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Warsaw, 10 June 2019

MEMORANDUM

for the European Federation of Energy Traders (EFET)

on the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements

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2.1.1 Enforceability of Early Termination rights as the result of an insolvency- or restructuring-based Material Reason

Provisions envisaging the termination of a contract in the event of a pre-insolvency related situation in respect of one of the parties to that contract are enforceable and valid. Polish courts should then uphold and find to be enforceable the rights of early termination of the EFET General Agreement and all Individual Contracts as provided for in § 10.5(c) (ii), (v), (vii) and (ix) of the EFET General Agreement with respect to pre-insolvency related events.

Provisions which relate directly, or indirectly, to opening of insolvency (or restructuring) proceedings, or filing a petition for bankruptcy (or restructuring petition) will be invalid[1]. This applies to provisions of § 10.5(c)(iii), (iv), and (vi) of the EFET General Agreement.

Nevertheless, all Individual Contracts falling into safe harbor provision (i.e. commodity forwards, commodity options and commodity swaps), concluded under EFET General Agreement, and the EFET General Agreement itself, can be terminated after opening of bankruptcy or restructuring proceedings, based on special statutory termination right – please refer to sections 4.1.1.1 and 4.1.1.2 below for further details. Use of such right will result in settlement of all Individual Contracts pursuant to rules provided for in EFET General Agreement (the law respects netting clause included therein) – please refer to section 4.1.1.1 and 4.1.1.2 below for further details.

The above conclusions apply to both Early Termination and the Automatic Termination, as they are treated identically in the above context.

2.1.2 Right of an official receiver to withdraw from the agreement (cherry picking)

The official receiver cannot terminate EFET General Agreement and Individual Contracts constituting <u>forward transactions</u> under its cherry-picking right as per Polish insolvency law. There is a potential risk that spot transactions could be affected by the cherry picking right and terminated by the official receiver. As described in the below section 2.1.3 we believe this risk is relatively low in case the time delay between the execution of the transaction and the delivery is at least one calendar day (i.e. in case of day-ahead transactions) and thus potentially only intraday transactions would be affected.

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[1] For the purposes of this opinion the terms „insolvency petition", „bankruptcy petition" and „petition for bankruptcy" or other similar terms have been used interchangeably, unless otherwise provided in this opinion.

2.1.3 Enforceability of Close-out Netting in insolvency or restructuring under Polish insolvency law

2.1.4 We believe that the close-out netting provisions contained in the section §11 of the EFET General Agreement are enforceable under Polish law outside an insolvency scenario. In case of insolvency of the Polish counterparty, these provisions are clearly enforceable only in relation to those Individual Contracts that concern commodity forwards, commodity options and commodity swaps. This would imply that all spot transactions will be excluded from close-out netting and would be treated in the insolvency as standard obligations (please refer to sections 4.1.1.1 and 4.1.1.2below for details). However, in practice we believe that he risk of insolvency trustee excluding spot transactions from the safe harbour clause, in particular if such transactions provided for at least few hours time delay between when the transaction is made and the commodity is delivered, is low. We believe that the risk is even lower in case the time delay between the execution of the transaction and the delivery is at least one calendar day (i.e. in case of day-ahead transactions).

2.1.5 Automatic Early Termination

Under Polish law there would be no benefits in choosing automatic early termination as per clause §10.4 of the EFET General Agreement. We recommend not to opt for automatic early termination to apply against a Polish counterparty.

2.2 Collateral and Parent Company Guarantee

2.2.1 Financial Collateral

Under Polish law, the parties are free to choose a law to govern their contractual obligation with no need to establish a link between the agreement and the law chosen. In the absence of the choice of law, the agreement shall be governed by the law of the country with which it is most closely connected.

A contract for the transfer of ownership of a property, receivable or other rights shall be effective towards the bankruptcy estate if executed in writing with a certified date subject to the exception to this rule set out in article 84 item 3 of the Bankruptcy Law. In practical terms, in Poland a certified date is usually authenticated by a notary public. These requirements will apply to collaterals - other than cash (i.e. cash transfers under the CSA do not require documentation with a notarized date) - established under Credit Support Annex. Collaterals established on the basis of the Polish Act on Certain Financial Collaterals and meeting its requirements do not need to be executed in writing with a certified date in order to be effective towards the bankruptcy estate. Therefore, transfer of financial instruments governed by the Polish Act on Certain Financial Collaterals shall be effective in bankruptcy regardless of form. Properly transferred assets shall not be excluded from the bankruptcy estate, but shall be subject to provisions relating to pledged assets, to be applied mutatis mutandis. Therefore, in cases of bankruptcy estate containing previously assigned assets, the receiver liquidates the transferred assets and uses the funds generated to satisfy claims of the transferee secured by the transfer. The receiver may include the remaining amount in the bankruptcy estate only upon full satisfaction of the claim secured by the title transfer.

There are no special form requirements for a financial pledge over rights. Therefore, a court might re-characterize an improperly executed transfer of rights as transfer of rights governed by the Polish Act on Certain Financial Collaterals or a financial pledge with a right of use. A right of use means that a pledgee may exercise rights to the pledged asset and dispose of the asset. Following the disposal, the pledgee is only obliged to replace the collateral with an appropriate equivalent by the time of fulfilment of the obligation secured by the pledge. If an enforcement event occurs, the obligation to return the equivalent collateral may be subject to set-off. Therefore, re-characterization of the transfer of collateral as transfer of rights governed by the Polish Act on Certain Financial Collaterals or a financial pledge may be regarded as a remedy for a transfer executed without formal requirements which would otherwise be ineffective towards the bankruptcy estate.

If collateral is replaced by new collateral, this might be regarded as an event inherently involving creation of a new security. This would have an important impact on effectiveness of the collateral due to so called "suspect periods" which relate to rules of Polish law providing for ineffectiveness of certain acts in law made by the bankrupt prior to the date the petition for bankruptcy was filed, whereby the bankrupt disposed of assets, or paid or secured a non-matured debt. However, the suspect period provisions do not apply to creation of security over the bankrupt debtor's assets occurring before the date of declaration of bankruptcy in connection with the financial terms operations and or borrowing or sale of financial instruments involving an undertaking to repurchase them, referred to in article 85 of the Bankruptcy Law.

Since 20 July 2011, the close-out netting of collaterals has been recognized also in bankruptcy. Therefore, the close-out amount would now be calculated not only in relation to derivatives/repos only (as explicitly allowed under article 85 of the Bankruptcy Law) but also to claims for return (or be returned) of the collateral.

The possibility of including the claim to return the collateral in the calculation of the lump amount arising in accordance with the close-out netting mechanism remains doubtful with respect to the receivables of the security provider for waiver, amendment, revocation or return of a Letter of Credit.

2.2.2 Parent Company Guarantee

A corporate guarantee is structured under Polish law as a suretyship *("poręczenie")*, whereby a surety *("poręczyciel")* undertakes to pay the debt of a primary debtor towards the creditor in cases where a primary debtor does not do so on time.

A suretyship should be established by a written agreement between the surety and the creditor in order to secure a debt of the debtor. A surety is obliged to pay the debt in the event of default by an obligor.

A suretyship is an accessory to the principal debt secured. Therefore, if If the primary obligation becomes void, then the suretyship also becomes void, and the repayment of a debt leads to the extinction of the suretyship. The scope of a surety's obligation is determined according to the current scope of the primary debtor's obligation.

A Polish law suretyship must established: (i) up to a specific capped amount and (ii) for a predetermined time.

2.3 General Enforceability

Based on the assumptions and subject to qualifications set out in this opinion, we are of the opinion that the EFET General Agreement constitutes a legally valid and binding agreement. Unless otherwise stated in this opinion, our review of the EFET General Agreement has not revealed any provisions that apparently violate Polish law or Polish public order.

2.4 Confirmation Practices

2.4.1 Binding Individual Contact

Under Polish law, parties are free to execute agreements in any form (statutory exceptions apply to the transfer of real property or transfer of an enterprise for example, but not to the sale of electricity or emission allowances). Consequently, as a rule, an oral agreement between the parties leads to the conclusion of a valid and binding contract just as written agreements do. A signature is required only if the need to employ the written form is a statutory requirement or was introduced by the parties.

With respect to agreements on the sale of electricity or emission allowances no statutory requirements as to the form are applicable.

Assuming that the Confirmation does not modify the contents of the orally pre-agreed Individual Contract, the moment an oral agreement is reached is the moment of the conclusion of an agreement.

If a contract concluded between business entities without observing the written form is immediately confirmed by one of the parties in a written document addressed to the other party, and that document contains no amendments or supplements to the contract which significantly amend its contents, the parties are bound by the contract rendered in the wording determined in the confirmation, unless the other party immediately objects to it in writing.

2.4.2 Means of Evidence

Since courts are vested with the responsibility of assessing probative value (strength) and credibility of evidence, the Polish Code of Civil Procedure provides for an open catalogue of evidence. So, in principle, all tangible material may be submitted as evidence.

Nevertheless, under the Code there are several types of evidence which in practice vary in probative value the courts attribute to them. Material labelled as "other means of evidence", i.e. not belonging to any other specific group, may be given lower probative value. A written witness' statement, e-mails, other electronic messages, a transaction entry system, and facsimiles are in general classified as "other means of evidence".

A recording of conversation should be admitted as evidence, provided parties have agreed to record conversations pertaining to transactions.

However, ultimately the court will assess both admissibility and probative value of a recording.

2.5 Governing Law, Arbitration and Jurisdiction

The Parties' agreement on the governing law, submission to arbitration or jurisdiction would be in general upheld in Poland. If invalid or ineffective for whatever reason, the governing law and jurisdiction would be established on the basis of relevant EU law or national law, to the extent it is applicable.

2.6 Regulatory Regime

2.6.1 Currency or exchange control laws

Under Polish Foreign Exchange Law regulations, restrictions with respect to money transfers to EU member states, Organization for Economic Cooperation and Development (OECD) member states (e.g. the United States of America), and member states of the European Economic Area (EEA) are not applicable. Some restrictions will be applicable to parties from countries outside of the OECD and the EEA.

2.6.2 Licenses, permits, approvals, and other regulatory issues affecting physically settled electricity transactions in Poland

According to the Polish Energy Law, conducting business activity involving electricity trading in Poland requires a license granted by the President of the Energy Regulatory Authority. What would be deemed to constitute "conducting business activity involving electricity trading in Poland" is discussed in detail in the main body of the opinion.

Entities selling electricity to Polish counterparties under the EFET General Agreement will not be bound to purchase certificates of origin (such as certificates issued for electricity from renewable energy sources or from highly efficient cogeneration), as long as the purchasers are other wholesale energy traders and not end users.

2.6.3 The impact of the Law on Trade in Allowances for Emission of Greenhouse Gases and Other Substances

The Law on Trade in Allowances does not provide for any license or similar requirements with respect to trade in allowances (there are permit requirements for installation operators, which do not affect the enforceability of the EFET General Agreement).

2.6.4 Public Procurement Law

We have analysed the potential impact of the Public Procurement Law on the transactions under the EFET General Agreement and believe that:

(a) the public procurement procedures will not have to be followed by entities selling emission allowances, electricity and/or Options under the EFET General Agreement, but may have to be applied by some entities such as various types of local communities or public entities, which do not have legal personality separate from the State Treasury in the case of purchase transactions;

(b) if a purchaser of electricity is a company (irrespective of whether it is privately-owned, publicly-owned or controlled by quasi-governmental entities, including various types of local communities), it will not have to apply the public procurement procedures to enter into and perform the Individual Contracts, provided that they do not perform one of the activities provided in the Public Procurement Law such as e.g. the provision or operation of fixed networks for transportation or distribution of drinking water, or the supply of drinking water to such networks or the management of airports and maritime or inland ports or provision of them to carriers by air, sea or inland waterway and are not an entity controlled by the state, created for a special purpose to satisfy common needs of non-commercial and nonindustrial nature;

(c) purchasers such as local communities or public entities, which do not have legal personality separate from the State Treasury, may have to employ public procurement procedures to enter into and perform the Individual Contracts.

(d) private entities may, in certain circumstances, become subject to the requirements set out in the Public Procurement Law. However, we are of the opinion that it does not apply to wholesale trade in electricity.

3. FACTS

3.1 Documents to be considered

(a) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007) (**Enclosure 1**),

(b) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (**Enclosure 2**),

(c) EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010) (**Enclosure 3**),

(d) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published April 3, 2012) (**Enclosure 4**),

(e) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 28, 2018) (**Enclosure 5**),

(f) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005) (**Enclosure 6**),

(g) 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) (**Enclosures 8 to 10**),

(h) EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013) (**Enclosure 11**),

(i) EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013) (**Enclosure 12**),

(j) EFET Electronic Confirmation Agreement (published 28 June 2005) (**Enclosure 15**),

(k) 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) (**Enclosure 16**),

(l) EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005) (**Enclosure 17**),

(m) EFET Master Netting Agreement (Version 1.0, published June 2010) (**Enclosure 18**),

(n) 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) (**Enclosures 19 and 20**),

(o) EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (**Enclosure 21**),

(p) EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011) (**Enclosure 22**).

3.2 Standard Assumptions and Qualifications

Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organized or has its center of main interest in Poland (Party A).

Both counterparties to the EFET General Agreement are corporations of limited liability, partnerships, publicly- owned or quasi-governmental legal entities and not individuals.

Party A is a Corporation, financial institution or other entity.

The EFET General Agreement, the previous EFET General Agreement and any of Enclosures 3-27 are enforceable under the laws of any jurisdiction (other than the laws of Poland) and each counterparty has duly authorized, executed and delivered and has the capacity to enter into the EFET General Agreement, the previous EFET General Agreement and any of Enclosures 3-27.

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 to the Instruction Letter of 2 July 2018.

The Individual Contracts provide for the physical delivery of commodities or emission rights in exchange for cash, however, some of them may also provide for cash settlement or, in the event that offsetting physical delivery obligations are entered at different times, may be settled by agreement through a combination of, as applicable, a partial or total cancellation of otherwise offsetting physical delivery obligations, coupled with a net financial payment.

No foreign law will affect the conclusions set out in this opinion.

The Agreement will be entered into, and each payment and delivery thereunder will be made at arm's length, so that no element of gift or undervalue from one Party to the other Party will be involved, and without the former Party preferring the latter Party in the event of the former Party going into insolvent liquidation.

We would also like to draw your attention to the following limitations of this opinion:

- the views expressed in this opinion are based upon the laws of Poland as at the date hereof, and
- any change in such laws may affect these views. We assume no obligation to advise you of any changes concerning any matter discussed in this opinion, whether or not material, of which we may become aware on or after the date of this opinion.

We are opining only on Polish law and its effect on the EFET General Agreement and Individual Contracts and we have made no investigation of the laws of any country or jurisdiction other than Poland.

This opinion is limited to the matters stated herein, and does not extend to and is not to be read as extending by implication to any other matter in connection with the Agreement, or to any other document of a similar nature issued and endorsed by EFET.

We express no opinion as to matters of taxation. We do not render any tax or public liens opinion in this opinion

In this opinion, Polish legal concepts are expressed in English and not in their original Polish. The concepts concerned may not be identical to the concepts described by the same English language terms, as they exist under the laws of other jurisdictions. This opinion may, therefore, only be relied upon under the express condition that any issues of interpretation arising in connection with this opinion will be brought before a Polish court.

Poland has no rule of precedent upon which one can rely in reviewing or opining on such matters relating to the law, and there is an appreciable likelihood of varying opinions, decisions and interpretations on the same issue of the law by different courts. Thus, rendering of opinions on the law in Poland is less certain by nature than in a jurisdiction which adopts the principle of precedent.

As used in this opinion, the term "enforceable" means that the Agreement is of a type and form that may be enforced by the Polish courts. It does not mean that each obligation of the Parties contained in the Agreement will be enforced in accordance with their respective terms or in every circumstance, or in foreign jurisdictions or by or against third parties, or that any particular remedy will be available. In particular:

– where obligations are to be performed in a jurisdiction outside Poland, they may not be enforceable in Poland if their performance would be illegal under the laws of such other jurisdiction;

– enforcement may be limited with respect to specific performance, which may not be available where damages are considered to be an adequate remedy;

– claims may become barred by prescription, or may be or become subject to set-off or counterclaim;

– enforcement may be limited by general principles of equity *("zasady współżycia społecznego"* and *"społeczno-gospodarcze przeznaczenie prawa")*; in our view, the provisions of the Agreement do not conflict with such principles of equity, although we cannot exclude the possibility that a court or arbitral tribunal may take a different view; and

– enforcement may be limited if any of the terms of the Agreement violate important public policy of Poland; in this respect, unless otherwise described in this opinion, we are not aware of any principle of public policy or legal order in Poland that is contradicted by the General Agreement, although in the absence of any legal definition of the term "public policy" or "legal order" and a clear-cut interpretation of those terms stemming from either court decisions or legal doctrine, it is not possible to express a precise and definite view of the exact scope of Polish "public policy".

