European Federation of Energy Traders

Amstelveenseweg 998

1081 JS Amsterdam, Netherlands

14 May 2020

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

We have been requested by you to give our opinion regarding the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a) published on 21 September 2007) (the "**EFET General Agreement**"), the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement (Version 2.0, published May 2010) (the "**EFET Credit Support Annex**") and other related issues as outlined below.

For purposes of giving this opinion, we have examined the following documents:

(a) EFET General Agreement;

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

(c) EFET Credit Support Annex;

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

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

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

(g) GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a), published 21 September 2007) (Version 1.0, published 11 September 2009);

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

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

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

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

For purposes of **Part B.5** (Confirmation Practices) only, we have further examined:

(l) EFET Electronic Confirmation Agreement (published 28 June 2005); and

(m) Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2) to the Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 3 April 2012).

For purposes of **Part B.6** (Core Provisions) only, we have further examined:

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

(o) EFET Master Netting Agreement (Version 1.0, published June 2010);

(p) 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)

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

(r) EFET Credit Support Annex to the Master Netting Agreement (Version 1.0, published February 2011).

The documents referred to in (a)-(s) above are hereinafter referred to as "**Documents**" and each individually, a "**Document**". Capitalised terms defined in the EFET General Agreement shall have the same meaning in this legal opinion if not otherwise defined herein.

Contents

Executive Summary

This is an executive summary of the findings of this opinion letter. It should be read together with the body of the opinion in **Part B** hereto, as well as the assumptions and qualifications in **Parts A** and **C**, respectively. Further, a general overview of Finnish insolvency proceedings, recovery regime and safe harbour rules, as well as relevant laws and terminology is laid out in **Appendix A** to this opinion letter.

Outside the context of insolvency proceedings, contractual termination rights based on non-insolvency related termination events, as well as the netting provisions contained in the Documents would be generally enforceable under Finnish law (see **Part B.4** (*General Enforceability*)).

- During a contracting party's insolvency or during a suspect period preceding such insolvency, termination and netting could be challenged by the insolvency administration seeking to assume the contract and thus cancel the termination, or by the insolvency administration or a creditor seeking to revoke the netting on the basis of the Finnish recovery regime. The same applies to the granting of security during a suspect period (see **Part B.1** (*Enforceability of Close-out Netting*) and **Part B.2** (*Collateral*)).

- Safe harbour rules for netting and granting of security are provided for in the Finnish Netting Act and the Finnish Financial Collateral Act. These two Acts would, within their scope of application, protect the enforceability of netting provisions against adverse claims by the bankruptcy estate or creditors, when the close-out netting is carried out due to collective insolvency proceedings of the contracting party. Close-out netting in such circumstances may be automatic or based on a separate notice. However all Individual Contracts with the insolvent party must be terminated at the same time, and for instance structures entailing partial close-out could be challenged (see **Part B.1** (*Enforceability of Close-out Netting*), **Part B.6** (*Core Provisions*) and **Appendix A**, Section 1.6 (*The Netting Act*) and Section 1.7 (*The Financial Collateral Act*)).

- We consider it likely that the Netting Act would apply to the transactions under the EFET General Agreement, with the exception of spot transactions and the possible exception of certain classes of physically settled derivatives. Where the Netting Act applies, we believe that § 11 of the EFET General Agreement, setting out the method of the close-out netting, will be enforceable under Finnish law (see **Part B.1** (*Enforceability of Close-out Netting),* **Appendix A**, Section 1.6 (*The Netting Act*) and Section 1.7 (*The Financial Collateral Act*)).

- In the context of insolvency proceedings, and where neither the Netting Act nor the Financial Collateral Act apply, the enforcement of the netting provisions contained in, or security granted in connection with, the Documents could be limited by generally applicable insolvency laws (see **Appendix A**, Section 1.1 (*Insolvency proceedings*)).

- The enforcement of the Documents could also be limited if an Individual Contract becomes subject to attachment, or where the contracting party is of such type that bank resolution legislation applies (see **Appendix A**, Section 1.3 (*Attachment*) and Section 1.2 (*Bank Recovery and Resolution*)).

- Under Finnish law, ownership of a collateral asset does not usually transfer to the pledgee/transferee. Under the Financial Collateral Act the transfer of ownership is permitted, but the Act would apply only in limited circumstances when one of the parties is a qualifying financial institution. However, under most circumstances the procedures set out in the Credit Support Annex would nevertheless create a valid security interest (but not an unconditional transfer of title) over the assets purported to be transferred (see **Part B.2** (*Collateral*)).

- There are generally no filing or notarisation requirements to ensure the enforceability of the Documents in Finland (see **Part B.5** (*Confirmation Practices*)).

Further, we note that there is no Finnish legal literature or published Supreme Court case law regarding the enforceability of netting provisions. Consequently, some of the opinions below are based on the preparatory works of the relevant legislation. In cases where the matter is not finally determined by law, we have expressed our view of the most likely outcome and the reasoning behind the view.

A ASSUMPTIONS

In giving the opinion stated herein, we have made the following general assumptions (in addition to additional assumptions set out below regarding each relevant section):

(a) two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organised or has its centre of main interest in Finland ("**Party A**");

(b) Party A is a corporation, financial institution or other entity as further described in **Appendix B**;

(c) the relevant EFET General Agreement is governed by the laws of Germany or England and Wales;

(d) each Document, each Individual Contract and each transfer of Collateral is enforceable in accordance with its terms under the laws of any jurisdiction by which they are stated to be governed or which are otherwise applicable to them (other than the laws of Finland) and each counterparty has duly authorised, executed and delivered, and has the capacity to enter into, each Document, each Individual Contract and each transfer of Collateral;

(e) 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 thereafter enter into a number of Individual Contracts which include all of the Individual Contracts described in **Appendix C**;

(f) the Individual Contracts provide for the physical delivery of commodities, certificates or emission rights in exchange for cash, however, some of them may also provide for cash settlement;

(g) each of the parties to the Documents is duly organised and validly existing under the laws of its jurisdiction of incorporation, and no steps have been taken (other than as assumed in any additional assumptions) for its voluntary or involuntary winding up, liquidation, bankruptcy or any analogous proceedings (including procedures under the Finnish Act on Procedure for the Resolution of Credit Institutions and Investment Firms (the "**Resolution Act**", implementing Directive 2014/59/EU providing for the establishment of an EU-wide framework for the recovery and resolution of credit institutions and investments firms, the "**BRRD**" (see **Appendix A**, Section 1.2));

(h) the Documents, each Individual Contract and each transfer of Collateral are on arms-length terms and there is no element of fraud, gift or undervalue favouring a counterparty;

(i) each counterparty is entering into the Documents, each Individual Contract and each transfer of Collateral for bona fide commercial reasons in the ordinary course of business and without the intent to favour a creditor or to make assets unavailable to creditors generally;

(j) the decision by each counterparty to enter into the Documents and Individual Contracts to which it is a party and if applicable to grant security pursuant to any EFET Credit Support Annex to which it is a party have been based on a bona fide best effort assessment that doing so is in the best commercial interest of that counterparty on a stand alone basis and without regard to group benefit;

(k) entering into the Documents, each Individual Contract and each transfer of Collateral is within the field of business of each party and does not contravene any of their constitutional documents, any governmental consent or permit applicable to them or any agreement binding on any party;

(l) the parties to the Documents are the original and only counterparties to the Documents, and none of the rights and obligations relating to the Documents have been transferred to them from third parties or by them to third parties;

(m) the Documents qualify as customary agreements for the purposes of the Netting Act[1];

(n) the Cash included in the Eligible Credit Support meets the definition set out in Article 2, Paragraph 1, Subparagraph d of the Financial Collateral Directive (see **Appendix A**, Section 1.7);

(o) the rights and obligations of the parties are settled outside of any settlement system;

(p) other than any elections made in the Election Sheet, none of the terms of the Documents relevant for this opinion have been amended or waived and there exists no other agreement or commonly applied practice between the parties which would override the terms of the Documents, and

(q) the Individual Contracts are entered into and the transfers of Collateral perfected prior to the commencement of insolvency proceedings or a party being notified by an enforcement official of any enforcement action in respect of the Individual Contracts or the Collateral.

[1] The government bill containing the preparatory works for the Netting Act discusses the conditions upon which a provision may be considered ”customary”. A provision may be considered customary at least when it is included in an industry standard agreement. While the examples referred to in the government bill do not expressly mention EFET, it is in our view reasonable to conclude that the EFET standard agreements meet the requirement.

B OPINION

1. Enforceability of Close-out Netting

We have been asked to distinguish between a termination and close-out based on (1) an event that constitutes a Winding-up, Insolvency or Attachment (as defined in § 10.5(c) of the EFET General Agreement) and (2) other non-insolvency related Material Reasons.

A general overview of Finnish insolvency proceedings, recovery regime and safe harbour rules, as well as relevant laws and terminology is laid out in **Appendix A** to this opinion letter.

1.1 Single-jurisdiction parties

ADDITIONAL ASSUMPTIONS:

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

(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 Finland 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.

ISSUES:

(a) *Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or recommendable to modify the scope of Automatic Termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in §10.5(c)(iv) of the EFET General Agreement?*

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

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

From Finnish perspective there is no clear recommendation as to whether the parties should elect Automatic Termination to apply, as both Automatic Termination and optional termination should be equally enforceable. This view is supported by the government bill preceding the Netting Act, which specifically states that close-out netting may be optional or automatic. With respect to Individual Contracts that fall outside the scope of applicability of the Netting Act and the Financial Collateral Act, it could be argued that Automatic Termination does not constitute an "act" to which recovery or moratorium could apply, and therefore Automatic Termination would enjoy more beneficial treatment in comparison to optional termination. We, however, believe, that the conclusions reached in Opinion (bb) vis-à-vis Individual Contracts which fall outside the scope of applicability of the Netting Act or the Financial Collateral Act hold true regardless of the chosen termination mechanism, mainly because in Finnish legal doctrine contractual clauses aimed at avoiding mandatory insolvency law are generally held to be invalid.

In terms of whether it would be necessary or recommendable to modify the scope of Automatic Termination, it is worth noting that some of the events set out in § 10.5 (c) of the EFET General Agreement have no Finnish law equivalent, or are not insolvency proceedings referred to in the Netting Act (please see below in more detail in Opinion (b) below, and **Appendix A**, Section 1.6). While it could well be argued that Finnish courts should recognise and uphold close-out netting also in circumstances which are beyond the wording of the Netting Act, the possibility of an opposite outcome cannot be ruled out, and in that case the protection provided by the Netting Act would not apply. Tailoring the wording of § 10.5 (c) of the EFET General Agreement to include, in respect of Finnish entities, specifically the Insolvency Proceedings referred to in the Netting Act could therefore be considered as an option, and a proposal for the amended items for § 10.5 (c) is presented below. This, however, comes with a caveat that by not including anticipated insolvency or petitions, the revised wording could, in comparison to the original clause, delay and possibly limit the scope of the Terminating Party's right to terminate the contracts.

The wording proposal for § 10.5 (c) of the EFET General Agreement is as follows:

(i) *is declared bankrupt by a court;*

(ii) *becomes subject to a corporate reorganization procedure (yrityssaneeraus) in accordance with the Finnish Act on Company Reorganization;*

(iii) *where a Party or a Credit Support Provider is a credit institution, has its operations suspended (pursuant to the Finnish Act on Temporary Interruption of Operations of Deposit Banks or otherwise), is placed into liquidation, closed or loses its licence, or otherwise becomes subject to comparable enforcement measures, in each case due to a ruling or decision by a competent authority;*

(iv) *is subject to a comparable foreign insolvency procedure where the procedure is based on a ruling or decision by a public authority; or*

(v) *is subject to an attachment procedure where the assets attached include an Individual Contract or Eligible Credit Support delivered.*

With regard to the timeframe in which is a debtor that is subject to a clearly frivolous bankruptcy petition able to cause such petition to be dismissed depends on various matters, including the grounds on which the bankruptcy is sought to be initiated. In a general Finnish bank financing context, the standard for grace periods like the one in § 10.5 (c)(iv) of the EFET General Agreement is 14 calendar days, and we would consider such period appropriate also in the context of the EFET General Agreement.

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

When it comes to the mechanisms triggering the termination of the EFET General Agreement (including all Individual Contracts), both Automatic Termination and optional termination should, as noted above, be equally enforceable under Finnish law. As far as, in turn, provisions of the EFET General Agreement that deal with the effects of a termination are concerned, we believe, based on the general assumptions and the additional assumptions above, that an EFET General Agreement governed by Finnish law will be generally enforceable under Finnish law.

This conclusion is based on the Netting Act, which allows the parties to agree that upon the initiation of Insolvency Proceedings against one party, the non-defaulting party has the right to terminate the agreement (and net all individual transactions entered into in connection therewith) between the parties, and, further, this netting is binding on the bankruptcy estate or the reorganisation administration, as applicable. The provisions of the Netting Act also exclude the applicability of Section 10 of the Recovery Act, the bankruptcy estate therefore being unable to challenge the early termination under said provision.

Some exceptions to the foregoing, however, apply. Most notably:

1) Where the defaulting party is a BRR Institution, close-out netting may be limited as a result of the application of the measures provided for in the Resolution Act, and such measures or events directly linked to the application of the same may not qualify as Insolvency Proceedings for the purposes of the Netting Act (see **Appendix 1**, Section 1.2).

2) As noted in Opinion (a) above, items (ii), (iii), (iv), to the extent that it refers to a petition, (v), (vi), (vii) and (ix) of § 10.5(c) of the EFET General Agreement refer to anticipated insolvency or insolvency proceedings which do not have an equivalent in Finnish insolvency legislation. These events would most likely not qualify as Insolvency Proceedings under the Netting Act (nor do they appear to correspond to the definition set out in Article 2 (j) of the Settlement Finality Directive to which the government bill for the Netting Act refers), in which case close-out netting after a termination on these grounds and in the absence of Insolvency Proceedings would not fall within the definition of close-out netting as used in the Netting Act. While, as noted in Opinion (a) above, § 10.5 (c) of the EFET General Agreement can be tailored to include the Insolvency Proceedings referred to in the Netting Act, we believe that the wording of the Netting Act is an indication of the most likely scenario in which close-out netting would occur rather than a strict rule on applicability, and an exclusion of close-out netting in other circumstances seems contrary to the stated purpose of the Netting Act, nor is such an exclusion discussed in the government bill. Further, in circumstances where also the Financial Collateral Act applies, this outcome is also supported by the fact that the definition of netting in the Financial Collateral Act is not similarly restricted to insolvency proceedings, and therefore netting due to any event of default should benefit from the protection of the Financial Collateral Act (see **Appendix A**, Section 1.6 and Section 1.7).

3) If the conditions set out in items (h) to (j) in the general assumptions above are not satisfied (i.e. there are *mala fide* reasons for entering into the EFET General Agreement or the Individual Contracts), there is a risk that the bankruptcy estate or the reorganisation administration could challenge the transaction on the basis of other provisions of the Recovery Act than Section 10 (see **Appendix A**, Section 1.5).

4) With respect to Individual Contracts which do not qualify as Netting Act Transactions (see **Appendix A**, Section 1.6) and to which the Financial Collateral Act does not apply (see **Appendix A**, Section 1.7) or unless set-off is supported by the Recast Insolvency Regulation (see **Part B.1.2.1**), the termination provisions of the EFET General Agreement would still be enforceable *inter partes*, but enforceability would be subject to all bankruptcy, moratorium, reorganisation, administration, insolvency and other laws affecting creditors' rights generally, including e.g. the bankruptcy estate's right to assume contracts (see **Appendix A**, Section 1.1) and the moratorium on enforcement action set out in the Act on Company Reorganisation. Further, the termination could be subject to recovery under the Recovery Act (see **Appendix A**, Section 1.5).

