LEGAL OPINION

EFET

EUROPEAN FEDERATION OF ENERGY TRADERS

on

THE ENFORCEABILITY OF CLOSE-OUT NETTING AND THE VALIDITY AND ENFORCEABILITY OF THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF NATURAL GAS AND ITS COLLATERAL AGREEMENTS

Belgrade, 7 April 2020

BDK Serbia: BDK Advokati AOD
Majke Jevrosime 23
11 000 Belgrade
Serbia
Tel: +381 11 3284 212
Fax: +381 11 3284 213
E-mail: office@bdklegal.com

BDK Montenegro
Bulevar Džordža Vašingtona 51
81 000 Podgorica
Montenegro
Tel: +382 20 230 396
Fax: +382 20 230 396
E-mail: office.cg@bdklegal.com

BDK Bosnia and Herzegovina
Gundulićeva 6
78 000 Banja Luka
Bosnia and Herzegovina
Tel: +387 51 250 641
Fax: +387 51 250 642
E-mail: office.banjaluka@bdklegal.com

TIN: 106930367
ID: 20708344

www.bdklegal.com

This legal opinion ("Opinion") is strictly limited to the issues addressed herein and is valid only as of its date. We do not undertake to inform you of any changes which may hereafter come to our attention, unless expressly instructed to do so.

This Opinion is addressed exclusively to the European Federation of Energy Traders ("EFET"). It (i) is for the sole benefit of EFET and its Legal Committee members and any other subscribing entities; (ii) may not be relied upon by, or disclosed to, any other person or legal entity without EFET's or our prior written approval; but (iii) may be made available by EFET members to the appropriate regulatory authorities.

Any rights of EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions, arising out of or as a result of the Opinion, may not be assigned, encumbered or otherwise disposed of or dealt with and neither EFET nor members of EFET who have subscribed to its opinion service may attempt or purport to do so without our prior written consent.

The Opinion is governed by and shall be construed in accordance with Serbian law as it is enacted and interpreted by Serbian courts at the date of the Opinion ("Serbian Law"). The competent courts of Serbia shall have exclusive jurisdiction over all disputes arising out or in connection with the Opinion.

Table of Contents

A INTRODUCTION

A.1 Subject-Matter and Scope of the Opinion

1. We have been instructed by EFET to review and express an opinion under Serbian Law on:

(i) enforceability of close-out netting provisions of the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas ("**EFET General Agreement**");

(ii) enforceability of close-out netting provisions of the EFET General Agreement concerning the multibranch parties ("**Multibranch Parties**");

(iii) enforceability of rights in collateral provided under the EFET Credit Support Annex ("**Collateral**");

(iv) the validity and enforceability of other provisions of the EFET General Agreement in respect of issues such as Limitation of Liability and Force Majeure and their respective consequences ("**General Enforceability**");

(v) in general terms, the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation or other non-written documentation to be eligible for evidencing a legally binding Individual Contract ("**Confirmation Practices**");

(vi) the validity and enforceability of the EFET General Agreement and how this may be affected when certain provisions are modified by the parties ("**Core Provisions**");

(vii) enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**"); and

(viii) the existence of specific licensing requirements or currency or exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("**Regulatory Regime**").

2. We were asked to consider the following documents ("**Documents**"):

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

---

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

(ii) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 6 January 2003),

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

(iv) EFET Allowances Appendix (Gas) to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 28 February 2018),

(v) EFET Credit Support Annex to the General Agreement (Version 1.0, published 5 April 2002),

(vi) EFET Amendment Letter to the Allowances Appendix (Version 3.0, published 3 April 2012),

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

(viii) EFET Allowances Appendix (Gas) to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 17 July 2008),

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

(x) EFET Allowances Appendix (Gas) to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published March 2006),

(xi) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 30 November 2006),

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

(xiii) EFET Sample Amendment Agreement to § 14 (VAT and Taxes), the definition of "Other Tax" and "Zero-Rated" in Annex 1, and the Election Sheet to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published July 2007),

(xiv) EFET Sample Amendment Agreement to § 8 (Remedies for Failure to Deliver and Accept the Contract Quantity) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published October 2005),

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

(xvi) EFET PVB Appendix Version 1.0 to the EFET General Agreement Concerning the Delivery

---

Termination Amount is to be calculated based on all positive and negative Settlement Amounts as determined in compliance with § 11 of the EFET General Agreement.

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

and Acceptance of Natural Gas 2.0(a) (Version 1.0, published 19 September 2016),

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

(xviii) EFET Italian Gas Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 24 June 2004),

(xix) Austrian VTP Appendix to the EFET General Agreement concerning the Delivery and Acceptance of Natural Gas 2.0(a) (Version 2.0, published 20 September 2013),

(xx) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0, published 26 May 2014),

(xxi) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published April 2011),

(xxii) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published on 14 July 2006),

(xxiii) EFET TTF Appendix Guidance Notes (Version 2.0, published 20 September 2006),

(xxiv) EFET TTF Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published on 1 June 2004),

(xxv) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 4.0/October 2018),

(xxvi) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 3.0, published 30 March 2015),

(xxvii) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 31 March 2008),

(xxviii) EFET PEG Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 15 December 2004),

(xxix) EFET ZBT 2004 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published June 2006),

(xxx) EFET ZBT 2012 Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 19 April 2013),

(xxxi) EFET Zeebrugge Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0 4 December 2017),

(xxxii) EFET UK 6:6 Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 2016),

(xxxiii) EFET UK 5:5 Beach Appendix to the EFET General Agreement Concerning the Delivery and

Acceptance of Natural Gas (Version 1.0, published 7 September 2015),

(xxxiv) EFET UK Beach Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 19 April 2013),

(xxxv) EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 7 September 2015),

(xxxvi) EFET NBP Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published December 2006),

(xxxvii) EFET GasPool Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas Version 2.0/January 6, 2003 and Version 2.0(a)/May 11, 2007 (Version 1.1(a), published 1 March 2012),

(xxxviii) EFET GasPool Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas Version 2.0/January 6, 2003 and Version 2.0(a)/May 11, 2007, replacing earlier the GUD Appendix (Version 2.0, published 31 December 2008), which itself replaced the BEB Appendix (Version 1.0, published September 2007), (Version 1.1, published 19 May 2010),

(xxxix) GUD Appendix (Version 2.0, published 31 December 2008), which itself replaced the outdated BEB Appendix (Version 1.0, published September 2007),

(xl) EFET ITAB Appendix (Version 1.0, published 1 December 2009),

(xli) EFET ITAB Appendix Guidance Notes (published 20 January 2010),

(xlii) EFET Gas Capacity Appendix (Fluxys/GRTgaz) (Version 1.0, published 31 December 2008),

(xliii) EFET Polish VP Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 1.0, published 14 December 2013),

(xliv) EFET Individual PRISMA Gas Capacity Contract (version 2.0, published 15 October 2014),

(xlv) EFET Individual PRISMA Gas Capacity Contract (version 1.0, published 7 May 2014),

(xlvi) Guidance Notes for the Individual PRISMA Gas Capacity Contract (published 14 May 2014),

(xlvii) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 16 December 2013).

3. For purposes of Part E.6 (Confirmation Practices) only, we were asked to consider the following documents:

(i) EFET Electronic Confirmation Agreement (published 28 June 2005),

(ii) Confirmation of Allowance Transactions (including AEUA, EUA, CER & ERU Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2)) to the Allowances Appendix to the EFET General Agreement

Concerning the Delivery and Acceptance of Natural Gas (Version 2.0, published 3 April 2012), and

(iii) Confirmation of Allowance Transactions (including EUA, CER & ERU Transactions) to the Allowances Appendix to the EFET Power Master Agreement or to the EFET Gas Master Agreement (Version 1.0, 6 March 2008).

4. For purposes of Part E.7 (Core Provision) only, we were asked to consider the following documents:

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

(ii) EFET Master Netting Agreement (Version 1.0, published 25 June 2010),

(iii) 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),

(iv) EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master agreement (Version 1.0, published 23 June 2003), and

(v) EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011).

5. We were provided with instructions attached as Annex 1 to this Opinion ("**Instructions**"). We have been instructed to review and express our opinion both in structure and content substantially in accordance with the Instructions.

A.2 Exclusions

6. The Instructions intended for the opinion to include, *inter alia*, the EFET Italian Natural Gas Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 24 June 2004). However, because Part I of the Italian Natural Gas Appendix is a customization of the General Agreement to the Mandatory Provisions of Italian law, while Part II is meant to subject the entire General Agreement to Italian law, we exclude the EFET Italian Natural Gas Appendix to the General Agreement Concerning the Delivery and Acceptance of Natural Gas (Version 1.0, published 24 June 2004) from the scope of our Opinion.

7. Certain Appendices heavily rely on the rules of a market operator, TSO or another entity of a third country and therefore our review of those documents was necessarily limited.

A.3 Limitations

8. This Opinion is based on and limited to the laws, bylaws and other regulations of the Republic of Serbia in force and as interpreted as of the date of this Opinion ("**Serbian Law**"). We do not undertake to inform you of any relevant changes to the Serbian Law or its interpretation which may hereafter come to our attention, unless expressly instructed to do so.

9. This Opinion and our engagement are to be governed by, and construed in accordance with Serbian Law, as it stands at the date of this Opinion.

10. References in this Opinion to BDK Persons are to OAD BDK Advokati (registered number 20708344) ("**BDK**") and BDK's respective partners, employees and consultants engaged on a hire basis ("**BDK Persons**").

11. Neither EFET nor any other person that may rely on this Opinion in accordance with its terms (nor any of their respective officers, employees, advisers, agents or representatives) shall make any claim against any BDK Person (including, for the avoidance of doubt, general partners of BDK) other than BDK in respect to any losses, liabilities, damages, costs, expenses or fees suffered or incurred in connection with reliance on this Opinion.

12. The total aggregate liability of BDK Persons (to the extent not excluded by the above provisions) for any losses, liabilities, damages, costs, expenses or fees suffered or incurred in connection with reliance on this Opinion is limited to EUR 2,500,000.

A.4 Definitions

13. All capitalized terms not defined in this Opinion shall have the meaning ascribed to them under the EFET General Agreement.

14. In this Opinion:

Association of Local Government, if Party A, means an entity jointly established by the Serbian political sub-divisions (*jedinice lokalne samouprave*) pursuant to the Serbian Local Self-Government Act (*Zakon o lokalnoj samoupravi*).

Bank means, if Party A, a joint-stock company organized pursuant to the Banking Act, which has the license issued by the NBS and engages in deposit taking and granting credit, and may perform other activities in accordance with the law. Bank is the only type of credit institution under Serbian law.

Corporation means, if Party A, a legal entity organized pursuant to the Companies Act, as a limited liability company (*društvo sa ograničenom odgovornošću* or *d.o.o.*) or a joint-stock company (*akcionarsko društvo* or *a.d.*) (public (listed) or private (not listed)).

Insurance Company means, if Party A, a joint-stock company organized pursuant to the Serbian Insurance Act (*Zakon o osiguranju*), which has the license issued by the NBS and carries on insurance business.

Investment Fund Management Company means, if Party A, a legal entity organized pursuant to the Serbian Investment Funds Act (*Zakon o investicionim fondovima*), which has the license issued by the Serbian Securities Exchange Commission and engages in management of investment funds.

Investment Services Provider/Investment Firms means, if Party A, a legal entity organized pursuant to the Capital Markets Act, which has the license issued by the Serbian Securities Exchange Commission and engages in providing investment services to third parties, i.e. which performs one or more investment activities on professional basis.

Municipality means, if Party A, a municipality (*opština*) in Serbia that is duly established pursuant to the Serbian Local Self-Government Act.

Partnerships means, if Party A, a limited partnership (*komanditno društvo*) or a general partnership (*ortačko društvo*).

Publicly-owned Corporation means, if Party A, a public company (*javno preduzeće*) or a company with capital owned by the state (*pravno lice sa državnim kapitalom*).

(Remainder of Page Intentionally Left Blank)

B EXECUTIVE SUMMARY

15. Subject to all assumptions, qualifications and more detailed analysis and elaborations set out in this Opinion, our conclusions are that:

    (a) The right to Early Termination (whether by notice under § 10.3 of the EFET General Agreement or by Automatic Termination under § 10.4 of the EFET General Agreement) for Material Reason described in § 10.5(c) of the EFET General Agreement is enforceable.

    (b) With respect to Eligible Financial Contracts, the provisions of § 10.3 and 11 of the EFET General Agreement are enforceable against Party A in and outside insolvency. However, they may be unenforceable if the Party A is a Bank that is subject to resolution proceedings. In order to qualify as Eligible Financial Contracts, the Individual Contracts would have to be concluded between two financial market entities (such as banks and similar financial institutions) and also would need to qualify as financial transactions – please refer to section E.1.1.2 for further details. As participants on the Serbian energy market usually do not meet these conditions, it can be assumed that vast majority of Individual Contracts would not qualify as Eligible Financial Contract and thus would not be able to benefit from the safe harbour provisions of Serbian insolvency law.

    (c) Close-out netting of the Settlement Amounts under Individual Contracts which are Eligible Financial Contracts, on the one hand, and Individual Contracts which are not Eligible Financial Contracts, on the other hand, is not enforceable against Party A in insolvency.

