WOLF THEISS

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

1 January 2019

014-4456-5356/2/EUROPE

European Federation of Energy Traders

Amstelveenseweg 998

1081 JS Amsterdam

The Netherlands

EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas

Dear Sirs,

We have been asked to give an opinion on (i) the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas ("**EFET General Agreement**" or "**General Agreement**") and (ii) the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement ("**Credit Support Annex**") as well as other related issues outlined in your instruction letter dated 2 July 2018 ("**Instruction Letter**"). These issues include (i) the enforceability of collateral provided under EFET Credit Support Annex ("**Collateral**"), (ii) validity and enforceability of other provisions of the EFET General Agreement in respect of issues such as Limitation of Liability and Force Majeure and their respective consequences ("**General Enforceability**"), (iii) the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation or other non-written documentation to be eligible for evidencing a legally binding Individual Contract ("**Confirmation Practices**"), (iv) the validity and enforceability of the EFET General Agreement and how this may be affected when certain provisions are modified by the parties ("**Core Provisions**"), (v) the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**"), and (vi) the existence of specific licensing requirements or currency exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("**Regulatory Regime**").

This opinion ("**Opinion**") discusses the issues outlined above in substantially the same order as shown in the Instruction Letter.

The Opinion does not relate to any Individual Contract under the General Agreement and does not give an opinion on any tax, accounting, regulatory or related matters other than to the extent we express an opinion hereunder.

Capitalised terms used in this Opinion, if not otherwise defined herein or in Appendix A and unless the context otherwise requires, shall have the meaning given to them in the General Agreement.

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EXECUTIVE SUMMARY

This executive summary intends to provide a summary of the key conclusions set out in Part C of this Legal Opinion. This executive summary was prepared on the basis of the assumptions and subject to the limitations set out in this Opinion, this is an executive summary of the opinions expressed in this Opinion. This executive summary does not form a part of this Opinion and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having and interpretative effect on the opinions in this Opinion.

Enforceability of Close-out Netting and of Early Termination and Automatic Termination

(a) Close-out netting in a pre-insolvency scenario is generally enforceable (Please refer to Part C.I of this Opinion).

(b) The notice of termination provision of § 10.3 of the General Agreement would be enforceable under the Slovak law and in most cases be upheld by the Slovak courts, except of the situation of the initiation of restructuring proceedings in respect to the Slovak Corporate where the other Party is not one of the Qualified Parties.

(c) Automatic Termination, if elected to apply, would in most cases be upheld by the Slovak courts, except in the event of institution of the restructuring proceedings in respect of a Slovak Corporate where the Other Party is not a Qualified Party, but specific considerations apply in respect to the Early Termination Date. For further clarification please refer to Part C.I.1.5.

(d) Consistently with Articles 68 and 71 of the BRRD, there are also certain restrictions under the Resolution Act and other respective Slovak laws related to a Slovak Bank, Slovak Investment Firm and Slovak Management Company in case of the involuntary administration (in Slovak: *nútená správa*) and resolution proceedings (in Slovak: *rezolučné konanie*) with regards to the termination rights. Under the Resolution Act, the Resolution Council may suspend the termination rights for maximum of 48 hours in the resolution proceedings in relation to Slovak Bank and Slovak Investment Firm. In addition, the termination rights cannot be enforced if the sole ground for the termination is the imposition of involuntary administration or the institution of resolution proceedings in respect of a Slovak Bank, Slovak Investment Firm or a Slovak Management Company.

(e) The close-out netting provisions of the General Agreement would be enforceable under Slovak law in case that a Slovak Party is not subject to any insolvency proceedings.

The close-out netting provisions of the General Agreement would be enforceable under Slovak law in case of a Slovak Party in bankruptcy, restructuring or involuntary administration, except where the General Agreement is entered into between a Slovak Corporate and the Other Party is not one of the Qualified Parties. In such situation, there is a substantial risk that the close-out netting provisions of the General Agreement could be treated as a set-off (in Slovak: *započítanie)* by the Slovak court in bankruptcy, restructuring and involuntary administration and consequently:

- the close-out netting provisions would not be enforceable in the event of the declaration of bankruptcy in respect of a Slovak Corporate because of the reasons set out in Part C.I.1.10; and
- the close-out netting provisions would not be enforceable in the event of the institution of restructuring in respect of a Slovak Corporate because of (i) the reasons set out in Part C.I.1.4, and (ii) the restrictions on termination rights discussed in Part C.I.1.10.

Despite the above concerns as to the enforceability of the close-out netting provisions, the bankruptcy administrator of a Slovak Corporate cannot "cherry pick" Individual Contracts.

Section 80 of the Resolution Act safeguards close-out netting, except that protected deposits and client assets can be transferred separately or carved out from the transfer in the course of resolution proceedings. Consequently, enforceability of close-out netting provisions of the General Agreement entered into with a Slovak Bank, Slovak Investment Firm and Slovak Management Company should not be negatively affected by the commencement of resolution proceedings to the extent none of the Transactions concerns protected deposits or client assets.

No restrictions on enforceability of termination and close-out netting provisions of the General Agreement apply in respect of Slovak Municipalities and Slovak Regions, because these entities cannot be subject to insolvency proceedings affecting the rights of the creditors in general.

<u>Multibranch Parties</u>

Financial Institutions

The conclusions in Parts C.II.1 and C.II.2 of this Opinion concerning the enforceability of close-out netting under the General Agreement would not change if a Slovak Bank entered into the General Agreement and then conducted business under the General Agreement on a multibranch basis prior to its insolvency.

The treatment of the General Agreement as a single, unified agreement would not be affected by the treatment of the General Agreement or Individual Contracts by a bankruptcy administrator, in a jurisdiction where close-out netting may be unenforceable.

If Country H is a Member State, then the insolvency proceedings in respect of Party F (which is a third country financial institution), including any of its assets situated in the territory of the Slovak Republic, will be governed solely by the laws of the relevant Member State (i.e. no separate proceedings will be possible in respect of a Slovak Branch).

If Country H is not a Member State, separate proceedings under the Bankruptcy Act can be initiated in respect of a Slovak Branch or in respect of the assets of Party F located in the territory of the Slovak Republic.

Foreign corporate Multibranch Parties

In case Party F is a foreign corporate having its centre of main interests in Country H, which is a Member State, secondary proceedings under Article 3(2) of the EU Insolvency Regulation could be commenced in the Slovak Republic. The opening of such secondary proceedings would have the following consequences:

- If the Other Party has its centre of main interest outside the Slovak Republic, the claims of the Slovak Branch against the Other Party under the General Agreement should not fall within the scope of the secondary proceedings commenced in the Slovak Republic in connection with the Slovak Branch. However, this approach is not tested with Slovak courts and we cannot confirm that the Slovak court would adopt the same view.

- If the Other Party has its centre of main interest in the Slovak Republic and the Safe Harbour Provisions do not apply, there is a risk that the bankruptcy administrator of a Slovak Branch could try to require the Other Party to pay the mark-to-market value of the Individual Contracts entered into with the Slovak Branch and that the separate insolvency proceedings with respect to the Slovak Branch would thus upset the close-out netting envisaged by the General Agreement. If the Safe Harbour Provisions do apply, there are valid arguments as to why the Termination Amount should not be divided into an amount payable with respect to the transactions entered into with a Slovak Branch and an amount payable with respect to other transactions entered into with Party F under the same General Agreement. However, this approach is not tested with Slovak courts and we cannot confirm that the Slovak court would adopt the same view.

If Country H is not a Member State, separate proceedings under the Bankruptcy Act can be initiated in respect of a Slovak Branch or in respect of the assets of Party F located in the territory of the Slovak Republic. If the Safe Harbour Provisions do not apply, there is a risk that the bankruptcy administrator of a Slovak Branch could try to force the Other Party to pay the mark-to-market value of the Individual Contracts entered into with the Slovak Branch and that the separate insolvency proceedings with respect to the Slovak Branch would thus upset the close-out netting envisaged by the General Agreement. If the Safe Harbour Provisions do apply, there are valid arguments as to why the Termination Amount should not be divided into an amount payable with respect to the transactions entered into with a Slovak Branch and an amount payable with respect to other transactions entered into with Party F under the same General Agreement. However, this approach is not tested with Slovak courts and we cannot confirm that the Slovak court would adopt the same view.

Collateral

The Credit Support Annex relies for its effectiveness on the close-out netting provisions of the General Agreement. Slovak netting legislation sets out that the close-out netting amount calculation may include the value of collateral provided by one party to the other. Consequently, to the extent that the close-out netting provisions of the General Agreement would be enforceable under Slovak law (please refer to discussion on the Safe Harbour Provisions in Part C.I.1.2 below), § 11 of the Credit Support Annex would be enforceable as well.

We believe that although there is a residual risk of recharacterisation, there are solid arguments under both Slovak national law and EU law as to why Slovak courts should not permit the recharacterisation (please refer to discussion in Part C.III.2.)

General Enforceability and Core Provisions

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, we understand that the General Agreement stipulates the details of the contractual relationship between the parties and it shall be enforceable before the Slovak court in general.

A. DOCUMENTS CONSIDERED

For the purpose of this Opinion the following documents were considered in accordance with the Instruction Letter.

- EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0(a), published 11 May 2007)[1],

- EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010)[2],

- EFET Allowances Appendix (Gas) ("Phase IV (Gas) Appendix") to General Agreement Concerning the Delivery and Acceptance of Gas Version 2.0 (a)/May 11, 2007 (Version 4.0/February 28, 2018),

- EFET Amendment Letter to the Allowances Appendix (Version 3.0/April 3 2012),

- EFET Allowances Appendix (Gas) to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published 3 April 2012),

- EFET Amendment Letter to the Allowances Appendix Version 2.0 (Version 2.0, published 3 April 2012),

- EFET VAT Agreement for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 20 November 2005),

- EFET IBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0/4 December 2017),

- EFET PVB Appendix Version 1.0 to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 1.0, published 19 September 2016),

- EFET PSV Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published January 2007),

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[1] The EFET General Agreement constitutes a bilateral master agreement governing all Individual Contracts the Parties may enter into for the purchase, sale and acceptance of natural gas. The EFET General Agreement provides that all Individual Contracts and the General Agreement form a single Agreement (§ 1.1 of the General Agreement), which upon the occurrence of a Material Reason, including a winding-up, insolvency or attachment, may be terminated as a whole only (§ 10.3(a) of the EFET General Agreement). Except as specifically provided (e.g. in the case of termination of only the Individual Contracts for emissions trades under an EFET General Agreement supplemented by an Emissions Allowances Appendix without termination of the Individual Contracts under that same agreements concerning the trade of Natural Gas), the termination and close-out under the EFET General Agreement of only certain Individual Contracts, absent the termination of all outstanding Individual Contracts, is not permitted. Following the termination of the Agreement a Termination Amount is to be calculated based on all positive and negative Settlement Amounts as determined in compliance with § 11 of the EFET General Agreement.

[2] The EFET Credit Support Annex provides for the transfer of full ownership in the collateral to the Secured Party that acquires the right of complete and unrestricted use of the collateral. Upon termination of the EFET General Agreement, any collateral provided but not yet re-transferred by the parties is to be valued and included in the close-out amount to be determined pursuant to § 11 of the EFET General Agreement (§ 11 of the EFET Credit Support Annex). One special feature of the EFET Credit Support Annex is the definition of "Exposure", which includes all sums due and payable, and the Value of all the commodity delivered, but for which payment has not been received. Another particularity is the inclusion of Letter of Credits.

- Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 2.0, published 20 September 2013),
- EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 26 May 2014),
- EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published April 2011),
- EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published on 14 July 2006),
- EFET TTF Appendix Guidance Notes (Version 2.0, published 20 September 2006),
- EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/October 2018),
- EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published 30 March 2015),
- EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 31 March 2008),
- EFET ZBT 2004 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published June 2006),
- EFET ZBT 2012 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 19 April 2013),
- EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 4 December 2017),
- EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 2016),
- EFET UK 5:5 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 7 September 2015),
- EFET UK Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 19 April 2013),
- EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 7 September 2015),
- EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published December 2006),
- EFET GasPool Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas Version 2.0/January 6, 2003 and Version 2.0(a)/May 11, 2007 (Version 1.1(a), published 1 March 2012),

- EFET ITAB Appendix Guidance Notes (published 20 January 2010),
- EFET Gas Capacity Appendix (Fluxys/GRTgaz) (Version 1.0, published 31 December 2008),
- EFET Polish VP Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 1.0, published 14 December 2013),
- EFET Individual PRISMA Gas Capacity Contract (version 2.0, published 15 October 2014),
- EFET Individual PRISMA Gas Capacity Contract (version 1.0, published 7 May 2014),
- Guidance Notes for the Individual PRISMA Gas Capacity Contract (published 14 May 2014),

For the purpose of Part C.V (Confirmation Practices) only:

- EFET Electronic Confirmation Agreement (published 28 June 2005);
- Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2) to the Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 3 April 2012).

For the purpose of Part C.VI (Core Provisions) only:

- EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005);
- EFET Master Netting Agreement (Version 1.0, published June 2010);
- EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003);
- EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011);

B. SCOPE OF REVIEW

B.I ASSUMPTIONS

B.I.1 General Assumptions

Based on the Instruction Letter the General Assumptions on which the Opinion is based are the following:

1. Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organised or has its centre of main interest in the Slovak Republic ("**Party A**" or "**Slovak Party**") and the other Party ("**Other Party**") (together the "**Parties**" or "**Counterparties**") and are governed (unless otherwise specified in this Opinion) by Slovak law. Please refer to B.I.2.2 for further description of the Slovak Party.

2. The relevant EFET General Agreement is governed by the laws of Germany or England and Wales. (However with respect to Part C.I.1 (Close-out Netting), Part C.II (Multibranch) and Part C.VII (Governing Law) the assumption is broader in order to cover also General Agreements governed by foreign/Slovak law).

3. Each EFET General Agreement and of the above Annexes (including the Credit Support Annex) is enforceable under the laws of any jurisdiction for purposes of private international law (other than Slovak law) and each counterparty has duly authorised, executed and delivered, and has the capacity to enter into each document.

4. On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B.

5. 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. All products – except for emission allowances and derivatives thereon, may only be settled physically and are traded on an OTF (former non-MTF).

B.I.2 Further Assumptions

In addition to the General Assumptions given in the Instruction Letter, the opinions in this Opinion are given on the basis of the assumptions and are subject to the limitations set out in Parts B.I.2, B.I.3 and B.II in each case in their entirety. The opinions given in this Opinion are strictly limited to the matters expressly stated under point C (*Opinions*) below and do not extend to any other matters. For the purpose of this Legal Opinion, we have further assumed that:

1. The Agreements are made between at least one Party incorporated or organised or having its centre of main interest in the Slovak Republic (**Party A** or **Slovak Party**) and the other Party (**Other Party**) (together the Parties) and are governed (unless otherwise specified in this Legal Opinion) by Slovak law;

2. The Slovak Party is one of the following:

(a) a bank (in Slovak: *banka*) incorporated in the Slovak Republic and licensed under Act No. 483/2001 Coll. on Banks, as amended ("**Act on Banks**") ("**Slovak Bank**") and a Slovak branch of a foreign bank;

(b) a securities broker (in Slovak: *obchodník s cennými papiermi*) incorporated in the Slovak Republic and licensed under Act No. 566/2001 Coll. on Securities and Investment Services, as amended ("**Securities Act**") ("**Slovak Investment Firm**");

(c) an insurance company (in Slovak: *poisťovňa* or *zaisťovňa*) incorporated in the Slovak Republic and licensed under Act No. 39/2015 Coll. on Insurance, as amended ("**Insurance Act**") ("**Slovak Insurance Company**");

(d) an investment fund management company (in Slovak: *správcovská spoločnosť*) incorporated in the Slovak Republic and licensed under Act No. 203/2011 Coll. on Collective Investment, as amended ("**Act on Collective Investment**") ("**Slovak Management Company**") acting in its own name and own account and not as a manager of a fund;

(Slovak Parties referred to in paragraphs (a) to (d) together as "**Slovak Financial Institutions**");

(e) a company[3] (in Slovak: *obchodná spoločnosť*) incorporated in the Slovak Republic under Act No. 513/1991 Coll. the Commercial Code, as amended ("**Commercial Code**") either in the form of a limited liability company (in Slovak: *spoločnosť s ručením obmedzeným*, abbreviation *s. r. o.* or *spol. s r. o.*), a joint-stock company (in Slovak: *akciová spoločnosť*, abbreviation *a. s.*[4]), a simple joint stock company (in Slovak: *jednoduchá spoločnosť na akcie*, abbreviation j. s. a.), a general commercial partnership (in Slovak: *verejná obchodná spoločnosť*, abbreviation *v. o. s.*) or a limited partnership (in Slovak: *komanditná spoločnosť*, abbreviation *k. s.*) or a Societas Europea (in Slovak: *európska spoločnosť*) incorporated in the Slovak Republic under Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE), as amended and Act No. 562/2004 Coll. on a European Company, as amended (each "**Slovak Corporate**"); or

(f) a Slovak municipality or city under Act No. 369/1990 Coll. on Municipalities, as amended ("**Slovak Municipality**") and a Slovak self-governing region under Act No. 302/2001 Coll. on Self-Governing Regions ("**Slovak Region**" and together with Slovak Municipality "**Slovak Municipality and Slovak Region**").

3. The Agreements and each respective Individual Contract are legally binding and enforceable against both Parties under the laws by which they are expressed to be governed, if not the laws of this jurisdiction and that none of the opinions expressed below will be affected by the

[3] Each of a Slovak limited liability company and a Slovak joint-stock company falls within the category of "Corporation" as defined in other legal systems, and each of a Slovak general commercial partnership and a Slovak limited partnership falls within the category of "Partnership". Please note, however, that Slovak law does not make a clear distinction between the concepts of "Corporation" and "Partnership". All Slovak partnerships have legal personality.

[4] Most major Slovak energy market participants are incorporated as joint-stock companies. This includes the Slovak natural gas transmission network operator SPP – distribúcia, a.s.

laws (including, without limitation, the insolvency laws and the public policy) of any jurisdiction outside Slovakia.

4. Each Party to the Agreements and Individual Contracts is duly incorporated and validly exists under the applicable laws of the jurisdiction of its incorporation.

5. Each Party to the Agreements and Individual Contracts has the capacity, power and authority, and each Party to the Agreements and Individual Contracts has fulfilled all internal authorisation procedures and has received all approvals to execute or issue (as applicable), and to exercise its rights and perform its obligations under the Agreements and Individual Contracts.

6. Each Party entering into any of the Agreements and Individual Contracts has all necessary authorisations of any public authority and licenses to carry out any and all acts contemplated in the Agreements and Individual Contracts for such Party and complies with all supervisory laws for the acts contemplated in the Agreements and Individual Contracts (including, without limitation, financial market rules, energy market rules) in all relevant jurisdictions.

7. The by-laws, guidelines or other rules which exist with respect of a Party to the Agreements and Individual Contracts and/or the respective managing director(s) of a Party to the Agreements and Individual Contracts and/or the supervisory board of a Party to the Agreements and Individual Contracts do not foresee any regulation with respect to any limitation to or additional corporate authorization necessary for a Party to the Agreements and Individual Contracts entering into the Agreements and Individual Contracts or – if such requirement is given – it is complied with by such Party. The statutory body of a Party to the Agreements and Individual Contracts has approved the entering into the Agreements and Individual Contracts either by written or by oral resolution.

8. No Material Reason for termination as outlined in § 10.5 with respect to a Party has occurred and is continuing when entering into the Agreements and Individual Contracts.

9. The Agreements and any Individual Contracts under it are entered into prior to the formal commencement of any insolvency proceedings against either Party.

10. The Agreements and Individual Contracts are mutual between the Parties in the sense that each is personally and solely liable on its own account as regards obligations owned by it and is the sole beneficial owner of obligations owed to it.

11. The Agreements and Individual Contracts under it were entered into, and each delivery and payment made thereunder were made at arm's-length so that no element of gift or undervalue from one Party to the other Party is involved and without any intention of a Party to prefer the other Party in the event of its insolvency.

12. All Individual Contracts entered into between the Parties and governed by the Agreements will be of the types defined in Appendix B.

13. Either both Parties are commercial undertakings and the contractual relationships between them relate to their business activities or one Party is a commercial undertaking and the contractual relationship relates to its business activity and the other Party is a public law entity

(state, self-governing territorial unit, municipality or any other entity controlled or financed by a public law entity) and the contractual relationship relates to the provision of public services or the public law entity's own operation. Neither of the Parties is a consumer.

14. Each of the Agreements and Individual Contracts have been entered into, and each of the transactions contemplated thereunder is carried out on arm's length terms by each of the parties thereto and for bona fide commercial reasons, for the purpose of carrying out their respective businesses and for their own benefit.

15. There are no other dealings, agreements or understandings (written or oral) between the Parties that affect, amend, supersede or qualify any Agreement or Individual Contract; in particular none of the Parties has entered or will enter into any Agreements and Individual Contracts with any purpose other than those apparent from such Agreements and Individual Contracts or to the prejudice of any of its creditors.

16. Subject to the Part C.VI below no provision of the Agreements and Individual Contracts that is necessary for the giving of this Opinion has been altered in any material respect. No selection contemplated by the General Agreement and made in the Election Sheet to that General Agreement or in a Confirmation of a Transaction under that General Agreement would be considered a material alteration for this purpose.

17. The obligations of each Party under the Agreements and Individual Contracts are legal, valid, binding and enforceable under the relevant governing law (other than Slovak law). Insofar as any obligation falls to be performed in any jurisdiction outside the Slovak Republic, its performance will not be illegal or ineffective by virtue of the laws of that jurisdiction;

18. Except for certain regulatory matters discussed in C.VIII, each Party has the relevant power and capacity to enter into and perform its obligations under the Agreements and Individual Contracts and such Agreements and Individual Contracts are properly executed, and the Election Sheet to the General Agreement is properly completed by both Parties in accordance with their constitutional documents and all applicabustle laws.

19. Each Party takes all necessary steps to authorize, execute, deliver and perform the Agreements and Individual Contracts and all signatures on the executed documents will be genuine.

20. The Parties are personally liable as principal for their obligations under the Agreements in relation to each Individual Contract and are beneficially entitled to their rights under such Agreements in relation to each Individual Contract (in other words, there is full mutuality between the Parties).

21. A Director, procurist (in Slovak: *prokurista*) or any other person authorized to act on behalf of one of the Parties to the Agreements and Individual Contracts (or individuals close to, or any persons acting on the account of, any of these individuals) is not, at the same time, authorized to enter into the Agreements and Individual Contracts on behalf of the other Party to the Agreements and Individual Contracts.

22. One Party to the Agreements and Individual Contracts is not a founder of or a direct equity interest holder (or any persons controlling or controlled by any of these persons) in the other

Party to the Agreements and Individual Contracts.

23. The Agreements and each Individual Contract are entered into by each Party prior to formal commencement of, or filing with the relevant authority of any petition for, any insolvency, bankruptcy, composition, restructuring, dissolution, liquidation, administration or winding-up proceedings against such Party.

24. All signatures of all persons signing any Agreements and Individual Contracts are authentic and the persons purported to have signed any Agreements and Individual Contracts have signed them.

25. Each of the statements of matters of fact contained in the Agreements and Individual Contracts are true, accurate and complete and that all representations and warranties given by any of the Parties to the Agreements and Individual Contracts are, and will at any time, be true and accurate.

26. The Agreements and each Individual Contract are entered into at a time when the Slovak Party is not insolvent (in Slovak: *v úpadku*) under the Bankruptcy Act[5] and entering into the Agreements and any Individual Contract will not result in the insolvency (in Slovak: *úpadok*) of the Slovak Party under the Bankruptcy Act.

27. The registered seat and the "centre of main interests" (as referred to in the EU Insolvency Regulation)[6] of the Slovak Party is situated in the territory of the Slovak Republic.

28. The intention of the Parties is not to achieve a "concealed" act, being a secured loan or any other act.

29. In case the Agreements or any Individual Contract is a mandatorily published agreement within the meaning of the Disclosure Act, it has been duly published in accordance with the Disclosure Act.

30. If any Party to the Agreements or any Individual Contract shall be registered in the Register of Partners of Public Sector, such Party was duly and timely registered.

31. If the General Agreement is governed by Slovak law, amendments to the General Agreement have been made substantially as set out in Appendix D.

32. No foreign law affects the conclusions stated in this Opinion.

B.I.3 Additional Assumptions

B.I.3.1 For the purpose of Part C.I.1 (*Winding-up, Insolvency or Attachment*), Part C.VI (*Core Provisions*) our Opinion is based, in accordance with the Instruction Letter, on the following additional assumptions:

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5 Act No. 7/2005 Coll. on Bankruptcy and Restructuring, as amended ("**Bankruptcy Act**")

6 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("**EU Insolvency Regulation**")

1. The relevant EFET General Agreement is governed by any law (including English or German law or the laws of your jurisdiction).

2. After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary case under the insolvency laws of the Slovak Republic and, subsequent to the commencement of the insolvency (in Slovak: *Začatie konkurzu*), either Party A or an insolvency official seeks to assume the confirmations representing profitable Individual Contracts for the insolvent Counterparty.

B.I.3.2 For the purpose of Part C.II.1 (*Slovak Multibranch Party*) Part C.VI (*Core Provisions*), our Opinion is based, in accordance with the Instruction Letter, on the following additional assumption:

1. Party A has entered into Individual Contracts under the EFET General Agreement through offices in the Slovak Republic 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 the Slovak Republic.

B.I.3.3 For the purpose of Part C.II.2 (*Foreign Multibranch Party*) Part C.VI (*Core Provisions*), our Opinion is based, in accordance with the Instruction Letter, on the following additional assumption:

1. 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 the Slovak Republic 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 the Slovak Republic ("**Slovak Branch**").

2. 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.

B.I.3.4 For the purpose of Part C.III (*Collateral*) our Opinion is based on the following additional assumptions:

1. 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.

2. 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.

3. Furthermore the term "Collateral", is understood to be equivalent of the term "Eligible Credit

Support" as defined in the Credit Support Annex.

In order to provide more explicit opinions and eliminate ambiguity to the most extent possible, for the purpose of this Part we have further assumed the following:

4. Letters of Credit may have the form of a (a) bank guarantee (in Slovak: *banková záruka*) as provided in Section 313 et seq. of the Commercial Code, and/or (b) letter of credit (in Slovak: *akreditív*) as provided in Section 682 et seq. of the Commercial Code.