If the EFET General Agreement is stipulated to be governed by laws other than the laws of Finland, we consider it likely that the courts of Finland would, as discussed in more detail in Opinion (hh) below, generally recognise and uphold such a choice of law in accordance with the provisions of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the "**Rome I Regulation**").

The applicability of the Act is not explicitly limited to netting provisions governed by Finnish law. We therefore believe that if the application of foreign law to the netting provisions contained in the EFET General Agreement would not result in an outcome that is substantially different from that resulting from the application of Finnish law, the Netting Act would prevent the bankruptcy estate or reorganisation administration from challenging the netting on the basis of the Bankruptcy Act or Section 10 of the Recovery Act. However, recovery on the grounds of the parties acting in bad faith could, as noted above, be possible.

(b) *Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the EFET General Agreement) upon the occurrence of an event described in § 10.5(c) of the EFET General Agreement:*

aa) would it be necessary or recommendable to modify the scope of termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would permit the Terminating Party to terminate and/or (ii) adding other Material Reasons upon the occurrence of which it should be entitled to terminate)?

bb) are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of Finland or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?

The conclusions reached in Opinions (a) and (bb) above would apply also in circumstances where Automatic Termination has not been elected to apply.

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

We believe that § 11 of the EFET General Agreement setting out the method of the close-out netting will be enforceable under Finnish law. This view is based on the express provisions in the Netting Act, which provide that following the termination due to the commencement of Insolvency Proceedings against one party, the obligations may be aggregated into one payment or delivery obligation in a manner agreed by the parties. The relevant government bill also states that close-out netting may include the netting of obligations regarding delivery of different assets. However, determinations of the monetary value of the Gains, Losses or Costs (as defined in § 11.2 of the EFET General Agreement), if manifestly incorrect, may in principle be challenged as a breach of contract. Further, where the termination and close-out netting are not carried out upon or immediately after the commencement of insolvency proceedings, it may be possible that termination, enforcement or similar costs incurred during the Insolvency Proceedings by the terminating party may not be fully included in the termination amount determined as part of the close-out netting once it is invoked.

Further, if the Netting Act does not apply but the Financial Collateral Act applies, there is an express requirement in the Financial Collateral Act that the assets included in netting are valued by using the current price of such assets. The liquidation and valuation methods agreed to be used will be upheld, unless it is shown that they infringe the interests of one of the parties.

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

The government bill leading up to the enactment of the Netting Act specifically states that even when the termination and close-out netting are voluntary and based on a notice of termination, all outstanding Individual Contracts with the insolvent party must be terminated at the same time. The definition of close-out netting under the Netting Act (item (iii) of the definition) also refers to the acceleration of *all* payment and delivery obligations of the contracting parties. We therefore believe that the close-out netting provisions of the EFET General Agreement would be applied to all Individual Contracts and that Partial Close-Out would most likely not be possible. While the single agreement concept is not directly referred to in the Netting Act or the Financial Collateral Act, we understand that a single agreement clause would make it clear that all Individual Contracts are to be accelerated at once and would thus be beneficial to ensure that the close out actions receive the protection of the Netting Act.

For the reasons discussed above, the consolidation of multiple agreements within the scope of a Master Netting Agreement may require that all individual contracts under such Netted Agreements (as defined in the Master Netting Agreement or the Cross-Product Master Agreements) are subject to simultaneous close-out, even if some of them are specified as Excluded Agreements (as defined in the Master Netting Agreement). Similarly, where agreements are aggregated for the purposes of determining margin requirements, it may be necessary that all individual contracts under such aggregated agreements are closed out simultaneously.

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

In our opinion the obligation to pay the net termination amount in the agreed currency will be enforceable under the laws of Finland, subject to the provisions of the Promissory Notes Act to the effect that where the parties have agreed that payment be made in a foreign currency, upon the enforcement of a judgment, a Finnish obligor is entitled to effect the payment in euro. A payment so effected in euro would be calculated with reference to the exchange rate of the specific currency and euro at the date of payment. As regards potential exchange loss incurred by the creditor as a result of payment not occurring on the due date, the creditor may be entitled to require that the exchange rate applicable on the due date of the payment be applied to the payment.

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

The two generally applicable insolvency proceedings under Finnish law are bankruptcy and company reorganisation, which are both available to "ordinary" corporate entities. However, as discussed in the general overview in **Appendix A**, certain types of legal entities cannot be subject to these proceedings, and in some cases specific rules supplement the general procedure.

In addition to bankruptcy and company reorganisation, the Netting Act specifically addresses the interruption of the operations of a deposit bank. Section 6 of the Netting Act provides that (i) obligations existing prior to the interruption may be netted and (ii) if the deposit bank continues trading during the interruption, such obligations may be netted against obligations created prior to the interruption and against obligations created during the interruption.

Non-Insolvency related Material Reasons

Please discuss the issues outlined above under (d), (e) and (f), as well as the following question:

(g) *Are the rights of the Terminating Party to terminate and close-out the EFET General Agreement enforceable in accordance with the terms of the EFET General Agreement, irrespective of the insolvency of Party A?*

For this response we assume that none of the parties is insolvent at the time when the netting is carried out and that none of the parties later becomes insolvent at such a time that the netting occurred during the applicable suspect period. As discussed above, the subsequent insolvency of a party may allow the bankruptcy estate administrator to seek to assume or the bankruptcy administrator or a creditor to challenge (under the Finnish recovery regime) the netting carried out during the suspect period even if none of the parties were insolvent at the time when the netting was carried out. In this scenario our responses in (d) through (f) apply.

In respect of (d) above, both complete and partial Close-Out would be enforceable between the parties. As discussed under (e), claims in foreign currencies are enforceable in Finland, but the debtor may also be able to discharge the obligation by payment of the equivalent Euro amount.

In respect of (f) and question (g) above, the Netting Act and the Financial Collateral Act aim to ensure the finality of close-out netting regardless of the actions of the bankruptcy estate, reorganisation administration or creditors of Party A. Subject to the exceptions and uncertainties discussed above, we believe that the rights of the Terminating Party to terminate and close-out the EFET General Agreement and all Individual Contracts are enforceable in accordance with the terms of the EFET General Agreement in the collective insolvency proceedings of Party A. However, as discussed above, the close-out netting in the case of individual enforcement action by a creditor may be recoverable and the Resolution Act, where applicable, may restrict enforcement.

1.2 Multibranch Parties

We have been asked to distinguish between (1) a Multibranch Party incorporated, organised or having its centre of main interest in Finland and (2) a Multibranch Party incorporated, organised or having its centre of main interest outside Finland, but operating through one or more branches in Finland.

1.2.1 General Overview of Finnish international insolvency law

As a starting point a Finnish bankruptcy encompasses all the assets of the debtor regardless of where they are located (principle of universality) when the debtor's centre of main interests is located in Finland. However, Finnish law will not normally give legal effect to bankruptcy proceedings initiated in other countries than Member States of the European Union (other than Denmark) (each individually referred to as a "**Member State**") and member countries to the Nordic Bankruptcy Treaty concluded among Finland, Denmark, Iceland, Norway and Sweden that entered into force on 7 November 1933 (the "**Treaty**"). Similarly, it is not certain that other countries than Member States and member countries to the Treaty would recognise the universality of Finnish bankruptcy.

Under the Bankruptcy Act, the assets that the debtor has at the start of the bankruptcy and the assets that the debtor acquires before the conclusion of bankruptcy shall be assets of the bankruptcy estate, subject to certain exceptions described below. In addition, assets that can be recovered to the estate by virtue of the Recovery Act or on some other basis shall be assets of the bankruptcy estate. Assets that are acquired by way of substitution to the bankruptcy estate, as well as the proceeds of assets of the bankruptcy estate, shall likewise be assets of the bankruptcy estate.

<u>Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings</u>

On 29 May 2000 the Council of the European Union adopted Council Regulation (EC) No 1346/2000 on insolvency proceedings (the "**Original Insolvency Regulation**") which entered into force on 31 May 2002. The Original Regulation was updated in 2015 by a new recast regulation, namely Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the "**Recast Insolvency Regulation**"), the substantive provisions of which entered into application on 26 June 2017. Denmark (pursuant to recital 88 of the Recast Insolvency Regulation) is not participating in the adoption of the Recast Insolvency Regulation and is therefore not bound by it nor subject to its application.

The objective of the Recast Insolvency Regulation is to ensure that cross-border insolvency proceedings within the EU operate efficiently and effectively. The scope of applicability of the Recast Insolvency Regulation has been broadened in comparison to the Original Insolvency Regulation, with the coverage now extending to a larger set of pre-insolvency phase formal restructuring proceedings. From Finnish corporate insolvency viewpoint, the adoption of the Recast Insolvency Regulation with the broadened scope did not, however, entail any new

Finnish proceedings falling within its scope insofar as companies and legal persons are concerned. Similar to the Original Insolvency Regulation, the national proceedings to which the Recast Insolvency Regulation applies are listed exhaustively in Annex A thereto (such proceedings referred to below as "**EU Regulation Insolvency Proceedings**"). Further, certain types of entities are specifically excluded from its operation (for example credit institutions, insurance undertakings, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings (Article 1(2)) and the validity of certain third party rights *in rem* are not affected by the opening of insolvency proceedings (Article 8).

Broadly, the Recast Insolvency Regulation serves to grant the courts of a Member State within the territory of which the centre of a debtor's main interests are located jurisdiction to open EU Regulation Insolvency Proceedings in respect of such debtor. These proceedings are, with regard to other Member States, international in scope and to be governed by the law of the Member State where proceedings are opened and are to be effective in all Member States, unless secondary proceedings are opened in another Member State. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary (Article 3(1)), subject to a requirement, introduced by the Recast Insolvency Regulation, that the presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

Even if the centre of a debtor's main interests is in a Member State, the courts of another Member State may open secondary proceedings in the event that such debtor possesses an establishment (defined in the Recast Insolvency Regulation as any place of operations where the debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets) in the territory of such other Member State (Article 3(2)). The applicable law will be the law of that other Member State. However, secondary proceedings are territorial in scope and so will not extend beyond the Member State where they are opened, save in respect of creditors who have given their consent. Generally they will be opened following the opening of the main proceedings, but there are exceptions to this principle.

If the centre of the main interests of the debtor is located in a state other than a Member State, Finnish courts shall have jurisdiction if the debtor has business premises in Finland or holds such assets in Finland that it can be deemed expedient to have the bankruptcy proceedings initiated in Finland. In this case the Finnish court would most likely (although this is not based on an express provision of law) under the Bankruptcy Act apply the same principles as those set out in the Recast Insolvency Regulation with regard to secondary proceedings; i.e. the Finnish bankruptcy would only encompass the assets located in Finland.

<u>The Recast Insolvency Regulation and Set-off</u>

The provisions of the Recast Insolvency Regulation dealing with set-off and those dealing with the interaction between primary and secondary proceedings are not clear. The following is a summary of how we believe a Finnish court would apply the Recast Insolvency Regulation with regard to set-off. No opinion is expressed on how any court other than a Finnish court would apply the Recast Insolvency Regulation, and it should be noted that there are no Supreme Court rulings that would clarify the correct interpretation of the Recast Insolvency Regulation in Finland.

Article 7(1) provides that, save as otherwise provided in the Recast Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the member state within the territory of which such proceedings are opened.

The Recast Insolvency Regulation specifically states that “the opening of insolvency proceedings shall not affect the right of creditors to demand set-off of their claims against the claims of the debtor, where such set-off is permitted by the law applicable to the insolvent debtor’s claim” (Article 9(1)).

Article 7(2)(d) provides that any set-off is subject to the conditions as to when set-off may be invoked imposed by the law of the member state where the insolvency proceedings are opened, but this would seem to be subject to Article 9 (as set-off would seem to be otherwise provided for in Article 9).

Article 7(2)(m) provides that the laws of the state of the opening of proceedings shall determine “the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors”.

Article 9(2) provides that Article 9(1) shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 7(2)(m).

While the interaction between Article 9 and Article 7(2)(m) is not clear, the position would seem to be as follows:

(i) to the extent set-off is permitted in the jurisdiction of the member state in which the relevant insolvency proceedings are opened, set-off should not be affected by the proceedings;

(ii) to the extent that set-off is not permitted in the jurisdiction of the member state in which the relevant insolvency proceedings are opened it may nevertheless be permitted if (i) it is permitted by the law applicable to the insolvent debtor's claim under the conflict of laws principles of the jurisdiction of the member state in which the relevant insolvency proceedings are opened, unless (ii) permitting the set-off would be regarded, under the laws of that jurisdiction, as contravening rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors (i.e. within Article 7(2)(m)).

The precise interaction between main and secondary proceedings in the event of conflicting legal systems’ approach to insolvency is unclear. Although the Recast Insolvency Regulation does allow secondary proceedings to be stayed at the request of the liquidator in the main proceedings, any such request being very difficult to refuse, this remains subject to such liquidator taking any suitable measure to guarantee the interests of the creditors in the secondary proceedings. It is unclear what result would follow if set-off were applied by operation of law in the member state where secondary proceedings are opened but not permitted by the applicable law in the main proceedings.

<u>The Nordic Bankruptcy Treaty</u>

Under the provisions of the Treaty, Finnish courts shall not have jurisdiction if the debtor has been declared bankrupt in Iceland, Norway or Denmark and the debtor has been domiciled in the same state.[2] The provisions of the Treaty provide that bankruptcy proceedings commenced in one of the contracting states shall also include the assets of the bankrupt party located in the other contracting states, provided that such bankrupt party upon commencement of the bankruptcy proceedings was domiciled in, i.e. incorporated or organised under the laws of, the

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[2] The mutual relationship between Finland and Sweden is governed by the provisions of the Recast Insolvency Regulation.

contracting state in which the bankruptcy proceedings were commenced ("**Universal Bankruptcy**").

The Treaty does not regulate bankruptcy proceedings where the debtor is domiciled in a different contracting state than the one where the bankruptcy is declared ("**Territorial Bankruptcy**"). In spite of this, Territorial Bankruptcy is possible; it is territorial in scope and thus only encompasses the assets located in the contracting state where the Territorial Bankruptcy is declared. Territorial Bankruptcy does not prevent the contracting state where the bankrupt party is domiciled from declaring a Universal Bankruptcy. If Territorial Bankruptcy is declared prior to Universal Bankruptcy, the Territorial Bankruptcy may continue and the Universal Bankruptcy shall not encompass the assets belonging to the Territorial Bankruptcy. However, after the Universal Bankruptcy is declared, it is not possible to declare the Territorial Bankruptcy under the Treaty.

While the Recast Insolvency Regulation supersedes the Treaty in matters involving Finland and Sweden, the Treaty is applied in all insolvency proceedings between Finland, Iceland, Norway and Denmark. Furthermore, the Treaty is applied between all Nordic countries in insolvency proceedings falling outside the scope of the Recast Insolvency Regulation. The provisions of the Act on Commercial Banks, the Act on Co-operative Banks and the Insurance Companies Act referred to above are likely to have replaced, in respect of matters referred to therein, the Treaty in the relations between the members of the European Economic Area.

1.2.2 Finnish Multibranch Party

We have based our opinion on Finnish Multibranch Party on the following additional assumption:

(i) Party A, which has its centre of main interests in Finland, has entered into Individual Contracts under the EFET General Agreement through offices in Finland 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 collective insolvency proceeding under the insolvency laws of Finland.

ISSUES:

(h) *Would there be any change in your conclusions reached under Opinions (a) through (g) above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?*

As the assets of the Finnish bankruptcy estate of Party A would consist of all assets of the bankrupt debtor regardless of location, conducting business under the EFET General Agreement on a multibranch basis prior to its insolvency does not change our conclusions above regarding the enforceability of close-out netting under the EFET General Agreement. We express no opinion on whether the laws of the jurisdictions where the branches are located (other than Member States and member countries to the Treaty) would affect the enforceability of the provisions of the EFET General Agreement or whether such jurisdictions would recognise and give effect to Finnish insolvency proceedings. If Party A is a BRR Institution, the Resolution Act is stated to apply also to the assets of the foreign branch(es), thereby potentially restricting the enforcement of all Documents entered into by Party A.