    (d) With respect to non-Eligible Financial Contracts, in order to lower the risks associated with potential insolvency of Party A, we recommend to elect Automatic Termination under § 10.4 of the EFET General Agreement, to be triggered by the filing of the Petition against Party A, and deemed effective immediately prior to the filing of Petition. In that case, no grace period should be made applicable in § 10.5.(c)(iv). The proposed Automatic Termination clause could read as follows:

        "*Automatic Termination shall apply to Party A and shall be triggered by the filing (by Party A or any other party) of the petition for initiation of insolvency proceedings (*predlog za pokretanje stečajnog postupka*) over Party A, with termination effective immediately prior to such filing. Filing of the petition for initiation of insolvency proceedings shall be considered a Material Reason provided for in § 10.5.(c)(iv).*"

        However, we cannot exclude that the courts may disregard the foregoing Automatic Termination provision as circumvention of the mandatory provisions of the Insolvency Act.

    (e) With respect to Physical Commodity Transactions, the provisions of §§ 10.3, 10.4 and 11 of the EFET General Agreement are not enforceable against Party A even outside its insolvency if its bank accounts are attached by creditors. The online public registry of the National Bank of Serbia ("**NBS**") contains information on the corporate entities whose bank accounts are attached. Netting under Physical Commodity Transactions requires that Party A and Party B sign a separate agreement on set-off or exchange separate written statements proposing and accepting set-off, respectively.

(f) Individual Contracts which are not Eligible Financial Contracts and which are not effectively terminated as of the opening of insolvency proceedings over Party A, are subject to the right of insolvency administrator to cherry-pick whether to assume the contract or repudiate it.

(g) Individual Contract which are not Eligible Financial Contracts, and payment and close-out netting operations thereunder, are vulnerable as preference on all grounds.

(h) Claim filed in insolvency proceedings pending over Party A is converted into Serbian Dinars by applying the middle exchange rate published by NBS on the date of the opening of insolvency proceedings. No mechanism is foreseen to protect Party B from adverse changes to the exchange rate from the date of the opening of insolvency proceedings until the settlement date.

(i) The foregoing conclusions are not affected by the fact that Party A is acting as a Multibranch Party.

(j) The foregoing conclusions are not affected by the fact that Party B is acting as a Multibranch Party.

(k) Close-out netting in case of Early Termination for non-insolvency related Material Reasons is enforceable under Serbian law.

(l) Thee is no legal or regulatory classification of emission allowances under Serbian law. We think emission allowance is neither goods nor services, but a *sui generis* right. Allowance Transactions are not Eligible Financial Contracts. It is unclear which rules, if any, apply to the netting of payments or delivery obligations in relation to Allowance Transactions. In the absence of explicit statutory permission, we cannot confirm the Physical Settlement Netting and Cross-Product Payment Netting provisions of the Allowance Appendix are enforceable.

(m) Based on an opinion of the NBS, only financial market entities (such as banks and similar financial institutions referred to in paragraph 35 as Eligible Parties) may provide collateral under the Credit Support Annex and, among them, only Banks may freely transfer Cash to Party B to an off-shore account, while the other Eligible Parties may transfer Cash to Party's B non-resident Serbian account only.

(n) We do not think that there is any risk of re-characterisation of transfer of Cash collateral by Eligible Party under the Credit Support Annex. The EFET Credit Support Annex entered into with a non-Eligible Party could be re-characterized by Serbian court as pledge agreement and title transfer as security interest. This would further lead to potential invalidity of such security interest as incompatible with Serbian Law, primarily because the subject-matter of the pledge is not sufficiently defined. In any event, such EFET Credit Support Annex would not be able to benefit from the safe harbour provisions of Serbian insolvency law.

(o) Serbian law requires financial collateral arrangements to be evidenced in writing (whereas "writing" includes recording by electronic means and any other durable medium which allows the unchanged reproduction of the information stored).

(p) Once the Transferee acquires ownership in a collateral, the Serbian Law imposes no requirement to take any further action to ensure that the title continues.

(q) The provisions of EFET General Agreement governing the non-performance due to Force Majeure (§ 7 of the EFET General Agreement) are enforceable under Serbian law.

(r) The provisions of EFET General Agreement governing the remedies for non-performance (§ 8 of the EFET General Agreement) are enforceable under Serbian Law.

(s) The provisions of EFET General Agreement governing the limitation of liability (§ 12 of the EFET General Agreement) are enforceable under Serbian Law, subject to certain limitations and qualifications contained in Section E.5.3.

16. Please note that the above executive summary does not form part of the opinion and is given for convenience purposes only.

(Remainder of Page Intentionally Left Blank)

C GENERAL QUALIFICATIONS

17. More specific qualifications in this Opinion shall not be to the prejudice of the ensuing more general qualifications. Furthermore, whenever a particular qualification is linked to a specific provision of EFET General Agreements, it shall be deemed to qualify another provision of that Agreement or any other Document to which it is equally applicable.

18. Interpretation of Serbian Law is a matter of opinion of the court or other public bodies and our Opinion must remain subject to the particularities of each individual case, all of which may not be covered in general, and in particular, within the scope of this limited Opinion. Where in case of a dispute the interpretation of the EFET General Agreement is to a large extent subject to the discretion of the court, or is an issue of first impression, our Opinion should not be taken to imply that a court will necessarily give effect to or put into practice all Parties' rights and obligations or support all our conclusions in the Opinion.

19. The opinions expressed in the Opinion are limited strictly to the Documents listed in Section A.1 of this Opinion and are not to be construed to extend to any other documents of similar nature issued and endorsed by EFET.

20. The EFET General Agreement has been drafted to afford the parties flexibility and may accordingly be widely amended and specified not only by selecting from pre-defined optional provisions but also by inserting specifically negotiated changes in the Election Sheet. It is impossible to render an exhaustive and final legal opinion that would cover customized provisions that the Parties could draft via Election Sheet.

21. We have limited our review of the Documents referred to in Section A.1 of this Opinion to specific issues stated in the Instructions. The Opinion must, therefore, be strictly limited to the issues addressed herein.

22. For the avoidance of doubt, the Opinion does not substitute for an independent review of any individually negotiated EFET documentation.

23. To our knowledge, Serbian courts have not so far entertained any dispute or passed a decision or taken a position on the capacity to enter into, validity or enforceability of EFET General Agreement, whether governed by Serbian Law or another law, and whether in an insolvency or in a non-insolvency context. Where no court decision is available on a specific subject, the possibility cannot be excluded that the courts would not rule in accordance with an opinion or a conclusion expressed herein.

24. Even if a court decision or opinion of an authority is available that supports an opinion or a conclusion expressed herein, this does not mean that a court or another competent authority, as the case may be, is legally bound to the conclusions made in such decision or opinion, but only indicates that a certain (non-binding) precedent exists. Where in case of a dispute the interpretation of a legal provision of or relevant to the EFET General Agreement would be to a large extent subject to the discretion of the court or other competent decision-maker, our Opinion should not be taken to imply that a court or such other competent decision-maker will necessarily give effect to or put into practice all parties' rights and obligations or support all our conclusions in the Opinion.

25. When we use the term "enforceable" or similar terms in this Opinion, it means that the obligations of the parties to the EFET General Agreement are of a type that the courts of Serbia should be expected to usually enforce. It does not mean that such obligations will necessarily be enforced in all circumstances in accordance with their terms. In particular, claims may become barred under the statute of limitation or prescription, or may be or become subject to a counterclaim, the defense of set-off or other defense.

26. Under Serbian law, any creditor having a due claim may seek to avoid transactions undertaken by its debtor, even outside the insolvency proceedings, if such transaction is deemed to be to the detriment of the challenging creditor, i.e. if as a result of such transaction the debtor does not have enough assets to satisfy the creditor's claim (*actio pauliana*). A transaction for remuneration can be avoided on this basis only if the debtor knew or should have known at the time of the transaction that the transaction damages its creditor and the debtor's counterparty was or could have been aware of that.

27. A Serbian court could hold invalid (or refuse recognition and enforcement of a foreign judgment imposing) any obligation that it would consider factually or legally impossible to be performed, contrary to public policy or good norms or undetermined and undeterminable.

28. Under Serbian law, a party may seek from a court to rescind a contract if after the execution of the contract circumstances arise which make performance by such party more difficult or frustrate the purpose of the contract, in either case if it is obvious that the contract no longer matches the expectation of the parties and if it would be, based on general opinion, unfair to maintain it (*rebus sic stantibus*).

29. A determination, designation, calculation, notification, opinion, certificate or the like by any Party to the EFET General Agreement to a matter provided for therein may, in certain circumstances, be held by a Serbian court not to be final, conclusive and binding, notwithstanding the provisions of such document, in particular if such determination, designation, calculation, notification, opinion, certificate or the like is erroneous, arbitrary, ambiguous or insufficiently precise. Furthermore, the Serbian court may not recognize records of one Party as conclusive evidence of the existence and accuracy of an external event, circumstance or fact.

30. If a Party to the EFET General Agreement knew or ought reasonably to have known that any representation, warranty, acknowledgment or statement of the other Party was incorrect, inaccurate or incomplete or any covenant was or could reasonably be expected to be impossible to fulfil, such Party may be limited in enforcing its rights under such representation, warranty, acknowledgment, statement or covenant, as the case may be.

D GENERAL ASSUMPTIONS

31. In our examination, and for all purposes of the Opinion, we have, unless specifically indicated otherwise, assumed:

(i) Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in Serbia ("**Party A**").

(ii) The EFET General Agreement (and any of the Documents) is, in accordance with an election made by the Parties thereto, governed by the laws of Germany or England and Wales.

(iii) Each EFET General Agreement (and any of the Documents) is enforceable under the laws of any jurisdiction (other than the laws of Serbia) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

(iv) 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 of the Instructions.

(v) The Individual Contracts provide for the physical delivery of commodities 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 the combination of, as applicable, a partial or total cancellation of otherwise offsetting physical delivery obligations, coupled with a net financial payment.

32. Additional assumptions apply in relation to specific Sections of this Opinion only, and to the extent they apply, they will be set forth in the relevant Sections.

33. Unless otherwise expressly stated, all reference in this Opinion to Articles, Sections and Sub-Sections are references to Articles, Sections and Sub-Sections of the EFET General Agreement.

(Remainder of Page Intentionally Left Blank)

E ISSUES AND ADDITIONAL ASSUMPTIONS

E.1 ENFORCEABILITY OF CLOSE-OUT NETTING

E.1.1 Winding-Up, Insolvency or Attachment

E.1.1.1 Additional Assumptions

34. The following additional assumptions apply to this Section:

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

(ii) After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Serbia and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") Individual Contracts for the insolvent counterparty.

E.1.1.2 Eligible Financial Contracts under the Financial Collateral Act

35. The Financial Collateral Act[3] regulates, among other things, close-out netting and other insolvency-related protections in the event of insolvency of a specified eligible Serbian counterparty to specified limited types of financial contracts ("**Eligible Financial Contract**"). Eligible Financial Contract under the Financial Collateral Act is:

(i) financial collateral agreement; and:

(ii) "*a master or other agreement concluded in the manner and form customary in business* practice between [the Eligible Parties] which creates a financial obligation upon the debtor *<u>and the right upon creditor to receive a settlement in cash and/or transfer of money or financial instruments</u> in accordance with the law (financial transaction), that is:*

(i) <u>contracts for "financial derivatives" within the meaning of the [Capital Markets Act[4]] (options, futures, swaps, interest rate forwards and others)</u>;

…; and

(iv) other financial contracts specified in a list to be published by the NBS" (there is currently no such list) " (emphasis added),

if each party to such contract belongs to one of the following categories ("**Eligible Party**"):

(a) the Republic of Serbia, its autonomous province, city or municipality, a public authority, a

---

[3] Zakon o finansijskom obezbeđenju, "Official Gazette of the Republic of Serbia", No. 44/2018

[4] Zakon o tržištu kapitala, "Official Gazette of the Republic of Serbia", Nos. 31/2011, 112/2015, 108/2016 and 9/2020

public sector body charged with management of public debt or holding accounts for public-funded entities, a state development agency or an export credit and insurance agency;

(b) the NBS;

(c) a Serbian licensed financial institution, including banks, insurance companies, broker-dealer firms, investment fund and voluntary pension management companies, investment funds, electronic money institutions, payment institutions, public post operator (when acting as a financial service provider, factoring companies and financial lease companies);

(d) a Serbian central counterparty, settlement agent or clearing house;

(e) a foreign state or public authority, including public sector bodies charged with or intervening in the management of public debt, but excluding publicly guaranteed undertakings;

(f) the ECB and other central banks;

(g) IMF, BIS, EIB and other specified developments banks;

(h) EU financial institutions subject to prudential supervision, including credit institutions and the financial institutions as defined in Directive 2000/12/EC, investment services providers/investment firms, and their non-EU equivalents, insurance companies, UCITS and UCITS management; and (ix) central counterparty, settlement agent or clearing house as defined in Directive 98/26/EC, and their equivalents acting in the third-country futures, options and derivatives markets.

