order to be valid and enforceable under Bulgarian law, § 12.4 should be supplemented and gross negligence should be explicitly pointed out therein too.

3.2. Where it is undisputable that under Bulgarian law exclusion clauses may be agreed in order to limit / exclude the parties' liability under a contract (their contractual liability), it is disputable in legal doctrine whether the liability resulting of tort may be limited by exclusion clauses. We tend to agree that exclusion clauses are permissible only in respect of the contractual liability but some credible arguments supporting the other opinion should not be underestimated.

Subject to that we believe that § 12.2 should be generally enforceable in Bulgarian courts.

4. General enforceability of the General Agreement

Subject to our comments, assumptions and reservations set out in this Opinion it can be concluded that the General Agreement would be legal, valid and binding under Bulgarian laws.

V. Confirmation Practices

1. Written form

Written form is a pre-condition for the validity of the Individual Contracts. With a view to that our recommendation is all Individual Contracts to be concluded always only in writing and this requirement to be explicitly stated in the Election Sheet.

For more details on the written form requirement please see below section **C.VI.1** on pages 90-92.

2. Taped agreements

It will be hard to convince Bulgarian judges that records (tapes) proving the entering into an agreement are admissible evidence. There is, however, a provision in the Commerce Act on the basis of which one could try to ground that agreements taped in compliance with the law in force actually meet the requirements for written form and could therefore be used as valid evidence in court.

It is highly recommendable in all cases when telephone recordings relating to Individual Contracts under the General Agreement are to be made, the explicit consent of the other party's representatives (employees / officers) who will be recorded to be preliminarily obtained – in writing, or, if not possible, such representatives to be warned before each telephone conversation on entering into the Individual Contract that this conversation is going to be recorded and that if they do not explicitly object this will be considered as their consent to the recording. If the recorded individual continues the conversation it can be assumed that his/her consent has been duly obtained.

3. E-mails

The legal ground for recognition of e-mails as valid evidence by Bulgarian courts is unstable. Due to that and to the related uncertainty we would recommend all confirmations of Transactions under the General Agreement to be done also in 'standard' written form (i.e. with a signature by an authorized person, etc.).

In any case we believe that if the parties to an agreement explicitly agree in the agreement that e-mails shall be regarded as valid communication means in their relations, this would increase the chance for recognition of such e-mails as valid evidence by the courts.

VI. Core Provisions

We deem that following provisions of the General Agreement may be regarded as Core Provisions as regards the enforceability of close-out netting: § 1.1, § 10.3, § 10.4, § 10.5(c)(iv) and §11, and, of course, the related Defined Terms contained in Annex 1 to the General Agreement.

VII. Governing Law, Arbitration and Jurisdiction

1. Choice of law

If the Parties to the General Agreement have explicitly agreed in § 22.1 that their relations under the General Agreement shall be governed by the laws of a jurisdiction other than Bulgaria (e.g. by German or English law), and Bulgarian courts are competent to examine a dispute under the General Agreement, Bulgarian courts would apply German or English law.

Bulgarian courts would not apply foreign law if its provisions are manifestly incompatible with Bulgarian public policy and/or contradict to overriding mandatory rules of Bulgarian law. Assessment whether there is such incompatibility / contradiction shall be made in each particular case taking account of all concrete circumstances.

If all the elements of the General Agreement and the Individual Contracts are connected with Bulgaria only, the choice of foreign law shall not prejudice the application of Bulgarian mandatory rules (with a view to that, for the sake of legal clarity, it could be recommended in such scenarios Bulgarian law to be chosen as applicable in the Election Sheet).

2. Choice of jurisdiction

If the Parties are domiciled in two different jurisdictions (for instance in Bulgaria and Germany), and the Parties have explicitly agreed in § 22.2 that their relations under the General Agreement shall be referred for resolution to the court of a Member State, such court should be competent to examine and adjudicate on a dispute under the General Agreement.

On the contrary, if all the elements of the General Agreement and the Individual Contracts are connected with Bulgaria only (purely internal cases), the Parties should not have the right to agree that a foreign court will be competent to resolve their disputes.

3. Arbitration

If the Parties to the General Agreement have their seats (registered offices) in two different jurisdictions (for instance in Bulgaria and Germany), and the Parties have explicitly agreed in § 22.2 that their relations under the General Agreement shall be referred for resolution to a foreign (i.e. with seat abroad) arbitration, such foreign arbitration should be competent to examine and adjudicate on a dispute under the General Agreement.

If both Parties have their registered seat in Bulgaria but one of the Parties has the place of its real management in a foreign country, agreeing on foreign arbitration should be permissible as well.

If both Parties to the General Agreement are Bulgarian entities and have the place of their real management in Bulgaria, they may not agree that a foreign arbitration will be competent to resolve their disputes. In such a case the Parties have generally two options: (i) to agree that competent to resolve their disputes will be Bulgarian courts, or (ii) to agree on a Bulgarian arbitration institution.

4. Governing language

It is recommendable, if the General Agreement is signed in a bilingual version (e.g. English – Bulgarian), in the Election Sheet to be explicitly stipulated that in case of discrepancies the English version shall prevail.

VIII. Regulatory Regime

1. Currency or Exchange Control Law

Pursuant to Bulgarian currency legislation there are no restrictions in respect of transfers of sums from and to abroad. The legal regime is merely declaratory.

2. No gas trading license required

In contrast to electricity traders, gas traders do not need to obtain a license for trade in natural gas under Bulgarian law.

It should be noted that the practical liberalisation of the Bulgarian gas market is still very limited although the legislative preconditions are already existing.

A. Introduction

This Opinion examines the validity and enforceability of the General Agreement and the other Documents in the light of the laws of the Republic of Bulgaria (**Bulgaria**) and is based on the EFET's Instruction Letter dated 2 July 2018 (the **Instruction Letter**) which has been provided to us by the European Federation of Energy Traders (**EFET**). It is strictly limited to the matters stated herein and does not extend, and is not to be read as extending by implication, to any other matters. This Opinion is based exclusively on, and relates solely to matters of, Bulgarian law as now (13 December 2018) in force.

This Opinion is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions, is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other person or legal entity without EFET's prior written approval, but may be made available by EFET members to the appropriate regulatory authorities.

This Opinion shall not be used as the sole basis for entering into Individual Contracts (as defined in the General Agreement), making an investment decision or taking any financial or other commitment.

Capitalized terms used in this Opinion, if not otherwise defined herein and unless the context otherwise requires, shall have the meaning as given to them in the General Agreement or any other of the Documents.

B. Assumptions. Potential Counterparties. Transactions under the General Agreement

I. Assumptions and Reservations Necessary for the Opinion

1. General Assumptions

- Two counterparties enter into the General Agreement and at least one of the counterparties is incorporated or organised or has its centre of main interest in Bulgaria (**Party A** or the **Bulgarian Party**).
- Party A is a corporation, financial institution or other entity as further described in Appendix A to the Instruction Letter (see also Sec. B.II below).
- Each General Agreement and any of the Annexes (incl. the Credit Support Annex) is enforceable under the laws of any jurisdiction for purposes of private international law (other than the laws of Bulgaria, for which we have been requested to opine on in this legal opinion) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.
- On the basis of the terms and conditions of the General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B to the Instruction Letter (see also Sec. B.III and IV below).
- The Individual Contracts provide for the physical delivery of commodities, certificates or emission rights in exchange for cash, however, some of them may also provide for cash settlement.

2. Drafting this Opinion we have assumed that the counterparties are duly incorporated, organised and validly existing in accordance with the laws of the jurisdiction of their incorporation and/or the centre of their main interest; each Party has taken all necessary corporate and other appropriate steps to enter into and to perform the General Agreement and the Individual Contracts; all other Representation and Warranties under § 21 of the General Agreement are true and correct; the General Agreement and the Individual Contracts are entered into and performed based on at arm's length principles; all governmental authorisations, approvals, licences, permits and consents of any country which might be required in connection with the entering into, the delivery and the performance of the General Agreement and the Individual Contracts have been or will be obtained.
3. It should be noted that the General Agreement is still not very popular in Bulgarian legal and trade practice (although the number of market players using it is increasing). We are not aware of relevant practice of Bulgarian courts or Bulgarian arbitration courts with regard to the General Agreement (however, as far as we know, there are already cases regarding the General Agreement concerning the Delivery and Acceptance of Electricity before *foreign* arbitration courts involving Bulgarian power trading companies). Bulgarian legal doctrine does not review in detail the clauses of the General Agreement either. The General Agreement's structure and many of the terms used in it are not typical for Bulgarian law (it is hard to translate some of them with correct Bulgarian legal terms). Besides, the General Agreement is very general – on the one hand it is a frame (master) agreement and, on the other, it has been drafted in order to be applicable in all EU Member States in which energy trade is being carried out.

That is why, in the absence of any relevant court experience, our legal analysis of the General Agreement reflects only our understanding of general principles of Bulgarian law.

4. The present legal Opinion does not deal with any tax and financial issues related to the performance of transactions with natural gas. All provisions of Bulgarian tax legislation are mandatory and the parties to an agreement may not replace them by the agreement's clauses. Any agreements between the parties remain only on the plane of the civil liability (i.e. if one of the parties is obliged by virtue of law to pay certain tax and pays it, but the parties have agreed that this tax shall be paid by the other party, the first party has a claim against the other party for the paid amount). Our recommendation is in each particular case concrete tax advice to be sought.
5. We have given the legal terms in English (and sometimes in German too, since we believe that Bulgarian legal terms can be better explained with German legal terms) and not in Bulgarian (where appropriate we have given in brackets also synonymous English terms, and only in some cases we have given the Bulgarian legal term). This might impede to some extent the understanding of our Opinion but it should be clear that it is impossible to guarantee a totally accurate translation or interpretation, especially when such specific matters and terms are concerned.
6. On the basis of the legal analysis we have made of the General Agreement and the other Documents we would conclude that they are generally compliant with and enforceable under Bulgarian law. Where we consider some clauses contradicting to some extent to Bulgarian law, being not clear enough or just being unusual in Bulgarian contract practice, we have made respective comments in our Opinions below.

II. Potential counterparties

Please consider the following preliminary notes as regards the potential counterparties to the General Agreement in the light of Bulgarian law:

1. Corporations, partnerships, banks/credit institutions

- (i) Companies have legal personality under Bulgarian law. The most popular company forms are the private limited company (*Gesellschaft mit beschränkter Haftung* in German, *drujestvo s ograničena otgovornost* (OOD)) and the public limited company (*Aktiengesellschaft* in German, *aktzionerno drujestvo* (AD)). The shareholders in those types of companies are not liable for the obligations of the companies.

Bulgarian legislation explicitly regulates the registration of *Societas Europaea* (SE) with the Bulgarian Commercial Register, in case their seat (registered office) is in Bulgaria.

The Bulgarian Commerce Act (published in State Gazette 48/18.06.1991, last amendments published in State Gazette 88/23.10.2018) (the **Commerce Act**) recognizes also the following company forms: unlimited partnership (*sabiratelno drujestvo*) (partners are joint debtors and are unlimitedly liable for the debts of the company; creditors of the company have direct claim against the partners), limited partnership (*komanditno drujestvo*) (some of the partners are joint debtors and are unlimitedly liable for the debts of the company, where the liability of the others is limited up to the amount of their contribution into the company; creditors of the company have direct claim against the partners) and partnership limited by shares (*komanditno drujestvo s aktzii*). As mentioned, these companies play an insignificant role in Bulgarian business life.

These companies should be distinguished from the ‘pure’ partnership – the so called ‘civil partnership’ under article 357 of the Obligations and Contracts Act (published in State Gazette 275/22.11.1950, last amendments published in State Gazette 42/22.05.2018) (the **OCA**). The civil partnership is not a legal entity and is thus not entitled to be holder of rights and obligations. Such holders are the single partners. This form of legal presence under Bulgarian law is popular most of all with a view to the establishment of consortia for the purpose of participation in various public procedures (privatization, public procurement, concessions, etc.).

Another form of legal presence in Bulgaria is the cooperation. It is a legal entity incorporated by natural persons and is recognized as a merchant under the Commerce Act. The role of cooperations in Bulgarian business life is low too.

- (ii) Foreign companies may establish their subsidiaries (which have legal personality) and/or their branches (which do not have legal personality, but are treated for tax and other purposes as separate entities; transactions entered into by the manager of the branch bind directly the company) in Bulgaria. It is very popular for a foreign company to hold 100 % of the capital of its Bulgarian subsidiary (in the form of a private (EOD) or a public limited company (EAD)).
- (iii) As from 1 January 2007 the Credit Institutions Act regulating the licensing, activity, supervision and winding up of the credit institutions came into force in Bulgaria. ‘Credit institutions’ are the banks. It should be noted that the bank insolvency is regulated by a separate law – the Bank Insolvency Act (published in State Gazette 92/27.09.2002, last amendments published in State Gazette 22/13.03.2018).

Banks may be incorporated only in the form of a public limited company.

Pursuant to the Credit Institutions Act, a financial institution is an entity different from a credit institution or an investment intermediary whose main activity is carrying out of one or more of the transactions under article 2, para 2, items 1, 2, 6-13 of the Act (financial leasing, trade in various financial instruments, etc.).

2. Publicly-owned corporations

- (i) In Bulgaria after the economic changes in 1989, there were many companies (private or public limited companies) owned by the Bulgarian State. Most of these companies have now been privatized and are currently owned by private (including foreign strategic or private equity) investors or jointly owned by the Bulgarian State and private investors.

Generally the state owned companies are governed by the same rules as normal commercial undertakings but there are specific rules and regulations as well, such as:

- Reorganisation or winding up of companies 100 % owned by the Bulgarian State shall be done by the Council of Ministers or the respective minister in accordance with his sphere of competence.
- Reorganisation or winding up of companies with more than 50 % state participation in their capital shall be done only with the consent of the Privatization Agency (except for the insolvency cases).

The Bulgarian State is the single owner (single shareholder) in companies with 100 % state participation in their capital. Its shareholder rights are exercised by the Council of Ministers or the respective minister in accordance with his sphere of competence.

The single owner's consent is necessary for the valid entry into some kinds of transactions (loan agreements, establishment of mortgage or pledge over long-term assets of the company, etc.) by the state-owned companies.

In their day-to-day business operations the state owned companies are represented by their respective managing bodies (Managing Director in case of a private limited company and Executive Directors in case of a public limited company).

It is therefore to be concluded that a state owned company may freely enter into the General Agreement provided that (a) no securities as listed above are being established (otherwise the State's consent shall be necessary) and (b) no further restrictions are envisaged in the company's constitutional documents (by-laws, etc.).

If the entity is with 50 % or more state or municipal participation in its capital, the principle is that for the valid entering by it into some kinds of transactions (loan agreements, transactions for securing of receivables, etc.) the consent of the Privatization Agency, respectively of the municipal council shall be necessary as well.

- (ii) The Commerce Act provides also for the possibility special 'public undertakings' to be established (by the State or the municipalities) in the form of private or public limited companies, or, if so envisaged in a special law, of state undertakings which are not companies. Such special state undertakings have been established for example in the transport sector (railway, sea, etc.).

- (iii) Entities belonging to the public sector shall comply with the provisions of the Public Procurement Act (published in State Gazette 13/16.02.2016, in force as from 15.04.2016, last amendments State Gazette 102/11.12.2018) (the **PPA**) when awarding contracts for delivery of goods (commodities), services and construction (if these contracts are above certain thresholds). Such entities are the state authorities, the bodies governed by public law¹ but also the companies carrying out any of the specific energy, water, transport and other activities listed in the PPA (the so called ‘sector assignors’ or ‘utilities’). For example, the national gas companies Bulgargas EAD and Bulgartransgas EAD are both bodies governed by public law and sector assignors, therefore, when entering into contractual relations with them, the necessity of a procedure under the PPA shall be assessed on a case by case basis.

We do not believe that the PPA rules have much relevance for the EFET members since the latter carry out wholesale trade and do not supply end customers. Nevertheless we deem that for the sake of completeness some notes in this regard would be useful.

It can be concluded that entities falling within the scope of the PPA shall carry out a procedure under the PPA if they want to enter into a gas procurement contract as buyers (the PPA contains special rules for the entering into Framework Agreements within the meaning of public procurement law; such an agreement shall contain the main conditions of the contracts the parties intend to conclude within the next 4 (maximum) years, including ‘*regarding the prices*’; when entering into the separate contracts on the basis of the Framework Agreement the parties may not amend ‘*substantially*’ the conditions agreed in the Framework Agreement).

This rule shall not apply to gas procurement contracts entered into by sector assignors (as buyers) carrying out any of the energy related activities listed under article 15(1), item 4 with reference to article 124 and article 125 of the PPA (the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of natural gas, heat or electricity, as well as the supply of natural gas, heat or electricity to such networks).

It should be further noted that in case of public procurement procedures the awarding entities attach to the tender documentation a template contract, i.e. the contract to be concluded may not be proposed by the candidates (and as a rule the candidates have to confirm that they accept the template contract’s terms & conditions, i.e. they are even not allowed to propose amendments to this contract).

Once concluded, public procurement contracts are generally governed by the common rules of Bulgarian civil and commercial legislation (the Commerce Act and the Obligations and Contracts Act). The main restriction is that the parties to a public procurement contract are not allowed to amend it (amendments are permissible only in any of the cases explicitly listed in article 116 of the PPA).

3. Regulatory aspects of the Bulgarian gas market

¹ The PPA contains a rather exhaustive definition of a ‘body governed by public law’, where the main principle is that these are legal entities which have been established for the purpose of meeting needs in general interest and which are financed and/or controlled by the State, by state authorities or by other bodies governed by public law.

We believe that a brief description of the Bulgarian gas² market and of the market participants would contribute to the better understanding of regulatory aspects of wholesale gas transactions.

It should be underlined that in contrast to electricity traders, gas traders do not need to obtain a license for trade in natural gas under Bulgarian law.

- 3.1. The main legal document is the Energy Act (published in State Gazette 107/09.12.2003, last amendments published in State Gazette 91/02.11.2018) (the **Energy Act; EA**). Of particular importance are the changes to the EA published on 17 July 2012 because they implemented into the Bulgarian legislation the requirements of the EU Third Energy Package. The secondary legislation under the EA was to be adopted/approved mainly by the energy regulator the Commission for Energy and Water Regulation (the **CEWR**). This process lasted longer than expected (until December 2016) but finally the following secondary legislation documents were adopted by the CEWR, published in State Gazette and became effective:
- Rules for Trade in Natural Gas, published in State Gazette 59/04.08.2015, last amendments published in State Gazette 99/13.12.2016 (the **Trade Rules**) (*an English version of the Trade Rules is attached to this Opinion as Appendix No 1*);
 - Natural Gas Market Balancing Rules, published in State Gazette 99/13.12.2016 (the **Balancing Rules**) (*an English version of the Balancing Rules is attached to this Opinion as Appendix No 2*);
 - Rules for access to the gas transmission and/or the gas distribution networks and the natural gas storage facilities, published in State Gazette 36/16.04.2013, last amendments published in State Gazette 103/27.12.2016 (the **Access Rules**) (*an English version of the Access Rules is attached to this Opinion as Appendix No 3*);
 - Methodology for determining the prices for access and transmission of natural gas through the transmission networks of Bulgartransgas EAD, published in State Gazette 72/29.08.2014, last amendments published in State Gazette 76/30.09.2016;
 - Daily Imbalance Charge Calculation Methodology, published in State Gazette 99/13.12.2016 (*an English version of the Methodology is attached to this Opinion as Appendix No 4*).

According to Art. 173 EA the transactions in natural gas shall be effected on the basis of written contracts in compliance with the provisions of the EA and of the Trade Rules.

- 3.2. It should be noted that, despite the adopting of the above secondary legislation, the liberalisation of the Bulgarian gas market is still very limited in practice. The internal gas market is still heavily dominated by the public provider Bulgargas EAD (**Bulgargas**; webpage: <https://www.bulgargaz.bg/>) (a 100 % owned subsidiary of Bulgarian Energy Holding EAD (**BEH**), which is 100 % owned by the Bulgarian State) which purchases the imported gas (at freely negotiated prices) under long-term gas purchase agreements and resells it to the end suppliers (in charge of the supply of the end consumers (customers) connected to the gas distribution network) and to the consumers directly connected to the gas transmission network (at prices regulated by the CEWR). In other words, Bulgargas is a kind of intermediary envisaged by the law between the wholesale traders (such as Wintershall, Overgas Inc. AD and Gazpromexport in the past; currently Bulgargas purchases the necessary gas directly from Gazprom) and the end suppliers.

² The commodity subject of trade under the General Agreement will be referred to in this Legal Opinion as ‘natural gas’ and ‘gas’, both terms used with one and the same meaning.

- 3.3. Centralised operative management, coordination and control over the Bulgarian gas transmission network shall be effected by the Gas Transmission System Operator (the **TSO**). The Bulgarian TSO is Bulgartransgas EAD (**Bulgartransgas**; webpage: <https://www.bulgartransgaz.bg/en>), 100 % owned subsidiary of BEH. Bulgartransgas is the owner of the gas transmission network. Bulgarian legislator chose the Independent Transmission Operator (**ITO**) model as unbundling option applicable to the Bulgarian TSO. On 22 June 2015 Bulgartransgas was certified as an ITO by the CEWR.

In addition, Bulgartransgas is owner and operator of the only gas storage facility in Bulgaria – gas storage facility “Chiren”.

- 3.4. The gas distribution network is under construction (its development is an obligation of the licensed gas distribution companies (distribution system operators (**DSOs**)); currently the functions of DSOs and end suppliers are within one and the same entities for the respective licensed territory).
- 3.5. The SCEWR shall regulate the prices:
- At which Bulgargas sells gas to the end suppliers;
 - At which Bulgargas sells gas to the customers connected to the transmission network;
 - At which the end suppliers sell gas to the customers connected to the respective distribution network;
 - For access to and transmission through the gas transmission and distribution networks (except for the cases where there is a methodology adopted by the SCEWR for setting the price for access and transmission through the transmission network - see above);
 - For access to and storage of gas in storage facilities.
- 3.6. Extraction companies or gas traders, on the one side, and Bulgargas, the end suppliers, the operators of gas storage facilities, the operators of liquefied natural gas (**LNG**) facilities, gas traders or customers, on the other side, conclude gas delivery transactions with each other at freely negotiated prices (Art. 176(1) EA).

The above parties and Bulgartransgas conclude also transactions in gas for balancing of the market under conditions and according to a procedure and rules for pricing of natural gas intended for balancing as provided for in the Trade Rules and the Balancing Rules.

- 3.7. According to the legal definition (Art. 179 EA), gas traders are local (Bulgarian) or foreign legal entities registered as traders (merchants) under their national legislation (*here the corporate and commercial legislation is meant and not the specific energy meaning of the term ‘trader’*) who purchase gas from the gas extracting undertakings, from operators of gas storage facilities and/or other gas traders and sell it to the customers and/or to other gas traders. They may also enter into transactions with the public provider Bulgargas or the end suppliers. As mentioned, gas traders enter into these transactions at freely negotiated prices (**gas traders should be differentiated from the end suppliers of gas which supply end consumers at regulated prices and which are licensed only for a certain territory**).
- 3.8. Theoretically, any customer connected to the gas transmission and/or gas distribution network shall have the right to select a gas provider, irrespective in which EU Member State the provider is registered, as long as the provider complies with the Trade Rules and the delivery security requirements (Art. 180 EA). However, in practice the sales to end customers (industrial or household) are being done by the end suppliers/DSOs (purchasing the necessary

gas from Bulgargas) who are to be licensed for a particular territory by the CEWR (in contrast to the traders). Their activity is different from the trading activity. So, in theory, (a) the end suppliers/DSOs may purchase gas from gas traders, and (b) the traders may also supply end customers but this still does not happen in practice except for a limited number of cases.

Extraction companies and natural gas customers inside and outside Bulgaria may construct direct gas pipelines between each other and may conclude contracts for delivery of natural gas through the said gas pipelines.