(i) *Would the EFET General Agreement be treated as a single unified agreement by the Finnish receiver under the laws of Finland, regardless of the treatment of the EFET*

General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?

We believe that in the event of the insolvency proceedings for Party A in Finland, the bankruptcy estate in Finland and Finnish courts would recognise the close-out netting provisions of the EFET General Agreement in accordance with their terms regardless the treatment of the EFET General Agreement or the Individual Contracts by an insolvency official in a country where close-out netting is unenforceable.

1.2.3 Foreign Multibranch Party

We have based our opinion on the following assumptions:

(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, organised or having its centre of main interest in a country ("**Country H**") other than Finland 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 Finland (the "**Finnish 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.

ISSUES:

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

A branch of a foreign entity is not considered a separate legal person for purposes of Finnish law, which would imply that it cannot be declared bankrupt in Finland. However, both the Recast Insolvency Regulation and national legislation contain provisions whereby such bankruptcy is possible.

If Country H is a member of EEA, we are of the opinion that in respect of corporate entities to which the Recast Insolvency Regulation is applied, there could be separate proceedings in Finland with respect to the assets and liabilities of the Finnish Branch. Pursuant to the Recast Insolvency Regulation, such secondary proceedings would not be initiated automatically upon the commencement of the insolvency proceedings for Party F in Country H. A creditor of the Finnish Branch may make a petition to initiate the secondary proceedings, but the decision to do so would be made by the relevant authorities. Under article 49 of the Recast Insolvency Regulation, any excess assets of the Finnish Branch remaining after the payment of all liabilities under the secondary proceedings, would be transferred to the main proceedings.

As regards credit institutions (to which the Recast Insolvency Regulation does not apply), the Credit Institutions Act (2014, as amended) provides that if Country H is a member of the EEA, the decision made in Country H regarding the winding-up of Party F automatically and immediately enters into force in Finland with respect to a Finnish

Branch that operates as a credit institution in Finland. Under Directive 2001/24/EC on the reorganisation and winding up of credit institutions[3] the adoption of reorganisation measures or the opening of winding-up proceedings shall not affect the validity of the rights *in rem* of creditors or third parties in respect of tangible or intangible, movable or immovable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the credit institution and situated within the territory of another Member State at the time of the adoption of such measures or the opening of such proceedings. Further, the adoption of reorganisation measures or the opening of winding-up proceedings does not affect the right of creditors to demand set-off of their claims against the claims of the credit institution, if such a set-off is permitted by the law applicable to the credit institution's claim.

Furthermore, the Credit Institutions Act allows the bankruptcy of Party F in Finland, if Country H is not a member of the EEA and the Finnish Branch operates as a credit institution in Finland. In principle this bankruptcy would extend to all assets of Party F (and not just its Finnish branch), but in practice we would expect the bankruptcy proceedings to be limited to assets located in Finland unless there is a treaty between Country H and Finland that would allow the Finnish bankruptcy to include the assets located in Country H. The Treaty does not include provisions regarding this.

If Country H is a member of the EEA and Party F is subject to BRRD in Country H, recovery and resolution measures carried out by the competent authority in Country H would be recognised and enforced in Finland.

If Country H is not a member of the EEA and Party F qualifies as a foreign credit institution (as defined in the Credit Institutions Act) or a foreign investment service provider (as defined in the Investment Services Act), and either Finland or the EU have entered into a mutual recognition treaty, a recovery or resolution measure carried out in Country H should be recognised in Finland. Finally, independent recovery or resolution measures may be initiated against the Finnish Branch in the circumstances referred to in Article 96 of the BRRD.

(k) *If there were separate proceedings in Finland with respect to the assets and liabilities of the Finnish Branch, would the receiver or liquidator in Finland and the Finnish courts, based on the facts above include Party F's position under the EFET General Agreement, in whole or in part, among the assets of Finnish Branch and, if so, would the receiver or liquidator and the Finnish courts recognize the close-out netting provisions of the EFET General Agreement in accordance with their terms? The most significant problem arising would be if a Finnish receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Finnish Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Finnish Branch to the liquidator or receiver of the Finnish Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same EFET General Agreement. In considering this issue, please assume that close-out netting under the EFET General Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.*

As discussed above in more detail, certain Finnish laws determine the effects of a netting agreement on the basis of the law referred to in the relevant netting agreement. Where

[3] With respect to insurance undertakings, a similar provision is included in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), the substantive provisions of which apply as of 1 January 2016. Solvency II replaced Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings.

Finnish insolvency proceedings are initiated and the insolvency laws of Finland are applied, we believe that they would not restrict the applicability of the Netting Act because its applicability is neither restricted to Finnish parties nor agreements under Finnish law.

Based on the above, we believe that if there were separate proceedings in Finland and the close-out netting under the EFET General Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H, the Finnish bankruptcy estate and Finnish court would apply Finnish insolvency law and accordingly recognise the close-out netting provisions of the EFET General Agreement in accordance with its terms.

(l) *Please consider your answer to your question assuming instead that Party F has no branch located in Finland, but has assets in Finland.*

Assuming that Country H is a member of EEA, we are of the opinion that the procedure specified in Opinion (j) above and relating to EEA members would apply.

Assuming that Country H is not a member of EEA, we are of the opinion that the procedure specified in Opinion (j) above and relating to non-EEA member would apply.

According to article 3(2) of the Recast Insolvency Regulation, the right of another Member State to open secondary insolvency proceedings is dependent on the existence of an “establishment” within the territory of that other Member State. Based on this we are of the opinion that in case Party F has no branch located in Finland the procedure specified above in Opinion (j), and relating to corporate entities to which the Recast Insolvency Regulation applies, would not apply. In this case the relevant Finnish authorities would, subject to the restrictions set out in the Recast Insolvency Regulation, defer to the proceedings in Country H, so that the assets and liabilities located in Finland would be handled as part of the proceedings for Party F in Country H.

2. Collateral

2.1 General overview

Finnish written law contains very few detailed provisions on security arrangements, and the law is rather based on principles derived from the few provisions that exist. In general, Finnish law recognises only one form of security over assets, a pledge, which under Finnish law does not transfer ownership to the pledgee. Further, any contractual provision entitling the pledgee to take ownership of the pledged assets upon a breach by the debtor (in this case Party A) is pursuant to Section 37 of the Contracts Act null and void. Further implications of the pledgor retaining ownership of the pledged assets include the pledgee’s inability to exercise owner’s control over the pledged assets and the pledgee’s duty to return any excess value of the pledged assets to the pledgor.

Transfers of ownership with the intention of creating a security interest have been discussed in Finnish legal literature. Generally, such arrangements have been regarded as simulated transfers, where the intention of the parties overrides the form of the transaction. This means e.g. that the pledgee/transferee’s obligation to account for excess value would nonetheless apply.

The purpose of the Financial Collateral Act is to implement the EU Directive 2002/47/EC on financial collateral agreements (the “**Financial Collateral Directive**”) and prevent legal uncertainty for qualifying transactions. As already discussed above, the Financial Collateral Act also contains a safe harbour provision for netting. In the context of collateral, the most relevant provision of the Financial Collateral Act is the provision, pursuant to which the parties may agree on a purchase of securities or cash on terms of repurchase or on another arrangement, where the beneficiary of the security obtains title to the security assets. Pursuant to the same provision, the Transferee shall transfer equivalent collateral to the transferor under the agreed terms at the latest on the due date, unless it has been agreed that the value of the collateral will be set off against the secured obligation. Finally, the provision stipulates that the transfer is binding when the securities have been delivered into the possession of the Transferee or the transfer of title to the securities or cash perfected in the same way as a transfer of title generally.

We have based our opinion on the following additional assumptions:

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

(ii) The counterparties agree that Eligible Credit Support will include cash and Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

(iii) that the assets granted as Eligible Credit Support are, or will at the time of perfection of such security be, owned by Party A and that such assets are not subject to any existing security interest or transfer, perfected through a qualifying transfer of possession, by the giving of a qualifying notice, through registration or a combination of the above prior to the perfection of the security under the EFET Credit Support Annex.

ISSUES:

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

The principle of freedom of contract allows the parties to determine the law applicable to their contract, and such choice of law provisions are typically upheld by Finnish courts. However, as regards the effects of the transfer of ownership *vis-à-vis* third parties, Finnish courts would apply the *lex rei sitae* principle, pursuant to which such effects are determined in accordance with the laws of the jurisdiction in which the transferred assets were located at the time of transfer.

The Promissory Notes Act distinguishes between negotiable and other ("ordinary") promissory notes. This distinction is important in the context of applying the *lex rei sitae* principle to Cash and Letters of Credit.

If a receivable is evidenced by a physical negotiable instrument, the requirements for a perfected transfer would be determined in accordance with the laws of the jurisdiction where the negotiable instrument is located. We believe that the terms of a Letter of Credit could be such that the instrument would, under the Promissory Notes Act, be classified as a negotiable promissory note.

With regard, in turn, to receivables not evidenced by a negotiable instrument (*e.g.* cash on a bank account and claims under contracts and also Letters of Credit if their terms do not cause them to be classified as negotiable promissory notes), the exact application of the *lex rei sitae* principle is not clear in Finland when it comes to the perfection and third-party effects of a transfer of such receivables in a cross-border context. To our knowledge, majority of Finnish legal scholars support the view that the law of the transferor's jurisdiction should apply in such circumstances, but also other views have been presented, and the rules are not without exceptions, as we, for instance, believe that Finnish courts would apply Finnish law when determining the third-party effects and due perfection of a transfer of title in Cash held on a bank account with a Finnish bank, regardless of the account holder's jurisdiction. It is also worth noting that the EU Commission has on 12 March 2018 passed a regulation proposal on the law applicable to the third-party effects of assignments of claims (COM(2018) 96), with a view to establish uniform EU-wide conflict of law rules for transfers of receivables.[4] The regulation proposal is currently subject to an ongoing EU law-making procedure (2018/0044/COD).

Under the Promissory Notes Act, a security interest is perfected in the same way as a transfer of title.

The issuing of a Letter of Credit by a credit institution to the Transferee would not constitute a transfer of ownership from the Transferor to the Transferee.

(n) *Would the laws of Finland characterize each transfer of collateral as erecting 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 recharacterization?*

If the Financial Collateral Act applies (see **Appendix A**, Section 1.7), Section 4 of the Act would prevent a re-characterisation of transfer under the EFET Credit Support Annex, and the title transfer collateral arrangement, under which the Transferor transfers full ownership of the Collateral for the purpose of securing the performance of the Transferor's obligations under the Agreement, would be upheld in accordance with its terms.

If the Financial Collateral Act is not applicable, the intention of the parties would override the wording used in the EFET Credit Support Annex. As the expressed purpose of the arrangement is to "*collateralize outstanding obligations between the Parties from time to time pursuant to the Agreement*", a Finnish court could re-characterise the transfer as creating a security interest and not a transfer of title.

If the transfer is re-characterised as a pledge, the validity of the security interest *vis-à-vis* the third-party creditors of the Transferor would depend on whether the security interest has been duly perfected under the applicable laws. We believe that the procedures set out in the EFET Credit Support Annex, namely the transfer of Cash to the Transferee's account, would be sufficient to create a perfected security interest in favour of the Transferee.

As between the parties, the re-characterisation would prevent the Transferee from transferring title to the collateral to a third party prior to enforcement (although pledging

[4] The principal rule laid down in the regulation proposal is that the third-party effects of a transfer of a receivable would be governed by the law of the transferor's jurisdiction (Article 4(1)). The third-party effects of a transfer of cash credited to an account in a credit institution would be governed by the law applicable to the transferred receivable (Article 4(2)), *i.e.* quite likely the jurisdiction in which the credit institution holding the account is located.

the security interest is in principle possible) and would obligate the Transferee to return any excess value to the Transferor.

As discussed in Opinion (m) above, the granting of a Letter of Credit would not constitute a transfer of collateral.

As the re-characterisation risk in Finland is removed by the Financial Collateral Act, the only way to mitigate the risk without changing the nature of the EFET Credit Support Annex would be to ensure that one of the parties is an institution within the meaning of the Financial Collateral Act[5]. However, this will most likely be practical only in the context of a group of companies, some of which qualify as institutions and some of which do not.

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

After receiving an ownership interest in the Eligible Credit Support, the Transferee will have to take the perfection measures necessary to perfect the ownership. There are no filing or similar requirements necessary or advisable. There are no other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained to establish, enforce or continue such ownership interests.

(p) *What is the effect, if any, under the laws of Finland 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?*

Assuming that the transfer of ownership is valid (as discussed in Opinion (n)) and provided that the substitutions are perfected in the same way prior to or immediately after the release of the previous collateral, the right to substitute collateral should have no implications beyond those discussed below in Opinion (s).

(q) *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 Finland 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 amount payable"?*

Under the Netting Act and the Financial Collateral Act the parties are free to determine on the terms of the netting, provided that such provisions are "customary". If this condition is fulfilled, we have no reason to believe that the validity of § 11 of the EFET Credit Support Annex would be challenged.

[5] As the relevant form of Eligible Security is Cash, the additional condition for applicability of the Financial Collateral Act, when the beneficiary of the security is an institution, is fulfilled.

However, any collateral included in the net amount payable by virtue of the last sentence of § 3.1 of the EFET Credit Support Annex but not delivered to Party B when insolvency proceedings are commenced against Party A would be considered unperfected security. This would mean that such collateral would not be available to Party B, in which case the "deemed inclusion" provided by the last sentence of § 3.1 of the EFET Credit Support Annex could change the commercial outcome of the netting.

(r) *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?*

Outside of insolvency, the principle of freedom of contract would apply, with the possible exception of the re-characterisation risk and a specific prohibition of contractual stipulation transferring title to the collateral to the pledgee upon an enforcement event without any settlement between the parties (*lex commissoria*). While the EFET Credit Support Annex does intend to immediately transfer ownership, Clause 11 of the EFET Credit Support Annex provides a settlement of claims between the parties and a duty to return excess value, and we therefore believe that the *lex commissoria* rule does not restrict the enforceability of the EFET Credit Support Annex.

Bankruptcy, reorganisation and temporary suspension of the activities of a deposit bank would each, in the absence of specific provisions to the contrary, limit the enforcement of Party B's rights under the EFET General Agreement and the EFET Credit Support Annex. As many such aspects are specifically addressed in other parts of this opinion, this Opinion (r) is limited to the possible implications for the enforceability of security interests during the insolvency of a Party A.[6]

The commencement of reorganisation proceedings or the temporary suspension of the activities of a deposit bank would impose a general moratorium on all collection of debt and enforcement of security. Exceptions to the moratorium may be granted by the relevant court, *e.g.* if the collateral is not considered necessary for the success of the reorganisation proceedings. Both the Financial Collateral Act and the Netting Act provide roughly similar exceptions to the moratorium. If the Financial Collateral Act applies, the collateral may be realised irrespective of the moratorium. As discussed in more detail in Opinion (u) below, the applicability of the Netting Act to the EFET Credit Support Annex is not certain. If applied, the Netting Act would similarly allow Party B to enforce the security.

