**22 February 2019**

# LEGAL OPINION ON THE GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY

# TO

# THE EUROPEAN FEDERATION OF ENERGY TRADERS

HAVEL & PARTNERS

CONNECTED THROUGH SUCCESS

# TABLE OF CONTENTS

**EFET - European Federation of Energy Traders**
Attn. Jan Haizmann
Amstelveenseweg 998
1081 JS Amsterdam
Netherlands

To whom it may concern:

The law firm HAVEL & PARTNERS has been requested by the European Federation of Energy Traders to render a legal opinion as to the Czech law aspects on the enforceability of close-out netting provisions of the EFET General Agreement, the validity and enforceability of collateral provided under the EFET Credit Support Annex and other related issues as outlined in the Instruction Letter.

## A. DOCUMENTS CONSIDERED

For the purposes of this legal opinion we have taken into consideration the following documents provided by EFET:

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007);
- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000);
- EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010);
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published 3 April 2012);
- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published 28 February 2018);
- EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005);
- EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000);
- GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity [Version 2.1, published 20 December 2000 and Version 2.1(a) published 21 September 2007] (Version 1.0, published 11 September 2009);

- EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013);

- EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013);

- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16 December 2013);

- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015).

For the purposes of section E.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 Electricity (Version 2.0, published 3 April 2012);

For the purposes of section E.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);

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

- 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. DEFINITIONS

Terms defined in the EFET documents have the same meaning when used in this legal opinion, unless otherwise stated herein.

In addition, the following definitions are used in this legal opinion:

"**ARC**" means Czech Act No. 340/2015 Coll., on Special Conditions for the Effectiveness of Certain Contracts, the Disclosure of These Contracts and the Register of Contracts, as amended;

"**Banking Act**" means Czech Act No. 21/1992 Coll., on Banks, as amended;

"**CCA**" means Czech Act No. 90/2012 Coll., on Corporations and Cooperatives, as amended;

"**Civil Code**" means Czech Act No. 89/2012 Coll., the Civil Code, as amended;

"**CMA**" means Czech Act No. 256/2004 Coll., on Capital Market Business, as amended;

"**Commission Regulation No 1287/2006**" means the Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards Record-keeping Obligations for Investment Firms, Transaction Reporting, Market Transparency, Admission of Financial Instruments to Trading, and Defined Terms for the Purposes of that Directive;

"**Commodities**" means the commodities as they are defined in Appendix B of the Instruction Letter, i.e. electricity, emissions allowances, certificates and capacity rights;

"**Country H**" means a country other than the Czech Republic in which Party F is incorporated, organized or having its centre of main interest;

"**Czech Branch**" means the branch of Party F located in and subject to the laws of the Czech Republic;

"**Directive on Financial Collateral Arrangements**" means the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements;

"**ECA**" means the Czech Act No. 627/2004 Coll., on a European Company, as amended;

"**EFET**" means the European Federation of Energy Traders;

"**EFET Credit Support Annex**" means the EFET Credit Support Annex to the EFET General Agreement;

"**EFET Documents**" means documents provided by EFET and listed in part A of this legal opinion;

"**EFET General Agreement**" means the EFET General Agreement Concerning the Delivery and Acceptance of Electricity;

"**EU Credit Institution**" means the credit institution referred to in Article 3 (1) (1) of 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 2006/49/EC;

"**EU Insurance Undertaking**" means the insurance undertaking within the meaning set forth in Art. 3 (1) (5) of 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 2006/49/EC;

"**FCA**" means Czech Act No. 408/2010 Coll., on Financial Collateral, as amended;

"**HAVEL PARTNERS**" means the law firm HAVEL & PARTNERS s.r.o., attorneys-at-law;

"**Insolvency Act**" means Czech Act No. 182/2006 Coll., on Insolvency and Methods of its Resolution, as amended;

"**Insolvency Regulation**" means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast);

"**Instruction Letter**" means the instruction letter provided by EFET dated 2 July 2018;

"**Insurance Act**" means Czech Act No. 277/2009 Coll., on Insurance Business;

"**Non-regulation Debtors**" mean debtors established or having assets in states which are not bound by the Insolvency Regulation;

"**Party A**" means the counterparty incorporated or organized or having its centre of main interest in the Czech Republic;

"**Party B**" means the counterparty other than Party A in the meaning ascribed to such term in section E.III below;

"**Party F**" means a corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution incorporated, organized or having its centre of main interest in Country H;

"**Physically Settled Derivatives**" means the derivatives (Commodity Forwards and Commodity Options) which in each case provide for physical settlement;

"**PILA**" means Czech Act No. 91/2012 Coll., on Private International Law, as amended;

"**Relevant Transactions**" means the transactions under the EFET General Agreement: Commodity forwards, Commodity options, Commodity swaps and Physical Commodity transactions as defined in Appendix B to the Instruction Letter, a copy of which forms Annex 2 of this legal opinion;

"**REMIT**" means Regulation (EU) No. 1227/2011 on Wholesale Energy Market Integrity and Transparency;

"**RMFI**" means Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and amending Regulation (EU) No. 648/2012;

"**Rome Convention**" means the Rome Convention on the Law applicable to Contractual Obligations (1980);

"**Rome I Regulation**" means 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);

"**RRFMA**" means Czech Act No. 374/2015 Coll. on Recovery and Resolution in the Financial Market, as amended.

## C. GENERAL ASSUMPTIONS AND LIMITATIONS

In consideration of the instructions we received, this legal opinion is based on the following key assumptions:

- Two counterparties enter into the EFET General Agreement and at least one of the counterparties is Party A.

- Party A is:

  (i) a company incorporated as a joint-stock company (*"akciová společnost"* in Czech) or a limited liability company *("společnost s ručením omezeným"* in Czech) or a partnership incorporated as a general partnership *("veřejná obchodní společnost"* in Czech) or limited partnership (*"komanditní společnost"* in Czech), in each case, under the CCA, or a European company ("*evropská společnost*" in Czech) under the ECA, in each case having its registered seat in the Czech Republic;

  (ii) a company or a partnership similar to those set forth under (i) above, in each case incorporated, organized or established outside the Czech Republic, to the extent it is authorized to conduct its respective business in the Czech Republic through a branch in the Czech Republic;

  (iii) a banking institution licensed under the Banking Act incorporated in the Czech Republic or, where so indicated in this legal opinion, an EU Credit Institution that has set up a branch in the Czech Republic and has obtained an authorization to provide banking services in the Czech Republic through that branch, or a foreign credit institution (other than an EU Credit Institution) that has set up a branch in the Czech Republic and has obtained an authorization to provide banking services in the Czech Republic through that branch;

  (iv) a securities dealer (*"obchodník s cennými papíry"* in Czech) licensed under the CMA, incorporated in the Czech Republic as a joint-stock company (*"akciová společnost"* in Czech) or a limited liability company (*"společnost* *s ručením omezeným"* in Czech) under the CCA, in each case having its registered seat in the Czech Republic, or a foreign securities firm that has set up a branch in the Czech Republic and has obtained an authorization to provide investment services in the Czech Republic; or

(v) an insurance company within the meaning of Section 3 (1) (b) of the Insurance Act, incorporated in the Czech Republic, or an EU Insurance Undertaking having its branch in the Czech Republic, or a foreign insurance undertaking (other than an EU Insurance Undertaking) that has set up a branch in the Czech Republic and has obtained an authorization to provide insurance services in the Czech Republic through that branch.

- None of the parties to the EFET Documents is either a consumer within the meaning of Section 419 of the Civil Code, or a weaker party within the meaning of Section 433 of the Civil Code. Additionally each party qualifies as an entrepreneur within the meaning of Section 420 of the Civil Code.

- No provision of the EFET General Agreement that is necessary for giving this opinion has been altered in any material respect, unless amended in accordance with the recommendations given in this legal opinion.

- Each EFET General Agreement and any of its annexes (including the EFET Credit Support Annex) is valid and enforceable under the laws of any jurisdiction (other than the Czech Republic) for purposes of private international law, and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document. If either of the parties was, when entering into the EFET General Agreement and Individual Contracts, represented by a proxy or representative, such proxy or representative had full power and capacity and was fully competent and duly authorized to do so.

- Each party has the requisite licences, permits and governmental or other approvals necessary to carry on its business, including the business of trading in electricity and/or Allowances, as applicable, as contemplated by the EFET Documents.

- Entering into, executing and delivering the EFET Documents and performance under the EFET Documents, does not violate any of the parties' constitutive documents.

- 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.

- All factual circumstances which give rise to a party's right to terminate the Agreement constitute valid and enforceable termination events and any obligation to pay an amount on the basis of the EFET General Agreement or any Individual Contracts constitutes a valid and enforceable obligation.

- The EFET General Agreement and any Individual Contracts are entered into by each party and the obligations thereunder are fulfilled prior to any action restricting the parties´ rights under the RRFMA or by any procedural measure which would prevent the respective parties from acting.

- Party A has entered into the EFET General Agreement and any Individual Contracts in compliance with the relevant Czech law.

- The obligations of each party under the EFET General Agreement are legal, valid and binding under the relevant governing law (other than the law of the Czech Republic). There is no relevant bilateral or multilateral international treaty in place and effect that would govern in any private international law (conflict of laws) matter between the parties.

- There are no mandatorily applicable rules of law of the country where Party A's counterparty or a branch of that counterparty is located. This assumption is applicable only if, and to the extent that, such rules would affect the conclusions set out in this legal opinion and if, according to the laws of that country, such rules must be applied regardless of the law governing the contract.

- 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.

## D. EXECUTIVE SUMMARY

### I. CLOSE-OUT NETTING

Under Czech law, claims whose subject matter is funds, financial instruments, greenhouse gas emission allowances and commodities are essentially eligible for close-out netting. Eligibility of commodities (electricity) and greenhouse gas emission allowances for close out-netting stems directly from the relevant applicable law.

The Relevant Transactions are eligible for close-out netting by virtue of qualifying either as financial instruments or by virtue of qualifying as contracts whose subject matter is a commodity or a greenhouse gas emission allowance.

In other words, in our opinion, the provisions in § 11 of the EFET General Agreement are valid and enforceable under Czech law, even in the case that insolvency proceedings were commenced with respect to Party A.

### II. BRANCHES OF FOREIGN COMPANIES ESTABLISHED IN THE CZECH REPUBLIC

Czech law does not recognize branches as separate legal entities. As such, a party to the EFET General Agreement and Individual Contracts is not the branch itself, but the legal person to whose assets the branch belongs.

Czech branches of foreign corporations are in general subject to Czech insolvency law, but only to the extent the debts and obligations are incurred and entered into by the Czech Branch.

The validity and enforceability of the close-out netting provisions set out in the EFET General Agreement should not be affected by the opening of secondary insolvency proceedings in the Czech Republic with respect to the foreign branch.

### III. COLLATERAL

Cash and Letters of Credit may be posted as Eligible Credit Support under the EFET Credit Support Annex. Under Czech law, as long as financial collateral was created before the commencement of insolvency proceedings, it is unaffected by the commencement of insolvency proceedings against a party to the EFET General Agreement with certain reservations listed below.

## E. ISSUES AND ADDITIONAL ASSUMPTIONS

### I. ENFORCEABILITY OF CLOSE-OUT NETTING

#### 1.1. Insolvency-related Material Reasons

Our opinion is based on the following additional assumptions:

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

**1.1.1.** ***Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or recommendable 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) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in §10.5(c)(iv) of the EFET General Agreement? If you are recommending that a grace period be made applicable***

***in respect of §10.5(c)(iv), what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of the Czech Republic to have that proceeding dismissed or otherwise terminated?***

Due to the fact that Early Termination provisions of the EFET General Agreement should be, in our view, valid and enforceable under Czech law even in the case of insolvency of Party A, Automatic Termination is not required to ensure the close-out netting with respect to Party A and Czech law.