- 3.9. On the webpage of Bulgartransgas is published a sample standard contract dealing with the access to and the transmission through its gas transmission network for the purpose of both transit transmission and transmission through the national transmission network (*contract for transmission of natural gas (the **transport contract**, an English version of the transport contract is attached to this Opinion as Appendix No 5) and general terms and conditions to the contracts, rules for working with the users of natural gas transmission services, respective applications for registration and for access, etc.* - <https://www.bulgartransgaz.bg/en/pages/service-conditions-85.html>) – these are two separate pipelines (gas transmission network (NGTN) and gas transmission network for transit transmission (GTNTT)), interconnection between them at the interconnection point of Ihtiman happened recently.
- 3.10. Before being invited by Bulgartransgas to sign the transport contract, a trader that wants to book entry/exit capacities to/from Bulgaria has to go through the formal procedure for getting access to its network and for booking of capacities, as described in the Access Rules. This procedure includes: **(a)** submission of a standard application for access to Bulgartransgas³ with the required enclosures and approval of the application by Bulgartransgas (*the approval has 6-month validity*); **(b)** registration on the Regional Booking Platform (**RBP**)⁴ and securing the necessary credit limit in accordance with the requirements of Bulgartransgas; **(c)** participation in the procedures for allocation of transmission capacities and confirmation for capacity allocation; **(d)** signing of the transport contract with Bulgartransgas (within 3 days as from the completion of the capacity allocation procedure Bulgartransgas shall submit to the participant with allocated capacity draft transport contract in line with the confirmation for allocated capacity at the nominated by the participant entry/exit points); **(e)** effective implementation of the nominations under the transport contract. According to Art. 6(4) of the Trade Rules, when entering into a gas transmission contract, the network user shall also enter into a sale and purchase of natural gas agreement for the purposes of balancing with Bulgartransgas. A sample standard contract for sale and purchase of natural gas for the purposes of balancing is available on the webpage of Bulgartransgas as well. There is also a sample standard contract for using a virtual trading point (there is no obligation to enter into this contract). *English versions of both contracts are attached to this Opinion respectively as Appendices No 6 and No 7.*
- 3.11. By 17 January 2013 the SCEWR should have issued pricing guidelines for the prices for access to and transmission through the gas transmission network *or* should have approved a pricing methodology of the prices for access to and transmission through the gas transmission network (such prices to be in compliance with the requirements of Regulation (EO) No 715/2009). The Methodology was finally approved by the SCEWR on 11 August 2014 and amendments were

³ Available on Bulgartransgas' webpage (<https://www.bulgartransgaz.bg/en/pages/service-conditions-85.html>).

⁴ <https://www.bulgartransgaz.bg/en/pages/rbp-126.html>

published in State Gazette 76/30.09.2016. The new pricing rules introduced the entry-exit tariff model which finally started applying as from 1 October 2017.

Bulgartransgas shall determine prices of access to and transmission through the gas transmission network according to the Methodology, i.e. without such tariffs to be approved by the CEWR, the CEWR shall only approve the necessary incomes of Bulgartransgas and other price forming components. The current prices for the gas year 01.10.2018 – 30.09.2019 are published on the webpage of Bulgartransgas (<https://www.bulgartransgaz.bg/en/pages/tarifi-28.html>).

III. Transactions under the General Agreement

1. Bulgarian law makes a distinction between a ‘spot’ contract and a ‘forward’ contract, and provides for an explicit definition of what is considered to be an option transaction. Legal definitions are provided by the Commodity Exchanges and Market-places Act (published in State Gazette 93/01.11.1996, last amendments published in State Gazette 7/19.01.2018) (the **CEMA**), as follows:
 - (i) A ‘transaction with immediate performance’ (i.e. a ‘spot’ transaction, although the term ‘spot’ is not explicitly used in the CEMA) within the meaning of the CEMA is a transaction the parties to which have agreed upon a delivery of available commodities and the obligations under which are to be fulfilled, within 10 business days as from entering into the transaction.
 - (ii) ‘Forward transaction’ within the meaning of the CEMA is a transaction the parties to which sell or buy a certain commodity at a price fixed at the moment of entering into the transaction and with a preliminary agreed delivery date.
 - (iii) The CEMA also contains definitions of ‘futures’ and ‘option’ transactions.

"Futures transaction" is a term exchange transaction under which the parties have undertaken to purchase/sell a specific type of commodity on a pre-set date at a price determined on the day of signing the futures transaction. The futures transaction implementation shall be secured by a clearing system in compliance with the parties' orders.

"Option transaction" is a transaction by which the parties agree that within certain period of time one of the parties against payment of a premium shall have the right to acquire by a unilateral statement the right to be buyer, or respectively seller, of a commodity of given type against preliminary agreed price and within definite term. The other party undertakes the obligation to be the counterparty to such a transaction.

2. More precise and detailed definitions of a ‘spot’ contract and a ‘forward’ contract, as well as of the other types of transactions, usually entered into on a (stock or commodity) exchange, are provided by Bulgarian legal doctrine. The main difference between the ‘spot’ and the ‘forward’ contracts is the term for their performance – ‘spot’ transactions require immediate performance; they are ‘real’ or ‘physical’ transactions (i.e. they concern commodities which are really existing – in a warehouse, on a ship, etc.). ‘Forward’ transactions are bound to a certain fixed date in the future on which or after which the parties’ obligations become due and payable (to transfer the ownership over the commodity concerned, to pay the preliminary fixed price, etc.).

3. Taking into consideration the above and the provisions of the General Agreement and the Annexes thereto (as well as the defined transactions as per Appendix B to the Instruction Letter), it could be inferred that, dependent on the concrete delivery conditions agreed in the Individual Contract, the Individual Contracts under the General Agreement could be defined as ‘spot’ contracts or ‘forward’ contracts or as ‘options’ under Bulgarian law.
4. Similar to the new Markets in Financial Instruments Directive (MiFID II)⁵, the new Bulgarian Markets in Financial Instruments Act (**MiFIA**) (published in State Gazette 15/16.02.2018, last amendments published in State Gazette 24/16.03.2018) provides almost the same criteria for a concrete derivative contract relating to a commodity to be recognized as a “financial instrument” within the meaning and the scope of MiFIA (article 4):
 - (i) the concrete derivative contract shall be settled in cash; or
 - (ii) the concrete derivative contract may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event); or
 - (iii) the concrete derivative contract may be physically settled but in that case the contract shall be traded on a regulated market and/or on a multilateral trading facility (MTF) and/or an organised trading facility (OTF) (except for wholesale energy products traded on OTF which must be physically settled, as determined in accordance with Article 5 of Delegated Regulation (EU) No. 2017/565⁶) or the contract is not intended for commercial purposes and have the characteristics of other derivative financial instruments under Article 7, paragraphs 1, 2 and 4 of Delegated Regulation (EU) No. 2017/565.

If the concrete derivative contract meets any of the above listed criteria such derivative contract could be considered as a “financial instrument” subject of regulation under the MiFIA.

Based on the above, each separate Individual Contract under Annex B to the Instruction Letter shall be subject of separate analysis for its classification as a “financial instrument” under the MiFIA. On the other hand, similar to the provisions of MiFID II, the MiFIA provides for some exemptions from the scope of its regulation with regard to the quality of the persons trading in such financial instruments - please refer to item **C.I.1.3.7** below for more information with regard to the MiFIA and the exemptions under it.

Therefore, it is possible to have a situation where a concrete Individual Contract is to be classified as a “financial instrument” within the meaning of MiFIA but due to the specific quality of the contractual parties the transaction itself is to be excluded from the scope of MiFIA.

⁵ 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 (recast).

⁶ 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.

C. Issues / Additional Assumptions / Opinions

I. Enforceability of Close Out-Netting

1. Winding-up, Insolvency or Attachment

1.1. Short overview of Bulgarian insolvency proceedings, laws and relevant terminology applicable to Party A

Following the instructions given in the Instruction Letter, we have provided this part of our Opinion in a separate annex (Annex 1.1).

1.2. The contract types listed in Appendix B to the Instruction Letter and Bulgarian insolvency rules

In our opinion there are no specific insolvency rules provided by Bulgarian laws regarding the different contract types listed in Appendix B (Commodity Forward, Commodity Option, Commodity Swap and Physical Commodity Transaction), except for the discussed exception under the LPSPS. As discussed in Annex 1.1, the applicable rules depend rather on the capacity of the counterparties to the General Agreement (and not on the transaction type; see also the discussion in item C.I.1.3.7 below whether or not the gas/electricity transactions in Bulgaria are regulated by the MiFIA). Therefore, the common legal rules should be applicable, depending on the capacity of the parties to the gas purchase agreement.

1.3. Opinion on effects of insolvency proceedings on the General Agreement and transactions arising under the General Agreement, incl. of the Early Termination and close-out netting rights provided for in the General Agreement

Preliminary note: §10.3 in relation with §10.5 (defining the Material Reason) of the General Agreement envisages an active (or optional) early termination clause, where §10.4 (in relation with §10.5(c)) contains an automatic early termination clause.

Additional assumptions:

- The relevant General Agreement is governed by any law (including German or English law or the laws of Bulgaria);
- After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Bulgaria and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ('in the money') Individual Contracts for the insolvent counterparty.

1.3.1. 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? If yes, would it be necessary or advisable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) by adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as

contemplated in §10.5(c)(iv) of the EFET General Agreement to provide for optimal timing of such termination under local law? If you are recommending that a grace period be made applicable in respect of §10.5(c)(iv), what, in your best estimation, is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of your jurisdiction to have that proceeding dismissed or otherwise terminated? If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? Please supply specific language for purposes of customizing §10.4 of the EFET General Agreement to implement your recommendation and the optimal termination timing?

- (i) The Early Termination mechanism (§ 10.3 of the General Agreement) is generally compliant with and enforceable under Bulgarian law. Although some of its elements (the close-out netting (§10.3(b), third sentence and §10.3(c), second sentence) in particular) are unusual in Bulgarian commercial practices, its general admissibility could be grounded with (a) the principle of contractual freedom (Art. 9 OCA: *‘The parties to a contract may freely determine the contract’s content, as far as this is not in contradiction with the mandatory legal rules and the bona fide (die guten Sitten) principles’*) and (b) the subsidiary application of the commercial customs to matters not regulated by the Commerce Act and Bulgarian civil legislation (Art. 288 of the Commerce Act) (i.e. in case of a dispute it could be contended that such close-out netting provisions have become common practice in European energy trading and thus have the status of European commercial custom).

However, when active Early Termination is due to an insolvency based Material Reason (§10.5(c)), it is disputable whether the close-out netting and the calculation of the Settlement Amount resulting therefrom are permissible and enforceable under Bulgarian law. Other creditors may argue that these actions are detrimental to them and try to challenge the actions, in particular on the grounds of article 645(3) of the Commerce Act (see for more details item (iv) below).

Therefore, it is recommendable the Automatic Termination (§ 10.4 of the General Agreement) to be specified as applying in the Election Sheet upon a Material Reason described in § 10.5(c) of the General Agreement.

Please find below a discussion on the relevant legal aspects on which we base this conclusion.

- (ii) Close-out netting and set-off

It should be noted that Bulgarian law contains a definition of close-out netting (in the FCAA, see item 1.1.6(ii) of Annex 1.1). This definition and the respective (more beneficial) consequences are relevant, however, **only in respect of financial collateral arrangements** - see item 1.1.6(iv) of Annex 1.1 (‘netting’ is used as a term (but without a definition) also in other Acts, for example in the Credit Institutions Act, see item 1.1.2.1(iii) of Annex 1.1). Therefore, the legal nature of the close-out netting and its legal treatment under Bulgarian law should be scrutinized in the light of more traditional legal terms, such as the set-off (*Aufrechnung* in German) and the novation (*Novation, Schuldumschaffung* in German).

The set-off is regulated in articles 103 to 105 of the OCA as one of the mechanisms for payment (extinguishing) of debts. Pursuant to article 103(1) OCA, the necessary pre-conditions for the

set-off are: **(a)** identity of the parties to the claims subject of the set-off⁷ (i.e. the claims to be between the same two parties); **(b)** the claims to be monetary or for replaceable commodities of one and the same kind; **(c)** the claim of the setting-off party ('the active claim'; the other claim is the 'passive claim') to be due and payable; **(d)** its grounds and amount to be determined ('liquidity' of the claim; there are numerous theories regarding the legal nature of this pre-condition, including an opinion that such a pre-condition is not necessary⁸; the prevailing opinion in case law, especially in the newer and binding case law (*see for example Interpreting Judgements of the Supreme Court of Cassation No 1 of 4 January 2001 in case No 1/2000, item 6 and No 1 of 9 December 2013 in case No 1/2013, item 4*), puts a sign of equality between 'liquid' and 'undisputed'; if the receivable is disputed by the debtor, it is not liquid and the legal effect of the out-of-court set-off shall be considered as not having occurred; if the party that has made the set-off statement wishes to have the effect of the set-off, it will have to make the set-off statement (or to file a counter claim) in the court proceedings (if its counterparty files a claim for its receivable (i.e. the passive receivable) which has been subject to the set-off); once the receivable is confirmed by the court, it will become liquid (i.e. its grounds and amount will be determined by the court).

The set-off is effected by a unilateral statement of the setting-off party. Bulgarian law (in contrast to French law, for example) does not recognize the automatic set-off by operation of law (*ipso jure*).

As a result of the set-off the two mutual (counter) claims of the parties are deemed redeemed (liquidated) up to the amount of the smaller claim as of the date on which it was possible the set-off to be effected (*ex tunc*).

The novation is another mechanism for extinguishing of debts (article 107 OCA). A debt is novated when it is exchanged with another debt by virtue of an agreement with the creditor. The collateral provided by third parties for securing the old debt shall remain effective for the new debt only if such third parties explicitly grant their consent.

With a view to the above it can be concluded that the close-out netting derives from the set-off, but has some additional elements (in general, the close-out netting has two main elements: the **close-out part** and the **netting/set-off part**): **(a)** event of default or any other event made equal by the parties to an agreement to non-performance under this agreement; **(b)** upon the occurrence of this event the agreement is usually terminated and the obligations of the defaulting party become due and payable (or are transformed in monetary obligations, which are also due and payable, this is the novation element); **(c)** the setting-off party (the Terminating Party under the General Agreement) calculates its gains and losses and sets-off its claims against the defaulting party's claims; **(d)** if there is a difference (Settlement Amount), the setting-off party requires from the other party payment of the residual amount.

It could be inferred that the close-out netting approach is generally permissible under Bulgarian law also out of the context of the financial collateral arrangements. A ground for such a conclusion could be found in the cited general principle of contractual freedom (article 9 OCA) and the subsidiary application of the commercial customs to matters not regulated by the Commerce Act and Bulgarian civil legislation (Art. 288 of the Commerce Act).

⁷ Deviations from this rule are admissible only if explicitly provided by the law – e.g. in the case of providing a collateral (pledge) for the debts of a third party, the collateral provider may request set-off with claims of the **debtor** (and not of the collateral provider) against the creditor (Art. 151 OCA). See also Art. 142 OCA according to which the guarantor may set-off a claim of the **debtor** to the creditor (i.e. the beneficiary) against the claim of the creditor to the guarantor, even if the debtor has waived this right or has acknowledged his debt.

⁸ V. Popova, 'The Set-off. Substantive legal issues', Fenea, 2002, p. 74.

Therefore, in order to further assess the permissibility and enforceability of the termination clauses of the General Agreement under Bulgarian law, the permissibility and enforceability of set-off in case of insolvency proceedings have to be reviewed (*analogia legis*).

(iii) Permissibility of the set-off under Bulgarian insolvency law

The conditions for a set-off in case of insolvency proceedings have been reviewed in item 1.1.1(ii) of the Annex (they are contained in article 645 of the Commerce Act). The insolvency set-off is generally permissible provided that prior to the date of the judgement for institution of the insolvency proceedings both debts have existed and were counter and of the same kind and the creditor's claim was due and payable. The statement for set-off shall be sent to the insolvency receiver.

(iv) Challengeability of the set-off under Bulgarian insolvency law

The set-off may be challenged and declared null and void with respect to the insolvency creditors by the court, in case the creditor has acquired the claim and the debt to the debtor prior to the date of the judgement for institution of the insolvency proceedings, but he knew as at the time of acquiring the claim or debt that inability to pay debts, respectively over-indebtedness, has occurred in respect of the debtor or that a petition for opening of insolvency proceedings has been filed. Such a claim may be filed by the receiver or (if he fails to do so) by any insolvency creditor within one year as from the date of opening the insolvency proceedings.

It is therefore of crucial importance to determine what is the time of acquiring by the Terminating Party of the claims under the Agreement (i.e. under the Individual Contracts) subject of set-off (close-out netting). We believe that this issue might be problematic in case of active (optional, discretionary) Early Termination: for instance, a petition on opening of insolvency proceedings is filed against a Party under the General Agreement; the other Party learns about that and sends a notice of Early Termination designating the Early Termination Date (which is, for example, in 7 business days); if the claims are deemed to occur at the time of termination of the General Agreement, it is for sure that at this date the Terminating Party already knows about the filed petition and that the above rule about challenging the set-off may be applied.

It is, therefore, recommendable in the Election Sheet to be selected the Automatic Termination clause in order to reduce the potential risk of successful challenging of the set-off (close-out netting) (see also next items (vi) - (xi)).

A set-off shall be further null and void with respect to the insolvency creditors if it has been effected by the debtor (Party A) after the initial date of the inability to pay debts, respectively the over-indebtedness (i.e. within the suspect period) – but not earlier than one year prior to the lodging of the request for opening of the insolvency proceedings - except for the part that the creditor would acquire after the distribution of assets converted into cash, regardless of the time of occurrence of both counter debts (article 645(4) of the Commerce Act).

(v) Challengeability of the entering into the General Agreement and the Individual Contracts

As regards the risk the entering into the General Agreement and the Individual Contracts to be challenged by the receiver and/or the insolvency creditors, this is possible in our view only if

they fall within any of the hypothesis explicitly provided by the Commerce Act as challengeable transactions in the course of the insolvency proceedings (articles 645 – 647, see item 1.1.1(ii) of Annex 1.1). Some of them concern economically unequal transactions which should not be relevant for the case at hand. Actions and transactions effected after the date of the judgement for institution of the insolvency proceedings do not fall under the reviewed scenario either (because the General Agreement and the Individual Contracts have been concluded prior to the commencement of the insolvency proceedings).

Therefore, of particular importance are most of all the challengeable actions / transactions entered into within the suspect period (i.e. after the initial date of the inability to pay debts, respectively the over-indebtedness, as determined by the insolvency court). As stated (1.1.1(i) of Annex 1.1), the court has the almost unrestricted right on its own motion (based on the evidence collected, of course) to fix this date by its judgement on opening of the insolvency proceedings. There is no legal limit in the Commerce Act how long backward in time this date may be fixed. This lead to problems and uncertainty in practice with a view to the possibility some transactions concluded and payments made within the ‘suspect period’ to be challenged by the insolvency receiver, respectively by the creditors of the debtor.

That is why in February 2013 rules were introduced into the Commerce Act that limited the date back in time until which certain transactions can be challenged as null and void (for more details see item 1.1.1(ii) of Annex 1.1).

Reviewing the hypotheses listed in the Commerce Act, we do not consider that there is a significant risk the entering into the General Agreement and the Individual Contracts itself to be successfully challenged by the receiver and/or the insolvency creditors.

Such a risk exists in principle with respect to the providing of collateral since in the list of challengeable transactions fall the ‘*establishing a pledge or a mortgage for the securing of a debt that has not been secured so far (made within 1 year prior to the lodging of the request for opening of the insolvency proceedings)*’.

However, this rule applies only if the collateral is provided in the form of pledge or mortgage; this is a difference from the legal regime applicable until February 2013 which included in the list of challengeable transactions ‘*and other security*’. If the collateral is Cash or Letter of Credit, as per the CSA, the rule shall not apply.

The rule shall not apply either in case the collateral is provided in relation to a transaction under the General Agreement concluded (a) between qualifying parties (e.g. a bank and a trader), and (b) supplemented by a CSA and Eligible Credit Support in the form of Cash has been provided - see item 1.1.6(iv) of Annex 1.1).

Particular attention should be paid also to the hypothesis ‘*payment of a due and payable debt, regardless of the manner of performance (made within 6 months prior to the lodging of the request for opening of the insolvency proceedings)*’ (wording until February 2013: ‘*performance of a debt regardless of the way of performance*’) which provision is not clear enough and gives ground for various interpretations by the judges (this rule corresponds to the special rule of article 645(4) of the Commerce Act, as cited above, which is applicable only as regards the set-off).

- (vi) With a view to all stated above we would reiterate our recommendation in the Election Sheet the Automatic Termination to be selected as applicable upon a Material Reason described in § 10.5(c) of the General Agreement (and in § 10.5(c)(iv) in particular) in order to reduce the

potential risk of successful challenging of the set-off (close-out netting) and calculation of the Settlement Amounts, respectively of the Termination Amount (as discussed, it cannot be predicted how Bulgarian courts would interpret the Automatic Termination, the close-out netting and the calculation of the Settlement Amounts, that is why it cannot be said that by introducing the Automatic Termination mechanism the risk of successful challenging of these actions is eliminated, but in any case this would lead to risk reduction).

- (vii) In our opinion it is not necessary the scope of Automatic Termination to be further modified. We do not deem that any additional specific recommendation on efficacy of making the Automatic Termination operative *vis-à-vis* the Bulgarian Party is necessary. It is, however, important that the Early Termination Date coincides with the moment of occurring of the Material Reason under §10.5(c) (e.g. with the moment of filing of a request on opening (institution) of insolvency proceedings) and is not later than this moment.
- (viii) It should be clear that for some of the Material Reasons under § 10.5(c) of the General Agreement it is really difficult or even impossible to determine whether and when they have occurred and to bound the Automatic Termination to such occurrence. One example – the inability to pay debts is ascertained by the court in an open insolvency procedure, with the support of experts, the application of coefficients and formulas, etc. If such a procedure is not initiated, how could the Non-defaulting Party know about such inability to pay debts of the other Party and respectively know that the Agreement should be deemed terminated? Therefore, the Automatic Termination scenario is feasible in the cases where the occurrence of the respective Material Reason can be easily evidenced (e.g. by a submitted document – a petition for opening of insolvency or liquidation (*Abwicklung* in German) proceedings).
- (ix) It is up to the Parties to the General Agreement to decide whether to limit any of the events specified in §10.5(c) which would trigger the Automatic Termination. Our recommendation is in any case §10.5(c)(iv) to be kept as a Material Reason for Automatic Termination.
- (x) It is further up to the Parties to agree upon a certain grace period as contemplated in §10.5(c)(iv) of the EFET General Agreement. In our view such a grace period would create additional legal uncertainty and is to be avoided.

Besides, it is not likely the insolvency court to dismiss the (unsubstantiated) petition within a reasonable term (e.g. 30 days). According to the Commerce Act, the court shall open a case under the filed petition on the day the petition was filed and shall pass a judgement after four months at the latest; besides, this term may be longer, because it is merely instructive and not binding for the court; from our practical experience we would rather say that this term is approx. 8 months. Therefore, the hypothetical advantage of the grace period does not work in practice, but its disadvantages remain. That is why we would not recommend such a grace period to be envisaged in the Election Sheet.

For the sake of completeness, it is to be mentioned that under the Commerce Act (article 631a), if by an entered into force judgement a creditor's petition to institute bankruptcy proceedings has been rejected, the debtor shall be entitled to indemnification if the creditor has acted intentionally or gross negligently. Indemnity shall be due for all material (property) and immaterial (non-property) damages which are the direct and immediate consequence of the harm. If the petition to institute bankruptcy proceedings has been filed by several creditors, they shall be held jointly liable.

- (xi) As regards the optimal timing for the Automatic Termination to take effect, please note the following:

We know that in order to reduce the risk, certain actions which have been performed on the date of the judgement on opening of the insolvency proceedings to be considered by virtue of law as effected **after** the institution of the insolvency proceedings⁹ (and to be challengeable on this ground), even if these actions precede the taking of the judgement ('zero hour principle'), under some jurisdictions it is considered in the Election Sheet to be specified that the termination effect of the Automatic Termination shall be at 11.59 p.m. on the day before the occurrence of the Material Reason.

We do not consider such approach feasible and necessary under Bulgarian law. First of all, we have doubts that the Parties may give such retroactive effect to the Automatic Termination. Secondly, with a view to the 'zero hour principle' (although the insolvency set-off is not explicitly included in Art. 634a of the Commerce Act, as discussed in the footnote below), one can argue that the discussed approach is a clear case of circumvention of the law and of this principle in particular (and shall be thus null and void).

Besides, if the mere filing of the petition for opening of insolvency proceedings is the Material Reason and leads to termination of the Agreement, then the risk related to the very date of the judgement on opening of the insolvency proceedings (which is later in time) is to be regarded as remote. Last but not least, actions which have been performed on the date of the judgement on opening of the insolvency proceedings represent an isolated (rare) case.

That is why, it should be sufficient in our view in the Election Sheet to be specified in respect to any Bulgarian incorporated Party to the General Agreement that the Early Termination Date coincides with the moment of occurrence of the Material Reason under §10.5(c) and to be further clarified that with respect to §10.5(c)(iv) this is the moment of filing of a request on opening (institution) of insolvency proceedings, for example:

'§ 10.4 Automatic Termination: § 10.4 shall apply to Party xxx [to the Bulgarian incorporated Party/Parties to the General Agreement] and with termination effective (Early Termination Date) on the moment a Material Reason under §10.5(c) occurs. With respect to §10.5(c)(iv) this moment coincides with the moment of filing of a petition on institution of insolvency proceedings (article 625 of the Bulgarian Commerce Act).'