5. Parent Company Guarantee means the undertaking of the parent company of Party A to pay to Party B any amounts due pursuant to the terms of the EFET General Agreement upon the request of Party B preceded by the default of payment of those amounts by Party A.

6. Under Slovak law, a distinction is to be made between the various forms of Eligible Credit Support (*i.e.* Cash, Letters of Credit, and Parent Company Guarantee) in respect to the regulation thereof.

B.I.3.5 For the purpose of Part C.V (*Confirmation Practices*) our Opinion is based on the following additional assumptions:

1. 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 or other means of electronic transmission).

2. 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.

B.I.3.6 For the purpose of Part C.VII (*Governing Law, Arbitration and Jurisdiction*) our Opinion is based, in accordance with the Instruction Letter, on the following additional assumption:

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

B.II LIMITATIONS

The opinions set out in this Opinion are subject to the following limitations:

B.II.1 Limitations regarding the enforceability of claims

1. The term "*enforceable*" means that each obligation or document is of a type and form enforced by the courts of the Slovak Republic. It is not certain, however, that each obligation or document will be enforced in accordance with its terms in every circumstance, enforcement being subject to, *inter alia*, the nature of the remedies available to the courts of the Slovak Republic, the powers of such courts to stay proceedings, provisions relating to prescription

periods within which claims may be brought under the laws of the Slovak Republic and other principles of law of general application (including, but not limited to, general provisions in respect of unfair contract terms) and all limitations resulting from the laws of bankruptcy, insolvency, liquidation, resolution proceedings or other law affecting generally the enforcement of creditors` rights.

2. The enforceability of the Agreements may be limited by:

- bankruptcy, insolvency, restructuring, moratorium or other similar laws affecting creditors' rights generally;
- general principles of law, including, without limitation, concepts of materiality, good morals (in Slovak: *dobré mravy*), reasonableness, good faith (in Slovak: *dobrá viera*) and fair dealing (in Slovak: *zásady poctivého obchodného styku*); and
- rules of enforcement of judgments and arbitration awards and Section 39 of the Civil Code[7], pursuant to which any legal act which, by virtue of its content or its purpose, breaches (in Slovak: *odporuje zákonu*) or circumvents (in Slovak: *obchádza zákon*) the law or is contrary to good morals (in Slovak: *prieči sa dobrým mravom*) is not valid.

3. With respect to any authorization in the Agreements and Individual Contracts, Section 22 (2) of the Civil Code, provides that no person whose interest is in conflict with the represented person can represent the same.

4. With respect to any authorization in the Agreements and Individual Contracts, Section 33b (3) of the Civil Code provides that an authorizing person may not validly waive the right to revoke the power of attorney any time. Terms excluding this right and establishing irrevocable authorization may be unenforceable.

5. Under private international law, the relevant law governing the perfection of a security in an asset should be the law of the place where the asset is located (situs). Accordingly, if any Collateral is located outside of the territory of the Slovak Republic, the perfection requirements of the jurisdiction where such Collateral is located would apply to the perfection of the security over such Collateral.

6. The provisions on severability of the provisions in the Agreements and Individual Contracts, which are unenforceable or invalid, from the other provisions of the Agreements and Individual Contracts shall be considered, in its own discretion, by the competent court.

7. Claims may become time-barred under laws relating to limitation periods (in Slovak: *premlčané*) or may be or become subject to set-off or counterclaim.

8. In order to be admissible as evidence in proceedings before Slovak courts, any documents executed or issued in a language other than Slovak or Czech must be officially translated by a sworn translator and the Slovak court's decision will be based on such translation.

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[7] Act No. 40/1964 Coll., the Civil Code as amended ("**Civil Code**")

9. According to Rome I[8], a court which is hearing a dispute arising out of the Agreements and Individual Contracts may:

- be forced to apply provisions of the law of the country (other than law chosen by the Parties) with which all other elements relevant to the situation at the time of the choice of law are connected, which cannot be derogated from by agreement (in Slovak: *ustanovenia právneho poriadku, od ktorých sa nie je možné zmluvne odchýliť*);

- be forced to apply provisions of law of one or more of the Member States of the European Union (other than law chosen by the Parties) in which all other elements relevant to the situation at the time of the choice of law are located, which cannot be derogated from by agreement (in Slovak: *ustanovenia práva Európskej únie, od ktorých sa nie je možné zmluvne odchýliť*);

- be forced to apply overriding mandatory provisions (in Slovak: *mandatórne ustanovenia*) of the law of the forum (*i.e.* the place where the dispute is being heard);

- have regard to overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those mandatory overriding provisions render the performance of the relevant Agreements or Individual Contracts unlawful;

- refuse to apply provisions of law insofar as they are manifestly incompatible with public policy (in Slovak: *verejný poriadok*) of the forum.

10. Slovak courts do not have a history of interpreting complex commercial agreements, including without limitation, the Agreements and Individual Contracts.

11. Enforcement of the obligations under an Agreements and Individual Contracts may be limited by the general principle of good faith. Courts may not grant enforcement in the event they take the view that a right has not been exercised in good faith or that it has been exercised in such a manner as to constitute an abuse of rights.

12. Enforcement may be limited by the provisions of Slovak law applicable to agreements held to have been frustrated by events happening after their execution.

13. Enforcement may be further refused by Slovak courts, if the recognition of the enforceability of the obligation would manifestly be contrary to Slovak public policy, or it would be irreconcilable with an earlier judgement rendered by Slovak courts in a dispute between the same parties on the same basis; or if the jurisdiction of the other court rendering the judgement the enforcement of which is sought in Slovakia is in conflict with Slovak rules pertaining to special or exclusive jurisdiction.

14. A party to an agreement may be able to avoid its obligations under that agreement (and may have other remedies) where it has been induced to enter into that agreement by a

[8] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) ("**Rome I**")

misrepresentation and the Slovak courts will generally not enforce an obligation if there has been fraud.

15. Under the laws of this jurisdiction, where any Party is vested with discretion or may determine a matter, the laws of this jurisdiction may require that such discretion is exercised or determination made reasonably.

16. Any provision in the EFET General Agreement providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any Party thereto. The courts of this jurisdiction may regard any calculation, determination or certification as no more than prima facie evidence of the matter calculated, determined or certified.

17. Unless the agreement stipulates otherwise, a party to an agreement is not entitled to terminate it upon default by the other party of obligations or covenants which are insignificant in relation to the main obligation under such an agreement.

18. If an agreement requires one party to perform its obligations first, that party may postpone its performance or seek additional security if the position of the other party deteriorates so that the performance of such other party's obligations is put into question.

19. Any subsidies or other funds obtained by a Slovak Party from the state budget or from the budget of the European Union or any assets purchased from funds originated from the state budget or from the budget of European Union are immune from attachment and from execution and would not be available to creditors in any enforcement proceedings. As from 28 December 2015, virtually all assets of state-owned heat suppliers are immune from attachment and from execution. Certain assets of Slovak Municipalities and Slovak Regions are also immune from attachment and from execution.

20. This Opinion does not cover entering into the Individual Contracts other than in general terms, nor does it cover the performance of the Individual Contracts, since at this stage we are not aware of the terms of all the Individual Contracts that may be entered into under the General Agreement (which is a long-term framework agreement), and since the Individual Contracts themselves may be executed pursuant to Confirmations which contain terms which may render the Individual Contracts illegal, unenforceable or where the Parties would not be permitted to enter into them.

21. If a foreign exchange emergency is declared by the Government of the Slovak Republic under the Foreign Exchange Act[9], payments in foreign currency or abroad generally may be suspended for the duration of such emergency (not to exceed three months at any one time).

22. Pursuant to Section 21 of the Energy Act[10], a gas distribution network operator has a right to declare and recall a crisis situation in the gas industry. In accordance with the framework

[9] Act No. 202/1995 Coll. on Foreign Exchange, as amended ("**Foreign Exchange Act**").

[10] Act No. 251/2012 Coll. on Energy, as amended ("**Energy Act**").

established by the Regulation on Security of Gas Supply[11] and the Directive concerning measures to safeguard security of natural gas supply[12], such crisis situation can have three levels: (i) state of emergency, (ii) alert and (iii) early warning. The gas distribution network operator can order restrictive measures which may include interruption of gas supply in certain order set forth by the Energy Act, depending on who is the ultimate consumer.The Ministry of Economy may either (i) acknowledge the crisis situation, (ii) order gas distribution network operator to recall the crisis situation, or (iii) request an assistance from the EU or another EU Member State.

23. Claims under the Agreements may not be submitted to arbitration proceedings with respect to any disputes arising in connection with bankruptcy, liquidation, restructuring, administration or similar proceedings, or in connection with the enforcement of an arbitration award or in connection with other issues which cannot be resolved by arbitration under Slovak law.

24. A Slovak court may in certain circumstances commence proceedings against either Party, even where proceedings have already begun in a foreign court.

25. Slovak courts may not give effect to any indemnity for legal costs incurred by a litigant in proceedings before Slovak courts.

26. Under Slovak law, indemnity is recognized under (i) claim for damages that consists of actual damage and lost profit, resulting from breach of a contractual or mandatory obligation and (ii) promise of indemnity (in Slovak: *sľub odškodnenia*). Pursuant to Article 725 of the Commercial Code, under a promise of indemnity, the promisor (in Slovak: *sľubujúci*) undertakes to indemnify the promisee (in Slovak: *príjemca sľubu*), if the promisee suffers damages as a result of his action performed upon the promisor's request without having a duty to perform such action. Moreover, pursuant to Article 727 of the Commercial Code, the promisor must compensate the promisee also for all the costs incurred as a result of his actions requested by the promisor. Thus, for the indemnity to be enforceable under Slovak promise of indemnity, it is necessary to specify action that the promisee is not obliged to perform but which the promisor requested him to take and as a result, the promise of indemnity applies to such action.

27. There could be circumstances in which a Slovak court would not treat as conclusive those certificates and determinations which the Agreements state to be so treated.

28. The Disclosure Act[13] requires publication on the internet of the full wording of most written contracts (including written amendments to existing contracts) entered into by certain obliged Slovak public and quasi-public counterparties[14] after 31 December 2010. A breach of the disclosure obligation causes the relevant contract to be unenforceable and automatically (after three months) void under Slovak law. However, an exemption applies that the contracts

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[11] Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010.

[12] Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply.

[13] Act No. 211/2000 Coll. on Access to Information, as amended ("**Disclosure Act**").

[14] The obliged Slovak parties for the purpose of the Disclosure Act, include mainly government bodies, municipalities, regions, other public administration bodies and also legal persons established under specific legislation or established by the mentioned legal persons. This includes certain Slovak Corporates established by public entities.

related to financial instruments entered into after 31 December 2011 are not subject to the disclosure obligation.

29. Under the Public Sector Partners Act[15], which came into force as of 1 February 2017, recipients of funds or certain other performances through almost any transactions with the state or state-related parties which include *inter alia* any Slovak Corporate controlled by the state or public entity or in which the state or other public entity can appoint majority of management or supervisory body (jointly the "**Public Sector**") are required to register as public sector partners (the "**Public Sector Partners**") in the public sector partners register (the "**Register**") established by the Public Sector Partners Act and disclose information on their ownership structure, including their ultimate beneficial owners. A *de minimis* exemption will apply if recipient receives no more than EUR 100,000 in a single payment or EUR 250,000 in several payments in aggregate in a calendar year from the Public Sector.

The Public Sector Partners Act contains sanctions which may be imposed on, and adverse consequences affecting, the Public Sector Partners for breaching certain obligations under the Public Sector Partners Act during or after registration in the Register (including, without limitation, the obligation to provide correct or complete information, update any out-dated information in the Register or verify whether the information in the Register is accurate). Such sanctions include fines which may be imposed on the Public Sector Partner or deletion of the Public Sector Partner from the Register by the registration authority. The adverse consequences include the right of the Slovak entity to suspend payments or withdraw from relevant contract.

Finally if a Slovak Party is registered in the Register under the Public Sector Partners Act or it has been registered in the Register in the past five years prior to the declaration of its bankruptcy or opening of its restructuring, the creditor of such debtor who is not a public administration body and whose claims against such Slovak Party exceed the aggregate amount of EUR1,000,000 is considered to be such debtor's related party within the meaning of Section 9 of the Bankruptcy Act until it evidences to the insolvency administrator that it has been registered in the Register. On this basis, if bankruptcy of such Slovak Party is declared or restructuring of such Slovak Party is opened, the Other Party will be required to register in the Register; otherwise it will be regarded as such Slovak Party's related party and its claims will be considered as subordinated related-party claims.

B.II.2 Other limitations

1. We express no opinion as to matters of fact.

2. We express no opinion as to the validity and enforceability of any provisions of any master trading agreements other than the EFET General Agreement. We express no opinion as to the validity and enforceability of any provisions of the EFET General Agreement other than those to which express reference is made in this Opinion.

3. We express no opinion as to whether the method for settling the claims arising from the Individual Contracts under the EFET General Agreement is acceptable and recognised on the

[15] Act. No. 315/2016 Coll. on the register of public sector partners, as amended ("**Public Sector Partners Act**").

market for transactions set out in Appendix B to the Instruction Letter and this Opinion, or whether it is eligible for recognition for risk-reducing or other similar purposes.

4. Based on the Instruction Letter we were not requested to analyse, and therefore we do not express opinion on the application of the terms of the EFET General Agreement if termination is triggered by insolvency of a Party's Credit Support Provider.

5. If a Party to any of the Agreements and Individual Contracts is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Community or Slovak sanctions implemented or effective in Slovakia, or is otherwise the target of any such sanctions, then the obligations of the other Party to that Party under the EFET General Agreement may be unenforceable or void.

6. The opinions given in this Opinion are governed by and relate only to Slovak law as applied by the Slovak courts as at today's date. We are unaware of any practice of Slovak courts in the application of legal provisions governing close-out netting and financial collateral agreements. We are also unaware of any such practice of the Slovak authorities in the application of sector-specific insolvency legislation. Consequently, our views set out hereunder cannot be viewed as established in practice, but should rather be viewed as an interpretation of Slovak legal provisions governing the relevant matters.

7. In this Opinion Slovak legal concepts are expressed and described in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying Slovak law concepts. Therefore, this Opinion is issued and may only be relied upon the express condition that any issues of interpretation or liability arising hereunder will be governed by and construed in accordance with Slovak law and all disputes in relation to this Opinion will be brought before the courts of Slovakia.

8. The EU Insolvency Regulation is not applicable in case of Denmark. We strongly advice the parties to request separate external legal advice in case of any proceedings with a Danish Counterparty.

9. We have not advised as to matters of the tax law and practice.

B.III POTENTIAL PARTIES

Further to the Instruction Letter, we were required to give an opinion in respect of potential party types as specified in B.I.2 of this Legal Opinion. Without prejudice to this, when assessing the potential parties to the Agreement, the following needs to be taken into account.

1. As indicated in C.VIII of this Legal Opinion, according to Energy Act, undertaking business in the energy sector includes *inter alia* also the generation, transmission, distribution, storage and supply of the natural gas. For these kind of activities, a special licence issued by the RONI is required.

2. The subject of the natural gas market comprises the supply of natural gas, connection to the transmission system, distribution system, transmission network and distribution network, access to the transmission system and the transmission of natural gas and

access to distribution system and distribution of natural gas in the defined territory, access to the storage facilities of natural gas and storing of natural gas, the provision of system services in the energy sector, and the connection and access of new natural gas producers to the system or to network.

3. Under the Energy Act, the natural gas market participants are:

- the natural gas producer,
- the transmission system network operator,
- the distribution system network operator,
- the natural gas storage facility operator,
- the natural gas consumer,
- the natural gas supplier.

4. If the subject is considered as a natural gas supplier under the Energy Act, such subject is obliged to have a special licence issued by RONI[16]. Moroeover each subject which trades with natural gas, stores natural gas or operates a liquefied gaseous hydrocarbon distribution plant within the territory of the Slovak Republic is obliged to have a licence issued by RONI. Such licence can be obtained by any entity or natural person who meets the statutory requirements and the law does not contain further restrictions based on the type of an entity (restrictions may arise under sector-specific regulations e.g. ability of an entity to perform energy trading may be prohibited or limited by industry specific applicable laws).

5. We note that certain potential parties as specified in B.I.2 of this Legal Opinion are defined on the basis of the specific activity pursued by the corporation (e.g. banks, financial service providers, etc.). These types of potential parties (as well as the types of transactions envisaged in Appendix B) apparently go beyond the traditional meaning of pursuing physical trading (delivery and acceptance) of natural gas.

6. Please be aware that, from an energy and financial regulatory point of view, the borderline line between physical trading in natural gas and trading commodity derivatives is not clear. The Securities Act states, in accordance with the MiFID II, that its provisions do not apply to persons who deal on their own account in commodity derivatives, emission allowances or derivatives thereof, or who provide investment services in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business, provided that (i) such activity is an ancillary activity to their main business on a group basis, (ii) the main business is neither the provision of investment services within the meaning of the Securities Act nor of banking activities, nor market making in commodity derivatives, and (iii) those persons do not apply a high-frequency algorithmic trading technique. However, similar provisions on the energy regulatory side are missing. The Energy Act does not specifically deal with trading of natural gas derivatives, but requires natural gas traders to store the information on all transactions relating to the sale and purchase of natural gas, including

[16] Nevertheless certain *de minis* and green energy subsidy related exception to this general rule apply, but we are of the opinion that these exception don't have any bearing on our conclusions hereof.

derivatives. Although such requirement seems to equalize the physical trading in natural gas with the trading in derivatives, there is no explicit requirement suggesting that a natural gas trading licence would be required for the trading of such derivatives. Consequently, there is no clear delineation in practice between physical trading of natural gas and the trading of derivatives. The lack of clear allocation of regulatory (including licencing) competences between the two regulatory sectors might cause practical difficulties, for instance, in view of the limitations on the scope of activities which financial institutions and similar entities may engage in, as prescribed by the financial regulatory rules.

7. If certain power trading products qualify as financial instruments under MiFID II / Securities Act then a special licence issued by NBS (or passported MiFID II licence or passported CRD IV licence) is required under Slovak law.

C. OPINIONS

C.I ENFORCEABILITY OF CLOSE-OUT NETTING

C.I.1 Winding-up, Insolvency or Attachment

Opinions in this Part C.I.1 are based on additional assumptions expressed in Parts B.I.3.1.

C.I.1.1 ***Is there a distinction in time with respect to the creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines that a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected?***

<u>The bankruptcy proceedings</u>

The Slovak law effectively distinguishes several phases of the bankruptcy proceedings. In general, different implications are connected with these stages.

The application for the bankruptcy proceedings may be filed to the respective court by the debtor-company itself, its liquidator or its creditors. The company is obliged to apply for its own bankruptcy <u>within 30 days</u> after the day when it became aware of, or could become aware of, its insolvency (based on balance-sheet test).

When the court ascertains that the petition for the declaration of bankruptcy formally complies with the statutory requirements, the court must commence the bankruptcy proceedings <u>within 15 days</u> from the receipt of the petition. Otherwise the court will reject the petition within 15 days from the expiry of a ten-day period granted to the petitioner to remedy the lack of formal compliance of the petition with the statutory requirements.

The filing of the petition for the bankruptcy does not in any way affect the rights of the creditor. As described in Appendix C, filing of the petition for the bankruptcy is just an initial phase preceding the commencement of the bankruptcy and further stages of bankruptcy and the Bankruptcy Act does not provide for any limitation or adjustment of creditors' right at the time of filing the petition for bankruptcy.

The examination phase of the bankruptcy proceedings starts on the day following the publication of the court's decision in the Commercial Bulletin. The bankruptcy proceedings "effectively" commence on the next day following the publication of this resolution in the Commercial Bulletin. Commencement of the bankruptcy proceedings has several consequences affecting creditor's rights, *inter alia:* (i) a debtor is obliged to restrict its activities only to the day-to-day operation (this could be interpreted as a restriction of the debtor's ability to trade with commodity derivatives, unless derivatives trading is the debtor's main business activity); (ii) assets of the debtor cannot be subject to enforcement proceedings and any pending enforcement proceedings are suspended; (iii) any assets securing debtor's obligation cannot be subject to collateral enforcement (this does not apply to cash, bank account receivables, state bonds, and transferable securities or to continuance of collateral sales in the voluntary public auction).

If the statutory conditions are met, the court declares the bankruptcy. The Bankruptcy Act provides that the declaration of bankruptcy does not affect the close-out netting provisions, provided that the conditions of the Safe Harbour Provisions (please see Part C.I.1.2 below) are met. In case these provisions are not met and the Slovak court treats the close-out netting as a set-off (please see C.I.1.10), the declaration of the bankruptcy would affect the creditor's rights in the following manner.

First, a receivable of the Other Party from the bankrupt Slovak Party that was not registered by the Other Party in the bankruptcy proceedings in the manner set out in the Bankruptcy Act cannot be set-off against any receivable of the bankrupt Slovak Party from the Other Party.

Furthermore, the following receivables from the Slovak Party cannot be set-off against any receivables owed by the Other Party: (i) a receivable from the bankrupt Slovak Party owed to the Other Party, which has arisen before the declaration of bankruptcy in respect of that bankrupt Slovak Party, cannot be set-off against the receivable from the Other Party owed to the bankrupt Slovak Party, which has arisen after the declaration of bankruptcy; this applies equally to contingent obligations of the bankrupt Slovak Party capable of being claimed in the bankruptcy proceedings; (ii) a receivable from the bankrupt Slovak Party which is registered in the bankruptcy proceedings, but which is acquired after the declaration of bankruptcy as a result of its transfer; and (iii) a receivable from the bankrupt Slovak Party acquired by its creditor as a result of a successful challenge of an act of the bankrupt Slovak Party with a view to it being set aside.

The creditors may register their claims by submitting the application within 45 days as of a day the bankruptcy declaration (as described above). If the application is delivered after expiration of the period, such application will be take into a consideration, but the creditor will have no voting rights nor the other rights associated with the registered claim.

The restructuring proceedings

If a Slovak Corporate is insolvent or its insolvency is imminent, it may seek a restructuring evaluation opinion to be prepared by the restructuring administrator. If the restructuring administrator recommends a restructuring, the Slovak Corporate as a debtor or its creditors (with the debtor´s consent) may file the application with the respective court.

The application must be filed within 30 days from the date of the restructuring opinion, which has been prepared by the restructuring administrator and which has to be enclosed to the application.

Within 15 days after the filing of the application, the restructuring proceedings must be formally instituted/commenced or the application must be dismissed. The restructuring proceedings are instituted as of the day following the date of publication of a decision of the relevant court on the institution of the restructuring proceedings in the Commercial Bulletin.

Commencement of the restructuring proceedings has several consequences for debtor and its creditors, *inter alia*: (i) a debtor is obliged to restrict its activities only to day-to-day activities, other activities are subject to administrator's consent (this could be interpreted as a restriction of the debtor's ability to trade with commodity derivatives, unless derivatives trading is the debtor's main business activity); (ii) a receivable to be lodged in the proceedings cannot be enforced at the court or in the enforcement proceedings, (iii) any security enforcement over the debtor's assets securing a receivable to be lodged in the proceedings cannot be commenced or continued, (iv) contractual party is not allowed to terminate or withdraw from a contract entered into with a debtor due to delay with performance due prior to commencement of the restructuring proceedings and any termination or withdrawal is ineffective, (v) contractual provisions allowing the other party to terminate or withdraw from the contract with a debtor due to restructuring or bankruptcy proceedings are ineffective.

The Bankruptcy Act explicitly provides that the commencement of the restructuring proceedings does not affect the close-out netting arrangements, provided that these benefit from the Safe Harbour Provisions, for further clarification regarding Safe Harbour Provisions please refer to Part C.I.1.2.

In case the close-out netting is treated as a set-off, upon the commencement of the restructuring proceedings, the obligation of the Other Party which is lodged in the restructuring proceedings, cannot be set-off against a Slovak Party being subject to restructuring proceedings.

C.I.1.2 ***Does Slovak insolvency law provide for a "safe harbor" for certain contract types and /or entities and would the contract types listed in Appendix B and the entities as specified in B.I.2 of this Legal Opinion benefit from such provision?***

The concept of close-out netting and also close-out netting agreements in bankruptcy and restructuring are regulated in the Bankruptcy Act.

According to respective provisions of the Bankruptcy Act, the bankruptcy and restructuring proceedings shall not affect the rights of the parties to the close-out netting agreement ("**Safe Harbour Provisions**"). The Safe Harbour Provisions apply also in case of the involuntary administration of a Slovak Financial Institution.

"**Close-out netting agreement**" is defined in Section 180 (1) of the Bankruptcy Act as "*an agreement governed by Slovak or foreign law entered into between parties pursuant to paragraph 5, in relation to one or more derivative trades [....] trades with financial instruments, [...], trades with collateral rights related to financial instruments, commodity trades or trades with emission allowances or other similar trades, irrespective of the nature of the underlying asset and irrespective of the manner of settlement (cash or physical delivery) and that stipulates the calculation of one single obligation in relation to the actual or estimated losses or actual or estimated profits, resulting from the termination or cancellation of one or more trades entered into in relation with such an agreement or under such agreement.*"

"**Close-out netting**" is defined in Section 180 (2) of the Bankruptcy Act as "*a calculation in accordance with the terms of a close-out netting agreement of the amount of a single net obligation in respect of any losses or gains occurred, whether actual or estimated, arising in connection with the termination or cancellation of one or more transactions under or in connection with that close-out netting agreement. The parties will agree on the method of calculation of that single net obligation in the close-out netting agreement, provided that the calculation shall be made by reference to any actual or estimated losses or gains* *of the parties relating to any payments or performances that would have been paid or made if the event giving rise to termination or cancellation of one or more of those transactions would not have occurred, including any costs or revenues incurred in connection with that termination or cancellation; the calculation may be based on quotations of interest rates, exchange rates or prices obtained from other participants of relevant financial markets in connection with those terminated or cancelled transactions*".

If the contractual parties have entered into transactions under a close-out netting agreement or in connection with it (*i.e.* EFET General Agreement) and a termination of transactions which are subject to close-out netting under that close-out netting agreement will occur, only a single net obligation shall be due and payable in respect to those transactions. The amount of a single net obligation shall be determined in the manner specified in the close-out netting agreement.