In other words, opting for the Automatic Termination does not, in our view, affect the validity and enforceability of the close-out netting and, in our view, it is rather more appropriate for jurisdictions where close-out netting is not enforceable. As opting for Automatic Termination does not bring any benefit from a legal perspective, we make no recommendations on whether the parties should or should not elect such provisions as we do not see this as a legal issue but rather a commercial one. In any case, if the parties choose to elect said provisions, we are of the opinion that Automatic Termination in case of Party A's dissolution, insolvency or liquidation should be, in principle, held valid and enforceable under the laws of the Czech Republic. If the governing law of the EFET General Agreement is not Czech law, then pursuant to EU, international and domestic law[1] Czech courts (to the extent they would have jurisdiction) would be required to apply the elected governing law.

Automatic Termination stipulated in the EFET General Agreement is essentially a resolutive condition under which the EFET General Agreement and all the Individual Contracts are terminated and a Termination Amount is calculated pursuant to § 11 of the EFET General Agreement.

To the extent the EFET General Agreement is governed by Czech law, for a contract to be terminated upon the occurrence of a resolutive condition, the termination cannot be based on an impossible condition; otherwise such a condition would be disregarded.[2]

With regard to the above, we are of the opinion that certain provisions set out in § 10.5 (c) of the EFET General Agreement, which are of a more factual nature, may cause uncertainty in evoking the Automatic Termination. Additionally, some of the terms stipulated as conditions of Automatic Termination are not recognized by Czech law and may thus cause interpretive problems for Czech courts. Our remarks to some of the conditions stipulated in § 10.5 (c) of the EFET General Agreement are presented on a point-by-point basis below.

[1] Specifically the Rome Convention, the Rome I Regulation, the PILA and any bilateral or multilateral international treaty that would govern any private international law matter between the parties. The Rome Convention, Rome I Regulation and the PILA stipulate certain exceptions to the application of foreign law, e.g. infringement of the *ordre public*.

[2] However, this is not an international cogent norm.

*§ 10.5 (c) (i) dissolution*

Under Czech law, the dissolution (*"zrušení"* in Czech) of Party A means that based on a juridical act, the expiry of a period, a decision of a public body or by achieving the purpose for which it was created, Party A shall be liquidated or its assets transferred to a legal successor. Afterwards, Party A is terminated (*"zánik*" in Czech) on the date of its deletion from the public register (Commercial Register).

The terms *"merger"* (*"fúze sloučením"* in Czech) and "*amalgamation*" (*"fúze splynutím"* in Czech) are recognized under Czech law and should not generally pose interpretative problems. The term *"consolidation"* is not recognized as a legal term under Czech law and its ambiguity may cause interpretive problems for Czech courts. Even though consolidation would most probably be subsumed under merger and amalgamation, we recommend not applying "*consolidation*" as an exception to the Material Reason stated in § 10.5 (c) (i) of the EFET General Agreement.

However, we are of the view that this non-recognition would not cause problems from a practical standpoint.

*§ 10.5 (c) (ii) insolvency*

For the definition of insolvency under Czech law, we refer to Annex 1 of this legal opinion.

Determining the exact moment a party becomes insolvent is ordinarily difficult. Therefore, it may be problematic to tie Automatic Termination to such an event, as the parties would be uncertain as to whether the Automatic Termination is legally effective.

We would, therefore, recommend that Automatic Termination be effective upon any of the moments that can be determined objectively (e.g. the day the party is declared insolvent by the insolvency court or the publication of the information about the commencement of the insolvency proceedings in the insolvency register taking into account the grace period described below). This modification should make the Automatic Termination more conclusive to the parties and make it more effective from a practical standpoint.

*§ 10.5 (c) (iii) general assignment, arrangement or composition, § 10.5 (c) (vi) party seeks or becomes subject to the appointment of persons described therein*

Acts described as "*a general assignment, arrangement or composition with or for the benefit of* [party's] *creditors*" are not recognized under Czech law.

Persons described as administrator, provisional liquidator, conservator, receiver, trustee and custodian may cause certain interpretative problems for Czech courts as these persons are not recognized under Czech law.

Czech law recognizes only a liquidator (*"likvidátor"* in Czech), an insolvency trustee (*"insolvenční správce"* in Czech), a provisional insolvency trustee (*"předběžný insolvenční správce"* in Czech) or a separate insolvency trustee (*"oddělený insolvenční správce"* in Czech). However, in our view, these persons fall under *"other similar official*[s]*"* and this provision would not cause any issues, so no amendment to the wording should be necessary.

*§ 10.5 (c) (iv) party institutes or has instituted against it proceedings described therein*

It is not uncommon for unsubstantiated or frivolous petitions to be filed by creditors in Czech insolvency proceedings. Czech courts are obliged without undue delay or at the latest within 7 days after the insolvency petition was filed to refuse the insolvency petition, if it is clearly groundless. Although Czech courts are getting more acquainted with such groundless petitions, there are cases when Czech courts do not issue a ruling on these petitions for weeks or months.

If the parties include in the EFET General Agreement creditors' petitions as a trigger for Automatic Termination, the parties might consider having the Automatic Termination occur only if the party is eventually declared insolvent by the insolvency court or if such a petition is not rejected or otherwise dismissed within an agreed upon grace period, so that the court would have enough time to deal with the petition and the debtor would be able to persuade the court of the frivolousness of such a petition. To increase the probability that the grace period is effective, we recommend that a grace period with regard to § 10.5 (c) (iv) should be stipulated in the duration of at least 30 (thirty) days from the filing of the petition by a creditor.[3]

If, after the close-out netting (novation) takes place, the non-insolvent party is left with a positive claim against the insolvent party, the parties should be aware of the fact that in corporate insolvency proceedings there is a certain period in which the claim must be filed. This period lasts 2 (two) months and starts on the day the insolvency court declares the party insolvent.[4]

[3] As noted above, it might take months for the insolvency court to deal with the groundless insolvency petition. However, given the pending insolvency proceedings, the party being subject to insolvency proceedings might get into financial constraints as the information about the pending insolvency proceedings is, subject to certain time limitations, publicly available.

[4] Please note that certain claims might qualify as the so-called preferential claims which are not subject to strict rules on the lodgement of claims.

*§ 10.5 (c) (v) a resolution is passed for a party's winding-up, official management or liquidation*

Czech insolvency law contemplates only bankruptcy (*"konkurs"* in Czech) and reorganization (*"reorganizace"* in Czech); both of these methods of insolvency resolution may only be issued by the court. For a summary of both of these proceedings we refer to Annex 1 of this legal opinion.

Czech insolvency law does not recognize winding-up and official management as legal terms. In the use of § 10.5 (c) (viii), the Czech court might interpret official management to mean reorganization and winding-up to mean bankruptcy, but the nature of official management differs from reorganization as it is known under Czech law. Automatic Termination would, however, already be triggered by § 10.5 (c) (iv) with the commencement of the insolvency proceedings, so this interpretative problem would most probably not arise. However, to avoid any doubt, we recommend not applying the passing of a resolution for Party A's winding-up and official management as Material Reasons for Automatic Termination.

**1.1.2.** ***If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of the Czech Republic, what is the optimal timing for that Automatic Termination to take effect?***

As stated in section 1.1.1 above, we are of the opinion that the election of Automatic Termination is not necessary as close-out netting is, in our view, enforceable under Czech law. As such, we make no recommendations as to whether the parties should make the Automatic Termination provisions applicable or not.

Nevertheless, with respect to the question of the optimal timing for the Automatic Termination to take effect, we refer to our answer in section 1.1.1 above regarding § 10.5 (c) (iv) of the EFET General Agreement.

**1.1.3.** ***Assuming you recommend Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the EFET General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of the Czech Republic) enforceable under the laws of the Czech Republic or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party?***

As stated in section 1.1.1 above, we are of the opinion that the election of Automatic Termination is not necessary as close-out netting is, in our view, enforceable under Czech law. As such, we make no recommendations as to whether the parties should make the Automatic Termination provisions applicable or not.

Nevertheless, regarding the enforceability of the provisions of the EFET General Agreement terminating the EFET General Agreement (including all Individual

Contracts) upon the occurrence of a Material Reason described in § 10.5 (c) of the EFET General Agreement, we refer to our conclusions stated in section 1.1.1 above.

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

Close-out netting arrangements entered into by any counterparty defined as Party A are regulated in Section 193 of the CMA[5] and defined therein in the following manner:

*"(1) A close-out netting arrangement is an arrangement of a contract negotiated under Czech or foreign law,*

*(a) which can be substantiated in writing or, where appropriate, by a recording which permits reproduction in an unaltered form,*

*(b) which relates to the <u>claims of the contracting parties</u>, including charges and interest related to such claims <u>which may be secured by a financial security under the law governing financial collateral</u> and to <u>claims</u>, including charges and interest related to such claims, <u>resulting from financial collateral or a similar legal relationship under foreign law</u>, and*

*(c) where, in the event of an occurrence that has been settled on in advance, there is an extinction and replacement of the debts corresponding to the claims referred to in (b) or a setting-off of the claims which have not yet matured and, if necessary, matured, according to (b) such that the result will be a single claim of one contracting party and the corresponding amount of the other contracting party's debt.*

*(2) The method of valuation of claims according to (b), the moment at which such valuation must be carried out and the manner and period of performance of the resulting single claim shall be the subject of the close-out netting arrangement and shall not be contrary to the practices of the relevant financial market…"*

It should be further stated that Section 193 (2) of the CMA requires that close-out netting arrangements include:

(i) the method of valuation of claims eligible for close-out netting;

(ii) the moment at which such valuation must be carried out; and

(iii) the manner and period of performance of the resulting single claim.

Furthermore, Section 193 (2) of the CMA requires that the conditions above must not be contrary to the practices of the relevant financial market. *"Practices"* are not defined

[5] For the avoidance of any doubt, we would like to stress that even though the close-out netting arrangement is regulated by the CMA (Act on Capital Market Business), the parties to such arrangements do not have to be doing business on capital markets.

under Czech law but a similar term, trade customs (*"obchodní zvyklosti"* in Czech), is used in the Civil Code. Czech courts generally accept the trade customs and assess their existence on a case-by-case basis, and they would most probably treat practices in the same way.

The Czech law governing financial collateral is the FCA, which incorporated the Directive on Financial Collateral Arrangements. With regards to the possible subject of financial collateral, Section 6 of the FCA stipulates that:

*"(1) Financial collateral may only secure a <u>claim of a financial nature</u>, including any charges and interest related thereto, provide that it is not relevant whether or not it is a claim against the collateral provider or any other person.*

*(2) Financial collateral may be agreed for a subordinated claim or for a claim that is only to arise in the future.*

*(3) Financial collateral may also be agreed for claims of a specific nature arising to the collateral taker at a specific time or for various claims arising to the collateral receiver on the same legal basis."*

Section 2 (a) of the FCA defines a claim of a financial nature as a *"claim under contracts on funds, <u>financial instruments, greenhouse gas emission allowances or commodities</u>*[6]*<u>, as well as the rights and claims related to such contracts</u>*".

Section 3 (1) under letters (g), (h) and (l) of the CMA stipulates that financial instruments are (among others)[7]:

*"(g) options, futures, swaps, forwards and other instruments the value of which relates to commodities and derives the right to settle in cash or the right of at least one party to choose whether it wishes to settle in cash, unless it is a settlement in cash due to the failure of one of the parties to the derivative or another reason for the premature termination of the derivative,*

*(h) options, futures, swaps, forwards and other instruments the value of which relates to commodities and derives the right to deliver such commodities and traded on an EU regulated market or in an MTF or an OTF, with the exception of wholesale energy products, as defined in Article 2(4) of Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency, traded on OTFs that must be physically settled,*

*(l) greenhouse gas emission allowances."*

[6] A footnote in Section 2 (a) of the FCA refers to Art. 2 (1) of the Commission Regulation No 1287/2006, which defines a commodity as *"any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity".*

[7] The definition of financial instruments corresponds to the definition of financial instruments within the meaning 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 (recast).

We understand that the transactions envisioned under the EFET General Agreement which are listed in Annex 2 of this legal opinion would concern Commodities as they are defined therein, i.e. electricity, emissions allowances[8], certificates and capacity rights.[9] The Commodities shall be subject to the Relevant Transactions.