36. As mentioned in paragraph 35, the definition of "financial transaction" in the Financial Collateral Act refers to "financial derivative within the meaning of the [Capital Markets Act] (option, future, swap, interest rate forward and others)". The Capital Markets Act does not define "financial derivatives" as such, but it lists, defines and regulates "financial instruments". In line with the Directive 2004/39/EC (MiFID I) and Directive 2014/65/EU (MiFID II), the definition of "financial instruments" encompasses, *inter alia*,

"*options, futures, swaps, forward rate agreements and any other derivative financial instruments relating to commodities that:*

- *must be settled in cash, or*

- *may be settled in cash at the option of one of the parties other than by reason of default or other termination event*"; and

"options, futures, swaps, forward rate agreements and any other derivative contracts relating to (…) *emission allowances* (…) *that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event).*"

37. Commodity Forward and Commodity Swaps are commodity derivatives that must be settled in cash and therefore qualify as Eligible Financial Contracts.

38. Commodity Options may result in physical delivery rather than cash settlement if the debtor of the obligation chooses to settle it physically. The test under the definition of Eligible Financial

Contract is that the contract must create "a financial obligation upon the debtor and the right upon creditor to receive a settlement in cash". Under the Commodity Call Option, the creditor does not have the right to request a cash settlement but only physical delivery, while the debtor has the right to perform by cash settlement. Even though this has not yet been confirmed by any authority, we think that the Commodity Call Option does qualify as Eligible Financial Contract despite the fact that the creditor does not have the right to receive cash settlement from the outset but only from the moment the debtor elects to perform in cash. The option of the debtor to settle its obligation in cash rather than by physical delivery is what makes this contract a financial contract rather than a commodity trade.

39. The definition of "commodity" in the Capital Markets Act refers to "any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy". The capacity rights do not fit within this definition. Therefore, an Individual Contract which involves a purchase of these rights (forward, option), or uses any of them as a benchmark (swap), is not an Eligible Financial Contract.

40. Physical Commodity Transactions, being physically settled, do not qualify as Eligible Financial Contracts.

41. In conclusion:

(i) Commodity Forward, Commodity Swap and Commodity Option are covered by the insolvency-related protections of the Financial Collateral Act if Party A is a Bank, an Investment Services Provider/Investment Firm, an Insurance Company, an Investment Fund Management Company, other Financial Institution referred to in paragraph 35, or a Municipality, and if Party B falls within one of the categories referred to in paragraph 35.

(ii) Commodity Forward, Commodity Swap and Commodity Option are not covered by the insolvency-related protections of the Financial Collateral Act if Party A is a Corporation, a Partnership, an Association of Local Government, a publicly-owned Corporation or a Quasi-Governmental Entity.

(iii) Physical Commodity Transactions are not Eligible Financial Contracts.

(iv) Commodity Forwards and Commodity Options involving a purchase of capacity rights and Commodity Swaps using capacity rights as a reference value, are not Eligible Financial Contracts.

E.1.1.3 Enforceability of Early Termination rights (whether by notice under § 10.3 of the EFET General Agreement or by Automatic Termination under § 10.4 of the EFET General Agreement) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement

42. Termination by notice under § 10.3 of the EFET General Agreement for Material Reasons referred to under § 10.5 (c) is enforceable under Serbian law.

43. However, Individual Contracts which are not Eligible Financial Contracts and which are not effectively terminated prior to the opening of insolvency proceedings against Party A are subject to the right of the insolvency administrator to decide whether to assume or repudiate such transactions. This follows from Article 94 of the Serbian Insolvency Act, which regulates legal

consequences of the opening of insolvency proceedings on bilateral contracts which have not been fully performed by the date of the opening of insolvency proceedings ("**Executory Contracts**")[5]. This means that the insolvency administrator may "cherry-pick" and assume in-the-money contracts while repudiating out-of-money contracts. This risk exists if no Automatic Termination is stipulated in the Election Sheet or the EFET General Agreement is not effectively terminated by notice prior to the court's decision on the opening of insolvency procedure. If the insolvency administrator of Party A elects to perform an Executory Contract but Party A later fails to perform, Party B shall be deemed a priority creditor. If the EFET General Agreement and/or any of the Individual Contracts happen to remain effective after the judgment on the opening of insolvency proceedings over Party A is entered, Party B may invite Party A's insolvency administrator to pronounce whether he/she intends to uphold those contracts. The administrator has 15 days to respond. The courts have held that if the administrator fails to respond, it shall be deemed to have repudiated the contract. In that case, Party B may register in insolvency proceedings its claim against Party A stemming from such repudiation, but at this point close-out netting under the EFET General Agreement which is not an Eligible Financial Contract would not be enforceable. See paragraph 51 below. The insolvency administrator may not exercise its powers under Article 94 in respect of Individual Contracts which are Eligible Financial Contracts.

44. Serbian Law distinguishes between (a) termination for breach of an obligation under the contract (non-performance), which has to be by notice, except in fixed-term contracts when it is automatic unless the creditor upholds the contract, and (b) termination of contract upon the occurrence of an event or circumstance (terminating condition, *raskidni uslov*), which is an automatic termination.[6] Material Reasons under § 10.5 (c) of the EFET General Agreement, though they represent events related to Party A, do not represent a failure to *perform* the Agreement. However, irrespective of the differences under Serbian law between events of default and terminating conditions, we think that the principle of freedom of contract permits the Parties to stipulate in their EFET General Agreement that a particular event or occurrence will represent a Material Reason entitling the party not affected by the relevant event or circumstance to terminate the Agreement by giving a notice to the other Party. We do not see any public policy reasons for restricting party autonomy in this respect.

45. Automatic Termination under § 10.4 of the EFET General Agreement for Material Reasons referred to under § 10.5 (c) is enforceable under Serbian law.

46. The Obligations Act[7] expressly regulates automatic termination in two contexts: fixed term-contracts and contracts subject to terminating conditions. According to Article 74 (1) of the

---

[5] For the purpose of the present discussion, we shall assume that all Individual Contracts can be qualified as executory contracts.

[6] The Obligations Act contains only one article on the right to early terminate a contract for a credit event, but this provision is not applicable to the situation embodied in § 10.3 in connection with § 10.5(c) of the EFET General Agreement.

[7] Zakon o obligacionim odnosima, "Official Gazette of the SFRY", nos. 29/78, 39/85, 45/89 and 57/89, "Official Gazette of the FRY", No. 31/93 and "Official Gazette of the Serbia and Montenegro", No. 1/2003

Obligations Act, a contract is concluded under a condition (*"uslov"*) if its commencement or termination depends on an uncertain fact. According to Article 74 (3) of the same law, a contract entered into under a terminating condition (*"raskidni uslov"*) automatically ceases to be in effect upon the occurrence of the condition. The Serbian law does not expressly regulate whether the parties may stipulate that the contract shall be deemed terminated before or after a certain period of time after the occurrence of the terminating condition. To our knowledge, the courts have not made a pronouncement on any of these issues. Nevertheless, we think that the foregoing falls within the legitimate realm of party autonomy.

47. With respect to the Individual Contracts which qualify as Eligible Financial Contracts (see paragraph 41), the election of Automatic Termination is not required or recommended. With respect to the Individual Contracts which do not qualify as Eligible Financial (see paragraph 41), the election of Automatic Termination is recommended for reasons explained in paragraph 54.

E.1.1.4 Enforceability of Close-out Netting in the context of Party A's insolvency

48. Article 82 of the Insolvency Act[8] contains rules on set-off in insolvency with respect to contracts which do not qualify as Eligible Financial Contracts, while with respect to Eligible Financial Contracts, the provisions of the Financial Collateral Act on close-out netting apply.

E.1.1.5 When the Individual Contract is not an Eligible Financial Contract

49. Article 82 of the Insolvency Act provides:

"If the creditor acquired the right to set-off its claim against the insolvency debtor with a claim of insolvency debtor against that creditor prior to the filing of the petition for initiation of insolvency proceedings, such right shall not be lost as a result of the opening of the insolvency proceedings.

The creditor is obliged to submit to the court his claim in its entire amount and a set-off notice until the expiry of the deadline for registration of claims. Otherwise, the creditor shall forfeit its right to set-off."

50. Under the EFET General Agreement, on the Early Termination Date, the obligations of each Party under the Individual Contracts are released and replaced by a new obligation of the Party owing the higher Settlement Amount to pay to the other Party the difference between the Settlement Amounts (the Termination Amount). This could be interpreted under Serbian law to involve a set-off in order to arrive to the net obligation of one Party.

51. Close-out netting under Individual Contract which is not Eligible Financial Contract is not enforceable in the event of Party A's insolvency. This is because according to Article 82 paragraph 1 of the Insolvency Act, set-off may be exercised after the opening of insolvency proceedings over Party A if the right to set-off was "acquired" prior to the filing of the Petition. In

[8] Zakon o stečaju, "Official Gazette of the Republic of Serbia", nos. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018 and 95/2018

this case, Party B as creditor has to register in insolvency proceedings its gross claim and a set-off notice, before the expiry of the deadline for claims registration.[9] This provision apparently does not have in mind automatic set-off. When set-off is automatic and not by notice, the distinction between the moment of "acquisition" of the set-off right and the completion of the set-off becomes irrelevant. In any event, the question is when the right to set-off is deemed to be "acquired" in the context of close-out netting under the EFET General Agreement. Under the general set-off provisions of the Obligations Act, one can extinguish one's own obligation to the counterparty by offsetting it against the counterparty's claim, if both claims are for money, ascertained and due and payable.[10] Under the EFET General Agreement, the Termination Amount is ascertained on, or as soon as reasonably practicable after, the Early Termination Date. This means that, when the Parties elect Automatic Termination, the right to effect a set-off in the context of close-out netting under the EFET General Agreement is acquired on the Early Termination Date. When Early Termination is by notice pursuant to § 10.3, the right to effect a set-off can be said to be "acquired" either on the date the Early Termination notice is received by the terminated Party or on the Early Termination Date.

52. Consequently, the opening of insolvency proceedings over Party A does not affect enforceability of close-out netting when the Early Termination Date has occurred at any time before the filing of the Petition. If one took a more liberal view (not yet confirmed by any authority) that the right to set-off is "acquired" when the Early Termination notice is served on Party A, the close-out netting would also be enforceable if the Early Termination notice has been served prior to the filing of the Petition.

53. However, Article 82 of the Insolvency Act does not seem to support close-out netting when Early Termination notice is served after the filing of the Petition.

54. This means that Party B to an Individual Contract which is not an Eligible Financial Contract should consider stipulating for Automatic Termination, to be triggered by the filing of the Petition against Party A, and to be deemed effective immediately prior to the filing of Petition. In that case, no grace period referred to in § 10.5.(c)(iv) should be designated in the Election Sheet. The proposed Automatic Termination clause could read as follows:

"*Automatic Termination shall apply to Party A and shall be triggered by the filing (by Party A or any other party) of the petition for initiation of insolvency proceedings (*predlog za pokretanje stečajnog postupka*) over Party A, with termination effective immediately prior to such filing. Filing of the petition for initiation of insolvency proceedings shall be considered a Material Reason provided for in § 10.5.(c)(iv).*"

55. We think that it is within legitimate realm of party autonomy to agree that termination is to be deemed to have taken place immediately prior to the occurrence of the designated termination event. However, this view has not yet been confirmed by any authority in Serbia. We therefore

---

[9] This deadline is set in the decision on the opening of insolvency proceedings and cannot be shorter than 30 days and longer than 120 days from the date of the publication of the notice on the opening of insolvency proceedings in the Official Gazette of the Republic of Serbia.

[10] Article 336 *et seq*.

cannot exclude that the courts may disregard such provision as circumvention of the mandatory provisions of the Insolvency Act.

56. According to Article 83 of the Insolvency Act:

"*Set-off in insolvency proceedings will not be allowed if:*

(1) the creditor has obtained the claim sought to be set-off within the period of 6 months prior to the filling of the petition for commencement of insolvency proceedings while the creditor knew or under the circumstances should have known that the debtor is insolvent;

(2) the conditions for set-off were acquired based on a transaction which may be. subject to avoidance in insolvency..."

Although this has not yet been confirmed by courts, we think the foregoing provision does not authorize the insolvency administrator to avoid set-offs completed automatically by way of a contract prior to the opening of insolvency proceedings over Party A, because the avoidance claims are regulated separately in the Insolvency Act and the relevant provisions do not extend to set-off. The foregoing provision, in our view, restricts the exercise of set-off after the opening of insolvency proceedings, i.e. it derogates the general provision of Article 82 of the Insolvency Act which states that set-off is effected by reporting to the insolvency administrator a gross claim and a set-off notice. In that sense, it may, for example, prevent Party B from offsetting its claim for the Termination Amount owed to Party B against a Party A's claim if the claim to the Termination Amount was acquired by Party B within the period of six months prior to the filing of the petition for Party A's insolvency and Party B knew or ought to have known at the time that Party A was unable to meet its payment obligations or was insolvent. In this case, set-off will nevertheless be permitted if "*it involves a claim acquired in connection with performance of an executory contract*". However, the meaning of this exception is unclear and we cannot confirm whether it covers a termination claim.

57. The second basis for inadmissibility of set-off in Party A's insolvency, that "*the conditions for set-off*" (and not to the "claim") have been acquired based on a "*transaction which may be subject to avoidance*", is unclear because, under the Obligations Act, the conditions for set-off are met when both claims are ascertained, of the same kind (e.g. for money) and due and payable.