If the bankrupt party (*i.e.* a Slovak Party) has a claim in respect to the net obligation under the close-out netting agreement against the other party, the bankruptcy administrator shall demand that claim from the other party only in the amount determined in accordance with the agreed close-out netting calculation.

On contrary, if the other party to the close-out netting agreement (different from the bankrupt party) has a claim in respect to the net obligation under the close-out netting agreement, it may demand that claim in the bankruptcy proceedings only in the amount determined in compliance with the agreed close-out netting calculation.

The Safe Harbour Provisions apply in a situation when the close-out netting agreement (i.e. in our case the General Agreement) is concluded mutually between the "qualified parties" as defined in the Bankruptcy Act ("**Qualified Parties**") or between a Qualified Party referred to under (a) to (d) and (f) and any third party.

The Qualified Parties include any of the following:

(a) public authorities of EU and EEA Member States;

(b) NBS or the central bank of the other EU country, European Central Bank, International Monetary Fund, European Investment Bank, Bank for Reconstruction and Development, Bank for International Settlements;

(c) a Slovak bank, a Slovak branch of the foreign bank, Slovak securities broker, foreign securities broker, Slovak insurance company, foreign insurance company, the insurance company of another EU country (different from the Slovakia), Slovak asset management company, foreign asset management company, Slovak electronic money institution, foreign electronic money institution, Slovak collective investment entity, foreign collective investment entity managers and funds);

(d) any other person different from the persons described in section c) above, which is subject to prudent supervision and is carrying out as its main business activity one of the activities to be carried out by a Slovak bank or the Slovak branch of the foreign bank or the person with registered seat in a foreign country, which conducts similar business activity;

(e) any other person different from the persons described in section c) above, which is subject to prudent supervision and is carrying out as its main business activity the acquisition of the ownership interests (in Slovak: *nadobúdanie podielov na majetku*) under respective regulation or the person with registered seat in a foreign country, which conducts similar business activity; and

(f) central depositary of securities, payment system operator, settlement agent, foreign clearing house, joint representative (trustee) of bond holders or other debt securities holders, or the person with registered seat in a foreign country, which conducts similar business activity including a person whose business activity is the settlement and clearing of transactions in financial instruments or activities of a central counterparty (even if it is not a foreign central depositary).

The scope of eligible transactions for the purpose of the Safe Harbour Provisions is relatively wide and hence, should encompass all transactions described in Appendix B, provided that the conditions described in Appendix B are fulfilled.

However, physical commodity transactions related to capacity rights are not expressly covered by the Safe Harbour Provisions as these types of transactions are not listed in the definition of the close-out netting agreement. Consequently, it cannot be ruled out that the Slovak Court would interpret the Safe Harbour Provisions narrowly and may exclude such transactions from Safe Harbour Provisions. Please see Appendix B for more details.

Furthermore, please note that a Slovak Corporate or a foreign corporate would not be considered as a Qualified Party. Consequently, a General Agreement entered into between a foreign corporate and a Slovak Corporate or between two Slovak Corporates would not benefit from the Safe Harbour Provisions.

C.I.1.3 ***Is there publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g. financial statements, corporate actions, etc.).***

Under Slovak law, there is a mandatory obligation to publish the individual financial statements of legal entities. Such individual financial statements are publicly available and accessible via internet. The legal entities have to communicate with the state authorities solely via electronic means and deliver the individual financial statements to the Financial Administration of the Slovak Republic. The Financial Administration shall send the individual financial statement to the Register of Financial Statements without undue delay. The exact period therefor is not statutory prescribed, however, should not last more than five days. The Register of Financial Statements shall publish the individual financial statements with the Register of Financial Statements within five working days following its delivery.

<u>Bankruptcy and restructuring proceedings of a Slovak Corporate</u>

No information concerning the filing of the petition for declaration of the bankruptcy/ opening of the restructuring proceedings is publically available.

When the court ascertains that the petition for the declaration of bankruptcy/restructuring formally complies with the statutory requirements, the court will publish decision regarding the commencement of the bankruptcy/restructuring proceedings in a Commercial Bulletin (in

Slovak: *Obchodný vestník*).

Following commencement of the bankruptcy / restructuring proceedings, the court may declare the actual bankruptcy / permit restructuring provided that all statutory requirements are met. Decision on declaration of bankruptcy / permission of restructuring is also published in the Commercial Bulletin.

Both court´s resolutions are published solely in the Slovak language and their publication has legal effect from the day following the day of publication.

In addition to the Commercial Bulletin, information on bankruptcy and restructuring proceedings are also published in the publicly available insolvency register.[17] Information that are published include *inter alia*, the case reference number, the date of the opening of bankruptcy proceedings, the date of the commencement of the restructuring proceedings, debtor's name, registration number, contact details of the insolvency administrator, the time limit for lodging a claim, the date of closing of the insolvency proceeding (if any) and the court before the resolution on the proceeding can be challenged. This registry also contains the information regarding (i) debtor's assets; (ii) the lodged claims, (iii) information on the creditors' committee meetings and others.

<u>Involuntary administration of a Slovak Bank and Slovak Insurance Company</u>

NBS will publish information concerning the involuntary administration in (i) Bulletin of NBS (in Slovak: *Vestník Národnej banky Slovenska*), (ii) at least two Slovak daily newspaper with a nationwide distribution and (iii) in publicly accessible premises of the entity upon which the involuntary administration has been established.

If the Slovak Bank / Slovak Insurance Company has a Branch in any EU Member State, the decision of NBS and other statutory information shall be published also in (i) Official Journal of European Union and (ii) at least two daily newspaper with a nationwide distribution in respective EU Member State either in Slovak language and in a language of respective Member State.

The publication of the information mentioned above has no legal effect on the initiation of the involuntary administration of respective entity.

<u>Involuntary administration of a Slovak Investment Firm and Slovak Management Company</u>

NBS will publish information concerning the involuntary administration in (i) at least one Slovak daily newspaper with a nationwide distribution and (ii) in publicly accessible premises of the entity upon which the involuntary administration has been established.

<u>Resolution proceedings in relation to a Slovak Bank and Slovak Investment Firm</u>

Decision on commencement of resolution proceedings is published (i) in the Commercial Bulletin, (ii) on a website of the Resolution Council, (iii) on a website of NBS and (iv) on a

[17] Insolvency Register is available at available at https://ru.justice.sk/ru-verejnost-web/.

website of the concerned Slovak Bank or Slovak Investment Firm, unless the Resolution Council decides otherwise.

Involuntary administration of the Slovak Municipality and Slovak Region

The Slovak Municipality is obliged to publish the decision on imposing the involuntary administration within 7 days after the delivery of such decision by the means usually used for such purposes (*e.g.* information desk, periodical press issued by the relevant municipality, website, etc.). Moreover, the Slovak Municipality is also obliged within the same period to inform all banks and branches of the foreign banks keeping its accounts and any other municipality's creditors on the imposing involuntary administration.

Liquidation of a Slovak Party

In case of the liquidation of a Slovak Party, the liquidator is obliged to publish the relevant information in the Commercial Bulletin. In addition, information that the Slovak Party is in liquidation, shall be registered in the Commercial Register as well.

As regards Slovak Bank and Slovak Insurance Company, the liquidator is obliged to publish the information on entering these entities into a liquidation also in the Official Journal of the European Union.

In situation that Slovak Bank has branches established within the territory of any EU Member State, the liquidator shall publish the information on the liquidation in at least two daily newspapers with nationwide distribution in a relevant Member State.

C.I.1.4 ***General description of limitations applicable to set-off (both in an insolvency related and non-insolvency related Early Termination scenario or otherwise) (a) between the Parties of claims arising under the General Agreement; (b) between the Parties of claims arising outside the General Agreement if contractually provided for in an amendment to the General Agreement; and (c) between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the General Agreement.***

Under Slovak law, set-off (in Slovak: *započítanie*) in a non-insolvency-related context is governed by the Civil Code and by the Commercial Code. Set-off in insolvency related context is governed by the Bankruptcy Act.

The right to set-off mutual claims arises *ex lege*. A contract can limit or expand the scope of such statutory set-off, but there are no conceptual differences between a statutory set-off and a contractual set-off. Consequently there is no difference in the treatment of statutory set-off and contractual set-off.

There is no concept of a separate insolvency set-off under Slovak law. Slovak insolvency law only imposes certain limitations on the exercising of set-off in insolvency (as described below), but the concept is the same as outside insolvency.

Non-insolvency set-off

In a non-insolvency-related context, the Civil Code stipulates that, where the creditor and the debtor have mutual claims of the same type (*i.e.* usually monetary claims), these claims can be discharged by set-off upon unilateral notice by one of the parties. No agreement between the parties is required. The extinguishment shall take place at the moment when the receivables eligible for set-off meet each other.

Certain claims are excluded from the possibility of a unilateral set-off, such as compensation claims for injury, unenforceable claims and time-barred claims. Claims which are not yet due cannot be set-off unilaterally against due claims. However, even these claims may be set-off by mutual agreement of the parties.

The Commercial Code applicable in relationships between entrepreneurs further relaxes some conditions for set-off. In particular, even a time-barred claim can be used for set-off provided that the set-off was possible before the claim was time-barred. The Commercial Code also specifically stipulates that claims in different currencies (provided that these are freely convertible currencies) can be set-off against each other.

The Commercial Code further provides that it is possible to set-off any mutual claims on the basis of an agreement between the Parties – *i.e.* all the above discussed statutory restrictions can be overridden by an agreement of the Parties. We therefore recommend providing in the General Agreement that the Parties may set-off any mutual claims under or in connection with the General Agreement notwithstanding whether the claims are due, contingent, time-barred etc. Please refer to Appendix D for suggested wording.

Origin of off-set claims

When considering set-off under Slovak law, it is not relevant whether the mutual claims arise under the same agreement or under various agreements or different legal causes (*e.g.* in connection with a damages claim).

Cross-affiliate set-off

The claims to be set-off must be mutual under Slovak law, *i.e.* between two parties. Therefore, cross-affiliate set-off would not be enforceable under Slovak law, save that the relevant affiliate would consent to such set-off and assume or assign respective obligations which would be subject to such set-off. The same conclusion applies to set-off rights *vis-à-vis* a Credit Support Provider.

Set-off in bankruptcy and restructuring proceedings

In an insolvency related context, the conditions for set-off are stricter. Generally, a set-off in respect of the mutual obligations of the bankrupt Slovak Party and the Other Party is generally permitted, subject to certain exemptions set out below.

First, an obligation owed by the bankrupt Slovak Party to the Other Party that was not registered by the Other Party in the bankruptcy proceedings in the manner set out in the Bankruptcy Act cannot be set-off against any obligations owed by the Other Party to the bankrupt Slovak Party.

Furthermore, the following obligations of a bankrupt Slovak Party cannot be set-off against any obligations of the Other Party:

(i) an obligation of a bankrupt party owed to the other party, which has arisen before the declaration of bankruptcy in respect of that bankrupt party, cannot be set-off against the obligation of the other party owed to the bankrupt party, which has arisen after the declaration of bankruptcy; this applies equally to contingent obligations of the bankrupt party capable of being claimed in the bankruptcy proceedings;

(ii) an obligation of the bankrupt party which was not registered in the bankruptcy proceedings in accordance with the Bankruptcy Act;

(iii) an obligation of the bankrupt party which is registered in the bankruptcy proceedings, but which is acquired after the declaration of bankruptcy as a result of its transfer; and

(iv) an obligation of the bankrupt party acquired by its creditor as a result of a successful challenging of an act of the bankrupt party.

In restructuring proceedings in respect of a Slovak Corporate, the legal regulation is even stricter. No claims that originated before the commencement of the restructuring proceedings can be set-off against claims of the Slovak Corporate in restructuring.

Insolvency set-off is also regulated by provisions of Section 9 of the EU Insolvency Regulation according to which there is a right of set-off if set-off is available under the governing law of the relevant claims, even where such set-off is not available under Slovak law. In other words, if the governing law of the General Agreement (other than Slovak law) allows set-off in the case of bankruptcy or involuntary administration and this fact is proven to a Slovak court, then this should qualify as a permissible exception under Slovak law. To the extent of our knowledge, Section 6 of the EU Insolvency Regulation has not been tested in Slovak courts.

<u>Set-off in bankruptcy of a Slovak Bank and a Slovak Insurance Company</u>

In bankruptcy of a Slovak Bank or Slovak Insurance Company, the above general restrictions would apply as well, save that the set-off would be also possible where such a set-off is permitted by the law applicable to the Slovak Party's claim. This, however, applies only if the governing law is the law of one of the Member States.

In other words, if the governing law of the General Agreement (other than Slovak law) allows set-off in case of bankruptcy to operate and this fact is proven to a Slovak court, then this should qualify as a permissible exception under Slovak law. To the extent of our knowledge, this provision has not been tested in Slovak courts.

Set-off in involuntary administration

In involuntary administration of a Slovak Financial Institution[18], a set-off in respect of obligations owed to, or by, a Slovak Financial Institution, is not permissible within six months after the institution of the involuntary administration.

The suspension of any set-off arrangements does not apply if the laws of the jurisdiction of a Slovak Financial Institution's counterparty permit set-off during the institution of any reorganisation measure. This, however, applies only if a Slovak Financial Institution's counterparty's jurisdiction is any of the Member States.

In other words, if the jurisdiction of the Other Party to the General Agreement is that of any Member State and the laws and regulations of that Member State allow set-off in case of any reorganisation measures to operate and this fact is proven to a Slovak court, then this should qualify as a permissible exception under Slovak law. To the extent of our knowledge, this provision has not been tested in Slovak courts.

Set-off confirmed by a foreign judgment or arbitral award

If a set-off is confirmed by a foreign judgment or arbitral award for the payment of a net amount obtained by the Other Party prior to commencement of insolvency proceedings in the Slovak Republic, such decision would be recognised in the Slovak Republic subject to discussion in Part C.VII (*Governing Law, Arbitration and Jurisdiction*) below, including in bankruptcy, restructuring and involuntary administration of a Slovak Party. We believe that no rule of Slovak law limiting set-off in insolvency would give rise to an *ordre public* objection, although there are no precedents which could give definite guidance on this issue.

C.I.1.5 ***Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? Would it be necessary or 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 (ii) by limiting those insolvency events specified in § 10.5(c) which would trigger 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?***

Generally, we do not recommend electing Automatic Termination to apply upon a Material Reason as described in § 10.5(c) in EFET General Agreement. We particularly do not recommend opting the operation of Automatic Termination with retrospective effect to a date/time prior to the actual occurrence of the event specified as a Material Reason under § 10.5(c). We are of the view that such a condition is solicitous, and could be interpreted as a provision aiming at evading the applicable legal regulations, and as such, could qualify as illegal and consequently null and void.

[18] Please note that in case of a Slovak Management Company, these rules apply only in case the Slovak Management Company is authorized to carry out investment services under the Securities Act.

We believe there is a risk that Automatic Termination may not be enforceable under Slovak law in the event of institution of the restructuring proceedings in respect of a Slovak Corporate where the Other Party is not a Qualified Party (i.e. where the Safe Harbour Provisions do not apply) and in the event of the institution of the involuntary administration or resolution proceedings in respect of a Slovak Bank, Slovak Management Company or Slovak Investment Firm.

We believe that Automatic Termination upon a Material Reason pursuant to § 10.5(c) of the EFET General Agreement would not be enforceable under Slovak law in the following scenarios:

(i) the institution of the restructuring proceedings in respect of that Slovak Corporate where the Other Party is not a Qualified Party (*i.e.* where the Safe Harbour Provisions do not apply); and

(ii) the institution of the involuntary administration or resolution proceedings in respect of a Slovak Bank, Slovak Management Company or Slovak Investment Firm, which is a selected institution under the Resolution Act.

This statement is based on the following:

<u>Analysis with regard to restructuring proceedings in respect of a Slovak Corporate</u>

With regard to the restructuring, the relevant provisions of the Bankruptcy Act provide that, in the event of the institution/commencement of restructuring proceedings, contractual provisions allowing the other party of a contract to terminate or withdraw from that contract due to the restructuring proceedings or bankruptcy proceedings are ineffective as of the moment of the institution of the restructuring proceedings. In addition, it is not possible to terminate or withdraw from a contract due to delay with performance (in Slovak: *omeškanie s plnením*) which has occurred before the institution of the restructuring proceedings (moratorium).

The purpose of the relevant provisions of the Bankruptcy Act is to effect a moratorium on agreements entered into by a Slovak Corporate as of the moment of the institution of the restructuring proceedings. Therefore, in our view, Automatic Termination may be considered by a relevant court or restructuring administrator as being in conflict with the Bankruptcy Act and thus, invalid. Please note that such a conclusion is not applicable if the Safe Harbour Provisions apply, as in such an event the institution of restructuring proceedings would not affect the rights of the parties in respect of close-out netting.

Furthermore, the general provisions of Section 39 of the Civil Code provide for the invalidity of all legal acts, which are illegal (*contra legem*), circumventing the law (*in fraudem legis*) or against good morals (*contra bonos mores*). In our view, a restructuring administrator may argue that, by providing for Automatic Termination, the Parties have attempted to circumvent the relevant provisions of the Bankruptcy Act providing for a moratorium. Given the nature and purpose of a moratorium, the argument is relevant irrespective of Automatic Termination occurring upon or immediately prior to occurrence of an event specified in § 10.5(c) of the General Agreement.

Analysis with regard to involuntary administration and resolution proceedings in respect of a Slovak Bank, Slovak Investment Firm and Slovak Management Company

As to the question whether the Parties can agree on an Automatic Termination upon involuntary administration of a Slovak Bank, Slovak Investment Firm or Slovak Management Company, one could argue that Sections 10 and 17 of the Resolution Act do not explicitly refer to any contractual provisions providing for automatic termination of the relevant contract (unlike the termination on the basis of an active decision and sending a termination notice to the Other Party). However, the purpose of Section 10 of the Resolution Act is clearly to protect the institution being subject to a crisis prevention or crisis management measure by disabling termination provisions in the contracts entered into by a Slovak Bank, Slovak Investment Firm or a Slovak Management Company. The purpose of Section 17, based on which the Resolution Council may suspend the termination rights for maximum of 48 hours, is to allow for the implementation of the resolution. For a full overview of the powers of the Resolution Council please refer to Part C.I.1.10 below.

In our view, Automatic Termination would be in conflict with the purpose of the relevant provisions of the Resolution Act. Section 39 of the Civil Code provides that a transaction is invalid if its contents or purpose contradicts (*contra legem*) or circumvents the law (*in fraudem legis*), or if it contravenes good morals (*contra bonos mores*). Therefore, the provisions on Automatic Termination are likely to be invalid (and thus not enforceable) under Slovak law if agreed in the event of occurrence of a crisis prevention or crisis management measure enacted or for the purposes to avoid the suspension of the termination rights.

Analysis regarding Automatic Termination due to Material Reasons specified in § 10.5(c) (outside of restructuring of a Slovak Corporate)

Under Slovak law, parties can withdraw from commercial contracts, without a notice period if there is such a possibility regulated by Slovak law or the contractual parties agreed on withdrawal in the contract. However, incomprehensible or inconsistent terms of the contract are null and void.

The institute of withdrawal from a contract is a unilateral legal act, which is effective as at the moment the other party has the opportunity to get acquainted with it. Despite the fact that there is no statutory obligation to send a notice on withdrawal in writing, based on judicial decisions of the Slovak courts, it is recommended to inform the other party about such withdrawal in writing provided that the agreement was concluded in a written form.

Pursuant to § 10.4 of the EFET General Agreement "*the Terminating Party need not send the Other Party any notice of designation on an Early Termination Date if the Early Termination Date in such event is specified in the Election Sheet*". Taking into account our opinions expressed above, this provision of the EFET General Agreement might be interpreted as either incomprehensible or inconsistent and as a result might be considered invalid by Slovak courts.

Moreover, the events stipulated in § 10.5(c) (i), (ii), (iii), (vii), (viii) and (ix) which enable a Party to Automatically Terminate the General Agreement without sending a notice to the Other Party, are drafted vaguely and allow for various interpretations of the moment when the Material Reason and thus, Automatic Termination should occur. As a result, it might be difficult to determine the Early Termination Date (if not clearly specified in the Election Sheet), as of which the Termination Amount should be calculated. Due to such lack of clarity, the respective provisions could be interpreted under Slovak law as unenforceable and provide grounds for a dispute among the Parties. For further clarifications in respect of the prospective contradictory interpretations of the individual events discussed above, please refer to Part C.I.1.8.

C.I.1.6 ***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 dismissed or otherwise terminated?***

The filing of a petition for the declaration of bankruptcy or permission of restructuring proceedings by a creditor does not always give a clear indication on the solvency of a debtor. Therefore, if a Material Reason for termination is simply linked to the submission of a petition for the bankruptcy / restructuring proceedings of a party, even frivolous applications of creditors may trigger the termination. The reason for this is that although the minimum formal requirements of a petition to institute bankruptcy / restructuring proceedings is set out in the Bankruptcy Act, nothing prevents a creditor from filing a petition to this end, even if later unfounded application is rejected by the court. Hence, a grace period regulated for those events when a petition is submitted by a creditor may reduce, but not eliminate the risk of terminating the Agreement on the basis of a frivolous application of a creditor.

In case of a creditor's petition, solvency of a debtor has to be proved at a hearing that should take place within seventy (70) days from the commencement of the proceedings and the court is obliged to rule on the merits of the petition within seven (7) days after concluding the evaluation of evidence on solvency. However, as there is not a deadline for conclusion of the evidence evaluation, it is not possible to determine the length of the grace period after which insolvency of a party would be duly established.

In case of a debtor's petition, no grace period is available.

C.I.1.7 ***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? In this event, please supply specific recommended language for purposes of customizing § 10.4 of the General Agreement to implement such optimal termination timing.***

As discussed in Parts C.I.1.5 above, we are of the opinion that there is a risk that Automatic Termination may not be enforceable under Slovak law in the event of the institution of the restructuring proceedings in respect of a Slovak Corporate where the Other Party is not a Qualified Party (*i.e.* where the Safe Harbour Provisions do not apply) and in the event of the institution of the involuntary administration or resolution proceedings in respect of a Slovak Bank, Slovak Investment Firm or a Slovak Management Company.

Automatic Termination does not eliminate the risk of non-enforceability of the early termination provisions in these cases.

Therefore, we do not recommend electing the Automatic Termination to apply in the General Agreement. If the Other Party would nevertheless prefer to choose Automatic Termination (*e.g.* because it attempts to override the termination right restrictions discussed in Parts C.I.1.5 and C.I.1.8 despite the risk of non-enforceability of such attempt), please take into consideration our conclusions described in Parts C.I.1.5 and C.I.1.6, as we are of the opinion that should the Automatic Termination apply in an unchanged form or shall the Election Sheet lack clear specifications of the Early Termination Date, then it cannot be ruled out that the court would consider such Automatic Termination to be unenforceable under Slovak law.

We note, however, that even if the Automatic Termination was enforceable, this would not necessarily result in the enforceability of the netting provisions of the Agreement (if the Agreement is not entered into with a Qualified Party), since set-off cannot be automatic and furthermore, there are restriction on set-off applicable from the moment of declaration of bankruptcy and institution of restructuring, for further clarification please refer to Part C.I.1.4.

C.I.1.8 ***Assuming the Parties have elected Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of the Slovak Republic or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?***

As discussed in Parts C.I.1.5 and C.I.1.7 above, we are of the opinion that Automatic Termination, if elected to apply, there is a risk that in its present form and without clear specification in the Election Sheet of the Early Termination Date or without providing a written termination notice where such Early Termination Date would be specified, Automatic Termination could be unenforceable under Slovak law.

Furthermore, we do not recommend opting the operation of Automatic Termination with retrospective effect to a date/time prior to the actual occurrence of the event specified as a Material Reason under § 10.5(c). We are of the view that such a condition is solicitous, and could be interpreted as a provision aiming at evading the applicable legal regulations, and as such, could qualify as illegal and consequently null and void.

Furthermore specifically, the Automatic Termination would also be unenforceable in the following situations:

(i) the institution of the restructuring proceedings in respect of that Slovak Corporate where the Other Party is not a Qualified Party (*i.e.* where the Safe Harbour Provisions do not apply); and

(ii) the institution of the involuntary administration or resolution proceedings in respect of a Slovak Bank, Slovak Investment Firm or Slovak Management Company.

Due to the risk associated with the events specified above in Part C.I.1.5, we are of the impression that such conditions might qualify as incomprehensible conditions and as a result might be interpreted as partially invalid. As a result, the Automatic Termination could be challenged by a liquidator, administrator, receiver or a third party.

Secondly, to clarify further, we believe that the Early Termination Date, in the event of Automatic Termination pursuant to any of the above listed Material Reasons, might be subject to disputable interpretation, if not sufficiently clearly specified in the Election Sheet. This is due to the wording of individual conditions specified in § 10.5(c) as the exact moment of occurrence of the respective Material Reason, might be difficult to determine. Moreover, the disputability of the moment of the Early Termination Date leads to a disputable calculation of the Termination Amount pursuant to §11 of the General Agreement, as with respect to the Settlement Amounts, "*the Terminating Party may, but is not obliged, to calculate its Gains and losses as at the Early Termination Date, at its discretion, without in any replacement transactions*".

To conclude, we believe that Automatic Termination pursuant to §10.5(c) in its present form is connected with a risk of it being challenged by a liquidator, administrator, receiver or a third party, due to the possibility of contradictory interpretations of the moment of the Early Termination Date, which may lead to different calculation of the Termination Amount or due to potential retroactive termination. For further details please refer to Part C.I.1.5.

C.I.1.9 ***Assuming the Parties have <u>not</u> specified that Automatic Termination (as defined in § 10.4 of the EFET General Agreement) applies, are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of the Slovak Republic or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the early termination by notice itself could be challenged by a liquidator, administrator, receiver or third party?***

The EFET General Agreement stipulates (except the Automatic Termination) also provisions permitting an Ordinary Termination under § 10.2 and Termination for Material Reasons under §10.3. In addition, under § 7.5, the Claiming Party shall have a right to terminate Individual Contract by written notice.

If the parties have not selected Automatic Termination to apply in relation to the Slovak Party, then, under § 10.3 of the General Agreement, the non-defaulting Party is entitled to give notice of Early Termination to the other Party. As of the Early Termination Date designated in the notice of Early Termination, all further payments and performance shall be released and existing duties and obligations of the Parties shall be replaced by the obligation to pay the Termination Amount.