- 1.3.2. **Assuming you recommend Automatic Termination to apply, are the provisions of the General Agreement terminating the EFET General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of Bulgaria) enforceable under the laws of Bulgaria or is there a risk that the Automatic Termination could be challenged by a liquidator, administrator, receiver or third party?**
- (i) Under §10.5(c) of the General Agreement as a Material Reason for termination of the Agreement shall be considered *inter alia* also the institution of 'a proceeding seeking a judgement of insolvency or bankruptcy' (point (iv)). Our understanding is that here the mere fact of submission of a request on opening (institution) of insolvency proceedings (by the

⁹ See e.g. article 634a of the Commerce Act according to which the insolvency proceedings shall be deemed opened on the date of the judgement on opening of the proceedings; if certain actions (e.g. payment of obligations to the debtor) are committed on this date, they are deemed to be done **after** the institution of the insolvency proceedings. In the list of actions is not explicitly included Art. 645 regulating the insolvency set-off.

debtor itself or by its creditors) shall be regarded as a Material Reason, and not the court's judgement on opening of the proceedings (see item 1.1.1(i) of Annex 1.1).

- (ii) Since the mere filing of a request on opening (institution) of insolvency proceedings will have terminating effect on the General Agreement (if, of course, the Early Termination Date specified in the Election Sheet coincides with the moment of filing of such a request) and will have also as effect the replacement of all existing duties and obligations of the Parties by the obligation of one Party to pay damages to the other Party in an amount calculated in accordance with §11.1 of the General Agreement, all the conditions for valid set-off stated in article 645(1) of the Commerce Act will have been fulfilled before the date of the judgement for institution of the insolvency proceedings. Consequently, in our view the Automatic Termination and the related close-out netting are generally permissible and enforceable under Bulgarian insolvency law. If the insolvency proceedings have been already opened, the set-off statement has to be directed to the insolvency receiver (if it is submitted to the receiver of a bank, the statement must be with notarised signatures (article 59(2) of the BIA)).
- (iii) Our understanding of the Automatic Termination concept is that even if the creditor (the Terminating Party) learns about the filed petition on opening of insolvency proceedings on the same day of filing, this should not lead to voidness of the set-off since his claims have already occurred as of the moment of submission of the petition.

It should be, however, noted that this conclusion is not indisputable (at least for the reason that there is no relevant court practice). One can try to argue for example that, since the 'damages' (the Costs and Losses as defined under § 11(2)) are incurred by the Terminating Party as result of the termination of the Individual Contracts and their amount is consequently calculated by the Terminating Party, therefore, as at the time of acquiring the claims the Terminating Party already knew about the initiated insolvency proceedings. We do not deem that there are enough solid legal arguments in favour of this opinion but the existing legal unclarity and uncertainty should not be underestimated.

- (iv) Therefore, in our opinion the Automatic Termination should not be regarded as circumventing Bulgarian insolvency law. There is a provision, indeed, empowering the insolvency receiver to terminate each contract party to which is the company against which the insolvency proceedings have been opened (article 644 of the Commerce Act, see item 1.1.1(i) to Annex 1.1; as mentioned, this is the insolvency receiver's 'cherry-picking right' under the Bulgarian law). This power is relevant, however, at a later stage – when the procedure has been already opened and the receiver has been appointed, whereas the Automatic Termination is bound to the filing of a claim 'seeking a judgment of insolvency'.
- (v) Some legal concerns exist, however, in our view as regards the understanding in the light of Bulgarian law of the close-out netting mechanism under the General Agreement and in particular the calculation of the Settlement Amounts and the Termination Amount by the Terminating Party (see below item 1.3.3).

1.3.3. 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 Bulgaria or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?

- (i) It is important to be underlined that the mechanism under § 11 of the General Agreement of calculation of gains, costs and losses in case of termination of a contractual relationship is not known in Bulgarian law. Besides, the preliminary determining of the compensation due in case

of termination of the General Agreement (the Termination Amount) could lead to the conclusion that this is a kind of liquidated damages (*неустойка* in Bulgarian, *Vertragsstrafe* in German) agreed between the parties. On the other hand, the mechanism of calculating the Termination Amount is nearer to the general way for calculation of compensations under Bulgarian law.

Furthermore, the Terminating Party has certain discretion to determine the Termination Amount (it is restricted merely by the requirement to do this in a '*commercially reasonable manner*', which requirement of course can be interpreted in various ways and does not create sufficiently stable legal ground for the calculation of the Settlement Amounts) which might lead (and will lead in our view) to objections on the part of the other Party and, in case of insolvency proceedings, on the part of the insolvency receiver and/or the other creditors, respectively.

A possible approach to reduce the related risks and to create more legal clarity would be a kind of reference basis (that can be proven in case of a dispute) for the calculation of the Termination Amount to be agreed in advance between the Parties.

With a view to all the above it cannot be predicted what the courts' position in regard to the Termination Amount calculated by the Terminating Party would be. We believe that in any case the Terminating Party has to be prepared to prove the exact amount of the damages suffered (i.e. the Termination Amount, the Settlement Amounts and all their elements – Costs, Gains and Losses, as defined under §11). This is so of course also with regard to the proving of the pre-conditions for a valid set-off / close-out netting (as mentioned above) and in particular of the requirement the claim(s) of the setting-off party (the Terminating Party) to be due and payable and its grounds and amount to be determined.

- (ii) As regards the payment of the Termination Amount, it is our understanding that, if there are no guarantees and securities under the General Agreement (§16 and §17) for the claims of the Terminating Party, and insolvency proceedings are opened against the other Party, the Terminating Party will not have any privilege for the residual amount resulting from the settlement under §11 (i.e. for the Termination Amount) but will have the right to be satisfied *pari passu* together with the other creditors in accordance with the general rules of the Commerce Act (article 722, see item 1.1.1(vii) of Annex 1.1).

1.3.4. Do the laws of Bulgaria 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? If the single agreement concept is particularly important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.

It is our understanding that the Single Agreement concept is explicitly envisaged in the General Agreement and that the Early Termination provisions apply to all Individual Contracts under the General Agreement (including to the Allowances Transactions under the Allowances Appendix) ('*All Individual Contracts and this General Agreement shall form a single agreement between the Parties (collectively referred to as the 'Agreement')*'). The provisions of

this General Agreement constitute an integral part of each Individual Contract’ - §1.1; ‘If a Material Reason with respect to a Party has occurred and is continuing, the other Party may terminate the Agreement by giving the other Party notice’ - §10.3(a)).

We believe that the Single Agreement concept is necessary in order for the enforceability under Bulgarian law of Early Termination rights and the ability to close out net to be preserved. If, for any reason, it is necessary an Individual Contract or Transaction to be severed from the Master Agreement, this can be done in the wording of this Individual Contract or Transaction. Thus, on the grounds of §2.2 the specific terms agreed in the Individual Contract or Transaction ‘shall prevail for the purposes of that Individual Contract’, where the Single Agreement concept shall remain unaffected.

Respectively, if the Parties want to create a mechanism for termination of some Individual Contracts only, this can (and must) be done by an explicit agreement (like the added clause in §10 of the Allowances Appendix) between them, regulating the conditions for such partial terminating and partial close-out. In our opinion such a provision should not impact the enforceability of the Single Agreement concept because it is an exception from the general rule that the General Agreement and the Individual Contracts are terminated as a whole. This means that if Partial Close-Out is made (on the grounds of an explicitly agreed rule), this should not impact the enforceability of subsequent rights to terminate Individual Contracts remaining under the General Agreement.

Please note that the single agreement concept is not known in Bulgarian legal theory and practice, hence the above conclusions are based merely on our own considerations and represent only one of the possible interpretations.

1.3.5. Is the insolvent counterparty’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 Bulgaria or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

In principle, pursuant to article 103 OCA, a sufficient pre-condition for a valid set-off is the claims to be monetary. No requirement is envisaged in the sense that the claims have to be proven / claimed in the currency of the country where the Bulgarian insolvent counterparty is based (i.e. in Bulgarian leva (BGN)). This has been confirmed by the court practice as well (e.g. in judgement of 1 November 2001 of the Sofia Appellate Court in civil case No 233/2001 it is explicitly stated that ‘*whether the counter debts are in USD or in BGN is of no importance, because in both cases we have generic determined goods of the category ‘money’. The value of the one debt towards the other is a matter of calculation according to the respective exchange rate as at the date of making the statement for set-off... regardless of the currency these are goods of one and the same kind – money.*’). Therefore, the insolvent counterparty’s obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) is enforceable under the laws of Bulgaria.

It should be, however, noted that according to §2 of the additional provisions to the Commerce Act, claims in foreign currency shall be converted in Bulgarian leva at the exchange rate of the Bulgarian National Bank as of the date on which the judgement to institute insolvency proceedings was taken.

- 1.3.6. **Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings against a party based in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?**

See Annex 1.1 and in particular item 1.1.5 thereof regarding the different legal treatment of the different types of entities and the references made to the various legal rules applicable in case of their insolvency (in the respective sections dealing with the insolvency rules particular attention is paid to the rules (if any) regulating the set-off and the close-out netting within the insolvency proceedings of the different types of entities).

Furthermore, as mentioned (item 1.1.6(iii) of Annex 1.1), the Financial Collateral Arrangements Act (FCAA) provides for some special rules protecting the creditors (collateral takers) in case of insolvency proceedings. These rules (including the close-out netting rules), however, apply **only in respect of collateral financial arrangements within the meaning of the FCAA** (see item 1.1.6(iv) of Annex 1.1) and provided that parties to the arrangement are entities/ institutions under item 1.1.6(i) of Annex 1.1, sub-items (a) to (p), or a trader and an entity/institution under sub-items (a) to (p). The special (more beneficial) legal treatment shall **not** be applied in cases not explicitly mentioned in the FCAA. Bulgaria has not expanded (in contrast to Luxembourg, for instance) the scope of Directive 2002/47/EC.

- 1.3.7. **We are also interested in whether the insolvency law provides for a “safe harbor” for certain derivatives or other categories of transactions and whether the contract types listed in Appendix B would benefit from such provision(s).**

- (i) Until the end of year 2010 a kind of ‘safe harbour’ was envisaged in the Public Offering of Securities Act (**POSA**), articles 109a to 109c regulating the settlement systems for transactions in securities. The provisions were compliant with Directive 98/26/EC on settlement finality in payment and securities settlement systems. However, these provisions did not deal with trade in other financial instruments (derivatives), but only with securities.

With the amendments, made to the POSA and in the Law on the Payment Services and Payment Systems (**LPSPS**, published in State Gazette 23/27.03.2009) on 28 December 2010, in force as from 30 June 2011, the above mentioned ‘safe harbour provisions’ (articles 109a to 109c of POSA) were deleted from the POSA and were moved (with amendments and supplementations) to a new Chapter V(a) of the LPSPS.

New Law on Payment Services and Payment Systems was adopted in 2018 (published in State Gazette 20/06.03.2018 and effective as of 06.03.2018).

The provisions of the new LPSPS (Chapter VIII) repeat the provisions of Chapter V(a) of the revoked LPSPS regarding the start of reorganisation measures or winding-up proceedings (or insolvency procedure) and provide that the start of reorganisation measures or winding-up proceedings (or insolvency procedure) shall not have retroactive effects on the rights and obligations of the participants in the payment system and may not lead to the re-calculation of the receivables and liabilities of participants arising from or in connection with their participation in the settlement finality system prior to the start of such procedure. The transfer orders and netting shall be legally binding even in the event of reorganisation measures or winding-up proceedings opened against a participant in the settlement finality system and shall

be binding to third parties provided that the transfer orders were entered into the system **before** the moment of the opening of the reorganisation measures or winding-up proceedings (Art. 131(4) of the LPSPS).

Where the transfer orders are submitted into the settlement finality system after the moment of imposing the reorganisation measures or opening of winding-up proceedings and were executed within the business day, they shall be legally enforceable and binding on third parties only if, after the moment in which the orders have become irrevocable, the system operator is able to prove that it was not aware, nor should have been aware of the opening of such procedures. The moment of submitting the transfer order into the settlement finality system shall be established by the rules of the concrete system. The business day shall cover both day and night-time settlements and shall encompass all events happening during the business cycle of a settlement finality system.

The rights of a system operator or of a participant in a settlement finality system to collateral security provided to them in connection with a system or any interoperable system, and the rights of central banks of the Member States or the European Central Bank to collateral security provided to them, shall not be affected by reorganisation measures or winding-up proceedings against a security provider participant, a system operator of an interoperable system which is not a participant, a counterparty to central banks of the Member States or the European Central Bank, or any third party which provided the collateral security.

- (ii) As per POSA (Art. 109a), the provisions of Chapter VIII of the LPSPS shall apply for payment systems established for transactions in financial instruments under the meaning of the abovementioned Markets on Financial Instruments Act (**MiFIA**), transposing into Bulgarian law the MiFID II. MiFIA considers most of the derivative transactions (forwards, futures, swaps, options and other derivative transaction based on commodities) as transactions in financial instruments. If the entering into Individual Contracts is to be qualified as entering into derivative contracts with financial instruments within the meaning of the MiFIA, then the respective regulatory regime under the MiFIA, incl. the above discussed safe harbour provisions, should be applicable as well. See, however, the discussion below on the exemptions from the scope of the MiFIA and our conclusion that that it is likely the entering into Individual Contracts **not** to fall within the scope of the MiFIA.
- (iii) The subject of MiFIA shall include *inter alia* the following financial instruments (other than securities):
 - (a) options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities (i.e. including electricity/gas) that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);
 - (b) options, futures, swaps and any other derivative contracts relating to commodities (i.e. including electricity/gas) that can be physically settled provided that they are traded on a regulated market and/or on a multilateral trading facility (MTF) or on an organised trading facility (OTF) (except for wholesale energy products traded on OTF which must be physically settled, as determined in accordance with Article 5 of Delegated Regulation (EU) No. 2017/565 or that are not intended for commercial purposes and have the characteristics of other derivative financial instruments under Article 7, paragraphs 1, 2 and 4 of Delegated Regulation (EU) No. 2017/565);

(c) options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, emission allowances 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 the parties (otherwise than by reason of a default or other termination event).

Therefore, comparing the definitions of the contract types in Appendix B to the Instruction Letter and the definitions of financial instruments under MiFIA, it could be concluded that the contract types listed in Appendix B in principle fall within the scope of the MiFIA (with the exception of Physical Commodity Transaction - it is our understanding that for this transaction type only physical settlement ('*actual delivery*') is envisaged, with no option for cash settlement).

(iv) However, the exemptions from the scope of the MiFIA (which repeat the exemptions under article 2 of the MiFID II) should be taken into consideration in each particular case, for example:

(a) persons dealing on their own account, including market makers, in commodity derivatives or emission allowances or their derivatives, with the exception of the persons dealing on their account when executing client orders; or ;

(b) persons providing investment services other than dealing on their own account in commodity derivatives or emission allowances or their derivatives to clients or suppliers in the scope of their main business;

In both cases under letter a) and letter b) above the exemption shall be applicable provided that:

- for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of MiFIA and MiFID II or banking activities under Directive 2013/36/EU or Credit Institutions Act, or acting as a market-maker in relation to commodity derivatives,
- those persons do not apply a high-frequency algorithmic trading technique¹⁰, and
- those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business.

Analysing the above exceptions in the light of the Bulgarian energy market, we believe that it is likely the entering into Individual Contracts **not** to fall within the scope of the MiFIA (and the regulatory regime and the safe harbour provisions provided therein should be thus **not** applicable to the parties to the respective General Agreement). Of course, this should be

¹⁰ As per MiFIA "High-frequency method for algorithmic trading" is a technique for algorithmic trading, which is characterised by:

a) infrastructure designed to minimise network and other types of delays, which includes at least one of the following items for submission of algorithmic order: shared use, hosting a short distance or high-speed direct electronic access;

b) determination by the system of the initiation, generation, targeting or performance of an order without human intervention for individual transactions or orders, as well as

c) in a large number of messages throughout the day, which represent orders, quotations or cancel orders, determined in accordance with Article 19 of Delegated Regulation (EU) 2017/565.

checked on a case-by-case basis with a view to the concrete circumstances (incl. the parties to the particular transaction).

The main reason for this conclusion is because of the current status of the Bulgarian energy market and the capacity of the parties to such transactions in Bulgaria: the market is still nascent and derivatives trading has hardly developed; the rule is that physical electricity/gas is being traded between classical energy companies (such as electricity traders) whose main business is namely trading in energy on own account and to the best of our knowledge there are no financial institutions or similar entities whose main business is not trading in electricity/gas that are parties to such transactions. Derivative contracts are rather an exception on Bulgarian energy market.

So, our understanding is that - despite that in principle the contract types listed in Appendix B of the Instruction Letter fall within the scope of MiFIA - because of the capacity of the Parties to energy transactions in Bulgaria such transactions are excluded from the scope of the MiFIA (and from the safe harbour provisions accordingly).

Of course, in case a transaction under the General Agreement is entered into which (a) is to be qualified as entering into derivative contracts with financial instruments within the meaning of the MiFIA, and (b) such a transaction is not exempted from the MiFIA according to any of the above exemptions, the contractually agreed close-out netting provisions would benefit from the safe harbour provisions cited above (item 1.3.7.(i)).

1.3.8. A general description of limitations under Bulgarian law, if any, applicable to set-off of claims (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise):

(a) between Parties of claims arising under the EFET General Agreement

- (i) Bulgarian law does not recognize the legal set-off (automatic set-off by operation of law (*ipso jure*)). The set-off is regulated in articles 103 to 105 of the OCA as one of the mechanisms for payment (liquidation) of debts. As mentioned above (C.I.1.3.1(ii)), the necessary pre-conditions for the set-off are: identity of the parties to the claims subject of the set-off; the claims to be monetary or for replaceable commodities of one and the same kind; the claim of the setting-off party ('the active claim') to be due and payable; its grounds and amount to be determined (i.e. the claim to be 'liquid' - undisputed, according to case law). As result of the set-off the two mutual (counter) claims of the parties are deemed redeemed (liquidated) up to the amount of the smaller claim as of the date on which the set-off could have been effected (article 104(2) OCA).

The conditional set-off or the set-off under a specified term is in principle inadmissible.

Like in German law (§ 388 BGB (German Civil Code)), the set-off under Bulgarian law is effected by a unilateral statement of the setting-off party. Creditor's consent on the set-off shall be necessary in case claims resulting of intentional tort (*Delikt*), or claims for taxes¹¹, or claims over which no forced execution is permissible are being set-off.

Of course, set-off may be effected also by virtue of a contract concluded between the parties having mutual claims (this approach is even better than the unilateral set-off because each

¹¹ Please note that there are special rules under Bulgarian law for set-off of tax and other public liabilities.

party contractually recognizes the other party's claim and has no objections against it, which might be a problem in case of set-off effected by a unilateral statement of one of the parties).

- (ii) Bulgarian legal doctrine and court practice deal in detail also with the objection for set-off, made by the defendant in a lawsuit (and explicitly mentioned only in article 298(4) of the Civil Proceedings Code (published in State Gazette 59/20.07.2007, in force as from 1 March 2008, last amendments published in State Gazette 65/07.08.2018). The objection for set-off is often preferred to the counter claims, because no state fee shall be paid for the objection (in contrast to the counter claim).
 - (iii) The pre-conditions for a valid set-off in the insolvency proceedings (article 645 of the Commerce Act) have been reviewed in detail in item 1.1.1(ii) of Annex 1.1.
 - (iv) Our understanding is that the claims arising under the General Agreement have to comply with the pre-conditions for set-off as per article 103(1) of the OCA (see the above item (i)) in order for the set-off to be enforceable under Bulgarian law. In an insolvency related Early Termination scenario the pre-conditions under article 645 of the Commerce Act must also be complied with.
- (b) **between Parties of claims arising outside the General Agreement if contractually provided for in an amendment to the General Agreement**

In our opinion the Parties may agree also their mutual claims outside the General Agreement to be set-off (such a set-off is permissible also if effected by a unilateral statement of the setting-off party, but, as mentioned above, the contractual set-off is in principle more recommendable). The OCA does not require the mutual (counter) claims to originate from one and the same legal relation (i.e. from one and the same contract). Of course, for the enforceability of the set-off the pre-conditions under the above item (i) shall be met.

- (c) **between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the General Agreement.**
- (i) As mentioned above, one of the necessary pre-conditions for set-off under Bulgarian law is the identity of the parties to the claims subject of set-off. Exceptions from this rule are admissible only if they are explicitly provided by the law; see next item (iii).

Therefore, even if the Parties to the General Agreement generally agree also claims between their Affiliates or Credit Support Providers to be set-off, these entities have in principle to become creditors, respectively debtors under the claims to be set-off.

- (ii) This can be achieved by virtue of a contract for assignment of claims or by a contract for assumption of debts (depending on the concrete situation).

For the sake of clarity we would like to provide you with a summary of the relevant legal provisions regulating the assignment of rights and assumption of obligations under Bulgarian law:

Assignment of rights

Articles 99 and 100 of the OCA regulate the assignment (transfer) of rights (claims) (*цесия* in Bulgarian, *Vertrag über Abtretung von Forderungen*, *Zessionsvertrag* in German). Such a transfer is principally permissible, unless the contract, the law or the nature of the right does not allow it.

The transfer of rights has effect towards third parties and the debtor as from the date of receipt of the notification about the transfer by the debtor. Pursuant to article 99(4) of the OCA the notification shall be made by the transferor (i.e. by the assigning party) and not by the transferee.

Bulgarian legal theory¹² recognises the admissibility of the transfer also of future rights. Such a transfer shall have effect once the claim arises.

Assumption of debts

Articles 101 and 102 of OCA regulate two different forms of assumption of debts (obligations), as follows:

- article 101 – entering into debt (*встъпване в дълг* in Bulgarian, *Schuldbeitritt* in German): the entering into a debt may be effected upon an agreement of the entering party with the creditor or with the debtor. In this case the creditor shall have two debtors who are jointly liable (*Gesamtschuldner* in German).
- article 102 – debt substitution (*заместване в дълг* or *поемане на дълг* in Bulgarian, *Schuldübernahme* in German): for the debt substitution the creditor's explicit consent is necessary. In this case the substituted debtor shall be freed from liability towards the creditor.

After the valid effecting of any of the above acts (taking into consideration the aimed purpose) the set-off will be enforceable. It is common business practice in Bulgaria trilateral and multilateral agreements to be concluded in order for the above operations (in various combinations), including set-off, to be effected in a fast and effective manner.

- (iii) As regards the Credit Support Providers, there are in principle two legal provisions which under the concrete circumstances (e.g. depending on the particular credit support provided) could allow also the Credit Support Providers to participate in the set-off (each particular scenario should be separately scrutinized in order for its admissibility under Bulgarian law to be checked):

Art. 151 OCA – Set-off in the hypothesis of provided pledge or mortgage for securing the debt of a third party

According to the cited provision, in the case of providing a pledge for the debts of a third party, the collateral provider may request set-off between claims of the **debtor** (and not of the collateral provider) against the creditor and the secured creditor's claim.

Bulgarian legal doctrine¹³ discusses whether it is admissible the collateral provider to make a set-off between **his** claim against the creditor and the secured creditor's claim. There is no legal provision allowing the collateral provider to do this¹⁴. That is why the conclusion is made that the collateral provider does not have such a right but a proposal *de lege ferenda* is made such a possibility to be explicitly included in the law.

It is inadmissible the debtor to make a set-off between a claim of the collateral provider against the creditor and the secured creditor's claim.

¹² See for example 'Contractual law', Prof. Angel Kalaidjiev, 4th edition, Sibi 2007, page 486.

¹³ V. Popova, 'The Set-off. Substantive legal issues', Fenea, 2002, p. 134.

¹⁴ In contrast to other legal systems – e.g. German law – see § 268(2) BGB.

Art. 142 OCA – Set-off in the hypothesis of provided guarantee for securing the debt of a third party in the form of a guarantee agreement¹⁵ (Bürgschaftsvertrag in German)

According to the cited provision, the guarantor may set-off a claim of the **debtor** to the creditor (i.e. the beneficiary under the guarantee agreement) against the claim of the creditor to the guarantor (arising out of the guarantee agreement; this is actually the secured debt of the main debtor, but the prevailing opinion is that the debt of the guarantor has separate existence), even if the debtor has waived this right or has acknowledged his debt.

Bulgarian legal doctrine discusses whether it is admissible the guarantor to make a set-off between **his** claim against the creditor and the secured creditor's claim. Although there is no legal provision allowing the guarantor to do this, the prevailing opinion is that the guarantor has such a right. A ground for the different treatment compared to the collateral provider securing third party's debt (see previous paragraph) is found in the circumstance that the guarantor is liable with all his assets (and the collateral provider – only with the pledged assets).

Since the guarantor is joint debtor with the main debtor, the creditor should have the right to make a set-off between his secured claim and a debt he has to the guarantor.