Given the fact that the General Agreement has been drafted in a way to enable the Parties to be as flexible as possible, and given that the General Agreement may be widely amended and modified by inserting specifically negotiated changes into the Election Sheet by which the parties to the Agreement may modify or remove provisions of the General Agreement and/or may implement additional provisions not envisaged in the General Agreement, it is impossible to render an exhaustive and final legal opinion that covers all possible modifications. Therefore, this opinion is limited to the issues addressed within it, which we have reviewed in accordance with your instructions, and which we deemed important to fit the purpose of this document. This opinion does not substitute an independent legal review of any individually negotiated agreement based on the General Agreement, which may be necessary to cover all the particularities of each individual case.

4. LEGAL ANALYSIS

4.1 Opinions — Issues and Additional Assumptions

4.1.1 Enforceability of Close-out Netting

An overview of the relevant insolvency proceedings, laws and terminology is provided in Annex 1 to this opinion.

4.1.1.1 Brief discussion of Polish insolvency laws applicable to financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them

Insolvency proceedings

Cherry-picking: Pursuant to article 85 section 1 pt 2 of the Bankruptcy Law, a bankruptcy trustee cannot "cherry-pick" financial term operations or agreements pertaining to borrowing or sale of financial instruments involving an undertaking to repurchase them, if such transactions are executed in discharge of a master agreement, and if termination of the master agreement results in termination of all Individual Contracts executed in discharge of a master agreement. The same rule applies to Individual Contracts even if they are not executed in discharge of the master agreement.

Termination: Pursuant to article 85 section 3 of the Bankruptcy Law, any of the parties, including the solvent party, can terminate the master agreement referred to in article 85 section 1 of the Bankruptcy Law, subject to such manner of settlement as is provided for in the master agreement in the event of termination. The Bankruptcy Law does not regulate automatic termination of the master agreement. Yet, according to some commentators, automatic termination is also admissible under that provision. The above means that any party to the master agreement can terminate that master agreement (and all individual contracts concluded under that agreement) after opening of the bankruptcy proceedings. This right is independent from contractual clauses included into master agreement and individual agreements and cannot be excluded by the parties.

Exclusion of Individual Contracts from arrangement: Pursuant to article 85 section 1 point 1 of the Bankruptcy Law, a claim that arises under an Individual contract is excluded from arrangement in insolvency proceedings. This means that only a claim for a Termination Amount due in connection with Early Termination of the master agreement can be subject to arrangement.

Set-off: Pursuant to article 85 section 4 of the Bankruptcy Law, set-off of a Termination Amount is admissible in insolvency proceedings. This provision is interpreted as a special provision enabling a creditor to set off its claim for a Termination Amount despite limitations applicable to set-off in insolvency proceedings. This means that a Termination Amount due to a solvent creditor can be set off: (i) against the debt of the creditor towards the bankrupt debtor which arises after the Date of Bankruptcy; (ii) even if the creditor has acquired its claim within one year preceding the Date of Bankruptcy and knew of the bases for declaration of the debtor's bankruptcy; (iii) while ignoring the requirement to attach a set-off statement to a lodgement of claim. Please note also the general conditions that must be met for the purpose of any set-off: (i) both parties must be both creditors and debtors with respect to one another; (ii) the object of both debts must be money or items of the same quality designated only as to their kind; (iii) both debts must have matured (however claims vis-à-vis a bankrupt debtor become automatically due as of the Date of Bankruptcy); and (iv) both debts must be actionable before a court or other public authority.

Financial term operations: Pursuant to article 85 section 2 of the Bankruptcy Law, the term "financial term operations" means operations with an agreed price, exchange rate, interest rate or index - in particular, the purchase of foreign currencies, securities, gold or other precious metals, or **commodities or rights**, including contracts for notional settlement only, options and derivatives - executed for an agreed date or term, in market trade. **Although the defined term refers exclusively to financial term operations, the defining expression covers not only financial term operations but also**

commodity term operations, ("(...) the purchase of (...) gold or other precious metals, **commodities or rights** (...)").

For the purposes of close-out netting it is then necessary to distinguish between forwards and spots. Due to different nature of spot and forward transactions (in particular due to difference in time when they are settled), only forwards are financial term operations within the meaning of article 85 of the Bankruptcy Law.

Spots should generally not be covered by the safe-harbor clause as provided for in the article 85 of the Bankruptcy Law (subject to remarks made below).

We believe that following transactions can be deemed as **financial term operations:**

- **commodity forward**,
- **commodity option**,
- **commodity swap**, and
- **other physical commodity transaction** (where there is a time delay between when the transaction is made and the commodity is delivered).

There is almost no case law on the interpretation of the above definition. In a recent decision of 19 March 2015 (IV CSK 429/14), the Supreme Court confirmed the applicability of article 85 section 2 of the Bankruptcy Law to IRS transactions, however it seems that the inclusion of IRS transactions in the scope of "financial term operations" was never questioned.

There are, however, two conflicting views on the scope of the above definition in legal commentaries. On the one hand, there is a view that commodity term transactions fall within the scope of the term "financial term operations" under article 85 section 2 of the Bankruptcy Law (broad interpretation). As we understand it, this is based on the wording of the defining expression. On the other hand, there is a view that commodity term transactions do not fall within the scope of "financial term operations" (narrow interpretation).

We are inclined to follow the broad interpretation. However, the issue is new in Poland and has not been ultimately resolved in legal literature. Also, no court decisions are available addressing the issues of interpretation of the above provisions as regards commodity term transactions.

In view of the above, for the purposes of the analysis below, we have described the effects of a party's insolvency on forward, physically settled electricity transactions where they are treated as not being "financial term operations" as defined in article 85 section 2 of the Bankruptcy Law. However, in the relevant sections we also briefly describe how the situation would change if such transactions were treated as "financial term operations". In a judgment dated 16 February 2012 the Supreme Court did not express any view with respect to the meaning of this term, moreover it stated that this term has not been properly defined in legal literature yet, and its relationship to the term "financial instrument" has not been precisely established.

In addition it must be emphasized that in practice some spot transactions may provide for a time delay between the moment when the transaction is made and the moment when commodity is delivered. This might be the case e.g. in day-ahead transactions. It might be argued that even such insignificant time difference constitutes an element of "term" referred to in definition of financial term operations. That is because article 85 of the Bankruptcy Law covers transactions "(...) made for a fixed date or term (...)" and does not provide for any minimal "term" which must be included in the contract for it to be qualified as financial term operation. In addition, under Polish law it is admissible to set even a term of a few hours, or of one day. A practical effect of such approach would be inclusion of spot transactions with at least minimum (even a few hours) time delay element under protection of Polish safe harbour provisions. We believe that the risk is even lower in case the time delay between the execution of the transaction and the delivery is at least one calendar day (i.e. in case of day-ahead transactions).

From that point of view it would be indifferent whether the market practice recognizes a particular transaction as spot transaction or not. This means that such approach would be against rationale of article 85 of the Bankruptcy Law which, in our opinion, was not intended to protect the spots. Despite that fact we believe that such approach would be very probable in a real-life situation. In particular if there were many different types of contracts (and not only spot contracts) concluded under one EFET General Agreement, and settled by one netting clause, the risk of insolvency trustee excluding of only some spot transactions from the contractual netting clause would be low.

<u>Netting clauses:</u> Pursuant to article 85a of the Bankruptcy Law, declaration of the debtor's bankruptcy does not affect the netting clause referred to in the Act of 2 April 2004 on certain financial collaterals (the "**Act on Financial Collaterals**"), if an agreement was concluded: (i) before the Date of Bankruptcy; (ii) on the Date of Bankruptcy but prior to the decision declaring the debtor bankrupt; (iii) on the Date of Bankruptcy but after the decision

declaring the debtor bankrupt, if the beneficiary under the collateral can confirm that he was not aware, nor could have been aware, of the declaration of bankruptcy. This means that all netting clauses that comply with the Act of Financial Collaterals will be recognized in the insolvency proceedings, as provided for in point 4.2.1.2 of this opinion. For the avoidance of doubt, we are of the opinion that **article 85a of the Bankruptcy Law should not be understood as limitation of recognition of netting clauses in insolvency proceedings only to netting clauses referred to in the Act on Financial Collaterals**. This is because close-out netting clauses included in master agreements are separately protected by article 85 section 3 of the Bankruptcy Law. This provision enables both parties to these agreements to terminate them after the Date of Bankruptcy and to employ the method of settlement provided for in that provision in the event of termination. The result of this provision is recognition of contractual netting clauses in the bankruptcy proceedings even in the event a party uses statutory termination right.

Time vs. creditor's rights: There is no strict relationship between the time when a creditor exercises its early termination rights and the insolvency proceedings. The regime arising from article 85 and 85a of the Bankruptcy Law comes into force with the beginning of the Date of Bankruptcy. Therefore, it cannot affect creditors' claims arising from Early Termination of a master agreement effective before that date.

Restructuring Proceedings

Termination: Article 250 of the Restructuring Law reiterates the contents of article 85 of the Bankruptcy Law. It applies to all kinds of restructuring proceedings. Therefore, our remarks concerning the insolvency proceedings made above in this point can be applied *mutatis mutandis* to those proceedings.

Exclusion of Individual Contracts from arrangement: The effect of this regulation is that claims arising under Individual Contracts are excluded from arrangement concluded in restructuring proceedings. A claim for a Termination Amount may however be subject to debt restructuring and is treated as an ordinary pre-restructuring claim, unless secured by a right *in rem* over a debtor's assets. This approach was confirmed in a judgment issued by the restructuring court in Warsaw[2]. According to this judgment: (i) the bank's claim that arises in connection with termination of a currency swap transaction should be qualified as an ordinary pre-restructuring claim

[2] Judgement of the District Court in Warsaw, X Commercial Division for Insolvency and Restructuring matters of 26 July 2016, X GR 36/16.

falling under arrangement in rehabilitation proceedings; (ii) part of the claim which was covered by security over a debtor's assets can be included in arrangement only with prior consent of the bank. In our opinion the approach of the court was correct.

Time vs. creditors' rights: Classification of the Termination Amount as a pre-restructuring debt, or as a current debt that should be repaid on a regular basis, might be a contentious issue. According to most commentators, the Termination Amount should also be included in an arrangement, unless the claim is secured by a right *in rem*[3].

According to another approach, the issue depends on the legal nature of the netting clause[4]. If the netting clause is based on a contractual set-off, then the Termination Amount is a claim that arose under one of the Individual Contracts, which is excluded from arrangement under the clear wording of article 250 section 1 of the Restructuring Law. If the netting clause is based on novation, the date of creation of the new obligation to pay the Termination Amount indicates whether this obligation will be included in the arrangement, or not. Since the obligation to pay the Termination Amount arises as of the moment of termination of the master agreement, every such termination effective after opening of the restructuring proceedings will result in exclusion of the Termination Amount from the arrangement. This results in preference of creditors holding claims arising from the master agreement and was, most probably, not intended by lawmakers.

Therefore, we are of **the opinion that the Termination Amount that arises in connection with termination of Individual Contracts executed before restructuring proceedings are opened should be included in arrangement made in those proceedings.**

Cherry-picking: Cherry-picking is available only for the administrator in rehabilitation proceedings, and not for restructuring officials (or the debtor) in other types of restructuring proceedings. However, pursuant to article 299 section 1, the right of the administrator to withdraw from unprofitable contracts is excluded with regard to master agreements referred to in article 250 section 1 of the Restructuring Law. The same applies to Individual Contracts, even if they are not executed in discharge of the master agreement. In addition, either party (the debtor and the solvent party) may

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[3] P. Zimmerman, *Prawo restrukturyzacyjne. Komentarz,* Legalis 2018, commentary to Art. 250 of the Restructuring Law.

[4] B. Jagodziński, M. Chodosz, *Klauzule kompensacyjne oraz zaspokojenie wierzytelności z transakcji pochodnych w postępowaniu restrukturyzacyjnym i upadłościowym*, Monitor Prawa Bankowego 4/2016, s. 86-87.

terminate the master agreement referred to in article 250, subject to the settlement of accounts between the parties as set forth in the agreement.

4.1.1.2 Winding up, Insolvency or Attachment

Enforceability of insolvency- or restructuring-related termination

Pursuant to article 83 of the Bankruptcy Law, any provision in an agreement stipulating that a legal relationship to which the bankrupt is a party has to be modified or terminated if a bankruptcy petition is filed or if bankruptcy is declared is invalid. The Restructuring Law (articles 225, 247, and 273 in conjunction with articles 247 and 297 and with article 247) provides for a similar rule according to which a contractual provision which enables modification or termination of a legal relationship due to filing of a restructuring petition or opening of restructuring proceedings is invalid. However, this prohibition does not apply to the termination of the EFET General Agreement and Individual Contracts triggered by an insolvency-related event affecting a Credit Support Provider (providing that the Credit Support Provider is not a party to the EFET General Agreement). Thus, the EFET General Agreement may be terminated due to an insolvency-related event affecting a Credit Support Provider. The analysis below relates only to the termination of the EFET General Agreement due to an insolvency-related event concerning one of the Parties.

Leading commentators consider provisions stipulating the termination of a contract in the event of a pre-insolvency- or pre-restructuring- related event in respect of one of the parties not to be governed by article 83 of the Bankruptcy Law (or similar provisions of the Restructuring Law) and to be valid and enforceable. Th is due to the fact that the invalidity affects only a contractual provision concerning a petition for bankruptcy or a declaration of bankruptcy[5]. The same approach was taken in a judgment of the Appeal Court in Warsaw of 8 December 2015, VI Aca 175/15.

There are however certain doubts in relation to the enforceability of contractual provisions stipulating termination triggered by filing of a petition in bankruptcy in relation to one of the parties to the contract, or any other event within the period from the moment the petition is filed until the Date of Bankruptcy. These events are mentioned in:

(i) § 10.5(c)(iii) of the EFET General Agreement, with respect to the right to terminate and a Party making a general assignment, arrangement or composition with or for the benefit of its creditors;

[5] P. Zimmerman, Prawo upadłościowe. Komentarz, komentarz do article 83, nb 2 [w:] Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz, Warszawa 2018, Legalis.

(ii) § 10.5(c)(iv) of the EFET General Agreement, with respect to the right to terminate and a Party instituting or has instituted proceedings against it seeking a declaration of insolvency or bankruptcy, or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights; and

(iii) § 10.5(c)(vi) of the EFET General Agreement, with respect to the right to terminate and a Party seeking or becoming subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all of its assets.

The aforementioned events can be deemed to have taken place at the moment a petition for bankruptcy, or a restructuring petition is filed.

In conclusion, Polish courts should uphold and recognize the rights of Early Termination of the EFET General Agreement and all Individual Contracts as provided in § 10.5(c)(ii), (v), (vii)and (ix) of the EFET General Agreement in relation to pre-insolvency-related events as enforceable. Early Termination rights as provided for in § 10.5(c) (viii) will be valid to the extent that they relate to clauses referred to in the preceding sentence.

The right of Early Termination as provided for in § 10.5(c) (iii) will be invalid to the extent that it relates to conclusion of arrangement or a composition in restructuring proceedings. This is because conclusion of arrangement (composition) is always preceded by filing of a restructuring petition and opening of restructuring proceedings.

Since the right of Early Termination as provided in § 10.5(c) (iv) is expressly contrary to article 83 of the Bankruptcy Law, it will also be invalid.

The same might apply to right of Early Termination as provided for in § 10.5(c) (vi). This clause provides that a Material Reason can be also based on an event where a Party "seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets". This regulation includes events that take place together with declaration of bankruptcy, or opening of restructuring proceedings, performed by a court, such as the appointment of a receiver, administrator or court supervisor. These events are covered by article 83 of the Bankruptcy Law (or similar provisions of the Restructuring Law). Consequently, the right of termination with respect to § 10.5(c)(vi) of the EFET General Agreement, to the extent that it relates to events taking place on or after the Date of Bankruptcy of the Party, would be valid to the extent that it relates to appointment of insolvency or restructuring officials.

The above analysis applies to both Early Termination and Automatic Termination (unless stated otherwise above). They are treated identically in this context.