E.1.1.5.1 When the Individual Contract is an Eligible Financial Contract

58. According to Article 82 paragraph 3 of the Insolvency Act, "*netting resulting from* acceleration *or early termination (close-out netting) of* [*Eligible Financial Contracts*] *is governed by the provisions of the Financial Collateral Act*". The Financial Collateral Act explicitly provides that "*initiating/opening and conduct of insolvency proceedings and liquidation or the implementation of reorganization measures do not affect enforceability of the close-out netting*". Article 50a of the Insolvency Act provides that the creditor of the insolvent Party A is insolvency creditor only with respect to its net claim, if any, remaining after the close-out netting in accordance with the Financial Collateral Act. Net claim must be registered in insolvency proceedings within the deadline for claims registration. It is converted into RSD by applying the middle exchange rate published by NBS on the date of the decision on the opening of insolvency proceedings. The creditor has an obligation to notify the insolvency administrator of the close-out netting effected on or after the opening of insolvency proceedings within eight days from the date of effecting it.

59. With respect to close-out netting, the Financial Collateral Act stipulates:

> "[*Eligible Financial Contract*] *may foresee events or circumstances (failure to make a payment of a due financial obligation or another similar* *__event or circumstance pertaining to one party__*) *the occurrence of which entitles a party to, automatically or upon a notice, undertake the following:*
>
> *1) mutual obligations under one or more* "[*Eligible Financial Contracts*] *are accelerated and expressed in monetary terms or are terminated and replaced with new monetary obligations, in accordance with their estimated current value, or the value determined in the manner foreseen in that contract; and/or*
>
> *2) mutual rights and obligations under one or more* "[*Eligible Financial Contracts*] *are netted (off-set), so that one contractual party which owes a higher amount owes the difference between mutual claims (net amount).* (emphasis added)"

60. Although this has not yet been tested, we think that the words "events or circumstances (failure to make a payment of a due financial obligation or another similar event or circumstance pertaining to one party)" are sufficiently broad to cover all events representing a Material Reason under § 10 5. (c) of the EFET General Agreement which pertain to Party A. Therefore, the rights of the Terminating Party to terminate and close-out an Eligible Financial Contract for a Material Reason under § 10 5. (c) of the EFET General Agreement pertaining to Party A is enforceable under Serbian Law.

61. However, it is less certain whether close-out netting under the Eligible Financial Contract is enforceable when an event representing a Material Reason under § 10 5. (c) of the EFET General Agreement occurs with respect to the Party A's Credit Support Provider. There is a risk that the words "event or circumstance pertaining <u>to one party</u>" could be interpreted narrowly to refer only to the events or circumstances affecting the Party itself. We think these words should be interpreted in a broader manner to mean that events and circumstances affecting a Party's Credit Support Provider are events and circumstances pertaining to the Party whose Credit Support Provider this is. However, this has not been confirmed by any authority.

E.1.1.5.2 Additional general qualifications applicable to close-out netting in insolvency context

62. Party B may be prevented from enforcing its rights stemming from termination of the Agreement during preliminary bankruptcy proceedings if security measures are imposed by the court (see paragraph 5 of the Annex to this Opinion). This is relevant only when Party A is not a Financial Institution, because the insolvency proceedings involving a Financial Institution do not involve a preliminary stage (see Section V of the Annex to this Opinion).

63. Close-out netting may be unenforceable if Party A is a Bank which is subject to resolution proceedings. The Banking Act[11] governs the resolution proceedings over Serbian banks in a substantially similar manner to the EU Bank Recovery and Resolution Directive[12] ("**BRRD**").[13]

---

[11] *Zakon o bankama*, "Official Gazette of the Republic of Serbia", Nos. 107/2005, 91/2010 and 14/2015

[12] Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms

The NBS is authorized to apply one or more resolution tools at its own discretion and without the consent of the bank's shareholders or creditors. These resolution tools are the same as the ones laid down in the BRRD. Based on Article 128j, the NBS is vested with significant resolution powers. Most notably, it may terminate or modify a contract of a Bank under resolution. The resolution powers have not been put into practice yet and therefore the ultimate practical consequences of this provision remain unknown.

64. Furthermore, the NBS is entitled to suspend any payment or delivery obligations, as well as the counterparty's termination rights and rights to enforce security interest pursuant to any contract to which the Bank under resolution is a party. The suspension may last from the publication of a notice of the suspension until midnight at the end of the business day following that publication. Accordingly, if NBS puts a Bank into resolution, NBS can temporarily suspend payments to the Party B and its termination and acceleration rights under the EFET General Agreement.

65. According to Article 128i paragraph 8 of the Banking Act, the fact that the NBS has used a resolution tool or taken a restructuring measures against a Bank, or any event directly linked to the application of these tools and measures, cannot be of itself considered as an enforcement event under any contract entered into by the Bank under resolution prior to the opening of resolution proceedings. Accordingly, imposition of resolution proceedings over a Bank cannot be of itself considered an Event of Default under the EFET General Agreement entitling the Party B to Early Termination.

66. The provisions of the Insolvency Act on close-out netting have never been tested in Serbia. It is believed that insolvency administrators received no special training on the concept of close-out netting under master agreements. One cannot therefore exclude the risk of a Serbian insolvency administrator challenging the calculation of the Termination Amount as incorrect or unreasonable.

67. If the insolvency administrator challenges a claim in the insolvency proceedings, the creditor will be directed to initiate litigation to obtain a declaratory judgment determining its claim. Serbian court has exclusive competence in such litigation. This would mean that the choice of forum clause from the EFET General Agreement would not be enforceable with respect to litigation

[13] According to Article 128ž of the Banking Act, NBS, as the competent resolution authority, may adopt a decision on the opening of resolution proceedings against a Bank if it determines that the following conditions are cumulatively met:

(i) the Bank is failing or is likely to fail; such determination may be made if: (a) there are reasons justifying revocation of the banking license or such reasons are likely to occur in the near future; (b) the Bank has or is likely to have in the near future more liabilities than assets; (c) the Bank is or is likely to become illiquid in the near future; or (d) the bank requires extraordinary public financial support;

(ii) there is no reasonable prospect, taking into account all relevant circumstances, that any alternative action by the Bank or a private sector person would prevent the failure of Bank within a reasonable timeframe.

(iii) the resolution action is necessary and in the public interest; public interest in resolution would exist if NBS determines that the Bank is systemic or the resolution action is necessary for the achievement of, and proportionate to, the resolution objectives and the same result would not be obtainable if the Bank went into regular insolvency or liquidation proceedings.

initiated after the insolvency administrator has challenged the creditor's claim. This conclusion is based on Article 58 of the Civil Procedure Act[14], which provides that "*the court located at the place of the insolvency court is the exclusive venue for resolution of all disputes that arise in the course of and in connection with insolvency proceedings*". According to an opinion of the Higher Commercial Court in Belgrade[15], when a claim is challenged by the insolvency administrator, the dispute as to the existence of that claim becomes the dispute "*in connection with insolvency proceedings*" and thus comes within the exclusive jurisdiction of the commercial court at the seat of the debtor. In one of its earlier judgments, the Higher Commercial Court emphasized that "*the essence of* [*now Art. 58 of the Law on Civil Procedures*] *is to concentrate all disputes in the court which is in charge of the insolvency proceedings.*"[16] The courts have also held that the rule on the exclusive competence of Serbian court in charge of insolvency proceedings also applies to those litigations that were pending prior to the opening of insolvency proceedings.[17]

68. Article 84, paragraph 2 of the Insolvency Act stipulates that "the claims against the insolvency debtor that are expressed in foreign currency are to be registered in that currency and converted into their dinar counter-value by application of the middle exchange rate published by the NBS as of the day of the opening of insolvency proceedings." This means that Party B is permitted to register its claim resulting from Early Termination of the Agreement in the currency of the Agreement, however, the amount of the claim will be converted into Serbian Dinar by applying the middle exchange rate published by NBS on the date of the opening of insolvency proceedings against Party A. No mechanism is foreseen to protect foreign creditors from adverse changes to the exchange rate from the date of the opening of insolvency proceedings until the settlement date.

69. According to Article 126, paragraph 3 of the Insolvency Act:

> " *A legal act or a legal transaction representing usual or unusual satisfaction of creditors, or direct damaging of creditors, cannot be challenged if such act or transaction is undertaken:*

1) prior to the filing of a [Petition];

2) under an [*Eligible Financial Contract*]*;*

3) in accordance with usual business practice for implementation of agreements of that type."

---

[14] *Zakon o parničnom postupku*, "Official Gazette of the Republic of Serbia", Nos. 72/2011, 49/2013, 74/2013, 55/2014 and 87/2018

[15] Response given at the Session of the Division for Commercial Disputes of the Higher Commercial Court in Belgrade of 30 August 2002.

[16] Decision of the Higher Commercial Court, Pz 56/97 of 14 March 1997.

[17] Legal Opinion of the Higher Commercial Court in response to the question of commercial courts determined on the sessions of the Division for Commercial Disputes of 19 and 20 September 2005 and Division for Commercial Offenses and Administrative Disputes of 26 September 2005 – Court practice of commercial courts – Bulletin no. 3/2005.

We understand these three conditions to be cumulative. Accordingly:

(i) Individual Contracts which are not Eligible Financial Contracts, and netting performed under those contracts, are not exempted from the application of avoidance rules in case of insolvency of Party A.

(ii) Eligible Financial Contracts and netting operations thereunder (those netting operations could also be deemed a "legal act or a legal transaction"), if entered into/effected prior to the filing of Petition, cannot be avoided as preference on the basis of the following avoidance grounds from the Insolvency Act: usual satisfaction of creditors; unusual satisfaction of creditors; or direct damaging of creditors. *A contrario*, Eligible Financial Contracts and payment or close-out netting thereunder are subject to the application of avoidance rules on all grounds prescribed by the Insolvency Act if entered into/effected after the filing of Petition.

70. Eligible Financial Contracts, and netting operations performed thereunder, remain vulnerable to the application of avoidance rules on the basis of "intentional damaging of creditors" (Article 123 of the Insolvency Act) or if they can be qualified as transactions entered "at no value" or "for insignificant value" (Article 124 of the Insolvency Act), whether entered into/undertaken prior to or after the filing of Petition. This will be rarely relevant in the context of the EFET General Agreement. In order to succeed with a claim for avoidance of a transaction on the basis of "intentional damaging of creditors" (Article 123 of the Insolvency Act), the claimant has to demonstrate the existence of general conditions for avoidance, which are that the challenged transaction favours one creditor, damages other creditors or affects proportional satisfaction of creditor's claims, as well as the following special conditions:

(i) the transaction or legal act was entered into/undertaken within the period of five years prior to the filing of the Petition or after the filing of the Petition;

(ii) with the intention of insolvency debtor to damage one or more of its creditors; and

(iii) the counterparty knew of such intention.

71. The counterparty's knowledge of insolvency debtor's intention to damage one or more creditors is presumed if the counterparty knew that the insolvency debtor was unable to pay its debts and that the challenged transaction damages creditors. In order for a transaction to be avoided on the basis of it being entered at no "no value" or "for insignificant value" (Article 124 of the Insolvency Act), the applicant would have to prove that particular transaction was entered into: (a) within the period of five years prior to the filing of the Petition, and (b) at no or for insignificant consideration for the insolvency debtor.

E.1.2 Non-Insolvency Related Material Reasons

E.1.2.1 When the Individual Contract is not an Eligible Financial Contract

72. The rights of the Terminating Party to terminate and close-out an Individual Contract which is not an Eligible Financial Contract for non-insolvency related Material Reasons is enforceable under Serbian Law, subject to the below qualifications and comments. The Obligations Act provides that the agreement cannot be terminated for a failure to perform a neglectable portion of an obligation. The "materiality" test should be applied when the relevance of a

particular obligation is assessed against the totality of the party's obligations under a contract, and also in case of partial (non) performance of a particular obligation. There is no case law or authoritative legal writing in Serbian on whether the foregoing provision constitutes part of Serbian public policy and we cannot exclude the risk of it being deemed in potential recognition proceedings part of Serbian public policy.

73. Under § 10.5 (a) of the EFET General Agreement, a Party may terminate the Agreement not only for non-performance of the counterparty, but also for a failure of the counterparty's Credit Support Provider, when required, to make a payment, deliver a Performance Assurance or perform any other material obligation under a Credit Support Document (after giving effect to any applicable notice or grace period thereunder). The Credit Support Provider is a third-party to the Agreement and a Credit Support Document is not part of the Agreement. According to § 10.5 (b) of the EFET General Agreement, if an election is made to that effect, a Party may also terminate the Agreement for cross-default of the other Party, its Controlling Party or its Credit Support Provider. Serbian Law distinguishes between (i) termination by notice for breach of an obligation under the contract (non-performance) and (ii) automatic termination of contract upon the occurrence of an event or circumstance (terminating condition, *raskidni uslov*). However, irrespective of the differences under Serbian law between events of default and terminating conditions, we think that the principle of freedom of contract permits the Parties to stipulate in their EFET General Agreement that a particular event or occurrence will represent a Material Reason entitling the non-defaulting Party to terminate the Agreement by giving notice to the other Party.