- (iv) The effect of the set-off can be achieved also by an instruction (*delegatio*) for payment (*Anweisung* in German). This is appropriate in trilateral schemes, where one of the parties is creditor to the second party (claim A) and debtor of the third party (claim B). In such a case the first party instructs the second party to pay its debt (claim A) directly to the third party. After payment (assuming, of course, that claim A and claim B are of the same amount) by the second party claim A and claim B shall be considered liquidated. This is probably the fastest approach for debt settlement between more than two parties. Also in this case, however, it would be recommendable written evidence (letters of confirmation, agreements, etc.) to be produced in order for maximum legal certainty and clarity to be achieved. It should be further noted that this approach is not to be defined as set-off under Bulgarian law.

1.3.9. Do Bulgarian laws consider early termination, set-off and close-out netting as legally distinct and separate rights, similar or related rights or do they make no such distinctions between them?

- (i) It should be once again noted that Bulgarian law contains a definition of close-out netting which is merely for the purpose of the financial collateral arrangements. As mentioned above (see item 1.1.6(ii) of Annex 1.1), under article 10(2) of the FCAA, a close-out netting provision is a provision of a financial collateral arrangement, or, in absence of such provision, any statutory rule, by which, in case of non-performance:
 - the obligations of the parties become immediately due and transform into obligations to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or
 - the obligations of the parties are redeemed up to the amount of the smaller obligation, where the party owing the larger amount remains debtor to the other party for the net sum equal to the balance of the account.

¹⁵ This rule is applicable with respect to guarantee **agreements** only; it is disputable whether unilateral guarantees (e.g. a parent guarantee) are enforceable under Bulgarian law at all, see below item **C.III.9** dealing with the Parent Company Guarantee.

‘Netting’ is used as a term also in the Credit Institutions Act (see item 1.1.2.1(iii) of Annex 1.1) but there is no legal definition.

Comparing the above definition of close-out netting with the provision of article 103 OCA as discussed above, it can be confirmed that close-out netting derives from the set-off and is a similar legal figure under Bulgarian law (as already mentioned, even the last part of the definition under FCAA is taken from the definition of set-off under the OCA). In case obligations are replaced by an obligation to pay an amount representing their estimated current value, the close-out netting has also elements of a novation.

- (ii) However, close-out netting has also its specificities (as discussed above)¹⁶. Close-out netting under the FCAA is a contractually agreed mechanism the effect of which occurs **automatically** where set-off under the OCA is effected by a unilateral statement.

This is confirmed also by the Bulgarian legal doctrine – ‘*The [close-out] netting institute is similar to the set-off but is not its synonym. The term ‘netting’ has broader content than the set-off. In contrast to the set-off (article 104(1) OCA), there is no necessity of a unilateral statement by the one party to the other. The netting clause has significantly more advantages compared to the ordinary set-off and in contrast to the set-off guarantees the validity and the non-repealability of the effected payment*’¹⁷.

It should be underlined that close-out netting is not well known in Bulgarian court practice. Bulgarian legal doctrine is not very exhaustive either (it focuses on the close-out netting merely on the plane of the financial collateral arrangements and the settlement of relations between banks). This makes the analysis of the practical aspects of close-out netting very difficult and the position of Bulgarian courts in respect of close-out netting provisions in case of potential lawsuits unpredictable. In any case we believe that Bulgarian courts would interpret the close-out netting provisions of the General Agreement in the light of the more familiar legal figure of the set-off.

- (iii) As regards the close-out netting under the General Agreement, we understand its mechanism as follows: upon occurrence of a Material Reason and termination of the Agreement (automatically under §10.4 or by a notice under §10.3(a)), with effect from the Early Termination Date (coinciding with the moment of occurring of the Material Reason under §10.5(c)(iv) or as designated in the Early Termination notice), all existing duties and obligations of the Parties shall become due and payable, the Terminating Party will calculate the Settlement Amounts/ the Termination Amount and will notify the other Party of the Termination Amount (if any) to be received or paid by it.

It is not fully clear in our opinion whether the set-off element of the close-out netting under the General Agreement occurs automatically or not. On the one hand, the Automatic Termination has as effect that ‘**with effect from the Early Termination Date all further payments and performance in respect of all Individual Contracts shall be released (and not merely suspended) and existing duties and obligations of the Parties shall be replaced by the obligation of one Party to pay the Termination Amount to the other Party as calculated in accordance with § 11.1’ (§ 10.3(b))** – this might lead to the conclusion that the close-out

¹⁶ See also *The Principles on the Operation of Close-Out Netting Provisions*, adopted by the International Institute for the Unification of Private Law (UNIDROIT) in May 2013.

¹⁷ ‘Legal regime of the netting in the Financial Collateral Arrangements Act’, Ivan Mangachev, Commercial and Competition Law, issue 5/2008, page 54, ‘The new legal regime of the financial collateral arrangements’, Ivan Mangachev (Ciela 2011), page 129.

netting effect occurs automatically. On the other hand, the calculation of the Termination Amount (Gains less the aggregate of the Losses and Costs) shall be done by the Terminating Party and notified to the other Party (§ 11) – this resembles the unilateral set-off statement. This ambiguity could lead to additional difficulties in the application and interpretation of the close-out netting mechanism under the General Agreement (e.g. potential interested parties may claim that since the close-out netting effect under the General Agreement occurs automatically this is in breach of the rule under Bulgarian law that set-off is effected by a unilateral statement of the setting-off party and that on this ground the close-out netting is not valid and enforceable under Bulgarian law; in such a case as counterargument could be pointed that by signing the General Agreement the Parties have agreed their relations to be settled namely by this mechanism (contractual freedom) but in any case potential disputes in this regard should be kept in mind).

- (iv) One further legal figure familiar to Bulgarian legal doctrine and court practice should be mentioned as well, called ‘compensation (set-off) of the damages against the gains’ (*compensatio lucri cum damno*). This figure is relevant when damages have been caused (regardless whether due to breach of a contract or to liability resulting of tort (*Delikthaftung* in German)) but the prejudiced party has also obtained some profits, gains as result of the infringement. The idea is that the function of the compensation for damages should be the damages to be compensated (repaired) and not the prejudiced party to be enriched. The gains have to be concrete and actual and not future, and to be evaluable in money. There must be causation between the unlawful behavior which has caused the damages and the gains. The set-off of damages against gains must be compliant with *bona fide*. Such a set-off is made upon request of the party who has caused the damages. This party bears also the obligation to prove the gains and their amount. According to Bulgarian legal doctrine this legal figure is not set-off within the meaning of article 103 of the OCA (as described above). However, no further detailed considerations regarding the distinction between the two set-offs is provided.

In our view this set-off resembles to some extent to the set-off / close-out netting under the General Agreement and the related calculation of the Settlement Amount (§ 10.3 and § 11). However, since as mentioned above such a mechanism for settlement of the parties’ contractual relations is not popular in Bulgaria and to the best of our knowledge is not known in Bulgarian court practice, it is hard to predict whether Bulgarian courts will regard the close-out netting and the calculation of the Settlement Amount under the General Agreement as a pure set-off under article 103 of the OCA, as a contractually agreed set-off, as a set-off of the damages against the gains (*compensatio lucri cum damno*) (as described above) or as something different (e.g. as a novation¹⁸).

- (v) As regards the Early Termination, our understanding is that it is a contractually agreed mechanism for termination of the Agreement. It allows one of the Parties to terminate the Agreement by a unilateral statement if a Material Reason has occurred with respect to the other Party. Such an approach is generally permissible under Bulgarian laws – see for example Art. 20(2) OCA: ‘*The contracts may be amended, **terminated**, rescinded or annulled only upon mutual consent of the parties or upon any of the grounds envisaged by the law*’ – i.e. the Parties may agree in the Agreement the mechanisms to terminate the Agreement. The close-out netting and the set-off are consequences of the Early Termination.

¹⁸ As mentioned, the novation is another legal mechanism for extinguishing of debts under Bulgarian law (article 107 OCA) which is effected by a contract between the creditor and the debtor.

2. Termination (§10, §11) for Non-Insolvency Related Material Reasons

Please discuss the issues outlined above under 1.3.3, 1.3.4 and 1.3.5 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?

- (i) The cited principle of contractual freedom (article 9 OCA) prescribes that the parties to a contract are free to determine the contract's clauses, provided that any mandatory legal provisions and common ethics (*bona fide*) are not breached. In our opinion the Material Reasons (other than due to insolvency) as defined in § 10.5 of the General Agreement and the Early Termination for such Material Reasons (§ 10.3) do not contradict mandatory legal provisions and common ethics and are therefore considered enforceable under Bulgarian law.
- (ii) However, in respect of close-out netting and the calculation of the Termination Amount (§ 10.3 and § 11) our comments under the above item C.I.1.3.3 and 1.3.9 should be taken into consideration – they remain fully relevant also in the context of a non-insolvency related Material Reason.
- (iii) For the sake of clarity, a differentiation between termination and rescinding of a contract under Bulgarian law should be made. In case of rescinding (article 87 OCA) one of the parties is always in default (i.e. there is a breach of the concluded contract), where in case of termination (usually) there is no defaulting party. Termination is not explicitly regulated by law, where articles 87 and 88 of the OCA regulate the pre-conditions for rescinding and the consequences thereof (sending a prior written notice to the defaulting party and giving it a period to remedy the breach (as well as the cases in which such a notice ought not to be sent), what kind of contracts may be rescinded only in court proceedings (real estate related contracts), compensation in case of rescinding (negative interest), etc.). The rescinding has in principle effect *ex tunc* (for the past) where the termination has effect *ex nunc* (for the future). Due to that, in case of rescinding a contract the rules for unjust enrichment shall apply where in case of termination the provisions of the terminated contract shall apply.

Reviewing the Material Reasons under § 10.5 of the General Agreement one can come to the conclusion that some of them (Non-Performance, Failure to Deliver or Accept, Breach of Representation or Warranty) are grounds for rescinding the General Agreement rather than grounds for its termination with all the legal consequences resulting thereof – obligation for sending a prior written notice to the defaulting party and giving it a period to remedy the breach, etc. We believe, however, that the counterparties should have the freedom to determine in the contract the events the occurrence of which will be considered as a material reason for termination (and not for rescinding) of this contract without being restricted by the rules of articles 87 and 88 of the OCA. Arguments in support of this opinion can be found in the court practice as well (for instance in judgement No 1694 of 11 November 2002 of the Supreme Court of Cassation in civil case No 1265/2002).

- (iv) Regarding the Single Agreement concept please see our comments in the above item C.I.1.3.4.
- (v) Regarding the currency of the claim issue please see our comments in the above item C.I.1.3.5.

II. Multibranch Parties

Prior to proceeding with the analysis of the constellations under Part II of the Instruction Letter, several preliminary notes need to be made.

1. Assumptions and preliminary observations

- 1.1. It is our understanding that it is within the scope of this Opinion to analyze the situations where the Multibranch Party has entered into the General Agreement with one and the same counterparty domiciled in a different jurisdiction, whereas the Individual Contracts have been concluded either by the Multibranch Party itself or by its branches. Multibranch Party is to be regarded to have its center of main interest (**COMI**) alternatively in Bulgaria (Party A), or outside Bulgaria (Party F).
- 1.2. Application of Council Regulation (EC) No 1346/ 2000 of 29 May 2000 on Insolvency Proceedings (the **EU Insolvency Regulation**)
 - 1.2.1. As mentioned (item 1.1.3 of Annex 1.1; for the better understanding of our comments in this section of our Opinion we deem it necessary to reiterate some of the comments already made), the EU Insolvency Regulation is in force for Bulgaria in its capacity as an EU Member State. Thus, in case the Multibranch Party has its COMI¹⁹ in either Bulgaria, or another Member State, the Insolvency Regulation shall have to be applied (see Recital 14 of the EU Insolvency Regulation: *‘This Regulation applies only to proceedings where the centre of the debtor’s main interest is located in the Community’*).

Our analysis of the potential issues connected with the EU Insolvency Regulation is done predominantly on the basis of the conclusions of the legal doctrine at the Community level, as well as on the basis of the limited number of judgments of the Court of Justice of the European Union (**ECJ**). In addition, we are going to comment the possible outcomes of the case study on the basis of our experience and logic which may not to be completely shared and accepted by the Bulgarian judicature, as the case may be.

- 1.2.2. In case the COMI of the Multibranch Party is within the Community, main insolvency proceedings are to be opened in the particular Member State whose courts should be regarded to have been allocated the exclusive jurisdiction to hear the insolvency case (Art. 3(1) of the EU Insolvency Regulation).²⁰ Moreover, the law of that very Member State is to govern as a

¹⁹ We consider the meaning of the contents of the term center of main interest to be almost settled in the legal doctrine for which reason we will not elaborate further on that matter. See for example: *Fletcher, F.* in “*The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide*”, editors – Gabriel Moss, Ian Fletcher, Stuart Isaacs, Oxford University Press, 2002, p. 39, as well as *Virgos-Schmit Report*, para 75, as well as *recital 13 of the Regulation* itself. However, recently some commentators showed that certain issues amongst national jurisdictions have arisen on occasions of interpretation of the rebuttable presumption under Art. 3, para1, *sent.* 2 of the Insolvency Regulation which, in its turn, may lead to a positive conflict of jurisdictions. See for example *Torremans, P.* – “*Coming to Terms with the COMI Concept in the European Insolvency Regulation*” in “*International Insolvency Law – Themes and Perspectives*”, ed. by Paul J. Omar, Ashgate, 2008, p. 178 and following, as well as the court practice cited therein and especially the judgment of ECJ on *Eurofood IFSC Ltd* Case C-341/04 [2006]. According to the ECJ the COMI is the place on which the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. The COMI “must be identified by reference to criteria which are both objective and ascertainable by third parties”. The ECJ holds that the presumption can be rebutted for example in the case of a “letterbox” company not carrying on business in a Member State.

²⁰ The COMI criterion should be able to ensure sufficient degree of certainty, foreseeability and flexibility. With its help the Community legislator clearly envisages that there should be one single court to deal with the cross-border insolvency

whole the insolvency proceedings (in its capacity as *lex fori concursus principalis*) (Art. 4 of the EU Insolvency Regulation).

In case the Multibranch Party maintains an establishment in any other Member State, secondary proceedings upon the start of the main proceedings may be opened. The secondary proceedings are governed by the law of the respective Member State (in its capacity as *lex fori concursus secundi*) and develop as winding-up proceedings. It is not necessary to examine the insolvency of the debtor separately from the main proceedings in order that a secondary proceeding could be validly opened (Art. 27).

Furthermore, in case the requirements and conditions of Art. 3(4) of the EU Insolvency Regulation are met, independent territorial proceedings may be opened even prior to the main insolvency proceedings as per the place of the COMI of the respective debtor. The territorial proceedings may operate exclusively against the assets of an “*establishment*” of the debtor situated in the respective Member State. The mere presence of assets, even if they are in a considerable value, is not sufficient. The territorial insolvency proceedings under Art. 3(4) of the EU Insolvency Regulation are governed by the local law. As a result, a plurality of insolvency proceedings and applicable legal orders is highly possible, which is about to create the major difficulties by the application of the Regulation.²¹

- 1.2.3. The Instruction Letter requires that the different scenarios described are analyzed as regards “*branches*” of the Multibranch Party by whose operation some of the Individual Contracts have been executed. In that regard, and taking into consideration that the EU Insolvency Regulation shall apply, the correlation between the two terms, i.e. “branch” and “establishment” should be discussed in order that characterization problems could be avoided.
- (i) The term “branch” is unfamiliar to the Community legislator in the field of cross-border insolvency. The autonomous community characterization of the term may not be excerpted from any similar acts of the secondary community legislation either as regards the European Private International Law (i.e. the measures passed under Art. 61 and 65 of the EC Treaty). In case Bulgarian law is to be applied as *lex fori concursus* the Bulgarian courts will be obliged to apply Art. 39 of the Private International Law Code and will make characterization according to *lex fori*. Thus, “branch” would be understood in compliance with Art. 17 of the Commerce Act, that is, as having no distinctive legal personality different from the one of its mother-company²². Notwithstanding that the branch must have a branch manager (so has a certain degree of independence from the mother company and is subject to the managerial decisions of the branch manager), the branch may not own any property. It executes contracts in the name of and with effect for the mother company.
- (ii) The Community legislator would rather operate with the term “establishment”. The latter has been explained with an autonomous definition in the final paragraph of Art. 2 of the EU Insolvency Regulation. In order that the full meaning of the term could unfold, the respective practice of the ECJ interpreting the term “establishment” as per Art. 5(5) of the Brussels I Regulation (Art. 7(5) of the recast version) should be taken also into consideration. The ECJ defines the term “establishment” as a place of business which has the appearance of permanency, has a management and is materially equipped to negotiate business with third

matter within the Community. However, the EU Insolvency Regulation has been also criticized as not taking into consideration the specific issues related to insolvency of corporate groups.

²¹ See further commentary on the matter in Israël, Jona – “*The European Cross-Border Insolvency Regulation*”, Intersentia, 2005, p. 291 - 292.

²² It has merely a kind of limited legal personality for tax and employment law purposes.

parties. The establishment should act as the prolonged arm of its principal, whereas it needs a minimal amount of equipment and personnel (e.g. in case the only person employed is the entrepreneur himself, an establishment cannot be said to exist).²³ An establishment under the terms of the international insolvency requires not only passive presence of the debtor in a Member State.

- 1.2.3.1. Thus, in case the branch of the Multibranch Party registered in any Member State (including Bulgaria) does not meet the preconditions for existing of an establishment as defined in Art. 2 of the EU Insolvency Regulation and as interpreted by the ECJ, the branch would be regarded only as assets and property of the Multibranch Party in the respective jurisdiction.

On the contrary, if the branch meets the requirements for an ‘establishment’, secondary insolvency proceedings may be in principle opened in the Member State where this branch is located.

For the purposes of this Opinion we assume that the branches of the Multibranch Party qualify as establishments within the meaning of the EU Insolvency Regulation.

- 1.2.3.2. For the sake of completeness it should be noted that according to the Bulgarian insolvency law no insolvency proceedings could be commenced as regards the branch itself as long as it does not possess any legal personality and is not to be regarded a “trader” according to the Bulgarian Commerce Act (according to whose Art. 607a and following, insolvency proceedings are admissible only as regards traders – companies or sole proprietors).

- 1.2.3.3. In addition, in case the establishment of the Multibranch Party in Bulgaria is organized not in the form of a branch but rather as a separate subsidiary or affiliated company, the EU Insolvency Regulation would have to be applied separately for each separate legal personality. The Regulation does not provide any specific tool to deal with the insolvency of groups of affiliated companies, holding companies or multinational corporate groups. Art. 3(1) of the Regulation will give primary insolvency jurisdiction to the courts of different Member States for each separate affiliated company having its COMI in the Community, as long as the Community legislator strictly respects the existence of separate legal personality.²⁴

- 1.2.4. Issues connected with the **set-off** under the EU Insolvency Regulation

- (i) As already stated, the EU Insolvency Regulation envisages a combination between two distinctive rules for the set-off: Art. 4.2(d) and Art. 6. The alternative application of either the *lex fori concursus*, or the law governing the insolvent debtor’s claim (the ‘passive claim’) has been provided for.

The commentators dealing with that matter²⁵ provide a universal explanation that the provision of Art. 4 established the basic rule of the system of cross-border insolvency of the European Community. However, special rules should be provided for the law governing the set-off as a special mechanism to effect the discharge of the debtor’s obligations. **Art. 6 of the EU Insolvency Regulations provides an exception to Art. 4 in order to protect the legitimate**

²³ See the judgments of ECJ on the following cases: Somafer SA v. Saar-Ferngas AG (Case 22/78 [1978] ECR 2183), Blanckaert & Willems PVBA v. Luise Trost (Case 139/80 [1981] ECR 819), SAR Schott GmbH v. Parfians Rothschild SARL (Case 218/86 [1987] ECR 4905, Lloyd’s Register of Shipping v. Societe Campenon Bernard (Case C-439/93 [1995] ECT I-961).

²⁴ See further commentary in Torremans, P., *op.cit.*, p. 177, 181.

²⁵ See for example Virgós, M., Garcimartin, F. - “*The European Insolvency Regulation – Law and Practice*”, Kluwer Law International, 2004, p. 116.

expectations and the certainty of transactions (recital 24) especially in cases where the set-off is seen as a form of security for the creditor. The law governing the passive claim is known in advance and does not depend on the place in which the insolvency proceedings have been initiated and opened. Thus, Art. 6 is seen more or less as a guarantee that the creditor will be given the possibility to have “*two bites at the set-off cherry*”²⁶ and in addition adds to the predictability and certainty of the EU legislation.

- (ii) The Bulgarian version of Art. 4.2(d) of the EU Insolvency Regulation may be expected to cause similar interpretation problems as in the case with the versions in German, Spanish, French, etc. If compared to the English text which is regarded by most commentators as clear and authoritative (in reading that the *lex fori concursus* is to determine “*the conditions under which the set-offs may be invoked*”), the Bulgarian text is much more restrictive. It provides that the *lex fori concursus* shall determine the “*conditions for the validity of the set-off*” (“*условията за валидност на прихващането*”). This formulation may invoke interpretations that the *lex fori concursus* is to regulate exclusively the validity conditions of a previously existent non-insolvency right to set-off. This notion has, however, been already refuted and qualified by most of the commentators as rather narrow model of interpretation.²⁷ Thus, *lex fori concursus* is to be considered to govern also the conditions for executing and making efficient of a right to set-off, even the one that has originated upon the opening of the insolvency proceedings.
- (iii) To the contrary, the law applicable to the passive claim may be invoked only as regards of claims that could have been extinguished by way of set-off prior to the opening of the insolvency proceedings.²⁸ The mutual claims must have existed and must have been incurred prior to the opening of the insolvency proceedings in order that the law applicable to the passive claim could be relied upon by the creditor. “*Article 6 applies when the claims arose out of contracts or other dealings entered into prior to the opening of the insolvency proceedings, even they were, at that moment, mature or immature, contingent or not*”.²⁹ The law applicable to the passive claim may be any law, including a law of a non-Member State. This conclusion is in line with the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I). According to its Art. 17 the law applicable to set-off is the law chosen by the parties and in case of absence of choice of applicable law, the set-off is regulated by the law governing the passive claim. On the other hand, in compliance with Art. 3 of Regulation Rome I parties are free to choose any law to govern their contractual relations and they are not restricted to choose only among the legal orders of the EU Member States.³⁰ Bearing in mind that the set-off/close-out netting as provided for under the General Agreement could be qualified as a contractual agreement, the last conclusion seems to be even more undisputable, as long as under Art. 12(1)(d) of Regulation Rome I the contractual statute (the scope of applicable law) determines the “*various ways of extinguishing obligations*”. Thus, it could be anticipated that the law of the passive claim would often coincide with the law governing the General Agreement as a whole. Thus,

²⁶ See Virgos/Schmit Report on the Convention on Insolvency Proceedings, Paragraph No 109. The exclusion of Art. 6 of the Insolvency Regulation is designated to protect creditors in case no set-off would be possible under the law governing the main proceedings.

²⁷ See Virgós, M., Garcimartin, F. - “*The European Insolvency Regulation – Law and Practice*”, Kluwer Law International, 2004, p. 113.

²⁸ See Virgos/Schmit Report on the Convention on Insolvency Proceedings, Paragraph No 110.

²⁹ Thus Virgós, M., Garcimartin, F. - “*The European Insolvency Regulation – Law and Practice*”, Kluwer Law International, 2004, p. 117.

³⁰ On the contrary Virgós, M., Garcimartin, F. - “*The European Insolvency Regulation – Law and Practice*”, Kluwer Law International, 2004, p. 117, Paragraph 189.

all the Individual Contracts and the possible set-off arising out of them are going to be governed by one and the same applicable law (if Art. 6 of the EU Insolvency Regulation applies).

The actions of voidness, voidability or unenforceability which might affect the set-off under Art. 6 of the EU Insolvency Regulation are subjected to the *lex fori concursus* (Art. 6(2) in relation with Art. 4(2)(m)). Art. 6(2) of the Regulation is however to be interpreted in conjunction with Art. 13 thereof which allows for an exclusion of the application of the provisions of the Regulation in case the respective act proves to be legally unquestionable according to the respective applicable law.

- (iv) Another issue connected with the set-off and the opening of secondary (independent territorial) proceedings may be considered in brief: what should be the solution in case of conflicts between the provisions of the *lex fori secundi*, *lex fori principalis* and the law applicable to the passive claim³¹. Some commentators have grounded an opinion that the opening of secondary (independent territorial) proceedings could affect the possibility to set-off. Commentators interpret this issue in connection with Art. 2(g), last indent of the EU Insolvency Regulation according to which claims are to be located in the Member State in which the third party debtor has its COMI. This allows the localization of the claim of the insolvent debtor (in its capacity as creditor) against its debtor (third party debtor). It may well turn out that the active claim (the claim of the third-party debtor) is not covered by the definition mentioned. Thus, it does not fall into the ambit of the law governing the secondary insolvency proceedings. In case, however, the law applicable to the main insolvency proceedings permits the set-off (prohibited by the secondary insolvency proceedings), this solution should be respected.³²

- 1.3. In case the Multibranch Party has its COMI, or is incorporated in a third state, out of the European Union, the rules of **Bulgarian Private International law** as regards the cross-border insolvency shall apply.