To qualify as financial instruments pursuant to Section 3 (1) (g) of the CMA the Relevant Transactions have to carry the right for cash settlement or the right of at least one party to choose whether it wishes to settle in cash, unless the choice for a cash settlement is due to the failure of one of the parties to the Relevant Transaction or another reason for the premature termination of the Relevant Transaction. Considering the above, we are of the view that <u>each of the Relevant Transactions, with the exception of transactions that must be physically settled (see below), should be eligible for close-out netting by virtue of qualifying as financial instruments within the definition set in Section 3 (1) (g) of the CMA</u>.

Additionally, there are certain Relevant Transactions (Commodity Forwards and Commodity Options) which in each case provide for physical settlement. Relevant Transactions of such nature will be further referred to as the Physically Settled Derivatives.

Due to the fact that Physically Settled Derivatives must in each case provide for a physical settlement, these derivatives do not qualify as financial instruments within the meaning of Section 3 (1) (g) of the CMA. Physically Settled Derivatives traded on organized trading facilities[10] do not qualify as financial instruments within the meaning of Section 3 (1) (h) of the CMA either, as the exception stipulated therein precludes wholesale energy products[11] from qualifying as financial instruments pursuant to the aforementioned provision.

It is also necessary to state that the Physical Commodity Transactions are not financial derivatives and thus do not qualify as financial instruments within the meaning of Section 3 (1) of the CMA.

Despite the fact that <u>Physical Commodity Transactions and Physically Settled Derivatives</u> should not be considered financial instruments, they should nevertheless be considered as contracts whose subject matter is a commodity, as is required by Sections 2 and 6 of the FCA, and thus as transactions <u>eligible</u> for close-out netting.

---

[8] Only greenhouse gas emission allowances are addressed in this legal opinion.

[9] Czech law does not consider emissions allowances, certificates and capacity rights to be commodities. These underlying assets are included here only due to their inclusion in the definition of *"Commodities"* in the Instruction Letter (see further text).

[10] Physically Settled Derivatives are not traded on multilateral trading facilities (MTF) or EU regulated markets.

[11] Article 2 (4) of the REMIT defines wholesale energy products as, *inter alia*, derivatives relating to electricity or natural gas produced, traded or delivered in the Union and derivatives relating to the transportation of electricity or natural gas in the Union.

Greenhouse gas emission allowances are eligible for close-out netting regardless of whether they have to be physically settled or not. Greenhouse gas emission allowances are eligible for close-out netting by virtue of qualifying as financial instruments within the meaning of Section 3 (1) letter (l) of the CMA, as well as by virtue of their subject matter being greenhouse gas emission allowances pursuant to Section 2 (a) of the FCA.

Considering all of the above, we are of the opinion that the Relevant Transactions whose subject matter is electricity, i.e. a commodity, and emission allowances are eligible for close-out netting.

However, as we have stated earlier, certificates[12] and capacity rights[13] are not recognized as commodities under Czech law.

Nevertheless, in our view certificates and capacity rights qualify as claims of a financial nature arising from contracts whose subject matter is commodity derivatives, i.e. rights and claims related to commodities, and by this virtue are eligible for close-out netting.

To summarize, only claims whose subject matter is funds, financial instruments, greenhouse gas emission allowances, commodities and their derivatives are eligible for close-out netting. Eligibility of commodities (electricity) and greenhouse gas emission allowances for close out-netting stems directly from the law. Certificates and capacity rights should be permissible subject matter of transactions eligible for close-out netting by virtue of qualifying as commodity derivatives.

All of the above-mentioned conclusions were essentially supported by the Czech National Bank, as (based on our inquiry) the Czech National Bank confirmed that derivative contracts (forwards, options and swaps) whose underlying asset is electricity, emission allowances, commodity certificates and capacity rights may be considered to be claims of a financial nature by virtue of qualifying as rights and claims related to transactions (contracts) whose subject matter is a commodity.

According to the Czech National Bank, this conclusion is further reinforced by the principles and goals described in the Directive on Financial Collateral Arrangements according to which the regulation envisaged in this directive should serve to promote a more integrated, effective and secured financial market.

[12] Certificates are defined in Section 50f (3) (a) of the CMA as "…certificate[s] referred to in Article 2(1)(27) of 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". Article 2 (1) (27) of the RMFI defines certificates *as "…those securities which are negotiable on the capital market and which in case of a repayment of the investment by the issuer are ranked above shares but below unsecured bond instruments and other similar instruments"*.

Article 39 of the Commission Regulation No. 1287/2006 stipulates that derivative contracts of the kind referred to in Section C (10) of Annex I to Directive 2004/39/EC also include derivative contracts relating to transmission or transportation capacity relating to commodities, whether cable, pipeline or other means.

[13] We understand that capacity rights mean rights existing in relation to the transmission capacity for electricity within the meaning of Czech Act No. 458/2000 Coll., on the conditions for conducting business and exercising governmental authority in the energy sectors.

The Relevant Transactions (including Physically Settled Derivatives) are thus, in our view, eligible for close-out netting by virtue of qualifying either as financial instruments or by virtue of qualifying as contracts whose subject matter is a commodity or a greenhouse gas emission allowance.

In conclusion, the provisions in § 11 of the EFET General Agreement meet the above-mentioned requirements and are, therefore, in our view valid and enforceable under Czech law.[14]

For the sake of completeness, it has to be further added that should Party A become a subject of insolvency proceedings commenced in the Czech Republic, close-out netting provisions of the EFET General Agreement should be valid as Section 366 (2) of the Insolvency Act stipulates that:

*"The provisions of this Act shall not have an effect on the close-out netting arrangement under the law governing enterprising in capital markets if the close-out netting arrangement was concluded before the commencement of the insolvency proceedings."*

**1.1.5.** ***Do the laws of the Czech Republic recognize that the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in the Czech Republic, please elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.***

The close-out netting provisions stipulated in Section 193 of the CMA do not necessitate that the relevant claims need to arise from a single contract. As to the legal requirements of close-out netting arrangements, we refer to our conclusions stated in section 1.1.4 above.

Partial close-out netting is not contemplated by Section 193 of the CMA. Section 193 (1) (c) of the CMA contemplates only a full close-out netting by which all of the claims are extinguished and replaced (novated) by a single obligation. Although the wording of the relevant provision does not explicitly preclude such an arrangement

[14] For the sake of completeness, we would like to point out that the last sentence of § 11 of the EFET General Agreement might cause certain interpretative difficulties, as it is not entirely clear that the phrase *"at its discretion"* refers to a party's right to calculate its Gains and Losses without entering into any replacement transaction. We would recommend modifying this sentence in such a way that it does not provide for any margin of misinterpretation.

between the parties, in our opinion, partial close-out netting could be considered as invalid and unenforceable by Czech courts.[15]

**1.1.6.** ***Is the insolvent counterparty obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of the Czech Republic or could the calculation in a foreign currency be challenged by a liquidator, receiver[16] or third party?***

An obligation of a Czech insolvent counterparty to pay its financial obligation in EUR, USD or GBP is valid and enforceable under Czech law.

However, pursuant to Section 175 of the Insolvency Act, the Termination Amount lodged in the insolvency proceedings has to be converted into the Czech currency and lodged as such. The exchange rate used for such a conversion would be the foreign exchange rate published by the Czech National Bank on the date on which the insolvency proceedings were commenced or, if the maturity date of the claim was earlier than this day, then the foreign exchange rate published on the maturity date.

The Czech insolvency trustee would also pay the financial obligation of the insolvent party in the Czech currency equivalent based on the above-mentioned exchange procedure.

**1.1.7.** ***Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party based in the Czech Republic are 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. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?***

The CMA, FCA or other Czech statutory laws do not distinguish between the different types of entities when it comes to them affecting termination and close-out rights of parties. As such, no issue should arise in this matter.

Some public entities must, however, publish certain contracts in the Registry of Contracts. Pursuant to Section 2 of the ARC, it is mandatory to publish (disclose) all private-law contracts and contracts for the provision of subsidies or repayable financial assistance in which the Czech Republic, a regional or local authority, a government organization, state fund or other legal entity in which a state or local government authority has a majority stake holding, is a contracting party.

Contracts subject to the ARC will be published (disclosed) by the public bodies listed in Section 2 of the ARC, not their private-law contractual partners. Furthermore, such

[15] However, as there is no relevant case law regarding this issue and the statutory law is not definite, we cannot state this conclusion as an absolute.

[16] With regard to our conclusions in section 1.1.1 above, we understand a receiver to mean an insolvency trustee.

contracts only become effective, if they are published in the Registry of Contracts (and become effective on the day of their publication).

However, Section 3 (2) of the ARC exempts certain type of contracts from this rule, and no publication is required for their effectiveness. These contracts include *inter alia* (i) contracts under which performance is mainly carried out outside of the Czech Republic or (ii) contracts where at least one contracting party is a joint-stock company whose securities were accepted to be traded on a regulated market or a European regulated market on the condition that it concerns a joint-stock company in which a state or local government authority has a majority stake holding.

### 1.1. Non-insolvency related Material Reasons

#### 1.1.1. *Please discuss the issues outlined in sections 1.1.5, 1.1.6 and 1.1.7 above, as well as the following question: Are the rights of the Terminating Party to terminate and close-out the EFET General Agreement enforceable in accordance with the terms of the EFET General Agreement, irrespective of the insolvency of Party A?*

Conclusions reached in section 1.1 above should be appropriately applicable even to non-insolvency related Material Reasons. As stated above, close-out netting arrangements are excluded from the application of the Insolvency Act. With regard to the principle of the contracting freedom of the parties and provided that the EFET General Agreement is validly entered into under their respective governing law and is not an ineffective legal act on the grounds of being detrimental to other creditors, any of the Material Reasons stated in the EFET General Agreement are eligible to terminate the EFET General Agreement and all Individual Contracts while initiating a close-out netting procedure and the extinction and replacement of the relevant claims.

## II. MULTIBRANCH PARTIES

### 1.2. Czech Multibranch Party

Our opinion is based on the following additional assumptions:

- Party A has entered into Individual Contracts under the EFET General Agreement through offices in the Czech 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 voluntary or involuntary proceedings under the insolvency laws of the Czech Republic.

- Party A’s centre of main interests (COMI) within the meaning of Art. 3 (1) of the Insolvency Regulation is in the Czech Republic.

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

For the details of Czech insolvency proceedings, we refer to Annex 1 of this legal opinion.

In accordance with Art. 3 (1) of the Insolvency Regulation, Czech courts have jurisdiction to open main insolvency proceedings with respect to Party A. In general, the effects of main insolvency proceedings cover all of the debtor's assets located in the Member States. Any commencement of insolvency proceedings should be recognized in all Member States as of the date it becomes effective in the Czech Republic.

After the commencement of the main insolvency proceedings in a Member State, secondary insolvency proceedings[17] may be commenced in other Member States against branches and other assets located in these other Member States. With regard to secondary insolvency proceedings, we refer to section 1.1.1 below.

Furthermore, pursuant to Art. 12 (1) of the Insolvency Regulation, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

The Non-regulation Debtors are in principle regulated by Section 111 of the PILA. Pursuant to Section 111 of the PILA, the Czech courts would have jurisdiction to commence insolvency proceedings with regard to Non-regulation Debtors if their jurisdiction was provided by the Insolvency Regulation had the Non-regulation Debtors been debtors established or having their assets in states bound by the Insolvency Regulation. In such cases, the Czech insolvency proceedings and the rights and authority of the insolvency trustee to dispose of the insolvency estate also extend to the assets of the debtor located abroad, provided that the relevant foreign laws recognize the effects of the Czech insolvency proceedings.

Given the above, there would be no change in our conclusions. Provided that the laws of the jurisdiction in which the foreign branch is established consider the branch to be a part of Party A and recognize that the branch is not a separate legal entity, Czech insolvency proceedings should cover all assets of Party A, including all branches.

The fact that Party A entered into Individual Contracts under the EFET General Agreement on a multibranch basis would have no effect on this, as Party A is the party to the EFET General Agreement, not the branch itself.