With relation to Early Termination, article 84 of the Bankruptcy also needs to be mentioned. Pursuant to this regulation, a provision of a contract to which the bankrupt is a party, which provision renders the achievement of the goal of the bankruptcy proceedings impossible or difficult, is ineffective towards the bankruptcy estate.

Article 84 section 1 of the Bankruptcy Law provides a sanction of ineffectiveness of a contractual provision that renders the achievement of the goal of the bankruptcy proceedings impossible or difficult.

The phrase "preventing or hindering the attainment of the objective of bankruptcy proceedings" is unclear. Therefore, it cannot be fully excluded that the EFET General Agreement's provisions relating to termination and close-out netting would be regarded as preventing or hindering the attainment of the objective of bankruptcy proceedings, and therefore ineffective. We are however more inclined to conclude that this risk will not arise[6]. It should be emphasized that:

(i) if an Individual Contract can be deemed as „financial term operations" (see our remarks in that regard above) and

(ii) if the EFET General Agreement is to be understood as a "master agreement",

a Party would be allowed to terminate the EFET General Agreement and Individual Contracts by way of Early Termination (i.e. by giving the other Party notice) also after the Date of Bankruptcy and after the date of opening of restructuring proceedings. **Then article 85 section 3 of the Bankruptcy Law or article 250 section 4 of the Restructuring Law would apply and even after the Date of Bankruptcy (or the date of opening of restructuring proceedings), the solvent Party would be able to terminate, by way of Early Termination, the EFET General Agreement and each of the Individual Contracts.** This means that as long as the Early Termination right is not contrary to article 83 of the Bankruptcy Law (or similar provisions of the Restructuring Law), it will be effective in proceedings concerning insolvency and restructuring of Party A. However, even if a contractual Early Termination right occurs to be ineffective (invalid), any of the parties may

[6] Similar remarks shall be made with regard to Article 248 of the Restructuring Law which is a provision analogous to Article 84 of the Bankruptcy Law, but applicable to restructuring proceedings.

still use statutory termination right provided for under article 85 section 3 of the Bankruptcy Law.

There are certain doubts whether Automatic Termination may be applicable to the transactions mentioned[7]. We are of **the opinion that article 85 of the Bankruptcy Law (and similar provisions of the Restructuring Law) do not affect automatic termination in the case of a non-insolvency related event.**

We believe that **a master agreement concerning both spot and term operations is regulated by article 85 of the Bankruptcy Law**. However, application of article 85 of the Bankruptcy Law is limited to Individual Contracts as financial term operations (in particular forward transactions). Then, only financial term operations would be settled according to Early Termination clause. With respect to Individual Contracts as spot transactions, general Bankruptcy Law provisions would apply instead of article 85 of the Bankruptcy Law.

Any termination right permissible pursuant to the above analysis will apply to the EFET General Agreement and Individual Contracts as set out in § 10.3(a) of the EFET General Agreement. **Under the Bankruptcy Law, the Parties do not need the Single Agreement concept in order to preserve the enforceability of the Early Termination rights described above.** Nevertheless, **we do not believe that the provisions of the EFET General Agreement relating to the Single Agreement concept need to be removed.**

<u>Opinion on selection of an Automatic Termination clause</u>

<u>Our recommendation:</u> As discussed above, there are no significant differences in terms of recognition of close-out netting clauses based on Early Termination and those based on Automatic Termination. The differences between these two solutions may however appear in classification of a claim for a Termination Amount as a pre-insolvency or post-insolvency claim, or as a pre-restructuring or post-restructuring claim.

In insolvency proceedings, a claim for a Termination Amount could be either:

- a privileged receivable that is satisfied by the insolvency trustee among costs of the proceedings, or

[7] In accordance with article 83 of the Bankruptcy Law, Automatic Termination clauses will certainly be invalid in the event that a bankruptcy petition is filed or bankruptcy is declared. Only one author expressed the opinion that Article 85 section 1 of the Bankruptcy Law respects automatic termination of the master agreement. On the other hand, more authors have expressed the opinion that special provisions of the Bankruptcy Law on cherry-picking, and termination of contracts due to bankruptcy declaration, do not affect contractual provisions on termination or expiry of contracts due to non-insolvency related reasons. See P. Zimmerman, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Legalis 2018, kom. do article 83 Prawa upadłościowego; S. Gurgul, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Legalis 2018, kom. do article 83 Prawa upadłościowego.

– an ordinary commercial receivable that is satisfied as a 2nd-rank claim, amongst other trade receivables and tax receivables.

The first approach was followed by the Supreme Court in a judgment of 19 March 2015, case no. IV CSK 429/14. This approach was however broadly criticized in legal writings. We agree with the authors who criticized this judgment and are of the opinion that a Termination Amount is an ordinary commercial receivable. We presume that the second approach would prevail in an insolvency court in a case based on the EFET General Agreement and a claim that arises under that Agreement. Thus, for the purpose of insolvency proceedings, a choice between Automatic Termination and Early Termination clause would be irrelevant.

In restructuring proceedings, a claim for a Termination Amount could be either:

– a claim that arises after restructuring proceedings are opened – that would not be included in the arrangement and should be satisfied when it became due and payable;

– a claim that arises before opening of the proceedings – and thus included in the arrangement.

The choice of Automatic Termination clause would, in most cases, result in its application before opening of the proceedings. As a consequence, Party A would have a chance to restructure its debt to pay the Termination Amount by way of an arrangement with creditors. Therefore, in the case of restructuring proceedings, an **Automatic Termination clause may be more advantageous to the debtor. For that reason, if we advised Party A, we would recommend that it select Automatic Termination.**

On the other hand, the choice of Early Termination would enable the creditor to give the debtor notice of termination once the proceedings were opened. According to some authors, this would result in the claim for Termination Amount being excluded from the arrangement. **For that reason, if we advised Party A's counterparty (the solvent party), we would recommend not selecting Automatic Termination.** Regardless of the above, it is hard to foresee now, if the courts' approach would be truly that a creditor may choose whether its claim is included in the arrangement or not, just by choosing the date on which termination notice is served to a debtor. Therefore, in practice the choice between Automatic Termination and Early Termination clause might prove to be irrelevant also for the purpose of restructuring proceedings.

Recommendation regarding modification of the EFET General Agreement if Automatic Termination is selected: We see **no reasons to modify any of the**

events listed in § 10.5(c) of the EFET General Agreement. Even though some of the clauses provided for in that paragraph might be ineffective in Polish bankruptcy and restructuring proceedings, the other clauses are sufficient to procure that a Material Reason arises before bankruptcy/restructuring proceedings are opened. As a consequence, the EFET General Agreement may be automatically terminated before, or after, the opening of such proceedings, according to the parties' intention. We do recommend specifying a grace period for § 10.5(c) (iv) of the EFET General Agreement of 6-8 weeks from the date on which a party learns of an insolvency petition or restructuring petition being filed against that party. Until that grace period expires, or the potentially insolvent party cures the Material Reason, the solvent party should be however granted a right to withhold its performance under all the Individual Agreements[8]. The optimal timing for the Automatic Termination to take effect would be the date on which a Material Reason arises. This would mean that the Automatic Termination would effect retroactively and the parties can avoid the clause being invalid pursuant to article 83 of the Bankruptcy Law, or article 247 of the Restructuring Law.

Recommendation regarding modification of the EFET General Agreement if Automatic Termination is not selected: We see **no reasons to modify any of the events listed in § 10.5(c) of the EFET General Agreement. Even though some of the clauses provided for in that paragraph might be ineffective in Polish bankruptcy and restructuring proceedings, the other clauses are sufficient to procure that a Material Reason arises before opening of bankruptcy/restructuring proceedings**. As a consequence, the EFET General Agreement may be terminated by notice served before, or after, the opening of such proceedings, according to the parties' intention. The enforceability of provisions permitting the Terminating Party to terminate the Agreement upon occurrence of a Material Reason is discussed above in paragraph *Enforceability of insolvency- or restructuring-related termination.*

Opinion on whether or not the termination of the Agreement, the calculation of the Termination Amount or payment of that amount is voidable, challengeable or in any way deletable by a liquidator, receiver or third party or the court, and

whether or not the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts when determining the Termination Amount are enforceable under the laws

[8] Such right of the solvent party may be derived from Art. 490 of Polish Civil Code. Nevertheless, it might be controversial if the master agreement is a "mutual agreement" which falls under this provision of law. Therefore we recommend to implement a clear right to withhold the solvent party's performance in the EFET General Agreement.

of Poland or there is a risk that this determination could be challenged by a liquidator, receiver or third party, and

whether or not the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could be challenged by a liquidator, receiver or third party

There are certain provisions in Polish law designed to protect creditors against detrimental acts by a debtor. In particular, these are:

- *Actio Pauliana*, regulated in articles 527 - 534 of the Polish Civil Code[9],
- articles 127 – 130a of the Bankruptcy Law, and
- articles 304-305 of the Restructuring Law.

Actio Pauliana is a legal instrument of general application because it is not confined to Bankruptcy Proceedings or Restructuring Proceedings[10].

Pursuant to article 527 of the Polish Civil Code, any act in law which has the effect of being both "detrimental" to creditors and by which a third party has gained a "benefit" can be declared ineffective if:

- the debtor acted deliberately to the detriment of creditors, and
- the third party was aware of that fact - or should have known if it had exercised (appropriate) due diligence.

If the third party knew or should have known (had it exercised due care) that the debtor was acting deliberately to the detriment of creditors, then the benefit can be subject to a "claw-back" in favor of the affected creditors.

Knowledge of the debtor acting to the detriment of creditors is imputed to the third party if it had "a close relationship" with the debtor (article 527 § 3) or had a "permanent economic relationship" with the debtor (article 527 § 4). A "permanent economic relationship" certainly does exist if parties enter into regular transactions, especially if this happens over a long period, or if the parties are bound by a single but long-term agreement regarding the continuous delivery of commodities or services in exchange for regular payments. The mere execution of the EFET General Agreement without entering into any Individual Transactions, or with only a limited number of irregular transactions between the parties, probably would not qualify as a "permanent economic relationship".

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[9] The Civil Code of 23 April 1964, consolidated text of 10 May 2018 (Journal of Laws of 2018, item 1025 as amended).

[10] But can be used also by insolvency/restructuring officials in insolvency and rehabilitation proceedings.

Finally, whether a creditor of any of the Parties can justify its claim in accordance with this provision can be ascertained only in relation to a specific situation. *Actio pauliana* is usually used to challenge disposal, or encumbrance, of the debtor's assets, which will not take place in connection with termination of the Agreement or Individual Contracts, or in connection with use of the close-out netting clause. In addition, the view that *actio pauliana* cannot be used to challenge fulfilment of an existing obligation is widely accepted by the courts[11]. This means that a payment of the Termination Amount in connection with application of a close-out netting clause is not an action of the debtor that can be deemed detrimental to the creditors as long as the debtor fulfils an obligation in its original form. Only if a debtor fulfills an obligation in kind, where the obligation was originally a monetary obligation, can such fulfilment can be challenged by the creditors. In addition, the mere entering into an agreement cannot be subject to *action pauliana*[12]. The above means that the risk of sole application of § 10-11 of the EFET General Agreement being successfully challenged on the basis of *action pauliana* is low. In addition, we have not come across any court judgment according to which a close-out netting clause is subject to such action.

Of course, in some cases it may be argued that if Party A has not obtained any physical or monetary performance from the other party to the contract, but has to pay a Termination Amount, that Termination Amount would be a gratuitous performance on the part of Party A made to the detriment of its creditors. We do not agree with this approach and are of the opinion that a court would concur. This is because the Termination Amount is an aggregate of all positive and negative Settlement Amounts. Hence, if all the Settlement Amounts were physically exchanged between the parties, Party A would have obtained funds due to Party A under the EFET General Agreement, but also would have to pay higher amounts to the other party constituting Settlement Amounts due to that other party. As a consequence, application of termination and close-out netting clauses included in the EFET General Agreement would be neutral with respect to satisfaction of Party A's creditors.

Avoidance of contracts under the Bankruptcy Law

[11] See, for example, Judgment of the Appeal Court in Bialystok, of 17 January 2018, case no. I ACa 673/17, Judgment of the Supreme Court of 3 March 2017, case no. I CSK 157/16, Judgment of the Appeal Court in Cracow of 11 December 2015, case no. I ACa 1326/15, Judgment of the Appeal Court in Katowice of 23 September 2015, case no. I ACa 442/15.

[12] Judgement of Appeal Court on Katowice of December 2016, case no. I ACa 626/16.

The Bankruptcy Law envisages certain voidability provisions applicable in insolvency proceedings.

First of all, pursuant to article 127 section 1 of the Bankruptcy Law, acts in law made by the bankrupt for one year prior to the date the petition for bankruptcy is filed, whereby the debtor disposed of assets, are ineffective towards the bankruptcy estate if such acts were made without payment, or with payment if the value of the bankrupt's performance grossly exceeds the value of the performance received by the bankrupt or reserved for the debtor or a third party. In our view, **it is possible, though unlikely, that a Polish court would find that, with respect to the calculation and payment of the Termination Amount, the value of Party A's performance grossly exceeds the value of the performance received by Party A or the payment of the Termination Amount is a gratuitous performance on the part of Party A to the benefit of the other Party.** Our remarks made above with regard to *actio pauliana* will apply here *mutatis mutandis*.

Further, pursuant to the first sentence of article 127 section 3 of the Bankruptcy Law, the debtor's payment of a non-matured debt within six months before a petition for bankruptcy is filed is ineffective towards the bankruptcy estate. It seems that **the payment of an accelerated and then matured debt should not be treated as the payment of immature debt**. Only mock, unjustifiable acceleration of the original payment term, based on mutual arrangement between the debtor and the creditor, could be deemed as such payment. Of course, it could be argued that Early Termination of an Individual Contract, and payment of the Settlement Amount due under that contract, in connection with application of a close-out netting clause, constitutes an ineffective payment of that kind. Nevertheless, a payment acceleration mechanism in the event of default, similar to that stipulated in § 10-11 of the EFET General Agreement, can be found in many loan agreements. Such mechanisms are usually upheld in court proceedings. Thus, assuming that the EFET General Agreement and each Individual Contract are terminated and the debtor effects payment of the Termination Amount within this period, it seems to us that the risk of **payment of the Termination Amount being ineffective is low**. However, there is no case law or legal commentaries in this regard that confirm this.

Pursuant to the second sentence of article 127 section 3 of the Bankruptcy Law, a person who has received payment may demand that these acts be deemed effective towards the bankruptcy estate, if it was not been aware of the existence of grounds for bankruptcy.

In addition, pursuant to article 127 section 4 of the Bankruptcy Law, the article 127 section 1-3 does not apply to collaterals established before the date of the declaration of bankruptcy in connection with contracts referred to in article 85 paragraph 1 of the Bankruptcy Law. Therefore, any collateral established for payment of the Termination Amount (or Settlement Amounts) under the EFET General Agreement could not be challenged based on article 127 of the Bankruptcy Law.

Avoidance of contracts under the Restructuring Law

In restructuring proceedings avoidance actions are available only to an administrator established in rehabilitation proceedings.

Article 304 section 1 of the Restructuring Law provides for a claim of the administrator similar to that regulated in article 127 section 1 of the Bankruptcy Law. Therefore, our remarks made above in that regulation are repeated here.

Article 304 sections 3 and 4 of the Restructuring Law enable the administrator to challenge certain types of collateral established over the debtor's assets. However, pursuant to article 304 section 6, the administrator's claim cannot be applied to collaterals established before the date of opening of the rehabilitation proceedings in connection with contracts referred to in article 250 section 1 of the Restructuring Law. Therefore, collateral established for an obligation to pay the Termination Amount (or Settlement Amounts) under the EFET General Agreement could not be challenged based on article 304 of the Restructuring Law.

Opinion on whether there is publicly available information confirming any of the procedural steps or other solvency-related facts (for example financial statements, corporate actions, etc.)

According to the Act on the National Court Register[13] the following information and facts related to insolvency matters have to be entered into the National Court Register (publicly admissible register):

- securing of a debtor's assets in bankruptcy proceedings by way of appointing an interim court supervisor or a compulsory administrator;
- dismissal of a bankruptcy petition due the fact that assets of the insolvent debtor are not sufficient to satisfy the costs of proceedings or also due to the fact that the debtor's assets are encumbered with security interests to such extent that the remaining assets of the insolvent debtor are not sufficient to cover the costs of the proceedings;

[13] The Act on National Court Register of 20 August 1997, consolidated text of 13 April 2018 (Journal of Laws of 2017, item 986 as amended).

- information on opening of restructuring proceedings and on declaration of bankruptcy, on completion of said proceedings or setting aside of an arrangement, and the person being the compulsory administrator, trustee, court supervisor, administrator, foreign receiver and persons appointed in the course of restructuring or bankruptcy proceedings to represent the debtor.