Unfortunately those rules are not exhaustive and are out of date. In the course of the reform of the Bulgarian Private International Law, the issues connected with the cross-border insolvency were not included into the new Bulgarian Private International Law Code (**PILC**). The existing legal provisions are several very brief conflict-of-laws rules that appear in the Bulgarian Commerce Act - Art. 757 – 760. Some of the more important rules are:

- Bulgaria shall recognize on the basis of mutuality (only!) foreign judgments on the declaring of insolvency provided they are taken by an authority of the state where the debtor's registered seat is located (i.e. the Commerce Act uses the older formal approach and not the COMI).
- The receiver appointed by a foreign court shall have the powers envisaged in the state where the insolvency proceedings are initiated, provided they do not contradict Bulgarian public policy rules.
- A Bulgarian court is not obliged but is granted the discretion to open auxiliary insolvency proceedings against an insolvent foreign trader that possesses considerable property (assets) in Bulgaria (i.e. in contrast to the EU Insolvency Regulation, the presence of assets

³¹ For example in case the law of the passive claim allows for set-off and the *lex fori concursus secundi* does not, but in the same time the *lex fori concursus principalis* allows for the set-off, in its part.

³² Such a manner of reasoning has led some authors to state that the set-off is regulated only by the *lex fori concursus principalis*, or *lex fori concursus secundi*, depending on the location of the insolvent debtor's claim only. In that manner the balance with Art. 2 (g) is ensured. See more details on this in Israël, Jona, *op. cit.*, p. 299.

(and not necessarily of an establishment) would be sufficient for such auxiliary insolvency proceedings to be opened). The competence of the Bulgarian court is limited strictly to these assets in Bulgaria only. Such proceedings may be opened upon request filed either by the debtor, the foreign receiver or by a creditor.

Taking into account the ill-structured and inefficient legal provisions of Bulgarian Private International Law as regards the cross-border insolvency cases outside the scope of application of the EU Insolvency Regulation (which in practice leads to unpredictability of the courts' position as regards potential insolvency cases to be dealt with outside the scope of the EU Insolvency Regulation), as well as the total lack of relevant court practice on the application of the cited rules of Art. 757 – 760 of the Commerce Act, we would rather examine in detail only the hypotheses falling under the Regulation. In addition, we believe that this will be the most probable and customary issues that may arise taking into consideration the fact that Parties to the General Agreement are going to be mainly companies that are domiciles of the EU.

2. Bulgarian Multibranch Party

Additional assumptions:

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

2.1. Would there be any change in your conclusions reached under C.I.1 or C.I.2 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?

- 2.1.1. The main conclusions reached under C.I.1 and C.I.2 above could be supported. Party A has conducted business under the General Agreement on a multibranch basis prior to its insolvency and since Party A has its COMI in Bulgaria, the EU Insolvency Regulation shall apply and Bulgarian courts will be competent to pass a judgement on opening of the main insolvency proceedings and Bulgarian law shall apply in respect of those proceedings, as discussed above in C.I.1. Unless secondary proceedings are opened, Bulgarian law shall apply also with respect to the Individual Contracts entered into by the branches of Party A (i.e. the single agreement concept, the Automatic Termination and the close-out netting/set-off should be permissible, subject to our comments and reservations expressed above). Party A's counterparty under the General Agreement has to lodge its claims (if any, e.g. for the outstanding amount (the Termination Amount) after the termination of the General Agreement and the close-out netting) against Party A in the main insolvency proceedings in Bulgaria.
- 2.1.2. The courts of the other state(s) where Party A has branches will have the jurisdiction (upon request filed by the receiver in the main proceedings or by local creditors) to open secondary insolvency proceedings against Party A, where the effect of those proceedings will be restricted to the assets of the debtor situated in this state. For these territorial proceedings the respective local law would apply.

In particular, the local receiver could argue that the insolvent debtor Party A has assets in his jurisdiction, being Party A's claims under Individual Contracts concluded by the local branch.

He might be tempted to separate these claims from the other claims under the General Agreement (under Individual Contracts concluded directly by Party A) and turn them into a local insolvency estate from which local creditors are to be satisfied. In principle, the resolving of this issue depends on the concrete local law applicable to the secondary insolvency proceedings which law could contain regulations as regards the set-off that differ sharply from the provisions of the Bulgarian law and thus the conclusions drawn as regards the admissibility of close-out netting with regard to that the claim governed by the law of this respective jurisdiction may have to be changed. This potential risk, however, may not be predicted in advance and would rather be assessed on case by case basis taking into consideration the concrete peculiarities of the respective constellation.

On the other hand, if we assume that the General Agreement is enforceable under the laws of any jurisdiction (see the assumptions on page 4 of the Instruction Letter), then we should assume that the single agreement concept, the Automatic Termination and the close-out netting/set-off are permissible also under the laws of the state where the secondary insolvency proceedings are opened and that therefore there would be no conflict of laws detrimental to the interests of Party A's counterparty under the General Agreement.

2.2. Would the EFET General Agreement be treated as a single unified agreement by the Bulgarian receiver under the laws of Bulgaria, 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?

In our view the treatment of the General Agreement and the Individual Contracts by an insolvency official in a country where close-out netting is unenforceable should not have impact on the treatment of the Agreement by the Bulgarian receiver/court, provided that Bulgarian law shall apply in respect of the main insolvency proceedings and the Bulgarian receiver/court considers the close-out netting provisions of the General Agreement enforceable under Bulgarian law.

3. Foreign Multibranch Party

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 Bulgaria 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 Bulgaria (the "**Bulgarian 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.
- As mentioned above, we further assume that Country H is an EU Member State, i.e. the EU Insolvency Regulation shall be applicable. As regards cases in which the COMI of Party F is outside the Community, please see **C.II.1.3** above.

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

3.1.1. It should be noted once again that branches are not legal entities under Bulgarian law and that a contract concluded with the branch of a company is actually concluded with the company itself (but ‘through its branch’). Claims arising out of direct relations with the branch may be filed at the seat of the branch but are again deemed to be filed against the company.

3.1.2. Observations regarding the insolvency proceedings in Bulgaria as regards the branch of Party F, whereas the latter is a **corporation** (company)

3.1.2.1. As made available above, the provisions of the EU Insolvency Regulation shall apply in this case. Thus, secondary insolvency proceedings under Art. 3(2) in connection with Art. 27 and following of the Regulation may be commenced in Bulgaria upon the start of the main insolvency proceedings in Country H (where Party F has its COMI). The secondary insolvency proceedings shall be directed against the debtor Party F and shall have regard only to the assets of its establishment organized as a branch in Bulgaria (see C.II.1.2.3 above for more details). The debtor’s insolvency declared in the course of the main insolvency proceedings may not and must not be re-established under the secondary proceedings in Bulgaria. With the help of the secondary insolvency proceedings creditors of the Bulgarian branch of Party F could retain any special advantages which they could enjoy under the terms of Bulgarian law.

One of the tools to ensure the interrelationship between the main insolvency proceedings and the secondary insolvency proceedings is the provision of Art. 32(1) of the Regulation which establishes the principle that “*any creditor may lodge his claim in the main proceedings and in any secondary proceedings*”.³³

3.1.2.2. In compliance with Art. 29 of the EU Insolvency Regulation eligible to request the opening of the secondary insolvency provisions are the liquidator under the main proceedings and any person who is entitled to do so according to the provisions of the *lex fori concursus secundi*, that is the Bulgarian insolvency law in force. Further to Art. 625 of the Commerce Act the insolvency proceedings in Bulgaria could commence and be opened upon a respective application by the debtor himself, by his liquidator, by one of his creditors under a commercial transaction, or by the National Revenue Agency.

Therefore, local creditors are entitled to initiate separate secondary insolvency proceedings in Bulgaria.

3.1.3. Observations regarding the insolvency proceedings in Bulgaria as regards the branch of Party F, whereas the latter is a **bank**

3.1.3.1. The EU Insolvency Regulation does not apply as regards the insolvency proceedings of banks (Art. 1(2) of the Regulation). Thus, the specific provisions of the Bulgarian law in force apply.

³³ Further and more detailed commentary on that issue is made by Fletcher, Ian – “*Insolvency in Private International Law – National and International Approaches*”, Second Edition, Oxford, 2005, p. 433 – 444.

- 3.1.3.2. The Bulgarian legislator distinguishes between two types of branches of foreign banks that could operate in Bulgaria – branches of banks licensed in other Member States and branches of banks of third states outside the EU. The branches of banks licensed in other Member States do not have to obtain a specific additional license for execution of their activity in Bulgaria, whereas the branches of banks of third states must at any case be issued an additional license in order to be allowed to operate in Bulgaria.
- 3.1.3.3. According to the Bulgarian law in force no separate insolvency proceedings may be initiated as regards a branch of a bank in Bulgaria. The Bank Insolvency Act is to be applied only as regards banks having their seat in Bulgaria. Thus, in our opinion, the assets and liabilities of the bank's branch in Bulgaria will have to be added to the main insolvency estate of its mother company and will have to be handled in it.
- 3.1.3.4. Another view is also possible. Article 612(2) of the Commerce Act states that insolvency proceedings of a bank shall be regulated by a special law but the provisions of the Chapter of the Commercial Act dealing with insolvency shall apply in cases where the special law does not provide anything else, i.e. it could be grounded that articles 757 – 760 of the Commerce Act as outlined above are applicable (incl. the possibility auxiliary insolvency proceedings to be opened in Bulgaria).
- 3.1.3.5. Further to Art. 139 of the Credit Institutions Act the judgment for opening of insolvency proceedings against a bank of another Member State which bank is operative in Bulgaria through a branch are to be recognized directly and without any formalities whatsoever. Such a judgment should be registered into the Commercial Register. The applicable law is the law of the member state in which the main insolvency proceedings have been opened (in its capacity as *lex fori concursus*), unless something different is provided by the Credit Institutions Act (see for example the cited Art. 144 of the Credit Institutions Act, according to which the adoption of reorganisation measures or the opening of a winding-up procedure of a bank shall not affect the right of creditors to demand the set-off of their claims against the claims of the bank, where such a set-off is permitted by the law applicable to the bank's claim).

In that regard it is worth also mentioning that further to Art. 145, it. 2 of the Credit Institutions Act in the course of the development of the insolvency proceedings the law applicable to netting agreements is *lex causae* (the law governing the very netting agreement), without prejudice to the provisions of Art. 100 and Art. 103 of the Act on Recovery and Resolution of Credit Institutions and Investment Intermediaries. Thus, the Bulgarian legislator with an explicit provision envisages a powerful tool to enable the prevailing of the provisions of a netting agreement over the law applicable to the insolvency proceedings. In this way it could be considered that the priority application of a close-out netting agreement is attempted to be ensured, when it goes to insolvency proceedings commenced against a bank.

- 3.1.4. Observations regarding the insolvency proceedings in Bulgaria as regards the branch of Party F, whereas the latter is an **insurance company**
- 3.1.4.1. The EU Insolvency Regulation does **not** apply as regards the insolvency proceedings of insurance undertakings (Art. 1(2) of the Regulation). Thus, the specific provisions of the Bulgarian law in force apply.
- 3.1.4.2. In accordance with Art. 624(1) of the Insurance Code the judgment for opening of insolvency proceedings against an insurance company licensed in another Member State is enforceable in Bulgaria as of the date on which it causes its effect in the respective Member State. Going out

of this provision, it could be concluded that the Bulgarian legislator does not envisage the possibility that separate insolvency proceedings could be opened in Bulgaria as regards a branch of an insurance company for which main insolvency proceedings have been opened abroad. The judgment of the foreign court dealing with the insolvency should be enforced in Bulgaria, thus, in our opinion, the assets and liabilities of the Bulgarian branch of such company would have to be added to the main insolvency estate.

3.1.4.3. Another view is also possible. According to Art. 622(2) of the Insurance Code the provisions of the Commerce Act find a subsidiary application to the matters of insolvency of insurance companies (with the exception of those explicitly listed therein, articles 757 – 760 of the Commerce Act are not explicitly excluded). Thus, *analogia juris* with article 759 of the Commerce Act could turn out to be possible. As mentioned, according to the cited regulation auxiliary separate insolvency proceedings may be opened (upon the discretion of the competent Bulgarian court) only as regards a foreign trader that has considerable assets in Bulgaria. For that reason, it could possibly be concluded that in case the requirements of Art. 759 of the Commerce Act are fulfilled, separate proceedings as regards the assets and liabilities of the Bulgarian Branch of Company F, being an insurance company, could be admissible.

3.2. If there were separate proceedings in Bulgaria with respect to the assets and liabilities of the Bulgarian Branch, would the receiver or liquidator in Bulgaria and the Bulgarian 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 Bulgaria, and, if so, would the receiver or liquidator and the Bulgarian 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 Bulgarian receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Bulgarian Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Bulgarian Branch to the liquidator or receiver of the Bulgarian 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.

3.2.1. We assume that secondary insolvency proceedings are opened in Bulgaria with respect to the assets and liabilities of the Bulgarian Branch of Party F. For these territorial proceedings Bulgarian insolvency law would apply (Art. 28 of the EU Insolvency Regulation). Pursuant to Art. 4(2) of the EU Insolvency Regulation *lex fori concursus* regulates the question of which assets form part of the estate, as well as to determine also the powers of the liquidator (receiver).

3.2.1.1. As stated above, the branch of a foreign company does not have any legal personality according to the Bulgarian company law in force. In addition, all assets, rights and liabilities of the branch are considered acquired in the name of its mother company and are directly and automatically allocated to it.

On the other hand, the Bulgarian Branch of the Party F must have a separate accounting for taxation purposes according to Bulgarian accounting and taxation law. From the accounting books it can be clearly visible what kind of contracts have been entered into by the branch itself and what from accounting and purely economic point of view could be characterized as assets and liabilities of the branch.

- 3.2.1.2. Thus, it is a matter of interpretation, initiative and will on the part of the Bulgarian receiver in charge. He has the sole discretion to consider the rights and obligations as per the Individual Contracts as allocated to the establishment of the branch. The receiver, may, however, decide also on the contrary – that these assets and liabilities are to be allocated to the mother company, i.e. must be dealt with within the main insolvency proceedings.

Therefore, in principle, as regards Party F's claims under Individual Contracts concluded by the Bulgarian Branch, the local receiver might be tempted to separate these claims from the other claims under the General Agreement (under Individual Contracts concluded directly by Party F) and undertake the necessary actions (e.g. to challenge the close-out netting) to turn them into a local insolvency estate from which local creditors to be satisfied (i.e. at least theoretically it is possible that the Bulgarian receiver requires the counterparty of the Bulgarian Branch of Party F to pay its obligations under the Individual Contracts entered into with the Bulgarian Branch to him). This is applicable of course only in case the counterparty has its COMI in Bulgaria (see Art. 2(g) of the EU Insolvency Regulation).

Whether the Bulgarian receiver would do so depends mainly on whether he would accept that the single agreement concept, the Automatic Termination and the close-out netting/set-off are **not** enforceable under Bulgarian law. As discussed above, they should be enforceable **in our opinion** but due to various circumstances (lack of court practice and legal doctrine on these issues, not fully clear and unambiguous provisions of the General Agreement, etc.), it cannot be predicted nor guaranteed whether the Bulgarian receiver would share the same view and would recognize the system of functioning of the close-out netting under the General Agreement enforced in Country H.

3.3. Please consider your answer to our question assuming instead that Party F has no branch located in Bulgaria, but has assets in Bulgaria.

- 3.3.1. The answer to this question depends mainly whether the assets would qualify as an 'establishment' in the light of the EU Insolvency Regulation. With a view to our consideration above (C.II.1.2.3), the conclusions can be made that: **(i)** the mere presence of assets located in Bulgaria does not qualify as an 'establishment', **(ii)** therefore, no secondary insolvency proceedings may be opened in Bulgaria with respect to these assets, **(iii)** the receiver in the main insolvency proceedings will have the power to include these assets in the main insolvency estate under his supervision (subject to articles 5 and 7, see article 18(1) of the Regulation) and their treatment will be governed by the *lex fori concursus*.
- 3.3.2. As regards cases in which Party F's COMI/registered seat is outside the Community (i.e. Country H is not an EU Member State), particular attention should be paid to the cited rule of Art. 759 of the Commerce Act empowering Bulgarian courts to open auxiliary insolvency proceedings against a foreign trader declared insolvent by the foreign court, if the trader possesses considerable assets in Bulgaria (i.e. in such scenarios the 'establishment'-test is not relevant). The competence of the Bulgarian court is limited strictly to these assets in Bulgaria. What does 'considerable' mean is to be assessed on case-by-case basis with a view to all concrete circumstances.

III. Collateral

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 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 authorized and empowered to transfer ownership in the collateral.
- The counterparties agree that Eligible Credit Support will include cash, Letters of Credit and Parent Company Guarantee (PCG). Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

Please discuss and advise on the following issues:

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

- 1.1. We understand that under the Credit Support Annex there are two types of Eligible Credit Support: **(a)** Cash (an amount of money in Base Currency or any Eligible Currency, as agreed, and held in an account under the control of Party B as stipulated above), and **(b)** Letter of Credit (a standby letter of credit, bank guarantee or similar document in a format acceptable to the Transferee issued irrevocably by a leading commercial bank which obliges the bank to pay the amount guaranteed therein upon first demand of the Transferee).

For the sake of clarity, the PCG is separately discussed in **C.III.9** below.

- 1.2. The law applicable to the General Agreement (as agreed in § 22.1 thereof) should be applicable to the Credit Support Annex as well (*'This Annex ... forms part of and is subject to the General Agreement ...'* – page 1).
- 1.2.1. This, however, does not mean that this law will be necessarily applicable with respect to the Letter of Credit as well. Since the Letter of Credit is a unilateral statement (and not a contract), the respective specific rules and international commercial customs (depending on the particular type of the guarantee) shall apply with respect to it. E.g., under the Uniform Rules for Demand Guarantees, if the guarantee letter does not provide otherwise, the law of the State where the guarantor has its place of business shall apply (respectively, the law in the location of the guarantor's branch which has issued the guarantee) (article 27 of the URDG 458 version); unless otherwise provided in the guarantee, its governing law shall be that of the location of the guarantor's branch or office that issued the guarantee (article 34 of the URDG 758 version). Therefore, if in the Letter of Credit is pointed out concrete law, this law shall be applicable to the Letter of Credit (incl. as regards the assessment of its validity); if there is no such an express clause, the law in the place of business of the guarantor shall apply. Of course, the Parties may (and should) agree in advance the law applicable to the Letter of Credit. If the Letter of Credit issued does not comply with this agreement, the Transferor shall be deemed incompliant with his obligation to provide Eligible Credit Support.
- 1.2.2. As regards the providing of Cash, in our opinion to this collateral should apply the law agreed in the General Agreement and respectively applicable to the Credit Support Annex as well,

since the Cash is not a separate document (statement made by a third party) in contrast to the Letter of Credit.

- 1.3. With a view to that, following should be taken into consideration, if Bulgarian law is agreed as governing law under the General Agreement:

- 1.3.1. In our opinion the transfer of ownership in collateral is **not** permitted under Bulgarian law outside the context of the financial collateral arrangements (title transfer financial collateral arrangements – see 1.1.6 of Annex No 1.1³⁴). According to article 152 of the OCA, *‘An agreement which stipulates in advance that if the obligation is not performed the creditor shall become owner of the property, as well as any other agreement which stipulates in advance a manner for satisfying the creditor other than the one provided for by the law shall be invalid’*.

Therefore, on the grounds of the cited provision it can be argued that the transfer of ownership in the Cash under the Credit Support Annex (which is made by a payment of the Cash onto an account of Party B (and not, for example, onto an escrow account)) is null and void³⁵. Such a conclusion would be in line with the court practice (which is, however, on a bit different plane – transfer of real estate for securing of debts).

Whether the practical consequences of such nullity are so crucial for Party B is another question (for example, if Party A has a claim against Party B for reimbursement of the invalidly transferred Cash and Party B has an outstanding claim against Party A arising out of their contractual relations, Party B may set-off both claims and thus the collateral effect of the transferred Cash would be achieved, despite of the invalidity of this transfer).

Cash can be subject of a pledge under Bulgarian law (both under the OCA and the Special Pledges Act) – this is made by virtue of an agreement for pledge of a receivable (i.e. of the receivable of the pledgor against the bank in which the cash is kept) – but we understand that this is security interest which is undesired under the Credit Support Annex, that is why we do not elaborate on such an approach.

- 1.3.2. It should be noted that for the sake of legal clarity the legislator has included an explicit provision in the FCAA that article 152 of the OCA shall not apply to the financial collateral arrangements within the meaning of this Act.

With a view to that, a possible approach for avoidance of the application of the above rule would be the Parties to enter into a financial collateral arrangement within the meaning of the FCAA (a title transfer financial collateral arrangement) - see item 1.1.6(iv) of Annex No 1.1. However, a necessary pre-condition for the application of the provisions of the FCAA is parties to the arrangement to be entities/ institutions under item 1.1.6(i), sub-items (a) to (p) of Annex No 1.1, or a trader and an entity / institution under sub-items (a) to (p). Therefore, taking into account the current stage of development of the Bulgarian energy market, we consider the application of the FCAA in regard to the relations regulated by the General Agreement as limited.

³⁴ See also the reasons to the Bill on the FCAA: *‘This Bill regulates not only the pledge agreements but also the agreements for transfer of ownership rights with the purpose of securing financial obligations between the entities mentioned above, what regulation is not existing under the Bulgarian law in force’*.

³⁵ As far as we know, such an approach is not fully unfamiliar in commercial practice, but this does not make it legally compliant.

1.3.3. As regards the transfer of ownership in the Letter of Credit, it could be interpreted in a broader sense. Bulgarian law and practice do not deal with the term ‘transfer of ownership’ when standby letters of credit and bank guarantees are concerned. They use terms like ‘notification’ of the beneficiary under the letter of credit (article 435(1) of the Commerce Act) or just ‘delivery’ of the bank guarantee. With a view to that it could be speculated that the transfer of ownership of the Letter of Credit is namely its delivery which is fully compliant with Bulgarian law. Argument for this can be found in § 1.2 of the Credit Support Annex: *‘References to ‘transfer’ in this Annex mean, in relation to Cash, payment, and in relation to other assets, delivery’*. Therefore, the ‘transfer of ownership’ (i.e. the delivery) of a Letter of Credit would not contradict the above cited rule of article 152 of the OCA.

2. Would the laws of Bulgaria 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?

2.1. Please see 1.3.1 above regarding the potential invalidity of the transfer of ownership in Cash.

2.2. As regards the transfer of the Letter of Credit, we do not deem that there is a risk this to be considered as creating a security interest (see 1.3.3 above).

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 Bulgaria 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?

3.1. The particular actions to be done under Bulgarian law in order for a collateral to become enforceable depend on the type of the collateral provided (just a few examples – a mortgage is to be registered in the Immovable Property Register, the pledges under the Special Pledges Act require registration in the Central Registrar of the Special Pledges and some of them also in the Commercial Register, etc.).

3.2. The collateral discussed in the case at hand does not fall under any of the hypothesis provided by Bulgarian laws in which such special additional actions are required in order for these collaterals (Cash and Letter of Credit) to be enforceable.

However, as discussed above, it can be grounded that the transfer of ownership in the Cash contradicts Bulgarian law and is thus unenforceable.

The transfer of the Letter of Credit, i.e. its delivery to the Transferee, is a sufficient condition for its enforceability (subject of course to the particular conditions of the Letter of Credit – e.g. deadline in which the demand for payment may be made, etc.).