While the commencement of bankruptcy proceedings does not automatically restrict the enforcement of perfected security interests, the bankruptcy estate has certain powers that may affect enforcement by Party B. First, the secured creditor must inform the bankruptcy estate of its claim, the collateral and, if possible, any enforcement action it intends to take. Second, the bankruptcy estate may impose a temporary moratorium of up to two months on the enforcement action. Finally, under certain circumstances, the bankruptcy estate may take over the realisation of the collateral (the secured creditor nonetheless having priority to the proceeds). If the Financial Collateral Act applies, it would allow Party B to enforce the collateral in accordance with § 11 of the EFET Credit Support Annex regardless of the bankruptcy of Party A. Similarly, the Netting Act, if

[6] For completeness, while an attachment of a relevant asset would not constitute an insolvency procedure, it must be noted that assets used as financial collateral are not immune from other enforcement action. Where the title transfer security is recharacterised as creating a security while the transferor retains ownership of the Collateral, it cannot be excluded that such Collateral would be subject to attachment. However, this attachment could not affect a duly created and perfected security interest and would only apply to the value of the collateral (if any) after the amounts owed under the Individual Contracts (entered into before the counterparty was notified of the attachment) have been discharged.

applicable, would allow Party B to enforce the security. The Financial Collateral Act specifically overrides the duty to inform the pledgor of the enforcement action, but the Netting Act does not contain such an exception to the Bankruptcy Act. The prudent view is therefore that under the Netting Act, the bankruptcy estate would have to be informed of enforcement actions in advance.

Where the Resolution Act applies, the resolution authorities may order a temporary stay on the enforcement of security.

(s) *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?*

Collateral transferred prior to the commencement of the insolvency proceedings may be recovered by the trustee of the bankruptcy estate and by other creditors in the bankruptcy proceedings. Please refer to **Appendix A**, Section 1.5 for a general overview. Recovery of the collateral could be based on Section 5 or Section 14 of the Recovery Act.

If so, how long before the insolvency does this suspect period begin?

Please refer to **Appendix A**, Section 1.5. Collateral agreed on prior to the suspect period but perfected during the suspect period can be recovered.

If such a period exists, would the substitution of Collateral by a counterparty during this period invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing?

The Financial Collateral Act specifically excludes the application of Section 14 of the Recovery Act to collateral posted in substitution for previous collateral, provided that the new collateral is of no greater value than the old collateral and also qualifies as collateral under the Financial Collateral Act. We therefore believe that, when the Financial Collateral Act applies, the substitution of Collateral carried out in accordance with § 6 of the EFET Credit Support Annex would not invalidate the security interest.[7]

If the Financial Collateral Act does not apply, recovery on the grounds of either Section 5 or Section 14 cannot be excluded. However, it has been argued in Finnish legal literature that a replacement of collateral, if the substitute collateral is of no greater value than the assets it is replacing, does not jeopardise the interests of creditors and should therefore not be recoverable.

Is the posting of additional Collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

The Financial Collateral Act expressly provides that Collateral posted during the suspect period in accordance with a customary mark-to-market provision requiring additional Collateral in order to take account of changes in the value of Collateral or in the amount

[7] The practical implications of substitution may be very limited within the context of the EFET Credit Support Annex, as the only types of Eligible Security are Cash and Letters of Credit (the latter most likely not being eligible security under the Financial Collateral Act). A substitution of Cash for Cash would be protected by the Financial Collateral Act, while a replacement of Cash with Letters of Credit would not. It is not entirely clear whether the replacement of Letters of Credit with Cash would be protected by the Financial Collateral Act.

of relevant financial obligations will not be subject to recovery under Section 14 of the Recovery Act, provided that posting additional Collateral is regarded as customary considering the circumstances. As discussed above, some legal scholars have argued that recovery should not be possible even if the Financial Collateral Act does not apply.

(t) *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 Finland 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?*

If the Financial Collateral Act applies, the EFET Credit Support Annex is in an appropriate form to create the intended outright transfer of ownership and there are no requirements to ensure the validity of such transfer, other than the perfection requirements discussed above in Opinion (m).

If the Financial Collateral Act does not apply, the EFET Credit Support Annex could be construed as creating a security interest rather than the intended outright transfer of title. For consequences of such re-characterisation and perfection requirements, please refer to Opinion (n) above.

(u) *Do you have other specific recommendations on the subject of collateral that you would like the EFET member to consider?*

While the conditions for the applicability of the Financial Collateral Act may be difficult to meet *e.g.* in transactions between two producers or transporters of energy, the Netting Act (which may be more widely applicable) may offer a degree of protection. Sections 3 to 6 of the Netting Act contain provisions that e.g. allow the enforcement of collateral during the Insolvency Proceedings of the Transferor and prevent recovery under Section 14 of the Recovery Act.

Even if the Netting Act would apply to the enforcement of security, it would not *e.g.* remove the uncertainty relating to the re-characterisation of the transfer of ownership intended by the EFET Credit Support Annex.

3. Parent Company Guarantee

We have based our opinion on the following additional assumptions:

(i) With respect to a Party (the "**Principal Obligor**"), the parent company of that party (the "**Guarantor**") undertakes to pay when and if the Principal Obligor fails to pay any amounts when due pursuant to the terms of the EFET General Agreement (including any applicable grace period) ("**Default**").

(ii) The other, non-defaulting, Party and the beneficiary under the guarantee (the "**Beneficiary**") may demand payment from the Guarantor of any outstanding amount pursuant to section (i) above, immediately upon the occurrence of the Principal Obligor's Default without having to first take any action against the Principal Obligor, in particular, without having to:

- make any demand to the Principal Obligor, other than issuing the initial invoice in accordance with the terms of the EFET General Agreement;

- take any legal action against the Principal Obligor; or
- file any claim in the Principal Obligor's insolvency.

(iii) Upon the receipt of the Beneficiary's demand, a copy of the unpaid invoice and any breakdown of any additional outstanding amounts due to the Beneficiary, such as late payment interest, the Guarantor shall promptly pay the amount specified in the demand to the Beneficiary.

(iv) The liability of the Guarantor under the guarantee is limited to that of the Principal Obligor under the EFET General Agreement and any cap set out in the guarantee document.

(v) The guarantee is provided in the form of a written document signed by an authorised representative of the Guarantor.

(vi) The guarantee is governed by Finnish law and any disputes in connection with or claims under the guarantee are to be referred to and resolved by the courts of Finland.

(vii) The Guarantor has provided an address that the Guarantor can be served at in Finland but is not necessarily established in Finland.

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

There are no specific statutory formalities that should be complied with in order to create a valid guarantee document. However, it is recommendable to obtain a resolution of the board of directors of the Guarantor approving the granting of the guarantee especially if the amount of the guarantee in question is substantial to the company granting the guarantee.

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

It would be recommendable to include the following wording in the document of the guarantee:

This guarantee is a surety (omavelkainen takaus).

The provisions of the Act on Guarantees and Collateral for Third Party Debt (Fi: laki takauksesta ja vierasvelkapanttauksesta, 361/1999), to the extent it concerns the creditor's information duties, shall not apply to this guarantee and the Guarantor waives any rights and defences under the said act until the Guarantor and the Principal Obligor have no outstanding obligations towards the Beneficiary.

4. General Enforceability

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

In Finland, private law is not based predominantly on extensive codifications as in most continental legal systems. Parliament has enacted legislation governing certain important areas of law, such as the Sale of Goods Act (1987, as amended) (the "**Sale of Goods Act**") and the Contracts Act (1929, as amended) (the "**Contracts Act**"), which mainly covers the formation and invalidity of contracts, but outside the scope of such legislation the rules of Finnish contract law are to a large extent founded on case law, which has been organised into rules and general principles in the doctrine.

Pursuant to the principle of freedom of contract, which is generally applied in Finland, the parties to a contract may freely determine the provisions of the contract. Thus any contract is enforceable under the laws of Finland, subject to the below and other general qualifications set out in this Section 3 and relating to the enforceability of the Documents.

Should any foreign language documents be presented to a Finnish court, the court may request translations from the parties. If requested by the court, it is up to the parties to prepare an adequate translation of the Documents into the Finnish language or the Swedish language, in order for the court to rule on the issues brought before it.

Assuming that the agreement(s) in question is/are governed by a foreign law which is not known to the Finnish court, said court shall request the parties to produce evidence of the contents of applicable foreign law. In the absence of evidence regarding the applicable foreign law, the Finnish court may apply Finnish law instead.

In any proceedings before a Finnish court for the enforcement of the Documents, the proceedings would be conducted in accordance with the statutory Finnish procedural rules and the court would not be obliged to give effect to provisions in the Documents, such as agreements regarding the manner in which service of process is carried out, to the extent in conflict with such statutory rules.

As a general rule, Finnish courts will not give effect to obligations, the performance of which would be illegal under the laws of the jurisdiction in which they are to be performed, nor will they give effect to contractual provisions purporting to constitute (advance) waivers of applicable mandatory provisions of law.

We would like you to specifically discuss the provisions on:

(i) *Non-performance due to Force Majeure (§ 7 of the EFET General Agreement);*

Pursuant to the principle of freedom of contract, the parties may freely determine the scope and effects of *Force Majeure*. Thus, subject to the general qualifications set out in this Section 3 and relating to the enforceability of the Documents, we take the view that the inclusion of § 7 of the EFET General Agreement would not affect the enforceability of any of the Documents.

(ii) *Remedies for non-performance (§ 8 of the EFET General Agreement);*

Under Finnish law, the parties to a contract can freely agree on remedies for non-performance and we take the view that § 8 of the EFET General Agreement would be enforceable in Finnish courts subject to the below and other general qualifications set out in this Section 3 and relating to the enforceability of the Documents.

Pursuant to Section 36 of the Contracts Act, if a contract term is unreasonable or its application would result in an unreasonable outcome, the term may be adjusted or set aside.

Furthermore, the right to recover damages may be limited to the extent the aggrieved party could have avoided or mitigated the damages using reasonable efforts (see (iii) below).

(iii) *Limitation of liability (§ 12 of the EFET General Agreement); and*

Pursuant to the principle of freedom of contract, the parties may freely limit or exclude their liability for damages. Common limitations are the exclusion of indirect damages, a fixed maximum amount for damages and a time limit after which the liability expires. Thus the provisions of § 12 of the EFET General Agreement would in our view be upheld by a Finnish court. However, the terms of § 12 would be subject to interpretation and means of evidence, and the amount of possible Damages would be decided by the court.

The effectiveness of any terms in the Documents exculpating a party from liability or duty otherwise owed may also be limited by law or be subject to mitigation. The abovementioned Section 36 of the Contracts Act may apply to provisions relating to limitation of liability. Limitation of liability is expressly mentioned in the preparatory materials of the Contracts Act as one the occasions when said section may typically apply. Furthermore, according to Finnish law, a party guilty of intentional misconduct or gross negligence cannot successfully invoke limitations of liability in its defence. Ordinary negligence, on the other hand, does not prevent a party from relying on limitations of liability. Furthermore, the limit of gross negligence is set out relatively high in Finnish case law; the conduct of the party should be indifferent or close to intentional. The rights of consumers are also protected by limitations (e.g. consumers' right to claim for indirect damages cannot be excluded in a contract between a company and a consumer).

We note that "Kardinalspflichten", referred to in subparagraph 4 of § 12 of the EFET General Agreement, is not a concept known in Finnish law, and its meaning would likely have to be sought from German law.

We further note that the provisions of subparagraph 5 of the § 12 of the EFET General Agreement (Duty to Mitigate Losses) are, according to said subparagraph, "subject to applicable law". According to Section 70 of the Sale of Goods Act the injured party must take reasonable measures to mitigate his loss. If they fail to do so, they must bear the corresponding part of the loss themselves. The same Section also provides that the amount of damages payable to the injured party may be adjusted if the amount is unreasonable taking into account the possibilities of the breaching party to foresee and prevent the loss as well as other circumstances.

As regards the injured party's responsibility to mitigate his losses in commercial contracts, the duty to investigate different alternative actions is relatively high. Thus that party could unlikely successfully claim that he was not aware of the actions that needed to be taken, if those actions would be obvious to a professional in that industry.

The above provisions of the Sale of Goods Act are not mandatory provisions of law. The parties can agree to disapply the provisions of law, and in case of a dispute, the court would have to base its decision on what has been agreed on between the parties. In our opinion subparagraph 5 of the § 12 of the EFET General Agreement does not clearly indicate whether its provisions are subject to all applicable laws or merely the mandatory provisions of the applicable law.

In case the purpose of said subparagraph is that it will be applied unless mandatory provisions of the applicable law stipulate otherwise, we suggest the said subparagraph be amended to clearly indicate this.

(iv) *Any other provisions which in your opinion need to be commented on according to the law of Finland, including whether these provisions could and/or need to be further 'expanded' or 'strengthened' under the laws of your jurisdiction. We are especially interested in provisions that you may believe, for example infringe upon the ordre public in Finland and that may be challenged by the courts in Finland irrespective of the law that governs the EFET General Agreement.*

As regards subsection 4 of § 23 of the EFET General Agreement, we note that should illegality with respect to any provisions of any of the Documents exist, the question of whether or not any such invalid provisions may be severed from the other provisions thereof in order to save those other provisions would be determined by a Finnish court in its discretion.

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

Enforcement in Finland of the right of a party under any agreement or instrument may be limited by general time bar provisions and a general duty to give notice of non-conformities within reasonable time.

The term "enforceable", when used herein, means that the rights and obligations of the relevant party under the relevant document are of a type which Finnish law generally enforces or recognises; however, enforcement before the courts of Finland will in any event be subject to the remedies available in such courts (some of which may be discretionary in nature) and to the availability of defences such as set-off, abatement, counter claim and force majeure.

Any provision in any of the Documents which involves an indemnity for costs of litigation or enforcement may be subject to the discretion of the court to decide whether and to what extent a party to litigation or enforcement should be awarded the costs incurred by it in connection therewith. Furthermore, there may be circumstances in which a Finnish court would not treat as conclusive certificates and determinations which according to any of the Documents are stated to be so treated.

Where any party is vested with a discretion or may determine a matter in its opinion, Finnish law may require that such discretion is exercised reasonably or that such opinion is based on reasonable grounds.

5. Confirmation Practices

We have been asked to distinguish between (1) the formal requirements and procedure in the formation of a legally binding and enforceable Individual Contract and its inclusion in the EFET General Agreement and (2) the formal requirements a Confirmation should comply with under the laws of Finland in order to be sufficient for all purposes to evidence a binding Individual Contract and its inclusion in the EFET General Agreement.

We have based our opinion on the following additional assumptions:

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

(ii) 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.

5.1 Binding Individual Contract

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

Pursuant to Section 1 of the Contracts Act a legally binding contract is concluded by an offer and an answer to that offer with the same contents, but contracts may be entered into also as result of a negotiation process where offer and answer cannot be distinguished. There are no generally applicable provisions of law regarding the execution of a contract or the registration or notarisation of agreements in Finland. Unless otherwise specifically provided by law (e.g. transfer of real estate), there are no requirements on the form of the contract.

As regards enforceability, a binding Individual Contract would be enforceable in a Finnish court subject to qualifications specified in **Part B.4** (*General Enforceability*). However, in case of a dispute regarding the formation or the context of a contract, the actual enforceability in a Finnish court is subject to means of evidence. Thus it is highly recommendable to use written contracts signed by all contracting parties.

In certain cases, commercial practice may supersede the provisions of law provided that such practice is commonly used and accepted in that branch of industry.

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

The mechanics for entering into an Individual Contract would appear to closely follow the principle of offer and answer. As regards an Individual Contract agreed upon orally, it would become legally binding and enforceable (as discussed above) as from the moment when the parties have exchanged their consents with the same contents. According to the Contracts Act an answer to an oral offer must be given immediately, unless the offeror has specified a time during which the answer should be given. If the answer is not given immediately (or within the time specified by the offeror) the offer is considered to have been rejected. An answer to an offer arriving late would be considered as a new offer.

The parties may agree that after an Individual Contract has been agreed upon orally, a written Confirmation will be sent. If this Confirmation is for confirmation purposes only and the parties have agreed that it is not a requirement for the formation of an Individual Contract, it has no effect as to the formation of the Individual Contract and the Individual Contract is considered to be binding and legally enforceable as of the time of the oral agreement between the parties.

As regards the means of evidence, the parties can agree to sign the Confirmation whereby they confirm the oral contract. If the stipulations in the Confirmation are not similar to the ones agreed upon orally (and the stipulation in the Confirmation reflects the parties' intention), it is considered that the contract has been concluded by the signing of the Confirmation.