In principle, entries made in the National Court Register also have to be made in the Official Court and Commercial Journal.

According to the Act on the National Court Register, annual financial statements have to be filed with a court and are publicly available.

Documents containing information that has to be registered in the National Court Register may be filed with the National Court Register within a certain time limit, which means that there may be a 4-10 weeks delay in the relevant notice appearing on the files.

In addition, all major events related to insolvency and restructuring proceedings of the debtor are reported in the form of an announcement in the Official Court and Commercial Journal. The announcements are made to communicate to creditors that, *inter alia*:

- the court has appointed an interim court supervisor for the debtor (which means that the debtor has filed for bankruptcy or restructuring);
- the debtor has filed a petition for approval of an arrangement made in arrangement approval proceedings;
- the court has opened insolvency or restructuring proceedings of the debtor and appointed an insolvency trustee, administrator or court supervisor of the debtor;
- the insolvency/restructuring official has drafted a list of creditors/list of claims;
- the court has approved an arrangement made with creditors.

Each issue of the Official Court and Commercial Journal is available on-line at https://ems.ms.gov.pl/msig/przegladaniemonitorow.

The above information should be available in National Register of the Debtors, which is intended to start in December 2020.

<u>Opinion on whether or not the insolvent counterparty's obligation to pay the amount of any compensation claim in EUR, USD or GBP (as agreed between the parties in the Election Sheet) is enforceable under the laws of Poland</u>

If transactions are concluded between a Polish entity and another entity based in the EU, EEA or in an OECD country, it is possible to settle such transactions in any "convertible" currency. A list of convertible currencies is specified in the relevant secondary legislation and currently covers 128 currencies, including the EUR, USD and GBP. Settlements in any other currencies require a prior foreign exchange permit from the President of the National Bank of Poland (NBP). The above requirements could only affect the use of the EFET General Agreement if the parties choose to settle in a currency other than EUR.

Payment determined in a foreign currency can be made in PLN unless statutory provisions of law, a judgment, or contract require that the payment be made in a foreign currency. In addition, **conversion of pecuniary payments expressed in foreign currencies into PLN is to be made at the average exchange rate published by the NBP and applicable as of the date on which the obligation is due and payable (maturity date), unless statutory provisions of law, a judgment or contract state otherwise.** If a debtor is in arrears with payments, the creditor is entitled to demand from the debtor a payment in PLN based on the exchange rate published on the payment date.

If a contract is governed by Polish law, amounts payable thereunder are determined in a foreign currency and payments under the contract are to be made in that foreign currency and not in PLN, the contract has to expressly exclude payment in PLN. If amounts payable under the contract are expressed in a foreign currency but are to be paid in PLN, it has to be borne in mind that the contract should also describe the procedure for calculating the conversion rate; otherwise the average exchange rate published by the NBP on the maturity date will apply.

Regardless of the above, pursuant to Article 251 of the Bankruptcy Law, a claim in foreign currency is included on the list of creditors in insolvency proceedings converted into PLN at the average foreign currency exchange rate published by the National Bank of Poland on the date of the declaration of bankruptcy, and in the absence of that exchange rate - according to the average market price of that day. In addition, the claim is satisfied in the bankruptcy proceedings in PLN, and not in the foreign currency. The above does not however cause the nature of the claim to change, making it a claim in PLN. For example, if the same claim is pursued against its guarantor, or if the insolvency proceedings are discontinued, the claim should be satisfied in its original currency.

4.1.1.3 Non-insolvency related Material Reasons

<u>Enforceability of Early Termination for a Material Reason (§ 10.5) (other than due to insolvency)</u>

Under the general principle of freedom of contract, expressly provided for in article 353[1] of the Polish Civil Code, parties to an agreement may construct a contractual relationship between them as they deem proper, provided it is not contrary to:

– the character (nature) of that relationship;

– the mandatory provisions of the law; and/or

– the "principles of social coexistence".

Without going into a detailed discussion of the above limitations on the freedom of contract principle, and subject to the qualification described below, we believe that **the right of termination for non-insolvency related Material Reasons (§ 10.5 (a), (b), (d), (e) and (f)) and associated provisions of § 10.3 of the EFET General Agreement, applicable in such circumstances, create legal, valid and binding obligations of the parties and are enforceable.**

However, there are some doubts under Polish law as to the enforceability of an "assumption of delivery", which may affect the mechanism for setting the Early Termination Date in § 10.3 (b) of the EFET General Agreement. Therefore, for the avoidance of doubt in this respect, if the EFET General Agreement is governed by Polish law, **we recommend that any notice of Early Termination specify that Early Termination Date as a date occurring after actual delivery takes place** (e.g. upon a delivery date).

The considerations notes above with respect to article 84 of the Bankruptcy Law continue to apply to termination for non-insolvency-based Material Reasons.

<u>Enforceability of close-out netting provisions (§§ 10.3 and 11) in the event of Early Termination for Material Reasons 10.5) (other than due to insolvency)</u>

For the reasons given in point 4.2.1 above, we are of the opinion that **the close-out netting provisions in §§ 10.3 and 11 of the EFET General Agreement, applicable in the event of Early Termination for non-insolvency related Material Reasons, create legal, valid and binding obligations of the parties and are enforceable**. However, there is a remote risk that the provisions of § 11.2 of the EFET General Agreement relating to calculation of the Settlement Amount may not be fully enforceable in accordance with its terms. This is because it uses the slightly imprecise phrase "in a commercially reasonable manner", and it is hard to foresee how this would be interpreted in court proceedings.

4.1.2 Multibranch parties

4.1.2.1 Polish Multibranch Party

<u>Opinion on whether or not there would be any change in the conclusions reached under 4.2.1 above based upon the fact that Party A conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency</u>

Our previous conclusions remain unchanged with respect to multibranch entities that are subject to Polish insolvency proceedings only, irrespective of the fact that they have assets outside Poland. This refers to banks and insurance undertakings with their seats in Poland and to investment undertakings with their centers of main interest in Poland. **In the case of other entities** (which may be subject to Polish insolvency proceedings as well as to secondary insolvency proceedings conducted in other countries where they have assets), **close-out netting conducted in accordance with Polish law will be effected only with respect to Individual Contracts that relate to assets held in Poland and other jurisdictions where no secondary insolvency proceedings are pending**.

4.1.2.2 Foreign Multibranch Party

<u>Opinion on: (i) whether or not there would be separate proceedings in Poland with respect to the assets and liabilities of the Polish Branch upon the start of the insolvency proceedings for Party F in Country H, or (ii) the relevant authorities in Poland would defer to the proceedings in Country H, so that the assets and liabilities of the Polish Branch would be handled as part of the proceedings for Party F in Country H, and (iii) local creditors of the Polish Branch could initiate separate proceedings in Poland even if the relevant authorities in Poland did not do so.</u>

Answers to the above questions depend on the status of Party F and therefore they will be divided into separate sections.

Foreign banks and credit institutions

Credit institutions (i.e. banks with their seat in the EU) are not subject to insolvency proceedings conducted in Poland, whereas it is admissible to conduct bankruptcy proceedings in Poland against foreign banks (i.e. banks with their seat outside the EU). Only the Financial Supervisory Commission or Bank Guarantee Fund may file a petition for bankruptcy of a bank.

This means that **there will be no separate insolvency proceedings with respect to Party F's assets in Poland or its Polish branch, provided that Party F is a credit institution with its seat in the EU.**

The Bankruptcy Law does not prohibit Polish courts from conducting insolvency proceedings with respect to foreign banks. **In the case of foreign banks having a branch only in Poland and not in any other EU or EFTA Member State, a general insolvency regime for Polish banks shall apply.**

Only the Financial Supervisory Commission or Bank Guarantee Fund may file a bankruptcy petition concerning a bank.

Insurance undertakings

Insurance undertakings with their seat in the EU or EFTA countries are not subject to insolvency proceedings conducted in Poland, whereas it is admissible to conduct bankruptcy proceedings in Poland against insurance undertakings with their seat outside the EU or EFTA. Individual creditors as well as the Financial Supervisory Commission may file a petition for bankruptcy of an insurance undertaking.

This means that **there will be no separate insolvency proceedings with respect to Party F's assets in Poland or its Polish branch, provided that Party F has its seat in the EU or EFTA**.

The Bankruptcy Law does not prohibit Polish courts from conducting insolvency proceedings with respect to foreign insurance undertakings having their seats outside the EU or EFTA Member States. **In cases of foreign insurance undertakings having a branch only in Poland and not in any other EU or EFTA Member State, a general insolvency regime for Polish insurance companies applies.**

A bankruptcy petition concerning an insurance undertaking may be filed either by a debtor or by the Financial Supervisory Commission.

Investment undertakings which provide services involving the holding of funds or securities for third parties and to collective investment undertakings

Foreign investment undertakings may be subject to insolvency proceedings conducted in Poland. A creditor of an investment undertaking may file a petition for bankruptcy with respect to that undertaking.

The Bankruptcy Law does not provide for a special regime applicable to bankruptcy proceedings of foreign investment undertakings. Therefore, they are subject to the general regime of the Bankruptcy Law.

A bankruptcy petition concerning an investment undertaking may be filed by a creditor of the investment undertaking.

Other entities

Other entities may be subject to insolvency proceedings conducted in Poland. A creditor of such an entity may file a petition for bankruptcy of that entity.

In cases of entities having their seats in EU Member States, the EU Insolvency Regulation applies. If that entity has its seat outside the EU, the conclusions as to investment undertakings above apply – i.e. an entity is subject to the general Polish bankruptcy regime, and the EU Insolvency Regulation or the Bankruptcy Law implementing the Credit Institutions Insolvency Directive or Insurance Undertakings Insolvency Directive is disregarded.

According to article 3 of the EU Insolvency Regulation, Polish courts have jurisdiction to open insolvency proceedings (secondary proceedings) against a debtor having its center of main interests in other EU Member State only if the debtor has an establishment in Poland. The effects of secondary proceedings are restricted to the assets of the debtor situated in the territory of Poland. Opening of secondary proceedings may be requested by any person empowered to request the opening of insolvency proceedings under the laws of Poland, and therefore under the Polish Bankruptcy Law **local creditors may initiate secondary proceedings even if the relevant authorities in Poland fail to do so**.

<u>Opinion on whether if there were separate proceedings in Poland with respect to the assets and liabilities of the Polish Branch, the receiver or liquidator in Poland and the Polish courts, based on the facts above, would include Party F's position under the EFET General Agreement, in whole or in part, among the assets in Poland and, if so, the receiver or liquidator and the Polish courts would recognize the close-out netting provisions of the EFET General Agreement in accordance with those provisions. The most significant problem would arise if a Polish receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Polish Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Polish Branch to the liquidator or receiver of the Polish 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 that Agreement in the proceedings for Party F in Country H.</u>

Under article 3 section 2 of the EU Insolvency Regulation, **if the center of main interest of the debtor is located outside Poland, the bankruptcy proceedings conducted by the Polish court relate only to the debtor's assets located in Poland**. However, this rule applies only in relation to a debtor to which the EU Insolvency Regulation applies, hence excluding entities operating in the financial sector. We assume, for the purpose of further analysis, that rights under Individual Contracts concluded by the Polish Branch of Party F are located in Poland. Therefore, only receivables arising under Individual Contracts of the Party F Polish Branch will be included in the assets being subject to Polish insolvency proceedings, whereas receivables arising under Individual Contracts of Party F's main center of interests will not be subject to Polish insolvency proceedings. However, as Individual Contracts concluded by the Polish Branch of Party F are entered into under the EFET General Agreement, **it is possible that the whole EFET General Agreement will be terminated on the basis of the occurrence of a Material Reason**. This is because citing a Material Reason results in dissolution of the EFET General Agreement and underlying Individual Contracts.

Although there is no clear provision in Polish law in this respect, it seems probable that close-out netting following termination of the whole EFET General Agreement will be effected separately:

- in Poland subject to the Bankruptcy Law and only with respect to Individual Contracts concluded by the Polish Branch;
- in Country H, subject to bankruptcy law applicable to Party F's head office and only with respect to Individual Contracts concluded by Party F's head office and its other branches where there are no secondary insolvency proceedings pending.

This position is justified by the fact that the Polish Bankruptcy Law applies only to assets located in Poland, and thus only to Individual Contracts concluded by a Polish Branch.

Since an insolvency official appointed in Polish secondary insolvency proceedings of the Polish Branch would have to operate based on the Polish Bankruptcy Law, they would most probably:

- acknowledge a claim for a Termination Amount – if the Termination Amount was negative for the Polish Branch;
- pursue a claim for a Termination Amount against the counterparty of the Polish Branch – if the Termination Amount was positive for the Polish Branch.

<u>Assumption that Party F has no branch located in Poland, but has assets in Poland</u>

Credit institutions: Polish courts do not have jurisdiction in bankruptcy matters relating to credit institutions having assets in Poland, and thus the above conclusion that a credit institution is not subject to Polish bankruptcy proceedings remains unchanged.

Insurance undertakings: Insurance undertakings with their seats in EU or EFTA members, are not subject to Polish bankruptcy proceedings and thus the above conclusion that a credit institution is not subject to Polish bankruptcy proceedings remains unchanged.

Investment undertakings: The conclusions with respect to a foreign investment undertaking having assets in Poland but having no branch in Poland remain unchanged, i.e. they may be subject to bankruptcy proceedings in Poland.

Other entities: According to article 3 of Regulation 2015/848[14], Polish courts have jurisdiction to open secondary proceedings against a debtor having its center of main interests in another EU Member State only if the debtor has an establishment in Poland. Therefore, it is inadmissible to open secondary proceedings in Poland with respect to an entity not having a branch in Poland. If a debtor has no center of main interest in an EU Member State, then article 382 item 2 of the Bankruptcy Law would apply. This means that Polish secondary proceedings could be opened for such debtor even if it only had assets in Poland.

4.1.3 Collateral

4.1.3.1 Assumptions regarding Collateral:

We assume that (i) Party A is at all times a 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.

4.1.3.2 Specific issues to be discussed:

(a) Under the laws of Poland, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?

Regulation (EU) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) entered into force in the member

[14] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

states of the European Union, including Poland, on 25 July 2008 and became directly effective from 17 December 2009. The Rome I Regulation is applicable to contractual obligations in civil and commercial matters and superseded in that respect the Rome Convention dated 19 June 1980. Pursuant to Article 3 of the Rome I Regulation, the parties are free to choose a law to govern their contractual obligation without the necessity to establish a link between the agreement and the law chosen by the parties. In the absence of the choice of law, the agreement is governed by the law of the country where the party required to perform the characteristic performance under the contract has habitual residence.

If the bank account is held in Poland and the agreement on maintenance of the bank account is governed by Polish law, the transfer of funds deposited on the account is effected on the terms of and in accordance with the agreement on bank account maintenance and therefore is governed by the laws of Poland.

(b) Would the laws of Poland characterize each transfer of collateral as effecting an unconditional transfer of ownership title to 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 that risk? What would be the consequences of such a re-characterization?

In accordance with article 84 item 2 of the Bankruptcy Law, a contract for the transfer of ownership title to a property, receivable or other rights shall be effective towards the bankruptcy estate if executed in writing with a certified date, subject to the exception to this rule provided in article 84 item 3 of the Bankruptcy Law, which states that collaterals established on the basis of the Polish Act on Certain Financial Collaterals and meeting its requirements do not need to be executed in writing with a certified date in order to be effective towards the bankruptcy estate.

However, by virtue of article 70(1) of the Bankruptcy Law, property, a receivable or other rights transferred in order to secure claims shall not be excluded from the bankruptcy estate, but shall be subject to provisions relating to pledged assets, to be applied mutatis mutandis. At the same time, there are no special form requirements to create a financial pledge over rights. Therefore, it is possible that a court would recharacterize an improperly executed transfer of rights as transfer of rights governed by the Polish Act on Certain Financial Collaterals or a financial pledge. An argument in favor of such recharacterization as a financial pledge would be that a financial pledge with an option of a right of use of the pledged assets has certain similarities to an outright transfer. A right of use means that a pledgee may exercise rights to the pledged asset and dispose of the asset. Following the disposal, the pledgee is only obliged to replace the collateral with an appropriate equivalent by the time of fulfilment of the obligation secured by the pledge. However, if an enforcement event occurs, the obligation to return the equivalent collateral may be subject to set-off. Therefore, recharacterization of the transfer of collateral as a financial pledge may be regarded as a remedy for a transfer executed without formal requirements which would otherwise be ineffective towards the bankruptcy estate. Recharacterization is much less likely if the financial pledge does not provide for a right of use. Additionally, the risk of recharacterization is diminished due to § 7 item 3 of the EFET Credit Support Annex, which provides that nothing in the EFET Credit Support Annex is intended to create or does create a pledge or other security interest.