4. What is the effect, if any, under the laws of Bulgaria 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?

- 4.1. The right of the Transferee to substitute the collateral is explicitly regulated in the FCAA (article 9) – *‘The parties to a financial collateral arrangement may agree on provision of additional financial collateral, and on substitution or withdrawal of the financial collateral’*.
- 4.2. Based on the principle of contractual freedom, the Parties to the General Agreement may also agree such a possibility also outside the context of the financial collateral arrangements. They can do this in advance (as this is done in the Credit Support Annex), or subsequently.
- 4.3. We do not consider, however, that the special rule of article 9(5) FCAA (stating that the substitute financial collateral **(a)** shall be treated as having been provided at the same time as the original financial collateral was first provided and **(b)** shall be subject to the same conditions to which the original financial collateral was subject) would be applicable in case of substitution of the collateral under the Credit Support Annex, except for the cases referred to in item 1.1.6(iv) of Annex No 1.1 (i.e. in the cases where a qualifying party under the FCAA (e.g. a bank) enters into a General Agreement plus a CSA with a Bulgarian electricity/gas company, and cash is provided as collateral). In particular, any privileges relating to the initial collateral (e.g. due to the date of providing of the initial collateral) shall **not** apply to the substitute collateral. It will be deemed provided as of the actual date it is provided.
- 4.4. The presence of consent to substitution by Party B is a required pre-condition for the substitution under § 6 of the Credit Support Annex, but it has no bearing on the above given answer.
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 Bulgaria 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 [re-]transferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as “other amounts payable”?**
- 5.1. Please see 1.3.1 above regarding the potential invalidity of the transfer of ownership in Cash.
- 5.2. As regards the Letter of Credit, our understanding how the mechanism under § 11 of the Credit Support Annex in relation with § 11 of the General Agreement would function under Bulgarian law, is as follows:

Party B’s rights depend in principle on what is stated by the bank in this letter but in any case we understand that it will contain a statement that the bank undertakes to pay the amount guaranteed therein upon first demand of the Transferee. Since § 11 of the General Agreement shall apply in case of Termination for Material Reason/Automatic Termination, this should mean that all the obligations of the Parties have become due and payable as from the Early Termination Date. This would mean that if in the process of calculation of the Termination Amount Party B (the Terminating Party / Transferee) ascertains that after the close-out netting Party A will still have a debt towards Party B (only then the payment under the Letter of Credit would qualify as ‘other amounts **payable**’ in the meaning of § 11 of the General Agreement),

Party B would have the right to demand payment from the bank under the Letter of Credit³⁶ and to include the amount so received (or to be received) in the calculation of the Termination Amount (see also § 11 of the Credit Support Annex).

Then it will be in burden of Party A to prove (if this is the case) that this demand was illegal, incl. to undertake actions to stop the payment by the bank (e.g. to impose an attachment (*да наложи обезпечителна мярка „спиране на плащането“* in Bulgarian, *einstweilige Verfügung* in German) on the payment), to prove that the termination was groundless (e.g. because no Material Reason has occurred), that the calculation of the Termination Amount by Party B was not correct (e.g. because it has included in the calculation claims which do not exist or are at least disputable), etc.

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?

- 6.1. The rights of Party B in case of collateral provided in the form of Letter of Credit should be enforceable as per the above described scenario (item 5.2). As regards the transfer of ownership in Cash, please see 1.3.1 above regarding its potential invalidity.
- 6.2. Of course, the rights of Party B would be enforceable under Bulgarian law only if § 11 of the General Agreement is valid and enforceable in Bulgaria as well. With a view to that, our comments under the above item C.I.1.3.3 and 1.3.9 in respect of close-out netting and the calculation of the Termination Amount (§ 10.3 and § 11) should be taken into consideration.

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” preceding 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?

- 7.1. As discussed, there is no legal limit in the Commerce Act how long backward in time the court may fix the date of the commencement of the debtor’s inability to pay its debts (from which starts the ‘suspect period’). That is why in February 2013 rules were introduced into the Commerce Act that limited the date back in time until which certain transactions can be challenged as null and void (for more details see item 1.1.1(ii) of Annex 1.1).

In particular, in the list of challengeable transactions fall the ‘*establishing a pledge or a mortgage for the securing of a debt that has not been secured so far (made within 1 year prior to the lodging of the request for opening of the insolvency proceedings)*’ (article 646(2), item 2 of the Commerce Act).

As evident, this rule applies only if the collateral is provided in the form of pledge or mortgage; this is a difference from the legal regime applicable until February 2013 which included in the

³⁶ As recommended in the Practice Notes to the EFET/IECA Commodities Schedule to the CPMA, ‘Parties should pay particular attention to the expiration date on any Letter of Credit that they receive to ensure that adequate time will be allowed for the Close-Out process to occur before the Letter of Credit expires’.

list of challengeable transactions '*and other security*'. If the collateral is Cash or Letter of Credit, as per the CSA, the rule shall not apply³⁷.

- 7.2. It should be of course kept in mind that a Letter of Credit (e.g. a bank guarantee) is usually issued by the banks against a security (e.g. a pledge or a mortgage) established in favour of the bank by the debtor (Party A in this case). If this security has been established within the above mentioned suspect period, it would fall under the cases referred to in the cited article 646(2), item 2 of the Commerce Act and can be thus challenged as null and void. If this is the case, this could undermine the enforceability of the Letter of Credit – e.g. the bank may refuse to pay (depending on the agreement of Party A with the bank and on the wording of the Letter of Credit itself).
- 7.3. As regards the providing of Cash, as mentioned above it may be challenged on the grounds of the cited provision of article 152 of the OCA as null and void.
- 7.4. The substitution of a collateral during the suspect period (if the initial collateral was provided before the suspect period) would lead to a situation in which the collateral will be deemed provided as of the date of the substitute collateral (due to the lack of explicit legal provision to the contrary), i.e. within the suspect period, i.e. the above cited rules shall apply (see also item 4.3 above).
- 7.5. The collateral provided cannot be challenged either if the Parties enter into a financial collateral arrangement within the meaning of the FCAA (a title transfer or pledge financial collateral arrangement) - see item 1.1.6(iv) of Annex No 1.1 - in which case the beneficial treatment in case of insolvency proceedings would apply (see item 1.1.6(iii) of Annex No 1.1). However, a necessary pre-condition for the application of the provisions of the FCAA is parties to the arrangement to be entities/ institutions under item 1.1.6(i), sub-items (a) to (p) of Annex No 1.1, or a trader and an entity / institution under sub-items (a) to (p). Therefore, taking into account the current stage of development of the Bulgarian energy market, we consider the application of the FCAA in regard to the relations regulated by the General Agreement as limited.
- 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 Bulgaria 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 (3) above?**

Please see item III.3.2 above.

9. Parent Company Guarantee

The questions below concern the enforceability of a Credit Support Document (as defined in the General Agreement), which is a Parent Company Guarantee ('PCG'):

³⁷ Until February 2013 the insolvency receiver, respectively any insolvency creditor had also the right to submit a claim for declaring null and void by the court with respect to the insolvency creditors of acts for mortgaging, pledging **or establishment of another security** in favour of a claim that had not been secured so far, effected within 1 year prior to the institution of the insolvency proceedings (article 647, item 5 of the Commerce Act). After the amendments made in February 2013, this rule applies only with regard to the securing of third party's debts, i.e. it is not applicable to the case at hand.

9.1. Are there any specific statutory formalities that should be (or recommendable as good practice for the benefit of the Beneficiary) complied with in order to create a valid guarantee document?

- 9.1.1. The PCG could be regarded as a form of personal guarantee in the case of which the Guarantor is liable with all its assets for the debts of the main debtor, the Principal Obligor. It resembles the guarantee agreement (*Bürgschaftsvertrag* in German) (Art. 138 - 148 OCA) but is being provided (issued) as a unilateral statement.

However, in contrast to the guarantee agreement, the PCG is not explicitly regulated by Bulgarian law. According to Art. 44 OCA (in conjunction with Art. 288 of the Commerce Act), the rules regarding contracts shall accordingly apply also to unilateral statements [only] in the cases in which according to the law such statements create, amend or terminate rights and obligations (this is the reverse principle to the cited principle of contractual freedom, Art. 9 OCA). This could give the basis for the conclusion that, since the unilateral statement PCG is not explicitly envisaged in Bulgarian law, it is not valid and not enforceable under Bulgarian law.

It is to be noted that this is just a possible interpretation, there is no explicit and binding case law on that issue. PCG's are a popular instrument in Bulgaria which is used as a security *inter alia* in transactions with electricity and gas. However, this interpretation should be kept in mind and it is recommendable measures to be undertaken in advance in order to mitigate the related risks.

- 9.1.2. Such measures are for example:

(i) As applicable law in the PCG to be explicitly mentioned the laws of a State (and not Bulgarian laws) in which the PCG's are explicitly regulated as a legal instrument and in which State the PCG's are enforceable (see also the above item **C.III.1.2.1** regarding the law applicable to unilateral statements). In particular, a PCG issued by a Bulgarian company under a law which is not Bulgarian law should be enforceable against this company under Bulgarian law (but the creditor will have to prove before Bulgarian courts the respective non-Bulgarian law and that the PCG is valid under it).

(ii) The PCG to be countersigned by an authorised representative of the Beneficiary as well (and not only by the Guarantor) - thus it could be argued that this is not an unilateral statement (a PCG) but a contract (a guarantee agreement *or* an entering into debt agreement - see the above item **C.I.1.3.8(c)(ii)**) and that the rules of OCA (Art. 138 - 148, respectively Art. 101) should be applicable to it. This is the minimum recommended by us. Also a text could be added at the end of the PCG (before the Beneficiary's signature) that the Beneficiary accepts the guarantorship / entering into debt, etc.

In addition, if the Guarantor's and the Beneficiary's signatures are verified by a Notary Public, it could be tried to use the PCG as a ground for obtaining an order for immediate enforcement and a writ of execution (Art. 417, item 3 and Art. 418 of the Civil Proceedings Code). Therefore, such a notary verification is recommendable (it is not a precondition for the validity of a guarantee agreement, simple written form is in principle sufficient - Art. 138(1) OCA).

Please note that we have not fully tested yet at court the above recommendations (i.e. it cannot be predicted whether Bulgarian courts would accept that the countersigned PCG is a guarantee agreement, etc.). In a recent case the judge accepted that a countersigned PCG was an entering into debt agreement under Art. 101 OCA (of course, other judges may come to different conclusions).

(iii) The Guarantor and the Beneficiary to enter into an explicit guarantee agreement within the meaning of Art. 138 - 148 OCA *or* into an entering into debt agreement within the meaning of Art. 101 OCA (this proposal is to have a separate agreement instead of the PCG; the approach where countersigning and further markings are made on the PCG is the approach under the previous item (ii)).

9.2. Are there any specific statutory provisions that should be expressly set-aside, varied or referred to, or any specific statement/wording based on any such statutory provisions that should be expressly included, in the document of the guarantee in order to increase the chances of an effective enforcement of the guarantee as may be expected by the Beneficiary based on the assumptions?

See all our comments above. Also a text could be added to the document that this is a guarantee agreement within the meaning of Art. 138 - 148 OCA *or* an entering into debt agreement within the meaning of Art. 101 OCA (in addition to the above recommendations).

Important note: Art. 147 of OCA provides that the obligation of the guarantor remains valid after the maturity of the obligation of the Principal Obligor only if the creditor (the Beneficiary) institutes proceedings (files a claim) against the debtor within 6 (six) months from maturity.

This could be seen as an advantage of the entering into debt compared to the guarantee agreement.

10. Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?

Our general recommendation is legal advice to be sought in each case where Eligible Credit Support / Performance Assurances are going to be agreed and posted between the Parties, in order the compatibility with Bulgarian law of the concrete collateral, as well as its practical weight to be assessed.

IV. General Enforceability

Is the EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) enforceable under the laws of Bulgaria 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), (ii) remedies for non-performance (§ 8 of the EFET General Agreement) and (iii) limitation of liability (§ 12 of the EFET General Agreement) and any other provisions which need to be commented on according to the law of Bulgaria, including whether these provisions could be further expanded or strengthened under the laws of your jurisdiction. We are especially interested in provisions that you may believe infringe upon the *ordre public* in Bulgaria and that may be challenged by the courts in Bulgaria irrespective of the law that governs the EFET General Agreement.

1. Non-performance due to Force Majeure (§ 7 of the General Agreement)

- 1.1. Force majeure as a ground for suspending, respectively releasing the Parties from their obligations under a contract different from default-related grounds (the so called ‘objective impossibility for performance’ which exempts parties from their liability for damages) is regulated by article 306 of the Commerce Act. Pursuant to the legal definition, a force majeure shall be an unforeseen or unavoidable event of an extraordinary nature which has occurred after the conclusion of the contract (subsequent impossibility).

A debtor in a commercial transaction shall not be liable for failure to perform due to force majeure. Where the debtor was already in default, he may not invoke force majeure.

The party who cannot perform due to force majeure shall notify the other party in writing within a reasonable time about the nature of the force majeure, and its potential consequences for the contract. In case of failure to notify, compensation shall be due for the damages resulting from such failure.

The performance of obligations and the related counter-obligations shall be suspended for the duration of the force majeure.

Should the duration of the force majeure be such that the creditor loses his interest in the performance, he shall be entitled to terminate the contract. The debtor shall also have the same right.

It should be further noted that in Bulgarian commercial relations it is common practice force majeure to be evidenced by the party pleading force majeure by a certificate issued by the Bulgarian Chamber of Commerce and Industry (the **BCCI**). This is not a mandatory legal requirement but it could be assumed that if the parties to a contract expressly agree in the contract that such certificates issued by the BCCI shall be regarded as sufficient evidence for the occurrence of force majeure circumstances the parties should not dispute these circumstances.

We believe that the parties to a contract are in principle free to determine in the contract the concrete events which will be regarded as force majeure. Some of the events are standard (such as war, strike, etc.) and should be regarded as indisputable events of force majeure. Of course, the concrete events have to be assessed in the light of the reasonable commercial practice (e.g. insolvency of one of the parties’ sub-contractors should not be recognized in our view as force majeure event). We are of the opinion that the events mentioned in § 7.1 of the General Agreement may be considered as force majeure events.

With a view to all the above we could confirm that § 7 of the General Agreement would be enforceable under Bulgarian law. Although it is not explicitly mentioned in § 7 that the notification of force majeure shall be in writing (this is the explicit requirement of article 306(3) of the Commerce Act), this requirement is implied by § 23.2 of the General Agreement.

- 1.2. Article 89 of the OCA regulates the general principle of termination of contracts in case of subsequent objective impossibility for performance (the above cited article 306 of the Commerce Act develops further this principle on commercial law plain). This principle is different from the regulation of force majeure in the Commerce Act as cited above. Under the OCA, in case of a bilateral contract, if the obligation of one of the parties is extinguished due to impossibility for performance, the contract shall be cancelled automatically, by virtue of law (*ipso jure*). Where the said impossibility is only partial, the other party may claim a respective

reduction of its obligation or cancellation of the contract through the court, if it does not have sufficient interest in seeking partial performance.

- 1.2.1. Bulgarian civil law, legal doctrine and court practice distinguish two main reasons for subsequent objective impossibility – casual event (*casus fortuitis*) where the accent is put on its unpredictability (unforeseeability), and force majeure (*vis major*) where the accent is put on its unavoidability (irresistibility). The definition of force majeure given by article 306(2) of the Commerce Act is criticized as being eclectic and abolishing the difference between the casual event and the force majeure.

In our opinion this discussion has more theoretical (than practical) importance (especially with a view to the fact that there is a legal definition of force majeure). Important is in each particular case to be proven by the party pleading force majeure and objective impossibility to perform that the concrete event has been beyond its reasonable control, that this event has been unavoidable, that it has occurred after the concluding of the contract but before the party to be in default, and there must be causation relation between the event and the impossibility to perform.

- 1.2.2. Subsequent impossibility to perform should be distinguished from the initial impossibility (i.e. impossibility existing as of the moment of entering by the parties into the contract). Initial impossibility is one of the grounds ('impossible subject of the contract') a contract to be declared null and void by the court (article 26(2) of the OCA).
- 1.2.3. Impossibility to perform should be further distinguished from the so called 'economical unbearability' regulated by article 307 of the Commerce Act. The affected party may request from the court to modify or terminate the contract entirely or partially in the event of occurrence of such circumstances which the parties could not and were not obliged to foresee, and should the preservation of the contract be contrary to fairness and good faith. In contrast to force majeure, here performance is still possible but due to certain circumstances occurred after entering into the contract (usually amended economical situation, etc.) it is economically too unfavorable for one of the parties and puts this party in an economically too unequal position which contradicts to common understanding of fairness and good faith. In order to avoid intervention by the court and to simplify their relations, parties usually agree clauses giving them the right to amend or terminate the contract in case of occurrence of such circumstances (*clausula rebus sic stantibus*).

2. Remedies for non-performance (§ 8 of the General Agreement)

§§ 8.1 and 8.2: The following clarification should be made in the light of Bulgarian law in respect of the 'compensation for damages' mentioned in the said clauses:

(i) If in the text is really meant a 'compensation' for suffered damages (*Schadenersatz* in German), then these damages have to be proven (including their ground (the failure of the Party to perform its obligation), their amount, etc.). If this is the case, then one might be tempted to argue that the words 'or would be able...' are to be interpreted in a sense that the damages have not occurred yet and that there are no damages to be compensated.

(ii) The other possible interpretation is that in § 8 a kind of liquidated damages (*неустойка* in Bulgarian, *Vertragsstrafe* in German) is meant. The liquidated damages under Bulgarian law are a compensation for damages whose amount is preliminary determined (or at least determinable) and agreed between the parties (e.g. a lump sum or a percentage of the non-

performed amount, etc.). In case liquidated damages are agreed, the non-defaulting party is not required to prove the damages suffered, but merely the fact of non-performance of the other party's obligation. If the amount of the damages suffered is higher than the liquidated damages agreed, the non-defaulting party has the right to claim compensation for these damages by following the common way (see the previous sub-item (i)). Pursuant to article 309 of the Commercial Act in the relations between merchants the liquidated damages may not be decreased on the ground that they are excessive.

(iii) Last but not least, this way of determining of compensation, although not very common, is not unfamiliar in Bulgarian law. Article 323 of the Commerce Act regulating the rescinding of sale contracts stipulates that should the sale be rescinded and within an appropriate period of time after the rescinding the buyer purchases replacement goods, or the seller re-sells the goods, the party seeking compensation may receive the difference between the sale price and the price of the replacement transaction, as well as compensation.

To sum up: in our opinion the remedies under § 8 are intended as compensation for damages, as discussed in the previous sub-item (i), i.e. such a compensation shall be due only in case such damages have been incurred and the damages' amount has to be proven, but no replacement transaction is required to be entered into by the non-defaulting Party.

3. Limitation of Liability under Bulgarian law (§ 12 of the General Agreement)

3.1. General Enforceability of Exclusion of Liability (§ 12.2)

3.1.1. There is no explicit definition of exclusion clauses (i.e. of clauses agreed by the parties to a contract by which they preliminary³⁸ limit or exclude their liability for damages caused by the one party to the other party) in Bulgarian law. However, there are many legal provisions regulating what limitations of liability are inadmissible, therefore exclusion clauses are indirectly recognized by Bulgarian law. There is abundant court practice on these matters; the legal doctrine has not remained silent either.³⁹

With a view to that and on the grounds of the principle of contractual freedom (article 9 OCA) it can be accepted as undisputable that exclusion clauses are generally permissible under Bulgarian law. In each particular case, however, it should be carefully checked whether Bulgarian law contains any restrictions on the contractual freedom concerning the exclusion clauses. Such restrictions (i.e. prohibitions for limitation or exclusion of liability) are provided for by various laws and in respect of various contracts (e.g. in case of sale of a commodity with defects the seller shall be liable even if he did not know about the defects, an agreement for exclusion of his liability shall be considered null and void (article 193(3) OCA); null and void shall be in principle clauses for exclusion of the carrier's liability (article 373(3) of the Commerce Act); numerous prohibitions for exclusion of liability are contained in the Consumers Protection Act, etc.).

3.1.2. The most important provision in this regard, however, is provided for by article 94 of the OCA. Pursuant to it, clauses by which the debtor's liability for intentional (*Vorsatz* in German) or gross negligent (*grobe Fahrlässigkeit* in German) acts is preliminary excluded or limited shall be null and void. This provision gives the general mandatory legal framework of the exclusion

³⁸ We review the issue only in the light of preliminary limitation / excluding of liability. If the damages have been already suffered and the affected party refuses to claim compensation, this is remittance of debt and not an exclusion clause.

³⁹ See for instance 'Exclusion clauses in the contracts under Bulgarian civil law' by Krassimir Mitev (2005).

clauses under Bulgarian law and has to be considered in any case when exclusion clauses are agreed.

Therefore, in order to be valid and enforceable under Bulgarian law, § 12.4 of the General Agreement should be supplemented and gross negligence should be explicitly pointed out therein too.

We further tend to believe that Bulgarian courts would consider article 94 OCA as part of Bulgarian *ordre public*.

3.1.3. Where it is undisputable that exclusion clauses may be agreed in order to limit / exclude the parties' liability under a contract (their contractual liability), it is disputable in legal doctrine whether the liability resulting of tort (*Delikthaftung* in German) may be limited by exclusion clauses. We tend to agree that exclusion clauses are permissible only in respect of the contractual liability (which is the prevailing opinion) but some credible arguments supporting the other opinion should not be underestimated.

3.1.4. Subject to the above we believe that § 12.2 should be generally enforceable in Bulgarian courts.

However, the following distinctions should be made:

3.1.4.1. § 12.2 regulates not only the exclusion / limitation of liability of the counterparties resulting from breaches of the General Agreement (contractual liability), but also of the liability of the Parties' employees and officers. The liability for damages caused by officers or employees of a person (company) is regulated by the rules for liability resulting of tort (*Delikthaftung*). According to article 49 of the OCA, if a person has assigned to another person work, the assigning person shall be liable for the damages caused to third parties in the course or in respect of the performance of this job (compare with § 831 BGB (German Civil Code) – *Haftung für den Verrichtungsgehilfen*). Despite of the various interpretations in the legal doctrine and court practice it can be concluded that this liability is objective (i.e. no fault of the assignor is necessary), the employee's or officer's fault is important (acting intentionally or negligently) but it is not necessary to be proven which particular employee or officer has caused the damages in the course or in respect of the performance of the job assigned. Besides, it is disputable whether the third party has a direct claim against the employee / officer or the liability of his employer under article 49 of the OCA excludes the employee's / officer's liability towards the third party.

Since this liability is liability for tort, our comments under the above item 3.1.3 should be taken into consideration.

3.1.4.2. Our further understanding is that apart from the contractual liability of the counterparties and the liability for acts of the Parties' employees and officers, § 12.2 regulates also the exclusion / limitation of the liability of the Parties' (sub)contractors. This issue is not popular in Bulgarian court practice but has been addressed in the legal doctrine. Such clauses are considered on the basis of the contract in favour of third parties (compare with § 328 BGB – *Vertrag zugunsten Dritter*) and are considered as permissible in principle. It could be summarized that generally the liability of the sub-contractors towards the assignor of the main contractor is liability for tort (*Delikthaftung*), unless something different has been explicitly agreed (e.g. there might be entering into debt between the main contractor and his subcontractor). With a view to that, our comments under the above item 3.1.3 should be taken into consideration as well.

Another relevant issue on this plane is whether the assignor may have a direct claim against the sub-contractors if he has a claim against the main contractor based on his contractual liability. Where there are arguments in favour of the opinion that the assignor has the right to choose against whom to direct his claim – against the main contractor on contractual basis or against the sub-contractor on the basis of his liability for tort, it seems that the prevailing opinion in the court practice is that the contractual liability of the main contractor excludes the possibility the creditor to file a claim for liability for tort of the sub-contractor.

3.2. Enforceability of Limitation of Consequential Damages and similar types of liabilities (§ 12.3, § 12.4)

- 3.2.1. According to article 82 of the OCA, regulating the scope of the compensation in case of contractual liability, the compensation encompasses the losses incurred (*erlittener Verlust* in German) and the loss of profit (*entgangener Gewinn* in German), provided that they are a direct and immediate consequence of the non-performance and could have been foreseen as of the time of occurrence of the [non-performed] obligation (i.e. at the time of entering into the respective contract).

If, however, the debtor has acted in bad faith (i.e. has acted with gross negligence or with intentional default), he shall indemnify the other party for all direct and immediate damages, i.e. also for the unforeseeable damages.

Therefore, it can be concluded that under Bulgarian law consequential damages are not covered by the duty to indemnify the damages caused. It is also confirmed by Bulgarian legal doctrine and court practice that consequential damages is an antonym of direct damages and that thus consequential damages shall not be compensated.

Hence, § 12.3 of the General Agreement should be generally enforceable under Bulgarian law (please note our comments under 3.2.2 and 3.2.3 below).

- 3.2.2. The following clarification should be made in respect of § 12.3 because as shown above, under Bulgarian law, the loss of profit is classed as part of the damages together with the losses incurred. The division of the damages to direct and indirect (consequential) is on a different plane. Subject to compensation are only the direct damages. The limitation / exclusion of liability for loss of profit shall be assessed on the grounds of article 94 of the OCA (see the previous item 3.1.2). Therefore, liability for loss of profit may be generally excluded / limited, except in cases of intentional default or gross negligence.
- 3.2.3. As mentioned above (see item 3.1.2), in order for § 12.4 of the General Agreement to be valid and enforceable under Bulgarian law, it should be supplemented and gross negligence should be explicitly pointed out therein too.

3.3. Enforceability of Duty to Mitigate (§ 12.5)

Under Bulgarian law (article 83, para 1 OCA), if the non-performance is due to circumstances for which also the creditor (i.e. the person which has suffered damages as result of the breach of contract) is liable, the court may reduce the compensation amount or exempt the debtor from liability. The necessary pre-condition for this is creditor's behaviour to be non-compliant with the respective due diligence (in this case 'co-causing' of damages (by the debtor and the creditor) is meant).