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

As a starting point, under Finnish law, contracts cannot be amended unilaterally after they have been concluded. However, a confirmation can in exceptional cases affect the content of a contract. If the Confirmation amends the provisions of an oral Individual Contract it would be considered as an offer to amend such provisions. According to Finnish law there is no obligation to answer to such offer. The silence of one party in respect of such offer would, according to general principles of law, be considered as rejection of such offer.

However, the contractual relationship of the parties or commercial practice may indicate that silence is considered as an acceptance. In this case a confirmation might amend the contents of a contract. Generally this is rare according to Finnish legal literature. In any event, the evidentiary value of a Confirmation which has not been objected to will likely be high in determining the contents of the parties' agreement.

In case a party should have objected to incorrect terms, there is no relevant time period for such objection specified in Finnish law. The appropriate period would be assessed in accordance with what is reasonable taking into account the parties' intentions, previous practices between the parties and the relevant market practice.

As regards whether Finnish law could potentially override the governing law of the EFET General Agreement, Finnish courts would, pursuant to Article 10(1) of Rome I Regulation, as a principal rule apply the governing law of the EFET General Agreement when determining whether an Individual Contract has been amended in circumstances described above. However, the court would also have regard to Article 10(2), pursuant to which a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law that applies pursuant to the principal rule above. The application of Article 10(2) of Rome I Regulation could therefore result in Finnish law overriding the governing law of the EFET General Agreement in circumstances where there is a conflict between Finnish law and the governing law of the EFET General Agreement as to whether an agreement to amend the Individual Contract has been formed. As far as Finnish courts are concerned, we, however, believe that the bar for such an outcome would, in the context of this opinion, be relatively high. How non-Finnish courts apply said Article (or other conflict of law rules similar to it) would, in essence, be a matter of the laws of such non-Finnish court's jurisdiction, and would presumably depend on whether such non-Finnish court would find the outcome reached by the application of the law that governs the EFET General Agreement unreasonable such that it would apply Finnish law instead.

Should there be a need for a specific time limit during which the objection should be made at the latest, it might be useful to specify such in the § 3.3 of the EFET General Agreement. Otherwise the relevant time limit would be determined by a Finnish court according to the principles set out above.

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

There are no provisions in Finnish law regulating the form of an Individual Contract. There are, however, rules regarding the incorporation of general terms into a contract. The starting point is that general terms must be attached to the contract in order for them to be binding between the parties. If general terms are merely referred to in a contract, certain requirements must be fulfilled in order for them to qualify as part of that contract.

However, the EFET General Agreement, being an agreement into which the parties have already entered into, would likely not qualify as “general terms” to the Individual Agreement but instead a frame agreement applicable to all Individual Contracts. Thus, the manner and form in which the EFET General Agreement and the relevant Individual Contract are intended to constitute the Agreement is up to the parties to determine.

When interpreting a contract, a Finnish court would attempt to find out what was the intention of the parties when entering into an agreement. The wording of the agreement is a key element and starting point in the interpretation. However, the wording of the contract may be set aside if it can be shown that the wording does not correspond to the parties’ intention. If a party claims that the intention of the parties was contrary to the wording of the agreement, it is up to that party to provide evidence of this (see **Part B.5.2** below for means of evidence).

Based on the above, we take the view that the reference to relevant EFET General Agreement is sufficient for the inclusion of the Individual Agreement in the EFET General Agreement. However, for the purposes of evidence in circumstances where the same parties would have more than one EFET General Agreement in place, it would be recommendable to indicate which contracts actually form the relevant EFET General Agreement instead of having multiple Individual Contracts all referring generically to "the EFET General Agreement". For example, the reference to “all Individual Contracts” in § 1.1 of the EFET General Agreement could possibly give rise to a disagreement between the parties on which contracts are actually considered to be Individual Contracts for the purposes of the relevant EFET General Agreement. There are no specific requirements under Finnish for such identification, and generally all records of such identification would be admissible evidence in court (see Part **B.5.2** below).

5.2 Means of Evidence

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

In order to succeed with its claim, the plaintiff must prove the facts which it relies on in support of its case, whereas the defendant must normally prove the facts that the defendant invokes. There is no general rule prohibiting certain types of evidence, *e.g.*, evidence obtained in a certain manner and in principle any document, object, data (including taped recordings of phone calls) or information can be used as evidence in court proceedings.

As regards items (i), (iii) and (iv), we note the following:

In practice, the interested parties must themselves obtain and submit the evidence which they wish to present. The Code of Judicial Procedure (1734, as amended) (the "**Judicial Code**") also permits the court to decide to obtain items of evidence on its own initiative, but this rarely takes place in practice. Moreover, it may not order a new witness to be examined or a document to be presented on its own initiative against the joint will of the parties, if the case in question is amenable to out-of-court settlement. Evidence is presented to the court orally by hearing interested parties, witnesses and experts, as well through the presentation of written expert statements, other documents or objects and by conducting inspections. Finnish courts apply the so-called "theory of free evaluation of evidence". It means that the court, after having carefully considered all the facts presented, must decide what is to be regarded as the truth in the case. The court shall take into consideration all facts that appear either directly or indirectly from the trial material. The objective at trial is to find out as precisely as possible what really happened. In order to do this, the court may utilise all facts that appear in the matter as sources of information and evaluate the value of the evidence without restrictions. There are, however, certain limitations as to what kind of evidence may be presented. The relevant rules are discussed below.

Legal proceedings are divided into a preparation phase and a main hearing (or trial). All the evidence that a party wishes to present to a court should be announced already in the preparation phase. Under Chapter 6 Section 9 Subsection 2 of the Judicial Code, the parties are not allowed to refer to new evidence during the main hearing that has not been referred to during the preparation phase. However, such evidence may be admitted with the consent of both parties or if it is reasonable to assume that the relevant party has had a valid reason for not referring to that piece of evidence earlier. Specific privacy regulations apply to the taping of phone calls.

Further, with regard to item (i), we note that besides procedural matters, there are certain aspects in the context of Finnish data protection rules which should be taken into consideration. Where Finnish data protection rules apply, a party, so as to ensure compliance with such rules, would have to: i) have a valid legal basis, such as consent, for the processing of the call participants' personal data gathered through the call, and ii) inform the call participants of the processing of their personal data. Additionally, under Finnish employee privacy laws, there are further restrictions in how employers can process employees' personal data. E.g. general recording of employees' phone calls in Finland is prohibited.

We note that the wording of § 23.1 of the EFET General Agreement, which concerns the recording of telephone conversations, is relatively generic, and from general Finnish perspective the parties can in our view operate on that basis (*i.e.* on the assumption that necessary consents from employees to the recording of phone calls have been obtained and internal compliance has been arranged). However, if the parties would wish to tailor the wording to include more specific references to the Finnish requirements, the current wording of § 23.1 of the EFET General Agreement could be considered to be replaced with the following wording:

Subject to its compliance with all applicable data protection, privacy, and employee privacy laws and regulations, a Party is entitled to record telephone conversations held in connection with the Agreement and to use the same as evidence. Each Party shall be responsible for its own compliance with all applicable laws and regulations in connection with call recording, including but not limited to fulfilling its information obligations, obtaining all required consents, and fulfilling its employee privacy related obligations.

As regards question (ii), we note the following:

All persons heard as witnesses or for probative purposes must, as a general rule, be heard and cross-examined orally. In certain cases, persons can be heard without them being present in court, *e.g.*, through video conference equipment, if the court deems such hearing appropriate. A private written statement drawn up for the purpose of a pending or imminent trial, or an oral statement entered in the record of a criminal investigation, shall not, as a main rule, be admitted as evidence in a court, unless the court admits it for a special reason. Thus, a witness or an interested party may not give written testimony. However, if a witness or an interested party cannot be questioned in the main hearing or outside of the main hearing, the court may admit said document or statement as evidence. Witnesses and parties heard for probative purposes may, however, use written notes as a memory aid when they are being heard. As of 1 January 2016, written witness statements are allowed in civil matters provided that all parties agree to their use.

There are certain exceptions to a witness's obligation to answer questions, relating to e.g. self-incrimination or confidential or privileged information.

6. Core Provisions

We have based our opinion on the additional assumptions outlined under **Part B.1**:

(ee) *Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached in Part B.1 (Enforceability of Close-Out Netting) above? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.*

As discussed in **Part B.1**, the Netting Act does not attempt to define the exact netting mechanisms, but rather requires that the contractual terms must be "customary" in the industry. Aside from this requirement and the uncertainties relating to close-out netting on grounds other than Insolvency Proceedings, we have no reason to believe that the selections in the EFET General Agreement or the Annexes would affect the applicability of the Netting Act to the EFET General Agreement.

As discussed in Opinion (p) above, substitution carried out in accordance with § 6 of the EFET Credit Support Annex[8] would not affect our opinion.

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

We believe that § 1, § 10.3(a), the last sentence of § 10.3(b) and § 11 (and the related definitions) are Core Provisions as they provide the framework for close-out netting. § 10.5(c)(iv), to the extent that it relates to commencement of Insolvency Proceedings

[8] Most notably it is required that the previous collateral is released only upon delivery of the new collateral and that the release of any previous security cannot be carried out by the Transferor. If the obligations are at some time unsecured, the arrangement would not qualify as a substitution and would not be protected by the Financial Collateral Act. If the Transferor (i.e. security provider) can unilaterally reclaim previous security, the transfer to the Transferee would most likely not be considered perfected.

(and not merely a petition) is a Core Provision. In respect of the conclusion regarding automatic termination, also § 10.4 is a Core Provision.

(gg) *Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of your conclusions reached under Part B.1?*

The inclusion of the EFET General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement would not change our conclusions under **Part B.1**, provided that (i), all of the general agreements are entered into by and between the same two parties, (ii) the other general agreements would on a standalone basis fall within the scope of the Netting Act and (iii) the assumptions expressed in this opinion are true in respect of all of the general agreements. This view is based on the fact that the Netting Act intends to provide for the netting of all obligations between the parties, and the government bill specifically states that e.g. different commodities may be included.

In regard to the Master Netting Agreement and the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement, we note that they contain an option to limit the scope of close-out netting to specific agreements. As discussed in Opinion (d) above, we believe that the Netting Act may not protect partial close-out, which could therefore be challenged in a Finnish court.

7. Governing Law, Arbitration and Jurisdiction

We have based our opinion on the following additional assumption:

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

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

Under Finnish law (including the Rome I Regulation), the parties may agree on the governing law (for the avoidance of doubt, including the choice of English and/or German law). However, despite the valid choice of the governing law, the application by a Finnish court of that law in relation to the Documents is subject to (a) that law not being contrary to such mandatory rules of Finnish law that due to their public nature or general interest shall be considered applicable irrespective of the agreed choice of law; (b) the application of that law not resulting in an outcome contrary to the public policy (*ordre public*) of the Finnish legal system, and the condition in Article 3(3) of the Rome I Regulation[9].

Under Finnish law, the parties may also agree on the forum with the exception of bankruptcy forum, the forum of civil execution and forums in few other matters which are not relevant in this opinion. Thus, subject to the above, any submission to the jurisdiction of the courts of the relevant country specified in the § 22 of the EFET General Agreement

[9] Article 3(3) of the Rome I Regulation provides that where all other elements relevant to the situation at the time of the choice of law are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

is legal, valid, binding and enforceable under the rules of Finnish private international law and will be upheld by the Finnish courts.

Also the submission to arbitration contained in § 22 of the EFET General Agreement is legal, valid, binding and enforceable under the rules of Finnish private international law and will be upheld by the Finnish courts.

As regards jurisdiction, a Finnish court may stay proceedings if concurrent proceedings are being brought elsewhere.

It cannot be fully excluded that a Finnish municipality or county, as a political subdivision of the state, Quasi Governmental Entities and associations of Local Government could claim sovereign immunity. However, as entering into the Documents and the Individual Transactions are in our view acts of commercial nature (*acta jus gestionis*) and such entities will have expressly consented to the jurisdiction of the courts of the other state, we consider it unlikely that such immunity would be granted.

8. Regulatory Regime

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

A number of business activities involving Financial Instruments would constitute the "business of provision of investment services" for the purposes of the Act on Investment Services. To the extent that an entity engages in any of the following activities ("investment business"), it would have to obtain authorisation in Finland, if the relevant activities would be conducted in or into Finland and unless it qualified for an exemption or it has obtained an adequate license in another EEA country. Investment business consists of:

(a) reception and transmission of orders in relation to one or more Financial Instruments;

(b) execution of orders on behalf of clients;

(c) dealing on own account;

(d) portfolio management of Financial Instruments;

(e) investment advice to customer regarding Financial Instruments;

(f) underwriting of Financial Instruments and/or placing of Financial Instruments on a firm commitment basis;

(g) placing of Financial Instruments without a firm commitment basis;

(h) operation of multilateral trading facilities; and

(i) operation of organised trading facilities.

EEA entities that are subject to supervision in their home jurisdictions and that are permitted to engage in investment business under home-country authorisations, are exempt from the Finnish authorisation requirements upon notification to the Finnish authorities by the home-country supervisor. EEA entities are free either to provide cross-border services into Finland or (under general rules of establishment) to set up a branch in Finland if they intend to conduct their business in Finland, without any further authorisations from Finnish authorities.

Non-EEA entities, on the other hand, which engage in investment business in or into Finland, could legally do so only by establishing a branch in Finland, by providing the services to qualifying professional clients on a cross-border basis within the framework provided for in Article 46 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MIFIR) or, in the absence of the relevant equivalence decision referred to in Articles 46 and 47 of MIFIR, by providing the services to qualifying professional clients on a cross-border basis through a separate permission obtained from the FSA. Non-regulatory registrations in connection with branch establishments are handled by the National Board of Patents and Registration of Finland (Fi. *Patentti- ja rekisterihallitus*).

There is no general statutory exemption in respect of institutional or professional investors.

Certainty as to whether the proposed activities of an EEA entity falls under the single passport exemption would in practice have to be decided by the home-country supervisor: if that supervisor is prepared to notify the FSA of the relevant activities, the FSA would not take a different view. It is clear that Finnish companies would be exempt from authorisation to the extent that they provide investment business services to companies within the same group of companies. A group would, thus, be defined in the following terms: A legal entity (an entity having legal personality) is a parent entity (a 'parent') and another such legal entity is a subsidiary entity (a 'subsidiary') if the parent:

(a) holds more than 50 % of the votes in respect of the shares in the subsidiary and this majority of votes is based upon ownership, membership, the articles of association, partnership agreement or similar rules or other contractual arrangements ; or

(b) is entitled to appoint or remove more than 50 % of the directors (or members in any other supreme decision-making body with similar decision making powers) of the subsidiary.

In addition, joint management or other factual control of a subsidiary together with a parent constitutes control for the purpose of the group definition.

However, it is unclear whether the group exemption would be available to Finnish entities only or whether it would be available also to EEA entities in addition to the single-passport exemption. Certainty in this matter can only be achieved by obtaining from the FSA a written ruling in this respect.

There are no currency or exchange control laws in Finland that may affect the EFET General Agreement or the Individual Contracts.

We also note that the Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (REMIT) are applicable to energy derivatives qualifying as wholesale energy products for the purposes of said Regulation. For the purposes of the registration obligation laid down in REMIT, the relevant Finnish authority would be the Finnish Energy Authority (Fi. *Energiavirasto*). Further, Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR) and the related amending and supplementing EU acts impose certain risk-mitigation techniques applicable to OTC derivatives contracts not cleared through a central counterparty. Also, the mandatory clearing requirements imposed in EMIR may in the future become applicable to classes of non-financial derivatives.

9. Other Provisions

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

We have no recommendations beyond those expressed above.