(c) 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 Poland necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?

As noted above, security transfer requires certification of a date in order to be effective towards the bankruptcy estate and in order to be treated as a pledge (except for collaterals on the basis of the Polish Act on Certain Financial Collaterals). This means that certification of a date will not result in exclusion of transferred assets from the bankruptcy estate in the case of bankruptcy, but the transferee will only enjoy the same rights in the bankruptcy proceedings as those enjoyed by the pledgee with respect to the pledged assets. It is not possible to conclusively determine how the provisions on pledges will be applied in the case of the title transfer. The provision that may be regarded as the most significant with respect to the issue of treatment of pledged assets in bankruptcy provides that sums obtained from liquidation of assets encumbered by a pledge must be firstly used to satisfy claims of creditors secured by the pledge. Only remaining sums (if any) are included in the bankruptcy estate (article 336 of the Bankruptcy Law). Application of the above provision to transfer of title would probably lead to a solution in which the receiver would liquidate the transferred assets and use the obtained sum to satisfy claims of the transferee secured by the transfer. Only upon full satisfaction of the claim secured by the title transfer may the receiver include the remaining amount in the bankruptcy estate.

Generally, in accordance with Polish law a legal act has a certified date (i) if it is officially authenticated, (ii) if the performance of a legal act is confirmed in an official document – as of the official document date, (iii) if an official note is made on a document relating to a legal act by a state authority, a local government unit or by a notary – as of such note's date. In practical terms, the typical way of certifying a date is a certification executed by a notary public..

It is not only the EFET Credit Support Annex which requires date certification, but each collateral transfer executed thereunder.

With respect to a financial pledge there are no formal requirements as to its creation, however a financial pledge must be recorded on the appropriate account or in another register where the pledged asset is located. A financial pledge cannot be established by a pledgor being an individual, and at least one party to the agreement on establishment of the financial pledge must be a financial institution falling into one of the categories listed in the Polish Act on Certain Financial Collaterals. Among the entities specified in Appendix A, the following, among others, are classified as authorized to provide or take financial collateral: (i) banks/credit institutions; (ii) investment services providers/investment firms; (iii) insurance companies; (iv) investment fund management companies; (v) municipalities, counties, associations of local government, and quasi-governmental entities - provided that they are charged with or intervene in the management of public debt or authorized to hold accounts for customers.

(d) What is the effect, if any, under the laws of Poland, 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?

If collateral is replaced by new collateral, this might be regarded as an event inherently involving creation of a new security. This would have an important impact on effectiveness of the collateral due to so called "suspect periods" applicable under Polish law by virtue of article 127 of the Bankruptcy Law. Pursuant to article 127 section 1 of the Bankruptcy Law, acts in law made by the bankrupt for one year prior to the date the petition for bankruptcy is filed, whereby the bankrupt disposed of assets, shall be ineffective with regard to the bankruptcy estate if such acts were made without payment, or with payment if the value of the bankrupt's performance grossly exceeds the value of the performance received by the bankrupt or reserved for the bankrupt or a third party. Furthermore, pursuant to the first sentence of article 127 section 3 of the Bankruptcy Law, the bankrupt's payment of a non-matured debt or securing such debt within six months before a petition for bankruptcy is filed is ineffective towards the bankruptcy estate. However, the above provisions do not apply to creation over the bankrupt debtor's assets of security occurring before the date of declaration of bankruptcy in connection with the financial terms operations or borrowing or sale of financial instruments involving an undertaking to repurchase them, referred to in article 85 of the Bankruptcy Law. Thus, provided that Individual Contracts entered into under the EFET General Agreement are classified as financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them, the rights of replacement of collateral as stipulated in § 6 of the EFET Credit Support Annex will not affect effectiveness of security created under the EFET Credit Support Annex. Presence or absence of consent of the Transferee for the replacement does not affect the above analysis. However, § 6 of the EFET Credit Support Annex provides that the replacement of collateral is subject to approval of the Transferee (not unreasonably to be withheld). Given the above-mentioned conclusions and taking into account absence of absolute certainty as to the status of Individual Contracts as financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them within the meaning of article 85 of the Bankruptcy Law, it is always reasonable for the Transferee to withhold approval for replacement of collaterals.

(e) 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 Poland 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 assume that the reference in the above question to a collateral "provided but not yet transferred" should be read as a reference to Letters of Credit that have been provided by Party A, but whereupon no payment has been effected by the bank issuing the Letter of Credit.

A detailed discussion on whether it is possible for the amount of collaterals to be included in the close-out netting mechanism is covered in point 4.2.3.2. f). The arguments for and against this solution apply mutatis mutandis to collaterals provided but not yet transferred, however there is an additional issue which should be examined.

The receivables of the Transferor for waiver, amendment, revocation or return of collateral are non-pecuniary ones. They become pecuniary receivables as of the date of the bankruptcy declaration of beneficiary of the security, and thus - subject to the qualifications provided for in point 4.2.3.2. f) - they may be covered by the close-out netting mechanism. However, if the termination of the EFET General Agreement is due to a reason other than declaration of bankruptcy, the receivable of the Transferor does not become a pecuniary receivable and thus cannot be covered by the close-out netting mechanism.

(f) 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?

Enforcement of rights relating to collaterals involves application of the close-out netting mechanism provided for in the EFET General Agreement. As indicated above, the admissibility of closeout netting does not raise any doubts if it occurs prior to declaration of bankruptcy. Following declaration of bankruptcy, in accordance with article 85 of the Bankruptcy Law, the termination of a master agreement and settlement as provided for therein is recognized provided that the Individual Contact performed under the master agreement is "financial term operations" or "borrowing or sale of financial instruments involving an undertaking to repurchase them". It remains doubtful whether collateral transactions could be treated as financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them. Article 85 of the Bankruptcy Law may have been intended to cover only per se derivatives, and not any transactions entered into to secure claims arising under derivatives. Pursuant to the Bankruptcy Law, the close-out netting of collaterals is recognized also in bankruptcy. The close-out amount would now be calculated not only in relation to derivatives/repos only (as explicitly allowed under article 85 of the Bankruptcy Law) but also to the claims to return (or be returned) the collateral. This result is achieved by article 85a of the Bankruptcy Law, which provides that the declaration of bankruptcy of the debtor is without prejudice to rights arising from any close-out netting provision in the contract referred to in the Polish Act on Certain Financial Collaterals. The "single agreement" concept deployed in many master agreements or close-out netting provisions in such agreements enhances arguments supporting enforceability of close-out netting in respect of collateral arrangements, however in our view it is not itself sufficient in bankruptcy of Polish entities to overcome this risk of calculation of the close-out amount without taking into account collateral arrangements. The risk that close-out netting clauses (solely insofar as they pertain to collateral arrangements) could, at least in some cases, be void in relation to Polish entities upon the declaration of their bankruptcy, is often referred to as the Collateral Netting Risk. To sum up, due to article 85a of the Bankruptcy Law, the Collateral Netting Risk is not applicable with regard to close-out netting provisions meeting requirements set forth in the Polish Act on Certain Financial Collaterals .

However, there are certain arguments that the all close-out netting mechanisms cover collaterals too. Firstly, article 127 item 4 of the Bankruptcy Law expressly provides that provisions of article 127 item 1-3 (providing for ineffectiveness towards a bankruptcy estate of security created prior to bankruptcy declaration within the so-called suspect period) does not apply to creation of security prior to the bankruptcy declaration date, effected in connection with the financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them, referred to in article 85 of the Bankruptcy Law. Thus, security transfer of collaterals is recognized, subject to an important qualification.

Starting from 2 May 2009, recognition of security transfer of title no longer implies that the transferred assets are excluded from the bankruptcy estate, but are only treated as pledged assets within the bankruptcy assets. Therefore, the sole application of article 127 item 4 of the Bankruptcy Law is not persuasive as to admissibility of close-out netting with respect to collaterals. Moreover, article 127 item 4 of the Bankruptcy could be relied on only if the collateral provider was provided by the further bankrupt party, i.e. Party A.

Another argument for admissibility of close-out netting with respect to the collateral amount relies on article 93 item 1 of the Bankruptcy Law, which provides that the bankrupt's receivable may be set off against the receivable of the bankrupt's creditor, if both receivables existed on the day of the declaration of bankruptcy, even if the enforceability date of one of them has not yet occurred. The receivable for return of collateral exists from the actual transfer of collateral and it only becomes enforceable when the secured claim amount under the EFET General Agreement is set. Thus, a claim for return of collateral meets the criteria of application of article 93 item 1 of the Bankruptcy Law. The receivable being payment of the close-out amount (calculated with respect to the EFET General Agreement only, not including claims under the EFET Credit Support Annex) does not meet the criteria of article 93 item 1 of the Bankruptcy Law if it arises only upon termination of the EFET General Agreement effected after bankruptcy declaration. However, this receivable is not subject to article 93 item 1 of the Bankruptcy Law but enjoys a less strict regime under article 85 item 4 of the Bankruptcy Law, which provides that the settlement amount arising under the terminated contracts performed under the master agreement may be subject to set-off without any further requirements.

Although article 93 section 1 of the Bankruptcy Law provides some arguments supporting admissibility of receivables under the EFET Credit Support Agreement being covered by the close-out netting, the criteria of application of this provision raise certain doubts as to whether collaterals provided under the EFET Credit Support Annex could be netted. This doubt is justified by the fact that the set-off referred to in article 93 section 1 of the Bankruptcy Law is admissible only with respect to receivables existing on the date of declaration of bankruptcy. Therefore, following declaration of bankruptcy, security transfer of title will be regarded as a pledge, i.e. transferred assets are treated not as part of the Transferee's assets, but as part of the bankruptcy estate, while they are encumbered by the pledge in favor of the Transferee. Therefore, following bankruptcy declaration, the receivable of the Transferor being a claim for re-transfer and return of the transferred assets, in accordance with the security transfer agreement, ceases to exist. On the date of declaration of bankruptcy, the transferred assets become, by virtue of law, part of the bankruptcy estate - even though they are still deposited on the Transferee account and technically shall be re-transferred to the account of the bankruptcy estate. Because of that, a financial pledge with the right of use seems safer here. Following the execution of the right of use, the pledgee may become the owner of the pledged assets and might only be obligated to return an equivalent of the pledged assets. A financial pledge is not subject to any transformation due to declaration of bankruptcy, thus the receivable in the form of the pledgor's claim for return of the equivalent of the pledged assets which have been transferred to the account of the pledgee in execution of the right of use, will continue to exist following the bankruptcy and the criteria of article 93 section 1 of the Bankruptcy Law shall be met.

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

The Bankruptcy Law provides that creation of security (which also covers security transfer of title to assets) is ineffective towards the bankruptcy estate if performed within certain periods, traditionally referred to as "suspect periods". Pursuant to article 127 section 1 of the Bankruptcy Law, acts in law made by the bankrupt for one year prior to the date the petition for bankruptcy is filed, whereby the bankrupt disposed of assets, are ineffective against the bankruptcy estate if such acts were made without payment, or with payment if the value of the bankrupt's performance grossly exceeds the value of the performance received by the bankrupt or reserved for the bankrupt or a third party. Furthermore, pursuant to the first sentence of article 127 section 3 of the Bankruptcy Law, the bankrupt's payment of a non-matured debt or securing such debt within six months before a petition for bankruptcy is filed is ineffective towards the bankruptcy estate. The above suspect periods are not applicable to creation of security over the bankrupt debtor's assets prior to the bankruptcy declaration date in connection with the financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them, referred to in article 85 of the Bankruptcy Law. Thus, suspect periods will not affect effectiveness of collaterals provided that Individual Contracts performed under the EFET General Agreement are classified as financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them.

There is a risk that in the case of replacement of collateral with a new asset, the suspect period will start from the beginning with respect to the newly transferred assets. This is because replacement of collateral, in most cases, is regarded under Polish law as involving a new act in law which creates new security. This applies to a transfer of title or issue of a new letter of credit. It may be argued that a creditor would not face this risk in the case of a financial pledge over a bank account which is created only once and covers amounts deposited on the account at a given time. However, this argument could be challenged.

According to the prevailing opinion of Polish scholars, the suspect period referred to in article 127 item 3 of the Bankruptcy Law applies only to the creation of security which secures debt which was enforceable but was already existing on the date the security was created. It does not apply to creation of security which secures a newly acquired debt.

Pursuant to the second sentence of article 127 section 3 of the Bankruptcy Law, a person who has received payment may demand that these acts be deemed effective towards the bankruptcy estate if it was not aware of the existence of grounds for bankruptcy. Therefore, Party B could be protected in certain situations against negative consequences of suspect periods. This will be however difficult in the case of those entities which have access to information concerning the overall business and financial situation of their counterparties, i.e. especially in cases of banks maintaining bank accounts or granting loans to their counterparties.

(h) Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership title to the collateral to Party B? Are there any other requirements to be observed in Poland in order to ensure validity of that transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under point 4.2.3.2 c) above?

The EFET Credit Support Annex is an appropriate form to create the outright transfer of ownership title to the collateral. In addition to requirements to be observed in Poland, in order to ensure validity of the transfer as specified above under certain circumstances, the parties to the EFET Credit Support Annex need obtain foreign exchange revalidation of settlement of transactions entered into under the EFET Credit Support Annex. If a transaction specified in the EFET Credit Support Annex concluded between a Polish entity and the another entity based outside the EU, EEA or OECD country, they might be classified in accordance with the Polish Foreign Exchange Law of 27 July 2002 as transactions being transfer of receivables exercised by financial settlement and thus admissible upon receipt of a foreign exchange permit. On the other hand, since 24 January 2009, residents of Poland are no longer required to obtain a foreign exchange permit to undertake acts in law which may result in financial settlement in foreign currency within territory of Poland.

(i) Do you have any other specific recommendations on the subject of collateral that EFET and its members need to be aware of? If so, please provide a detailed answer.

Due to the reasons detailed above, the parties entering into the EFET Credit Support Annex may consider amending provisions of the EFET Credit Support Annex under which a financial pledge with rights of use may be established as a security for the risk the parties are exposed to under the EFET General Agreement.

4.1.3.3 Parent Company Guarantee

Polish law does not provide for specially designated legislation for in relation to the corporate guarantees (as opposed to bank guarantees, which can be granted only by the Polish banks or Polish branches of credit institutions). Therefore, a corporate guarantee is structured under Polish law as a suretyship *("poręczenie")*, whereby a surety *("poręczyciel")* undertakes to pay the debt of a primary debtor towards a creditor if a primary debtor does not do so on time.

Pursuant to the Polish Civil Code, a suretyship is established by a written agreement between the surety and the creditor in order to secure a debt due from the debtor. In practice, a surety is under an obligation to pay the debt in the event of default by an obligor. As and when the surety pays the debt in lieu of the primary debtor, he enters takes the place of the beneficiary of the suretyship by operation of law and is entitled to recourse against the primary debtor.

A suretyship is an accessory to the principal debt secured, therefore if the primary obligation becomes void, then the suretyship also becomes void, and the repayment of a debt leads to the extinction of the suretyship. The scope of a surety's obligation is determined according to the current scope of the primary debtor's obligation.

A Polish law suretyship is established up to a specific capped amount and for a predetermined time.

In order to have evidence of the guarantee is provided in the form of a written document. There are no special formal requirements for the guarantee to be valid and enforceable.

4.1.4 General Enforceability

With respect to the §22.1 of the General Agreement, the Agreement shall be governed by and construed in accordance with, the law of the Federal Republic of Germany. Therefore, in the event of filing a claim arising from the Agreement with a Polish court, the Agreement shall be interpreted in accordance with German law.

Nonetheless, we must emphasize that under certain circumstances it is possible for Polish court to refrain from applying German law, even if the Parties choose this law to be prevailing. This might happen also in bankruptcy proceedings.

As derived from Article 7 of the Act of 04 February 2011 Private International Law, foreign law does not apply if its application would result in effects contradictory to fundamental principles of legal order of the Republic of Poland. This regulation is often referred as to "the public order clause".

In the view of the above, Polish court might, under the public order clause, refuse to apply German law while handling a dispute arising from the Agreement. Although the law vests courts with such a right, the public order clause serves as a 'last resort', applicable only if proceeding in accordance with foreign law would evidently infringe the principles of the Polish legal order.