The notice termination provision of § 10.3 as well as § 7.5 would be enforceable under Slovak law except in the following events:

- the institution of the restructuring proceedings (in Slovak: *začatie reštrukturalizačného konania*) in respect of a Slovak Corporate where the Other Party is not a Qualified Party (i.e. where the Safe Harbour Provisions do not apply); and
- the institution of the involuntary administration (in Slovak: *zavedenie nútenej správy*) or resolution proceedings in respect of a Slovak Bank, Slovak Investment Firm or Slovak Management Company, which is a selected institution under the Resolution Act.

In all other cases, the enforceability of the termination right would be protected by the Safe Harbour Provisions.

Analysis with regard to restructuring proceedings in respect of a Slovak Corporate

As discussed in C.I.1.5, the relevant provisions of the Bankruptcy Act provide that, in the event of the institution/commencement of restructuring proceedings, contractual provisions allowing the other party of a contract to terminate or withdraw from that contract due to the restructuring proceedings or bankruptcy proceedings are ineffective as of the moment of the institution of the restructuring proceedings. In addition, it is not possible to terminate or withdraw from a contract due to delay with performance (in Slovak: *omeškanie s plnením*) which has occurred before the institution of the restructuring proceedings (moratorium).

Analysis with regard to involuntary administration and resolution proceedings in respect of a Slovak Bank, Slovak Investment Firm or Slovak Management Company.

With regard to the involuntary administration, under Section 10 of the Resolution Act, which implements Article 68 of the BRRD, neither a crisis prevention nor crisis management measure, nor any event directly linked to the application of such a measure, is allowed to constitute a trigger for contractual termination, netting or set-off rights or enforcement of security in relation to the institution in resolution or a member of its group on a cross-default basis, provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed. This position under Slovak law is consistent with the BRRD.

Under Section 10(2) of the Resolution Act, "crisis prevention measure" includes inter alia the appointment of an involuntary administrator under the Act on Banks and Securities Act in respect of a Slovak Bank, Slovak Investment Firm or Slovak Management Company and the appointment of a special administrator under the Resolution Act. Although Slovak law is not explicit on that point, the NBS should appoint the involuntary administrator together with imposing the involuntary administration upon a Slovak Financial Institution. Therefore, Section 10 of the Resolution Act effectively prevents exercising of the right to terminate the Agreement under § 10.3 of the General Agreement if the relevant event of default is the imposition by the NBS of involuntary administration and appointment of an involuntary administrator.

Although Section 10 of the Resolution Act significantly limits the termination rights, we note that:

- the position under Slovak law appears to be consistent with the BRRD; and
- Section 10 of the Resolution Act does not affect the right of the counterparty to terminate the Agreement if there is a breach of principal obligations thereunder (e.g. non-payment, non-delivery or a failure to transfer collateral).

Suspension of termination rights by decision of the Resolution Council

Under Section 17 of the Resolution Act, the Resolution Council has the power (by way of publication of a notice) to suspend the termination rights of any party to a contract with either (a) a Slovak Bank, Slovak Investment Firm or Slovak Management Company being subject to the resolution proceedings or (b) a subsidiary of such institution, where such subsidiary's obligations are guaranteed or otherwise supported by the institution and the relevant termination right is based solely on the insolvency or financial condition of the institution in resolution. The intention behind the suspension is to allow the Resolution Authority time to take measures without the interfering effects of exercising termination rights of the institution's counterparty.

The suspension is in each case limited in time and will last only from publication of the notice of the suspension until midnight at the end of the following business day, i.e. a maximum of 48 hours. However, Section 17 of the Resolution Act does not include the provision under the BRRD that the suspension only applies if the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed. In other words, if the termination rights are suspended by the Resolution Council, the Other Party would not be entitled to terminate the Agreement even in case of failure of the Slovak Bank, Slovak Investment Firm or Slovak Management Company to make payment or delivery under the Agreement before or during the suspension period. In addition, if at the end of the suspension period the obligations under the Agreement have been transferred to another entity, the Other Party would be entitled to terminate only if the ground for termination persists under the original terms of the Agreement or if a new ground for termination arises after the transfer. Also, if the Resolution Council effects a bail-in, the original termination right in respect of the original breach is permanently overridden. However, the termination rights under the Agreement should be preserved in respect of any new breach or other termination reason occurring after the bail-in.

Furthermore, as discussed in C.I.1.5, it cannot be ruled out that certain events described in § 10.5(c) of the General Agreement might be qualified as incomprehensible or be subjected to various interpretations, and as a result an Early Termination by notice itself could be challenged by a liquidator, administrator, receiver or third party.

Liquidation of Slovak Corporate

The notice termination provision would be enforceable under Slovak law in the event of a Slovak Corporate entering into liquidation (in Slovak: *vstup do likvidácie*).

C.I.1.10 ***Are the provisions in § 11 of the EFET General Agreement (Calculation of the Termination Amount) providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of the Slovak Republic or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?***

General enforceability of close-out netting in insolvency

§ 10.3(b) and § 11 of the General Agreement provide for the netting of termination values in determining a single lump-sum Termination Amount upon termination of the General Agreement.

The close-out netting provisions of the General Agreement would be enforceable under Slovak law if the Safe Harbour Provisions apply (please see C.I.1.2).

If the Safe Harbour Provisions do not apply, there is a substantial risk that the close-out netting provisions of the General Agreement could be treated as set-off by a Slovak court and consequently:

- the close-out netting provisions would not be enforceable in the event of the declaration of bankruptcy in respect of a Slovak Corporate because if the Safe Harbour Provisions do not apply (*i.e.* in the case of the General Agreement entered into with a Slovak Corporate where the Other Party is not a Qualified Party), a Slovak court may refuse to consider determination of the Termination Amount as a novation (or other *sui generis* settlement method) and treat the close-out netting mechanism under the General Agreement as a set-off at least with respect to some amounts taken into account in the calculation of the Termination Amounts. This is because some amounts included in the Termination Amount may, under Slovak law, be viewed as "obligations" owed by one Party to another Party. These could be (a) certain elements used in determining the Costs; (b) *all other amounts payable between the Parties under or in connection with the Agreement* referred to in § 11.1 of the General Agreement when payable by the Slovak Corporate to the Other Party; (c) the Base Currency Equivalent of all Eligible Credit Support under § 11 of the Credit Support Annex (if any and if payable by the Slovak Corporate to the Other Party); and (d) positive and negative Settlement Amounts determined with respect to terminated Individual Contracts.

- the close-out netting provisions would not be enforceable in the event of the institution of restructuring in respect of a Slovak Corporate because of (i) the reasons set out above (recharacterisation of close-out netting into a set-off) and (ii) the restrictions on termination rights as discussed in Part C.I.1.5.

We stress again that the issues with non-enforceability of close-out netting largely arise from the risk of recharacterisation of close-out netting into a set-off. Therefore, if the Other Party succeeds with the argument that neither the close-out netting provisions are set-off provisions nor that the close-out netting mechanism involves set-off of mutual obligations between the Parties (*i.e.* there is no recharacterisation), then the close-out netting provisions would be enforceable under Slovak law, subject to the restricted right to terminate the General Agreement in the restructuring of a Slovak Corporate as discussed above in Part C.I.1.5.

To support the arguments of the Other Party in this respect and in order to mitigate the recharacterisation risk, in case the General Agreement is governed by Slovak law, we suggest adding certain clarifications in § 11 of the General Agreement. Please refer to Appendix D for the suggested wording.

(i) Safeguards concerning derivative transactions, close-out netting and collateral arrangements under the Resolution Act

<u>The powers of the Resolution Council and safeguards in general</u>

The Resolution Council has broad powers to transfer or modify any contracts of a Slovak Bank or Slovak Investment Firms in resolution proceedings and exercising such powers could significantly affect the contractual and commercial position of the parties.

Such powers include the suspension on termination rights of the Other Party. Such power is enshrined under Section 17 of the Resolution Act, the Resolution Council has the power (by way of publication of a notice) to suspend the termination rights of any party to a contract with either (a) a Slovak Bank or Slovak Investment Firm being subject to the resolution proceedings or (b) a subsidiary of such institution where such subsidiary's obligations are guaranteed or otherwise supported by the institution and the relevant termination right is based solely on the insolvency or financial condition of the institution under resolution proceedings. The intention behind the suspension is to allow the Resolution Council time to take measures without the interfering effects of exercising termination rights of the institution's counterparty. The suspension is in each case limited in time and will last only from publication of the notice of resolution measure in the Bulletin of NBS and published on the website of NBS, instituting the suspension until midnight at the end of the following business day, *i.e.* a maximum of 48 hours. However, Section 17 of the Resolution Act does not include the provision under the BRRD that the suspension only applies if the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed. In other words, if the termination rights are suspended by the Resolution Council, the Other Party would not be entitled to terminate the General Agreement even in case of failure of the Slovak Bank or Slovak Investment Firm to make payment or delivery under the General Agreement before or during the suspension period. In addition, if at the end of the suspension period the obligation under the Agreement have been transferred to another entity, the Other Party would be entitled to terminate only if the ground for termination persists under the original terms of the General Agreement or if a new ground for termination arises after the transfer. Also, if the Resolution Council effects a bail-in, the original termination right in respect of the original breach is permanently overridden. However, the termination rights under the Agreement should be preserved in respect of any new breach or other termination reason occurring after the bail-in.

The Resolution Council is further entitled to apply the following main resolution tools to institutions that meet the conditions for resolution set out in the Resolution Act:

- the sale of business tool;
- the bridge institution tool;
- the asset separation tool; and
- the bail-in tool.

These resolution tools may be applied individually or in any combination, except for the asset separation tool, which may only be applied in conjunction with another resolution tool.

In its resolution order, the Resolution Council may order the transfer of assets and/or liabilities in whole or in part and/or to reduce or write down the liabilities of a Slovak Bank, Slovak Investment Firm or Slovak management Company (including claims and liabilities in respect of the transactions). The Resolution Council may amend provisions of agreements to which the Selected Institution under resolution is a party.

However, there are specific safeguards related to derivatives, close-out netting and collateral arrangements designed to protect the integrity of the basic contractual mechanism in order not to undermine systemic stability and preserve legitimate capital market arrangements.[19]

Protection against partial transfers

The Resolution Council may not order the partial transfer of claims and obligations which are subject to a close-out netting or collateral arrangement. The Resolution Council may also not use its ancillary power to amend such agreements. Section 80 of the Resolution Act provides explicitly that through the use of ancillary powers under Section 13 of the Resolution Act, the Resolution Council must protect rights and liabilities arising from *inter alia* netting arrangements entered into between a Slovak Financial Institution under resolution and another person against transfers of protected parts of the rights and liabilities, their change or termination. It also provides explicitly that the Safe Harbour Provisions of the Bankruptcy Act on close-out netting apply mutatis mutandis also to the protection of rights and liabilities in the resolution proceedings. This is to ensure that claims subject to netting or collateral arrangements may only be transferred all at once.

For completeness, notwithstanding its obligation to protect the above-mentioned rights and liabilities, the Resolution Council may, consistently with Section 77 (2) of the BRRD, if it is necessary for availability of the protected deposits:

- transfer protected deposits and protected client assets forming a part of any of the arrangements mentioned above without transferring other assets, rights or liabilities that form a part of the same arrangement; and

- transfer, modify or terminate any of the arrangements relating to assets, rights or liabilities without transferring the protected deposits and protected client assets.

We note however that protected deposits are not typically involved in the Individual Contracts under the General Agreement. For the sake of clarity, cash collateral transferred by the Other Party to a Slovak Bank or Slovak Investment Firm under the Credit Support Annex on a true title transfer basis would not be considered as a "deposit" with the Slovak Bank or Slovak Investment Firm.

Bail-in of derivatives based on the net position

With respect to derivative transactions, the Resolution Council may exercise the write-down or conversion power (the bail-in tool) in relation to liabilities arising from derivatives only upon or after closing-out the derivatives pursuant to the Section 63 of the Resolution Act implementing Section 49 of the BRRD. After the commencement of resolution proceedings, the Resolution Council may terminate any derivative contract and close any related position from a derivative contract. However, where the derivative transaction is subject to a netting agreement (such as § 10 and § 11 of the General Agreement), the Resolution Council or an independent valuator determines the amount of liabilities arising from those transactions on a net basis in accordance with the terms of the agreement. On that basis, we believe that the Resolution

[19] See Recital 95 of the BRRD.

Council or the independent valuator should proceed in accordance with the close-out netting provisions of the General Agreement when exercising write-down or conversion powers.

Certain concerns have been raised on the basis that Section 63 of the Resolution Act refers specifically to "derivatives", but many Individual Contracts under the General Agreement would not qualify as such. Mainly, the Individual Contracts that do not qualify as financial instruments under MiFID 2 (see the analysis in Appendix B) would most likely not qualify as "derivatives" under Slovak law. It is arguably the case that Section 63 of the Resolution Act would not apply to such transactions. However, we note that Section 80 of the Resolution Act provides for general protection of close-out netting, in particular by confirming that the Safe Harbour Provisions under the Bankruptcy Act should apply mutatis mutandis in the resolution proceedings. On this basis, we believe that Section 63 of the Resolution Act would apply notwithstanding that certain transactions under the relevant General Agreement would not qualify as derivatives under Slovak law.

Also, under Section 59 (1) (b) of the Resolution Act, a write-down or conversion may only be effected to the extent the resulting net liability is not a "secured liability" up to the value of the provided collateral.

Group and multibranch measures

Resolution measures taken by an EEA resolution authority would, in general, be enforceable in the Slovak Republic by the Resolution Council in accordance with the principles of mutual recognition of such resolution measures within the EEA. Under Section 85 of the Resolution Act, the Resolution Council may recognize a resolution measure of a resolution authority outside of the EEA, either on the basis of mutuality and co-operation agreement, its own decision or as part of a resolution college. If such third country measure is recognized, the Resolution Council may make resolution orders in connection with assets located in the Slovak Republic or governed by Slovak law and may suspend the close-out rights and the rights under the collateral arrangements if it is necessary for the implementation of the resolution measure. However, the Resolution Council when effecting any such powers to implement a third country resolution measure would be still subject to requirements under the Resolution Act and may refuse implementation of such measure if it would be in breach of Slovak law. We believe that this means that a resolution measure which does not comply with the safeguards relating to close-out netting will not be recognized.

Finally, the Resolution Council may also initiate resolution proceedings in respect of a Slovak branch of a non-EEA financial institution, provided that the relevant home state authority fails to take resolution action or there are circumstances involving risk to the financial stability of the Slovak Republic or another EEA Member States or other grounds under Section 85 (7) of the Resolution Act.

To conclude, we believe that enforceability of close-out netting provisions of the General Agreement entered into with a Slovak Bank or Slovak Investment Firm should not be negatively affected by commencement of resolution proceedings to the extent none of the Individual Contracts concerns protected deposits or client assets and except that termination rights under the Agreement arising solely due to occurrence of a crisis prevention or crisis management measure are restricted and may be further suspended by the Resolution

Council.

C.I.1.11 ***Do the laws of the Slovak Republic recognize that the close-out netting provisions in section §§ 10 to 11 of the EFET General Agreement (Term and Termination Rights; Calculation of the Termination Amount) apply to all Individual Contracts? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate the 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 Contract under the General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the General Agreement following a previous Partial Close-Out.***

Single agreement concept

The single agreement concept (as expressed in § 1.1 of the General Agreement) would be enforceable under Slovak law. The single agreement concept is also particularly important under Slovak law, because it safeguards the rights of the Other Party by preventing the Slovak Party (or its insolvency administrator) from cherry-picking Individual Contracts even where the termination provisions and close-out netting may not be enforceable in accordance with their terms. At the same time, although the single agreement concept is in our view enforceable, it is not commonly used in Slovak law context and Slovak courts may struggle with its interpretation. Therefore, where the General Agreement is governed by Slovak law, we recommend that the concept is clarified by the amendment suggested in Appendix D.

Cherry-picking

In view of the risk that the close-out netting provisions of the General Agreement would not be enforceable with respect to a Slovak Corporate where the Other Party is not a Qualified Party, we have examined the risk of "cherry-picking" in that situation. We have assumed that the Slovak Party or its insolvency administrator seeks to assume the profitable Individual Contracts and to reject the unprofitable Individual Contracts.

The General Agreement does not allow termination of Individual Contracts separately from each other, unless otherwise agreed between the Parties, *e.g.* where a partial close-out is agreed in respect of the Allowance Transactions. We note that such agreed partial close-out does not affect enforceability of the close-out netting in general under Slovak law.

There are, however, statutory rights under Slovak law to terminate or rescind an agreement that should also be considered. In the event of a declaration of bankruptcy, where an agreement in respect of mutual obligations has not yet been fully performed by either party, it may be rescinded by the party which has fully performed its obligations (or, if neither party has fully performed its obligations, by either party) but only to the extent of obligations which have not yet been performed.

Therefore, the general rule would be that the General Agreement could be rescinded by either the bankruptcy administrator or the non-defaulting Party, but only to the extent of the obligations to deliver any instruments or pay any amounts with respect to the outstanding

Individual Contracts. For the sake of clarity, this would apply to Individual Contracts under which one party provided delivery, but the payment for such delivery is pending by the other party – though we believe that in this case that General Agreement can only be terminated as whole.

The above rule would not, in our view, affect the Individual Contracts that have already been fully settled between the parties (*i.e.* both parties have performed their mutual obligations) before the declaration of bankruptcy, since the obligations of the parties to deliver any instruments or pay any amounts with respect to those Individual Contracts "have been fully performed".

In relation to whether or not bankruptcy administrators can "cherry-pick" when reviewing which transactions to set aside in the event of the bankruptcy of a Slovak company, it is at the bankruptcy administrator's discretion to choose which contracts may be challenged under the Bankruptcy Act and it should do so with the aim of maximizing the recovered amount.

However, the single agreement concept should, in our view, be sufficient for a General Agreement and all outstanding Individual Contracts to be viewed as forming one contract. The bankruptcy administrator cannot therefore "cherry-pick" Individual Contracts, but can make a decision on whether or not to rescind on the basis of the entire position of the Slovak Party under the General Agreement.

The question remains as to whether the close-out netting mechanism would survive rescission of the General Agreement.

With respect to the General Agreement governed by foreign law, due to the lack of any explicit provision of the Bankruptcy Act on this issue, arguably, it would follow from Sections 9 and 11 of the Slovak Act on International Private and Procedural Law (No. 97/1963 Coll., as amended) that relevant foreign law should govern the effects of such rescission. The same conclusion follows from Section 12 of the Rome I Regulation. However, this argument has not been tested with the Slovak courts and it is possible that a Slovak court would apply Slovak law to determine the effects of such rescission.

Under Slovak law, Section 351 of the Commercial Code governs the effects of rescission of a contract. The effect of this and the rule under the Bankruptcy Act would be that all unperformed rights and obligations would be terminated. Section 351(1) of the Commercial Code further provides that rescission of a contract does not prejudice the effects of those provisions of the contract that, according to the parties' determination or their nature, should survive the termination of the contract. Therefore, the additional provision in § 11 that we suggest in Appendix D should make it clear that the intention of the Parties is that the close-out netting provisions should survive any termination or rescission of the General Agreement. The additional provision is recommended where the General Agreement is governed by Slovak law. In any other case the question of surviving provisions would be governed by relevant applicable law.

For the sake of completeness, while it is reasonably clear that the close-out netting provisions are likely to survive rescission of the General Agreement by a bankruptcy administrator, the enforceability of such surviving close-out netting provisions is still subject to discussion in Parts C.I.1.4 and C.I.1.5. However, we confirm that there is no "cherry-picking" risk in a situation where the Safe Harbour Provisions apply. Section 180 of the Bankruptcy Act explicitly deals with the effects of a rescission or termination of any close-out netting agreement (i.e. including the General Agreement). The Bankruptcy Act provides that rescission of a close-out netting agreement shall have no effect on those provisions of that agreement dealing with close-out netting. Where parties have entered into transactions under or in connection with a close-out netting agreement and there is a rescission of that agreement, only a single net obligation shall be due and payable in respect of those transactions which are subject to close-out netting under that agreement. The amount of such single net obligation shall be determined in the manner specified in that agreement.

C.I.1.12 ***Is the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD, GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of the Slovak Republic or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?***

Any claim against an insolvent Slovak Party cannot be enforced in currency other than euro in bankruptcy and restructuring proceedings.

Any claim owed by a bankrupt Slovak Party to be registered by the non-defaulting Party in the bankruptcy proceedings must be registered in Euro (the legal currency of the Slovak Republic). If that claim is registered in any other currency, the amount of the claim will be converted into Euro by the bankruptcy administrator at the exchange rate published by the European Central Bank or NBS as at the date of the publishing of a decision of the relevant court on the declaration of bankruptcy in respect of the insolvent entity in the Commercial Bulletin. If that claim is registered in a currency for which the European Central Bank or NBS does not publish its exchange rate, the amount of the claim will be converted into euro by the bankruptcy administrator with due care.

The provisions for converting the claim into Euro apply *mutatis mutandis* to the registration of claims in restructuring proceedings.

C.I.1.13 ***Please specify, if and as applicable, the degree to which termination and close-out netting rights in insolvency 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 categorisation or regulatory or legal status?***

<u>Safe Harbour Provisions</u>

Slovak law (Section 180 of the Bankruptcy Act) recognizes the concept of close-out netting and safeguards the enforceability of close-out netting agreements in bankruptcy and restructuring by providing that the bankruptcy and restructuring shall not affect the rights of the parties to the close-out netting agreement. In addition to bankruptcy and restructuring, the Safe Harbor Provisions apply in the involuntary administration of a Slovak Financial Institution. The Safe Harbour Provisions apply also to a Slovak Corporate, provided that the other party of the General Agreement is one of the Qualified Parties as defined in the Bankruptcy Act. The Safe Harbour Provisions would also apply in case the Slovak Party itself is a Qualified

Party notwithstanding the status of the Other Party. For further clarification regarding the Qualified Parties please refer to Part C.I.1.2.

Slovak Municipality and Slovak Region

Slovak Municipalities and Slovak Regions cannot be subject to insolvency proceedings (save for a specific type of involuntary administration that does not affect the enforceability of close-out netting as described in Appendix C). Therefore, the restrictions on enforceability of termination and close-out netting provisions of the General Agreement (§ 10.3, § 10.4, § 10.5 and § 11) do not apply in respect of Slovak Municipalities and Slovak Regions and those provisions of the General Agreement would be enforceable under Slovak law, notwithstanding involuntary administration of Slovak Municipalities and Slovak Regions.

Slovak Financial Institution with a branch in another Member State

In respect of a Slovak Financial Institution having a branch in any other Member State, the effects of involuntary administration instituted in respect of that Slovak Financial Institution will be governed by the governing law of a contract, if such contract is "*any settlement agreement or other similar arrangement which aims to replace, or to change, the total difference between mutual rights and obligations of the contracting parties by, or to, a single aggregate mutual right and obligation of the contracting parties*".

We believe that the effects of the close-out netting mechanism in the General Agreement are *to replace, or to change, the total difference between the mutual rights and obligations* of the parties to the General Agreement *by, or to, a single aggregate mutual right and obligation* of the Parties to the General Agreement and that the calculation under § 11 is a calculation of that *single aggregate mutual right and obligation*.

Thus, the effect of the above rule is that, in the event of institution of the involuntary administration in respect of a Slovak Financial Institution having a branch in any other Member State, the effects of involuntary administration (*i.e.* a reorganisation measure) on the close-out netting mechanism under the General Agreement will be governed by the governing law of the General Agreement. In other words, one would have to establish what the effects of a bankruptcy or involuntary administration under that relevant governing law of a financial institution having a branch in any Member State are with respect to the close-out netting mechanism under the General Agreement.

If the result of the above analysis under the relevant governing law (*e.g.* English or German law) was that, in the event of the institution of any reorganisation measure in respect of a financial institution having a branch in any Member State, the close-out netting mechanism under the General Agreement would be enforceable, then this should cause the mechanism to be enforceable in the event of the institution of the involuntary administration in respect of a Slovak Financial Institution having a branch in any other Member State.

Furthermore, in addition to the above, please note that a Slovak court does not have jurisdiction to declare bankruptcy on the assets of a European financial institution, this being an institution defined by section § 181(2) of the Bankruptcy Act as an analogous institution to a Slovak financial institution pursuant to section § 176 (1) of the Bankruptcy Act[20], but based in a different EU Member State ("**European Financial Institution**"). Moreover, potential bankruptcy proceedings in respect of the assets of a European Financial Institution, including its assets situation in the Slovak Republic, would be conducted exclusively pursuant to the applicable law of its registered seat.

[20] Meaning one of the following: Bank, Institution of electronic money, Insurance Company, Reinsurance Company.

C.I.2 Non-insolvency related Material Reasons

C.I.2.1 ***Please discuss and advise on the issue outlined under point C.I.1.11, in the context of non-insolvency related Material Reason.***

As it has been already been mentioned previously, under Slovak law the netting provisions stipulated in sections §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts subject to the single agreement concept as described in § 1 of the EFET General Agreement. The single agreement concept is necessary in order to preserve the enforceability of the termination right and of the ability to calculate the net amount under the General Agreement, otherwise any default under (or other event in respect of) an individual transaction entered into under a framework agreement would not result in the termination of the framework agreement as well as of all other individual transactions under thereof.

On a contractual civil law basis, the Parties are free to agree on exceptions from the single agreement concept by precisely specifying those transactions and/or events which break through the veil of uniformity. Nevertheless, in our view this goes against the general single agreement concept.

Furthermore, we reiterate our reservations in respect of the Early Termination concept, for clarification please refer to Parts C.I.1.5.

C.I.2.2 ***Please discuss and advise on the issue outlined under point C.I.1.12 in the context of non-insolvency related Material Reason.***

It is at the discretion of the Parties to determine the currency they wish to apply in their contractual relationship. Please be aware that the following special provisions in relation to the international trade agreements are stipulated in the Slovak Commercial Code:

<u>Currency of the Monetary Obligation</u>[21]

The debtor is obliged to pay in a currency in which the payment was agreed. In case of doubt, the debtor is obliged to compensate any damages in the same currency as in which they are liable to compensate the creditor in the event of a breach of the contract or expiry of the obligation.