C QUALIFICATIONS

This opinion is subject to the following qualifications:

(i) save for the opinions in **Part B.1** (*Enforceability of Close-out Netting*) and **Part B.2** (*Collateral*), the opinions expressed in respect of the validity and enforceability of the Documents are subject to all bankruptcy, moratorium, reorganisation, administration, insolvency and other laws affecting creditors' rights generally;

(ii) where any party is vested with a discretion or may determine a matter in its opinion, Finnish law may require that such discretion is exercised reasonably or that such opinion is based on reasonable grounds;

(iii) powers of attorney (including, where applicable, the appointment of a process agent), although stated to be irrevocable, may under Finnish law be revocable;

(iv) enforcement in Finland of the right of a party under any agreement or instrument may be limited by general time bar provisions (Finnish: *vanhentuminen*);

(v) pursuant to Section 36 of the Contracts Act, if a contract term is unreasonable or its application would lead to an unreasonable outcome, the term may be adjusted or set aside.

(vi) enforcement of the Documents may be limited by general principles of equity; in particular, equitable remedies (such as an order for specific performance or an injunction) are discretionary remedies and may not be available under the laws of Finland where damages are considered to be an adequate remedy, and nothing in this opinion should be taken to indicate that any particular remedy would be available with respect to any particular provision of the Documents in any particular instance. Moreover, the effectiveness of terms in the Documents exculpating a party from liability or duty otherwise owed may be limited by law or subject to mitigation;

(vii) the term "enforceable", when used herein, means that the rights and obligations of the relevant party under the relevant agreement are of a type which Finnish law generally enforces or recognises; however, enforcement before the courts of Finland will in any event be subject to the remedies available in such courts (some of which may be discretionary in nature) and to the availability of defences such as set-off, abatement, counter-claim and force majeure;

(viii) any provision in any of the Documents which involves an indemnity for costs of litigation or enforcement is subject to the discretion of the court to decide whether and to what extent a party to litigation or enforcement should be awarded the costs incurred by it in connection therewith;

(ix) the right to recover damages may be limited to the extent the aggrieved party could have avoided or mitigated the damages using reasonable efforts;

(x) Finnish courts will not give effect to obligations, the performance of which would be illegal under the laws of the jurisdiction in which they are to be performed, nor will they give effect to contractual provisions purporting to constitute a waiver of applicable mandatory provisions of law;

(xi) the term "perfection", when used herein, refers to measures undertaken in order to make a transfer or security enforceable in relation to third parties (e.g. in the bankruptcy of the security provider) and shall have the meaning given to the term "*julkivarmistus*" in Finnish law and legal doctrine;

(xii) Finnish courts will normally apply the "*lex rei sitae*" principle to the effectiveness of the creation and perfection of security in relation to *inter alia* third party creditors and the effectiveness in such respect of security created or purported to be created under the Documents may as a consequence thereof under private international law as applied by Finnish courts (despite the designated choice of law) be subject to the application of laws other than the chosen law;

(xiii) if a Transferee, after receiving the collateral, is contractually obliged to release such collateral or to apply the collateral towards satisfaction of the obligations of the Transferor (other than the secured obligations) it is not entirely clear under Finnish law whether a pledge or transfer of such collateral would be considered perfected. If a transfer or pledge is not considered perfected the Transferee would not have a right *in rem* and would therefore rank as an unsecured creditor in respect of its claim against the Transferor in case of insolvency of the Transferor in Finland;

(xiv) if requested by the court, it is up to the parties to prepare an adequate translation into the Finnish language or the Swedish language of the Documents, in order for the court to rule on the issues brought before it;

(xv) there may be circumstances in which a Finnish court would not treat as conclusive those certificates and determinations which according to any of the Documents are stated to be so treated;

(xvi) the application by a Finnish court of foreign law in relation to the Documents is subject to (i) that foreign law not being contrary to such mandatory rules of Finnish law that due to their public nature or general interest shall be considered applicable irrespective of the agreed choice of law; and (ii) the application of the foreign law not resulting in an outcome contrary to the public policy (*ordre public*) of the Finnish legal system;

(xvii) in any proceedings before a Finnish court for the enforcement of the Documents, the proceedings would be conducted in accordance with the statutory Finnish procedural rules and the court would not be obliged to give effect to provisions in the Documents, such as agreements regarding the manner in which service of process is carried out, to the extent in conflict with such statutory rules;

(xviii) a contractual right of set-off may be held by a Finnish court of law to constitute unperfected security to the extent that it provides for a contractual right of set-off in a situation where a statutory right of set-off would not apply under Finnish law, *e.g.* due to the absence of mutual qualifying receivables, and therefore the optional set-off language included in § 10.1 (A) of the Master Netting Agreement would not be enforceable where one the parties is insolvent; and

(xix) In respect of banks organised and licensed under the Finnish Credit Institutions Act (2014, as amended), either as a commercial or similar bank under the Finnish Act on Commercial Banks (2014, as amended), as a savings bank under the Finnish Act on Savings Banks (2001, as amended), or as a co-operative or similar bank under the Finnish Act on Co-operative Banks (2013, as amended) and branches established or located in Finland of foreign entities of the type referred to above, the opinions in **Part B** are not given to the extent Finnish law is not applicable as a result of the application of the provisions set out in the Co-operative Banks Act and the Commercial Banks Act (implementing the EU Directive 2001/24/EC and applicable by reference also to savings banks and to branches established or located in Finland of foreign entities of the type referred to above) to the effect that legal implications of netting agreements are determined solely on the basis of the law applicable to such agreements (subject to certain measures under the Finnish Act on Procedure for the Resolution of Credit Institutions and Investment Firms (2014, as amended);

(xx) we express no opinion as to any law other than the law of Finland as presently in force and we have assumed that there is nothing in any other law that affects our opinion stated herein (including but not limited to the opinions regarding multibranch parties); legal concepts expressed or described herein shall be governed by and words and expressions used herein shall be construed in accordance with Finnish law notwithstanding that original Finnish terms and definitions may not always have been used.

* * *

This opinion is rendered to EFET and its members and may not without our prior written consent be divulged to others or referred to or relied upon in any other matter or context whatsoever. However, this opinion may be disclosed as required by law or regulation or administrative ruling having the force of law.

Yours faithfully,

ROSCHIER, ATTORNEYS LTD.

Helena Viita

Jonne Järvi

Appendix A

1. General Overview of Winding-up, Insolvency or Attachment and Set-Off

1.1 Insolvency proceedings

The bankruptcy, composition, rehabilitation (e.g. administration, receivership or voluntary arrangement) or other insolvency proceedings to which the Party A could be subject in Finland are the following:

(i) bankruptcy under the Bankruptcy Act (2004, as amended) (the "**Bankruptcy Act**"), (not applicable to certain government bodies[10]) with regard to insurance companies as supplemented by the provisions of the Insurance Companies Act (2008, as amended) and with regard to credit institutions as supplemented by the provisions of the Act on Commercial Banks (2001, as amended) which are also applicable to investment firms, the Act on Co-operative Banks (2013, as amended) and the Act on Savings Banks (2001, as amended) as applicable;

(ii) company reorganisation under the Act on Company Reorganisation (1993, as amended) (not applicable, *inter alia*, to insurance companies, to government bodies and the applicability to credit institutions being subject to the provisions of the Act on Temporary Interruption of Operations of Deposit Banks (2001, as amended));

(iii) temporary interruption of the operations of a credit institution under the Act on Temporary Interruption of Operations of Deposit Banks. A deposit bank[11] and a Finnish branch of a credit institution subject to supervision in an EEA state is obliged to file a notification with the Financial Stability Authority (*Fin: Rahoitusvakausvirasto*), the Bank of Finland and the Finnish Financial Supervisory Authority (the "**FSA**") if it is unable to pay its debts as they become due, unless it has given a qualifying notification in accordance with the Resolution Act or the Credit Institutions Act. Further, the Bank of Finland or the FSA must notify the Financial Stability Authority if they are of the opinion that it is likely that a such an institution is unable to pay its debts as they become due. The Financial Stability Authority or, in relation to a branch, the FSA may make a decision to temporarily interrupt the operations of the deposit bank or branch, in which case the FSA shall immediately appoint an administrator, whose duties include the supervision of the deposit bank or branch; and

(iv) recovery and resolution of credit institutions and investment firms under the Resolution Act, the Credit Institutions Act and Regulation (EU) No 806/2014 (the "**Resolution Regulation**"). This proceeding is applicable

[10] Entities that cannot be subject to bankruptcy proceedings include, *inter alia*: the Republic of Finland, the Åland Islands, a municipality or a municipal federation (*kuntayhtymä*) or other public co-operation entity of municipalities, state owned businesses (*valtion liikelaitos*) or institutions (this does not include limited liability companies owned by the state), and churches and parishes. The assets of these entities, however, do not benefit from general immunity against e.g. attachment.

[11] A deposit bank (*talletuspankki*) is a credit institution entitled to receive repayable funds from the public as "deposits" (*talletus*). All deposits must be covered by the Finnish deposit guarantee scheme, and borrowings that are not covered may not be called deposits. The legal form of a deposit bank may be a limited liability company, a cooperative or a savings bank.

also to institutions that are subsidiaries of credit institutions and qualifying investment firms as well as certain holding companies of such institutions.

The Bankruptcy Act provides a regulatory framework for bankruptcy proceedings, through which proceedings a debtor's entire estate is liquidated for the benefit of the debtor's creditors. Bankruptcy proceedings can be commenced at the initiative of the debtor or its creditors. When the bankruptcy proceedings are commenced, the debtor loses control over its assets, which will belong to the bankruptcy estate as of the decision by the court to commence the bankruptcy proceedings. As stated above, the Bankruptcy Act is supplemented by various provisions relating specifically to certain types of entities and further supplemented by provisions relating to all deposit banks regardless of their legal form.

The Bankruptcy estate's right to assume contracts

Pursuant to Chapter 3 Section 8 of the Bankruptcy Act, the bankruptcy estate may assume liability for unfulfilled contracts (e.g. Documents executed prior to the commencement of insolvency with payment and/or delivery to occur after insolvency) of the debtor. The counterparty to the contract must ask the bankruptcy estate whether the estate will assume the contract, and if it wishes to do so, the bankruptcy estate must grant adequate security for its obligations under the assumed contract. If the bankruptcy estate does so, the counterparty may not terminate the contract unless there are special circumstances why the counterparty cannot be reasonably expected to continue to be bound by the contract.

Contractual relationships in company reorganisation proceedings

The scope of the company restructuring proceedings and the statutory restrictions thereunder covers all of the debtor's debt that has arisen before an application for the proceedings is lodged. The restrictions include, *inter alia*, a moratorium on creditor action, which prevents creditors from demanding payment or enforcing their claims against the company under the reorganisation proceedings. Further, a contract may not be terminated solely on the basis of a payment default resulting from the commencement of the reorganisation proceedings. Actions that are contrary to the restrictions set out in the Act on Company Reorganisation are deemed void.

The Act on Company Reorganisation provides for one important exception to the moratorium on creditor action. The exception applies to unfulfilled contracts, i.e. contracts that (i) have been concluded before the commencement of the reorganisation proceedings, but (ii) under which the delivery takes place after the proceedings have commenced. For the purposes of the exception, such contracts are further divided into "ordinary" and "unusual" contracts, depending on their nature vis-à-vis the debtor's business activities. In the case of an ordinary contract, the commencement of the reorganisation proceedings does not affect either the creditor or the debtor's obligations to perform their obligations in accordance with the contract, i.e. the contract is fulfilled normally as if no reorganisation proceedings had been commenced. In the case of an unusual contract, the administrator of the debtor company has the right to choose whether or not to assume the contract. If the contract is assumed, it must be fulfilled normally. If the contract is not assumed, the creditor is entitled to terminate it. Any claims (e.g. compensation for damages) arising from the termination are subject to the reorganisation proceedings and the restrictions thereunder.

It is unclear whether the exception regime described above applies also to contracts, where the delivery takes place during the period between the lodgment of the application for reorganisation proceedings and the commencement of the proceedings. According to the wording of the law as well as legal literature, the exception regime would most likely not apply to such contracts. However, this interpretation has not been verified in court practice.

1.2 Bank Recovery and Resolution

The Council of the European Union has adopted a bank recovery and resolution directive which is intended to enable a range of actions to be taken in relation to credit institutions and investment firms considered to be at risk of failing. On 2 July 2014, Directive 2014/59/EU providing for the establishment of an EU-wide framework for the recovery and resolution of credit institutions and investment firms entered into force. The BRRD is designed to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system. The BRRD was implemented in Finland with effect as of 1 January 2015 by the new Resolution Act.

The relevant provisions of the Resolution Act apply to:

(i) credit institutions (as defined in the Credit Institutions Act) and investment service providers (as defined in the Investment Services Act);

(ii) any financial holding company, mixed financial holding company or mixed activity holding company (as defined in points 20, 21 and 22 of Article 4(1) of the capital requirements regulation (Regulation (EU) No 575/2013); and

(iii) any subsidiaries of entities referred to under (i) and (ii) above which are financial institutions (as defined in point 26 of Article 4(1) of the capital requirements regulation)

together, the "**BRR Institutions**", and parts of the Resolution Act apply also to Finnish branches of non-EEA entities, if the Finnish resolution authority considers that action is necessary in the public interest and one or more of the following conditions is met (these conditions are based on Article 96 of the BRRD):

(i) the branch no longer meets, or is likely not to meet, the conditions imposed by Finnish law for its authorisation and operation within Finland and there is no prospect that any private sector, supervisory or relevant third-country action would restore the branch to compliance or prevent failure in a reasonable timeframe;

(ii) the third-country institution is, in the opinion of the Finnish resolution authority, unable or unwilling, or is likely to be unable, to pay its obligations to EEA creditors, or obligations that have been created or booked through the branch, as they fall due and the Finnish resolution authority is satisfied that no third-country resolution proceedings or insolvency proceedings have been or will be initiated in relation to that third-country institution in a reasonable timeframe;

(iii) the relevant third-country authority has initiated third-country resolution proceedings in relation to the third-country institution, or has notified to the Finnish resolution authority its intention to initiate such a proceeding.

The BRRD contains four resolution tools and powers which may be used alone or in combination where the relevant resolution authority considers that (a) an institution is failing or likely to fail, (b) there is no reasonable prospect that any alternative private sector measures would prevent the failure of such institution within a reasonable timeframe, and (c) a resolution action is in the public interest: (i) sale of business - which enables resolution authorities to direct the sale of the firm or the whole or part of its business on commercial terms; (ii) bridge institution - which enables resolution authorities to transfer all or part of the business of the firm to a "bridge institution" (an entity created for this purpose that is wholly or partially in public control); (iii) asset separation - which enables resolution authorities to transfer impaired or problem assets to one or more publicly owned asset management vehicles to allow them to be managed with a view to maximising their value through eventual sale or orderly wind-down (this can be used together with another resolution tool only); and (iv) bail-in - which gives resolution authorities the power to write down certain claims of unsecured creditors of a failing institution and to convert certain unsecured debt claims to equity (the ***general bail-in tool***), which equity could also be subject to any future write-down. Relevant claims for the purposes of the bail-in tool can include the claims against Party A under the Documents, although in the case of derivatives and close-out netting arrangements, certain special protections are available as described below.

The BRRD also provides for a Member State as a last resort, after having assessed and exploited the above resolution tools to the maximum extent possible whilst maintaining financial stability, to be able to provide extraordinary public financial support through additional financial stability tools. These consist of the public equity support and temporary public ownership tools. Any such extraordinary financial support must be provided in accordance with the EU state aid framework.

An institution will be considered as failing or likely to fail when: it is, or is likely in the near future to be, in breach of its requirements for continuing authorisation; it is, or is likely in the near future to be, unable to pay its debts as they fall due; or it requires extraordinary public financial support (except in limited circumstances).

The powers set out in the BRRD will impact how credit institutions and investment firms are managed as well as, in certain circumstances, the rights of creditors. Counterparties to credit institutions and investment firms may be subject to write-down or conversion into equity on any application of the general bail-in tool, which may result in such counterparties losing some or all of their receivables.