Should a court resort to the public order clause with respect to the provisions of the General Agreement, it may decide to apply either (i0 other relevant regulation of German law or (ii) Polish law.

4.1.4.1 Force Majeure

<u>Circumstances affecting performance of a contract</u>

The Polish Civil Code does not refer to 'Force Majeure' *per se* in any provision. Therefore, the regulations of the EFET General Agreement should be construed in accordance with general provisions regarding circumstances affecting performance of a contract.

The Polish Civil Code provides for the following circumstances:

- when it is impossible for a contract to be performed,
- extraordinary change in circumstances affecting performance of the contract.

4.1.4.2 Impossibility of performance

A contract may be impossible to perform either from the moment of its formation (*original impossibility*) or due to circumstances that occurred after that moment (*subsequent impossibility*).

Impossibility to perform a contract is original if the circumstances that render performance impossible existed at the moment of contract's formation. In this case a contract is deemed invalid. If a party knew about such circumstances at the time of contract's formation and failed to notify the other party, it is liable for damages suffered by the other party provided that the latter was not aware of the said circumstances.

Impossibility of performance a contract is subsequent if the circumstances that render performance impossible occurred after the contract had been formed and the debtor is not liable for the contract. As a result, (the debtor's) obligation expires. If the object of the consideration is transferred, forfeited or damaged, the debtor is required to hand over all the proceeds obtained in exchange or as redress of damage.

Moreover, a contract may be mutual, i.e. consideration offered by one party is treated as the equivalent of consideration offered by the other party. If a party cannot offer consideration due to circumstances for which it is liable, the other party may either rescind the contract or demand compensation. If one party cannot offer consideration due to circumstances for which neither party is liable, it cannot demand (the mutual) consideration from the other party. If that party has already received consideration, it must return it, otherwise unjust enrichment has occurred.

Additionally, for mutual contracts, the Polish Civil Code provides for specific regulations concerning partial impossibility of performance of a contract. Regardless of whether partial impossibility is due to circumstances for which one or neither party is liable, a party may rescind a contract if partial performance of the contract by the other party - would be immaterial in view of the nature of the obligation or the purpose of a contract, known to the affected party beforehand. Naturally, if the contract continues, that party's right to (mutual) consideration is proportionally reduced.

4.1.4.3 Extraordinary change in circumstances

Another factor that may affect performance is set out in Article 357[1] of the Civil Code. This regulation refers to the principle of *rebus sic stantibus*. Under this rule, a court can modify a legal relationship between the parties by:

(a) stipulating the manner in which the contract is to be performed,

(b) stipulating the value of consideration, or

(c) terminating the contract.

The court can exercise this power at a party's request if due to an extraordinary change in circumstances performance entails excessive difficulties or exposes one of the parties to risk of substantial loss, which the parties did not foresee when concluding the contract. Prior to exercising this power, the court is required to consider the parties' interests. The modification of a legal relationship between the parties must be performed in accordance with the principles of community life. As far as it is necessary, when terminating the contract, the court may settle the parties' claims.

4.1.4.4 Remedies for non-performance

Contractual liquidated damages (contractual penalties) are allowed as redress for damage arising from non-performance or improper performance of a **non-monetary obligation**. Such damage may be remedied through the payment of a specified amount of money.

The party in default is required to pay liquidated damages notwithstanding the scope of the injury. This means that even if failure to properly perform a contract does not result in damage, the defaulting party is still, in principle, obligated to pay liquidated damages.

Importantly, by paying liquidated damages, the defaulting party will not automatically be released from an obligation to properly perform the contract. This can be achieved however with the other party's consent.

The amount of liquidated damages may be reduced by the court, if:

– a considerable portion of the contract has been performed,

– the amount is grossly excessive.

"Gross excessiveness" may be assessed in relation to either the moment of either formation or the moment of breach of the contract. Reduction of liquidated damages is decided at the discretion of the court and depends on specific circumstances of the case.

Unless the parties have decided otherwise, a demand for compensation exceeding the stipulated liquidated damages will not be allowed. In other words, as long as a contract does not expressly contain a suitable clause, the injured party cannot demand more than the amount of liquidated damages, regardless the value of damage.

Reduction of liquidated damages may only be performed by court upon the party's request, submitted in due time.

4.1.4.5 Limitation of liability for non-performance

Please note that this section applies only in the event that the Agreement is governed by Polish law.

In principle, failure to properly perform contractual obligations results in civil liability of the defaulting party for an obligation to redress the damage incurred by the other party. Liability arises if the breach of contract occurred due to circumstances for which the party is legally responsible (fault).

Importantly, the law provides for a rebuttable presumption that the breach has indeed occurred due to circumstances for which the party in breach is legally responsible. Thus, in the case of civil litigation, the party in breach bears the burden of proof with regard to lack of fault. What this generally means is that the defendant must show that he exercised due diligence while performing the contract. The standard of due diligence will be established in relation to the type of business a given party conducts.

This general rule of civil liability may be, to a degree, modified by the parties. Specifically, the parties may either extend or limit civil liability, with the exception of liability for intentional damage. Liability for intentional acts or omissions cannot be unlimited. Thus, it is possible to exclude or limit liability for gross negligence.

As for limitation of consequential damages, the Polish Civil Code does not contain this term. As a general rule, however, the injured party may seek compensation redressing both actual loss and lost profits that have a normal and adequate link (proximity) to the act or omission of the party in breach.

So, exclusion of liability for lost profits requires specific language in the contract.

However, a claimant demanding redress of lost profits must show high probability of lost profits, i.e. that it obtaining the profits would have been almost certain had it not been for the defendant's act or omission.

The claimant must also prove proximity (causation) between the act or omission and the damage. Causation must be adequate, which means that liability extends to monetary consequences that normally arise from a faulty act or omission in question. Therefore, the damage may not to be too remote from the event which caused it.

If the injured party contributes to the occurrence or extent of the damage, it is within the court's discretion to reduce the compensation accordingly.

4.1.4.6 Opinion

We are of the opinion that the provisions of the EFET General Agreement concerning the parties' liability are enforceable under Polish law.

A Force Majeure clause is generally enforceable under Polish law.

As for the clause concerning remedies for non-performance, it is generally enforceable under Polish law. However, should the Agreement be governed by Polish law, it is at the court's discretion to reduce the amount of liquidated damages under certain conditions.

In terms of exclusion of liability, the EFET General Agreement is in compliance with Polish law.

4.1.4.7 Other issues

The latest judicial decisions issued by courts in Poland support the view on the non-mandatory nature of the *rebus sic stantibus* principle. This means that the parties may decide to limit or even exclude the application of Article 357[1] of the Polish Civil Code.

Therefore, it is possible for the parties to agree that each party undertakes to refrain from filing claims regarding modification of the method or of the scope of performance of their contractual obligations, or dissolution of a contract due to an extraordinary change in circumstances.

Importantly, a provision on exclusion of *rebus sic stantibus* is binding on every party to the contract. In consequence, should the EFET's obligations become impossible to perform due to an extraordinary change in circumstance, it will not be allowed to request the modification of the contractual obligations pursuant to Article 357[1] of the Polish Civil Code.

Polish law does not expressly stipulate whether it is possible for such an exclusion to be binding on only one of the parties to a contract. Article 353[1] of the Polish Civil Code provides for the parties' right to arrange their legal relationship at their discretion, unless the content or the purpose of the contract is contrary to:

(a) the nature of the relationship,

(b) the law,

(c) the principles of community life.

In light of the principle of equality of the parties to a contract, a provision excluding only one of the parties may be rendered invalid by the court.

4.1.5 Confirmation Practices

4.1.5.1 Additional assumptions:

(a) As far as 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 telephone, 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).

(b) The 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.

4.1.5.2 Binding Individual Contract

Below, we outline selected principles for the conclusion and settlement of commercial transactions that would apply if Polish law were chosen to govern the EFET General Agreement. Should the transactions be subject to another jurisdiction, the respective requirements for conclusion and settlement of transactions would need to be analyzed in the light of the Polish conflict of laws provisions.

If Polish law governs an electricity or allowances trading transaction, then the rules of the Polish Civil Code would apply to the transaction. In particular, Polish Civil Code provisions regarding the ability of individuals and legal entities to contract, the manner of entering into agreements and the form of agreements, and general provisions regarding the performance of agreements as well as contractual and tort liability *(„odpowiedzialność deliktowa")* would apply to such transactions. The Polish Civil Code also regulates a number of typical agreements, including sale agreements, exchange (swap) agreements, agency agreements, guarantee agreements, etc.

It is a general rule applicable to contracts entered into under, and governed by, Polish law that, in the absence of the parties' agreement, the provisions of the Polish Civil Code (or other applicable regulations) apply to, and govern, all issues left unregulated by the parties. In this sense, there are a number of implied terms and conditions that apply to a contractual relationship, depending on the nature of this relationship. A thorough analysis of all of these implied terms and conditions would exceed the scope of this opinion. As an example, under the Polish Civil Code, in the absence of specific arrangements between the parties, interest on a delay in payment is due by operation of law, at the statutory rate. Other provisions of the Polish Civil Code allow the "silent acceptance" of an offer – if a business entity receives an offer within the scope of its business from an offeror with whom it remains in a continuous business relationship, then lack of response is deemed to constitute acceptance of the offer.

Pursuant to article 68(2) of the Polish Civil Code, a contract may be concluded if an offer is deemed to be accepted. In accordance with this concept, an offer is deemed to be accepted, and a new contractual relationship is created, if:

(a) the offer is received by a business entity;

(b) the offeror maintains a regular business relationship with the offeree;

(c) the offer relates to the line of business of the offeree; and

(d) the offeree does not immediately respond to the offer.

In order to avoid the Individual Contracts being concluded on the basis of the aforementioned "deemed to be accepted" concept, we suggest that the EFET General Agreement expressly exclude the application of article 68(2) of the Polish Civil Code in the case of Individual Contracts.

In view of the above, we recommend that § 3.1. of the EFET General Agreement be worded as follows:

"1 **Conclusion of Individual Contracts:** Unless otherwise agreed between the Parties, Individual Contracts may be concluded in any form of communication (whether orally or otherwise) and shall be legally binding and enforceable from the time the terms of such Individual Contracts are determined. The Parties exclude the application of article 68(2) of the Polish Civil Code."

As described above, article 68(2) of the Polish Civil Code provides for the possibility of a contract being concluded if an offer is deemed to be accepted. Although it is not expressly stated in the above-mentioned article of the Polish Civil Code, we believe that in certain circumstances it could also apply to offers relating to the modification of existing contracts. Therefore, also in this context, for the avoidance of doubt, and to ensure that the idea behind § 23.3 is not affected by the "deemed to be accepted" concept, we suggest that application of article 68(2) of the Polish Civil Code be expressly excluded in the EFET General Agreement.

(a) 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 your jurisdiction?

Generally, under Polish law, the parties are free to execute agreements in any form (statutory exceptions relate to the transfer of real property or transfer of an enterprise for example, but not to the sale of electricity or emission allowances). Consequently, as a rule, an oral agreement between the parties leads to the conclusion of a valid and binding contract just as written agreements do. To conclude a valid and binding contract, there is no need to have the oral agreement recorded, although for evidentiary purposes it is advisable to have an agreement recorded or in writing. A signature is required only if the need to employ the written form is a statutory requirement or was introduced by the parties.

With respect to agreements on the sale of electricity or emission allowance, no statutory requirements as to the form are applicable.

In accordance with § 23.3 of the EFET General Agreement, any amendments or additions to the EFET General Agreement can only be made in writing, and require the signatures of both parties. In order to avoid any disputes as to the potential consequences of non-compliance with the above written form requirement, we believe that this clause should be supplemented to expressly state that any amendments have to be made in writing in order to be valid.

In view of the above, we recommend that § 23.3 be worded as follows:

"3. Amendments: Except as provided for in § 3 (Concluding and Confirming Individual Contracts) with respect to Confirmations, any amendments or additions to this General Agreement can only be made in writing, and require the signatures of both Parties, otherwise any such amendment or addition will be null and void. In particular, for the avoidance of doubt, the Parties exclude the application of article 68(2) of the Polish Civil Code"

(b) At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction?

Assuming that the Confirmation does not modify the contents of the orally pre-agreed Individual Contract, then the decisive moment is the moment an oral agreement is reached.

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

As a rule, it is not possible to unilaterally modify a pre-agreed valid and binding contract by way of confirmation. However, there is an exception for transactions entered into between two business entities (a business entity is an individual, legal entity or other organization conducting business activity in its own name) in a form other than written form (e.g. orally, or through an exchange of electronic documents not bearing an electronic signature).

Pursuant to the Polish Civil Code, if a contract concluded between business entities without observing the written form is immediately confirmed by one of the parties in a written document addressed to the other party, and that document contains no amendments or supplements to the contract which significantly amend its contents, the parties are bound by the contract rendered in the wording determined in the confirmation, unless the other party immediately objects to it in writing.

(d) 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?

Such reference is sufficient for the inclusion of the Individual Contract in the EFET General Agreement.

4.1.5.3 Recording

Court may admit a recording as evidence as so-called 'other means of evidence'.

In accordance with the principle of free evaluation of evidence, the Code of Civil Procedure does not provide for a closed catalogue of means of evidence. Therefore, generally speaking, the parties can basically submit anything as evidence in support of their statements. Thus, in principle, court may admit a recording as evidence.

However, a court may refuse to hear this evidence if the recorded person was not aware of the recording (secret recording).

Nevertheless, we are of the opinion that the wording of § 23.1 of the EFET General Agreement provides sufficient basis to assert that consent has been duly given. Therefore, recordings made within the scope of such consents should be admitted as evidence and constitute basis for fact-finding in court proceedings. Finally, please note that parties' will with regard to use of evidence does not bind state courts.

4.1.5.4 Witness statements

Witness statements, understood as written declarations of knowledge, if submitted as evidence, will be treated as a private document (see above). The court will not use such documents to establish facts contained in the statements due to existing procedural principles, including the principle of immediacy.

4.1.5.5 Electronic evidence

Such evidence falls into the category of other means of evidence admissible under general principles of Polish civil procedure, as explained above. Therefore, if challenged by the other party, the court may attribute low probative value to it.

4.1.5.6 Facsimile

If the party cannot provide the original document, a facsimile may be admitted by a court as other mean of evidence. If not contested, the court will likely use such evidence to establish facts of the case.

It is possible for an attorney-at-law to certify such evidence as a true copy of the original document. As a result, a facsimile would gain probative value of the original document. However, an attorney-at-law cannot certify a copy of a document without prior examination of its original form.

In the event of submission of a facsimile as evidence, the other party may demand that the original document is presented before the court. Failure to provide it would be evaluated by the court. A party's refusal or inability to submit evidence is evaluated by the court when resolving a dispute.

4.1.5.7 Opinion

Since courts are vested with the responsibility of assessing probative value (strength) and credibility of evidence, the Polish Code of Civil Procedure provides for an open catalogue of evidence. Therefore, in principle, all kinds of tangible material may be submitted as evidence.

Nevertheless, under the Code, there are several types of evidence which in practice vary in the probative value the courts attribute to them. Evidence labelled as "other evidence", i.e. not belonging to any other specific group, may be given lower probative value.

4.1.6 Core Provisions

Additional assumptions:

As provided in points 4.2.1 and 4.2.2.

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 4.2.1 or 4.2.2 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.

Possible alterations of conclusions reached in relation to Close-Out Netting

Having reviewed the content of Election Sheet we identified certain alterations which relate to the General Agreement's provisions discussed in point 4.2.1 above. These are alterations of § 10.4, § 10.5 (b), § 10.5 (c), § 10.5 (d) and § 10.5 of the Election Sheet.

The conclusions reached in this opinion in point 4.2.1 (Enforceability of Close-out Netting) will not be affected by a modification of the General Agreement to the effects stipulated in § 10.4, § 10.5 (b), § 10.5 (c) and § 10.5 (d) of the Election Sheet. This is a consequence of the fact that in Section 4.2.1 we discussed the broadest possible content of the General Agreement with respect to § 10.4, § 10.5 (b), § 10.5 (c) and § 10.5 (d) of the Election Sheet.

Possible alterations of conclusions reached in relation to Mulitbranching

The conclusions reached in this opinion in point 4.2.2 (Multibranch Parties) will not be affected by a modification of the General Agreement to the effects stipulated in § 10.4, § 10.5 (b), § 10.5 (c) and § 10.5 (d) of the Election Sheet.

Considering your conclusions reached under point 4.2.1 or 4.2.2 above, what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that point 4.2.1 or 4.2.2 (each provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained in Annex 1 to the EFET General Agreement.

We assume that any modification to any Modifiable Provision would not have the effect of modifying any Core Provision.