If the legal regulations of the state in the territory of which the debtor has its registered office or place of business or, if applicable, residential address, or other governing legal regulations prevents payment in the currency as agreed between the parties, then the debtor is obliged to compensate any damage incurred by the creditor as a result of payment in a different currency.

<u>Conversion of Currencies</u>[22]

If payment is agreed by the parties in a certain currency and a debtor, under the contract concluded with a creditor or under an international treaty or other legal regulation, is to pay in

[21] Section 732 of the Commercial Code.

[22] Section 733 of the Commercial Code.

a different currency, then for the purpose of calculating the amount in such other currency, the median rate between both currencies valid at the time when the payment is provided at the place determined in the contract, otherwise at the place where the creditor has its registered office or place of business or, if applicable, residential address, shall be decisive for the currency conversion.

Currency Clause[23]

If the contract determines that the price or other monetary obligation is understood to be at a certain rate of exchange for the currency in which the obligation is to be fulfilled (secured currency) in relation to a certain other currency (securing currency), and if after conclusion of the contract the exchange rates of both currencies change, the debtor is bound to pay the monetary fulfillment amount either reduced or increased proportionately, so that the sum of the securing currency remains unchanged.

If the contract does not determine which exchange rates are to be taken into account, it shall be deemed that the decisive exchange rates are the median exchange rates valid in the state in which the debtor has its registered office or place of business or, if applicable, residential address at the time of concluding the contract and at the time when the monetary obligation is to be fulfilled.

Should the currency clause in the contract stipulate the use of several currencies as securing currencies, then the average of the exchange rates between the secured and the securing currencies is decisive, unless agreed between the parties otherwise in the currency clause of the contract.

Foreign exchange act

If a foreign exchange emergency is declared by the Government of the Slovak Republic under the Foreign Exchange Act, payments in foreign currency or abroad generally may be suspended for the duration of such emergency (not to exceed three months at any one time).

Furthermore both a Slovak Party or a Slovak based subsidiary of a foreign party are obliged to report to designated foreign exchange reporting places (a list is containing contact details of designated foreign exchange reporting places is accessible on the website of the NBS), information concerning transactions related to, direct investment, financial loans, securities transactions, financial market operations, however, the subsidiary of the foreign party is obliged to report only such transactions which are related to its operations in the Slovak Republic.[24] However, please note that the non-fulfilment of this duty does not impact the validity and enforceability of a contract, but rather can only subject the breaching part to a fine.

Hence, to summarize, we are of the opinion that subject to the limitations specified above, as well as assumptions and limitations in this Opinion and in the context of termination due to non-insolvency related Material Reason, payments of any compensation claims in Euro, USD

[23] Section 744 of the Commercial Code.

[24] The scope of information regarding the transaction which needs to be reported is further clarified in section §34b of the Foreign Exchange Act.

or GBP (as agreed between the parties in the Election Sheet) are enforceable under the laws of the Slovak Republic.

C.I.2.3 ***Please discuss and advise on the issue outlined under point C.I.1.13 in the context of non-insolvency related Material Reason.***

In regard to the different treatment which is enforceable as a result or dependent upon, or otherwise affected by, the status of one or more of the concerned parties falling within a particular category of classification of entity, we are of the opinion, that termination and close-out netting provisions of the General Agreement would be generally enforceable *vis-á-vis* a Slovak Party not being subject to insolvency proceedings.

The enforceability of the rights of the Terminating Party to terminate and close-out netting provisions the General Agreement in accordance with its terms, may be impacted by the following: (i) Involuntary administration of a Slovak Bank, (ii) Involuntary administration of a Slovak Investment Firm, Slovak Insurance Company and Slovak Management Company, (iii) Resolution proceedings in respect of a Slovak Bank or Slovak Investment Firm, (iv) Involuntary administration of a Slovak Municipality and (v) Liquidation (winding-up). For further details, please see Appendix C.

To summarize, our opinion is that the termination and close-out netting provisions of the General Agreement would be generally enforceable *vis-á-vis* a Slovak Party not being subjected to insolvency proceedings, however, subject to our reservations as elaborated above in Parts C.I.1.5 and C.I.1.10, should the Slovak Party fall within a particular category or classification as an entity, we note that certain restrictions on the enforceability of the termination and close-out netting provisions of the General Agreement are applicable.

C.I.2.4 ***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?***

<u>Enforceability vis-à-vis Slovak Party not being subject to insolvency proceedings</u>

Termination and close-out netting provisions of the General Agreement would be enforceable vis-à-vis a Slovak Party not being subject to insolvency proceedings, subject to limitations specified in Part C.I.1.5

<u>Enforceability vis-à-vis Slovak Party in insolvency proceedings</u>

In Part C.I above we described all the restrictions on enforceability of the termination and close-out netting provisions of the General Agreement vis-à-vis a Slovak Party in insolvency proceedings notwithstanding the reason for termination (i.e. whether it is the reason under §10.5(c) or a non-insolvency-related Material Reason).

We reiterate that the moratorium applicable in the event of restructuring of a Slovak Corporate where the Safe Harbour Provisions do not apply (as discussed in Part C.I.1.5) prevents the Other Party from terminating the General Agreement for any default (Material Reason) of the Slovak Party which has occurred before the institution of the restructuring proceedings.

C.II MULTIBRANCH PARTIES

Pursuant to the Instruction Letter, our conclusions under this Part C.II are going to distinguish between (1) a Multibranch Party incorporated, organized or having its centre of main interest in Slovakia ("**Slovak Multibranch Party**") and (2) a Multibranch Party incorporated, organized or having its centre of main interest outside Slovakia, but operating through one or more branches in Slovakia ("**Foreign Multibranch Party**").

C.II.1 Slovak Multibranch Party

Opinions in this Part C.II.1 are based on the additional assumptions set out in Part B.I.3.2.

C.II.1.1 ***Would there be any change in your conclusions reached under C.I.1 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multilateral branch basis prior to its insolvency?***

There would be no change in our conclusions reached under Parts C.I.1 and C.I.2 above concerning the enforceability of close-out netting under the General Agreement based upon the fact that a Slovak Bank has entered into the Individual Contracts on a multibranch basis prior to its insolvency.

As a matter of Slovak law, any non-Slovak branch of a Slovak Bank would not be regarded as a separate entity and any acts of that branch would be, under Slovak law, acts made by that Slovak Bank.

The Bankruptcy Act explicitly provides that the bankruptcy proceedings in respect of a Slovak Bank are to be governed solely by the Bankruptcy Act. Where the Slovak Bank's assets are situated in another Member State, then the bankruptcy proceedings under the Bankruptcy Act will also apply to those assets. However, if that Slovak Bank's assets are situated outside the territory of any Member State, then the Bankruptcy Act provides that any bankruptcy declared in respect of that Slovak Bank will apply to those assets if this is permissible under the laws of the state in which those assets are situated.

C.II.1.2 ***Would the EFET General Agreement be treated as a single unified agreement by the Slovak receiver under the laws of the Slovak Republic, 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?***

We can confirm that the treatment of the General Agreement as a single, unified agreement would not be affected by the treatment of the General Agreement or Individual Contracts thereunder by whatever treatment by an insolvency administrator in a jurisdiction where close-out netting may be unenforceable.

C.II.2 Foreign Multibranch Party

Opinions in this Part C.II.2 are based on additional assumptions expressed in Part B.I.3.3.

C.II.2.1 ***Would there be separate proceedings in Slovakia with respect to the assets and liabilities of the Slovak Branch upon the start of the insolvency proceeding for Party F***

in Country H? Or would the relevant authorities in Slovakia defer to the proceedings in Country H, so that the assets and liabilities of the Slovak Branch would be handled as part of the proceedings for Party F in Country H? Could local creditors of the Slovak Branch initiate separate proceedings in Slovakia even if the relevant authorities in Slovakia did not do so?

EU Member States

Courts of the EU Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to commence insolvency proceedings. These would be the main insolvency proceedings. The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the event that Party F is a foreign corporation having its centre of main interests in Country H, which is a Member State, secondary proceedings under Section 3(2) of the EU Insolvency Regulation could be commenced in the Slovak Republic. Secondary proceedings would be bankruptcy proceedings (in Slovak: *konkurz*) and they could be initiated by corporation's creditors. The effects of such secondary proceedings would be limited to assets situated in the Slovak Republic. Pursuant to Section 45 (1) of EU Insolvency Regulation, each creditor is entitled to lodge claims in the main proceeding in Country H as well as lodge claims in secondary proceeding in the Slovak Republic.

Provided that the Party F is an insurance undertaking, credit institution, investment firm or any firm, institutions and undertaking that is covered by the EU Directive 2001/24/EC or a collective investment undertaking with a registered seat in Country H, which is an EU Member State, the bankruptcy proceedings related to Party F, including all its assets situated in the Slovak Republic, are to be governed solely by the laws of a relevant Member State. No separate proceeding will be permissible in respect of a Slovak Branch. Nevertheless, please note that our opinions expressed herein are based upon the conclusion that the legal nature of Party F, pursuant to the Instruction Letter, would correspond to the exclusions from the application of the Regulation (EU) 2015/848 as defined in the paragraph above.

Non-Member States

Regardless of whether Party F is a foreign corporation or a foreign credit institution, if Country H is not a Member State, then separate bankruptcy proceedings with respect to the assets and liabilities of the Slovak Branch can be initiated in the territory of the Slovak Republic under the Bankruptcy Act. This Opinion is based on the following:

Generally, the jurisdiction of a Slovak court with respect to any bankruptcy proceedings under the Bankruptcy Act is given in cases where any debtor's assets are situated in the territory of the Slovak Republic. In the case where the Slovak Branch is a bank, the bankruptcy proceedings can only be commenced on the basis of the petition submitted by the NBS (*i.e.* the regulator of the banking industry) or, subject to a prior consent of the NBS, the administrator under the involuntary administration of the Slovak Branch. In other cases, bankruptcy proceedings can also be initiated by creditors.

Unless any international treaty which is binding upon the Slovak Republic and relating to the satisfaction of creditors of an insolvent debtor is applicable on the contractual relationship (and we are not aware of any such treaty), then any foreign decisions relating to insolvency proceedings will be recognized in the Slovak Republic if there is reciprocity between the Slovak Republic and Country H.

If any insolvency proceedings have commenced in Country H, then the effects of those foreign insolvency proceedings will be recognized in the territory of the Slovak Republic after the delivery of a petition of a foreign administrator subject to: (i) reciprocity between Country H and the Slovak Republic; and (ii) the foreign administrator having proved, at the time of the institution of those proceedings, its appointment and its legal interest in the recognition of the effects of those proceedings in the territory of the Slovak Republic. However, the foreign insolvency proceedings will not be recognized, if, in respect of Party F or the Slovak Branch: (A) any other foreign insolvency proceedings have already been recognized in the territory of the Slovak Republic; or (B) any bankruptcy or restructuring proceedings have been instituted in the Slovak Republic.

The Slovak court may, at its own discretion, decide that some of the effects of the insolvency proceedings in respect of Party F in Country H will not be recognized in the territory of the Slovak Republic.

The fact that the Slovak court has recognized the insolvency proceedings in Country H in respect of Party F does not prevent the institution of bankruptcy proceedings in respect of Party F or a Slovak Branch under the Bankruptcy Act. In such event, if the moment of the institution of the bankruptcy proceedings in respect of Party F or the Slovak Branch under the Bankruptcy Act precedes the recognition of the insolvency proceedings in Country H, then such recognition of such proceeding will cease to be effective.

C.II.2.2 ***If there were separate proceedings in Slovakia with respect to the assets and liabilities of the Slovak Branch, would the receiver or liquidator in the Slovak Republic and the Slovak courts, based on the facts above, include Party F's position under the EFET Agreement, in whole or in part, among the assets of the Slovak Republic and, if so, would the receiver or liquidator and the Slovak 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 Slovak receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Slovak Branch of Part F to pay the mark-to-market value of Individual Contracts entered into with the Slovak Branch to the liquidator or receiver of the Slovak 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.***

EU Member States

As already discussed above, in the event when Party F is a corporation, secondary proceedings could commence in the Slovak Republic in relation to the Slovak Branch. The effects of such proceedings would be restricted to assets situated in the Slovak Republic.

Under Section 2 (9) of the EU Insolvency Regulation, claims of the insolvent party (being its assets) are deemed to be situated in the Member State within the territory of which the third party required to meet them has its centre of main interests. Hence, claims of the Slovak Branch arising under the General Agreement would most likely be considered to be situated in the Member State in which the debtor to such claims (*i.e.* the Other Party) has its centre of main interests. For determining the Centre of main interest of a party subjected to insolvency proceedings, please refer to Section 3 of the EU Insolvency Regulation.

Consequently, there is a risk that, if the Other Party has its centre of main interests in the Slovak Republic, the claims of the Slovak Branch against such Other Party would fall within the scope of the secondary proceedings initiated in the Slovak Republic and that the bankruptcy administrator of a Slovak Branch could try to force the Other Party to pay the mark-to-market value of the Individual Contracts entered into with the Slovak Branch. It must also be noted that the aim of the bankruptcy administrator of the Slovak Branch is to maximize the recovered amount.

Hence, there is a risk that the separate insolvency proceedings with respect to the Slovak Branch would upset the close-out netting envisaged by the General Agreement where the Safe Harbour Provisions do not apply (*e.g.* in case the Other Party is a foreign corporate). On the other hand, where the Safe Harbour Provisions do apply, the close-out netting will be protected and we are of the opinion that the bankruptcy administrator of a Slovak Branch would have no right to force the Other Party to pay the mark-to-market value of the Individual Contracts entered into with the Slovak Branch.

The main argument is that the Safe Harbour Provisions would apply also to the separate proceeding in respect of the Slovak Branch, *i.e.* the integrity of the close-out netting mechanism should be preserved. At the same time, the Slovak Branch is not a separate entity. Therefore, the transactions under the single close-out netting agreement should not be terminated separately and the Termination Amount should not be divided into an amount payable with respect to the transactions entered into with the Slovak Branch and an amount payable with respect to other transactions entered into with Party F under the same General Agreement. However, this approach is not tested with Slovak courts and we cannot confirm that the Slovak court would adopt the same view as expressed herein.

In the event that the Other Party has its centre of main interest outside of the Slovak Republic, the claims of the Slovak Branch against such counterparty would not be deemed to be situated in the Slovak Republic within the meaning of Section 2 (9) of the EU Insolvency Regulation. In such a case, these claims should not fall within the scope of the secondary proceedings commenced in the Slovak Republic in connection with the Slovak Branch. However, please note that this approach is not tested with Slovak courts and we cannot confirm that the Slovak court would adopt the same view. Again, close-out netting would be protected in the case where the Safe Harbour Provisions are applicable.

In that the Party F is an insurance undertaking, credit institution, investment firm or any firm, institutions and undertaking that is covered by the EU Directive 2001/24/EC or a collective investment undertaking, there would be no separate proceedings in the Slovak Republic in respect of the Slovak Branch, provided that Country H is a Member State.

Non-Member States

If Country H is not a Member State and regardless of whether Party F is a corporation or an insurance undertaking, credit institution, investment firm or any firm, institutions and undertaking that is covered by the EU Directive 2001/24/EC or a collective investment undertaking, separate proceedings under the Bankruptcy Act can be initiated, as discussed above.

Because of the absence of any statutory provisions in this respect, it is not possible to arrive at any definitive view as to the approach of the bankruptcy administrator of the Slovak Branch and the Slovak courts.

If any Individual Contracts are concluded through the Slovak Branch, then the mark-to-market value of those Individual Contracts (if a negative number) could form an 'asset' of the Slovak Branch. Under the Bankruptcy Act, the location (situs) in relation to certain types of assets (such as rights and receivables) is not clearly defined. The EU Insolvency Regulation could be used per analogiam so as to define the location of such assets depending on the centre of main interests of the counterparty. However, even if such assets are situated outside of the territory of the Slovak Republic, under Section 174(2) of the Bankruptcy Act a bankruptcy declared by a Slovak court (*i.e.* in respect of a Slovak Branch) shall also apply to all assets situated outside of the territory of the Slovak Republic if this is permissible under applicable foreign law. Therefore, there is a risk that the bankruptcy administrator of a Slovak Branch could try to force the Other Party to pay the mark-to-market value of the Individual Contracts entered into with the Slovak Branch. It must also be noted that the aim of the bankruptcy administrator of the Slovak Branch is to maximize the recovered amount.

Hence, there is a risk that the separate insolvency proceedings with respect to the Slovak Branch would upset the close-out netting envisaged by the General Agreement.

However, the above risk would only arise in a situation where the Safe Harbour Provisions do not apply. If at least one party is a Qualified Party, the close-out netting would be protected and we believe that the bankruptcy administrator of a Slovak Branch would have no right to require the Other Party to pay the mark-to-market value of the Individual Contracts entered into with the Slovak Branch.

The main argument is that the Safe Harbour Provisions would also apply to the separate proceeding in respect of the Slovak Branch, *i.e.* the integrity of the close-out netting mechanism should be preserved. At the same time, the Slovak Branch is not a separate entity. Therefore, the transactions under the single close-out netting agreement should not be terminated separately and the Termination Amount should not be divided into an amount payable with respect to the transactions entered into with a Slovak Branch and an amount payable with respect to other transactions entered into with Party F under the same General Agreement. However, this approach is not tested with Slovak courts and we cannot confirm that the Slovak court would adopt the same view as expressed herein.

C.II.2.3 ***Please consider your answer to the question assuming instead that Party F has no branch located in Slovakia but has assets in Slovakia.***

If Party F is a foreign corporation and if Country H is a Member State, secondary proceedings can only be commenced in the Slovak Republic if Party F has an establishment in the Slovak Republic. Under the EU Insolvency Regulation, an establishment is defined as any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to institution of the main insolvency proceedings a non-transitory economic activity with human means and assets. Hence, the mere location of assets in the Slovak Republic would most likely not suffice to establish jurisdiction of Slovak courts for secondary insolvency proceedings in the Slovak Republic.

If Country H is not a Member State, then the jurisdiction of a Slovak court with respect to any bankruptcy proceedings under the Bankruptcy Act is given in cases where any Party F's assets are situated in the territory of the Slovak Republic.

Consequently, the discussion in Parts C.II.2.1 and C.II.2.2 above (in relation to non-Member States) would apply accordingly in the situation where Party F has no branch located in the Slovak Republic, but has assets in the Slovak Republic.

C.III COLLATERAL

Opinions in this Part C.III are based on additional assumptions expressed in Part B.I.3.4.

C.III.1 *Under the laws of the Slovak Republic, what law governs the transfer of ownership in various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?*

In case of absence of an explicit and clear choice of governing law in the Credit Support Annex, the law applicable to the General Agreement will also govern the Credit Support Annex. If the contractual parties do not select a governing law for the General Agreement, then the court will investigate the rules of private international law with respect to the General Agreement and the Credit Support Annex will follow the law determined by the court for the General Agreement. For more information regarding the choice of law please refer to Part C.VII of this Opinion.

We understand that the Credit Support Annex (§ 7.1) provides for a transfer of title to the Collateral under the respective governing law of the Credit Support Annex; § 7.3 of the Credit Support Annex also specifies that the Credit Support Annex is not intended to create any form of security interest in any Collateral transferred pursuant to the Credit Support Annex.

The transfer of title under § 7.1 of the Credit Support Annex is a matter which is within the sole scope of the governing law of the Credit Support Annex. Slovak law may, however, become relevant and applicable as the *lex concursus* in the event that the Slovak Party becomes subject to insolvency proceedings, because in such situations the recognition of the rights with respect to the Cash in insolvency proceedings may be subject to *inter alia* the recharacterisation risk as described in the following Part C.III.2.

C.III.2 *Would the laws of the Slovak Republic 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 re-characterization?*

We believe that, although there is a residual risk of recharacterisation of transfer of Cash, the transferee should be able to use the arguments below (under both Slovak national law and EU law) as to why Slovak courts should not permit the recharacterisation.

There is no recharacterisation risk with respect to a Letter of Credit or a Parent Company Guarantee. Both the Letter of Credit and the Parent Company Guarantee can be classified as promise of a third party (bank/Parent Company) to the Transferee to pay the amount of the Letter of Credit/Parent Company Guarantee to the Transferee. It is a contractual arrangement with a third party rather than an *in rem* right established by the Transferee.

Recharacterisation analysis under Slovak law

Paragraph 7.1 of the Credit Support Annex indicates that a transfer of cash is intended to take effect as an outright payment as opposed to, for example, to the assignment of the benefit of an account or the creation of a security interest in respect of an account. There is nothing elsewhere in the Credit Support Annex to indicate otherwise.

When analysing the question of whether the Credit Support Annex can be recharacterised as a security interest as a matter of Slovak law (as opposed to the transfer of outright ownership, which is, as discussed above, obviously the effect intended to be created by the Credit Support Annex), one has to assess certain provisions of Slovak law that could, at least theoretically, be capable of bringing about the recharacterisation.

There is a provision in Section 41a(2) of the Civil Code which provides that "if [a] certain act in law is intended to conceal another act in law, the other (concealed) act shall be valid provided that it corresponds to the intention of the parties and has all the requisites of such act in law". One could argue that a transaction under the Credit Support Annex is intended to conceal another act in law, *i.e.* the creation of a security interest. However, it is not clear that the interpretation that the act is in fact a "concealed" security interest would correspond to the intention of the parties, since the intention of the parties is not to achieve an allegedly "concealed" act of granting a security interest, but to enter into the arrangements on the terms of the General Agreement and the Credit Support Annex (*i.e.* a transfer of outright ownership). Therefore, basing our view on our interpretation of law, we do not believe that this provision should recharacterise the transfer of outright ownership as a security interest (but please note the following paragraphs).

Under Slovak law, there exist two conceptually different types of contractual security arrangement; these are the pledge (in Slovak: *záložné právo*) and the "security transfer" (in Slovak*: zabezpečovací prevod práva*). The difference between the two is that the former creates a security arrangement whereby the ownership of the collateral remains to be vested in the collateral provider, while the latter creates the security arrangement in the form of a title transfer whereby the ownership of the collateral "temporarily" passes on to the collateral receiver (but in a context where this is regarded as a type of security interest rather than a transaction based on, and resulting in, a transfer of outright ownership).

Though at first glance and on a formal basis the "security transfer" and the Credit Support Annex may seem to be equivalent legal instruments, we are of the opinion that they differ from one another in several material respects. The key differences are:

- The security transfer is created by the parties with the intention of securing certain secured liabilities by way of a security interest, and therefore it is a requirement that the secured liability be clearly specified in the "security transfer" agreement. There is nothing in the Credit Support Annex to indicate the need for, or to require, the specification of any "secured liabilities" in the Credit Support Annex in the sense in which "secured liabilities" are understood within a security transfer arrangement or other type of security interest available under Slovak law.

- The security transfer is typically created in respect of "specific" assets rather than in respect of "fungible" assets. This means that the collateral taker must, at the end of the security period, return to the collateral provider the same collateral – it generally cannot return the fungible collateral. Under the Credit Support Annex the collateral may be provided by the Transferee to the Transferor in the form of fungible collateral and that provision of such collateral is not affected by the fact that the secured period has expired.

- As the security transfer is regarded as a form of security, should the default occur, the secured party generally sells the collateral transferred to it, with the effect that the proceeds of the sale are applied against the outstanding secured liability. The method to be used under the Credit Support Annex is conceptually different – if there is a default, only the value of collateral should be included in the calculation of final sums under the close-out netting mechanism. This means that the Credit Support Annex relies for its effectiveness on the close-out netting provision of the General Agreement and not on the exercise by the Transferee of a power of sale or any other remedy of a secured creditor in relation to the security transfer or any other type of security interest.

Finally, the Slovak Civil Code recognises the general concept of collateral (in Slovak: *zábezpeka*). Where the Credit Support Annex is governed by Slovak law, an argument can be made that the transfer of the Eligible Credit Support is a *sui generis* collateral arrangement under the Slovak Civil Code, rather than a security transfer.

EU law aspects

Under Article 6 of the Financial Collateral Directive[25] (an instrument purported to be fully implemented into Slovak legislation): "*Member States shall ensure that a title transfer financial collateral arrangement can take effect in accordance with its terms*". Though this rule has not been implemented explicitly and unambiguously into Slovak law (for more information see next paragraph), we are of the opinion that, in a dispute relating to its interpretation, this may be an additional solid argument, in favour of the collateral taker, as a reason why not to recharacterise the Credit Support Annex as a security interest under Slovak law.

In accordance with Article 1(a) of the Financial Collateral Directive, the financial collateral arrangement means a title transfer financial collateral arrangement or a security financial collateral arrangement. The title transfer financial collateral arrangement is defined as an arrangement, including a repurchase agreement, under which a collateral provider transfers full ownership of the financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations.

Slovak law implemented the Financial Collateral Directive in respect of security financial collateral arrangements by introducing special legislative provisions for security interest in the form of a pledge over securities, bank accounts and credit claims. The implementation of the Financial Collateral Directive in respect of title transfer financial collateral arrangements was effected only in part – it is implemented in respect of those title transfer financial collateral arrangements which are for the purpose of "securing" the performance of relevant financial obligations, but not for those title transfer financial collateral arrangements which are for the purpose of "otherwise covering" the performance of relevant financial obligations. While the former were implemented through the introduction of special legislative provisions for security transfers, the latter (*i.e.* arrangements "*otherwise covering*" performance) are not explicitly implemented into Slovak law. The Credit Support Annex in our view clearly falls within this gap, *i.e.* it is entered into for the purpose of "*otherwise covering*" performance rather than for the purpose of "*securing*" performance, and thus it does not benefit from specific recognition under Slovak law. However, this type of arrangement is explicitly recognised under the

[25] Directive 2002/47/EC on financial collateral arrangements ("**Financial Collateral Directive**").

Financial Collateral Directive and, as already mentioned above, Article 6 of the Financial Collateral Directive can in our view be used as another solid argument for preventing the recharacterisation.

The above arguments can be used only in case of a Credit Support Annex where at least one party is a Qualified Entity. In the absence of EU law supporting arguments, *e.g.* where the Credit Support Annex is entered between two corporate counterparties, the recharacterisation risk would be materially higher.

Consequences of the recharacterisation

The risk is that, despite the obvious material differences between the Credit Support Annex on the one hand, and the "security transfer" on the other hand, somebody using a formal approach towards the interpretation of law (rather than an approach based on the substance of the matter and the intention of the parties) may regard the Credit Support Annex as a "security transfer".