Among the measures, the following are of particular relevance to counterparties of credit institutions and investment firms as they may affect permanently or temporarily the right to close out and net outstanding transactions and enforce security interests and amend the terms of the Documents as a result of measures taken under a resolution proceeding. Specifically, they are as follows:

(i) <u>Transfer of assets</u>. Pursuant to Chapter 9 of the Resolution Act, the resolution authorities have the power to transfer to another entity all or part of the rights, assets or liabilities of an institution under resolution. Such transfer may involve amendments to the Documents. Chapter 13, Sections 3-5 of the Resolution Act provide however that such transfer and amendment may only be completed with the appropriate protection for the arrangement and for the counterparties so as to generally prevent the transfer of some, but not all rights and liabilities that are protected under a qualifying financial collateral, set-off or netting arrangement. Under the Resolution Act it is not allowed to transfer assets or debts of an institution so that only part of the assets or debts that are covered by qualifying financial collateral, set-off or netting arrangement would be transferred (provided that the parties would be entitled to exercise set-off or netting in respect of the same). In accordance with Commission delegated regulation (EU) 2017/867 of 7 February 2017 on classes of arrangements to be protected in a partial property transfer under Article 76 of the BRRD set-off and netting arrangements under the Documents would be such protected arrangements *e.g.* where they relate to rights and liabilities arising under financial contracts or derivatives (provided that the parties would be entitled to exercise set-off or netting in respect of the same). Resolution authorities may however, in individual cases, exclude from the protections, security arrangements, or set-off and netting arrangements which relate to contracts including any clause which, in the event of default of a counterparty, permits a non-defaulting counterparty to make limited payments only, or no payments at all, to the estate of the defaulting party, even if the defaulting party is a net creditor. A similar protection applies to security arrangements restricting separation of secured debt, security asset and profit of the security asset except in the case of indemnifiable deposits.

The protections would continue to keep the assets and obligations covered by otherwise enforceable and qualifying netting or financial collateral arrangement under the Documents unseparated with the exception of indemnifiable deposits. The indemnifiable deposits would be statutorily indemnified to Party B and therefore this exclusion should not adversely affect such counterparty's position in a material respect. There may however be a delay in receiving indemnification from the relevant deposit protection fund and a deficit may arise due to currency conversion.

Otherwise the assets and obligations covered by such qualifying netting or financial collateral arrangement under the Documents would stay unseparated but due to the transfer it cannot be ruled out that the counterparty type would change which may affect the enforceability of netting following the transfer.

(ii) Temporary stay on close-out netting rights and right to enforce security interests. Pursuant to Chapter 12, Sections 8-10 of the Resolution Act, the resolution authorities may declare a temporary stay on the exercise of termination rights and rights to enforce security interest of any party to a contract with an institution under resolution. Such stay may last until midnight on the business day following the date on which the publication of such suspension occurred. The resolution authorities may also, under certain conditions, declare a temporary stay on the exercise of termination rights against a subsidiary of an institution under resolution. The temporary stay is not applicable to settlement systems within the meaning of the Netting Act or corresponding settlement systems within the EEA or to parties to the same, to central counterparties or to central banks or to security or margin posted by the institution in favour of the before-mentioned parties.

(iii) Prohibition of termination on the ground of resolution measures. Provided that the substantive obligations under the contracts (including payment and delivery obligations, and provision of collateral) continue to be performed, Chapter 12, Section 7 of the Resolution Act prohibits the exercise of any termination, enforcement of security, suspension, modification, netting or set-off rights on the sole ground of that a crisis prevention measure or a crisis management measure (including the occurrence of any event directly linked to the application of such measures) has been declared. The prohibition is partly applicable also to contracts to which a subsidiary of the institution is party if the institution or another group company has guaranteed or granted security for such contract. The prohibitions are not applicable to qualifying settlement systems, parties thereto, central counterparties and central banks.

(iv) Bail-in. Pursuant to Chapter 8 of the Resolution Act, the resolution authorities have the powers to exercise the general bail-in tool in respect of *unsecured liabilities*. Pursuant to the Chapter, the bail-in tool may not be applied to derivatives contracts before such derivatives contracts are closed. Further, if the derivatives contracts are subject to netting arrangements, the net position shall be determined before the general bail-in tool is applied.

In relation to a creditor whose rights, assets or debts have not been transferred in the resolution proceedings or have not been subject to the general bail-in tool, the end result may not mean higher losses to such creditor than the losses that would have been incurred if liquidation or bankruptcy proceedings had been commenced immediately before the commencement of the resolution proceedings. Any higher losses nevertheless incurred would be indemnified as set out in the Resolution Regulation.

1.3 Attachment

A creditor of a party to the Documents may, under the Finnish Enforcement Code (2007, as amended, the "**Enforcement Code**") apply for an execution proceeding for the payment of a debt owed by that party to that creditor. An execution officer may attach (and liquidate) an asset of the debtor for the payment of the debt that is subject to the procedure. It cannot be ruled out that the asset would be a receivable under an Individual Contract.

If the asset to be attached is a receivable under an Individual Contract the execution officer would notify the counterparty of the Individual Contract of the attachment, prohibiting payments to the debtor and instructing the counterparty to make payment of the receivable only to the execution officer.

1.4 Set-off

The receivables that the party who exercises the set-off owes to the counterparty are below referred to as the "**Principal Claim**" and the receivables that are owed by the counterparty to the party who exercises the set-off and which are used to set-off the Principal Claim are below referred to as the "**Counterclaim**". Set-off can be carried out either by mutual understanding according to an agreement between the parties or unilaterally (statutory right of set-off) through a notice of set-off given by the party holding the Counterclaim.

The terms of the contractual set-off can be agreed between the parties and contractual set-off is subject to the rules regulating contracts in general (see **Part B.5**).

The notice of set-off is a unilateral expression of intent and it is not subject to formal requirements. The statutory right of set-off can be of a defensive (set-off is exercised in order to stop the other party from initiating collection proceedings) or offensive (set-off is exercised before the initiation of collection proceedings by the other party) nature. Statutory right of set-off becomes effective as of the moment the other party receives the notice of set-off. This means that the obligation to pay interest on the receivable which is being set-off continues until the moment when the set-off becomes effective. The possibility to exercise set-off remains also in bankruptcy and execution, but may be limited. However, set-off cannot be exercised after a debt has already been paid.

The prerequisites for statutory right of set-off are that (i) the receivables are opposite; (ii) the receivables are of a similar nature; and (iii) the Counterclaim is collectible. Requirement (i) provides that each party is both creditor and debtor towards the other party, i.e. the debtor of the Principal Claim must be the creditor of the Counterclaim and *vice versa*. The receivables need not be opposite from the start. Requirement (ii) provides that the receivables which are being set-off need to be of a similar nature. For this reason set-off is usually only used for obligations discharged in cash. There are no requirements regarding e.g. the actual solvency of each party (see below), the interest rate used in each receivable or any security rights granted. Also receivables in different currencies can be set off against each other, provided that the party giving the notice of set-off is entitled, according to the provisions of the Promissory Notes Act (1947, as amended), to convert the receivables into the same currency. Requirement (iii) provides that the Counterclaim must be a receivable that can be collected by means of legal proceedings, i.e. by obtaining a judgment granting affirmative relief. Collectibility means that the Counterclaim is due when the notice of set-off is being given. However, this is not required in set-off during bankruptcy, as discussed below. Provided that requirements (i) - (iii) are fulfilled, either party can exercise set-off.

<u>Set-off during insolvency proceedings</u>

According to Chapter 6 Section 1 of the Bankruptcy Act, a creditor has the right to use its claim in bankruptcy toward set-off against a debt owed to the debtor at the beginning of bankruptcy. The creditor has this right of set-off even if either the debt owed to the debtor or the claim or both are not due when the notice of set-off is given.

According to the Bankruptcy Act, the right of a creditor to effect set-off in bankruptcy is, however, subject to the following restrictions:

(i) The creditor shall not use for set-off any claim that does not entitle him to payment out of the bankruptcy estate[12], or any claim that is junior to other claims as set out in Section 6 of the Act on the Ranking of Claims (1992, as amended)[13].

(ii) A claim against the debtor that has been acquired from a third party later than three months before the cut-off date referred to in Section 2 of the Recovery Act (as a main rule, this is the date on which the application for bankruptcy was filed) cannot be set off against a debt owed by the creditor[14] to the debtor at the time of the acquisition of the claim. The same provision applies to claims acquired before the cut-off date, if the acquiring creditor at the time of the acquisition had a justified reason to believe the debtor to be insolvent.

(iii) A creditor who has committed to the payment of a debt to the debtor in circumstances where the arrangement is comparable to a payment made by the debtor has no right of set-off to the extent that such payment would have been recoverable to the bankruptcy estate[15].

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[12] Such claims would include claims for salary or other compensation that is, in each case, disproportional to the work performed, and any claims that the courts of Finland would generally not enforce, such as gambling debt.

[13] Such junior debt would include subordinated bonds, other subordinated debt (including capital loans) and unfulfilled gifts.

[14] In this paragraph the "claim against the debtor" is the Counterclaim, and the "debt owed by the creditor (to the debtor)" is the Principal Claim.

[15] This could apply e.g. when the creditor borrows funds from the debtor or purchases items on credit terms, and subsequently attempts to set off this debt with the initial receivable. In such situations, the advancing of the loan or the delivery of the items to the creditor would be construed as a payment of the creditor's receivable.

(iv) Receivables, which are not due and payable at the time of commencement of the bankruptcy proceedings, must exist at the time of the same. However, conditional receivables and receivables based on damage compensation must generally be due and payable at the time of commencement of the bankruptcy proceedings in order for such receivables to be able to be set off, although the extent of this requirement has been debated in Finnish legal literature.

(v) For receivables denominated in a currency other than euro, a value in euro for the purposes of the proceedings is determined using the exchange rate of the date of commencement of the bankruptcy proceedings.

(vi) A credit institution is pursuant to the Bankruptcy Act, once bankruptcy proceedings against an account holder have been commenced, not entitled to set off its receivables from that account holder against funds standing to the credit of or being payable to any account that can according to the terms and conditions applicable to it be used for transfer of funds.

Set-off may be recoverable under the Recovery Act as discussed below. Provided that set-off would not have been possible during bankruptcy proceedings, a similar set-off effected prior to the proceedings is recoverable on the same conditions as a repayment of debt.

The abovementioned conditions for set-off (as well as the recovery risk) also apply in respect of a restructuring procedure.

Set-off against a claim that is subject to attachment

Upon receipt of a payment order, the counterparty to the Documents would not as a matter of Finnish law as a result of an express restriction in the Enforcement Code be entitled to exercise any set-off in relation to such receivable:

(i) unless, at the time of receipt of the payment order, the general requirements for set-off (the receivables to be set off are enforceable (i.e. valid, due and payable), mutual and in the same currency) were met and that counterparty had an enforceable execution title (e.g. a non-appealable court judgment) to its receivables to be used for set-off; or

(ii) unless this restriction is disapplied by the Netting Act or the Financial Collateral Act as discussed in sections 1.6 and 1.7 below.

Payment orders under the Enforcement Code may be delivered also to counterparties outside Finland.

Impact of the Netting Act and the Financial Collateral Act on close-out netting during an attachment procedure

The Netting Act and the Financial Collateral Act provide for certain exceptions to the express set-off restriction under the Enforcement Code referred to above. The Financial Collateral Act and the Netting Act implement the EU Directives 2002/47/EC and 1998/26/EC, respectively, and both Acts have been amended pursuant to the implementation of the Directive 2009/44/EC.

The general set-off restriction set out in the Enforcement Code is overridden by the more specific rules of the Financial Collateral Act and the Netting Act in situations where either of the Acts is applicable to the netting in question. As a result of such rules, netting should despite the express set-off restriction under the Enforcement Code be allowed against obligations that have arisen ***before*** the counterparty was notified of the execution procedure (and the accompanying prohibition on payment), subject however to the slight ambiguity of such rules discussed below.

Both Acts provide that, where netting has been completed before the counterparty was notified of the execution procedure (and the accompanying prohibition on payment) under the Enforcement Code of a receivable owed by that counterparty, the execution procedure will apply only to the net payment. Further, pursuant to Section 10 of the Financial Collateral Act and Section 7 of the Netting Act a receivable that is subject to an execution procedure may ***not*** be netted against an obligation that has arisen ***after*** the counterparty was notified of the execution procedure (and the accompanying prohibition on payment). The sections do not contain a clear statement on whether a receivable that is subject to an execution procedure could be netted against an obligation that has arisen ***before*** the counterparty was notified of the execution procedure and the prohibition on payment. The absence of a clear rule could imply that the main rule, which would generally not permit netting in this scenario, would apply.

The preparatory works for the Financial Collateral Act are clearer than the preparatory works for the Netting Act in this respect and state that a counterparty may net or set off obligations that have arisen ***before*** it was notified of the execution procedure and the prohibition on payment. According to the preparatory works, a counterparty may invoke a close-out netting provision notwithstanding any attachment, as required by the Directive 2002/47/EC. Therefore, netting where the Financial Collateral Act is applicable should despite the express set-off restriction under the Enforcement Code be allowed against obligations that have arisen ***before*** the counterparty was notified of the execution procedure (and the accompanying prohibition on payment).

The preparatory works for the Netting Act are silent with regard to the application of Section 7 of the Act. The Directive 1998/26/EC only governs collective insolvency proceedings, but in connection with its implementation in Finland by the Netting Act it was stated that the rules concerning netting in bankruptcy would also be applied to netting in the execution proceedings regulated by the Enforcement Code.

The preparatory works for the Financial Collateral Act directly state that Section 10 of the Financial Collateral Act corresponds to Section 7 of the Netting Act. Other sections of the preparatory works also support the view that Section 7 of the Netting Act should be interpreted similarly to Section 10 of the Financial Collateral Act, and as the scope of application of each of these Acts may overlap the scope of application of the other, it is likely that Section 7 of the Netting Act would be applied similarly to Section 10 of the Financial Collateral Act. Hence, the netting of a receivable that is subject to an execution procedure against an obligation that has arisen ***before*** the counterparty was notified of the execution procedure and the prohibition on payment should be possible also where only the Netting Act applies.

It is not clear that an attachment procedure as discussed above and in this paragraph would always constitute an Event of Default under the Documents. It is therefore possible that in an attachment scenario where Finnish law would uphold a close-out of all Individual Contracts at the time of the attachment, a party would not have a contractual right to do so. To mitigate this risk parties should consider adding to the Documents an Event of Default which is triggered if an attachment procedure is targeted to the Individual Contracts or credit support. We have included a suggestion for such wording in Opinion (a).

<u>Set-off during resolution proceedings under the Resolution Act.</u>

During the resolution proceedings under the Resolution Act, set-off would not be permitted solely on the basis of resolution measures, a temporary stay may be ordered and obligations to be set off may be transferred and their terms amended, each as discussed in Section 1.2 above.

1.5 The Finnish Recovery Regime

The Act on Recovery to a Bankruptcy Estate (1991, as amended, the "**Recovery Act**") establishes a regime for restoring the *status quo* that existed before an inappropriate transaction took place and hence protects the creditors' interests in bankruptcy. Recovery to a bankruptcy estate can be used to revoke a transaction which would normally be binding. As a general rule any type of transaction that occurred during a certain time period prior to the commencement of insolvency proceedings (as defined in the Recovery Act) may be revoked. A claim for recovery may be made in a district court by the bankruptcy estate administration or by a creditor who has notified the estate of its claim.

The Recovery Act treats transactions between related parties differently from transactions between unrelated parties. For the purposes of the Recovery Act, "related parties" are defined as the debtor and a close relative such as e.g. a spouse, child or sibling or a person otherwise very close to the debtor, or, in respect of a debtor which is a corporate entity, (i) any person who alone or together with related parties has, through ownership or other economic relation, a significant economic interest in the debtor; (ii) any person who through a management position has influence over the debtor; or (iii) any person related to a person referred to under (i) and (ii) above. In respect of (iii), the person is not treated as a related party if it can be shown that the relationship did not have any significance in the transaction in question.