We believe that the following provisions contained in the General Agreement are Core Provisions:

- in relation to the conclusions reached in point 4.2.1 (Enforceability of Close-out Netting) - § 10.3, § 10.4, § 10.5, § 11;
- in relation to the conclusions reached in point 4.2.2 (Multibranch Parties) - § 10.3, § 10.4, § 10.5

We believe that modifications to any Modifiable Provision would not affect our conclusions reached in this opinion, so long as the modifications did not have the effect of modifying any Core Provision.

<u>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 4.2.1 or 4.2.2?</u>

The mechanism of close-out netting contained in the Cross Product Master Agreement provides that upon occurrence of a certain event, the principal framework agreements may be terminated, which involves also termination of Individual Contracts concluded under the principal agreement. Following calculation of settlement amounts in accordance with the terminated principal agreements, the settlement amounts will be then subject to set-off and only the difference between the aggregate amounts will be payable to one party.

The Bankruptcy Law does not recognize any netting arrangements, it only allows for close-out netting effected in relation to Individual Contracts being financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them and entered into in accordance with a framework agreement. In the case of the Cross Product Master Agreement, close-out netting consists of two stages. In the second stage it is not financial term operations that are being netted, but settlement amounts arising after close-out netting executed under each principal agreement separately. Thus, even if the Cross Product Master Agreement could be possibly classified as a framework agreement, the close-out netting as provided in the Cross Product Master Agreement could be dismissed in Poland. This is because a principal agreement terminated in accordance with the Cross Product Master Agreement would rather not be classified as an individual contract referred to in article 85 of the Bankruptcy Law.

Therefore, we are of the opinion that the safe-harbor clause stipulated in article 85 of the Bankruptcy Law is not applicable to principal agreements terminated in accordance with the Cross Product Master Agreement.

4.1.7 Governing Law, Arbitration and Jurisdiction

4.1.7.1 Choice of law

The member states of the European Union, including Poland, are bound by Regulation No 593/2008 of the European Parliament and the Council of June 2008 on the law applicable to contractual obligations (**the "Rome I Regulation"**) and the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Since 25 July 2008, Rome I Regulation has been fully applicable and has prevailed over Polish statutes.

As provided for in Article 3 of the Rome I Regulation, a contract is governed by the law of the parties' choice. The parties may include a contractual provision regarding the law applicable either to the whole agreement or to a specific part.

If the parties do not select the governing law, the applicable law is determined on the basis of Article 4 of the Rome I Regulation. With regard to party's business activity, a contract for the provision of services is to be governed by the law of the country of the seller's habitual residence.

However, if the circumstances of the particular case point to closer connection of the contract with a country other than the one mentioned above, the law of this country applies.

If the applicable law cannot be determined on the basis of the aforementioned rules, then the law of the country most closely connected to the contract is considered the governing law.

4.1.7.2 Jurisdiction

Jurisdiction issues shall be resolved with reference to Council Regulation No. 1215/2012 of December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**the "Brussels I Regulation Bis"**).

In accordance with Article 25 of the Brussels I Regulation Bis, the parties may agree on jurisdiction of a court or courts of a chosen member state. This court shall have exclusive jurisdiction to settle any disputes that arise from or in connection with their legal relationship, unless the parties decide otherwise. Jurisdiction of courts of the member state in question may also be excluded due to substantial invalidity of the contract under the law of this member state.

The agreement conferring jurisdiction is to be concluded in one of the following forms:

(a) in writing or evidenced in writing,

(b) in a form that complies with practices established between the parties,

(c) with regard to international trade or commerce, in a form that complies with usage of which the parties are or ought to have been aware and which is widely known to the parties to the contract of the type involved in such trade or commerce.

4.1.7.3 Arbitration

Under Polish law it is possible to refer disputes arising from the contract to local or international arbitration.

Submitting a dispute to arbitration requires a written agreement. It can be concluded after a dispute has arisen. In the Polish context, the clear advantages of arbitration are:

1) flexibility in choice of type of arbitration/venue (including national or international arbitration)

2) flexibility in choice of tribunal (ad-hoc or permanent)

3) flexibility in choice of arbitrator

4) speed and efficiency

5) procedural flexibility

6) confidentiality

7) international recognition and enforcement of arbitral awards.

If litigation commenced before arbitration, the defendant can object to it on the basis of an arbitration agreement. The case will then will be dismissed on formal grounds (exclusion of common court jurisdiction).

Unless there are grounds for the award to be set aside by the court, the same dispute cannot be settled through litigation.

Recourse against arbitral awards is available, but will be granted only in very specific and limited circumstances (e.g. manifest violation of substantive or procedural law that effects the outcome). Thus, generally speaking, challenging an arbitral award is rather difficult and rare.

After recognition by a common court, a national arbitral award has legal force equal to a state court judgment.

International arbitral awards require recognition by a Polish court generally in line with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

A recognized arbitral award constitutes a proper basis for enforcement against the debtor.

4.1.7.4 Opinion

The Parties' agreement on the governing law, submission to arbitration or jurisdiction would be in general upheld in Poland. If invalid or ineffective for whatever reason, the governing law and jurisdiction would be established on the basis of national law or EU law discussed above.

4.1.8 Regulatory Regime

This point discusses whether there are any exchange control laws or license requirements (for example under any banking, securities trading or energy law) that may affect the enforceability of the relevant EFET General Agreement or the Individual Contracts.

4.1.8.1 Currency or exchange control laws

Under Foreign Exchange Law regulations, restrictions with respect to money transfers to EU member States, Organisation for Economic Cooperation and Development (OECD) member States (e.g. the United States of America) and member States of the European Economic Area (EEA) have been generally abolished. Some restrictions will be applicable to parties from countries outside of these international organisations.

If the EFET General Agreement (and subsequently the Individual Contracts) is entered into by a Polish Entity (defined for the purposes of this point as an entity incorporated in Poland as well as the Polish branch of a foreign entity) with parties from countries outside the EU, EEA or OECD, restrictions are applicable to:

(a) the disposal of receivables and other rights, executed upon cash settlement in Poland by parties from countries outside the EU, EEA or OECD;

(b) the purchase of receivables and other rights, executed upon cash settlement by a Polish Entity from parties from countries outside the EU, EEA or OECD.

If transactions are concluded between a Polish Entity and another entity based in the EU, EEA or in an OECD country, it is possible to settle such transactions in any "convertible currency". A list of convertible currencies is specified in the relevant secondary legislation and currently covers 127 currencies, including EUR, USD and GBP. Settlements in any other currencies require a prior foreign exchange permit from the President of the National Bank of Poland (NBP). The above requirements could only affect the use of the EFET General Agreement if the parties choose to settle in a currency other than EUR.

Payment determined in a foreign currency can be made in PLN unless statutory provisions of law, a judgement or contract require that the payment be made in a foreign currency. In addition, conversion of pecuniary payments expressed in foreign currencies into PLN is to be performed at the average exchange rate published by the NBP and applicable as of the date on which the obligation is due and payable (maturity date), unless statutory provisions of law, a judgment or contract state otherwise. If a debtor is in arrears with payments, the creditor will be entitled to demand from the debtor a payment in Polish zlotys based on the exchange rate published on the payment date.

If a contract is governed by Polish law, amounts payable under that contract are determined in a foreign currency and payments under the contract are to be made in that foreign currency and not in Polish zlotys, the contract must expressly exclude payment in PLN. If amounts payable under the contract are expressed in a foreign currency but are to be paid in Polish zlotys, it needs to be borne in mind that the contract should also describe the procedure for calculating the conversion rate; otherwise the average exchange rate published by the National Bank of Poland on the maturity date will apply.

4.1.8.2 Licenses, permits, approvals and other regulatory issues affecting physically settled natural electricity transactions in Poland

(a) The requirement of a local presence in cases in which a foreign entity trades in electricity in Poland

Undertaking and conducting business activity in Poland (defined as a profit-making activity in the field of, among other things, trade or providing services, if it is carried out permanently and in an organized manner) is regulated by a package of bills, so called the Business Constitution for Entrepreneurs, which came into force on 1 September 2017 (Business Constitution).

According to the provisions of the Business Constitution:

i. Foreign entities may conduct business activity in Poland only through establishing a limited liability company, joint stock company, limited partnership or limited-joint stock partnership, or through acquiring shares in such companies;

ii. However, foreign entities incorporated in EU member states, in European Economic Area member states not belonging to the European Union, or in states that are not parties to the EEAA but which enjoy the freedom of establishment on the basis of agreements executed by those states with the European Community and its member states, may undertake and conduct economic activity on the same terms and conditions as Polish entities. Thus, they enjoy the right to undertake and conduct their business activity in the same organisational forms that are available for Polish entities. These are, in particular: civil law partnerships, registered partnerships, professional partnerships, limited liability partnerships, limited joint-stock partnerships, limited liability companies and joint-stock companies;

iii. Also, in a situation where a foreign business entity wishes to conduct business activity in Poland without establishing a subsidiary seated in Poland, it may establish a branch here. However, for business entities not seated in EU member states, in European Economic Area member states not belonging to the European Union or in states that are not parties to EEAA but which enjoy the freedom of establishment on the basis of agreements executed by those states with the European Community and its member states, there is a requirement of reciprocity from the country where the company is seated. The branch may begin activity upon registration in the National Court Register. Branches do not enjoy separate legal identity from the head office of the business entity in the country of origin, and they may not conduct activities beyond the scope of the activities of the business entity;

iv. Foreign business entities may also establish a representative office in Poland. A representative office can only perform advertising and marketing activities of the foreign business entity. The establishment of a representative office is subject to registration in the Register of Representative Offices, kept by the Minister of the Economy.

As explained above, business activity is defined as profit-making activity in the field of, among others, trade, conducted on an ongoing basis and in an organised manner. Therefore, in our view, if a foreign entity conducts its power trading activities with Polish counterparties in such a way that it does not establish any organisational structure within the territory of Poland, it has no assets, business premises, or employees located in Poland, etc., and if sale and purchase agreements with Polish counterparties are concluded outside the territory of Poland and structured in such a way that the delivery/offtake point is located outside Poland (see point 4.2.8.3 (b) below for our views on the issue of "at-the-border" trading), then it could be argued that the above does not constitute conducting business activity in Poland, and therefore no local presence is required.

Any variations from the trading structure described above would have to be carefully examined in order to determine whether they constitute "conducting business activity in Poland" within the meaning of the Business Constitution. If so, a local presence in one of the forms described above would be required (i.e. at least a branch).

(b) The requirement to obtain an electricity trading license

According to the Polish Energy Law, conducting business activity (see point 4.2.8.3 a)) above for an explanation of this term under Polish law) involving electricity trading in Poland requires a licence granted by the President of the Energy Regulatory Authority (the **ERA**). Trade in electricity via an installation of voltage lower that 1 kV owned by the end user and trade in electricity on commodity exchanges, regulated markets and free markets by certain entities including companies running commodity exchanges and commodity brokers does not require a license.

Please also note that the fact of having obtained a licence for conducting business activity in electricity trading in another EU member state would not release an entity interested in starting electricity trading in Poland from the obligation to obtain a local trading licence as well.

The Energy Law defines "trading" as a business activity in the area of the wholesale or retail trade in fuels and energy. "Trading", therefore, certainly includes entering into physically settled transactions for the sale and purchase of electricity. The classification of physically settled Options is not as clear and definite. In the case of those transactions, it is still unsettled under

Polish law whether the licensing obligation is triggered by the mere fact of entering into an Option, or only by the actual exercise of a Put or Call Option. To the best of our knowledge, the ERA has never publicly expressed its opinion on the subject. In our view, there are strong arguments that an electricity trading licence is required to exercise an Option, and not to enter into such a contract. Nevertheless, one cannot exclude the risk that the regulator would attempt to exercise its jurisdiction over the latter as well. In order to fully exclude any such risk, entities planning to enter into electricity Options without applying for the licence first could make a formal inquiry to the ERA in this respect.

It is also worth mentioning that, in our view, it is not possible, by setting the place of delivery to be "at the-border", to create an abstract place of performance of an agreement that is "exterritorial" and therefore belongs to neither Poland nor any of its neighbouring countries. There is no such "no man's land" between the two countries, which means that an obligation is either performed in one country or in the other.

To avoid any doubt, either the EFET General Agreement or Confirmations should specify on which side of the border the obligation is to be performed. If the delivery/offtake point would be situated within the territory of Poland, the transaction could fall under a definition of conducting trading in Poland and trigger local licensing obligations.

Under the Energy Law, licences may only be issued to entities seated in EU member states, Switzerland, Turkey or in EFTA member states —parties to the EEAA. In practice, this means that, apart from entities seated in Poland, only foreign entities from the above countries may apply for a licence and conduct business activity in electricity trading in Poland without the need to establish a subsidiary in Poland (the issue of whether such entities are required to trade through a branch registered in Poland is discussed in point 4.2.8.3 a) above; it is important to stress that the ERA, while issuing trading licences, does not currently require applicants to establish such branches in Poland). All other foreign entities, in order to obtain a trading licence, would need to set up a company in Poland first, or incorporate a company in any of the EU member states, Switzerland, Turkey or EFTA member states — parties to the EEAA. Trading licences are issued for a period of between 10 and 50 years. To obtain a licence, an applicant must demonstrate that it has sufficient funds and technical capabilities to carry out a given type of activity. The ERA may make the issue of the licence conditional upon the applicant providing security for possible third party claims resulting from its activity. The form, content and value of the collateral may be negotiated with the ERA (the value usually does not exceed PLN 10 million). Licences are granted (or refused) by the ERA, as a matter of principle within two months at most from the date submission of the application.

(c) Release from the obligation to have electricity tariffs approved

Under the Energy Law, as a rule, licensed energy enterprises are obliged to apply electricity tariffs approved by the ERA. The tariff is a set of prices, and principles for their application, for the sold electric energy. It is arguable whether prices approved in the tariffs are fixed, or merely maximum prices that energy companies are allowed to charge.

Please also note that we believe the above tariff regime should not be applicable to transactions pertaining to the export of electricity from Poland.

As of 1 July 2001, the ERA released enterprises licensed to trade in electric energy from the requirement to submit electricity tariffs for its approval (this exemption did not apply to trading companies holding a license for both the transmission and distribution of electric energy, in relation to the electricity sold to the end users directly connected to their grid).

Therefore, assuming that entities trading in Poland under a EFET General Agreement would be involved purely in trading activities, they would not be subject to the tariff approval requirement with respect to power trading activities. You should also be aware of the fact that the ERA is entitled to revoke the above exemption if it concludes that the circumstances underlying the exemption have ceased to exist (e.g. that competition in the power trading sector is distorted). At present, revoking this exemption seems unlikely.

The ERA's release described above was made in the form of the regulator's "position statement" published on its official website and in its official bulletin (position statement of the President of the ERA, dated 28 June 2001, published in the *Biuletyn Urzędu Regulacji Energetyki* no.4, July 2001). Please note that there are some doubts as to the effectiveness of the release issued in this form. This is because, pursuant to the applicable procedural regulations, the regulator should have issued and delivered individual administrative decisions to each of the energy enterprises obliged to submit tariffs for approval. The ERA, contrary to the literal wording of the relevant provisions of the Energy Law, has chosen not to do so. Potentially, this may create a risk for the interested energy enterprises intending to make use of the release and apply unapproved prices. This is because, without an individual decision in this respect, it is not entirely certain that the position statement applies to them, and therefore whether they were actually exempted. At the same time, the Energy Law provides for obligatory fines on energy enterprises that apply prices without following tariff approval procedures.

In our opinion, the above risk could be avoided by obtaining written confirmation from the ERA on the application of the position statement to a given trading company. In any case, the risk connected with not having such a confirmation is somehow mitigated by the fact that most of the power generators and traders in Poland have assumed that the regulator's position statement constituted a release within the meaning of the relevant provisions of the Energy Law, and from 2001 we have not heard of any fines imposed on such companies for not having an approved electricity tariff.

Please note that in November 2007 the President of the ERA started the process of issuing ex officio individual decisions to all electricity trading companies holding licences to trade electricity in Poland on their release from the obligation to submit the electricity tariffs for regulatory approval. Later on, the President of the ERA decided to change the scope of the release by excluding the sale of electricity to household customers. Some of the suppliers selling electricity to households appealed against this decision claiming that the electricity market, including household customers, should be freed after 1 July 2007. In one of its judgement, dated 20 September 2011, the Supreme Court stated that the plaintiff (a trading company being also the supplier of last resort) was free of the tariff approval obligation, also with respect to households, since the position statement of the President of the ERA, dated 28 June 2001 was published.