74. Set-off/netting under the financial derivatives is regulated by Article 16 of the Foreign Exchange Act,[18] which provides that "payments, collection, transfers, *set-off* and reporting under transactions with financial derivatives shall be done under the conditions and in the manner prescribed by the National Bank of Serbia" (emphasis added). The NBS's Decision on Financial Derivatives[19] explicitly permits in its Section 9 that "mutual claims and liabilities on the basis of transactions with financial derivatives may be *set-off* for the purpose of performing a net obligation of one party to the other party (*netting*) – in case of termination of the agreement for non-performance, as well as in other cases in accordance with the parties' agreement" (emphasis added). The Decision further provides that "*netting* … can be performed in the manner foreseen in a standardized master agreement or, as the case may be, in a manner regularly used in business practice, in accordance with law or other regulation" (emphasis added). In our opinion, the part of the provision referring to "other cases in accordance with the parties' agreement" is broad enough to cover any netting under the EFET General Agreement (involving transactions that can be qualified as financial derivatives), i.e. both payment netting and close-out netting (and in the latter case, even if Early Termination is not, strictly speaking, for non-performance by one party).

75. Set-off, and thus close-out netting, under Physical Commodity Transactions which are not financial derivatives, is not possible when the accounts of Party A which is not a Financial

[18] Zakon o deviznom poslovanju, "Official Gazette of the Republic of Serbia", nos. 62/2006, 31/2011, 119/2012, 139/2014 and 30/2018

[19] Odluka o obavljanju čposlova s finansijskim derivatima, "Official Gazette of the Republic of Serbia", nos. 76/2018

Institution are blocked. According to the Foreign Exchange Act, claims under cross-border trade transactions can be offset under the conditions prescribed by the Government of Serbia. The Government prescribed the conditions in the Decree on the Manner of Offsetting Payables and Receivables under Export/Import of Goods and Services Transactions[20] ("**Cross-Border Trade Set-Off Decree**"). According to this Decree, mutual claims of Party A and Party B arising out of cross-border trade transactions (export/import of goods and services) can be set-off under the following conditions:

(i) both claims must have arisen under export-import transactions (a transaction is export-import when it is between a Serbian resident and a non-Serbian resident irrespective of whether the goods are delivered by crossing the border or within Serbia);

(ii) both claims have to be determined and mature;

(iii) not more than one year from the export/import transactions under which the claims have arisen must have passed;

(iv) Party A's bank accounts must not be attached by a third-party creditor;

(v) Party A and Party B have to sign a separate agreement on set-off or exchange separate written statements proposing and accepting set-off, respectively.

76. If the purchase price under a cross-border trade transaction is not paid for more than one year from the import/export of commodity, or delivery of goods is not made within one year from the advance payment, the transaction is considered a cross-border commercial credit. Such commercial credit transaction has to be reported to the NBS. The NBS has enacted the Decision on Set-Off under Cross-Border Credit Transactions[21] ("**Credit Claims Set-Off Decision**"). Pursuant to this Decision, cross-border claim arising from a commercial credit transaction cannot be offset if Party A's accounts are attached by a third-party creditor.

E.1.2.2 When the Individual Contract is an Eligible Financial Contract

77. The rights of the Terminating Party to terminate and close-out an Individual Contract which is an Eligible Financial Contract for non-insolvency related Material Reasons is enforceable under Serbian Law, subject to the below qualifications and comments.

78. Article 20 of the Financial Collateral Act states:

"[*Eligible Financial Contract*] *may foresee events or circumstances (failure to make a payment of a due financial obligation or another similar event or circumstance pertaining* <u>*to one party*</u>*) the occurrence of which entitles a party to, automatically or upon a notice, undertake the following:*

---

[20] Uredba o načinu prebijanja dugovanja i potraživanja po osnovu realizovanog spoljnotrgovinskog prometa robe i usluga, "Official Gazette of the Republic of Serbia", No. 59/2013

[21] *Odluka o načinu prebijanja dugovanja i potraživanja po osnovu kreditnih poslova sa inostranstvom u devizama*, "Official Gazette of the Republic of Serbia", No. 50/2013

1) mutual obligations under one or more "[Eligible Financial Contracts] are accelerated and expressed in monetary terms or are terminated and replaced with new monetary obligations, in accordance with their estimated current value, or the value determined in the manner foreseen in that contract; and/or

2) mutual rights and obligations under one or more "[Eligible Financial Contracts] are netted (off-set), so that one contractual party which owes a higher amount owes the difference between mutual claims (net amount). (emphasis added)"

79. We think that the words "events and circumstances (failure to make a payment of a due financial obligation or another similar event or circumstance pertaining to one party", as well as general principle of party autonomy, support a conclusion that termination for any non-insolvency related Material Reason under the EFET General Agreement is enforceable.

80. However, Early Termination for Non-Insolvency related Material Reasons may be unenforceable if the Party A is a Bank subject to resolution proceedings (see paragraphs 62 – 65).

E.2 MULTIBRANCH PARTIES

81. For the purpose of this Section, we understand:

(i) "branch" to refer to an organizational unit of the parent entity, which forms integral part of that parent entity and enjoys no separate legal personality;

(ii) "separate proceedings in Serbia" to refer to separate insolvency proceedings in Serbia.

E.2.1 Serbian Multibranch Party

E.2.1.1 Additional Assumptions

82. The following additional assumptions apply to this Section, in addition to the assumptions already outlined in Part D:

(i) Party A has entered into Individual Contracts under the EFET General Agreement through offices in Serbia as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the Insolvency Acts of Serbia.

E.2.1.2 Analysis

83. There are no changes to our conclusions reached under Section E.1.1 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency.

84. According to Article 16 of the Insolvency Act, Serbian court has jurisdiction over a debtor if the debtor's registered seat is located in Serbia. If the debtor's registered seat is not in Serbia, Article 16 of the Insolvency Act provides that Serbian court will have jurisdiction over such debtor if Serbia is the centre of the debtor's main interests, "provided the conditions set forth in this law are satisfied". Article 174a of the Insolvency Act provides for a rebuttable presumption that the centre

of main interests is in the country of the registered seat but the Insolvency Act does not set forth any criteria which may serve to rebut this presumption.

85. According to Article 101 of the Insolvency Act, bankruptcy estate is comprised of entire assets of the insolvency debtor, irrespective of whether those assets are located in Serbia or abroad. With respect to the insolvency debtor's assets located abroad, the provisions of the Insolvency Act on cross-border insolvency apply "if such assets are the subject-matter of foreign proceedings". *A contrario*, if the foreign assets of the Serbian insolvency debtor are not subject to foreign proceedings, the provisions of Insolvency Act governing local proceedings apply. Irrespective of whether provisions on cross-border insolvency apply or not, assets located abroad form part of the bankruptcy estate.

86. According to Article 105 of the Insolvency Act, the insolvency administrator takes possession of and administers "entire assets" forming the bankruptcy estate. Admittedly, the Insolvency Act does not specify how liabilities of the insolvency debtor are to be treated in order to establish bankruptcy estate. It is, in our view, reasonable to conclude that liabilities of the debtor "located" abroad should be treated in the same manner as assets located abroad.

87. We conclude that the Individual Contracts booked by a foreign branch of Party A should be regarded as assets and liabilities of Party A and be subject, as far as Serbian Law is concerned, to the insolvency proceedings taking place in Serbia. Foreign law of the country where the asset or liability is located may be, however, relevant for the determination of the nature and/or other aspects of that asset or liability.

E.2.2 Foreign Multibranch Party

E.2.2.1 Additional Assumptions

88. The following additional assumptions apply to this Section, in addition to the assumptions already outlined in Part B:

(i) A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than Serbia has entered under the EFET General Agreement into Individual Contracts both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Serbia ("**Serbian Branch**").

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

(iii) Party F has both its seat and centre of main interest in country H. (Serbian Insolvency Act claims the competence of Serbian courts in insolvency matters if the debtor's seat is in Serbia. Therefore, if Party F had its seat in Serbia but its centre of main interest was in Country H, Serbian courts would be competent to conduct insolvency proceedings irrespective of the fact that Party F's center of main interests is in Country H.)

E.2.2.2 Analysis

89. Foreign banks, insurance companies, brokerage/dealership companies and investment funds management companies referred to in the Template Opinion as Party F may not conduct activity in Serbia through a branch but would have to set up a separate legal entity. [22]Therefore, if Party F is a foreign bank, insurance company or investment fund management company, multibranch netting scenario involving Serbia is not applicable.

90. Close-out netting provisions of the Insolvency Act have not yet been applied in practice, let alone in a multibranch setting. Nevertheless, we think that there would be no separate proceedings in Serbia with respect to the assets and liabilities of the Serbian Branch located in Serbia, upon the start of the insolvency proceeding for Party F in Country H. The relevant authorities in Serbia would defer to the proceedings in Country H, so that the assets and liabilities of the Serbian Branch would be handled as part of the proceedings for Party F in Country H. After recognition of the foreign proceedings Serbian court may render legal aid to the foreign administrator.

91. Local creditors of the Serbian Branch should not be able to initiate separate insolvency proceedings in Serbia. In fact, local creditors would not be regarded under Serbian law as creditors of the branch, but as creditors of Party F, because the branch does not have separate legal existence.

92. The same opinion as expressed above applies if Party F has no Serbian Branch, but has assets in Serbia.

E.3 GENERAL VALIDITY OF THE EFET GENERAL AGREEMENT AS MODIFIED AND AMENDED BY THE ALLOWANCES APPENDICES

93. Serbia has not implemented any rules regarding the issuance of emission allowances or their trading. In principle, Party A may purchase and sell emissions allowances issued and traded in the EU market. The legal nature of emission allowances is not defined in the Serbian law. We think that the emission allowance, representing the right to emit one tonne of carbon dioxide (C02) equivalent during a specified period, is tecnically neither "goods" nor "service", but a *sui generis* right. In any event, the Allowance Transactions, being physically settled, are not financial derivatives and therefore do not qualify as Eligible Financial Contracts.

94. Unless specifically stated to the contrary in the following paragraphs 95–97, any qualification or limitation expressed herein in respect of the EFET General Agreement as applied to Individual Contracts for and concerning the delivery and acceptance of natural gas also apply to the EFET General Agreement as modified and amended by an Allowances Appendix and as applied to Allowances Transactions.

E.3.1 Physical Settlement Netting (§ 4.3 of the Allowances Appendix)

95. In the absence of specific rules on the cross-border trade with allowances, we cannot confirm

[22] With respect to other potential "investment services providers", we would need to have more details on the type of services in order to evaluate which form of presence in Serbia is required/permitted. 3

enforceability of physical netting provisions. If allowances were goods and services, the Cross-Border Trade Act[23] would not permit physical netting because a Serbian party may under that legislation export or import the goods and services without receiving or, as the case may be, making a payment only for the purposes of "performing its contractual obligations" (e.g. replacement of faulty goods and similar obligations) or if allowed by the Governmental decree. The decree[24] does not provide for offseting cross-border delivery obligations under Allowances Transactions.

E.3.2 Cross Product Payment Netting (§ 13.3.1 of the Allowances Appendix)

96. By virtue of the Serbian foreign exchange rules, payments in relation to Individual Contracts for Natural Gas (other than Physical Commodity Transactions which are not financial derivatives) cannot be netted against the payments in relation to Allowances Transactions..

97. Payments in relation to Physical Commodity Transactions which are not financial derivatives could be netted against the payments in relation to Allowances Transactions only if the emission allowances could qualify as goods or services (which we cannot confirm) and further provided the conditions set out in paragraph 75 are satisfied. However, if the emission allowances do not qualify as goods or services, but as a right *sui generis*, the netting of payments in relation to Allowances Transactions would not be permitted by foreign exchange rules.

E.4 COLLATERAL

E.4.1 Additional Assumptions

98. The following additional assumptions apply to this Section:

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

(ii) The counterparties agree that Eligible Credit Support will include Cash and Letters of Credit.

E.4.2 The Applicability of the Financial Collateral Act

99. The Financial Collateral Act applies to contracts for financial collateral only if it is between Eligible Parties (see paragraph 35). Accordingly, Party A may validly provide financial collateral in support of an Individual Contract if it is a Bank, Investment Services Provider/Investment Firm, Insurance Company, Investment Fund, Management Company, or other Financial Institution listed in paragraph 35, or a Municipality.

---

[23] Zakon o spoljnotrgovinskom poslovanju, "Official Gazette of the Republic of Serbia", nos. 36/2009, 36/2011 – other law, 88/2011 and 89/2015 – other law.

[24] Odluka o bližim uslovima za plaćanje, odnosno naplatu u robi, odnosno uslugama, "Official Gazette of the Republic of Serbia", nos. 109/2005, 44/2018 – other law and 6/2019

100. In contrast, Party A which is a Corporation, Partnership, Association of Local Government, publicly-owned Corporation or Quasi-Governmental Entity is not capable of providing a valid financial collateral since the Financial Collateral Act does not apply. If, hypothetically, such non-Eligible Party were to enter into EFET Credit Support Annex, the issues raised in the Instructions could only be discussed taking into account the general legal rules, which are inadequate for financial collaterals. For that reason, the enforceability of the EFET Credit Support Annex entered into by such counterparties under Serbian Law cannot be confirmed. The answers to specific questions related to the Cash collateral provided by non-Eligible Parties in this Section E.4 are academic only

101. The Financial Collateral Act applies to the following types of financial collateral: (i) cash, i.e. money credited to a payment account in local or foreign currency, excluding banknotes; (ii) negotiable financial instruments, within the meaning set forth in the capital markets regulations; and (iii) credit claims, i.e. transferable receivables arising from the loan agreements with banks. It does not apply to the collateral in form of the Letters of Credit.