Pursuant to <u>Section 5</u> the Recovery Act, a transaction can be recovered if the transaction, alone or together with other measures:

(a) unduly favors a particular creditor to the detriment of another creditor (e.g. repayment of debt or granting of security);

(b) transfers assets out of the reach of the creditors (e.g. a gift or donation); <u>or</u>

(c) increases the debts of the debtor to the detriment of the creditors, i.e. that the transaction would be such as to typically decrease the amount of proceeds payable to any of the other creditors in an insolvency proceeding,

always provided that:

(a) the debtor was insolvent (i.e. other than temporarily unable to pay its debts as they fall due) at the time the transaction was concluded or the transaction contributed to the debtor's insolvency <u>or</u> in case where assets have been transferred by means of a gift or a gift-like agreement or arrangement, the debtor was excessively indebted (i.e. the amount of the debtor's debts exceeded the value of its assets) or the transaction contributed to the debtor becoming excessively indebted, <u>and</u>

(b) the other party to the transaction knew or should have known of the insolvency or excessive indebtedness or of the impact of such transaction on the debtor's financial state as well as of the circumstances due to which the transaction was inappropriate.

In addition to the general recovery rule set out in Section 5, the Recovery Act contains specific rules concerning certain transaction types where recovery is, as a rule, possible even when the parties have acted in good faith without intending to favor or harm any creditor. The most relevant provisions are presented below:

Section 10

Pursuant to Section 10 of the Recovery Act, payments of debt that occurred during the suspect period (as specified below) can also be recovered by the bankruptcy estate if unusual means of payment were used or if the payment was premature or if the amount paid was considerable in comparison to the total assets of the debtor, in each case unless the payment as a whole can in the relevant circumstances be considered normal. While close-out netting and / or set-off could otherwise qualify as a premature payment or payment by unusual means, the Netting Act (discussed below) provides an exception to the applicability of Section 10 of the Recovery Act.

Section 14

Pursuant to Section 14 of the Recovery Act, the granting of security can be revoked, if (i) such security was not agreed on at the time the debt came into existence, or (ii) the transfer of possession, notice of assignment or other means of perfecting the security was not carried out without undue delay after the origination of the debt. The granting of security or additional security under the EFET Credit Support Annex could, under certain circumstances, most likely be revoked by virtue of this Section. However, the Netting Act and the Financial Collateral Act (discussed below) provide exceptions to the applicability of Section 14 of the Recovery Act.

Suspect periods

In respect of Section 5 of the Recovery Act (general provision), the suspect period is five years or, if the recoverable transaction is entered into with a related party, indefinite[16]. The suspect period applicable to Sections 10 and 14 is three months or, if the beneficiary is a closely related party, two years unless it can be proven that the debtor was not insolvent at the time and did not become insolvent as a consequence of the suspect transaction.

The suspect periods are (with some exceptions) calculated from the date of the application for bankruptcy, reorganisation or attachment, as applicable.

1.6 The Netting Act

As a starting point, under Finnish law, contractual termination and close-out netting provisions are subject to all insolvency laws affecting creditors' rights generally, including the recovery provisions discussed above. However, the Act on Certain Terms in Securities and Currency Trading as well as Settlement Systems (1999, as amended, the "**Netting Act**") as discussed below largely excludes the applicability of such insolvency laws in certain qualifying transactions. The Netting Act implements the Settlement Finality in Payment and Security Settlement Systems Directive 98/26/EC (the "**Settlement Finality Directive**").

The Netting Act applies to netting and other settlement of payments in a settlement system as well as netting and other settlement of delivery obligations relating to:

[16] In this case the suspect period is in practice limited by the requirement of causality between the transaction and the debtor's insolvency.

(i) trading in financial instruments referred to in the Act on Investment Services (2012, as amended) (the “**Financial Instruments**”), as well as to trading in comparable securities and derivatives contracts;[17] or

(ii) trading in currency or currency units legal in Finland or in another country,

Also, the Netting Act applies to netting of payment and delivery obligations in relation to securities, derivatives and currency transactions that are not executed in a settlement system (i.e. are executed between contracting parties) as well as to collateral security provided to a settlement system or a contracting party in connection with the netting or settlement of the transactions falling under the scope of the Netting Act. The transactions that fall under the scope of the Netting Act are herein referred to as the “**Netting Act Transactions**”.

It is our view that of the transactions contemplated by the Individual Contracts set out in **Appendix C** the following (subject to certain uncertainties noted below) would qualify as Netting Act Transactions:

1) Commodity Forwards, Commodity Options and Commodity Swaps which:

    (a) relate to emissions allowances; and

    (b) may be settled either physically or in cash;

2) Commodity Forwards,[18] Commodity Options and Commodity Swaps which:

    (a) relate to electricity (excluding wholesale energy products within the meaning of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency and which must be physically settled and are traded on an organised trading facility); and

    (b) either:

        i. 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;

        ii. (A) may be settled physically, and (B) are traded on a regulated market, a multilateral trading facility or an organised trading facility; or

[17] The definitions for financial instruments set out in the Act on Investment Services correspond generally to Section C of Annex 1 to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (“**MiFID II**”).

[18] Physically settled forward contracts are not specifically listed in the relevant paragraph of the Investment Services Act referred to herein. However, as noted above, Netting Act Transactions also include “other comparable securities and derivatives contracts”, meaning that the scope is intended to be broader than the list of financial instruments set out in the Act on Investment Services. We believe that physically settled forwards fulfilling the criteria in this paragraph can be construed as “comparable derivatives contracts”, except for where such forwards would be regarded as spot trades instead. This interpretation is, however, not verified (nor is it dismissed) by any published court precedent or practice.

iii. (A) may be settled physically, (B) are not made for commercial purposes, and (C) have the characteristics of other derivative contracts;[19]

3) Commodity Forwards, Commodity Options and Commodity Swaps which:

   (a) relate to capacity rights or certificates;[20] and

   (b) either:

      i. 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; or

      ii. (A) may be settled physically, and (B) are traded on a regulated market, a multilateral trading facility or an organised trading facility; and

4) Physical Commodity Transactions which relate to emissions allowances, provided that such emissions allowances consist of units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).[21]

If some of the transactions contemplated by the Individual Contracts Agreement qualify as Netting Act Transactions and some do not, the EFET General Agreement netting provision

[19] The Act on Investment Services (as amended following the implementation of MiFID II) or its preparatory works do not specify how conditions (B) and (C) should be assessed, although we believe that the provisions of Commission Delegated Regulation (EU) 2017/565, which specifies these within the context of MiFID II, should be had regard to.

[20] Capacity rights or certificates as underlyings are not specifically listed in the relevant paragraph of the Act on Investment Services referred to herein, but we believe that derivatives contracts relating to those would fall under the category of "other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in [the relevant paragraph of the Act on Investment Services]", in which case they would qualify as financial instruments, if they "have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, a multilateral trading facility or an organised trading facility." How "the characteristics of other derivative instruments" should be assessed in the context of that paragraph has not been specified in the Act on Investment Services or its preparatory works, although we believe that the provisions of Commission Delegated Regulation (EU) 2017/565 should be had regard to. In any case, we note that there is a degree of uncertainty when it comes to the extent to which the derivatives referred to in this paragraph 3) would fall under the scope of the Netting Act (*i.e.* qualify as Financial Instruments or "comparable derivatives contracts"), and the interpretation herein has not been verified (nor is it dismissed) by any published court precedent or practice.

[21] We assume that Physical Commodity Transactions are spot trades rather than forward contracts. In this regard it should be noted that the exact wording of the Netting Act provides that, in addition to transactions in <u>Financial Instruments and other comparable securities and derivatives contracts</u> executed in a settlement system, the Act applies to "the netting of payment and delivery obligations in relation to <u>securities, derivatives and currency transactions</u> that are not executed in a settlement system". Whilst the emissions allowances mentioned in this paragraph 4) are specifically stated to be Financial Instruments for the purposes of the Act on Investment Services, the wording of the Netting Act, if interpreted formally and insofar as trades executed outside a settlement system are concerned, does not seem to include spot trades in such emissions allowances (as they are not, to our understanding, transactions in securities, derivatives or currencies), even though they would qualify as Financial Instruments. Such interpretation would lead to an outcome where spot trades in emissions allowances executed in a settlement system would fall under the scope of the Netting Act whereas those executed outside a settlement system would not. There are no court precedents where this interpretation would have been verified, although we believe that all transactions in Financial Instruments, whether or not executed in a settlement system, should be covered by the Netting Act.

would, in our opinion, continue to be effective only in respect of those transactions that do so qualify as Netting Act Transactions.

For purposes of the Netting Act, “netting” means that, in accordance with a customary provision in an agreement:

(i) the opposite payment or delivery obligations of two parties to an agreement are, on each due date, aggregated into one payment obligation or into an obligation to deliver an investment instrument (such as securities) of the same class (*continuous netting*); or

(ii) the obligations of several parties are, in the manner set out in item (i) above, aggregated in a settlement system (*multilateral netting*); or

(iii) all payment and delivery obligations of the parties become due or may be accelerated and aggregated in a manner agreed upon, if insolvency proceedings are commenced with respect to one party (*close-out netting*).

Under general contractual principles of Finnish law, parties are generally allowed to agree upon the terms and conditions of their contractual relationship including the termination of such contractual relationship and the effects thereof (by way of close-out netting or otherwise). However, as discussed above, mandatory insolvency laws and the Finnish recovery regime may restrict this freedom of contract and the enforceability of the termination clauses. The function of the Netting Act is to specifically protect, within its scope of application, the enforceability of netting clauses by excluding the applicability of the contravening recovery and insolvency legislation. The end result is that where the Netting Act applies, netting clauses are generally enforceable regardless of the insolvency of one of the parties, with the exceptions introduced by the Resolution Act.

Initiation of insolvency proceedings is defined in the Netting Act as the commencement of proceedings against a party in respect of bankruptcy, reorganisation of a company, or a decision relating to the temporary interruption of activities of a credit institution, liquidation, closure or revocation of authorisation of a credit institution and any other comparable decisions of authorities to initiate execution proceedings (“**Insolvency Proceedings**”). We believe that this definition covers all collective insolvency proceedings under Finnish law that could be applied to the Finnish party; however, it does not include the attachment of the Finnish party’s assets or voluntary workarounds outside of the statutory insolvency proceedings. Where the Resolution Act applies to Party A, Party B is prohibited by the Act from exercising any termination, enforcement of security, suspension, modification, netting or set-off rights on the grounds that crisis prevention measures or crisis management measures (including the occurrence of any event directly linked to the application of such measures) under said Act has been declared in relation to Party A.

Pursuant to the Netting Act obligations created before the commencement of insolvency proceedings may be netted in accordance with a customary provision in an agreement regardless of the insolvency proceedings and the netting shall be binding in the insolvency proceedings of a party. If the result of the netting is that the bankrupt party must pay a net amount to the counterparty, this (net) payment obligation will be a claim against the bankruptcy estate.

1.7 The Financial Collateral Act

The applicability of the Financial Collateral Act (2004, as amended) is subject to the transaction and the parties thereto meeting the following criteria:

(i) the transaction entails the transfer of securities (as defined in the Finnish Securities Market Act (2012, as amended)) or other comparable securities or derivative instruments (e.g. publicly traded shares, bonds and debentures and also corporate debt securities, certificates of deposit and debt securities issued by a government), a receivable based on a monetary loan granted by a credit institution (or an entity referred to in the EU Directive 2002/47/EC Article 2, Section 1, Sub-section o) or cash as security, and

(ii) the security provider qualifies as an "institution" (see below) or the recipient of the security qualifies as an "institution" but then provided that the security provider is not a natural person, and further provided that any equity securities transferred as security are the subject of public trading. The requirement of public trading does not apply to non-equity securities.

The definition of "institution" includes, for purposes of the Financial Collateral Act, any of the following: (i) a public institution as defined in more detail in the Financial Collateral Act, (ii) the Bank of Finland, the European Central Bank, the Bank for International Settlements, the International Monetary Fund, the European Investment Bank, the Nordic Investment Bank or other multilateral development banks, (iii) a licensed credit institution, financial institution, investment firm, fund manager, custodian of a mutual fund, alternative investment funds manager, custodian and special custodian of an alternative investment fund, insurance company, pension insurance company and pension association, (iv) central securities depository, central counterparty and participant (authorised pursuant to industry specific legislation to enter transactions into a clearing entity or equivalent foreign entity), as well as (v) other domestic or foreign entity, which is engaged in comparable activities as those specified above as well as an entity which qualifies as an institution under Article 1 Section 2 Sub-section a-d of the Financial Collateral Directive.

The applicability of the Financial Collateral Act would thus depend on the status of Party A and its counterparty, as well as on the assets used as collateral fulfilling certain requirements.[22] As the definition of "cash" is intended to be wide, we have no reason to believe that Cash (as defined in the EFET Credit Support Annex) would not qualify for the purposes of the Financial Collateral Act.

Our understanding is that a Letter of Credit (as defined in Appendix 1 to the EFET Credit Support Annex) constitutes a guarantee or indemnity by a financial institution, and would therefore not fall within the scope of the Financial Collateral Act. However, the granting of such a guarantee by a third party issuer would not be recoverable in the insolvency proceedings of Party A unless the Letter of Credit is essentially a transferable payment obligation of the issuer which could be collected by a party other than the Transferee.

For purposes of the Financial Collateral Act and where the Financial Collateral Act is applicable, ***netting*** shall mean that upon the due date the opposite payment or delivery obligations of the security provider and recipient are aggregated into one payment or other obligation, as agreed between the parties, and the Financial Collateral Act further provides that such payment and delivery obligations do not involve (a) a claim acquired by the creditor later than three months

[22] The scope of assets which can be used as collateral in accordance with the Financial Collateral Act is defined in a broader way if the rights and obligations of the parties are settled in a settlement system with a central counterparty as in such case the Financial Collateral Act is applicable also to transactions entailing the transfer of other assets accepted by a central counterparty as collateral in accordance with the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories.

before the Decisive Date[23] or (b) an undertaking to which the creditor has become bound later than three months before the Decisive Date in a way corresponding to a payment of debt.

Pursuant to the Financial Collateral Act, obligations secured by qualifying financial collateral and the obligations to return collateral, to the extent such obligations have been created before the commencement of insolvency proceedings, may be netted regardless of the insolvency proceedings and the netting shall be binding in the insolvency proceedings of a party.

[23] i.e. the date from which the suspect period is calculated in accordance with the Recovery Act (see Section 1.5 above in this **Appendix A**).

Appendix B: Types of Counterparties

Limited liability company (*Osakeyhtiö*), public limited liability company (*Julkinen osakeyhtiö*) or *Societas Europaea* (*Eurooppayhtiö*)

Cooperative (*Osuuskunta*)

Savings bank (*Säästöpankki*)

General partnership (*Avoin yhtiö*) or limited partnership (*Kommandiittiyhtiö*)

Municipalities or Counties

Quasi Governmental Entities such as state owned businesses (*Valtion liikelaitos*) that are not independent legal entities and the organisation, management and duties of which are statutory (but such statutes do not include specific restrictions affecting the opinions herein).

The counterparties may fall into the following categories:

Banks organised and licensed under the Finnish Credit Institutions Act (2014, as amended), either as a commercial or similar bank under the Finnish Act on Commercial Banks (2014, as amended), as a savings bank under the Finnish Act on Savings Banks (2001, as amended), or as a co-operative or similar bank under the Finnish Act on Co-operative Banks (2013, as amended)

Investment Services Provider/Investment Firm

Insurance Company (*Vakuutusyhtiö*), but excluding pension and unemployment insurance entities

Investment Fund Management Company

Associations of Local Government

Appendix C: Transactions under the EFET General Agreement

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

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

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

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

"Commodity" means electricity, emissions allowances, certificates or capacity rights.