---

[17] Secondary insolvency proceedings are governed by the Insolvency Regulation and partly also by Section 430a of the Insolvency Act.

**1.1.3.** ***Would the EFET General Agreement be treated as a single unified agreement by the Czech receiver under the laws of the Czech 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?***

In reference to our conclusions in section 1.1.2 above, we are of the view that the insolvency estate of Party A would be bound by the Czech provisions on close-out netting regardless of any secondary insolvency proceedings commenced against any of its branches, including jurisdictions where close-out netting is unenforceable.

The EFET General Agreement should thus be treated in accordance with our conclusions under section 1.1.5 above.

**1.3. Foreign Multibranch Party**

Our opinion is based on the following additional assumptions:

- Party F has entered into Individual Contracts under the EFET General Agreement both through its home office and through one or more branches located in other countries, including in each case the Czech Branch.

- After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

- Party F's centre of main interests (COMI) within the meaning of Art. 3 (1) of the Insolvency Regulation is outside the Czech Republic.

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

With regard to secondary insolvency proceedings, we refer to section 1.1.2. above Secondary insolvency proceedings are governed by the Insolvency Regulation and partly also by Section 430a of the Insolvency Act.

In accordance with the Insolvency Regulation, after the commencement of the main insolvency proceedings in a Member State, secondary insolvency proceedings may be commenced in the Czech Republic against the Czech Branch. The effects of such proceedings are restricted only to the assets and liabilities of the respective Czech Branch. The Czech insolvency trustee is however obliged to cooperate with the insolvency trustee appointed in the main insolvency proceedings and vice-versa and shall also give that insolvency trustee an early opportunity to submit proposals on the realization or use of the assets in the secondary insolvency proceedings.

The commencement of secondary insolvency proceedings may be requested by the insolvency trustee in the main insolvency proceedings or any other person or authority empowered to do so under Czech law, including local creditors whose claims arise from or are in connection with the operation of the Czech Branch.

At the request of the insolvency trustee or Party F (if Party F is a debtor in possession), the Czech court may stay the commencement of secondary insolvency proceedings regarding the Czech Branch for a period not exceeding three months, if a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, provided that suitable measures are in place to protect the interests of local creditors.

If secondary insolvency proceedings were not commenced, any judgments handed down by the court presiding over the main insolvency proceedings which concern the course and closure of the insolvency, and compositions approved by that court, shall be recognized in the Czech Republic with no further formalities in accordance with Art. 32 of the Insolvency Regulation.

In addition, Czech courts may commence insolvency proceedings with regard to Non-regulation Debtors that have a branch in the Czech Republic, provided that such insolvency proceedings are requested by a creditor with its habitual residence or seat in the Czech Republic or whose claim against such a debtor has arisen in connection with the activities of such a branch. In this case, the Czech insolvency proceedings only apply to the debtor's assets located in the Czech Republic.

As far as financial institutions are concerned, the Insolvency Regulation is not applicable to them. The insolvency proceedings of financial institutions are governed by Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the Reorganization and Winding-up of Credit Institutions and Sections 367 to and including 388 of the Insolvency Act. As the Insolvency Regulation does not apply, no secondary insolvency proceedings can be opened.

For a more detailed description of financial institutions' insolvency proceedings, we refer to Annex 1 of this legal opinion.

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

***liquidator or receiver of the Czech 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.***

As we have stated in section 1.1.4 above, the Insolvency Act does not apply and has no effect on close-out netting arrangements. Pursuant to Art. 193 of the CMA, close-out netting arrangements are also arrangements negotiated under foreign law.

Based on the above, we are of the opinion that close-out netting should be recognized and executed accordingly. The Czech insolvency trustee should thus be bound by the close-out netting and the netting rights of the counterparty of Party F and its Czech Branch regardless of whether the EFET General Agreement was entered into on a multibranch basis or not.

**1.1.3.** ***Please consider your answer to your question assuming instead that Party F has no branch located in the Czech Republic, but has assets in the Czech Republic.***

Such an alteration does not affect our conclusions when it comes to the termination of the EFET General Agreement and the initiation of the close-out netting (extinguishment and replacement of claims) and the netting rights of the counterparty.

Secondary insolvency proceedings may be commenced only if the assets in the Czech Republic constitute an establishment pursuant to Art. 2 (10) in connection with Art. 3 (2) of the Insolvency Regulation, e.g. a branch.

In other words, if Party F has no Czech Branch, no secondary insolvency proceedings will be opened in the Czech Republic.

## III. COLLATERAL

Our opinion is based on the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral.

- The counterparties agree that Eligible Credit Support will include cash and Letters of Credit. 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.

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

The relevant legislation governing choice of law in the Czech Republic is generally the Rome I Regulation, or the PILA if the Rome I Regulation is inapplicable due to one of the parties falling outside its scope.

Under Czech law, cash credited to a bank account is considered as a receivable against the bank.[18]

The Rome I Regulation stipulates that an assignment of a receivable against another person (bank) shall be governed by the law that applies to the contract between the assignor (Party A) and assignee (Party B). Article 3 (1) of the Rome I Regulation allows parties to choose the governing law of a contract. Such a choice must be made expressly, or must be clearly demonstrated by the terms of the contract or the circumstances of the case. The parties can select the law applicable to the contract as a whole, or only to a part of the contract.

With regard to the above, Party A and Party B are free to choose the governing law of the assignment.

However, pursuant to Art. 14 (2) of the Rome I Regulation, the law governing the assigned receivable shall determine its assignability, the relationship between Party B and the bank, the conditions under which the assignment can be invoked against the bank and whether the bank's obligations have been discharged. Therefore, if the bank is situated in the Czech Republic, the receivable against the bank would typically arise from the relevant account agreement and as such would be governed by Czech law, specifically the Civil Code.

Accordingly, within the scope of the Rome I Regulation, although the parties are free to elect the choice of law governing the EFET Credit Support Annex, certain aspects of the financial collateral arrangement under the EFET Credit Support Annex would be governed by the law under which the relevant receivables arose, i.e. the governing law of the relevant account agreement.

For the sake of completeness, a letter of credit is not subject to any transfers of ownership. Party B is the sole beneficiary under a letter of credit, so there is no ownership to be transferred. The receivable that would arise from the letter of credit, if Party A fails to discharge its debt secured by the letter of credit, would be governed by the law chosen in the agreement concerning the letter of credit and not the EFET General Agreement, as the former agreement is entered into between Party A and a third party which would not be a party to the EFET General Agreement.

[18] Although under the Civil Code a receivable is considered a movable asset, rules on the transfer of ownership shall not apply in regards to the “transfer” of a receivable. Instead, a receivable shall be transferred by assignment and be subject to provisions regulating assignments.

**1.5. *Would the laws of the Czech 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 a re-characterization?***

Pursuant to Section 4 (1) of the FCA, financial collateral has the character of a pledge on the financial collateral or a transfer of financial collateral in favour of its beneficiary.

However, we understand that, pursuant to § 3 of the EFET Credit Support Annex, the Eligible Credit Support is supposed to be transferred from the Transferee to the Transferor on or promptly following a Valuation Day.

Pursuant to Section 5 (1) of the FCA, financial collateral may take the form of:

*"a) a financial instrument,*

*b) a separately transferable right otherwise associated with the financial instrument;*

*c) the right arising from the entry of the financial instrument in the register and allowing the right holder to deal with the financial instrument, either directly or indirectly, at least in a similar manner as the authorized holder;*

*d) funds credited to a Czech crown account or a foreign currency account;*

*e) a claim for the payment of cash; or*

*f) a credit claim if the creditor is a person specified in Section 7(1)(a), (b) or (t) or Section 7(2)(d), or a foreign person carrying out an activity similar to that of any of the persons specified in Section 7(1)(a) or (b)."*

Furthermore, pursuant to Section 5 (2) of the FCA, financial collateral may also take the form of a *"financial instrument or funds credited to an account to which the collateral provider becomes entitled only in the future, the right set out in subsection 1(b) or (c) that only arises for the collateral provider in the future, or a claim for the payment of cash or a credit claim that will only arise for the financial collateral provider in the future."*

If the Eligible Credit Support can be characterized as financial collateral within the meaning of Section 5 of the FCA, we are of the opinion that such Eligible Credit Support should not be re-characterized as a security.[19]

[19] For the sake of completeness, in our view, even if the Eligible Credit Support was re-characterized thus, the consequences of such re-characterization would be marginal as Section 4 (1) of the FCA understands for collateral to also include a security, i.e. pledge.

Lastly, Section 366 (1) of the Insolvency Act excludes the applicability of provisions of the Insolvency Act regarding security rights to financial collateral within the meaning of the FCA or a comparable foreign legal regulation, if the financial collateral was negotiated and established (i.e. the Credit Support Annex was entered into and cash collateral was credited to the relevant account) prior to the commencement of the insolvency proceedings.

**1.6.** ***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 Czech Republic necessary or advisable, including any filing, registration, notification, stamping, notarization 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?***

Pursuant to Section 9 (1) of the FCA, all that is required for the creation of financial collateral is for the financial collateral to be credited to the relevant account.

If the financial collateral is credited to the account held by Party B, no further actions or requirements are necessary to ensure that the title continues. Valid title to the financial collateral is perfected by the transfer of the respective amount of cash to the Transferee's account.

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

Section 14 (1) of the FCA enables the provider of the financial collateral to substitute the original financial collateral with a different but equivalent one. Pursuant to Section 14 (3) of the FCA, the substitution should have no effect as to the creation and existence of the financial collateral.

Czech law does not require the Transferee to give consent to a substitution of financial collateral (provided that the conditions stated in section 1.5 above are met). The provider of financial collateral can therefore substitute the financial collateral even without the consent of the pledgee.

However, parties are free to stipulate that the Transferee has to give such consent, as is stipulated in § 6 of the EFET Credit Support Annex. In this case, consent on the part of the Transferee would be required for substitution to take place.

Accordingly, the substitution of financial collateral pursuant to § 6 of the EFET Credit Support Annex should be considered valid.

For the sake of completeness, we state that it is theoretically possible that Czech courts may render such an act invalid or ineffective, if they find that the substitution was performed during the hardening period defined in Annex 1 to this legal opinion. However, in our view, we find it very unlikely that Czech courts would issue such a decision, as pursuant to Section 241 (3) (b) of the Insolvency Act such a substitution by the debtor must be to his own detriment.

**1.8.** ***Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with § 11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in the Czech 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"?***

We understand that the provision of financial collateral means the transfer of cash to Party A's account by which financial collateral within the meaning of the FCA is essentially created. The provided financial collateral is therefore protected from the insolvency of Party A as long as the financial collateral is created before the commencement of insolvency proceedings within the meaning of the Insolvency Act.

Generally, claims related to financial collateral are eligible for close-out netting pursuant to Section 193 (1) (b) of the CMA – we refer to our conclusions in section 1.1.4 above.

Pursuant to Section 366 (1) (b) of the Insolvency Act, financial collateral, as defined in the FCA or a comparable foreign legal act, that was created before the commencement of the relevant insolvency proceedings is exempt from the application of the Insolvency Act and is therefore protected from the effects of the insolvency proceedings.

In the light of the above and after all statutory and other conditions are met, § 11 of the EFET Credit Support Annex should be valid to the extent it includes cash collateral provided and not yet transferred in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable", and close-out netting should, therefore, be possible.

**1.9.** ***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?***

Yes. In accordance with section 1.8 above the commencement of insolvency proceedings should essentially have no effect on the provided or transferred financial collateral.

**1.10.** ***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?***

Although the Insolvency Act does not apply to the transfer of already-provided financial collateral, pursuant to Section 366 (3) of the Insolvency Act, provisions on the validity and effectiveness of legal acts (Sections 231 to and including 243 of the Insolvency Act) do apply.[20]

Czech courts may render transfers of financial collateral invalid or ineffective, if they find that the transfer was performed with a detrimental motive and the transfer reduced the possibility of other creditors' satisfaction. The grounds for opposing a legal act arise in the event that:

(i) a transaction is effected without adequate consideration, i.e. a transaction where the usual consideration in a similar transaction is significantly higher;

(ii) a transaction results in preferential treatment, e.g. premature or preferential repayment of the obligations of only some creditors; or

(iii) a transaction aims to curtail the creditors of certain benefits, provided that the debtor intended to do so and that the counterparty to the transaction had or should have had knowledge of this intention.