Article 83, para 2 stipulates further that the debtor shall not be liable for the damages which the creditor could have avoided [or mitigated] with due diligence (here the inactivity of the creditor is meant). No contractual liability occurs at all and the court should not have the discretion (in contrast to the case under the preceding paragraph) to assess whether to reduce or exclude the debtor's liability.

Therefore, § 12.5 of the General Agreement should be considered valid and enforceable under Bulgarian law.

3.4. Could the limitations and exclusions under § 12 of the General Agreement be further expanded or strengthened under Bulgarian law?

Just like in the EFET Electricity General Agreement, in § 12.2 'negligence' could be replaced by 'gross negligence' (*'Except where such Damages are due to the **gross** negligence, intentional default or fraud of a Party ...'*). Thus § 12.2 will become compliant with § 12.4, which is to be supplemented as advised above (i.e. gross negligence should be explicitly pointed out therein).

4. Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be made aware of regarding the general enforceability, from a legal stand point, of the EFET General Agreement and its Credit Support Annex.

In addition to all our above opinions and recommendations we would like to make the following comments (these comments serve most of all to clarification purposes and does not mean that the commented clauses necessarily need a revision in order for them to be enforceable in Bulgaria; in particular, we do not deem that these provisions infringe Bulgarian *ordre public*):

§ 13.5: Please note that it has been disputable in Bulgarian court practice whether the parties to a contract may agree interest rate which is different from the default interest (*Verzugszins* in German) determined by the Council of Ministers of Bulgaria. For your information, the annual amount of the default interest determined by the Council of Ministers is in the amount of the basic interest rate of the Bulgarian National Bank in force as from 1 January, respectively as from 1 July of the current year, plus 10 percent p.a.

The daily amount of the default interest is equal to 1/360 of the annual amount determined as described above.

The more recent practice of the courts is more flexible in this respect, i.e. pursuant to it the parties have the right to agree default interest rates deviating (i.e. higher or lower interest rate) from the rates determined by the Council of Ministers. With a view to that we share the opinion that the Parties to the General Agreement may freely agree on the amount of the default interest rate in the Election Sheet.

§ 19: Bulgarian law does not use the term 'assignment of obligations'. As mentioned above, articles 101 and 102 of OCA regulate two different forms of assumption of obligations - entering into debt and debt substitution. Our understanding is that here debt substitution is meant (i.e. the substituted debtor shall be freed from liability towards the creditor). We believe that the necessary creditor's consent for the debt substitution could be regarded as given in § 19.2 of the General Agreement (although given in advance), therefore, § 19 could be regarded as valid and enforceable under Bulgarian law. However, in order for maximum clarity to be achieved, we would recommend in the Election Sheet to be explicitly pointed out that

‘assignment of obligations’ means ‘debt (obligation) substitution’ (within the meaning of article 102 of the Obligations and Contracts Act).

§ 23.2: As mentioned above, Bulgarian law follows the receipt theory meaning a contract is deemed concluded at the moment the acceptance of the offer is received by the offering party (article 14(1) of the OCA). With a view to that we deem that § 23.2(b) could be regarded as legally not very precise. The documents listed therein (written notices, declarations and invoices) shall be effective on the day of their actual (and not presumed) receipt. Nevertheless, we believe that it could be grounded that article 14 of the OCA is not a mandatory legal provision and that the parties to a contract could agree something different. Therefore, the receipt fictions under § 23.2 should be regarded as admissible under Bulgarian law and as merely changing the burden of proof.

5. General enforceability of the General Agreement

Subject to our comments, assumptions and reservations set out in this Opinion it can be concluded that the General Agreement would be legal, valid and binding under Bulgarian laws.

The provision of article 26(4) of the OCA should be also kept in mind stating that if certain clauses of an agreement are null and void, this does not make the entire agreement null and void, provided that (a) these clauses are replaced by virtue of law by relevant mandatory legal rules or (b) when it can be assumed that the parties would have entered into the agreement also without the null and void clauses.

It should be further noted that from our discussions with power trading companies in Bulgaria within last years we are aware that many of these companies regard the EFET General Agreement as too heavy, complicated and inappropriate for Bulgarian market conditions and practices and prefer to use their own contract templates, at least as regards the power trading in Bulgaria (but often they use the main principles of the EFET General Agreement as a basis for their contracts, i.e. their contracts are a simplified form of the EFET General Agreement).

6. General enforceability of the Credit Support Annex

- 6.1. Subject to our comments in Section III above, it can be concluded that the Credit Support Annex would be legal, valid and binding under Bulgarian laws as regards Eligible Credit Support provided in the form of Letter of Credit.
- 6.2. As regards the transfer of ownership in the Cash, as mentioned above, it may be considered null and void as contradicting the mandatory rule of article 152 of the OCA (outside the scope of the FCAA). With a view to the abundant court practice on the application of this provision (although on a bit different plane), we tend to believe that Bulgarian courts would consider article 152 OCA as part of Bulgarian *ordre public*.

V. Confirmation Practices

Additional assumptions:

- As far as the Confirmation practice is concerned, when entering into an Individual Contract, the counterparties 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 or similar electronic, written or non-

verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission).

- Parties may or may not (i) use the EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations or (ii) enter into the EFET Electronic Confirmation Agreement.

1. Binding Individual Contract

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) under the laws of Bulgaria?

- 1.1.1. The main legal principle regulating the form of commercial transactions under Bulgarian law (article 293(1) of the Commerce Act) is that for the validity of a commercial transaction written (or any other special) form is required only in the cases explicitly envisaged in the legislation in force (see also item 1.1.2 below).

Pursuant to article 173, para 1 of the Energy Act, the transactions in natural gas shall be effected on the grounds of **written contracts**, in compliance with the provisions of the Energy Act and the Trade Rules.

Therefore, it can be concluded that there is a legal requirement a written agreement to be concluded in order for the Individual Contracts under the General Agreement to be valid and legally binding.

Non-compliance with the written form requirement is a condition a contract to be declared null and void by the courts on the grounds of article 26, para 2 of the OCA.

With a view to the above our categorical recommendation is **all Individual Contracts to be concluded always only in writing** and this requirement to be explicitly stated in the Election Sheet.

- 1.1.2. The provision of article 293(3) of the Commerce Act should be mentioned for the sake of completeness as well, stating that '*A party may not refer to nullity should its behaviour imply that it has not contested the validity of the statement [of its counterparty]*'.
- 1.1.3. The signature requirement is inseparably related to the written form issues. As seen above, written form, respectively signature is required in order for the Individual Contracts under the General Agreement to be valid and legally binding. The principle in civil law is that in order for the written form to be regarded as complied with, the respective document has to be signed by its author. In commercial law there are some deviations from this principle, e.g. according to article 293(4) of the Commerce Act the parties shall be deemed compliant with the written form requirement if their statements have been technically recorded in a way allowing their subsequent transcribing (see also C.V.2.2.2 below), or article 3(2) of the Electronic Document and Electronic Certification Services Act (published in State Gazette 34/06.04.2001, last amendments published in State Gazette 14/13.02.2018) (the **EDECSA**), pursuant to which the requirements for written form shall be deemed complied with if an electronic document under the EDESA has been drafted (see C.V.2.3.1 below).

1.2. **At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of Bulgaria?**

Under Bulgarian law, a contract shall be deemed concluded/legally binding as from the moment of receipt of the acceptance (confirmation) by the party who has made the offer (article 14(1) OCA).

Subject to the written form requirement for validity in respect of contracts for sale and purchase of natural gas, it can be concluded that if an Individual Contract is agreed upon only orally it does not become legally binding and enforceable. However, the cited rule of article 293(3) of the Commerce Act should be taken into consideration as well (*'A party may not refer to nullity should its behaviour imply that it has not contested the validity of the statement'*), i.e. if the Individual Contract is performed by both Parties, it could be argued that the Parties have not contested its validity and that therefore they may not claim that the contract is null and void.

If an Individual Contract is agreed upon orally and is later confirmed in writing, the confirmation (if signed by only one of the Parties) shall be regarded merely as an offer for entering into the Individual Contract. Therefore, this 'confirmation' (offer) is subject to further confirmation (acceptance) by the other Party. The Individual Contract shall thus become legally enforceable at the time of the acceptance of the offer (which must also be done in writing). If the confirmation of the preliminary arrangements is effected by a document bearing the signatures of both Parties (i.e. by a written agreement), the Individual Contract shall become legally enforceable at the time of this written agreement. In the written agreement the Parties may agree that their relations in the past shall be governed by the conditions stipulated by the written agreement.

1.3. **Does failure to object to incorrect terms in a received Confirmation (as provided for in § 3.3) constitute "acceptance" of those terms under the laws of Bulgaria? If so, is there a relevant time period under the laws of Bulgaria that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?**

In contrast to civil law, the principle in Bulgarian commercial law is that if a trader with whom the party sending an offer is in long-term commercial relations does not immediately object to the offer, this trader is deemed to have agreed with the offer (article 292(1) of the Commerce Act).

With a view to that and subject to the above conditions (long-term commercial relations, etc.) we tend to believe that in principle failure to promptly object to incorrect terms in a received Confirmation as provided for in § 3.3 of the General Agreement should be considered as acceptance of those terms. There is no concrete relevant time period in the Commerce Act. The cited article 292(1) says that objection is to be done 'immediately', but, of course, this issue has to be assessed in each particular case taking into consideration all relevant circumstances and reasonable commercial practice.

However, the written form requirement under article 173, para 1 of the Energy Act should always be kept in mind. With a view to it, one can reasonably object that, if no explicit written confirmation of the offer (i.e. of the Confirmation) has been made, no valid contract has been concluded by the Parties.

Therefore, the conclusion is that failure to object to incorrect terms in a received Confirmation (as provided for in § 3.3) does **not** constitute acceptance of those terms. In our view every

Confirmation (which, as mentioned above, would have the legal nature of an offer) needs to be confirmed (accepted) in writing by the other Party – only thus the written form requirement would be satisfied. Respectively, if the receiving Party objects to the terms in the ‘Confirmation’, this would constitute a counter offer to the other Party.

1.4. Is the reference to the relevant EFET General Agreement made in the relevant written confirmation exchanged (post trade) between the parties sufficient for the inclusion of the Individual Contract in the EFET General Agreement?

The General Agreement has the legal nature of a master (framework) agreement. There is no legal definition of master agreement in Bulgarian law (except for the purposes of public procurement law), but such a definition could be made on the basis of the intrinsic features of the master agreement: this is a contract by which the parties standardize their future business relations and set out a legal framework of all important general terms and conditions connected with the separate contracts which are going to be entered into between them on the basis of the master agreement. This legal framework shall be applicable in respect of all separate contracts, unless something different has been explicitly agreed between the parties in such a separate contract. In the separate contracts are in principle agreed merely the concrete details of each transaction – amount, price, delivery schedule, etc.

§ 1.1 of the General Agreement stipulates that the General Agreement shall govern **all** transactions the Parties will enter into for the purchase, sale, delivery and acceptance of natural gas and that the provisions of the General Agreement constitute an integral part of each Individual Contract.

As underlined above, Bulgarian Energy Act requires written form as a pre-condition for the validity of natural gas purchase agreements. This means that any Individual Contracts entered into orally or otherwise, if thus the written form requirement has not been satisfied, are to be considered null and void because of their non-compliance with the form required by law.

Respectively, if the Parties enter into an Individual Contract in a way satisfying the written form requirement, and make reference to it being an Individual Contract for the purpose of the General Agreement between the Parties, such Individual Contract should be considered validly included in the General Agreement and governed by its provisions.

2. Means of Evidence

Assumed there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in front of a Bulgarian court: (i) taped recording; (ii) witness’ statement; (iii) e-mail or other electronic message or transaction entry system; and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

2.1. Article 164, para 1, item (c) of the Civil Proceedings Code states that for proving of contracts with a value exceeding BGN 5000 (approx. EUR 2500) no witnesses’ testimonies shall be admissible.

Therefore, written form is not only a pre-condition for the validity of the Individual Contracts, but also a necessary pre-condition for proving the existence and the terms of such Contracts.

With a view to that we reiterate our recommendation all Individual Contracts to be concluded only in writing. Hereunder we discuss what means of entering into or confirming Individual Contracts may be regarded as compliant with the written form requirement under Bulgarian procedural law and thus accepted by Bulgarian courts as valid evidence.

- 2.2. The legal nature of the **taped agreements** deserves particular attention. To the best of our knowledge some Bulgarian companies operating in financial markets tape the agreements they enter into but in general this way for concluding transactions is not very popular in Bulgaria.
- 2.2.1. In our opinion telephone recordings without the consent of the parties to such recordings are illegal and not permissible. Such recordings will be in breach of the Constitution of Bulgaria and of article 32(2) in particular, which states that no person shall be followed, photographed, filmed, **recorded**, or subjected to any other similar actions without his/her knowledge or despite his/her express disapproval, save in cases provided for in the law⁴⁰.

Therefore, *per argumentum a contrario* if the other party's consent has been preliminary obtained, telephone recordings relating to an Individual Contract should be regarded as legal and permissible. It should be undisputable that the explicit consent of the individual (natural person) recorded and not of his/her employer – party to the General Agreement has to be obtained. We do not deem that the employer may validly give such consent on behalf of that employee. If the employer makes a false representation as to that employee's consent having been given and the recorded employee claims compensation for (immaterial) damages from the other party who has made the recording, then the other party should be able to claim compensation from that employee's employer (who has made the false representation).

Therefore, it is highly recommendable in all cases when telephone recordings relating to Individual Contracts under the General Agreement are to be made, the explicit consent of the other party's representatives (employees / officers) who will be recorded to be preliminary obtained – in writing, or, if not possible, such representatives to be warned before each telephone conversation on entering into the Individual Contract that this conversation is going to be recorded and that if they do not explicitly object this will be considered as their consent to the recording. If the recorded individual continues the conversation it can be assumed that his/her consent has been duly obtained.

- 2.2.2. Apart from the issues related to the other party's consent, this matter needs to be checked from point of view whether tapes are admissible evidence in court at all (for the purposes of this opinion we assume that the other party's consent for the recording has been obtained in compliance with all applicable rules and regulations). The court practice is not unambiguous. Most judges are sceptic about such evidence (records (tapes) proving the entering into an agreement). There is, however, a provision in the Commerce Act (article 293(4)) stating that the parties shall be deemed compliant with the written form requirement if their statements have been technically recorded in a way allowing their subsequent transcribing. We believe that on the basis of this provision one could try to ground that agreements taped in compliance with the law in force actually meet the requirements for written form and could therefore be used as valid evidence in court also for proving of contracts with a value exceeding BGN 5000. However, this is merely a possible interpretation of article 293(4) of the Commerce Act which should not be relied upon when entering into Individual Contracts. Other more secure approaches to evidence the concluded Individual Contracts and their content should be sought.

⁴⁰ Such cases are envisaged for instance in the Special Investigation Means Act (published in State Gazette 95/21.10.1997, last amendments published in State Gazette 56/06.07.2018).

- 2.3. The issue whether **electronically transmitted correspondence** (hereunder referred to for short as ‘e-mails’) may be regarded as written form of a transaction and as valid evidence at all (in case of eventual court proceedings) is very disputable in Bulgarian court practice and legal circles.
- 2.3.1. Please note that we comment below (2.3.2) only on ordinary standard e-mails, without being encrypted or protected in any other special way. As regards the electronic message and electronic document within the meaning of the EDECSA the following should be mentioned: Pursuant to article 3(2) of the EDECSA the requirements for written form shall be deemed complied with if an **electronic document** containing an electronic statement under the EDECSA has been drafted; the EDECSA is not applicable in respect of transactions for which the law requires a special written form (e.g. notarized signatures). Therefore, the conclusion can be made that if an electronic message is signed and encrypted in accordance with the requirements of the EDECSA and qualifies as an electronic document, this should be regarded by the courts as a written form and as a sufficient evidence for the concluded Individual Contracts and their terms.

This conclusion can be supported also with arguments derived from the Civil Proceedings Code (Art. 184) which explicitly mentions the ‘signed electronic document’ in the section dealing with the written evidence. An electronic document may be presented reproduced on a paper-based data medium in the form of a duplicate copy authenticated by the party. Upon request, the party shall be obligated to present the document on an electronic data medium. If the court does not have at its disposal technical means and experts making it possible to reproduce the electronic document and to duly verify the electronic signature in the courtroom in the presence of the persons who appeared, electronic copies of the document shall furthermore be presented to each of the parties to the case. In such case, the truthfulness of the electronic document may be contested during the next succeeding court hearing.

- 2.3.2. One of the main arguments against acceptance of **e-mails** as valid evidence is that the author of the e-mail cannot be checked, respectively proven. In principle everybody can send an e-mail from another person’s computer and e-mail address. Besides, there is no guarantee that the content of the e-mail has not been subsequently amended / modified. That is why judges are generally reluctant to accept e-mails as evidence in court.

There are judges, however, who are willing to accept e-mails for proving of certain circumstances (including of contracts with a value exceeding BGN 5000, i.e. such judges regard e-mails as written evidence). E-mails have, of course, to be presented in the due form to the court (e.g. if they are not in Bulgarian language, they have to be translated by a sworn translator, etc.).

There is no clear legal regulation of the above issues in Bulgarian legislation, which, of course, contributes to the uncertainty and the variety of controversial opinions. It should be, however, noted that the Electronic Commerce Act (published in State Gazette 51/23.06.2006, last amendments published in State Gazette 94/13.11.2018) indirectly recognizes the concluding of contracts via e-mails. In its article 12(2) the Act says that some specific rules of the Act do not apply towards contracts concluded exclusively via e-mail or any other equivalent means for exchange of individual statements. Article 293(4) of the Commerce Act should be quoted once again, stating that the parties shall be deemed compliant with the written form requirement if their statements have been technically recorded in a way allowing their subsequent transcribing.

On the other hand, one may argue that only electronic messages within the meaning of the EDECSA (i.e. messages in digital form, see above 2.3.1) and the respective electronic documents may be regarded as written form (*per argumentum a contrario* of the cited article 3(2) of the EDECSA) and that hence no standard e-mails are admissible as evidence.

Therefore, the legal ground for recognition of e-mails as valid evidence by Bulgarian courts is unstable. Due to that and to the related uncertainty we would recommend all Confirmations of Transactions under the General Agreement to be done also in 'standard' written form (i.e. with a signature by an authorized person, etc.).

In any case we believe that if the parties to an agreement explicitly agree in the agreement that e-mails shall be regarded as valid communication means in their relations, and that for the purpose of this agreement the written form shall be deemed complied with if an e-mail has been sent, this would increase the chance for recognition of such e-mails as valid evidence by the courts (see for example clause 3 of the EFET Electronic Confirmation Agreement).

- 2.3.3. There is no explicit legal regulation in Bulgarian law of the **electronic confirmation matching systems** (such as the EFET Confirmation Matching System). Therefore, we deem that the above considerations regarding electronic documents and ordinary e-mails are relevant in respect of such systems, in particular: **(i)** if the electronic messages exchanged between the Parties qualify as electronic documents within the meaning of the EDECSA (i.e. if they are electronically signed), they should be regarded by Bulgarian courts as written evidence; **(ii)** on the contrary, if they are not to be qualified as electronic documents but merely as ordinary electronic messages, it is highly probable that Bulgarian courts would not accept them as written evidence.
- 2.4. As regards the **fax/facsimile transmissions**, there is an explicit rule in the Commerce Act (article 293(5)), stating that in the event of statements made by telefax or telex, the written form shall be deemed met if the books and documents documenting the operation of these facilities exclude incorrect reproduction of the statement. Based on this provision, Bulgarian courts in principle accept documents sent/received by fax as valid written evidence. Of course, the sent document (e.g. a Confirmation of an Individual Contract) must be duly signed by a representative of the sender in order to be accepted by the court as such evidence.

VI. Core Provisions

Please base your opinion on the additional assumptions outlined under Part C.I.1 and C.II and discuss the following issues:

- 1. Would any of the elections 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 Part C.I or C.II (Enforceability of Close-out Netting) above? 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.**
 - 1.1. Subject to our comments and recommendations (e.g., Automatic Termination to apply in case of an insolvency-based Material Reason) made in this Opinion, in our view the elections contemplated by the General Agreement or the Annexes thereto (including the EFET Credit Support Annex) should not change the substance of our conclusions reached under Sections **C.I** and **C.II** above.

- 1.2. As regards the effect of electing to allow substitution with or without consent, we would refer to our comment in item **C.III.4.4** above.
2. **Considering your conclusions reached under Part C.I or C.II (Enforceability of Close-out Netting) above, 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 Part C.I or C.II (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.**

We deem that following provisions of the General Agreement may be regarded as Core Provisions as regards the enforceability of close-out netting: § 1.1, § 10.3, § 10.4, § 10.5(c)(iv) and §11, and, of course, the related Defined Terms contained in Annex 1 to the General Agreement.

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 Part C.I or C.II?**

The inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement or in the Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the CPMA) should not change the substance of our conclusions reached under Sections **C.I** and **C.II** above.

VII. Governing Law, Arbitration and Jurisdiction

Additional assumptions:

- The relevant EFET General Agreement is governed by the laws of a jurisdiction other than Bulgaria (including English or German law).

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

1.1. Choice of law (§ 22.1 of the General Agreement)

Following provisions of Bulgarian legislation and international/EU legal acts should be taken into consideration when the possibility is being assessed, the parties to a contract to choose the law governing this contract:

A. The Private International Law Code

The provisions of the Private International Law Code (published in State Gazette No 42/17.05.2005, last amendments published in State Gazette No 100/21.12.2010) (the **PILC**) shall be applicable in the relations between a Bulgarian Party to the General Agreement and a Party which has its seat (registered office)/place of real management in a country which is not an EU Member State. Of particular importance are the following provisions of the PILC:

- Part III of the PILC regulating the applicable law in respect of private legal relations with an international element, and in particular Chapter IV ‘General Provisions’ and Chapter X ‘Contractual Relations’⁴¹.
- Article 93(1) of the PILC which prescribes that the contracts are governed by the law chosen by the parties (*lex voluntatis*). The legislator has transposed also the rule of article 3(3) of the Rome Convention 1980 in article 93(5) of the PILC – if all elements of a contract at the time of the choice are connected with one country only, the choice of foreign law shall not prejudice the application of rules of the law of that country which cannot be derogated from by contract (i.e. by the principle of contractual freedom), i.e. the ordinary mandatory rules. Therefore, even if all elements of the General Agreement are connected with Bulgaria (incl. both Parties have their registered seat in Bulgaria), the Parties should be able to agree foreign (i.e. non-Bulgarian) law to govern their relations under the General Agreement, but only as regards matters which **(a)** are not explicitly regulated by Bulgarian law or **(b)** are regulated but by non-mandatory rules.

The choice of applicable law shall be explicit or to follow unambiguously from the contract’s provisions or from the circumstances related to the contractual relationship. The parties may choose applicable law in respect of the whole contract or only in respect of part of it.

- The choice of applicable law is not unrestricted. Articles 45 and 46 of the PILC contain some rules regulating the confines of this choice. A provision of a foreign law determined as applicable by the PILC shall not apply if the consequences of such application are manifestly incompatible with Bulgarian public policy (*ordre public*). Incompatibility shall be evaluated while taking account of the extent of connection of the relationship with Bulgarian public policy and the significance of the consequences of application of the foreign law. Where such an incompatibility is ascertained, another appropriate provision of the same foreign law shall be applied. In the absence of such a provision, a provision of Bulgarian law shall apply, if necessary for settlement of the relationship.

The provisions of the PILC shall not affect the application of the mandatory rules of Bulgarian law which, considering their subject matter and purpose, must be applied notwithstanding the referral to a foreign law (the so called ‘special mandatory rules’).

- Article 43 of the PILC regulates the rules for establishment of the content of the foreign law. The court applying the chosen law shall in principle of its own motion (*ex officio*) establish the content of the foreign law. The court may resort to the methods provided for in international treaties, may request information from the Ministry of Justice or from another body, as well as request opinions from experts and specialized institutions. The parties may present documents establishing the content of the provisions of foreign law on which they base their petitions or objections, or otherwise

⁴¹ Chapter X of the PILC has been drafted by the Bulgarian legislator in a way compliant with the provisions of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (the **Rome Convention 1980**).

assist the court. The court applying the chosen law may order the parties to assist it in the establishment of the content of the said law.

B. The Rome Convention 1980

The Rome Convention 1980 entered into force for Bulgaria on 15 January 2008. As from this date (and until 17 December 2009, see next item), the Rome Convention was applicable in the relations between a Bulgarian Party to the General Agreement and a Party which had its seat (registered office)/place of real management in another EU Member State. Following provisions of the Rome Convention 1980 deserve particular attention:

- Article 3 stating the general rule that the parties to a contract have freedom of choice over the applicable law – ‘*A contract shall be governed by the law chosen by the parties*’. The law applicable to a contract shall govern in particular ‘the various ways of extinguishing obligations’ (e.g. set-off) (article 10(1)(d)).
- Articles 7 and 16 providing the main limitations of the choice of law – the special mandatory rules and the *ordre public*.