102. There are foreign exchange restrictions on Party A (other than a Bank) with respect to holding a bank account outside Serbia. The relevant foreign exchange regulations provide for an exhaustive list of cases in which a Serbian resident legal entity may hold a foreign bank account. In all those cases, there is an additional requirement for a prior approval of the NBS. Holding a foreign bank account in connection to the entering into arrangements such as EFET Credit Support Annex or a similar contractual arrangement is not among the permitted reasons for holding a bank account outside Serbia. A Bank is the only Party A type permitted to hold account outside Serbia and transfer the cash deposited thereto to Party B as collateral. This means that Party A (other than a Bank) could only transfer cash to the Party B from its Serbian bank account.

103. Cash transfers from Serbian bank accounts to abroad must fall within one of the coded categories prescribed by the NBS's regulation on foreign exchange operations[25]. If a particular transaction is not assigned a particular code, then a paying bank may not effect the transfer. Concerning payments under cross-border trade transactions and payments under financial derivative transactions, there are several special codes but none of those specifically pertain to transferring cash as collateral. This does not mean of itself that a transaction under a Credit Support Annex is not permitted but may create practical difficulties. As a general matter, a commercial bank may always make an initiative with NBS and request it to amend its Codebook to include a special code for a particular transaction previously not covered. In one opinion, however, the NBS refused to advise on the applicable code to cash collateral transfer abroad, holding that the transfer of cash as collateral to the collateral taker's off-shore account is tantamount to holding one's own off-shore account which is prohibited to Serbian residents who are not Banks. Based on this opinion, Party A could provide cash collateral only to Party B's non-resident account in Serbia.

---

[25] *Uputstvo za sprovođenje odluke o uslovima i načinu obavljanja platnog prometa sa inostranstvom*"Official Gazette of the Republic of Serbia", Nos. 24/2007, 31/2007, 41/2007, 3/2008, 61/2008, 120/2008, 38/2010, 92/2011, 62/2013, 51/2015 and 82/2017)

E.4.3 Questionnaire

E.4.3.1 Under the laws of Serbia, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?

104. The Financial Collateral Act does not state which law governs the transfer of ownership in cash. The matter of applicable law in international context is regulated by the Act on Resolving Conflict of Laws with Laws of Foreign Countries[26] ("**PIL Act**"). Article 18 states that ownership issues are governed by the law of the country in which the asset is located and if the asset is in transit, by the law of the country of the destination. In legal doctrine, this provision has been interpreted to mean that the applicable law is the law of the country in which the relevant asset were located at the time when all conditions for transfer of ownership under that law were met.[27] Under the Serbian law, transfer of ownership requires actual or constructive delivery of the asset to the transferee. There is absolutely no case law in Serbia on what constitutes constructive delivery of cash via wire transfer. We note that the EFET Credit Support Annex does not define when the delivery of cash is deemed to be made. It seems to be implied in § 3.2 of the EFET Credit Support Annex that the obligation to make a transfer is deemed to be fulfilled at the moment the Transferor initiates transfer with its bank (otherwise, it may not be always possible to perform an international banking transfer by the close of business on the Business Day following the request).

105. We understand that this question does not apply to Letters of Credit since the provision of this form of Eligible Credit Support does not entail a "transfer of ownership".

E.4.3.2 Would the laws of Serbia characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?

106. When the EFET Credit Support Annex is not between Eligible Parties, there is a risk that the cash transaction may be perceived as a simulated contract. The Obligations Act states that a simulated agreement has no legal effect as between the parties and that if the contract hides another agreement, that other agreement will be valid, provided the conditions for its validity are satisfied.[28] Accordingly, the EFET Credit Support Annex could be re-characterized by Serbian court as pledge agreement and title transfer as security interest. This would further lead to potential invalidity of such security interest as incompatible with Serbian Law, primarily because the subject-matter of the pledge is not sufficiently defined. Furthermore, according to the Insolvency Act, any security acquired within 60 days before the date of the opening of the insolvency proceedings is subject to automatic avoidance and the holder of such security is

---

[26] *Zakon o rešavanju sukoba zakona sa propisima drugih zemalja*, "Official Gazette of the SFRY", Nos. 43/82 and 72/82, "Official Gazette of the SRY", No. 46/96 and "Official Gazette of the RS", No. 46/2006

[27] DIKA, Mihailo i dr., Komentar zakona o međunarodnom privatnom i procesnom pravu, Beograd, 1991., Nomos, str. 69; VARADI, Tibor i dr., Međunarodno privatno pravo, Beograd, 2007., Službeni glasnik, str.362

[28] Article 66 of the Obligations Act.

not deemed secured creditor.

107. When the EFET Credit Support Annex is between Eligible Parties, there are no recharacterization risks under Serbian law given that the Financial Collateral Act explicitly recognizes transfer arrangements.

E.4.3.3 Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Serbia 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?

108. When the EFET Credit Support Annex is not entered into between Eligible Parties, once the Transferee acquires ownership in cash collateral, the Serbian law imposes no requirement to take any further action to ensure that the title continues. In fact, outside the realm of the Financial Collateral Act, the Serbian law does not regulate transfer of title to cash as collateral.

109. When the EFET Credit Support Annex is entered into between Eligible Parties, the Transfer is subject to perfection requirements. The financial collateral is deemed perfected once it is taken by the collateral taker, which has to be evidenced in writing (whereas "writing" includes recording by electronic means and any other durable medium which allows the unchanged reproduction of the information stored). The collateral will be deemed "taken" when transferred or otherwise designated so as to be in the possession or under the control of the collateral taker or a person acting on behalf of the collateral taker. A confirmation that the cash has been credited to the account of the Party B would constitute sufficient evidence that this particular type of financial collateral was provided. The Financial Collateral Act does not impose any requirements in Serbia 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 that must be obtained or established, to continue the ownership interest. If an enforcement occurs, Party B will be entitled to appropriate cash provided as collateral, i.e. it would not be required to return this or equivalent collateral to Party A.

E.4.3.4 What is the effect, if any, under the laws of Serbia 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?

110. When the EFET Credit Support Annex is not entered into between Eligible Parties, once a collateral is transferred, the Transferor could not substitute the collateral without the Transferee’s consent. Also, in the context of Party A’s insolvency, each substitution risk is to be regarded as a separate transaction for the purpose of the avoidance rules.

111. The Financial Collateral Act provides that eligible financial collateral contract may: (i) oblige the transferor to top up collateral; (ii) entitle the transferor to withdraw excess collateral; and (iii) entitle the transferor to substitute posted collateral with another collateral of at least equal value in which case new collateral must be provided at least simultaneously with the withdrawal of the original collateral. New or, as the case may be, additional collateral is governed by the terms of the financial collateral contract which pertains to the original

collateral. Withdrawal or substitution of collateral is without prejudice to the transferee's rights under the contract for financial collateral. The Financial Collateral Act does not require that the withdrawal or substitution of collateral be subject to the consent of the transferee.

E.4.3.5 Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with §11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Serbia 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"?

112. The Financial Collateral Act separately regulates close-out netting under the contract for financial collateral and under the underlying derivative transaction (i.e. Eligible Financial Contracts). Article 17 of the Financial Collateral Act regulates close-out netting of rights and obligations under "contracts for financial collateral", while Article 20 regulates close-out netting of rights and obligations under "financial contracts" (i.e. Eligible Financial Contracts). Even though the EFET Credit Support Annex forms part of the EFET General Agreement, and EFET General Agreement is covered by the definition of "financial contract", because of separate regulation of close-out netting under contracts for financial collateral and close-out netting under Eligible Financial Contract, we cannot, in the absence of any practice, that § 11 of the EFET Credit Support Annex would be enforceable under Article 20 of the Financial Collateral Act

E.4.3.6 Are the rights of Party B enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A?

113. When the EFET Credit Support Annex is not entered into between Eligible Parties, if the cash transfer was re-characterized as creation of security interest in cash provided by Party A but was not invalidated as incompatible with Serbian Law, the enforcement of this security interest would generally be suspended in the insolvency proceedings against Party A.

114. When the EFET Credit Support Annex is entered into between Eligible Parties, in general, no freeze or stay on enforcement applies to enforcement of rights in the event of Party A's insolvency. However, freezes and stays may be imposed in the event of the Bank's resolution (see paragraphs 63 – 65). The NBS has the power to request from the courts a stay any proceedings to which the Bank is a party until the resolution has been implemented.

E.4.3.7 Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" 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?

E.4.3.7.1 When financial collateral agreement is not entered into between Eligible Parties

115. When EFET Credit Support Annex is not entered into between Eligible Parties, under the general Insolvency Act, the insolvency administrator or any of the creditors may contest a transaction of the insolvency debtor undertaken prior to the opening of insolvency proceedings which undermines pro rata settlement of creditors, damage creditors or favour certain creditors over the others.

116. Transactions representing a regular settlement (settlement of a creditor's claim or providing security to the creditor where there was a pre-existing entitlement of the creditor to such claim or security) which took place within six months before the filing of the Petition may be avoided if the insolvency debtor was insolvent at the time of the transaction, and the creditor was or ought to have been aware of the debtor's insolvency. Any person related to Party A at the time the action or transaction was carried out would be deemed to have known about the insolvency or the petition to open insolvency proceedings. The aforementioned transactions can be contested also when undertaken after the filing of the Petition, if the creditor was or ought to have been aware of the debtor's insolvency or was aware of the filing of the Petition.

117. Suspect period for irregular settlement is 12 months before the filing of the Petition. No knowledge or constructive knowledge of the debtor's insolvency on the part of the creditor is required in this case. The law defines "irregular settlement" as performance of a creditor's obligation or debtor providing security to a creditor where (i) the creditor was generally entitled to such performance or security, but was not entitled to enforce it, or, (ii) if entitled, the performance of the obligation or provision of security was not made in the required time or required manner. An examples would be when the debtor pays a debt (or provides collateral for the debt) after the expiry of the statute of limitation, or performs its obligations under a contract which lacked the required form (thereby validating the form by performance), or performs conditional obligations prior to the condition being fulfilled. Further examples are when the debtor and the creditor agree that the debtor would perform some other obligation instead of the originally agreed one (e.g. supply an asset instead of making a payment), or when the debtor makes a payment after the creditor has already commenced the enforcement proceedings against the debtor, or pays the debt prior to its maturity. Providing collateral in accordance with the terms of the EFET General Agreement could not be contested as "irregular settlement"...

118. Further, a legal transaction of the insolvency debtor directly damaging the creditors may be contested if:

(i) the transaction was entered into within six months before the filing of the Petition while the insolvency debtor was insolvent at the time and the creditor was aware of that ;

(ii) the transaction was entered into after the filing of the Petition and the creditor was or ought to have been aware of the debtor's insolvency or was aware of the filing of the Petition;

(iii) the contested action is a debtor's action or a failure to act that occurred within the period of six months prior to the filing of the Petition and such action or a failure to act has resulted in a loss or a preclusion of a debtor's right.

119. Legal transactions entered into with the intent of damaging one or more creditors may be challenged if undertaken within the period of five years prior to the filing of the Petition or

thereafter, provided that the debtor's counterparty knew of such debtor's intent.

120. Finally, a legal transaction undertaken at no value or at undervalue may be contested if it was concluded or taken within the period of five years prior to the filing of the Petition.

121. *A contrario*, transfers effected after the filing of Petition would be subject to the application of avoidance rules.

122. We think that substitute collateral and additional collateral would be regarded as stand-alone transactions.

123. Article 14 of the Financial Institutions Insolvency Act contains special avoidance rules when insolvency debtor is Financial Institution. Transaction favouring one or more creditors, other than the one undertaken in the course of a banking restructuring, can be avoided if undertaken within six months prior to the date of the publication of the notice on the opening of insolvency proceedings or, if undertaken with a related party, within one year prior to that date. The creditor or the administrator of the insolvent Financial Institution may file the avoidance claim within 12 months from the date of the publication of the said notice.

E.4.3.7.2 When EFET Credit Support Annex is entered into between Eligible Parties

124. Article 126 of the Insolvency Act stipulates that close-out netting performed in accordance with the Financial Collateral Act cannot be challenged as preference if undertaken prior to the filing of a Petition and in accordance with the "common business practice for conclusion of that type of agreement". The filing of the Petition does not take place in insolvency of Banks. Arguably, this provision can be read to refer to an analogous event marking initiation of insolvency proceedings against a Bank.

E.4.3.8 Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Serbia in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under o) above?

125. The Transfer Annex is appropriate legal basis for outright transfer of ownership in Collateral if the Parries are Eligible Parties. The Transfer is subject to perfection requirements. The financial collateral is deemed perfected once it is taken by the collateral taker, which has to be evidenced in writing. A confirmation that the cash has been credited to the account of the Party B would constitute sufficient evidence that this particular type of financial collateral (cash) was "taken" by Party B.