The hardening period of transactions under (i) and (ii) is one year prior to the commencement of insolvency proceedings or three years if the transaction was made for the benefit of a person affiliated with Party A.[21] The hardening period of a transaction under (iii) is five years from the commencement of insolvency proceedings.

Pursuant to Section 241 (3) (b) of the Insolvency Act, a favourable legal act is in particular *"an act by which the debtor agreed on a change or substitution of the liabilities to its detriment."* Furthermore, pursuant to Section 241 (3) (d) of the Insolvency Act, a favourable legal act is in particular *"an act by which the debtor provided its property for the collateral of the already existing liability…"*

If the substitute assets are not of greater value than the assets they are replacing, the substitution of financial collateral to the counterparty during the hardening period

[20] Section 366 (3) of the Insolvency Act refers due to errata to the now non-existent Section 366 (1) (d) of the Insolvency Act. However, the former exemption set in Section 366 (1) (d) of the Insolvency Act is now stipulated in the above-mentioned Section 366 (1) (b) of the Insolvency Act.

[21] Please note that transactions under (i) and (ii) might be challenged only if Party A undertook them when it was insolvent or if they rendered Party A insolvent.

should not invalidate the transfer as such an action would not be considered to be detrimental to the debtor.[22] Such a transfer should therefore be considered valid, yet we are not aware of any court decision which would unambiguously support the conclusion.

Considering the mark-to-market provisions of the EFET Credit Support Annex we are of the opinion that a transfer of additional financial collateral would most probably not be considered detrimental to other creditors and would be considered valid.

However, an act by which the debtor provided their property for the financial collateral of the already existing liability could be considered as an ineffective act.

**1.11.** ***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 Czech 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 above?***

Pursuant to Section 9 of the FCA, ownership in the financial collateral is transferred to the Transferee the moment the financial collateral is credited to an account held by Party B or when the financial collateral is provided to the Transferee in such a way that allows the Transferee or a person acting on its account to possess or legally or factually control the financial collateral.

Pursuant to Section 8 of the FCA, it is not required that the respective contract concerning the financial collateral has to be in any written or special form (e.g. a notarial deed); however, to create a valid financial collateral, it has to be possible to prove the creation of a financial collateral (providing cash to the relevant account) in writing.

The written form is maintained, if the creation of financial collateral is captured by a record which proves the creation of the financial collateral and enables reproduction in an unchanged form.

With all of the above taken into account, in our view the EFET Credit Support Annex[23] should be able to create the intended transfer of ownership in the collateral from Party A to Party B under Czech law.

[22] In our view, from an economic perspective in its complexity, the position of the creditor is not improved by the substitution of the collateral. By the same token, the position of other creditors is not deteriorated, even though formally new collateral is provided to a pre-existing liability.

[23] Our conclusions stated herein only relate to cash being the Eligible Credit Support as we do not consider a letter of credit to be able to form financial collateral under the FCA.

## IV. GENERAL ENFORCEABILITY

**1.12.** ***Is the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit Support Annex) enforceable under the laws of the Czech Republic in accordance with its own terms? We would like you to specifically discuss, in a detailed and circumstantiated manner the provisions on (i) non-performance due to Force Majeure (§ 7 of the EFET General Agreement), (ii) remedies for non-performance (§ 8 of the EFET General Agreement) and (iii) limitation of liability (§ 12 of the EFET General Agreement) and any other provisions which in your opinion need to be commented on according to the law of the Czech Republic, including whether these provisions could and/or need to be further "expanded" and/or 'strengthened' under the laws of the Czech Republic. We are especially interested in provisions that you may believe, for example infringe upon the ordre public in the Czech Republic and that may be challenged by the courts in the Czech Republic irrespective of the laws that governs the EFET General Agreement.***

Non-performance due to Force Majeure

To the extent the EFET General Agreement is governed by Czech law, Force Majeure is recognized as a valid obstacle preventing a party from performing its obligations under a contract. As such, parties are free to further specify the definition of Force Majeure in their contract and such provisions would generally be enforceable under Czech law, provided that they are not contrary to Czech statutory law. Typically, stipulated Force Majeure events cannot be *contra bonos mores* (against good morals) and must be conditioned on objective events devoid and principally absent of the parties' will.[24] Furthermore, the definition of Force Majeure under Czech law essentially contains similar elements as the Force Majeure Clause of the EFET General Agreement.

We note, however, that to the extent the EFET General Agreement is governed by Czech law, a release from obligation (*"osvobození od povinnosti"* in Czech) connotes a permanent release from an obligation and not a temporary one. From the wording of § 7.3 of the EFET General Agreement, we understand that the release from obligation was meant to be temporary. It would be preferable to use the term suspension of obligations (*"odložení plnění"* in Czech), which connotes a temporary suspension of an obligation until the obstacle (Force Majeure) preventing the party from performing its obligations ceases to occur. The wording of the Force Majeure Clause of the EFET General Agreement is, however, clear enough and should not give rise to any misinterpretation.

To the extent the EFET General Agreement is governed by Czech law, we additionally note that, if the obstacle is of a permanent nature and the performance of a contractual

[24] However, we believe that this provision is not part of the *ordre public* of the Czech Republic.

obligation becomes objectively and permanently impossible, the obligation ceases to exist altogether.

Remedies for non-performance

Under Czech law, the parties are free to determine the manner and extent of compensation of damages within the limits of statutory law, e.g. remedies cannot be *contra bonos mores* (against good morals). To the extent the EFET General Agreement is governed by Czech law, the remedy set in § 8 of the EFET General Agreement is, in our opinion, valid and enforceable.

Limitation of liability

Czech law differentiates between two categories of damages that can be claimed: (i) actual damages and (ii) lost profits.

Actual damages mean in principle a decrease in the financial value of the injured party's assets which occurred in causal connection with a loss. Actual damages include all costs incurred by the injured party in causal connection with the wrongdoer's unlawful acts and damage caused to a thing.

Lost profits mean harm incurred due to the fact that the injured party's assets are prevented from increasing in value despite the fact that such an increase could have been reasonably expected with regard to the regular course of matters. Lost profits are a loss of anticipated benefits, a realistic profit the injured party has lost. Compensation is determined as the difference between the anticipated profit and costs which have been incurred in order to achieve such profit. The conclusions offered by case law primarily in the context of commercial relationships, i.e. that the amount of lost profits is determined on the basis of an amount which the injured party would have gained under normal circumstances through its activities if the loss had not occurred while taking into account costs the injured party would have to pay to achieve such earnings, apply to the determination of the lost profits amount in general.

Czech law does not generally recognize concepts such as goodwill, business opportunity, anticipated savings and indirect or consequential damages. As a result, it is uncertain how Czech courts, to the extent they have jurisdiction, would ascertain such types of damages if they were brought before them.

Under Czech law, liability cannot be excluded for damages caused by wilful misconduct (*"úmyslně"* in Czech) or gross negligence (*"z hrubé nedbalosti"* in Czech), and any stipulations to the contrary are disregarded.

The duty to mitigate losses pursuant to § 12.5 of the EFET General Agreement is also stipulated in Czech statutory law, specifically in Section 2900 et seq. of the Civil Code.

Pursuant to all of the above, the provisions set in § 12 of the EFET General Agreement should be valid and enforceable under Czech law if § 12.4 incorporates also the exception to the limitation of liability with respect to gross negligence.[25]

Assumptions regarding notice delivery

Assumptions stipulated in § 23.2 of the EFET General Agreement regarding written notices, declarations and invoices establish a contractually stipulated legal fiction which is, according to relevant case law, impossible. Therefore, there is a relative risk that such assumptions would be found invalid by Czech courts.

If such a conclusion was reached, then the delivery of notices would be governed in accordance with relevant case law, which stipulates that a substantive legal act (e.g. a notice) is delivered if it can be objectively presumed that the addressee had the opportunity to get acquainted with it, e.g. when the act is delivered to the addressee's address.

## V. CONFIRMATION PRACTICES

Our opinion is based on the following additional assumptions:

- As far as the Confirmation Practice is concerned, when entering into an Individual Contract, the counterparties in each case (i) make oral reference to the EFET General Agreement when concluding the relevant Individual Contract over the phone or (ii) refer to the EFET General Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT or other means of electronic transmission);

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

### 1.13. Binding Individual Contract

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

No. Under Czech law, Individual Contracts as envisaged in § 1 of the EFET General Agreement do not require a written form or any formal acts for them to be legally binding and enforceable.

[25] However, we do not consider this rule to be an international cogent norm.

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

An Individual Contract agreed upon orally becomes legally binding and enforceable under Czech law when all parties have agreed to all essential requirements of such a contract.

**1.1.6.** ***Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of the Czech Republic? If so, is there a relevant time period per the laws of the Czech Republic that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?***

Under Czech law, if a confirmation following the conclusion of an oral contract is sent to the other party, and the confirmation does not substantially vary from the actually stipulated contents of the oral contract, the contract is conclusively presumed to have been concluded with the contents specified in the confirmation. However, to the extent the EFET General Agreement is governed by Czech law, Section 1740 (3) of the Civil Code which stipulates this rule can be excluded from application.

The above-mentioned presumption only applies if the variations are of such a nature that a reasonable entrepreneur would still have approved them, and if the other party does not reject these variations. Generally, the omission of a rejection or a tacit consent does not constitute an approval. The other party, however, should react to such an incorrect confirmation and make its objections known without undue delay or else it risks being bound by the revised terms.

We note that even if the confirmation varies substantially from the actually stipulated contents of an oral contract, it is advisable for the other party to still react and reject such a confirmation as it is difficult to predict what would and would not constitute a substantial variation due to a lack of relevant case law.

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

In our view, if all parties were aware that the Individual Contract is included in the EFET General Agreement at the time of concluding the Individual Contract, then a reference to the relevant EFET General Agreement made in the relevant written confirmation suffices for the Individual Contract to be a part of the EFET General Agreement.

## 1.14. Means of Evidence

**1.1.1.** ***Assumed there is a dispute with respect to the existence or the terms and conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in front of a court in the Czech Republic: a (i) taped recording, (ii) witness'***

***statement, (iii) e-mail or other electronic message or transaction entry system, and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?***

Under Czech law, any of the forms of evidence listed above are admissible in civil court proceedings. Czech courts will assess each piece of evidence in accordance with the principle of free evaluation of evidence, and it is up to the courts to decide which evidence shall prevail.

Taped recordings are eligible to serve as evidence if they were acquired in accordance with statutory law. Czech courts may, however, take into account the right to privacy of the recorded persons when assessing the admissibility of such evidence. A disclaimer at the beginning of telephone conversations informing the other party about the recording would greatly increase the admissibility of such recordings before Czech courts.

Witness statements, emails and facsimiles are standard categories of evidence and are all eligible to provide proof of the agreed upon terms of the Individual Contract.

Please note that all evidence is assessed ad hoc in accordance with the above-mentioned principle of free evaluation of evidence, and it cannot be predicted with absolute certainty how the courts will proceed in assessing the evidence.

## VI. CORE PROVISIONS

Our opinion is based on the additional assumptions outlined under sections I and II above.

**1.15.** ***Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under sections I and II (Enforceability of Closeout Netting and Multibranch Parties) above? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.***

The elections contemplated by the EFET General Agreement or any of the mentioned Annexes including the EFET Credit Support Annex would not change the substance of our conclusions above as to the enforceability of close-out netting. The relevant provisions should be valid and enforceable under Czech law.

As far as substitution with or without consent of the pledgee is concerned, we refer to our conclusions in section 1.7 above.