C. Regulation Rome I

The Rome Convention 1980 was applicable until 17 December 2009 from which date Regulation (EC) No 593/2008 on the law applicable to contractual obligations (**Regulation Rome I**) shall apply in relations between Parties from two EU Member States (with the exception of Denmark; the Danish government planned to join the Regulation if a referendum on 3 December 2015 approved converting its opt-out into an opt-in, but the proposal was rejected). Of particular importance are the following provisions of Regulation Rome I:

- The freedom to choose the applicable law (article 3).
- The limits of the choice of law (article 3(3); article 3(4) introducing a new principle compared to the Rome Convention 1980 protecting the mandatory provisions of EU law⁴²; article 9 regarding the special mandatory rules (for the first time there is a definition of these rules, called ‘overriding mandatory rules’⁴³); article 21 regarding the public policy (*ordre public*)).
- For the first time there is an explicit provision dealing with the choice of law to the set-off (article 17): ‘*Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted*’ (i.e. the passive claim – this approach is compliant with the approach followed in the EU Insolvency Regulation).

⁴² article 3(4): ‘*Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement*’.

⁴³ article 9(1): ‘*Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*’

To sum up, reviewing all the three above documents, it can be concluded that they generally follow the same rules and principles on the matters of particular interest. With a view to that, if the Parties to the General Agreement have explicitly agreed in § 22.1 that their relations under the General Agreement shall be governed by the laws of a jurisdiction other than Bulgaria (e.g. by German or English law), and Bulgarian courts are competent to examine a dispute under the General Agreement, Bulgarian courts would apply German or English law.

Bulgarian courts would not apply foreign law if its provisions are manifestly incompatible with Bulgarian public policy and/or contradict to overriding mandatory rules of Bulgarian law. Assessment whether there is such incompatibility / contradiction shall be made in each particular case taking account of all concrete circumstances.

If all the elements of the General Agreement and the Individual Contracts are connected with Bulgaria only (e.g. both Parties have their seats (registered offices)/places of real management in Bulgaria), the choice of foreign law shall not prejudice the application of Bulgarian mandatory rules⁴⁴ (with a view to that, for the sake of legal clarity, it could be recommended in such scenarios Bulgarian law to be chosen as applicable in the Election Sheet).

1.2. Choice of jurisdiction / arbitration (§ 22.2 of the General Agreement)

1.2.1. Choice of jurisdiction

The following provisions of Bulgarian legislation and international/EU legal acts should be taken into consideration when the possibility is being assessed, the parties to a contract to choose the jurisdiction, respectively the arbitration – see 1.2.2 below - competent to examine and adjudicate on their disputes under this contract:

A. The Private International Law Code

The provisions of the PILC shall be applicable in the relations between a Bulgarian Party to the General Agreement and a Party which has its seat (registered office)/place of real management in a country which is not an EU Member State. Of particular importance are the following provisions of the PILC:

- Article 23 of the PILC governs the conditions under which the parties to a contract may agree to submit their disputes to a foreign jurisdiction, respectively to Bulgarian courts. Where subject of the lawsuit is a property right (i.e. a right evaluable in money) and the dispute does not fall within the exclusive jurisdiction of Bulgarian courts, any such dispute may be submitted to a foreign court by an agreement in writing between the parties. Although not explicitly mentioned in article 23 of the PILC, we deem that another pre-condition for the valid submission of the dispute to a foreign court is the parties to have their seats (registered offices)/places of real management in two different jurisdictions.

Where a Bulgarian court has been seized while such an agreement is in place, the defendant must raise his/her objection not later than the term for reply to the claim.

Under the same terms as described above a case cognizable in a foreign court may be submitted to Bulgarian courts.

⁴⁴ See ‘The Regulation Rome I’, Chapter ‘The choice of applicable law according to article 3’, N. Bandakov, page 67-68, Ciela, 2009.

- Articles 4 and 15 of the PILC regulate the international jurisdiction of Bulgarian laws, in particular in matters relating to rights arising out of contractual relationships. Bulgarian courts shall have international jurisdiction where:

- (i) the defendant has a habitual residence (domicile), seat (registered office) or place of the actual management of his business in Bulgaria;
- (ii) the claimant is a Bulgarian national or is a legal entity registered in Bulgaria.

Claims against a legal entity, where the dispute has arisen out of direct relationships with its branch, may be brought before Bulgarian courts if the branch is registered in Bulgaria.

Bulgarian courts shall have jurisdiction over claims on contractual relationships also where the place of performance of the obligation is within Bulgaria or where the defendant has a principal place of business in Bulgaria.

B. Regulation Brussels I

Since as from 1 January 2007 Bulgaria became EU Member State, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (**Regulation Brussels I**) is directly applicable in Bulgaria as well and its provisions should also be respectively taken into consideration when the admissibility of choice of jurisdiction is being assessed (see below item C on the recast Brussels Regulation). Regulation Brussels I shall be applicable in the relations between a Bulgarian Party to the General Agreement and a Party domiciled⁴⁵ in another EU Member State (other than Denmark), but also with a Party which is not domiciled in a EU Member State⁴⁶ (article 23(1)). Following provisions of Regulation Brussels I deserve particular attention:

- Article 22 regulating the exclusive jurisdiction. We do not deem that the relations under the General Agreement and the Individual Contracts fall within any of the cases of exclusive jurisdiction, neither under any of the cases of protective jurisdiction (articles 13, 17 and 21).
- Article 23 dealing with the prorogation (derogation) of jurisdiction – *‘If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise’*. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction (Art. 23(3)).

⁴⁵ Article 60: ‘For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business’.

⁴⁶ The jurisdiction agreement applies independently of the later procedural roles of the parties – *‘Brussels I Regulation’*, edited by Ulrich Magnus and Peter Mankowski, 2007, page 389, note 48.

- As regards purely internal cases, it is widely accepted that in such cases article 23 is not applicable⁴⁷.

Therefore, if the Parties are domiciled in two different jurisdictions (for instance in Bulgaria and Germany), and at least one of them is domiciled in a Member State, and the Parties have explicitly agreed in § 22.2 that their relations under the General Agreement shall be referred for resolution to the court of a Member State, such court should be competent to examine and adjudicate on a dispute under the General Agreement.

On the contrary, if all the elements of the General Agreement and the Individual Contracts are connected with Bulgaria only (purely internal cases), the Parties should not have the right to agree that a foreign court will be competent to resolve their disputes.

C. *The 2012 recast Regulation Brussels I*

In 2012, the EU institutions adopted a recast Brussels I Regulation (Regulation (EU) No 1215/2012) which replaced the 2001 Regulation and applies as from 10 January 2015⁴⁸. One of the most significant changes to the recast Regulation is the abolition of exequatur proceedings when enforcing judgments given in other EU Member States.

The recast Regulation kept the rule that the parties to a contract may reach an agreement at the time of contracting as to which court should govern any dispute (jurisdiction agreement) - Art. 25(1): *'If the parties, **regardless of their domicile**, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, **unless the agreement is null and void as to its substantive validity under the law of that Member State**. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.'* There are two main differences compared to the legal regime under the 2001 Regulation (see the above cited Art. 23):

- The domicile requirement for parties to an Art. 25 jurisdiction agreement has been dropped, so a jurisdiction clause will fall within the scope of Art. 25 even if none of the parties are domiciled in an EU Member State. *'This change has significantly expanded the scope of those jurisdiction agreements captured by the Brussels regime. This amendment has the beneficial consequence of removing the need for a detailed (and potentially costly) enquiry as to the domicile of the parties to any contract'* (Sarah Garvey, Allen & Overy, 'Brussels Regulation (recast): Are you ready?', [http://www.allenoverly.com/publications/en-gb/Pages/BRUSSELS-REGULATION-\(RECAST\)-ARE-YOU-READY.aspx](http://www.allenoverly.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx)).
- There is a new explicit rule concerning the governing law to be applied to consider the validity of the jurisdiction clause - according to Art. 25(1), this question will be determined under the law of the Member State identified in the jurisdiction agreement (see also recital 20).

⁴⁷ See 'Brussels I Regulation', Magnus/Mankowski, page 386, note 40.

⁴⁸ Thus, the recast Regulation applies to legal proceedings instituted, authentic instruments drawn up, and court settlements concluded on or after 10 January 2015 (Art. 66(1)). For proceedings instituted, settlements concluded, or instruments drawn up before this date, the old Regulation continues to apply (Art. 66(2)).

Recital 3 of the recast Regulation clarifies that the aim of the recast Regulation is to eliminate divergences in civil matters ‘*having cross-border implications*’, i.e. it is clear now that the Regulation does not apply to purely national matters.

Subject to the above, our conclusions regarding the choice of jurisdiction in § 22.2 of the General Agreement under the 2001 Regulation Brussels I regime remain valid also under the recast Regulation regime. It should be further noted that the recast Regulation did not fully eliminate all the concerns that occurred during the time of application of the 2001 Regulation Brussels I. In particular, ‘*While sweeping away the requirement regarding the domicile of the parties, Article 25 remains confined to jurisdiction clauses that designate member state courts. This restriction means that there is still no uniform position across member state courts as to whether or not a jurisdiction clause in favour of a third state (for example, a New York jurisdiction clause) would be respected by them. ... following the CJEU's decision in Owusu v Jackson (Case C-281/02) [2005] EUECJ there remains an unanswered question as to whether a member state court has discretion to stay proceedings brought before them (perhaps as the place of the defendant's domicile) where those proceedings have been brought in breach of contract because the contract contains a third state jurisdiction clause.*’ (see the cited article by Sarah Garvey).

1.2.2. Choice of arbitration

- Arbitration is explicitly excluded from the scope of Regulation Brussels I, incl. from the recast version (article 1(2)(d)⁴⁹).
- Article 19(1) of the Civil Proceedings Code (published in State Gazette 59/20.07.2007, last amendments published in State Gazette 65/07.08.2018) (CPC) governs the conditions under which the parties to a contract may agree to submit their disputes to arbitration, including to foreign arbitration. The parties to a contract may in principle agree that all property disputes (i.e. disputes for rights evaluable in money) under a contract shall be adjudicated by a court of arbitration. Arbitration is not admissible in respect of disputes involving real estate rights or possession over real estate, alimony (maintenance) or rights under labour relationship, as well as of disputes one of the

⁴⁹ See also recital 12: ‘*This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*’

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘the 1958 New York Convention’), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.’

parties to which is a consumer within the meaning of the Consumers Protection Act (i.e. an individual).

- Article 7(2) of the International Commercial Arbitration Act (published in State Gazette No 60/05.08.1988, last amendments published in State Gazette 8/24.01.2017) (ICAA) provides for an additional condition – the arbitration agreement shall be concluded in writing.
- The choice of the **seat of arbitration** is one of the key issues in drafting an arbitration agreement due at least to the following reasons: **(i)** It may influence which law governs the arbitration and the arbitration agreement; **(ii)** It has bearing on the issue which courts can exercise supervisory and supportive powers in relation to the arbitration; **(iii)** The seat of arbitration determines the nationality of the award which is relevant for the enforcement of the award.
- It is not fully clear whether the choice of a foreign seat of arbitration (i.e. outside Bulgaria) is admissible in case all parties have their registered seat in Bulgaria.

According to article 1(2) ICAA, the international commercial arbitration shall resolve disputes in case the registered seat of at least one of the parties is not in Bulgaria. On the grounds of article 10 ICAA (referring to arbitration in another State than Bulgaria) and § 3 TFP of ICAA (excluding the application of article 10 in cases where all the parties have their registered seats in Bulgaria) it can be concluded that the ICAA does not allow parties having their registered seats in Bulgaria to agree foreign arbitration. This conclusion is confirmed by Bulgarian case law.⁵⁰

However, according to the relatively new (in force as from 1 March 2008) provision of article 19(2) of the CPC, the arbitration may have its seat abroad if one of the parties has its usual residence, its registered seat according to its incorporation act or the place of its real management abroad. This provision has been introduced recently, so that there is no practice of the Supreme Court of Cassation on its application⁵¹. The criterion ‘place of real management’ is new and the new CPC does not provide for a legal definition of this term.

In private international law doctrine⁵² the term ‘place of real management’ is delineated as follows: (i) ‘Real management’ is the **effecting of control over a company** (e.g. by owning the share capital of a company); (ii) The real management is where the directives, the frameworks for the company’s activity are prepared and not where (on the grounds of such directives and frameworks) the company’s resolutions are technically taken.

It cannot be predicted how ‘*place of the real management*’ will be assessed by the relevant courts and other authorities and whether they will not give preference to the

⁵⁰ Cf. the following case in 1999, under the abolished CPC: two Bulgarian companies agreed arbitration in London; the claimant filed a claim in London and won the lawsuit; the claimant filed a request for recognition of the arbitral award to the Sofia City Court; although the arbitration procedure was completed without any of the parties to object, the Court refused to recognise the arbitral award due to the foreign seat of arbitration with the argument that it contradicted Bulgarian public policy.

⁵¹ The ‘place of real management’ is even not commented at all in the Comment of the new CPC (R. Ivanova, B. Purnev, S. Chernev), *Trud i Pravo*, 2008 – the authors state incorrectly that ‘the provision of Art. 19 is not different from the previous rule (Art. 9 (1) and (2), abolished)’.

⁵² Prof. N. Natov, ‘*Comment of the Private International Law Code*’, Ciela, 2006.

more clear old criterion – the registered seat, thus coming to the conclusion that foreign arbitration is inadmissible in case both parties have their seats in Bulgaria, regardless of the fact that one of them is fully controlled from abroad.

In our opinion there are solid legal arguments to ground the conclusion that if **(i)** the Parties under the General Agreement have their registered seat in Bulgaria but **(ii)** one of them is controlled from abroad and this can be clearly proven, foreign arbitration should be admissible, but an assessment should be made for every particular case with a view to all concrete circumstances.

Subject to all the above it can be concluded that, if the Parties to the General Agreement have their seats (registered offices) in two different jurisdictions (for instance in Bulgaria and Germany), and the Parties have explicitly agreed in § 22.2 that their relations under the General Agreement shall be referred for resolution to a foreign (i.e. with seat abroad) arbitration, such foreign arbitration should be competent to examine and adjudicate on a dispute under the General Agreement.

If both Parties have their registered seat in Bulgaria but one of the Parties has the place of its real management (as discussed above) in a foreign country, agreeing on foreign arbitration should be permissible as well.

If both Parties to the General Agreement are Bulgarian entities and have the place of their real management in Bulgaria, they may not agree that a foreign arbitration will be competent to resolve their disputes. In such a case the Parties have generally two options:

- (i) To agree that competent to resolve their disputes will be Bulgarian courts. The court proceedings in Bulgaria are (in principle) three-instance which makes the ordinary court procedure more time-consuming compared to the arbitration procedure.
- (ii) To agree on a Bulgarian arbitration institution. The most popular and used arbitration court in Bulgaria is the Arbitration Court with the Bulgarian Chamber of Commerce and Industry. There is no arbitration court in Bulgaria specialized in resolving energy disputes.

(For your information: The Commission for Energy and Water Regulation has some powers to assist the voluntary settlement of disputes between energy companies, as well as between customers and energy companies.)

1.2.3. Governing language

It is, however, admissible, in case the General Agreement is signed in a bilingual version (e.g. English – Bulgarian) and even if both Parties are Bulgarian entities, the Parties to agree that in case of discrepancies between the English and the Bulgarian version the English version shall prevail. We believe that this approach is more reasonable taking into consideration that the ‘original’ version of the General Agreement is in English and that thus the risk related to any weak points in the Bulgarian translation could be minimised.

It is therefore recommendable, in the Election Sheet to be explicitly stipulated that in case of discrepancies the English version shall prevail. Of course, Bulgarian courts (if the dispute is pending before them) will use the Bulgarian version of the General Agreement. This means that in case of a dispute regarding the conformity of the Bulgarian with the English version

(i.e. in case a Party argues that the English version shall be applied), expert(s) will have to be appointed by the court in order for the correct translation of the English version to be verified.

1.2.4. Waiver of exemplary or punitive damages

Option A of § 22.2 contains an explicit clause that the arbitrators shall have no authority to award exemplary or punitive damages and that the Parties waive their right (if any) to recover such damages. For the sake of completeness it should be noted that from Bulgarian law perspective such a text in an arbitration clause sounds unusually and that a Bulgarian court might regard such a text null and void, being a preliminary waiver of rights (i.e. a waiver of rights which have not occurred yet).

VIII. Regulatory Regime

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?

1. Currency or Exchange Control Law

- 1.1. Official currency in Bulgaria is the Bulgarian lev (BGN) (1 lev = 100 stotinki). It has fixed exchange rate towards the Euro which is 1.95583 BGN per 1 Euro.

There is no prohibition in Bulgarian law payments to be agreed, respectively effected in other currency than in BGN (i.e. payments may also be freely agreed / effected in Euro).

- 1.2. The legal framework of transactions and payments between Bulgarian and non-Bulgarian entities, of cross-border transfers and payments and of currency control is provided for by the Currency Act (published in State Gazette 83/21.09.1999, last amendments published in State Gazette 93/09.11.2018). The Bulgarian National Bank (the **BNB**) has issued also several Ordinances on the implementation of the Currency Act.

The main principle stated in the Currency Act is that the above transactions, payments and transfers may be freely effected unless something different is stipulated by the Currency Act.

- 1.2.1. Bulgarian banks may effect cross-border transfers and payments only after the ground for these transfers/payments has been declared before them. If the value of the transfer/payment exceeds BGN 30,000 (approx. EUR 15,339), the person effecting the respective transfer/payment has to present to the bank the information and documents listed in Ordinance No 28 of the BNB for each particular case, depending on the ground for the transfer/payment (e.g. a copy of the contract on which the payment is based).
- 1.3. With a view to the above, it can be concluded that pursuant to Bulgarian currency legislation there are no restrictions in respect of transfers of sums from and to abroad. The legal regime is merely declaratory.

Therefore, we would not say that the Currency Act and the Ordinances of the BNB on its implementation would ‘affect’ the General Agreement and the Individual Contracts. Of course, the declaratory obligation contained therein has to be complied with (in case the sum transferred exceeds the above threshold).

2. Energy Law

2.1. No license for trade in natural gas required

As seen above (item **B.II.3**), in contrast to electricity traders, gas traders do not need to obtain a license for trade in natural gas under Bulgarian law.

2.2. Cross-border transactions with natural gas under the Energy Act

According to Art. 176a of the EA, the extraction companies, the public provider, the end suppliers, the gas storage facilities operators, the LNG facilities operators, the gas traders and the customers may conclude gas supply transactions with resident entities of an EU Member State if the following conditions are met:

- the extraction companies, the gas traders, the public provider, the end suppliers and the customers are entitled to free trade in gas under the legislation of the other country, and
- under reciprocity conditions, when the legislation of the other country provides an opportunity for free trade in gas for its customers.

2.3. Access to the gas transmission and distribution networks - see the above item **B.II.3.1 and 3.9 - 3.11.**

3. Allowances Trading

3.1. Legal framework

Bulgaria has transposed in its legislation the provisions of Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowances trading within the Community, as amended by Directives 2004/101/EC of 27 October 2004, 2008/101/EC of 19 November 2008 and 2009/29/EC of 23 April 2009, as well as by Decision No 1359/2013/EU of the European Parliament and of the Council of 17 December 2013 and Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014. The main rules were initially stated in the Environmental Protection Act (published in State Gazette 91/25.09.2002, last amendments published in State Gazette 98/27.11.2018) (the **EPA**). The EPA established a scheme for greenhouse gas emission allowances trading. The scheme was open for participation of natural and legal entities from Bulgaria and from other EU Member States, as well as from third countries in compliance with the international treaties to which Bulgaria is a party. The allocation of the greenhouse gas emission allowances (the **Allowances**) for 2008 – 2012 was made in accordance with the National Allocation Plan adopted by the Council of Ministers (and approved by the EU Commission in April 2010). After 2013 the cap on the allowances is for the entire EU, i.e. there is no more obligation of the EU Member States to adopt National Allocation Plans.

On 1 June 2012 the Council of Ministers adopted Third National Plan for Actions with regard to Climate Change for the Period 2013 - 2020.

On 6 July 2012 the European Commission authorised requests from Bulgaria, the Czech Republic and Romania for a continued free allocation of EU Emissions Trading System Allowances to their power sectors beyond 2012. The Commission has taken these decisions under the provisions of the Directive which allow certain Member States exemptions from the general rule that, from 2013 onwards, the power sector must buy all its Allowances at auctions

or in the market. Number of Allowances to be allocated for free to power plants by Bulgaria and year:

	2013	2014	2015	2016	2017	2018	2019	2020	Total
BG	13.542.000	11.607.428	9.672.857	7.738.286	5.803.714	3.869.143	1.934.571	0	54.167.999

Source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/530&format=HTML&aged=0&language=EN&guiLanguage=en>

In March 2014 the Climate Change Mitigation Act (the **CCMA**, last amendments published in State Gazette No 15/16.02.2018) was published and entered into force. It superseded the respective provisions of the EPA and provided a more detailed regulation of issues like the implementation of the government policy on climate change mitigation, the implementation of the EU Emissions Trading Scheme, the administering of the National Registry for Greenhouse Gas Emission Allowance Trading, etc.

For the construction of new and the operation of existing plants as per an appendix to the CCMA a greenhouse gas emissions permit shall be necessary. The permits are issued by the Executive Director of the Environmental Executive Agency for each installation operated by the operator.

The Executive Director of the Environmental Executive Agency shall maintain the National Registry for Greenhouse Gas Emission Allowance Trading and shall be national administrator within the meaning of Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry (as amended by Commission Delegated Regulation (EU) 2015/1844 of 13 July 2015 and Commission Regulation (EU) 2018/208 of 12 February 2018). On 5 September 2014 the Ordinance on the way and order for administering the National Registry for Greenhouse Gas Emission Allowance Trading was published in the State Gazette. The transfer of allowances shall be done in accordance with Regulation (EU) No 389/2013.

- 3.2. No specific requirements and/or restrictions are envisaged in the CCMA regarding the trade in Allowances by persons who are not operators of plants within the meaning of the CCMA (as stated above, operators must obtain greenhouse gas emissions permits for each installation). Therefore, no license or permit is required under Bulgarian law (so far) for trade in Allowances (in contrast to the trade in electricity). The scheme for trading in Allowances is open for participation of natural and legal entities from Bulgaria and from other EU Member States, as well as from third countries in compliance with the international treaties to which Bulgaria is a party. The participants in the scheme for trading in Allowances must be registered in the National Registry for Greenhouse Gas Emission Allowance Trading by the national registry administrator (i.e. by the Executive Director of the Environmental Executive Agency) and must have their accounts and authorized representatives in the National Registry. However, as mentioned, the transfer of allowances shall be done in accordance with Regulation (EU) No 389/2013. This means that in order to purchase, or sell Allowances (and not only to act as intermediaries), participants must be registered in the Union Registry, i.e. they shall have their accounts in the Union Registry, and the transfer is to be registered in the Union Registry.

- 3.3. Legal nature of an Allowances transaction

Our opinion is that Allowances themselves can be considered as financial instruments, in particular as securities, and more particular – as book entry securities ('dematerialized securities').

Additional light on this issue was cast by Regulation (EU) No 389/2013 and in particular by its Art. 40 called 'Nature of allowances and finality of transactions' which read as follows: '*(1) An allowance or Kyoto unit shall be a fungible, dematerialised instrument that is tradable on the market. (2) The dematerialized nature of allowances and Kyoto units shall imply that the record of the Union Registry shall constitute prima facie and sufficient evidence of title over an allowance or Kyoto unit, and of any other matter which is by this Regulation directed or authorised to be recorded in the Union Registry.*' Thus an official definition of the allowances' legal nature was given by the EU legislator (which definition is close to the interpretation given by us above).

4. MiFIA

Please refer to item **C.I.1.3.7** above for more information with regard to the MiFIA and the exemptions under it.

IX. Other Provisions

If you have other recommendations that you would like EFET member companies to consider (for example to fully optimize the EFET General Agreement for a specific purpose such as to support limited trading between two entities both organized and doing business solely in your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter. [Not applicable]

This Legal Opinion is as of this date (13 December 2018) and we do not undertake any obligation to update it or to advise of changes hereafter occurring. We express no opinion as to any matters other than those expressly set forth herein.

Sincerely yours,



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Enclosures:

Annex No 1.1 (*Short overview of Bulgarian insolvency proceedings, laws and relevant terminology*);

Appendix No 1: Rules for Trade in Natural Gas;

Appendix No 2: Natural Gas Market Balancing Rules;

Appendix No 3: Rules for access to the gas transmission and/or the gas distribution networks and the natural gas storage facilities;

Appendix No 4: Daily Imbalance Charge Calculation Methodology;

Appendix No 5: Transport contract with Bulgartransgas EAD;

Appendix No 6: Contract for natural gas sale and purchase for balancing;

Appendix No 7: Contract for the virtual trading point use.