There are no perfection requirements in respect of the transfer of cash except for effecting the transfer to the relevant account. Therefore, any recharacterisation concerns related to perfection are limited. However, the recharacterisation may give rise to doubts as to the precise definition of the rights and obligations of the parties, and this can have negative implications, especially in the event of the bankruptcy of a Slovak Transferor. In the worst case scenario (which we do not consider likely, but cannot be ruled out), the Transferee may be forced to return the Cash to the bankruptcy estate of the Transferor. We believe that even in such case the Transferee should be able to claim that it is a secured creditor in respect of the transferred Cash, *i.e.* any "proceeds" from the realisation of such Cash (minus costs of the administrator) should be used only for satisfaction of its claims against the Transferor. But the position is not free from significant doubts and there may be major practical difficulties with achieving the benefit of a secured creditor standing, *e.g.* the Transferee would have to register its claim as a secured claim in insolvency proceedings within prescribed deadlines.

We mentioned in this Part C.III.2 above that the recharacterisation risk would be comparatively higher in the case of transfer of the Cash between two corporate counterparties (*i.e.* where none of the parties is a Qualified Entity). Therefore, it seems preferable that the parties opt for a Letter of Credit/Parent Company Guarantee instead of cash collateral in such cases.

C.III.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 the Slovak Republic 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?***

There are no such perfection requirements under Slovak law. Transfer of Cash to the Transferee's bank account and receipt by it of a Letter of Credit or the receipt of a Parent Company Guarantee as provided in § 3.2 of the Credit Support Annex is sufficient.

C.III.4 ***What is the effect, if any, under the laws of the Slovak Republic of the right to substitute collateral pursuant to § 6 of the EFET Credit Support Annex (Exchange of Eligible Credit Support)? Does the presence or absence of consent to substitution by Party B have any bearing on this question?***

Under Slovak law, there is no effect on the validity of the Letter of Credit and Parent Company Guarantee provided pursuant to the Credit Support Annex.

The presence or absence of consent to the substitution of Collateral by Party B does not have any bearing on the validity of the Credit Support Annex.

The right to substitute the Collateral does not materially affect the conclusions of this Part C.III of this Opinion.

The presence or absence of consent to substitution by either Party has no bearing on this question.

C.III.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 (Calculation of the Termination Amount) together with §11 of the EFET Credit Support Annex (Termination of the Agreement). Assuming that § 11 of the EFET General Agreement is valid and enforceable in the Slovak Republic insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?***

Provided that the EFET General Agreement is valid and enforceable under Slovak law as it relates to the calculation of net amount payable by the either Party, § 11 of the EFET Credit Support Annex will be valid and enforceable as well.

We understand that the term *"collateral provided and not yet transferred"* in this question refers to *"Eligible Credit Support demanded but not received"* as set out in § 3.1 of the EFET Credit Support Annex. Further to § 3.1 of the EFET Credit Support Annex this collateral shall be deemed to be held by the demanding Party. We are of the view that although this assumption appears to support the title transfer nature of the collateral, such a collateral which does not exist (because it has not been transferred) cannot be included in the calculation of the net amount payable under § 11 of the EFET General Agreement as "other amounts payable".

However, please note that there are questions in regard to the enforceability of close-out netting provisions of the General Agreement under Slovak law in the event when Safe Harbour Provisions won't apply.

C.III.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?***

The Credit Support Annex relies for its effectiveness on the close-out netting provisions of the General Agreement. Consequently, should the close-out netting provisions of the General Agreement not be enforceable under Slovak law (as discussed above) then § 11 of the Credit Support Annex would be also affected.

The most important argument is that provisions of the Bankruptcy Act provide that calculation of a close-out amount may reflect value (determined in accordance with applicable contract) of the subject matter of a security right concerning cash, securities or credit claims, the purpose of which is to secure or otherwise cover the liabilities under a close-out netting agreement. This provision is designed to protect close-out netting mechanisms (such as the one in the General Agreement) where the contractually determined value of the credit support is treated as an unpaid amount, thus reducing the exposure of the collateral taker. This explicit protection is available only in cases where the Safe Harbour Provisions apply.

However, we believe that there are valid arguments that the Other Party should be able to rely on its title to the transferred cash collateral even if there are questions regarding the application of the Base Currency Equivalent of the Eligible Credit Support as an *other amount payable* under § 11 of the General Agreement, *i.e.* in cases where there is no explicit protection under the Safe Harbour Provisions. The main argument is that the full title to the cash Collateral has been transferred and there is limited room for the bankruptcy administrator to claim it back otherwise than on the basis of challenging the transfer as an unlawful preference as discussed in Part C.III.7 below. In other words, even where the close-out netting provisions of the General Agreement cannot be applied, the Other Party may have the right to retain title to the cash Collateral, although this has not been tested with Slovak courts and we cannot make a definite conclusion in this respect. The bankruptcy administrator could also claim that the transfer should be recharacterised as a security interest. But even in such case, the benefit of the security should remain available to the Other Party and the cash collateral should not be used for compensation of other creditors.

With respect to both the Letter of Credit and the Parent Company Guarantee, their enforceability would depend upon the governing law and its terms applicable between the issuer and the Transferee. However, enforceability of the Letter of Credit or the Parent Company Guarantee should not be affected by an insolvency of the Slovak Party.

Nevertheless, we note, that as discussed before, certain restrictions may apply if a party of the transaction were to be a Selected Institution pursuant to the Resolution Act, since in the event of institution of Resolution proceedings, the Resolution Council has broad powers to suspend or even terminate performance to which the respective parties are bound.

C.III.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?***

The transfer of collateral by a Slovak Party (Party A) can be avoided by the Slovak Party's bankruptcy administrator or creditors under certain circumstances. The grounds for avoidance are set out in: (i) the Civil Code, which can be applied for by the Slovak Party's creditors at any time or by an administrator in the event of involuntary administration in respect of a Slovak Financial Institution; and (ii) the Bankruptcy Act, which can be applied for by the Slovak Party's creditors (or the bankruptcy administrator) in the event of the declaration of bankruptcy in respect of the Slovak Party.

These rules do not apply with respect to provisions of the Collateral in the form of a Letter of Credit or Parent Company Guarantee.

General anti-avoidance rules under Section 42a of the Civil Code

A Credit Support Annex entered into with a Slovak Party with the intention of curtailing the satisfaction of a Slovak Party creditor's claim may be challenged by the Slovak Party's creditor with a view to it being set aside if the Other Party must have been aware of such intention. This would not apply, however, if the Other Party could prove that it could not have known, with due care, of such intention.

In addition, the Credit Support Annex entered into with a Slovak Party may be challenged by a Slovak Party's creditor with a view to being set aside if:

- obligations of the Slovak Party under the Credit Support Annex were assumed by it for an inadequate consideration at least in the amount determined by expert appraisal or expert estimate; and
- the entering by the Slovak Party into the Credit Support Annex or the provision by the Slovak Party of the Collateral under the Credit Support Annex:
    - has caused the insolvency of the Slovak Party;
    - was done with the intention of unjustifiably deferring or preventing the payment to another creditor of the Slovak Party; or
    - was done with the intention of assuming a liability which the Slovak Party would not be able to discharge on its maturity.

The above rights to challenge the acts of a Slovak Party exist for three years after the act in question concerned.

The effect of an act being set aside under the relevant provisions of the Civil Code is that, although the transaction remains legally binding on its parties, the creditors of a Slovak Party are entitled file the action to the respective court in order to demand satisfaction of their claims against the subject matter of the transaction.

Anti-avoidance rules under the Bankruptcy Act

Under the Bankruptcy Act, acts of a bankrupt party (including those where the obligations have already been fully performed) which curtail the satisfaction of a claim registered in the bankruptcy proceedings by any other creditor of the bankrupt party can be challenged with a view to them being set aside either by the bankruptcy administrator or, under certain circumstances, by creditors of the bankrupt party. The right to challenge those acts must be exercised within one year after the obtaining of the bankruptcy order, otherwise it will terminate upon the expiry of that period. In the case of a successful challenge of a payment by the bankrupt party of a payment obligation, the payee must return the funds to the bankrupt party's estate. As a result, the original payment obligation of the bankrupt party is restored to the full extent.

Section 58 of the Bankruptcy Act sets out that any act of the bankrupt party without any consideration or any act of the bankrupt party where the bankrupt party has delivered (or has been obliged to deliver) a performance for a consideration materially lower than an "arm's length" consideration for such performance is deemed to be an act "without an appropriate consideration".

Section 59 of the Bankruptcy Act defines "preferential acts" as any of the following acts of the bankrupt party:

- a disbursement (whether in full or partially only) by the bankrupt party of a payment obligation which otherwise would become payable as of the time of the declaration of bankruptcy;
- the creation by the bankrupt party of a security interest in respect of its already existing obligation;
- any agreement of the bankrupt party amending or replacing its right or obligation to the detriment of the bankrupt party;
- any other unjustified preferential treatment of the bankrupt party or a creditor of the bankrupt party, to the detriment of other creditors;
- any waiver by the bankrupt party of its right (whether in full or partially only) or an obligation of its debtor; and
- any agreement to, or the allowing of, a termination of the bankrupt party's right.

We assumed in assumption in Part B.I.2(f)26) above that each Agreement (including the Credit Support Annex) is entered into at the time when the Slovak Party is not insolvent under the Bankruptcy Act nor will the entering into of any Agreement result in the insolvency under the Bankruptcy Act of the Slovak Party. This is because any act of a Slovak Party "without an appropriate consideration" or any "preferential act" of a Slovak Party, if executed at the time when that Slovak Party is insolvent or which results in the insolvency of that Slovak Party, can be challenged with a view to it being set aside by the bankruptcy administrator. If such act is executed between related parties, the insolvency of the Slovak Party is deemed to exist, unless proved otherwise.

The acts referred to in both Section 58 and 59 of the Bankruptcy Act can be challenged if they were executed within one year before the commencement of bankruptcy proceedings (or three years in the case of related party transactions).

Section 60 of the Bankruptcy Act provides that any act of the bankrupt party detrimental to creditors, if executed with the intention of injuring/curtailing the creditors – and if the counterparty knew of this intention – then such acts may also be challenged with a view to it being set aside. The intention of the bankrupt party to injure/curtail the interests of the creditors and the knowledge of the counterparty does not have to be proved, if the act was executed between related parties, unless the related party proves that it could not have known of the intention to curtail the creditors. This right exists with respect to acts executed within five years before the commencement of the bankruptcy proceedings.

Section 61 of the Bankruptcy Act provides that any act of the bankrupt party executed after the termination of the bankruptcy proceedings may be challenged with a view to being set aside if bankruptcy has been declared in respect of that bankrupt party within six months after the termination of the preceding bankruptcy proceedings. However, any acts of the bankrupt party executed "in the ordinary course of business" cannot be challenged with a view to being set aside.

With respect to a Slovak Bank, Section 192 (4) of the Bankruptcy Act provides that in the event of bankruptcy, it is not permissible to challenge the acts of party, if the party which acts are challenged, proves that the challenged acts are governed by the law of a different member state and the applicable law does not permit challenging such acts.

With respect to a Slovak Investment Firm, under Section 153 of the Securities Act, the involuntary administration administrator is authorized to challenge certain acts pursuant to Section 42a and 42b of the Civil Code even if those acts are performed in accordance with applicable law of a different Member State.

Substitution of the Collateral

Assuming that the substitute assets are of no greater value than the assets that they are replacing, the substitution of the Collateral does not materially increase the risk of the challenging of the Credit Support Annex. The Safe Harbour Provisions protect substitution or topping up of the Collateral so that it cannot be challenged with a view to being set aside solely on the basis that the new or additional Collateral was provided in respect of an existing obligation.

Where the Safe Harbour Provisions do not apply, a replacement of the Collateral, even if the value is equivalent, could be considered as a security for pre-existing debt, which is avoidable under Section 59 of the Bankruptcy Act. The statutory definition does not include the assessment of whether the additional security was indeed preferential or merely a formal replacement. It is possible that a Slovak judge would apply such condition; however, given the formal reading adopted by many Slovak judges, we are of the opinion that there is a substantial risk that the substitution of the Collateral would be avoidable.

There are no issues with substitution of a Letter of Credit with a different Letter of Credit under Slovak law, provided that the substitution is not restricted in the Letter of Credit.

Posting additional Collateral

The Safe Harbour Provisions protect topping up of the Collateral so that it cannot be challenged with a view to being set aside solely on the basis that the additional Collateral was provided in respect of an existing obligation.

Where the Safe Harbour Provisions do not apply, the transfer of additional Cash as the Collateral pursuant to the mark-to-market provisions of the Credit Support Annex during the suspect period may be subject to anti-avoidance rules under Section 59 of the Bankruptcy Act as discussed above because it relates to an antecedent or pre-existing obligation (see the second and third bullet point above).

There are no issues with providing any additional Letter of Credit under Slovak law.

Exemptions under the governing law of another Member State

Under Section 16 of the EU Insolvency Regulation, detrimental acts enjoy a safe harbor if they cannot be avoided or otherwise challenged under the law of another Member State, which is the governing law of such act. In the event of the declaration of bankruptcy in respect of a Slovak Corporate, an act by the bankrupt Slovak Corporate could not be challenged, provided that the law of the Member State which governs the act does not allow for the challenging. A similar rule applies in bankruptcy of a Slovak Bank under Directive 2001/24/EC on reorganisation and winding-up of credit institutions as implemented in Slovak law.

Therefore, if the Other Party sustains the burden of proof with respect to the following:

- the Credit Support Annex is governed by the law of a Member State; and
- the governing law of the Member State does not allow the challenging of the Credit Support Annex with a view to it being set aside, then

the Credit Support Annex may not be challenged with a view to it being set aside by the bankruptcy administrator or by creditors of the bankrupt Slovak Party.

Consequently, the exemption will prevent challenging with a view to being set aside with respect to the German or English law governed by the Credit Support Annex, provided that German or English law (as applicable) does not allow the Credit Support Annex to be challenged (as to which however we express no view).

C.III.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 the Slovak Republic 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 point C.III.2 above?***

There are no additional requirements that would need to be observed under Slovak law.

C.III.9 ***Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?***

It follows from the above discussion that providing Collateral in the form of a Letter of Credit or

Parent Company Guarantee does not cause major issues from the point of view of enforceability under Slovak law, provided that the rendering of a Parent Company Guarantee is reimbursed, because should the Parent Company Guarantee be provided without any compensation, then the Parent Company Guarantee could be avoided by the bankruptcy administrator in the event of the Parent's company insolvency. On the other hand, there are concerns with enforceability under Slovak law in respect of Collateral consisting of Cash.

We are not aware of any additional Slovak legal aspects to be considered in this context.

C.IV GENERAL ENFORCEABILITY

Is the EFET General Agreement and any of the Annexes (including the EFET Credit Support Annex) enforceable under the laws of the Slovak Republic in accordance with its own terms?

Subject to the assumptions and limitations set out in this Legal Opinion, the General Agreement constitutes contractual arrangements of the Parties and, as such, it would be enforceable before Slovak courts in accordance with its expressed terms, subject to what is discussed below.

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

Slovak law does not define the term "*force majeure*". Under the respective provisions of the Commercial Code, the verbatim translation of this Slovak term is "*circumstances excluding liability*" and it is widely used in contractual relationships. Under the Commercial Code: "*Whoever breaches an obligation arising from a certain contractual relationship shall compensate the damage thus caused, unless it is proven the said breach was caused by the circumstances excluding the liability".*

With respect to the provisions stipulated in the Commercial Code, we recognise two types of provisions related to the contract law, the mandatory ones and those which serve as default rules (*ius dispositivum*) The provision related to "*circumstances excluding liability*" is a default rule, so the parties are free to defines such circumstances in way which differs from the legal definition.

Under the Slovak law, if the party fails to fulfil the contractual obligation due to circumstances excluding liability, it is exempted from its liability for damages. In order to use this exemption, some cumulative criteria must be met:

- existence of obstacle, which occurs regardless the party´s will;
- the obstacle hinders the obliged party from the fulfilment of its obligations;
- it cannot be reasonably presumed that the obliged party could have prevented or overcome such an obstacle or its effects;
- the obstacle could not have been reasonably foreseen.

Despite the deviation of the wording related to the force majeure from the statutory definition under the Commercial Code, § 7 of the General Agreement is in compliance with the Slovak law and should be enforceable in Slovak courts.

C.IV.2 Remedies for non-performance (§ 8 of the EFET General Agreement (*Remedies for Failure to Deliver and Accept*))

Considering the fact that § 8 of the EFET General Agreement regulates the contractually agreed consequences of delivery and acceptance failures on mutual grounds for the benefit of both parties with the same remedy and compensation method, we are of the view that § 8 of the EFET General Agreement, and claims based thereon, will be most likely enforceable and upheld by Slovak courts.

According to specific provisions of the Commercial Code, at least two types of damages are recognised: (i) the actual damage, and (ii) the lost profit. The injured party may demand instead of the actual lost profit, the compensation for profits usually attained in a fair business conduct under the conditions similar to those stipulated in a breached contract in the injured party´s business area. Indirect losses or consequential damages are not recognised as type of damages under Slovak law.

Damage shall be compensated in cash, however the injured party may request for a compensation by the restitution to the former state, which shall be granted, if this type of damages is possible and it can be considered as a common practice.

The provisions of the Commercial Code related to damages are default rules, so in accordance with the above mentioned, the parties may re-define the extent of payable damages in their contract. In case of a dispute, the amount of damages would be finally determined by the respective court based on the contractual agreement.

C.IV.3 Limitation of Liability (§ 12 of the EFET General Agreement)

Enforceability of exclusion and limitation of liability (§ 12.2, § 12.3 and § 12.4)

The admissibility of limitation of liability clauses in commercial contracts is still a much-discussed topic among Slovak (and Czech) legal practitioners and academics. The discussion is based on the following legal background. Slovak commercial law does not stipulate any specific regulation of limitation of liability clauses (as opposed to consumer law, where such clauses are expressly regulated). Under the Commercial Code, the provisions on compensation for damage and the extent of such compensation are framed as default rules.

However, there is one mandatory provision (Section 386 of the Commercial Code) which prohibits any *ex-ante* waiver of claims for damages. According to some opinions supported by one much-discussed decision of the Czech Supreme Court[26], any limitation of liability effectively amounts to a partial waiver of a damages claim and is thus invalid.

However, according to leading Slovak legal commentators, the prohibition of *ex-ante* waivers should not be interpreted too broadly and a reasonable contractual limitation of liability (reasonable in the sense that it does not reduce liability to a merely symbolic amount) should be permitted. Based on these opinions, and also based on our interpretation of the law, we are of the view that limitation clauses, which are common in international business transactions, should also be permissible under Slovak law.

Subject to the above, we take the view that § 12.2, § 12.3 and § 12.4 of the General Agreement should be enforceable in a Slovak court. However, we would like to point out that the legal debate on limitation of liability clauses is still on-going in the Slovak Republic and,

[26] Decisions of the Czech Supreme Court are not binding on Slovak courts, but given the common legal history, Slovak courts often draw inspiration from Czech case law and academic writings.

although the prevailing opinion is that such clauses should be enforceable, it cannot be excluded that courts would eventually adopt a different view.

Enforceability of Duty to Mitigate (§ 12.5)

Under Slovak law, there is a general obligation to avoid or mitigate any damage (Section 417 of the Civil Code and Section 384 of the Commercial Code). The party liable for the damage is not obliged to compensate damage which arose due to the fact that the injured party failed to exercise its duty to mitigate the arising damage.

Under § 12.5 of the General Agreement, each party has a duty to mitigate its damages. According to the General Agreement, this provision is to be construed in accordance with applicable law. Since the contractual provision refers to applicable law regardless, we do not envision any obstacles with its application under Slovak law.

C.IV.4 Ordre public

Please note that the term "*ordre public*" can be a subject of the different interpretation by the Slovak courts. However, there is always a minimum risk of different court´s view in particular case, we do not see any conflict of provisions stipulated in the EFET General Agreement with the *ordre public* of the Slovak Republic.

C.IV.5 Default interest

Paragraph 13.5 of the General Agreement provides for payment by the defaulting party of default interest on any overdue amount. This provision would be enforceable under Slovak law save that, under the Bankruptcy Act, any interest (including default interest) owed by the bankrupt party which accrued after the declaration of bankruptcy on a debt of the bankrupt party registered by its creditor in the bankruptcy proceedings would be excluded from satisfaction in the bankruptcy proceedings. This applies to all Slovak Parties.

Also, any interest (including default interest) owed by a Slovak Corporate which accrued after the institution of the restructuring proceedings in respect of that Slovak Corporate would be excluded from satisfaction under the restructuring plan.

As a result, § 13.5 of the General Agreement will not be enforceable in the event of: (A) the declaration of bankruptcy in respect of a Slovak Party, if such interest accrued after the declaration of bankruptcy; and (B) the institution of the restructuring proceedings in respect of a Slovak Corporate, if such interest accrued after the institution of the restructuring proceedings.

C.IV.6 Payment netting

Payment netting under § 13.3 of the General Agreement would be considered as a set-off under Slovak law. Consequently, § 13.3 would be enforceable under Slovak law subject to limitations set out in Part C.I.1.4 above.

C.IV.7 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.

We recommend opting for German or English law as the governing law of the General Agreement, and a German or English forum whenever commercially viable. We understand that the General Agreement has been developed under, and has largely been revised to confirm with, German and English law; therefore, although the General Agreement would in general be enforceable under Slovak law, its interpretation in accordance with the terms of Slovak law and the practice of Slovak courts may cause undesirable implications for the Parties.

The Slovak legal system has not yet developed a clear legal framework for derivative trading, closeout netting and financial collateral. There is no specific jurisprudence on these topics and no specific precedents. In our experience, Slovak courts tend to take a rather formalistic and non-commercial approach when interpreting similar or related issues. It may involve significant effort to explain to a Slovak court concepts such as that of a single agreement and/or close-out netting, which are established and widely accepted in more developed jurisdictions.

Please refer to Appendix D, where we include additional provisions to mitigate certain risks of the Slovak legal framework. These provision may mitigate some of the adverse consequences discussed above, but should not be relied upon as an ultimate effective remedy to the inherent weaknesses of the Slovak legal framework in the area of derivative trading.

C.V CONFIRMATION PRACTICES

Opinions in this Part C.V are based on additional assumptions expressed in Part B.I.3.5.

C.V.1 Binding Individual Contract

C.V.1.1 *Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization)?*

As a general rule, Slovak law does not require any specific form of communication for entering into an agreement. Therefore, agreements can be concluded either orally or in writing. Moreover, the intent to conclude a contract may also be expressed by conduct that implies such intent. Nevertheless, irrespectively of the form of the agreement, the Parties are obliged to agree on all essential terms of the relevant transaction.

The contract must be made in writing in order to be valid only in cases stipulated by law or if at least one party expresses the intent during discussions on concluding the contract in writing.

There are certain types of agreements, in which the law prescribes the written form as mandatory due to

(i) subject of the agreement, *e.g.* the transfer of real estate, transfer of registered certificated shares issued in the Slovak Republic or by a Slovak issuer, or lending of securities with any Slovak counterparty for which it is required that the agreement between the parties be recorded in written form and signed in order to be valid and binding upon the parties, bank guarantee;

(ii) character of the contractual parties, where certain types of Slovak entities are obliged to conclude agreements in compulsory written form. This is related to almost all transactions with the public entities, such as (i) transactions related to the Slovak property, (ii) legal acts disposing of property of Slovak Municipality or Slovak Region, (iii) agreements with obliged entities under public procurement rules.

Unless the Individual Contract does not fall into one of the above mentioned categories, there are no formal requirements regarding the conclusion of Individual Contracts, hence they do not have to be concluded in writing.

If the Individual Contract is concluded orally, the Confirmation as defined in the EFET General Agreement is not necessary. This rule is in accordance with § 3.2 of the EFET General Agreement which provides that a written Confirmation shall not constitute a requirement for a legally valid Individual Contract.

Concluding the Individual Contract or putting the Confirmation in writing is, in any case, advisable in order to avoid later disputes regarding the content of the agreement. Similarly, a signature (electronic or otherwise) may help to demonstrate the authenticity and integrity of the agreement and could serve as evidence in case of a dispute.

C.V.1.2 *At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable?*

Under Slovak law, a contract becomes legally enforceable from the moment of the "meeting of the minds", *i.e.* the effective exchange of the parties' mutual consents. Consents are regarded as effectively delivered once the expression of will reaches the addressee. Therefore, a contract becomes legally enforceable once, following an offer made by a party and the other party expresses its acceptance in respect thereof and such acceptance is delivered to the offeror.

In the case of an oral Individual Contract, this would mean that the contract is validly concluded when the expression of will of the offeree to be bound by the contract is "delivered" to the offeror, *i.e.* when the offeror hears the offeree's consent on the phone or when the expression of will is otherwise communicated to the offeror.

Where an Individual Contract has been agreed upon orally and is confirmed in writing at a later stage, such Individual Contract becomes legally enforceable at the time of the oral agreement between the parties.

C.V.1.3 ***Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?***

Pursuant the Slovak Civil Code, a contract is concluded when the acceptance of an offer to conclude a contract becomes effective. Silence or failure to act shall not mean the acceptance of an offer. However in commercial law there are also other ways how to express a will without explicitly expressing the consent (dispatch of goods / fulfilment of the obligations under the agreement), provided this follows the established practice between the parties.

Moreover, if an acceptance of an offer contains amendments, reservations, limitations or other changes it can be considered as a rejection of the offer and it is deemed to constitute a new offer. If the orally concluded Individual Agreement is, at the later stage, followed by the written Confirmation, which includes different conditions in compare with the oral agreement, such Confirmation should be considered as a new offer. Failure to object such terms stated in a Confirmation shall not automatically means an acceptance of the offer.

However if the content of the Agreement is described in the Confirmation in other words, without any material change of Individual Agreement, the Confirmation shall not be considered as a new offer and the failure to object its content has no legal effect in relation to the validity and enforceability of the Individual Agreement.

Under the Civil Code, there is general rule concerning the obligation of all contractual parties to prevent any disagreement occurring in contractual relationships. Since the Confirmation may be interpreted as an attempt to avoid the possible misunderstandings in relation to the oral Individual Agreement, the counterparty should communicate in order to prevent the misunderstanding as well. This does not automatically mean the acceptance of the Confirmation, but as recipient of the Confirmation breaches its statutory obligation by the failure to object, in potential dispute such inactivity may be interpreted as the recipient´s disadvantage.