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

Given the nature of the close-out netting arrangement and its definition under Czech law, we believe that the provisions set out in § 1, 10.3, 10.5(c)(iv), 11 and the related definitions contained in Annex 1 to the EFET General Agreement are Core Provisions.

Unless changes to the EFET General Agreement are made based on the recommendations stated in this legal opinion, we do not recommend deviating from these Core Provisions, as it may cause the conclusions stipulated in this legal opinion as to the validity and enforceability of the close-out netting arrangement to no longer be applicable and true.

**1.17.** ***Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of your conclusions reached under sections I and II above?***

Assuming that the Core Provisions as defined in section 1.16 above have not been changed, the inclusion of the EFET General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) would not change the substance of our conclusions reached under sections I and II above.

## VII. GOVERNING LAW, ARBITRATION AND JURISDICTION

Our opinion is based on the following additional assumption:

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

**1.18.** ***Would the parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in the Czech Republic, and what would be the consequences if it were not?***

An agreement on the governing law is generally upheld by Czech courts. The Rome I Regulation and the PILA which regulate the choice of law of contracts stipulate that there must be an international element in the relationship between the contracting parties for the clause concerning the governing law to be valid. Examples of such an international element are: (i) one of the parties is foreign, (ii) the subject of the agreement is located in a different state, or (iii) the facts legally relevant for the creation and existence of the legal relationships are related to different jurisdictions. If there is no foreign element in the relationship between the contracting parties, the governing law clause would be invalid.

The same applies to the agreement on the governing law applicable to non-contractual obligations arising from the EFET General Agreement, which is permissible pursuant to Art. 14 of Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II). Such an agreement would be upheld if the above-mentioned international element was present.

Under Czech law, there are several limitations regarding the right to submit one's dispute to an arbitrator. However, given the subject matter of the EFET General Agreement, an arbitration clause regarding disputes arising in connection with such an agreement should be upheld by Czech courts if the agreement is not contrary to public policy (*ordre public*). Subject to compliance with the 10 June 1958 New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards, an arbitral award obtained against a Czech party in connection with the EFET General Agreement should be enforceable in the Czech Republic.

In addition, please note that pursuant to Section 13 (1) of Czech Act No. 216/1994 Coll., on arbitration and enforcement of arbitral awards, arbitration courts in the Czech Republic may only be established by law. The only arbitration court in the Czech Republic fulfilling this requirement should be the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic.

Given the subject matter of the EFET General Agreement, a choice of jurisdiction pursuant to Art. 25 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters should also be in our view acceptable under Czech law and enforced by Czech courts. Czech law also permits a prorogation of jurisdiction in domestic disputes with no international element.

## VIII. REGULATORY REGIME

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

In the Czech Republic, the Czech National Bank may implement certain exchange control measures that might cause distortions on the capital market. However, the use of such measures is heavily restricted, and these control mechanisms are employed only to thwart serious economic and financial disruptions.

In the rare event a financial institution (e.g. a bank) fails, the Czech National Bank may issue a number of crisis management actions. Pursuant to Section 85 (1) of the RRFMA, one of these actions can be the suspension of exercising the right of a contractual party to a withdrawal, settlement or netting or a right which, if applied, would or could result in the maturity of debt or in a close-out netting arrangement:

*"The Czech National Bank may suspend the exercise of the right of a contractual party to a withdrawal, settlement or netting or a right which, if applied, would or could result in the maturity of debt or in a close-out netting arrangement, or a right which, if applied, would or could result in a generation, change, suspension or termination of other rights and obligations of contracting parties, if such right is laid down in the contract with the liable entity or by virtue of a legal norm and is linked to contractually or otherwise determined facts of law (hereinafter the right to terminate liability) and provided that the fulfilment of obligations which create the substance and purpose of the contract, including payment obligations and the provision of collateral, continue to be performed from the time of the publication of the suspension in accordance with Sections 222 and 223 until the end of the closest business day following the day of publication while the conditions for suspension shall form a part of the holding of the decision or a measure of general nature."*

Any person who means to carry on investment services in the Czech Republic has to be licensed as a securities dealer or bank, or authorized to provide investment services in the Czech Republic under a single passport principle. Examples of such investment services are:

(i) dealing on own account in relation to one or more financial instruments;

(ii) reception and transmission of orders in relation to one or more financial instruments;

(iii) execution of orders on behalf of clients in relation to one or more financial instruments.

However, Section 4b of the CMA stipulates a number of exemptions from the requirement of having a licence, e.g. the example stipulated in Section 4b (j) of the CMA:

*"a person who trades on own account with commodity derivatives or greenhouse gas emission allowances or their derivatives, including the market maker, but excluding a person who trades on own account in executing client orders or a person who provides main investment services other than dealing on own account in relation to commodity derivatives or greenhouse gas emission allowances or their derivatives, clients or suppliers of their main business activity,*

*1. in each of these cases individually and collectively, in the context of a group assessment, the activity is ancillary to their main business activity and the main business activity is not the provision of investment or banking services or the activity as a market maker in relation to commodity derivatives,*

2. *this person does not perform high frequency algorithmic trading and*

3. *this person annually informs the CNB of the use of this exemption and, on request, informs them of the reasons why it considers its activities under the introductory part of this subsection to be ancillary to its main business activity."*

For a person to be able to trade in electricity on Czech markets, a licence granted by the Energy Regulatory Authority is required. The applicant must submit all the necessary documents with the application, a list of which is available on the Energy Regulatory Authority's website. The granting of a licence is also subject to a fee. Additionally, a foreign person needs to have a branch registered in the Commercial Register (*"odštěpný závod"* in Czech) to be able to apply for such a licence.

With regards to all of the above, we are of the opinion that from a practical standpoint there are no exchange control laws or licence requirements that would affect the enforceability of the relevant EFET General Agreement or the Individual Contracts.

## F. ADDRESSEES, FURTHER IMPORTANT FACTS, ASSUMPTIONS AND RESERVATIONS

The opinion is addressed exclusively to EFET. It is provided for the sole benefit of EFET and its members and may not be relied upon by, or disclosed to, any other person or legal entity without EFET's and HAVEL & PARTNERS' prior written approval but may be made available by EFET members to the appropriate regulatory authorities.

This legal opinion is subject to the following main qualifications:

- The opinion is limited by the general principles of the laws of the Czech Republic regarding fair business conduct *("zásady poctivého obchodního styku"* in Czech), proper morals (*"dobré mravy"* in Czech) and good faith (*"dobrá víra"* in Czech) and other laws affecting principles of certainty and intelligibility of legal acts (*"určitost a srozumitelnost právních úkonů"* in Czech). These principles are determined by a court at its own discretion and are dependent on the facts of the individual case.

- The concept of close-out netting has not (as far as we are aware) been tested yet before the Czech courts, so it is uncertain how they would recognize this concept. There is no case law regarding the close-out netting regime and its limitations. However, to our knowledge, claims arising from the EFET General Agreement were registered in a number of insolvency proceedings and were not challenged by the insolvency trustee.

- Given the current status of the legal environment in the Czech Republic, mainly the lack of judicial interpretation with respect to the CMA and the FCA, this opinion is subject to any judicial interpretation of both above-mentioned Acts and the laws implementing the above-mentioned Acts generally, especially with regards to the close-out netting regime and its limitations.

- The enforcement of the EFET General Agreements and any of the Individual Contracts in the courts of the Czech Republic is subject to the rules of civil legal procedure as provided for by the applicable laws of the Czech Republic, including the rules on the adjudication of costs of proceedings.

- Under the laws of the Czech Republic: (i) a legal act which is in conflict with proper morals, as well as a legal action which is contrary to the law, in case that the meaning and purpose of the law so requires, is invalid; (ii) a provision stating what will happen in the event of an illegality (including a provision for severance of part of the contract) may be deemed invalid and unenforceable; (iii) if a ground for invalidity relates only to part of a legal act, only this part shall be invalid, unless it follows from the nature of the legal act or its contents or the circumstances under which it took place that such part may not be separated from the rest of the contents of the legal act; (iv) a provision of a contract which provides for a matter to be determined by future agreement may be deemed invalid and unenforceable; (v) a provision by which a party completely waives its rights that may arise in the future may be deemed invalid and unenforceable; (vi) a provision relating to the reimbursement of expenses of a person by another person may be deemed invalid and unenforceable; (vii) a provision stating that determinations, notices, decisions or records of one person will be binding on another person may be deemed invalid and unenforceable; (viii) a provision establishing a fiction of delivery may not be valid and enforceable; (x) a provision purporting to prohibit or restrict the right of the secured creditor to enforce its claims against the pledged property may be deemed invalid and unenforceable; (xi) a provision purporting to enable the secured creditor to enforce its claims against the pledged property in a way other than stipulated by law may be deemed invalid and unenforceable; (xii) a provision purporting to transfer debts or obligations without the explicit consent of the authorized person may be deemed invalid and unenforceable; (xiii) a provision purporting to assign claims or transfer rights and obligations that might arise in the future or purporting to provide a special prior approval without sufficient specification of such transferred claims and transferred rights and obligations may be deemed invalid and unenforceable; (xiv) any power of attorney granted under foreign law which may be utilized in the Czech Republic may be governed by Czech law despite the choice of another law and, as a result, could be subject to the mandatory provisions of Czech law permitting revocation of a power of attorney at the will of the grantor; (xv) under the laws of the Czech Republic: (a) any power of attorney granted under Czech law is revocable and (b) a person (the "attorney") may not represent another person (the "principal") if the interests of the attorney are in conflict with the interests of the principal, except when the principal knew or should have known of such conflict; if the attorney whose interests are in conflict with the interests of the principal acted vis-à-vis a third party and such third party knew of such circumstance, or should have known of such circumstance, such conflict of interest can be invoked by the principal; the interests of the attorney are deemed to be in conflict with the interests of the principal provided that the attorney is also representing another contractual party or if the attorney is also acting in his or her own matter.

- No opinion is expressed on matters of fact. We have not made any independent investigation of factual matters. Since an assessment whether the conditions of the close-out netting set out in the EFET General Agreement are in compliance with the practices of the relevant financial market is to some extent a matter of fact, we assume that they are not contrary to the practices of the relevant financial market.

- As indicated in this legal opinion, acts performed by the debtor might be challenged by the insolvency trustee in insolvency proceedings or even outside insolvency proceedings under certain circumstances by another creditor. We assume that when entering into the EFET Documents initially and as of the conclusion of an Individual Contract, neither of the parties is insolvent (*"platební neschopnost*" in Czech) or over-indebted (*"předlužení"* in Czech) within the meaning of Czech law or any other law applicable to such party, nor do such steps render the respective parties insolvent or over-indebted within the meaning of Czech law or any other law applicable to such party. In this connection, this legal opinion is based on the assumption that the EFET

General Agreement and any Individual Contracts are entered into, and each payment or delivery made thereunder is made, on an arm´s length basis.

- Contractual obligations can be discharged by matters such as breach of contract or frustration. Certain claims are barred by the statute of limitations ("*promlčení*" in Czech) if they have not been asserted within the period of time stipulated by law; if the debtor pleads the statute of limitations, a court cannot adjudge the statute-barred right to the creditor. Claims may be subject to defences or counterclaims such as a set-off, and such defences and counterclaims may not be waived.

- The availability in the courts of the Czech Republic or arbitral tribunals of certain remedies, such as injunction and specific performance, may be restricted under the laws of the Czech Republic, and are at the discretion of the courts or arbitral tribunals.

- No opinion is expressed with respect to any matters of tax laws or on any tax implications and rules of the Czech Republic or any other state.

- The opinions expressed herein are limited to the extent that the admissibility of the choice of law as well as its validity and effects will in each particular case be assessed under the respective legislation.

- Czech laws or other regulations that are unconstitutional may be invalidated by the Czech Constitutional Court as of the date determined in its decision.

- The opinions expressed in this opinion are subject to the effects of any sanctions or other similar measures with respect to any party to the EFET General Agreement.