E.4.4 Letter of Credit as collateral

126. We cannot confirm whether, as a matter of practice, Serbian banks would agree to issue Letter of Credit as collateral under the Credit Support Annex.

127. The foreign exchange regulations do not provide for the possibility that a Serbian resident, Party A, instructs a foreign bank to issue a Letter of Credit to Party B as security for the performance of the EFET General Agreement. In case Party B makes a demand and receives the amount

guaranteed in the Letter of Credit, the foreign bank would have difficulties in enforcing its compensation rights against Party A. The above restrictions do not apply to Party A which is a Bank given its ability to hold funds abroad.

E.5 GENERAL ENFORCEABILITY

E.5.1 Non-performance due to Force Majeure (§ 7 of the EFET General Agreement)

128. The provisions of §7 of the EFET General Agreement are enforceable under Serbian Law.

129. We note that the concept of force majeure under Serbian Law is stricter that the one embodied in §7, as it also requires that the occurrence representing force majeure was unforeseeable (in addition being unavoidable and unpreventable).

E.5.2 Remedies for non-performance (§ 8 of the EFET General Agreement)

130. The provisions of § 8 of the EFET General Agreement are enforceable under Serbian Law.

E.5.3 Limitation of liability (§ 12 of the EFET General Agreement)

131. The exclusion of liability as per § 12 is enforceable under Serbian Law, subject to the following comments:

132. Under Serbian law, liability for fraud, gross negligence and intentional wrongdoing cannot be excluded. Although this has not been confirmed, this provision could be potentially interpreted as public policy.

133. The contractual parties may exclude liability for ordinary negligence. However, the court may annul the provision on exclusion of liability for ordinary negligence if such provision arises from debtor’s monopoly position or otherwise unequal relation of contractual parties. It is not certain whether this is public policy or not.

134. Parties are also free to agree on a liability cap in case of breach of contract. However, liability cap is not enforceable if the cap is obviously disproportional to the damage suffered. Liability cap is also unenforceable if the impossibility to perform the obligation was caused intentionally or as a result of gross negligence. In this case, the damaged party is entitled to full compensation. This provision could be potentially interpreted as public policy, although this has not been confirmed.

135. The comments referred to above are for the Parties to bear in mind certain implications of § 12. We do not deem it necessary for the Parties to amend § 12.

E.6 CONFIRMATION PRACTICES

E.6.1 Additional Assumptions

136. As far as the Confirmation practice is concerned, when entering into an Individual Contract, the counterparties in each case (i) make oral reference to the EFET General Agreement when concluding the relevant Individual Contract over the phone or (ii) refer to the EFET General Agreement when subsequently exchanging confirmations or similar electronic, written or non-

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

137. 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.

E.6.2 Binding Individual Contract

E.6.2.1 Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization)?

138. Serbian Law recognizes oral contracts as binding, except where legislation provides that a specific type of contract (e.g. for the sale and purchase of real estate) must be in written form. Contracts for the wholesale of natural gas are not subject to written form or any other form requirement.

E.6.2.2 At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable?

139. A contract becomes binding the moment the parties agree (meeting of minds) on its material terms. Accordingly, an oral contract becomes binding prior to the exchange of written confirmations thereof. For the avoidance of doubt, we recommend that Confirmation of Individual Contract states the date on which such Individual Contract has become effective.

E.6.2.3 Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?

140. The Obligations Act stipulates that a failure to respond to an offer (remaining silent) does not in itself imply acceptance, except where the parties have a pre-established and on-going relationship with respect to particular commodities, in which case a failure to respond immediately upon receipt of the offer or within the period of time left in the offer amounts to a consent. We think that these provisions can be applied by analogy to the situation involving a failure to object to incorrect terms in a received Confirmation, with the consequence that, given the on-going contractual relationship between the Parties, the recipient of an incorrect Confirmation may be bound to its terms unless those terms are objected to immediately upon receipt of the Confirmation. We therefore recommend that the terms of an incorrect Confirmation be immediately objected by the recipient.

E.6.2.4 Is the reference to the relevant EFET General Agreement sufficient for the inclusion of the Individual Contract in the Agreement?

141. The reference to the relevant EFET General Agreement between the Parties, such as the one included in Annex 2 to the General Agreement (Confirmation of Individual Contract) is sufficient to incorporate the Individual Contract in the Agreement.

E.6.3 Means of Evidence

E.6.3.1 Tape recordings

142. The Civil Procedure Act does not restrict the type and format of evidence that can be used in civil litigation. Accordingly, telephone recordings are in principle admissible.

143. The Serbian Law does not criminalize recording of conversation directed to the party making the recording. However, telephone recording cannot be used as evidence in criminal proceedings if the recorded party did not give its consent to the recording. There is no explicit rule on using such recording in civil litigation. Most likely, however, the courts would not admit telephone recording as evidence if recording was made without the consent of the person recorded as this may be contrary to the general principle of litigation according to which the courts should not allow parties' actions that are contrary to public policy, public morals or good customs. This may mean that the consent of the recorded employees and other staff of the counterparty may be required by Serbian court in order for the telephone recording to be admissible in evidence. It remains unclear whether the absence of such consent would be deemed a breach of public policy that could prevent enforcement of a foreign judgment or foreign arbitral award based on a telephone recording of a person who had not consented to the recording.

E.6.3.2 Witness statements

144. Witness statement is admissible evidence for the purpose of proving the existence and the content of an oral contract. As a rule, witnesses are heard orally, although the judge may grant leave for a written witness statement.

E.6.3.3 E-mail or other electronic message or transaction entry system; facsimile

145. Since the Civil Procedure Act does not restrict the type of evidence that may be presented to the court in civil litigation, e-mails, facsimile or similar can be introduced.

E.7 CORE PROVISIONS

E.7.1 Additional Assumptions

146. Additional assumptions set forth in Sections E.1.1.1 and E.2.1.1 apply *mutatis mutandis* to this Part E.7.

E.7.2 Would any of the elections contemplated by the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting)?

147. It is impossible to assess the variety of possible changes to the General Agreement and their effect on the conclusions set forth in this Opinion. As stated previously, the Opinion does not substitute an independent review of any individually negotiated EFET documentation. The effect of any Additional Provisions that the Parties drafted to rather than merely selected from pre-defined options can be properly assessed only by reviewing the actual additional provisions.

E.7.3 Considering conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting), what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "Core Provision")?

148. This Opinion has been prepared in reliance on the relevant provisions of the General Agreement covered in the Opinion as they are printed in the versions of the General Agreement specified in the Instruction Letter. As a matter of principle, any material alteration of those provisions could, depending on the content of the alteration, affect the conclusions reached in Part C of this Opinion.

149. Without prejudice to the generality of the foregoing, we believe that the following provisions contained in the General Agreement are to be considered as the Core Provisions: (i) Subject of Agreement (§ 1.1); (ii) Definitions and Construction (§ 2.1 and § 2.2); (iii) Termination for Material Reason, Automatic Termination, Definition of Material Reasons (§ 10.3, § 10.4 and 10.5; (vii) Calculation of the Termination Amount (§ 11) and related definitions in Annex 1.

E.7.4 Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreeement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "CPMA") change the substance of your conclusions reached under Part C.I or C.II such as, but without limitation, by invalidating the netting provisions in the EFET General Agreement *due to its inclusion under the broader netting provisions of the CPMA?*

150. The Financial Collateral Act explicitly provides that upon the occurrence of the termination event pertaining to one of the parties, the close-out netting of the Settlement Amounts calculated under one or more Eligible Financial Contracts (Principal Agreements) is possible.

151. It is, however, not possible to net the Settlement Amount calculated under an Individual Contract which is not an Eligible Financial Contract, and the Settlement Amount derived from the close-out of an Eligible Financial Contracts.

E.8 GOVERNING LAW, ARBITRATION, JURISDICTION

E.8.1 Additional Assumptions

152. The relevant EFET General Agreement is governed by the laws of a jurisdiction other than Serbia (including English or German Law).

E.8.2 Validity of Choice of Law and Jurisdiction Clauses

153. According to the PIL a foreign party and a Serbian party may subject their contract to a foreign law. However, the choice of foreign law would not be applicable before the Serbian courts if the effects of the application of the chosen foreign law would be contrary to the "foundations of social and political order as determined in the Constitution" (public policy).[29] It is not clear under Serbian law what exactly constitutes "foundations of social and

[29] Article 4 of the PIL

political order as determined in the Constitution" but the Higher Commercial Court in Belgrade has held that this concept is certainly narrower than the concept of mandatory norms.[30] Unless otherwise mentioned elsewhere in this Opinion, we do not think that any provision of the EFET Agreement which is within the limits of the scope of this Opinion offends Serbian public policy.

154. According to Article 49, paragraph 2 of the PIL, the parties may agree on jurisdiction of Serbian courts if one of them has legal residence, i.e. a corporate seat in Serbia. Two Serbian parties cannot submit their dispute to the jurisdiction of a foreign court.

155. A Serbian and a foreign party may also stipulate for foreign arbitration such as the one in § 22 of the EFET General Agreement. Even two Serbian parties can agree on foreign arbitration, provided their relationship has an international element and further provided that the Serbian courts do not claim exclusive jurisdiction on the matter (which they do not in case of EFET General Agreement). The Arbitration Act[31] contains very broad criteria for determination of international element to a transaction and even allows the parties to qualify their relationship as international by stating so in the contract.

156. However, once Party A is in insolvency proceedings, any claim for declaration of the creditor's right has to be litigated in a Serbian court. See paragraph 67.

157. Foreign judgments are generally recognized in Serbia. The recognition and enforcement in Serbia of a foreign judgment may be refused if:

(i) the defendant was not able to participate in the proceedings, particularly if the defendant was not duly served;

(ii) Serbian court has exclusive jurisdiction in the relevant subject-matter (inapplicable to the disputes under the EFET General Agreement);

(iii) if Serbian court or other official body has already passed a decision on the same subject-matter (*ne bis in idem*);

(iv) the foreign judgment is found by the Serbian court to be contrary to the "foundations of social and political order as determined in the Constitution" (see above) which includes the possibility for review of the merits); or

(v) if Serbian court establishes that there is no reciprocity in judgment recognition and enforcement between Serbian and the foreign country in which the judgment was rendered. Reciprocity is presumed.

158. Serbia is party to the New York Convention on Recognition and Enforcement of Foreign

---

[30] Decision of the Higher Commercial Court, Pvž. 391/2008 of 5 May 2008 – Court practice of commercial courts – Bulletin n. 4/2008. Similarly, The Supreme Court of Serbia, Prev. 226/99, 6 December 2000, referred to in a Serbian law journal article by Prof. dr Maja Stanivukovic, Setting aside of arbitral awards in the practice of Serbia courts, Arbitraza, No 4, 2006.

[31] *Zakon o arbitraži*, "Official Gazette of the Republic of Serbia", No. 46/2006

Arbitral Awards.

E.9 REGULATORY REGIME

E.9.1 Foreign Exchange Regulations

159. Cross-border transactions with financial derivatives are regulated by the Foreign Exchange Act and the Decision on Financial Derivatives.

160. The Foreign Exchange Act stipulates that "*payments, collection, transfers, netting and reporting under transactions with financial derivatives shall be done under the conditions and in the manner prescribed by the National Bank of Serbia*" (Article 16).

161. Based on its implementing powers, the NBS adopted the Decision on Financial Derivatives, which imposes the following limitation: Party A (other than a Bank) may enter with non-residents into a transaction for the purpose of protection from the following risks: foreign exchange risk, interest rate risk, securities price fluctuation risk, commodities price fluctuation risk and stock exchange index value fluctuation risk.

162. Accordingly, Party A (other than a Bank) may not enter into the transactions for speculative reasons but only for the purpose of hedging and the types of risks that may be managed by hedging through the transactions are enumerated in an exhaustive manner (foreign exchange risk, interest rate risk, securities price fluctuation risk, commodities price fluctuation risk and stock exchange index value fluctuation risk).

163. Party A other than bank may not enter with non-residents into transactions which involve payments in Serbian dinars.

164. Where Party A is a company established by Serbia or Municipality, or a Publicly-Owned Company, payment to a non-resident assignee of Party B under a Physical Commodity Transaction requires prior written approval of the Government of Serbia.

165. It is questionable whether, in a situation where Party A is not a bank, Party B may assign its receivables under a financial derivative transaction. The Foreign Exchange Act generally allows a non-banking resident to make cross-border payments to a non-resident who is not the initial counterparty, under certain conditions. However, specifically with respect to financial derivatives, the Foreign Exchange Act refers to the Decision on Financial Derivatives. The decision does not explicitly allow residents to make cross-border payments under financial derivative transactions to persons other than the initial counterparties. The NBS interprets the Foreign Exchange Act to prohibit any cross-border payment which is not explicitly foreseen by that law. For the same reason, Party A may not assign its receivables held against Party B under Individual Contracts that qualify as financial derivatives.