Under Slovak law there is no statutory time period within which a party has to object to incorrect terms. It depends on the individual agreement between the contractual parties or the market practices in a relevant sector.

With respect to the above, the failure to object to incorrect terms in a received Confirmation does not automatically mean an acceptance, but the inactivity of the recipient may be interpreted in favour of the issuer of the Confirmation.

C.V.1.4 ***Is the reference to the relevant EFET General Agreement sufficient for the inclusion of the Individual Contract in the Agreement?***

Master agreements are designed to standardize the terms on which individually featured transactions will be entered into by the contracting parties. This is done by setting out in that master agreement all the provisions which it is envisaged will apply to such individual transactions – and with the documentation for a particular transaction needing only to set out the commercial terms and to apply or dis apply provisions of the master agreement, as appropriate.

Essentially, a master agreement can be described as an agreement under which the parties agree upon the general terms and conditions that will govern individual contracts which will be entered into by the parties in the future and in respect of which the terms and conditions of the master agreement will apply.

We are consequently not aware of any reason why, as far as Slovak law is concerned, Individual Contracts could not be validly entered into and incorporate by reference the terms and conditions of the General Agreement. We, however, propose to strengthen the single agreement concept in the General Agreement by the inclusion of the amendments suggested in Appendix 2.

C.V.2 **Means of Evidence**

Assuming 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 court: (i) taped recording; (ii) witness' statement; (ii) 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?

According to general rules of Slovak procedural law, there is no restriction on admissible means of evidence, so parties may use anything what may contribute to clarifying the case provided that it was gained in a legal way. Under Slovak Civil Dispute Procedure Code especially the procedural party testimony, the witness testimony, documents, the expert opinion, etc. may be included among the evidence. None of the evidence has a pre-determined value or decisive importance. The court is obliged to evaluate the evidence according to its own consideration, each of evidence independently and then all evidence as a whole.

Certain types of documentary evidence have increased their probative value. Public documents (both paper form and electronic documents) issued by the court, public notary or other authority within their scope of competence in a standard form have direct and primary evidentiary status and probative value.

Any of the listed means of evidence may be eligible for rendering evidence of the agreed terms of the Individual Contract.

Taped Recording

Taped Recordings may be considered as a very important means of evidence particularly with regards to the possibility to conclude the Individual Agreement in oral form. There is no special duty to confirm the verbal agreement in writing during the dispute. Nevertheless, for evidence purposes, it is certainly also prudent to confirm the verbal agreement in writing. However, even if the agreement is only evidenced by tape recording, such evidence is admissible in Slovak courts. The recording should be done with the consent of the interlocutor, otherwise it may not be admissible as evidence. Any abuse relating to voice recording is considered an infringement of personal rights.

Witness´ statement

Witness´ statements are admissible as an evidence under the Slovak law. In order to use this kind of evidence, one of the procedural party must propose to use the witness´ statement. The witness´ testimony has no pre-determined value and the court may not take this evidence into consideration (*e.g.* when it has no relevance in relation to the subject matter; other witness statements are in contrary; the witness is not trustworthy).

E-mail or other electronic message or transaction entry system

Emails, other electronic messages or transaction entry systems are also admissible as evidence under Slovak law. Please note that if the electronic document (for example the Individual Agreement) is signed by using the qualified electronic signature, this document is considered to be made in a written form. Even if the standard email or exchange of electronic data are used, they are still admissible as evidence.

Facsimile

Documents transmitted as facsimile are admissible by Slovak courts as well. It is important to underline that such document usually needs to meet certain formality requirements (*e.g.* the document is duly signed by authorized persons; signature of the issuer is notarized; the electronic document is signed by a qualified electronic signature). Thus, for instance, a facsimile of a Confirmation duly signed by the authorised representative of a party may be qualified as a private document with full probable force. However, as discussed above, the evaluation of such evidence would be within the margin of discretion by the court.

C.VI CORE PROVISIONS

C.VI.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 (Enforceability of Close-out Netting) or C.II (Multibranch Parties)? 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.***

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, we understand that none of the elections as suggested in the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) would change the substance of our conclusions reached under parts C.I (*Enforceability of Close-out Netting*) or C.II (*Multibranch Parties*) As far as the EFET Credit Support Annex is concerned, the potential effect of electing to allow substitution with or without consent of Party is indicated in point C.III.7 above.

C.VI.2 ***Considering your conclusions reached under Part C.I (Enforceability of Close-out Netting) or C.II (Multibranch Parties), 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 (Enforceability of Close-out Netting) or C.II (Multibranch Parties (each such provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 1 (Subject of Agreement), § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 (Calculation of the Termination Amount) and the related definitions contained in Annex 1 to the EFET General Agreement.***

We agree that § 1(Subject of Agreement), § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), §10.5(c) (iv) and § 11 (Calculation of the Termination Amount) of the EFET General Agreement are so essential that a material alteration thereof could affect our conclusions reached in respect of the Enforceability of Close-out netting.

Beyond this, we believe that § 4 (Primary Obligations for Delivery and Acceptance of Natural Gas), § 5 (Primary Obligations for the Options) determining the subject of the Agreement and the primary rights and obligations of the Parties to the Agreement and Annex 1 (Definitions) are also essential and material alteration thereof could affect our conclusions reached in this Opinion.

It is also possible that other provisions of the General Agreement would be considered as Core Provisions under the other law than Slovak law.

C.VI.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) ("CPMA") or in the EFET Master Netting Agreement change the substance of your conclusions reached under Part C.I (Enforceability of Close-out Netting) or C.II (Multibranch Parties) such as, but without limitation, by invalidating the netting provisions in the EFET General Agreement due to its inclusion under the broader netting provisions of the CPMA?***

The inclusion of the EFET General Agreement in the referred master netting agreements would not change the substance of the conclusions reached under Parts C.I (*Enforceability of Close-out Netting*) and C.II (*Multibranch Parties*), provided the Core Provisions would not be altered by the CPMA or the Master Netting Agreement.

We assume that the Master Netting Agreement is a valid contract. If the Master Netting Agreement does not meet the statutory requirements, then the unenforceability (invalidity) of the Master Netting Agreement itself will not affect the validity of the EFET General Agreement (except to the extent the Master Netting Agreement so provides, *e.g.* in last sentence of § 2.3 of the EFET Master Netting Agreement, which practically excludes the possibility of partial invalidity), nevertheless, we note that we express no view as to the enforceability of the CPMA and Master Netting Agreement under Slovak law.

C.VII GOVERNING LAW, ARBITRATION AND JURISDICTION

Opinions in this Part C.VI are based on additional assumptions expressed in Part B.I.3.6.

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

Choice of law

According to Rome I Regulation, the contractual parties may choose the governing law of the contract. The Rome I Regulation is directly applicable in the Slovak Republic, so we are of the opinion that the choice of law will be upheld in Slovakia, with the following limitations:

(i) the governing law could be prejudiced by the overriding mandatory provisions, which are defined as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisations, to such extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract;

(ii) If all other elements relevant to the situation at the time of the choice are located in the Slovak Republic (*i.e.* a country other than the country whose law has been chosen), the choice of the parties shall not prejudice the application of provisions of the Slovak law which cannot be derogated from by agreement;

(iii) the application of the governing law could be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Beyond the scope of the Rome I Regulation, the Parties choice of law will be upheld in Slovakia on the basis of the Private International Law Act, if there is a foreign element in their legal relationship.

Choice of arbitration

In the Slovak Republic, the arbitration rules are regulated especially in the Arbitration Act. Disputes (i) regarding creation, change or cessation of ownership right or other right *in rem* regarding the real estate, (ii) regarding the personal status, (iii) related to execution proceedings or (iv) which arise during the bankruptcy or restructuring proceedings cannot be subject of the arbitration proceedings. The consumer rights can be heard in a special type of proceedings. Besides the above mentioned restrictions, all other civil and/or commercial rights regulated in the contract can be submitted to the arbitration.

The arbitration agreement shall be concluded in a written form. The written form is preserved even when the arbitration agreement is a part of the mutual communication of the contractual parties or it was concluded by electronic means which provides a record of the agreement and the parties thereto. The arbitration agreement can also be incorporated by the reference, where it is contained in another document provided that by such reference, parties' will is to include such arbitration agreement in their contract. Moreover, the doctrine of separability also applies.

The Slovak Republic is a contractual party of the *New York Convention on the reciprocal enforcement of arbitration awards* and thus any foreign award would be enforceable in the Slovak Republic, if it is in compliance with the above mentioned Convention.

The Parties' agreement concerning the arbitration will be upheld in the Slovak Republic provided that it follows the above mentioned criteria.

Choice of jurisdiction

Under the Brussels Regulation the contractual parties, regardless of their domicile, may choose a court in a Member State of European Union to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship. There is no requirement that either party is domiciled within the European Union, so the parties may agree on a jurisdiction clause either if they are for example from America. However, the chosen court has to be the court of a Member State of European Union. The agreement conferring jurisdiction must be (i) in writing or (ii) evidenced in writing, or (iii) in a form that accords with practices established between the parties or in the relevant international trade or commerce. The Brussels Regulation is directly applicable in the Slovak Republic, so we are of the opinion that the choice of jurisdiction will be upheld in Slovakia.

A judgment rendered according to the Brussels Regulation shall be recognised in the Slovak Republic without any special procedure being required. Also a judgment given in a Member State of European Union which is enforceable in that Member State shall be enforceable in the Slovak Republic without any declaration of enforceability being required. In some specific case regulated by the Brussels Regulation the recognition and enforcement of the judgment shall be refused (*e.g.* conflict with public policy (ordre public) or if it was given in conflict with res judicata).

C.VIII REGULATORY REGIME

Are there any exchange control laws or licence 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?

Please see below.

C.VIII.1 Exchange control laws

There are no Slovak exchange control laws that may affect the validity and/or enforceability of the General Agreement, provided that no special regime pursuant to the Foreign Exchange Act is established. For example in the event of an extraordinary threat to the stability of the Slovak economy, the Slovak government at the advice of the NBS, may temporarily prohibit the transfer of funds outside of the Slovak Republic.

Furthermore both a Slovak Party or a Slovak based subsidiary of a foreign party are obliged to report to designated foreign exchange reporting places (a list is containing contact details of designated foreign exchange reporting places is accessible on the website of the NBS), information concerning transactions related to, direct investment, financial loans, securities transactions, financial market operations, however, the subsidiary of the foreign party is obliged to report only such transactions which are related to its operations in the Slovak Republic.

C.VIII.2 Licence requirements – financial instruments

In general, entering into any Individual Contract representing a financial instrument[27] requires fulfilment of applicable licensing requirements under Slovak law, since it qualifies for regulated trading in financial instruments as defined under the Securities Act.

A Slovak Investment Firm is authorized to enter into an Individual Contract representing a financial instrument based on the investment licence issued under the Securities Act, and therefore no further licensing requirements need to be fulfilled. The same also applies to a Slovak Bank, which is authorized to enter into an Individual Contract representing a financial instrument based on a licence issued under a respective special act.

Slovak Corporate, Slovak Municipality and Slovak Region may benefit from an exception related to licensing requirements stipulated in the Securities Act, provided that they are persons:

(i) trading with the financial instruments on their own account (excluding persons who deal on own account when executing client orders); or

(ii) providing investment services (other than dealing on own account), in commodity derivatives or emission allowances or derivatives thereof to the customers within the scope of its main business as an ancillary activity, if:

[27] Please see Appendix A for the definition of "financial instruments" under Slovak law.

- do not apply a high-frequency algorithmic trading technique; and
- it 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 under the Securities Act or banking services under the respective special act.

These persons are obliged to notify NBS annually on the fact that that they make use of this exemption and upon request report to the NBS the basis on which they consider that their activity is ancillary to their main business.

In relation to the Slovak Municipality and the Slovak Region, there are special restrictions since they should enter into transactions only in connection with the performance of their public administrative functions.

Furthermore, a Slovak Corporate may also be entitled to enter into an Individual Contract representing a financial instrument without fulfilling any licensing requirements, provided its main business activity consist of dealing on its own account in commodities or commodity derivatives. However, such exemption from the licensing requirement under the Securities Act does not apply to a Slovak Corporate engaged in dealings on its own account in commodities or commodity derivatives if such Slovak Corporate is part of a group which has its principal business activity of which is the provision of other investment services/activities or banking services.

Slovak Insurance Companies and Slovak Management Companies are authorized to trade in financial instruments pursuant to specific regulations. There are restrictions as to the type and purpose of derivative transactions these entities are allowed to enter into. Please refer to our discussion in Part C.VIII.7 below on the consequences of the breach of such restrictions by Slovak Parties.

C.VIII.3 Licence requirements – financial institutions

Licensed financial institutions (such as Slovak Banks) are not allowed to enter into Individual Contracts other than financial instruments under Slovak law unless they obtain a specific authorization of the NBS. Please refer to our discussion in Parts C.VIII.6 and C.VIII.7 below on the consequences of breach of such restrictions by Slovak Parties.

C.VIII.4 Licence requirements – allowances

If an Allowance Transaction (as defined in the Allowances Appendix) is to be settled by physical delivery of emission allowances, emission allowances trading schemes would be relevant. Act No. 414/2012 Coll. on Trading in Emission Allowances (the **Emissions Allowances Trading Act**) distinguishes the trading scheme in respect of greenhouse gas emission allowances on the basis of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and the trading system in respect of polluting gases. However, since the 1st September 2016, the trading system in respect of polluting gases ceased to exist. We understand that the Allowances Appendix only covers emissions of carbon dioxide and other greenhouse gases within the meaning of the

Directive 2003/87/EC.

In order to participate in trading with Allowances, the respective Slovak Party has to participate in the Allowances Trading Scheme, as either an:

(i) obligatory participants – are entities which operate certain installations producing greenhouse gases within the scope of the Annex to the Act on Trading in Emission Allowances (stationary operators) and aircrafts operators, as well as recipients of Allowances for any other type of installations located in the Slovak Republic have to be participants in the trading scheme by virtue of law;

(ii) voluntary participants - are any entities, which operate any other type of installation located in the territory of the Slovak Republic and which has been issued a permit for release of greenhouse gases based upon a submitted request; or

(iii) any other person who opens an account in the Union Register maintained under EU Regulation No. 389/2013. In order to open such account, the entity has to send a request to the Slovak National Administrator, which is ICZ Slovakia a.s.[28]

The Allowances are freely and without any limitations transferable between any of the participants in the Slovak Allowances trading scheme, participants in any other EU country's trading schemes and participants under Annex B to the Kyoto Protocol.

The respective Allowances are valid only for the trading period for which they have been issued. If Allowances are not surrendered, the administrator of the Register will cancel those Allowances within four months after the end of the relevant trading period.

C.VIII.5 Licence requirements – Natural Gas

Under the Energy Act, undertaking business in the energy sector includes inter alia also the generation, transmission, distribution, storage and supply of natural gas including physical delivery. In order to perform such activities, the special licence issued by the RONI is required. A licence may be issued for one or more activities for an indefinite period, unless requested otherwise by the applicant. In addition, the holder of such licence is obliged to be registered with the Register of Partners of Public Sector. In case of breaching this statutory registration duty, RONI shall revoke the licence.

The distribution, supply and generation of natural gas is not considered as undertaking business in the energy sector if such individual performs those activities only for either (i) its own consumption, (ii) or without charging any margins on the reselling of natural gas[29]. In such case, no special licensing requirements shall apply. The individual performing an activity that does not require a licence is subject to a duty of notification, under which he must notify RONI

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[28] ICZ Slovakia a.s., is a joint stock company incorporated under the laws of the Slovak Republic, with its registered seat at Soblahovská 2050 Trenčín 911 01, Business ID: 36 328 057, registered with the District court of Trenčín insert no. 10561/R. Pursuant to the contract no. 62/2012-8.2 regarding the performance of the role of the national administrator of emission allowances of the Slovak Republic, which was concluded between ICZ Slovakia a.s. and the Slovak Ministry of Environment on the 27th of October 2012, ICZ Slovakia a.s. has been in charge of the administration and management of Slovakia's national emission allowances since 01.01.2013.

[29] Section 4(2) of the Energy Act.

within thirty (30) days of the commencement, termination and/or any change in performance of such activity.

An individual licensed to supply natural gas by the authorities of another state that is a party to the Agreement on the EEA, which is interested in supplying natural gas in the Slovak Republic is obliged to apply for a licence for the supply of natural gas in the Slovak Republic which is issued by RONI.

RONI may impose a penalty amounting to between EUR 300 and EUR 300 000 for the performance of such activities without a licence or without submitting a notification. In case of repeated breach of such duty within three consecutive years from the day when the decision came into legal force, the potential penalty may be doubled.

Hence to conclude, if the Individual Contracts are settled by physical delivery, such delivery will be either subject to notification to RONI (in the event the supplier merely resells the natural gas) or subject to obtaining a licence for supply of natural gas from RONI.

C.VIII.6 Licence requirements and enforceability

Under Slovak law, acts executed by a company are generally valid even if they exceed the scope of the company's business. Section 3(1) of the Commercial Code (implementing Article 10 of Directive 2009/101/EC on coordination of safeguards) specifically stipulates that the validity of a legal act is not affected by the fact that a party thereto does not have a licence to carry out a certain business activity.

Therefore, in our view, even if a party to an Individual Contract did require a licence to trade in natural gas and even if it did not obtain such a licence, this would not preclude the validity and enforceability of the relevant Individual Contract or the General Agreement.

C.VIII.7 Other regulatory requirements and enforceability

A different situation may arise if the General Agreement or an Individual Contract were concluded in contravention of other regulatory obligations of one of the parties thereto (e.g. a Slovak Bank entering into an Individual Contract in breach of its obligations under banking regulations or a Slovak Municipality entering into an Individual Contract in breach of applicable public law rules).
There is an on-going legal debate as to whether breach of regulatory law causes the underlying civil contract to be invalid for being *contra legem* (under Section 39 of the Civil Code).

In our view, such breach of regulatory law should generally not render the underlying contract invalid, assuming that the other party has acted in good faith. Moreover, even if such contract were considered invalid, such invalidity would most likely be regarded as being caused by that counterparty, which breached its regulatory obligations. Therefore, such party would be liable for damages caused to the other party by the invalidity of the contract (Section 268 of the Commercial Code and Section 42 of the Civil Code).

C.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.

The amendment of Disclosure Act, which came into force, back in 2011, introduced fundamental changes to contracts entered into with public authorities and publicly-owned companies. Such agreements will not be deemed legally effective until they are published on the dedicated internet website https://www.crz.gov.sk ("**Registry**")[30]. If the contract is not published within three months after it is entered into, it is deemed non-existent. This legislation is aimed at increasing transparency and curbing corruption in the public sector.

The following entities in the Slovak Republic ("**Obliged Persons**") are subject to the Disclosure Act:

- State bodies, Slovak Municipalities and Slovak Regions;
- other legal or natural persons endowed with public administrative authority;
- entities established by law or budgetary entities established by the State, Slovak Municipalities or Slovak Regions (*e.g.* public television, some hospitals, schools); and
- any Slovak Party (including a Slovak Corporate), if its founder is any of the above entities and all of its shares are held by any of the above entities provided the contract is not concluded in the ordinary course of business. If the contract is entered into in the ordinary course of business, then only prescribed information about the contract must be published in the Registry. However, the failure to publish the information would not cause the contract to be deemed non-existent.

The disclosure obligation must be kept in mind when entering into agreements (including the General Agreement) with public entities such as the state, Slovak Municipalities, etc. The fourth bullet point should be kept in mind when entering into the General Agreement and Individual Contracts with fully state-held companies but it is not relevant for formerly or partially state-held companies (such as banks).

When a fully state-held Slovak corporate trades natural gas in the ordinary course of its business, then the exemption would apply and only the information about the concluded General Agreement or Individual Contract should be published. However, one should always consider whether the General Agreement and each Individual Contract is indeed entered into in the ordinary course of business. For example, trading in natural gas may be considered as being in the ordinary course of business, but trading in emission allowances may be outside of it in the case of some Slovak corporates. Whether such trading is within the ordinary course of business would be considered as a matter of fact under Slovak law. Therefore, obtaining the

[30] With the exception of Slovak Municipalities and Slovak Regions, which should publish the contracts on its own website.

representation of the Slovak Party under § 21 (g) of the General Agreement[31] does not in itself provide an ultimate comfort to the Other Party that the Agreement and each Individual Contract would be considered as entered into in the ordinary course of business of the Slovak Party for the purposes of assessment of the compliance with the Disclosure Act.

Even in the case of public entities and fully state-held companies, the Disclosure Act specifically excludes agreements related to financial instruments (as defined in the Securities Act in accordance with MiFID 2) from the mandatory publication.

The disclosure obligation is imposed on the Obliged Persons, however, the other party may apply for publication of the contract in the Commercial Bulletin if the Obliged Person fails to publish the contract within seven days from its entering into force.

Furthermore since 2017, the Act on the Register of Partners of Public Sector institutes a mandatory registration duty for all entities desiring to engage with Public sector institutions[32] in commercial transactions with a value exceeding EUR 100,000 per transaction or up to EUR 250,000 annually. The registration includes the disclosure of the ultimate beneficiary owners.

Furthermore both a Slovak Party or a Slovak based subsidiary of a foreign party are obliged to report to designated foreign exchange reporting places (a list is containing contact details of designated foreign exchange reporting places is accessible on the website of the NBS), information concerning transactions related to, direct investment, financial loans, securities transactions, financial market operations, however, the subsidiary of the foreign party is obliged to report only such transactions which are related to its operations in the Slovak Republic.[33] However, please note that the non-fulfilment of this duty does not impact the validity and enforceability of a contract, but rather can only subject the breaching part to a fine.

C.IX.2 Subordination of related parties under the Bankruptcy Act

The Bankruptcy Act contains strict provisions requiring the automatic subordination of certain related party creditors with an extremely broad definition of related parties.

The definition of a related party[34] includes any of the following: (i) a director, managing employee, procurist or a member of a supervisory board of the Slovak Party or of its qualified shareholder or any close person of those individuals; (ii) a qualified shareholder; or (iii) a legal entity in which any of the persons under (i) or (ii) holds a qualified shareholding. For the purpose of this provision, a qualified shareholding is defined as any direct or indirect holding of at least 5% of the relevant shareholding or voting rights in a legal entity or any influence on the management of a legal entity corresponding to a 5% shareholding.

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31 The representation reads: "it regularly enters into agreements for the trading of natural gas as contemplated by the Agreement, and does so on a professional basis in connection with its principal line of business, and may be reasonably characterised as a professional market party".

32 The definition provided in § 2 of the Public Sector Partners Act is rather extensive and includes *inter alia* Slovak Municipalities and Slovak Regions.

33 The scope of information regarding the transaction which needs to be reported is further clarified in section § 34b of the Foreign Exchange Act.

34 Pursuant to § 9 of the Bankruptcy Act.

Section 95 (3) of the Bankruptcy Act automatically subordinates all claims that are or were held by persons that are or were related parties to the bankrupt debtor. Any security interest granted in relation to such claims is automatically disregarded in bankruptcy proceedings.

There is no established case law giving sufficient guidance on their practical application. However, their broad wording gives rise to significant risks of automatic subordination, even in situations where the creditor may not even be aware of any affiliation to the debtor (*e.g.* where the creditor acquired the claim from an entity that has previously been a related party of the debtor). In light of the relatively low threshold of 5%, the automatic subordination may even catch financial institutions whose sister companies have qualified holdings in corporate debtors.

In addition, any security arrangement made in favour of a related party of a bankrupt Slovak Party will be automatically considered as non-enforceable in the bankruptcy of the Slovak Party. Consequently, because of a broad definition of the security arrangements for the purposes of the Bankruptcy Act, any Credit Support Annex entered into between a Slovak Party and its related party may be non-enforceable in the bankruptcy of the Slovak Party under Slovak law.

C.IX.3 Special pre-insolvency regulation of companies in 'crisis'

By an amendment to the Commercial Code and the Bankruptcy Act that came into force in 2016, the Slovak Parliament created a specific regime for certain related party transactions in a pre-insolvency setting.

Where a Slovak Corporate is insolvent or where the ratio of its equity to its liabilities is below a certain threshold (the ratio was 4/100 in 2016, then increased to 6/100 in 2017 and finally to 8/100 as from 2018), loans or other equivalent performance from certain related parties are deemed to constitute 'equity-replacing performance'.

The relevant related parties are (i) statutory representatives, senior management, commercial proxies, heads of branches or members of the supervisory board, (ii) shareholders with a direct or indirect stake of at least 5% or equivalent rights, (iii) silent partners, (iv) individuals close to the persons above, or (v) persons acting on the account of the persons under (i) through (iii) above. Please note that the definition of "related party" for the purposes of these rules does not include any direct or indirect subsidiaries.

Performance granted by entities with an unknown ultimate beneficiary are also presumed to be granted by a related party.

Such 'equity replacing performance' cannot be returned while the company is in a state of crisis or where the return would trigger such state of crisis.

A restrictive regime also applies to guarantees, collaterals or other security granted in favour of a Slovak Corporate by one of the related parties enumerated above. The restriction is mainly that any such guarantee or security must be granted on strictly and demonstrable arm's length basis and an adequate confirmation must be provided.

Therefore, special attention is required where the Parties to the Agreement are related parties or where a related party is issuing a guarantee or providing other collateral or security in favour of a Party to the Agreement. We confirm, however, that these restrictions by definition apply only to upstream guarantees, *i.e.* they should not typically give rise to any concerns with respect to the Parent Guarantees (which are downstream guarantees) discussed in Part C.III (*Collateral*) above or other security provided by a Slovak parent company in respect of obligations of any of its subsidiaries (provided such subsidiary acts on its own account and not on the account of any entity listed in the definition of "related party" above).

For completeness, we note that in the event that a Parent Guarantee secures an obligation of a Slovak Corporate in crisis, a creditor can enforce its secured obligation directly against the parent company, without having to claim it first with the Slovak Corporate. Any contractual provisions to the contrary are null and void.