The conclusions and recommendations above have been made on the basis of the documents and information provided, as listed in section A above, and are based on the assumption that these documents and information are true, correct, precise and complete. If this assumption is not correct, the correctness of the conclusions and recommendations above cannot be ensured. This legal opinion (including its annexes) is not a comprehensive legal opinion in the matter and may not be regarded as a substitute for specific legal advice on the matters covered in it.

This opinion (including its annexes) has been prepared under Czech law as of the date stated above and does not take into account the law of any other jurisdiction. If any matter indicated in this report relates to any jurisdiction other than the Czech Republic, a qualified lawyer from the relevant jurisdiction should be consulted for the respective advice.

Best regards,

HAVEL & PARTNERS

# ANNEX NO. 1
# GENERAL OVERVIEW OF CORPORATE INSOLVENCY PROCEEDINGS IN THE CZECH REPUBLIC

Insolvency proceedings in the Czech Republic are primarily regulated by the Insolvency Act and the Insolvency Regulation.[26] The Insolvency Act is not applicable to financial institutions for the period during which they are the licence or permit holders under special legal regulations governing their activity. Insolvency of such financial institutions is governed by special rules pursuant to Section 367 et seq. of the Insolvency Act and conditioned by the suspension of the relevant licence or permit.

Corporate insolvency proceedings are usually divided into three phases:

(i) the insolvency court decides on whether a debtor is insolvent; this phase starts with filing the insolvency petition by the debtor or its creditors and ends with a decision of the insolvency court on this petition (e.g., the ruling on insolvency);

(ii) the insolvency court and creditors decide on the method of resolving the debtor's insolvency; this phase starts with the ruling of the insolvency court on insolvency and ends with the decision of the insolvency court on the resolution method, which is generally either a declaration of bankruptcy or an approval of reorganization; and

(iii) the selected method of resolution is implemented.

**Insolvency**

Corporate insolvencies may take two forms: (i) inability to pay (with the debtor's liquidity as the decisive criterion) or (ii) over-indebtedness (with the value of the debtor's assets as the decisive criterion). In addition, the Insolvency Act also allows the commencement of insolvency proceedings by the debtor in case of imminent insolvency ("*hrozící úpadek*" in Czech).

**Inability to Pay (liquidity test)**

Inability to pay occurs when a debtor:

(i) has multiple creditors;

(ii) has mature financial liabilities overdue for more than 30 days; and

(iii) is unable to satisfy such mature financial liabilities.

All three criteria must be met concurrently. The Insolvency Act stipulates that a debtor is unable to satisfy its financial liabilities if one of the following circumstances occurs:

(i) the debtor stopped the payments for a substantial part of its financial liabilities;

[26] Please note that Annex 1 summarizes only basic elements of the insolvency proceedings governed by Czech law. Therefore, it contains several generalizations and omits certain specific features related to the respective issues.

(ii) the debtor is in default with its financial liabilities for more than 3 months after the due date;

(iii) it is impossible to satisfy any of the due and payable obligations of the debtor by means of court enforcement; or

(iv) the debtor failed to comply with its obligation to submit a list of assets and liabilities as imposed upon the debtor by the insolvency court.

It is presumed that a corporate debtor is able to satisfy its financial liabilities if the difference between the amount of its due financial liabilities and the amount of its available funds (the "**coverage gap**") set out in the liquidity report amounts to less than one-tenth of the amount of its due financial liabilities, or if the liquidity development outlook shows that the coverage gap will drop below one-tenth of its due financial liabilities in the period for which the liquidity development outlook is drawn up.

### Over-Indebtedness

A corporate debtor is deemed over-indebted if it has multiple creditors and concurrently the total of its liabilities exceeds the value of its assets. When executing the balance test the value of the debtor's assets will be compared with the amount of all the debtor's liabilities (as opposed to the amount of the debtor's mature liabilities).

An important factor taken into consideration is the debtor's potential future development and whether the debtor may reasonably be expected to continue administering its assets or conducting business.

### Imminent insolvency

Imminent insolvency exists if it can be predicted, in the light of all circumstances, that the debtor will be unable to satisfy a substantial portion of its financial liabilities in a due and timely manner. Under such circumstances, the debtor (but not the creditors) may (though does not have to) file a petition for the commencement of insolvency proceedings. Such a petition may be used, above all, when the debtor pursues reorganization.

### Commencement of insolvency proceedings and its effects

### Insolvency petition

Insolvency proceedings may be commenced on the basis of a petition filed by a debtor or any of its creditors. Following the delivery of the insolvency petition, the court generally publishes the petition in the insolvency register (which is publicly available)[27] within two hours after it was filed without any review by the court as to whether the petition is justified. If the insolvency court has reasonable doubts about the rightfulness of the insolvency petition filed by a creditor, it shall not publish the insolvency petition or any other documents kept in the insolvency file in the

[27] https://isir.justice.cz/isir/common/index.do

Insolvency Register. Please note that creditors' insolvency petitions are preliminarily assessed, which might have an impact on their publication in the insolvency register.

**Effects of insolvency under substantive law; debtor's duty to file a petition; restrictions vis-à-vis creditors and avoidance of transactions**

*Duty to File an Insolvency Petition*

Without undue delay after the debtor learned or with due care should have learned of the insolvency, the debtor must file an insolvency petition.[28] This obligation lies not only with the debtor (the company), but also directly with its executive body (the director in the case of a limited liability company; the board of directors in a joint stock company). Should a person fail to file an insolvency petition when so obligated under the Insolvency Act, liability for any damage or loss incurred as a result of such failure vis-à-vis the creditors arises. The liability of the members of an executive body is personal, and they are liable with their entire property. The members of a collective body are liable for damage jointly and severally.

*Debtor's Obligations vis-à-vis Creditors and Avoidance of Transactions*

An insolvent debtor must refrain from acts by which it reduces the extent of creditors' satisfaction or favours some of the creditors over others, unless there are statutory grounds for acting in such manner (e.g., exercise of a security interest by a creditor). Such acts include, *inter alia*, (i) performances that the debtor provides to a third party without adequate consideration, (ii) performances favouring a creditor and (iii) performances intentionally curtailing creditors' rights (e.g., agreements on amending a payment plan if such amendment is to the detriment of the debtor, agreements on establishing a security interest without sufficient consideration, waiver of debt, acknowledgement of a non-existent debt, assumption of new obligations).

Such acts of the debtor reducing a creditor's satisfaction or favouring one creditor over others are sanctioned by private as well as public laws as follows:

(a) by the right to contest such act (private law remedy).

The Insolvency Act provides that an act under the insolvency law may become ineffective if (i) the court issues a decision on insolvency, (ii) a court-appointed insolvency trustee files a complaint to challenge a debtor's act within one year after the court's decision on insolvency becomes effective, and (iii) the court issues a decision on the ineffectiveness of the challenged act.

The insolvency trustee may challenge a debtor's acts performed one year before the insolvency proceedings were initiated (but three years in case of legal acts performed by

[28] Neither the Insolvency Act nor case law stipulates a fixed term for filing an insolvency petition. The interpretation of the term "without undue delay" will, therefore, depend on actual circumstances (the time needed to draft the insolvency petition and to consider the debtor's potential future steps in protection against the creditor).

an affiliated person) and five years in case of legal acts that intentionally curtail creditors' rights. The creditors are not entitled to file such complaint.

The ineffectiveness of a debtor's act does not affect the validity of the same act. The debtor's performance provided on the basis of an ineffective legal act is deemed part of the debtor's estate from which the creditors may be satisfied;

(b) by holding the members of statutory bodies and other persons acting on behalf of the debtor criminally liable (public law remedy).

**Procedural effects of insolvency; risks related to an insolvency petition**

Filing an insolvency petition has a number of procedural effects on the part of both the debtor and the creditor, regardless of whether or not the debtor is actually insolvent. These effects are of two types:

(i) protection of the debtor from creditors ("automatic moratorium"); and

(ii) restriction of the debtor's right to dispose of its assets and liabilities, aimed at protecting the creditor against impairment of the debtor's assets.[29]

The effects of an insolvency petition remain in existence until the insolvency court issues a decision on the method of resolving the insolvency.

*Preliminary trustee*

The insolvency court may issue a preliminary measure under which it appoints a preliminary trustee before a regular trustee is appointed.

The appointed preliminary trustee is particularly entitled to carry out various measures to determine and seize the debtor's estate as well as to audit the debtor's accounts. Furthermore, the preliminary trustee may be entrusted with the right to dispose of all or a part of the assets of the debtor.

Unless the insolvency court decides to rule on the insolvency otherwise, the preliminary trustee becomes a "regular" trustee.

*Protection from creditors*

Once insolvency proceedings have been commenced:

(i) creditors may only assert their claims relating to the debtor's estate by means of a claims submission made within the insolvency proceedings (no separate statement of claim can be submitted and no other means of debt recovery is possible);

[29] However, even after an insolvency petition is filed, the debtor or its management remains the party exercising the right to dispose of its assets and liabilities.

(ii) the rights associated with the process of securing the claims can be established and exercised only in compliance with the Insolvency Act; and

(iii) although it is possible to order the enforcement of a judgment or distraint with respect to the debtor's assets or the assets comprised in the estate, such enforcement or distraint cannot be executed.

The effects resulting from the commencement of insolvency proceedings arise at the moment of publication of the judicial notice on the commencement of insolvency proceedings in the insolvency register, i.e., generally within two hours after the insolvency petition was filed, and they remain in existence until the proceedings are concluded.

*Restriction of the debtor's right to dispose of assets, discharge of obligations*

Unless the insolvency court decides otherwise, from the time the judicial notice on commencing insolvency proceedings is posted in the insolvency register the debtor must refrain from the following:

(i) disposing of its assets, provided that as a result of such disposal the structure, use or purpose of the assets would change materially or would be diminished to a significant extent; and

(ii) repaying debts, save where such debts are discharged under the terms and conditions set out by the Insolvency Act.

The above restrictions do not apply to the disposal of assets or debt repayment within the ordinary course of business, or the fulfilment of statutory obligations. Nevertheless, additional restrictions may ensue from (i) a preliminary injunction which can be ordered by the insolvency court even without a previous motion or (ii) from the appointment of a preliminary trustee by the insolvency court. The preliminary trustee may be entrusted with the right to dispose of all or a part of the assets of the debtor. If the debtor does not abide by the restrictions, his/her legal acts are ineffective and the debtor is held liable for damage arising thereof vis-à-vis his/her creditors.

**Moratorium**

A debtor who is an entrepreneur may file a petition in the insolvency court to declare a moratorium. Such petition must be filed within 7 days of the submission of an insolvency petition and within 15 days in the case of an insolvency petition of a creditor. The debtor is also entitled to file a petition for a moratorium even before the commencement of the insolvency proceedings.

For the duration of the moratorium, the ruling on insolvency may not be issued, and the debtor is entitled to pay its debts directly associated with maintaining its business which were established in the 30 days prior to the declaration of a moratorium, or after it, with priority over earlier payable debts (priority debts).

The other party (besides the debtor) in energy supply and raw materials agreements – as well as other agreements for the supply of goods and services – which by the date of the declaration of a moratorium had lasted for at least 3 months may not, for the duration of the moratorium, terminate or withdraw from such agreements due to the default of the debtor in payment for goods or services that occurred before the declaration of the moratorium. The above applies on the condition that the debtor fulfilled at least the priority debts (as described above) from such agreements.

A moratorium is effective from the date of publication of the decision on its declaration in the insolvency register, and it lasts for a period of no longer than 3 months. The insolvency court may, upon the petition of the debtor, extend the moratorium for a maximum of 30 days.

**Ruling on insolvency**

If the petition was filed by the debtor, the court should issue a decision on whether or not the debtor is insolvent within 15 days (however, in practice it takes longer for the courts to decide).

No such deadline has been set with respect to insolvency petitions filed by creditors (the decision is usually issued in two to four months, depending on the complexity of the case).

**Methods of the resolution of corporate insolvencies**

After the court found that the debtor is indeed insolvent, it may decide on the specific method by which the insolvency will be resolved. In regards to corporate insolvencies, the court has 2 options: bankruptcy or reorganization.