E.9.2 Licensing

166. Party A has to have a license in order to trade with Natural Gas. The licensing regime for gas trading in Serbia is governed by the Energy Act (*Zakon o energetici*, “Službeni glasnik RS”, no. 145/2014 and 95/2018) ("**Energy Act**"). Wholesale trading of gas is covered by the gas supply license which in addition to wholesale covers supply of end consumers (except for the

households, and small consumers whose (i) annual consumption is up to 100,000m3 and (ii) all facilities are connected to the gas distribution system). Only a domestic entity registered with the Serbian commercial registry for the activity of gas supply may obtain a gas supply license.

167. Licenses are issued within 30 days of the proper application, provided that all conditions are met. The validity period of the license is 10 years and is renewable upon the request of the supplier, provided that the request is filed no later than 30 days prior to the expiry.

168. License is not transferable. The Agency for Energy is entitled to temporarily suspend a license if the holder breaches the Energy Act or terms of the licenses. If the breach is not remedied within a given deadline, the license may be permanently revoked. An appeal to the decision of the Agency for Energy may be filed with the Ministry for Energy and Mining.

169. The Serbian gas system operator, the state-owned JP "Srbijagas", does not have a developed system of gas interconnections for cross-border sale and purchase transactions involving passage of natural gas to, from or through Serbia. Interconnections exist only with the Hungarian gas system and the gas system of Bosnia & Herzegovina. Those capacities are not allocated in auction proceedings but in direct negotiations. Srbijagas formally adopted the Gas Network Code (*Pravila o radu transportnog sistema prirodnog gasa, Official Gazette of Republic of Serbia no.74/2013 and 14/2014*), which, *inter alia*, prescribes for the allocation of transport capacities in annual, monthly and daily competitive procedures. However, the Gas Network Code is not applied in practice, i.e. Srbijagas does not perform the allocation procedure because it is still a vertically integrated entity engaged in production, transport and supply of natural gas.

BDK Advokati / Attorneys at Law AOD

Tijana Kojović

ANNEX

OVERVIEW OF SERBIAN INSOLVENCY PROCEEDINGS

I INTRODUCTION

1. Insolvency (*stečaj*) of commercial companies in Serbia is regulated by the Insolvency Act[32] ("**Insolvency Act**"). Insolvency of banks, insurance companies and financial leasing companies (together, "**Financial Institutions**") is regulated by the Law on Insolvency and Liquidation of Banks and Insurance Companies[33] ("**Financial Institutions Insolvency Act**") as *lex specialis*. The provisions of the general Insolvency Act apply to the mentioned financial institutions to the extent the special law does not regulate a particular issue differently.

2. The provisions of the Insolvency Act discussed in this Section and the legal issues arising in connection with close-out netting have never been tested before Serbian courts.

II PETITION AND PRELIMINARY INSOLVENCY PROCEEDINGS

3. Insolvency proceedings are initiated by the insolvency creditor or the insolvency debtor filing of a petition for initiation of insolvency proceedings ("**Petition**"). There is no special public registry of Petitions. The filing of a Petition is registered only on the court docket, in the same manner as any other court filing.

4. Subject to certain exceptions[34], preliminary insolvency proceedings are initiated by insolvency judge *ex officio*, within three days following the receipt of a formally valid Petition. The aim of preliminary insolvency proceedings is to determine whether any ground for the opening of insolvency proceedings exists.

5. Along with the decision on the opening of preliminary insolvency proceedings, the insolvency judge may order various security measures in order to prevent Party A from disposing of its assets if there is a danger that this party may dissipate its assets or destroy financial documentation prior to the formal opening of insolvency proceedings. The security measures may, *inter alia*, include:

---

[32] *Zakon o stečaju*, "Official Gazette of the Republic of Serbia", Nos. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018 and 95/2018

[33] *Zakon o stečaju i likvidaciji banaka i društava za osiguranje*, "Official Gazette of the Republic of Serbia", Nos. 14/2015 and 44/2018

[34] Preliminary insolvency proceedings will not take place if (i) the Petition is filed by the debtor, (ii) the Petition is filed by a creditor and the debtor admits the insolvency reason alleged in the Petition or (iii) the Petition is filed by a creditor in possession of an enforcement title (e.g. judgment creditor) if the creditor proves that it was not able to enforce the title against the debtor in court or tax enforcement proceedings. In those cases, a hearing for the examination of insolvency reasons should take place within 10 days from the receipt of a formally valid Petition. This deadline is often exceeded in practice.

appointment of provisional insolvency administrator (insolvency administrator is regularly appointed only upon the opening of insolvency proceedings – see sub-paragraph iv below); moratorium on payments from Party A's account without the consent of the insolvency judge or the provisional insolvency administrator, moratorium on disposal of Party A's assets (absolute or without the consent of the insolvency judge or the provisional insolvency administrator); imposition of a stay or temporary deferral of enforcement or other forced collection proceedings against Party A etc. Imposition of security measures on Party A in preliminary bankruptcy proceedings may thus prevent Party B from enforcing the Agreement while the measures are subsisting. The latter does not apply to or prevent close-out netting under the Eligible Financial Contracts and the exercise of the rights under the EFET Credit Support Annex (taking, substituting and enforcing collateral).

6. Subject to the decision on initiation of preliminary insolvency proceedings, a hearing for the examination of insolvency reason(s) alleged in the Petition shall be held no later than within 30 days from the receipt of the Petition. At the hearing, the judge either dismisses the Petition or renders a decision on the opening of insolvency proceedings (see paragraph 9). In practice, the instructive 30-day deadline is often exceeded, while the hearing for determination of insolvency reason is occasionally, though rarely, held in the earlier part of the 30-day deadline. It should be noted that, when the Petition is filed by Party A along with a pre-packed reorganization plan, the preliminary insolvency proceedings last for a minimum of 30 days from the day when the decision on their initiation is published in the Official Gazette of the Republic of Serbia (see paragraph 15).

7. Given that it cannot be determined with certainty how long the preliminary insolvency proceedings may last, it is advisable either not to include any grace period in the Election Sheet contemplated by § 10.5.(c)(iv) of the EFET General Agreement which is not an Eligible Financial Contract (although this bears the risk of the Agreement being terminated even if the Petition was filed without justification) or to provide for a 30-day grace period in case of an ordinary Petition and at least 60-day grace period in case of a Petition being filed with a pre-packed reorganization plan. To that end, the proposed wording of § 10.5.(c) in the Election Sheet is as follows:

   "§ 10.5.(c) (iv) shall apply only if such proceedings (as are referred to in § 10.5.(c) in § 10.5.(c) (iv) are not withdrawn, dismissed, discharged, stayed or restrained within:

   (a) 30 days from their institution, in case of insolvency proceedings instituted against Party A by virtue of a petition for commencement of insolvency proceedings being filed with the competent court;

   (b) 60 days from their institution, in case of insolvency proceedings instituted by Party A filing a petition for commencement of insolvency proceedings along with a proposal for a pre-packed reorganization plan (*unpared pripremljen plan reorganizacije*)".

8. If the Petition is dismissed after Early Termination of the Agreement, Early Termination, in our view, remains effective and the close-out netting would be taking place outside the bankruptcy context, in accordance with the provisions of the EFET General Agreement.

III OPENING OF INSOLVENCY PROCEEDINGS

9. Opening of insolvency proceedings occurs pursuant to a court decision rendered at the hearing for

the examination of insolvency reasons. By virtue of this decision, insolvency administrator (*stečajni upravnik*) is appointed.

10. Legal consequences of the opening of insolvency proceedings occur "at the beginning of the day on which the notice on insolvency proceedings is published on the court's notice board".[35] An inherent flaw of this solution is that the date when the notice is posted on the court's notice board is not easily identifiable. The Insolvency Act provides that the insolvency judge shall prepare the notice "promptly after rendering the decision on the opening of insolvency proceedings". However, the legislation does not stipulate the deadline for the actual publication of the notice on the court's notice board. The Insolvency Act also provides that the court shall forward the decision on the opening of insolvency proceedings to the Commercial Register on the day when such decision is rendered, while the Commercial Register should publish it on the day of its receipt.[36] Finally, the decision on the opening of insolvency proceedings is also to be published in at least one daily newspaper.[37] The Insolvency Act fails to stipulate the deadline for this publication, but the spirit of the law mandates that the publication of the notice on the opening of insolvency proceedings on both the court's notice board and in the newspapers should be done promptly upon the decision on the opening of insolvency proceedings.

11. As of the moment when the opening of insolvency proceedings becomes effective, which is the moment when the notice of the decision on the opening of insolvency proceedings is published on the court's notice board, all authorities of the general manager and other representatives of Party A terminate and are assumed by the insolvency administrator.

12. Legal transactions concluded by Party A after the opening of insolvency proceedings other than through the insolvency administrator are null and void.

13. After the opening of insolvency proceedings, unless Party A is put into reorganization ("*reorganizacija*"), Party A's assets will be sold in order to settle the claims of Party A's creditors and Party A will be ultimately deleted from the Commercial Register. An exception is the possibility of selling Party A as legal entity (going concern), in which case Party A continues to exist as legal entity, however, free of any pre-sale liabilities.

IV REORGANIZATION

14. The Material Reason under §10.5 (c) (iii), known under Serbian law as "adoption of a reorganization plan". Reorganization under Serbian law may evolve as either pre-packed reorganization or ordinary insolvency reorganization.

15. Party A may file Petition together with a proposal of a reorganization plan (the so-called pre-packed reorganization plan). In order to be admissible, a proposal of a pre-packed plan must have a preliminary sign-off of majority creditors from each creditor class envisioned by the proposal.

---

[35] Article 73 of the Insolvency Act

[36] *Id.*

[37] *Id.*

Within three days from the filing of complete documentation in this respect, the bankruptcy judge renders a decision on initiation of preliminary proceedings for the examination of Petition and the pre-packed plan. This decision is published in the Official Gazette of the Republic of Serbia and at least one daily newspaper. The hearing for the voting on the pre-packaged reorganization plan must take place within 30 days from this publication (although in practice this deadline is sometimes exceeded).

16. During these proceedings, a temporary administrator may be (but does not necessarily have to be) appointed and security measures may be (but do not necessarily have to be) imposed (. If imposed, security measures can last up to six months, and cannot be re-imposed in the same proceedings. However, the debtor may circumvent this limitation by withdrawing the plan and submitting a new one, along with a new petition for security measures.

17. If the pre-packed plan is rejected by the creditors, the judge shall dismiss Petition. If the plan is adopted by the creditors, the judge renders a decision to simultaneously (i) open insolvency proceedings against Party A; (ii) confirm the proposed reorganization plan; and (iii) suspend the insolvency proceedings. A confirmed reorganization plan binds all creditors (even those not encompassed by the plan).

18. If Petition is dismissed after Early Termination of the EFET General Agreement, Early Termination, in our view, remains effective and the close-out netting would be taking place outside the bankruptcy context, in accordance with the provisions of the EFET General Agreement.

19. If Petition is granted and the pre-packed reorganization plan is adopted by the creditors and approved by the judge after Early Termination, Early Termination and the resulting close-out netting, in our view, remain effective. In that case, any claim of Party B against Party A remaining after the close-out netting operation will be governed by the provisions of the reorganization plan.

20. Other than as pre-packed reorganization plan (which is prepared by debtor (Party A) in advance of insolvency proceedings and filed along with Petition), a reorganization plan may be filed by Party A's insolvency administrator or any of its creditors within 90 days from the date of the opening of insolvency proceedings (a two-times 60-day extension can be granted in specific circumstances).

21. The adoption of a reorganization plan, which occurs after the opening of insolvency proceedings, should not affect the validity of Early Termination and close-out netting exercised prior to the adoption of the reorganization plan, provided that the conditions for close-out netting prescribed by the Insolvency Act were satisfied. See Section E.1.1.4. However, in that case, any claim of Party B against Party A remaining after the close-out netting operation, if any, would be governed by the provisions of the reorganization plan.

V SPECIFIC FEATURES OF INSOLVENCY OF FINANCIAL INSTITUTIONS

22. Insolvency proceedings involving Financial Institutions do not have a preliminary stage in which the court examines the existence of the reasons for the opening of insolvency proceedings. Insolvency over a Financial Institution is formally opened by a decision of the competent court, rendered based on a decision of NBS on the fulfillment of the reasons for initiation of insolvency

proceedings. Such decision of NBS is rendered simultaneously with a decision on revocation of Financial Institution's license, unless the Financial Institution was, subsequently to the revocation of its license, put into restructuring. In the latter case, the NBS may render a decision on the fulfillment of the reasons for initiation of insolvency proceedings based on certain reasons pertaining to the restructuring.

23. The court renders a decision on the formal opening of insolvency proceedings within one day from the date of receipt of the mentioned NBS' decisions. The decision on the opening of insolvency proceedings over Financial Institution is published in the Official Gazette. The legal consequences of the opening of insolvency proceedings take effect from the moment the decision to that effect is published on the court's notice board. The creditors are invited to register their claims within a period that cannot be shorter than 30 days and longer than 90 days from the date of the publication in the Official Gazette. Accordingly, with respect to Financial Institutions, NBS determines the existence of the reasons for the opening of insolvency proceedings, while the court only rubberstamps the NBS' determination to that effect.

24. Unlike in the general insolvency proceedings, insolvency proceedings over Financial Institution cannot involve sale of Financial Institution as a going concern. Instead, sale of assets followed by liquidation takes place. There is no reorganization within insolvency proceedings involving Financial Institutions.