The current legal situation is complex. You should, however, assume that currently no sale of electricity, save for sale to household customers, requires tariffs approved by the regulator. The safest solution for entities holding a license to trade in electricity in Poland is to have this confirmed in an individual decision issued by the President of the ERA, however, the abovementioned ruling of the Supreme Court should provide additional comfort with this respect.

(d) The applicability of an obligation to purchase renewable energy certificates

The Energy Law imposes obligations on energy enterprises engaged in trading electricity and selling this electricity to end users in Poland, to purchase tradable renewable energy certificates in an amount specified in secondary legislation. This obligation also applies to: (i) end customers who are members of a commodity exchange (within the meaning of the Law on Commodity Exchanges) with respect to transactions executed on the commodity exchange in an end customer's own name; and (ii) brokerage houses, with respect to transactions executed on a commodity exchange on behalf of end customers. Such certificates are issued to renewable generators by the ERA. Energy enterprises burdened with the above purchase obligation can alternatively pay a substitute fee to the National Fund for Environmental Protection.

In view of the above, entities selling electricity to Polish counterparties under the EFET General Agreement will not be bound to purchase the certificates, as long as the purchasers are wholesale energy traders and not end users (defined by the Energy Law as "entities who are purchasing power in order to cover their own needs"). It is important to note that the term "end user" as defined in the Energy Law encompasses both household and industrial customers.

In order to mitigate the risk connected with the purchase obligation being triggered by the act of selling electricity directly to end users, it may be advisable to secure that a EFET General Agreement entered into with a Polish counterparty includes an express representation that it is not an "end user" within a meaning of the Energy Law. Such a representation may be especially important in case of dealings with distribution companies. This is because, for technical reasons, distribution companies may use part of such energy for their own needs, e.g. to cover transmission losses. Therefore, with respect to a party interconnected to power grids in Poland, § 21 (I) could have a following wording:

"(I) it does not accept electricity to be purchased under this Agreement as an end user *("odbiorca końcowy")* within the meaning of the Energy Law dated of 10 April 1997;".

(e) Obligation of electricity generators to sell electricity publicly

Pursuant to the recent amendment to the Energy Law, on 1 January 2019 the new wording of Article 49a of the Energy Law entered into force and imposed on power generators in Poland the obligation to sell 100% of generated electricity (i) on a commodity exchange (as defined in the Polish Law on Commodity Exchanges), (ii) on a platform organised by an entity running a regulated market (as defined in the Polish Law on Trading in Financial Instruments) in Poland, (iii) on an organised trading platform (as defined in the Polish Law on Trading in Financial Instruments) organised by an entity running a commodity exchange (as defined in the Polish Law on Commodity Exchanges) in Poland or (iv) within the framework of single day-ahead and intraday coupling conducted by designated electricity market operators within the meaning of Commission Regulation (EU) 2015/1222 dated 24 July 2015 laying down guidelines on capacity allocation and congestion management.

Prior to 1 January 2019 the above obligation was limited to 30% of electricity produced within a year.

Article 49a of the Energy Law does not apply to, among other things, the sale of electricity (i) generated in cogeneration with the average annual conversion efficiency higher than 52.5% (as defined in the relevant secondary legislation), (ii) generated using renewable energy sources, (iii) generated in a generation unit with a total installed capacity not exceeding 50 MW, (iv) necessary for power grid operators for the fulfilment of their duties, (v) produced by units which started production after 1 July 2017 and sold in order to discharge long term commitments related to the financing of investments in electricity generation.

4.1.8.3 The impact of the Law on Trade in Allowances for Emission of Greenhouse Gases and Other Substances

The Law on Trade in Allowances does not provide for any license or similar requirements with respect to trade in allowances (there are permit requirements for installation operators, which do not affect the enforceability of the EFET General Agreement).

4.1.8.4 The potential impact of the Financial Instruments Law on entities concluding EFET General Agreements

Certain aspects of trading in financial instruments are regulated by the Financial Instruments Law. The Law on trading in financial instruments dated 29 July 2005 (Financial Instruments Law), recently amended as of 21 April 2018 in order to implement the MIFID 2 directive, provides for a broad definition of "financial instruments", generally covering securities and other financial instruments. Within the definition there exist infer alia the following sub-categories related to commodities:

(a) options, futures, swaps (...), and any other derivative contracts relating to commodities that are settled in cash or may be settled in cash at the option of one of the parties;

(b) options, futures, swaps and any other derivative contracts relating to commodities that are physically settled provided that they are traded on a regulated market, multilateral trading facility or OTF, except for wholesale energy products traded on OTF which must be physically settled;

(c) not traded on a trading venue options, futures, swaps, forwards and any other derivative contracts relating to commodities that are physically settled, not being for commercial purposes and which have the characteristics of other derivative financial instruments;

(d) options, futures, swaps (...) and any other derivative contracts relating to climatic variables, freight rates, or inflation rates or other official economic statistics that are settled in cash or may be settled in cash at the option of one of the parties, as well as derivative contracts referred to in article 8 of Regulation 2017/565, and other which have the characteristics of other derivative financial instruments;

(e) emission allowances.

For the purposes of this Opinion we have assumed that in relation to electricity all transactions made under the EFET General Agreement (i) are be done over the counter (outside of trading venues), (ii) must be physically settled and (iii) do not have characteristics of financial instruments traded on a trading venue and consequently such transactions are not financial instruments.

However, any transactions in emission allowances, including physically settled and spot transactions, would constitute transactions in financial instruments.

4.1.8.5 Public Procurement Law

The Polish Public Procurement Law stipulates grounds for the public procurement rules and procedures applied in Poland. Generally, the current public procurement regime in force may affect the anticipated transactions under the General Agreement. As a rule, public procurement procedures must be applied to procurements with a value exceeding EUR 30,000 by the state or municipalities themselves. Companies also may, in certain circumstances, become subject to the requirements set out in the Public Procurement Law. This includes, in particular, entities being controlled by the state to a certain extent or conducting their activities on the basis of special or exclusive rights with respect to procurements with a value above EUR 414,000 (for services and deliveries) or EUR 5,186,000 (for construction works) granted by them in order to conduct certain types of activity enumerated in detail in the Public Procurement Law. The list of these activities includes such items as:

(a) exploration for or extraction of oil, gas, coal or other solid fuels;

(b) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of electric energy, or the supply of electric energy to such networks;

(c) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of drinking water, or the supply of drinking water to such networks; or

(d) the management of airports and maritime or inland ports or provision of them to carriers by air, sea or inland waterway.

We are of the opinion that, as wholesale trade in electricity is not specifically mentioned as one of the abovementioned activities, Public Procurement Law will not be applicable in this case. Moreover, entities that generally are obliged to apply Public Procurement Law as a consequence of performing activities listed in points (a) and (b) are not obliged to apply it when purchasing electricity.

Also companies that do not perform activities such as listed in items (a) - (d) above may be subject to Public Procurement Law, if they are being controlled by the state to a certain extent and have been created for a special purpose to satisfy common needs of non-commercial and non-industrial nature.

Under the Public Procurement Law, a formalised tender procedure has to be completed before any contract is concluded. It should also be noted that a failure to satisfy the obligations set out in the Public Procurement Law results in the respective contract being deemed null and void.

The purchase of emission allowances is excluded from the Public Procurement Law regulations.

In view of the above, we have analysed the potential impact of the Public Procurement Law on the transactions under the EFET General Agreement and believe that:

(a) the public procurement procedures will not have to be followed by entities selling emission allowances, electricity and/or Options under the EFET General Agreement, but may have to be applied by some entities in the case of electricity and/or Options purchase transactions;

(b) if a purchaser of electricity is a company (irrespective of whether it is privately-owned, publicly owned or controlled by quasi-governmental entities, including various types of local communities), it will not have to apply the public procurement procedures to enter into and perform the Individual Contracts, provided that they do not perform activities such as listed in point 5.3 (c) - (d) and are not an entity mentioned in point 5.4;

(c) purchasers such as local communities or public entities, which do not have legal personality separate from the State Treasury, may have to employ public procurement procedures to enter into and perform the Individual Contracts.

We also suggest that, in order to adjust § 21 (m) to the Polish public procurement regime, it should have the following wording:
"(m) in the event that regulations on public procurement procedures apply to a Party to any Individual Contract, such Party has fulfilled all of the requirements applicable to it under such regulations."

4.1.8.6 Act on Payment Periods in Commercial Transactions

On 8 March 2013, the new Act on Payment Periods in Commercial Transactions came into force. The Act on Payment Periods in Commercial Transactions imposes various limitations on business entities' contractual freedom to set any payment periods when entering into agreements involving the delivery of goods and/or provision of services. Those statutory provisions may not be contractually modified or waived. The Act on Payment Periods in Commercial Transactions aims at implementing the Directive of the European Parliament and of the Council 2011/7/UE dated 16 February 2011 on combating late payment in commercial transactions.

The Act on Payment Periods in Commercial Transactions applies to electricity and allowances wholesale trading transactions in Poland entered into under the EFET General Agreement. The Act on Payment Periods in Commercial Transactions is applicable to national and foreign entities conducting business activity in Poland (see point 4.2.8.2 a) above for a definition of "business activity") as well as to entities seated in EU member states, European Free Trade Association member states, member states of the European Economic Area, or any country which is a party to the contract with Swiss Confederation, which does not conduct any business activity in Poland and does not have a branch or representative office registered in Poland (see point 4.2.8.2 a) above).

The EFET General Agreement is compliant with the requirements of the Act on Payment Periods in Commercial Transactions.

According to § 13.2 of the EFET General Agreement, the Due Date for payment of a Premium is not set in the master agreement and is to be specified in Individual Contracts. Therefore, assuming that the Act on Payment Periods in Commercial Transactions applies, EFET members, when setting such Premium Payment Dates, should be aware that under the Act on Payment Periods in Commercial Transactions:

a) if the parties to a commercial transaction fix a payment period exceeding 30 days, then by operation of law the creditor is entitled to statutory interest for payment delays in commercial transactions (calculated as the reference rate published by the National Bank of Poland and 8%) from the 31 day after he has fulfilled his non-pecuniary obligation and delivered an invoice to the debtor, until the payment date; and

b) even if the parties do not set a contractual payment date, by operation of law a creditor will be entitled to statutory interest for payment delays in commercial transactions from the 31st day after he has fulfilled his non-pecuniary obligation, until the payment date specified in an invoice issued by such creditor.

Although it is not universally agreed between Polish legal commentators whether the above Act on Payment Periods in Commercial Transactions actually applies to options, and to what extent, we believe that, in order to avoid any potential late interest claims based on the Act on Payment Periods in Commercial Transactions, entities entering into options should always ensure that they set Premium Payment Dates, and that such dates are within the deadline described in item a) above.

It is not certain under Polish law whether the Act on Payment Periods in Commercial Transactions would be applicable if the parties to the EFET General Agreement chose a law other than Polish law to govern the transactions between them. We believe that there are persuasive arguments that the Act on Payment Periods in Commercial Transactions should not apply, but we cannot rule out the possibility that other views will be expressed. In particular, when resolving a dispute in this respect, the Polish court could apply the Act on Payment Periods in Commercial Transactions to an agreement governed by a foreign law for policy reasons.

4.1.8.7 Usury Law

According to the Polish Civil Code, the maximum level of interest resulting from a legal transaction in a year cannot be higher than twice the statutory interest rate (currently the maximum interest rate is 10% p.a. and the maximum default interest rate is 14% and is calculated according to the formula dependent on the reference interest rate published by the National Bank of Poland). Any interest which goes above the maximum level of interest is unenforceable and can be claimed back by the company (including in insolvency).

If the level of interest is not otherwise specified, statutory interest is due which is calculated according to the formula dependent on the reference interest rate published by the National Bank of Poland (reference rate plus 3,5%), i.e. currently 5%. If the level of default interest is not otherwise specified, statutory interest is due which is calculated on the formula dependent on the reference interest rate published by the National Bank of Poland (reference rate plus 5,5%), i.e. currently 7%.

The above regulations will be applicable irrespective of the foreign law chosen.

4.1.8.8 Calculations and Determinations

Any calculation, determination or certificate made or given pursuant to the provisions of the agreements that provide for such calculation, determination or certificate to be final, conclusive or binding (such as a calculation of Losses under § 11.2 (c) of the EFET General Agreement) may be held under Polish law not to be final, conclusive or binding. Where a party to the agreement is vested with discretion or may determine a matter in its opinion, Polish law may require that such discretion is exercised reasonably or that the opinion be based upon reasonable grounds. In particular, a calculation and/or determination might not be held final, conclusive or binding if it is shown to be fraudulent, incorrect, unreasonable, arbitrary, or not to have been given or made in good faith.

4.1.8.9 Control and Profit Transfer Agreement

With respect to a Party incorporated in Poland, § 17.2 (a) (iii) of the EFET General Agreement should be amended as follows:

"(iii) any Entity who is a party to a control and/or profit transfer agreement *("umowa przewidująca zarządzanie spółką zależną lub przekazywanie zysku przez taką spółkę")* within the meaning of article 7 of the Polish Commercial Companies Code *("Kodeks spółek handlowych") (Control and Profit Transfer Agreement)* with the other Party and that other Party is, in relation to that Entity, a subsidiary over which such Entity has control *(Controlling Party); or"*.

4.1.9 Other Provisions

4.1.9.1 Notices and Communications

§ 23.2 of the EFET General Agreement provides for a mechanism according to which all notices, declarations or communications sent by one Party to the other are deemed to be received by such other party and are deemed to be effective after a lapse of a certain period of time from a moment of their dispatch (irrespective of their actual delivery to the other party). You should be aware that, under Polish law, such an "assumption of delivery" may not be effective in all circumstances. In particular, it will not be effective in the event that an addressee is able to prove that the actual delivery took place at a time different from the "deemed" time of delivery. In such a situation, a Polish court would probably not uphold the "assumption of delivery", and would rely on the proven date.

However, we believe that the above clause may still have beneficial results for the sender, because, even if it is not fully enforceable, in practice it will shift the burden of proof relating to the time of delivery from the sender to the recipient.

4.1.9.2 General Terms and Conditions

Under article 384 of the Polish Civil Code, general terms and conditions (general terms) developed by one party may be binding on the other despite the fact that such general terms were not delivered to the other party, or there is no inclusion of, or reference to such terms in an agreement between the parties. The above rule applies to sectors where the use of such general terms is commonly accepted and customary, and provided that the other party could easily have learnt of the contents of the general terms. In addition, article 384(1) of the Polish Civil Code determines that with respect to "continuous contractual relationships", general terms of a given party will become binding on the other party even if they are issued/amended after a contract has been concluded, provided that the requirements of article

384 of the Polish Civil Code are satisfied, and the other party does not terminate the agreement at the earliest opportunity.

Although there is not much legal commentary on the above rules, we believe that the electricity supply sector is one of those sectors where use of general terms is common and customary, and that the EFET General Agreement creates some sort of a "continuous contractual relationship".

Therefore, in order to avoid the risks connected with the potential applicability of the above-described provisions of the Polish Civil Code, we recommend that a new section 6 is added to § 23 of the EFET General Agreement:

"6. General Terms and Conditions: The Parties exclude the application of any Party's general terms and conditions of business and any similar provisions, including those currently applicable and those that will be developed in the future."

4.1.9.3 Partial Invalidity

We would like to draw your attention to the fact that § 23.4 of the EFET General Agreement concerning the partial invalidity of the EFET General Agreement, in some circumstances may be not enforceable under Polish Law. This is due to the article 58 § 3 of the Polish Civil Code, which states that although partial invalidity of an agreement generally does not render the whole agreement invalid, such an agreement will be invalidated as a whole if it is proven that those invalid provisions were so fundamental to the parties that they would not have entered into the transaction without them. Therefore, § 23.4 of the EFET General Agreement will be enforceable only if partial invalidity does not affect those fundamental clauses of the EFET General Agreement or Individual Contracts.

Nevertheless, we do not recommend any amendments to § 23.4 of the EFET General Agreement relating to the effects of partial invalidity of the Agreement, as we believe that an obligation to negotiate stemming from this clause is enforceable and may serve to mitigate the risk resulting from operation of article 58 § 3 of the Polish Civil Code.]

4.1.9.4 § 22.3 of the Allowances Appendix

This clause can be regarded as limitation of the arbitration clause by excluding the authority of the arbitration court to decide specific issues.

We are of the opinion that this is a likely reasonable reading of the provision by an arbitration court, however the effectiveness and validity of such clauses under Polish law generally has not really been tested.

Consequently, if arbitration clause were to be invalid, this clause would likely also be unenforceable.

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