**Bankruptcy**

Bankruptcy is a method of resolution within which a creditor's ascertained receivables are satisfied on a pro-rata basis from the proceeds obtained through realization of the debtor's estate. The receivables or their parts that are not satisfied do not cease to exist after the bankruptcy is terminated. In the case of a legal entity, bankruptcy leads, in principle, to the termination of existence of such legal entity and to its deletion from the Commercial Register.

Once bankruptcy is declared, the debtor's executive body and shareholders lose practically all control over the debtor's business activity. The control is conveyed to the insolvency trustee who administers the debtor's estate and exercises the powers of the debtor's general meeting.

The Insolvency Act distinguishes several classes of claims which are to be satisfied within the insolvency proceedings.

These classes include, in particular:

(i) claims against the estate (e.g., expenses and fees of the insolvency trustee and creditors' committee members, moratorium claims and certain other claims which arise after the ruling on insolvency);

(ii) claims ranking pari passu with the claims against the estate (e.g., employees' claims or personal injury claims);

(iii) secured claims;

(iv) registered claims of a general nature; and

(v) subordinated claims and claims of shareholders related to their participation in the debtor (i.e., claims that can be satisfied only after other claims vis-à-vis the creditors are satisfied).

Claims against the insolvency estate and claims ranking *pari passu* with them will be paid out of the liquidation proceeds at any point during the bankruptcy proceedings. However, such payments cannot be made to the detriment of the secured creditors since the secured creditors are entitled to the proceeds of the sale of collateral. The proceeds from the sale of such collateral may be reduced by e.g. expenses associated with the management, sale, and the amount of the fee payable to the trustee. In relation to the management and sale of the collateral, the insolvency trustee is generally bound by the instructions of secured creditors who registered their receivables in the insolvency proceedings. As the insolvency trustee’s fee is payable immediately upon any sale of collateral, the trustee is motivated to sell as soon as possible.

After the above-mentioned claims have been satisfied, the general claims will be satisfied on a *pro rata* basis. Subordinated claims are satisfied according to the agreed or stipulated degree of their subordination. After all claims covered by the insolvency proceedings are satisfied in full, claims of the debtor’s partners or members arising from their membership in the company may also be satisfied.

In general, creditors’ satisfaction in bankruptcy is rarely higher than 5%. Although the Insolvency Act recognizes certain receivables that are to be satisfied with priority in the course of insolvency proceedings (e.g. claims against the estate), secured creditors have the most powerful right to satisfaction of their receivables.

Once all proceeds from the sale of the debtor’s assets are distributed pursuant to the distribution schedule, the insolvency trustee informs the court accordingly and the court decides on the discharge of bankruptcy/termination of bankruptcy proceedings. When the insolvency proceedings are terminated, the debtor as a company is liquidated and deleted from the Commercial Register.

**Reorganization**

Reorganization consists of gradually satisfying creditors’ claims while preserving the debtor’s business activity in accordance with an approved reorganization plan pursuing the aim of recovery of the business. The performance of the reorganization plan is monitored by the creditors on an ongoing basis.

Unless the debtor agrees otherwise with the creditors, the method of reorganization may be used only if the debtor (a business entity) has reached a turnover of at least CZK 50 million (approx. EUR 2 million) in the last year or has at least 50 employees. Certain businesses, such as securities traders and companies in the liquidation, cannot be subject to reorganization under any circumstances. Czech law also allows for the so-called pre-packaged reorganization process whereby the debtor and the creditors first approve the reorganization plan and only then does the debtor file for reorganization.

There is no mandatory content prescribed for reorganization. In principle, reorganization is an “agreement on composition with creditors” reflecting whatever was agreed to in the reorganization plan (entry of a strategic investor, disposal of assets, waiver of debt, debt-for-equity swap, etc.). The priority right to submit a reorganization plan rests with the debtor, who usually proposes and drafts the reorganization plan upon a prior agreement with the creditors.[30] For the purpose of voting on the reorganization plan, creditors with a similar status are grouped based on different economic interests. In addition to general creditors, special groups are created comprising each secured creditor, stakeholders (partners, members, shareholders) of the debtor and so-called unaffected creditors. The reorganization plan is subject to the separate approval by each of the creditor groups, with the exception of creditor groups whose claims are not affected by the reorganization plan and the stakeholders; if the reorganization plan is not approved, bankruptcy is declared.

If creditors approve the reorganization plan and if a guarantee exists that each creditor will receive payment that is equal to or greater than the value of the payment such creditor would likely receive under a bankruptcy scheme, the insolvency court will approve the reorganization plan. In exceptional cases, a reorganization plan may also be approved even if there is a disapproving group of creditors, provided however that the court reasonably believes that the debtor’s business can be revitalized and the reorganization plan is “fair” (so-called “cram-down”).[31]

In the course of reorganization, the debtor retains the right to handle his/her assets. This means that the executive body and, to the extent agreed in the reorganization plan, also the shareholders of the debtor maintain control over the debtor’s business (except as limited by the Insolvency Act). The shareholders maintain the right to appoint (or elect) and recall members of the debtor’s executive body and supervisory body at a general meeting unless the creditors decide otherwise; however, in any case all material transactions regarding the debtor’s assets will require the consent of the creditors’ committee. Upon the motion of the insolvency trustee or the creditors’ committee, the court may further curtail the debtor’s rights of disposal. Also, once the reorganization is approved, a set-off against the debtor’s claims is not permissible. Once all obligations of the debtor under the reorganization plan are satisfied, the court terminates the reorganization proceedings. Claims not included in the reorganization plan cannot be satisfied and, effectively, cease to exist in relation to the reorganized debtor.

If the debtor fails to comply with his/her material obligations or if any other material obligations related to the reorganization proceedings are breached, the insolvency court will decide on converting the reorganization into bankruptcy. In such case, the insolvency court’s decision will trigger the effects associated with the adjudication of bankruptcy. This should result in the revitalization of the receivables and other rights affected by the reorganization plan at the time of the plan’s approval.

---

[30] However, the creditors may decide by vote that the reorganization plan be drafted by a creditor.

[31] The concept of “fairness” of the reorganization plan is further explained in the Insolvency Act.

## Set-off

Under Czech law, if parties owe each other a financial obligation, each of them may declare with respect to the other party that it sets off its claim against the claim of the other party. A claim may be unilaterally set off once a party becomes entitled to demand satisfaction of its own claim and perform its own debt.

Claims eligible for a unilateral set-off are only those which can be asserted in court. An uncertain or indeterminate claim is not eligible for such a set-off. Parties may however agree in a contract to set off even claims which would not otherwise be eligible for a set-off.

The Insolvency Act does not in general prohibit a set-off of claims. There are however some exceptions to this rule. Set-off against claims that form a part of the insolvency estate is excluded during reorganization, moratorium and where the insolvency court issued an injunction prohibiting such set-offs. Section 140 of the Insolvency Act stipulates further requirements for set-off occurring after the debtor was declared insolvent:

"*…(2) The set-off of the mutual receivables of the debtor and the creditor is admissible after the decision on the insolvency if the statutory conditions of such set-off were met before the decision on the method of resolution of the insolvency, unless it is further stipulated otherwise.*

*(3) The set-off under Subsection 2 is not admissible, if the debtor's creditor*

*(a) failed to become a registered creditor in relation to its receivables eligible for offsetting, or*

*(b) gained a receivable eligible for offsetting by an ineffective legal act, or*

*(c) at the time of the acquisition of the receivable eligible for offsetting, knew about the debtor's insolvency, or*

*(d) has not yet paid the mature receivable of the debtor to the extent to which it exceeds the receivable eligible for offsetting of such creditor.*

*(4) The set-off referred to in Subsection 2 is also not admissible in the cases provided for by this Act or by a preliminary measure of the insolvency court.*"

Pursuant to Section 82 (3) of the Insolvency Act, the court may issue a preliminary measure under which it allows or prohibits a set-off of claims:

"*…Unless it is contrary to the common interest of the creditors, the insolvency court may, for reasons worthy of special consideration, through a preliminary measure also*

*(a) grant consent for the set-off of the mutual receivables of the debtor and the creditor during the period of moratorium, or*

*(b) grant consent for the set-off of the mutual receivables of the debtor and the creditor even after the publication of the petition for the restructuring permit in the Insolvency Register, or*

*(c) prohibit the set-off of the mutual receivables of the debtor and the creditor for certain cases or for a set period of time.*"

Pursuant to Section 369 (2) (c) and Section 381 (2) (c) of the Insolvency Act, the insolvency proceedings of financial institutions and insurance companies shall not have an effect on the right of the creditors to request a set-off against the receivable of the debtor, where such set-off is permitted by the law that governs the receivable of the debtor.

**Insolvency of Financial Institutions**

Under Czech law, a special regime applies to resolving insolvency of financial institutions. Methods of resolving insolvency of financial institutions as specific entities are provided for under Section 367 et seq. of the Insolvency Act; they have some specific features as compared with the legal regulation of the methods for resolving insolvency of other entities.

Pursuant to Section 2 of the Insolvency Act a financial institution means "*a bank, savings and loan cooperative, securities dealer that is an investment firm pursuant to Article 4(1)(2) of Regulation (EU) No. 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (a "Securities Dealer"), insurance and reinsurance companies and certain further persons pursuant to the terms and conditions set out herein".*

_Banks and Securities dealers_

Pursuant to Section 367(1) of the Insolvency Act, special provisions of the Insolvency Act apply to the insolvency of

*"(a) a bank, savings and loan cooperative following withdrawal of a licence or authorization pursuant to* [the Banking Act and Czech Act No. 87/1995 Coll., on Loan and Savings Cooperatives and Certain Related Measures and on Amendments to Act of the Czech National Council No. 586/1992 Coll., on Income Tax, as amended],

*(b) a foreign bank operating in the territory of the Czech Republic by virtue of a single licence pursuant to* [the Banking Act],

*(c) a branch of a foreign bank other than that referred to under letter (b),*

*(d) a securities dealer,*

*(e) a foreign securities dealer providing investment services in the territory of the Czech Republic on the basis of a licence pursuant to* [the CMA],

*(f) a branch of a foreign securities dealer other than that referred to under letter (e),*

*(g) obligated persons pursuant to Section 3(b) and (c) pursuant to* [the RRFMA]."

In the case of banks and savings and loan cooperatives subject to supervision or domestic supervision of the Czech National Bank, the special provisions of the Insolvency Act can be used only following withdrawal of the relevant licence or authorization of the Czech National Bank or after the licence otherwise ceased to exist.

General provisions of the Insolvency Act, with the exception of provisions regulating a moratorium, reorganization and discharge from debts, will be applied in the alternative to the insolvency of financial institutions, with the exception of foreign banks and foreign Securities Dealers which are subject to a separate regime.

Insolvency of a bank or savings and loan cooperative operating by virtue of a licence of the Czech National Bank and those branches of foreign banks operating in the territory of the Czech Republic by virtue of a licence of the Czech National Bank can be resolved only by means of bankruptcy.

One of the differences as compared with the general regulation of insolvency proceedings is a broader group of persons authorized to file an insolvency petition. The Czech National Bank is also a person authorized to file an insolvency petition.

An insolvency court is also obligated to inform, via the Czech National Bank, a supervisory authority in countries where a debtor operates by virtue of a single licence of the issuance of an insolvency decision and declaration of bankruptcy in respect of the bank's assets.

Claims of creditors as indicated by the accounting books of a financial institution are deemed to be filed upon the declaration of bankruptcy. An insolvency trustee is obligated to send, without undue delay, however no later than 60 days from the declaration of bankruptcy, a notification to each creditor filing such a claim in which the insolvency trustee must specify how, until when and where an objection to the amount of the claim can be raised.

*Insurance Companies*

The Insolvency Act further contains a special regulation for the insolvency of insurance companies following the withdrawal of their licence pursuant to the Insurance Act.

The special regulation providing for methods of resolving insolvency of insurance companies is basically similar to that regulating the insolvency of financial institutions.

## ANNEX NO. 2
## TRANSACTIONS UNDER THE EFET 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 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 electricity, emissions allowances, certificates or capacity rights.