Also, a lender or other creditor who provided a loan or an economically equivalent performance (*i.e.* borrowed money) to a Slovak Corporate in crisis and at the relevant time knew or from the last published financial statement could have known, of its crisis, may satisfy its claim from the Slovak Corporate's assets only up to the difference between the amount of the claim and the amount of the Parent Guarantee (or other parent security). However, the rule is not relevant in the context of natural gas trading, to the extent the supplier does not provide a loan or an economically equivalent performance to the Slovak Corporate.

C.IX.4 Special Levy on Energy Companies

Please note that pursuant to Act No. 235/2012 Coll. on a Special Levy from Business Activities in Regulated Industries, as amended, Slovak energy companies are subject to a special levy (effectively an additional income tax). As discussed above, only physical supplies of natural gas are subject to the licence requirement (not trading in financial instruments with natural gas being the underlying commodity) and thus trigger the tax obligation.

The levy is charged at a rate of 0.00545 under the rules set forth in Sections 4 et seq. of the Act on Special Levy. The rate will decrease to 0.00363 from 31 December 2020.

C.IX.5 Other recommendations

Jurisdictions

Please note that, since Slovak courts are generally not experienced in adjudicating disputes under energy contracts or related to commodity or other derivatives transactions, we recommend referring all such disputes to other court/arbitration tribunal well-experienced in the resolution of disputes arising out of or in connection with the General Agreement.

Choice of law

We recommend opting for German or English law as the governing law of the General Agreement whenever commercially viable. We understand that the General Agreement has been developed under and is largely adjusted to German and English law and therefore, although the General Agreement would be in general enforceable under Slovak law, its interpretation in accordance with terms of the Slovak law and through the practice of Slovak courts may cause undesirable implications for the Parties.

The Slovak legal system has not yet developed a clear legal framework for derivatives trading, closeout netting and financial collateral. There is no specific jurisprudence on these topics and no specific precedents.

Additional aspects and suggested amendments

We are not aware of any additional Slovak legal aspects to be considered in this context. Please refer to Appendix D for suggested amendments to the General Agreement, if it is governed by Slovak law.

D. ADDRESSEES, FORM AND TENOR, EXECUTIVE SUMMARY AND OTHER ISSUES

D.I ADDRESSEES

This Opinion is addressed exclusively to EFET and is for the sole benefit of EFET and its Legal Committee members and any other subscribing entities, and may not be relied upon by, or disclosed to, any other person or legal entity without the prior written approval of EFET or Wolf Theiss, and may be made available by EFET members to the appropriate regulatory authorities. Furthermore, this Opinion be made available by each EFET member to the professional chartered auditor engaged by that EFET member, but exclusively on a non-reliance basis, hence this Opinion may not be relied upon by any such auditor.

* * *

Yours faithfully,

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JUDr. Katarína Bieliková

WOLF THEISS Rechtsanwälte GmbH & Co KG
WOLF THEISS Rechtsanwälte GmbH & Co KG, organizačná zložka

APPENDIX A

DEFINED TERMS AND INTERPRETATION

Act on Budgetary Rules of Self-Governing Bodies - Act No. 583/2004. Coll. on Budgetary Rules of Self-Governing Bodies, as amended

Act on Collective Investment - Act No. 203/2011 Coll. on Collective Investment, as amended

Act on Municipalities - Act No. 369/1990 Coll. on Municipalities, as amended

Act on Self-Governing Regions - Act No. 302/2001 Coll. on Self-Governing Regions

Arbitration Act - Act No. 244/2002 Coll. on Arbitration Proceedings, as amended

Bank Act - Act No. 483/2001 Coll. on Banks, as amended

BRRD - Directive 2002/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

Brussels Regulation - Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Civil Code - Act. No. 40/1964 Civil Code, as amended

Civil Dispute Procedure Code - Act. No. 160/2015 Civil Dispute Procedure Code

Collateral Directive - Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements

Commercial Code - Act No. 513/1991 Commercial Code, as amended

Council Directive concerning measures to safeguard security of natural gas supply - Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply

CRD - Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/EC

Directive 2014/59/EU - Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms

EEA- European Economic Area

Emission Allowances Act - Slovak Act No. 414/2012 Coll. on Trading in Emission Allowances, as amended

Energy Act - Act No. 251/2012 Coll. on Energy

EU - European Union

EU Bankruptcy Regulation - Regulation (EU) No 2015/848 on insolvency proceedings, which applies to all EU Member States except the Denmark

Bankruptcy Act - Act No. 7/2005 Coll. On Bankruptcy and Restructuring, as amended

Insurance Act - Act No. 39/2015 Coll. on Insurance, as amended

MiFID II - 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

MiFIR - Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012

MTF - Multilateral Trading Facility

NBS - National Bank of Slovakia

OTF - Organised Trading Facility

Private International Law Act - Act. No. 91/1963 Coll. Private International Law Act

Regulation on Security of Gas Supply - Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010

Resolution Act - Act No. 371/2014 Coll. on resolution of crisis situations in the financial market and on amendments to certain laws

Resolution Council - Council for the Resolution of Financial Crisis under the Resolution Act

Rome I Regulation - Regulation (EC) No. 593/2008 on the law applicable to contractual obligations

RONI - Regulatory Office for Network Industries (in Slovak: Úrad pre reguláciu sieťových odvetví)

Securities Act - Act No. 566/2001 Coll. on Securities and Investment Services, as amended

Slovak Corporate - a company incorporated in the Slovak Republic under the Commercial Code in the form of (i) a general commercial partnership, (ii) a limited partnership, (iii) a limited liability company, (iv) a joint-stock company, (v) a simple joint-stock company as closely specified in a Part 1 of the Annex

Slovak Financial Institution - Slovak Bank, Slovak Investment Firm, Slovak Insurance Company, Slovak Management Company as closely specified in Part 1 of the Annex

Slovak Municipality and Slovak Region - Slovak Municipality and Slovak Region as closely specified in a Part 1 of the Annex

"**Third Gas Directive**" means Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC

APPENDIX B

Transactions under the General Agreement

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

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

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

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

"**Commodity**" means natural gas, emissions allowances, certificates or capacity rights.

Definition of Commodity under Slovak law

Please note that although the Securities Act refers to term "commodity", such term is not defined therein. Term "commodity" is defined in the Commodities Exchange Act, which defines it as "a tangible asset and manageable natural power, mainly good, energy or mineral, including precious metals except for gold, which are subject to trade on the goods or services market."

Further definition of the term "commodity" is included in the 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, which, for the purpose of MiFID II, defines commodity as "goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as natural gas."

It follows that the scope of definition of commodities for the purpose of this opinion differs from the definitions used in the Slovak law.

Definition of financial instruments under Slovak law

Some of the transactions above would qualify as financial instruments under Slovak law. The Securities Act contains a list of transactions which are financial instruments within the meaning of the Securities

Act. The list is (almost) a literal transposition of Annex 1, Section C of 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 (MiFID II). The list includes, *inter alia*:

(a) transferable securities;

(b) money market instruments;

(c) securities or shareholdings of collective investment funds;

(d) options, futures, swaps, forwards and other derivate contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivative instruments or other derivative instruments, financial indices or financial measures which may be settled physically or in cash;

(e) options, futures, swaps, forwards and any other derivative contracts relating to commodities 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);

(f) options, futures, swaps, forwards and any other derivative contracts relating to commodities that can be settled physically provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF and that must be physically settled;

(g) options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point f) which are not being for commercial purposes and have the characteristics of other derivative financial instruments;

(h) derivative instruments for the transfer of credit risk;

(i) financial contracts for differences;

(j) options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Part, which have the characteristics of other derivative financial instruments, having regard to whether, *inter alia*, they are traded on a regulated market, OTF, or an MTF;

(k) emission allowances consisting of any units recognised for compliance with the separate regulation.

Financial instruments under (d) to (j) above are classified as "derivatives".

As described above, the Individual Contracts relate to natural gas (*i.e.* the commodity in its general meaning), emissions allowances, certificates or capacity rights.

Natural gas

Commodity Forwards, Commodity Options or Commodity Swaps related to natural gas would be considered as financial instruments provided the conditions under (e), (f) or (g) above are fulfilled.

For the purpose of definition under (g) above, conditions set forth in the 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 ("**Delegated Regulation**) would apply. Although these conditions are complex, for the purposes of this opinion can be summarised as follows:

(i) the Individual Contract is not a spot contract and is not for commercial purposes;

(ii) the Individual Contract is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF; is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue; or is equivalent to a contract traded on a regulated market, MTF, an OTF or such a third country trading venue, with regards to the price, the lot, the delivery date and other contractual terms; and

(iii) the Individual Contract is standardised so that, in particular, the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

Emission allowances

Commodity Forwards, Commodity Options or Commodity Swaps related to emission allowances would be considered as financial instruments provided the conditions under (d) or (k) above are fulfilled.

Certificates

For the purpose of the Slovak law, certificates are considered as a securities. Consequently, Commodity Forwards, Commodity Options or Commodity Swaps related to certificates would be considered as financial instruments provided the conditions under (d) above are fulfilled. In addition, transactions related to Certificates would be considered as financial instruments under point (a) above.

Above described transactions related to Certificates will benefit from the Safe Harbour Provisions provided that such transactions are either (i) forwards, options or swaps that fall either within definition of a financial instrument or (ii) transactions that fall within the scope of point (a) above.

Capacity right

Slovak law does not expressly recognize capacity rights as either commodity or securities. Consequently, Commodity Forwards, Commodity Options or Commodity Swaps related to capacity rights would be considered as financial instruments provided the conditions under (j) above are fulfilled.

Pursuant to conditions of Section 8 of the Delegated Regulation, in addition to derivative contracts expressly referred to under point (j) above, a derivative contract shall be subject to these provisions where it meets the following criteria:

(a) it is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event; or it is traded on a regulated market, an MTF, an OTF, or a third country trading venue that performs a similar function to a regulated market, MTF or an OTF; or the conditions laid down in (i) to (iii) above are satisfied in relation to that contract; and

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

Consequently, Commodity Forwards, Commodity Options or Commodity Swaps related to capacity rights would be considered as financial instruments provided the conditions described above are fulfilled.

APPENDIX C

Overview of Slovak insolvency, liquidation and similar proceedings and relevant terminology

The main provisions governing bankruptcy, survival of insolvent commercial companies or generally insolvency laws and proceedings, to which Party A would be subject in the Slovak Republic, are contained in Act No. 7/2005 Coll. on Bankruptcy and Restructuring, as amended ("**Bankruptcy Act**").

The Bankruptcy Act does not apply to the Slovak Republic, state budget-funded entities (in Slovak: *štátna rozpočtová organizácia*), state contribution-funded entities (in Slovak: *štátna príspevková organizácia*), regional or municipal budget-funded or contribution-funded entities (in Slovak: *rozpočtová a príspevková organizácia v zriaďovateľskej pôsobnosti obce alebo vyššieho územného celku*), state funds (in Slovak: *štátny fond*), Slovak Municipalities, Slovak Regions and any persons for all obligations of which the Slovak Republic is liable or provides guarantee, the National Bank of Slovakia ("**NBS**"), the Deposit Protection Fund (in Slovak: *Fond ochrany vkladov*) and the Investment Protection Fund (in Slovak: *Garančný fond investícií*).

The Bankruptcy Act recognises the following two main insolvency proceedings:

- bankruptcy, which leads to the realisation of the company's assets and ultimately its deletion from the commercial register; and
- restructuring, which is partially modelled on the United States Chapter 11 proceedings and the aim of which is the further operation of the company.

In addition, specific proceedings are laid down for certain Slovak Financial Institutions.

Finally, the Commercial Code stipulates rules for the winding-up, liquidation and deletion from the Commercial Register of companies. Such liquidation can result from a resolution by the company's shareholders or from a winding-up resolution of a court (*e.g.* if the company fails to comply with certain statutory duties).

Below, please find a brief general discussion on the relevant legal concepts with respect to insolvency and liquidation.

Bankruptcy

Bankruptcy (in Slovak: *konkurz*) is the sole "liquidation nature" type of insolvency proceedings under Slovak law. It is regulated by the Bankruptcy Act. The purpose of bankruptcy proceedings is to resolve a Slovak Party's insolvency by realising its assets and collectively satisfying its creditors.

A Slovak Party is insolvent if:

- it is not able to pay at least two monetary obligations within 30 days after the relevant maturity dates to more than one creditor; when determining this test, all receivables originally owed to a single creditor at any time within 90 days before the filing of a petition for the declaration of bankruptcy are deemed to constitute one receivable (**cash flow test**); or

- it has an obligation to keep the accounting and has more than one creditor and the value of its obligations exceeds the value of its assets; when assessing this test, the value of assets is based on their book value or the value determined by an expert appraisal (in case of discrepancy, the expert determined value prevails), taking into account expected future returns of the administration of assets (if it can be reasonably expected that it would be possible to continue in administration of assets or carrying on the business activities) and excluding subordinated debts or debts owed to related parties that would be treated as subordinated in bankruptcy proceedings ("**balance sheet test**").

In the case of a Slovak Corporate, the company itself, its liquidator or its creditors have the right to file a petition for bankruptcy. The company is obliged to apply for its own bankruptcy within 30 days after the day when it became aware of, or (if acting with professional care) could become aware of, its insolvency under the balance sheet test (*i.e.* this obligation is not triggered if the company is insolvent solely under the cash flow test). The same duty applies to the persons authorised to act for and on behalf of the company.

Creditors may file a petition for bankruptcy if they can reasonably expect the debtor to be insolvent under the cash flow test. A creditor must evidence its claim by a notarised acknowledgement of debt signed by the debtor, by an enforceable judgment or similar documents based on which the enforcement of the decision or execution can be done, or by a confirmation of an auditor, court expert or administrator that the receivable *vis-à-vis* the debtor is duly accounted for in the creditor's books.[35]

In the case of a Slovak Bank, Slovak Insurance Company or a Slovak Electronic Money Institution, the petition for bankruptcy can only be filed by the NBS (*i.e.* the regulator of the financial services industry) or, subject to the prior consent of the NBS, by the administrator under the involuntary administration. In addition, in case of Slovak Banks, the petition for bankruptcy can be filed also by the Resolution Council.

When the court ascertains that the petition for the declaration of bankruptcy formally complies with the statutory requirements, the court must resolve to commence the bankruptcy proceedings within 15 days from the receipt of the petition. Otherwise the court will reject the petition within 15 days from the expiry of a ten-day period granted to the petitioner to remedy the lack of formal compliance of the petition with the statutory requirements. The court resolution on the commencement of the bankruptcy proceedings must be published in the Commercial Bulletin without delay after it has been issued. The bankruptcy proceedings "effectively" commence upon publication of this resolution in the Commercial Bulletin. The major effects of the commencement of bankruptcy proceedings are as follows:

- the entity must restrict its activities to those taken in the ordinary course of business;
- there is an automatic stay of individual court or administrative enforcement proceedings;
- there is an automatic stay of enforcement actions by individual secured creditors (save for the enforcement of a security interest over bank accounts, government bonds, transferable securities or continued enforcement of a security right by a public auction);
- there is an automatic stay of proceedings on the winding-up of the company without liquidation; and

[35] Please note that there are also other specific documents, which are, however, very case specific.

- it cannot be decided on merger or demerger of the entity or register such decision in the Commercial Register.

If the bankruptcy proceedings commenced on the company's petition, the court will declare bankruptcy within five (5) days from the commencement of the bankruptcy proceedings or it will appoint a preliminary administrator (if there is doubt whether the property of the company will be sufficient to cover at least the costs of bankruptcy).

If the petition is filed by a creditor, the court within five (5) days of commencement invites the debtor to prove its solvency within twenty (20) days from delivery of invitation. The court further schedules a hearing that should take place within seventy (70) days from the commencement. Once the evidentiary part of the proceedings is finished[36], the court decides on declaration of bankruptcy within seven (7) days of its decision on completion of evidentiary proceedings. In its decision on declaration of bankruptcy the court also appoints a bankruptcy administrator. The decision is again published in the Commercial Bulletin.

The court will terminate the bankruptcy proceedings if the preliminary administrator discovers that the company does not have sufficient assets to cover the costs of the bankruptcy proceedings. Otherwise, the court will declare bankruptcy within ten days from the filing of the final report of the preliminary administrator.

Restructuring of a Slovak Corporate

Restructuring proceedings in respect of a Slovak Corporate (in Slovak: *reštrukturalizačné konanie*) are also regulated by the Bankruptcy Act. Restructuring is not applicable to Slovak Financial Institutions (a similar proceeding in these cases is involuntary administration).

The aim of the restructuring is to provide for a flexible and business-oriented corporate recovery of an insolvent Slovak Corporate (or a Slovak Corporate whose insolvency is imminent). Restructuring proceedings are modelled on the United States Chapter 11 proceedings.

If a Slovak Corporate is insolvent or its insolvency is imminent, it may seek a restructuring opinion (In Slovak: *Reštrukturalizačný posudok*) to be prepared by an administrator. If the administrator recommends a restructuring, the Slovak company may present its petition for restructuring within 30 days from the date of the analysis. Also, any creditor of a Slovak Corporate is entitled to seek a restructuring opinion from the administrator and may subsequently present its petition for restructuring within the same period. However, this is subject to the consent of the Slovak Corporate.

Within 15 days after the presenting of the petition, the restructuring proceedings must be formally instituted or the petition must be dismissed. The restructuring proceedings are instituted as of the date following the day of the publishing of a decision of the relevant court on the institution of the restructuring proceedings in the Commercial Bulletin.

Involuntary administration of a Slovak Bank

Involuntary administration of a Slovak Bank is regulated in the Act on Banks.

[36] Please note that there is no time limit for completion of the evidentiary part. Thus there is no limit for issuance of the declaration by the court.

If the NBS becomes aware of any deficiencies in the activities of a Slovak Bank, then, depending on the nature of the relevant deficiency, it may take various steps under Section 50 of the Act on Banks. Such steps include the imposing of involuntary administration.

Involuntary administration is a reorganisation and restructuring measure which may have an impact on the rights of third parties. The purpose of imposing an involuntary administration is in particular the following:

- to prevent the directors of the bank from performing their functions that have a deteriorating effect on the bank's economic situation;
- to eliminate the most serious deficiencies in the management and activities of the bank with the objective of stopping further deterioration of its economic situation;
- protection of deposits and other rights of clients of the bank and protection of owners of secured bonds against damage or further damage; and
- to adopt a recovery programme, if an economic recovery of the bank is feasible, including the adoption and performance of organisational and other measures designed to gradually stabilise the bank and restore its liquidity, primarily in cooperation with its major shareholders.

The involuntary administration is imposed at the moment of delivery to the bank of the NBS 's decision on involuntary administration. The effects of the imposing of the involuntary administration normally apply to each branch of the bank situated in a Member State, unless any exception set out in the Act on Banks applies.

The involuntary administration terminates upon the earlier of:

- the delivery of NBS' s decision on the termination of involuntary administration, provided the reasons for its persistence no longer apply;
- the declaration of bankruptcy (in Slovak: *vyhlásenie konkurzu*);
- the expiry of 12 months after the imposing of involuntary administration, except if, upon the assessment by the NBS, the reasons for imposing the involuntary administration are still present; or
- the revocation or termination of the banking licence.

Involuntary administration of a Slovak Bank is a "crisis prevention measure" under the Resolution Act (see below paragraph on BRRD resolution proceedings).

Involuntary administration of a Slovak Investment Firm, Slovak Insurance Company and Slovak Management Company

Involuntary administration of a Slovak Investment Firm is regulated in the Securities Act. It is not applicable to ordinary companies. A Slovak Management Company may be subject to the same procedure, if it provides investment services under the Securities Act.

Involuntary administration of a Slovak Investment Firm, which is a selected institution under the Resolution Act, is a "crisis prevention measure" under the Resolution Act (see below paragraph on BRRD resolution proceedings).

Similarly, involuntary administration of a Slovak Insurance Company is regulated in the Insurance Act and is not applicable to other entities.

Both types of involuntary administration are largely similar to the involuntary administration of banks, with the regulatory authority also being the NBS.

All involuntary administrations constitute reorganisation and restructuring measures which may have an impact on the rights of third parties.

Resolution proceedings in respect of a Slovak Bank or Slovak Investment Firm

Resolution proceedings can be initiated in respect of a Slovak Bank or Slovak Investment Firm which is a "selected institution" the Resolution Act. The Resolution Council composed of representatives of the NBS, the Ministry of Finance and the Debt and Liquidity Management Agency and state treasury. A special department of the NBS provides support to the Resolution Council and the NBS is also the competent authority. The procedures under the Resolution Act implements those envisaged under the BRRD without substantial deviations which would be relevant for the purposes of this opinion. Please note, however, that the Resolution Act in accordance with BRRD limits or suspends termination rights of a Slovak Bank's or Slovak Investment Firm's counterparty in certain circumstances (please see relevant Parts of the opinion).

Involuntary administration of Slovak Municipality and Slovak Region

A Slovak Municipality, which passes an insolvency test defined in Section 19 of the Budgetary Act, and provided less restrictive measures have failed to remedy the situation, is placed under involuntary administration under the auspices of the Ministry of Finance. No automatic stays on creditor rights are introduced, but the municipality's spending is subject to approval by the administrator.

Liquidation (winding-up)

As opposed to the insolvency proceedings above, the liquidation is only possible if the Slovak Party is solvent. Otherwise, the liquidation of a Slovak Corporate can be converted into bankruptcy.

After a Slovak Party has been dissolved (in Slovak: *zrušená*), whether on the basis of a decision of its own relevant corporate body (shareholders' meeting) or the relevant court or, in case of a Slovak Financial Institution on the occurrence of certain circumstances, the NBS, the entity enters into liquidation (in Slovak: *likvidácia*). The purpose of the proceedings is to perform acts necessary in order to terminate all business activities, to satisfy the creditors, to distribute the liquidation balance (if any) (in Slovak: *likvidačný zostatok*) to the shareholders and to de-register the entity from the commercial register.

After the appointment of a liquidator (in Slovak: *likvidátor*), the liquidator performs acts leading to the liquidation of the company. The liquidator must discharge the obligations of the entity, claim its receivables and receive any payments or deliveries. The liquidator is also allowed to enter into any settlement agreements and any agreements on change or termination of rights and obligations.

However, the liquidator may not enter into any new contracts, unless such new contract is entered into in connection with the termination of the unsettled trades.

APPENDIX D

SUGGESTED AMENDMENTS TO THE GENERAL AGREEMENT

If the Parties opt for the Slovak law as the governing law of the General Agreement, we recommend:

1. Adding a new sentence at the end of the § 1.1, which will read as follows:

   "For the avoidance of doubt, the single agreement concept expressed in this § 1.1 means, inter alia, that no Individual Contract can be terminated separately (unless otherwise expressly agreed between the Parties) and the rights and obligations of the Parties in respect of all Individual Contracts in the event of termination of the Agreement are not severable. The Parties also represent and confirm to each other that, without relying on this principle, no Party would enter into any Individual Contract."

2. Adding new clause 5 to § 2 of the General Agreement (*Definitions and Construction*), which will read as follows:

   "**5. Standard practice:** This Agreement shall be interpreted in accordance with commonly applied practice of international energy and commodities markets including documents issued by the European Federation of Energy Traders."

3. Replacing the second sentence of § 10.3 (b) of the General Agreement with the following wording:

   "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 to the other Party an amount (if any) calculated in accordance with § 11.1 (the "**Termination Amount**")."

   If it is necessary to avoid direct amendment of a Core Provision of the General Agreement, please consider including the following interpretation rule in Part II of the Election Sheet:

   "The English language expression *obligation of one Party to pay damages for non-fulfilment to the other Party* in the second sentence of § 10.3 (b) of the General Agreement shall not be construed as an obligation of one Party to compensate damage (in Slovak: *nahradit' škodu*) to the other Party and the Parties have no intention to apply the rules on damage liability (in Slovak: *zodpovednost' za škodu*) in respect of the obligation to pay the Termination Amount. The expression is intended to mean a contractual obligation of one Party to pay to the other Party the Termination Amount in accordance with the terms of the General Agreement."

4. Adding new clause 3 to § 11 of the General Agreement (*Calculation of the Termination Amount*), which will read as follows:

   "3. Close-out netting:

   (a) To the extent permitted by applicable law, the agreement of the Parties expressed in § 10 (*Term and Termination Rights*) and this § 11 (*Calculation of *the Termination Amount*) shall be deemed as a close-out netting agreement (in Slovak: *zmluva o záverečnom vyrovnaní ziskov a strát*).

(b) If applicable law does not permit the agreement of the Parties expressed in § 10 (*Term and Termination Rights*) and this § 11 (*Calculation of the Termination Amount*) to be deemed as a close-out netting agreement, the replacement of rights and obligations of the Parties under § 10.3 (b) shall be a novation (in Slovak: *novácia*) of the mutual obligations of the Parties.

(c) For the avoidance of doubt, the provisions of § 10 (*Term and Termination Rights*) and this § 11 (*Calculation of the Termination Amount*) shall survive and shall apply upon (i) termination of the General Agreement under § 10 (*Term and Termination Rights*) and (ii) any termination or rescission (in Slovak: *odstúpenie*) of this General Agreement or any Individual Contracts under or in connection with any applicable mandatory provision of any law."

If it is necessary to avoid direct amendment of a Core Provision of the General Agreement, please consider including the above provision in Part II of the Election Sheet and make clear that it only applies in respect of close-out netting *vis-à-vis* Slovak Parties;

5. Election in respect of § 22.1 of the General Agreement (*Governing Law*) in the Election Sheet should read as follows:

"This Agreement and the rights and obligations of the Parties hereunder as well as any non-contractual obligations in connection with this Agreement shall be governed by Slovak law (excluding any application of United Nations Convention on Contracts for the International Sale of Goods) and, to the maximum extent permitted under the law, by the standards and practice of international energy and commodities markets. Any non-mandatory provisions of Slovak law shall not apply to the extent that their application may change or affect the rights and obligations of the Parties expressly set out in this Agreement. In particular, the provisions of Sections 347, 349 para. 2 and 3, 351 para. 2, and 361 of the Slovak Act No. 513/1991 Coll. Commercial Code, as amended, shall not apply."

6. Add new clause 6 to § 23 of the General Agreement (*Miscellaneous*), which will read as follows:

"**6. Set-off:** For the purposes of Section 364 of the Slovak Act No. 513/1991 Coll. Commercial Code, as amended, the Parties agree that each Party shall be entitled to set-off any mutual claims arising under or in connection with this Agreement at any time after occurrence of any Material Reason with respect to the other Party."