AS OF 19 AUGUST 2020

EFET ELECTRICITY
LEGAL OPINION UPDATE 2020
NORWAY

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European Federation of Energy Traders
Amstelveenseweg 998
1081 JS Amsterdam

Our reference 9029878/1
Partner in Charge Tore Mydske

Oslo, as of 19 August 2020

LEGAL OPINION ON THE EFET GENERAL AGREEMENT ON ELECTRICITY

INTRODUCTION

We have been instructed by the European Federation of Energy Traders ("**EFET**") to provide a legal opinion (the "**Opinion**") on the enforceability under Norwegian law of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity version 2.1 (a) published 21 September 2007 (the "**EFET General Agreement**" or the "**Agreement**"), in accordance with an instruction template dated 2 July 2018 (the "**Instruction Template**").

All the terms used, but not defined herein, shall have the meaning ascribed to the terms in the Agreement.

GENERAL ASSUMPTIONS

In providing the below opinion, we have made the following general assumptions:

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

- Party A is a corporation, financial institution or other entity as further described in Appendix A to the Instruction Template.

- The relevant EFET General Agreement is governed by the laws of Norway, England and Wales or Germany unless otherwise specified in the additional assumptions.

- The EFET General Agreement is enforceable under the laws of any jurisdiction for the purposes of private international law (other than the laws of Norway), and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

- On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the

EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B to the Instruction Template.

- 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.

EXECUTIVE SUMMARY

This is an executive summary of our findings, but it is not as such part of our legal opinion:

- It is not possible to give a clear opinion on the enforceability of close-out netting agreements under general Norwegian insolvency law. Legal theory is divided on the matter, and the issue has not yet been raised before the courts of Norway. In our view, there is a significant risk that a Norwegian court would deem close-out netting provisions as drafted in the Agreement to be unenforceable if they were to be challenged by the Insolvency Estate of Party A. Reference is made to the discussion on pages 4-5.

- However, there is a possible safe-harbour available, which will protect the close-out netting provisions of the EFET General Agreement from the potential challenge under general Norwegian insolvency law. The safe-harbour includes close-out netting provisions in agreements that are deemed to be a "commodity derivative". A commodity derivative includes commodity forwards, commodity options and commodity swaps that are settled in cash or may be settled in cash at the option of one of the parties. A physically settled contract may also be deemed to be a commodity derivative (covered by the safe-harbour), provided it is traded at a regulated market, MTF or OTF. Reference is made to the discussion on pages 6-10.

- An alternative safe-harbor could be available if the parties to the EFET General Agreement provide collateral in the form of a cash deposit and/or credit claims (and thus amend Section 3 of the Credit Support Annex), in order for the close-out netting provisions to enjoy the safe-harbour from general insolvency law provided by Section 6 of the Act on Financial Collateral Arrangements. Reference is made to the discussion on page 29.

- In our view, the election of Automatic Termination to apply upon a Material Reason described would not be recognized under Norwegian law, as the arrangement would be deemed to constitute a retroactive termination. Retroactive terminations are not allowed under the Recovery Act. Reference is made to the discussion on page 14.

We would advise parties to consider whether the Agreement will be deemed to be a commodity derivative, and thus covered by the safe-harbour.

ISSUES AND ADDITIONAL ASSUMPTIONS

I. Enforceability of close-out netting

Winding-up, Insolvency or Attachment

A. Enforceability of close-out netting under general Norwegian insolvency law

The effects of Insolvency Proceedings (as defined in Annex 1 to this Opinion) on the close-out netting provisions of the EFET General Agreement will depend on (i) the treatment of such agreements under general Norwegian insolvency law, and (ii) the scope of certain Norwegian insolvency provisions providing for explicit safe-harbours for close-out netting provisions. We consider the safe-harbours to be of high relevance considering the contracts entered into under the EFET General Agreement.

It is not possible to give a clear opinion on the enforceability of close-out netting agreements under general Norwegian insolvency law. In our view, there is a significant risk that a Norwegian court would deem close-out netting provisions to be unenforceable if they were to be challenged by the Insolvency Estate of Party A. There are two characteristics with close-out netting under general Norwegian insolvency law that in our opinion might lead to unenforceability. First, regarding termination and close-out netting, it is uncertain whether the parties validly can agree to limit the Insolvency Estate's right to choose what contracts to continue and what contracts not to continue (so-called "cherry-picking"). Second, there is uncertainty as to whether the general conditions for netting of claims would be deemed to be fulfilled or not. The preparatory works of the relevant acts are silent on these subjects, legal theory is divided and the relevant issues have not yet been considered by the Norwegian courts. The same applies to the calculation of the Termination Amount.

Furthermore, explicit safe-harbours have been introduced to ensure the enforceability of close-out netting under specific circumstances (see further discussions immediately below). It is quite possible that a Norwegian court would deem the legislator's introduction of explicit safe-harbours to constitute an argument to the effect that the "background law" (i.e. general insolvency law) does not deem close-out netting agreements to be valid in other situations as otherwise these safe-harbours would not be necessary. We will revert in more detail to the treatment of close-out netting under general Norwegian insolvency law in our answers to the specific questions/issues discussed below.

Close-out netting provisions are given explicit protection ("safe-harbours") from the general provisions in general Norwegian insolvency law in three different situations:

a) Close-out netting provisions in certain *financial derivative contracts* will be enforceable according to their terms. The relevant financial derivative contracts are listed in Section 2-4, Subsection 7, of the Norwegian Securities Trading Act of 29 June 2007 No. 75 (the "**STA**") and include i.a. "commodity derivatives" as defined in art. 2 (1)(30) of Directive 2014/600/EU ("**MiFIR**"), include financial instruments that relate to a commodity or an underlying referred to in points (5), (6), (7) and (10) of Section C of Annex I to Directive 2014/65/EU ("**MiFID II**"). We will discuss the scope of this safe-harbour in relation to the types of contracts listed in Appendix B of the Instruction Template below ("**Safe-Harbour No. 1**").

b) Close-out netting provisions in *financial collateral agreements* will be enforceable according to its terms, according to the Act on Financial Collateral Arrangements no.

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17 of 26 March 2004 (the "**FCA**"). The FCA implements directive 2002/47/EC on financial collateral arrangements into Norwegian law.[1] We will discuss the scope of this safe-harbour further below ("**Safe-Harbour No. 2**").

c) Close-out netting will be enforceable in relation to specified *payment systems* under the Payment Systems Act of 17 December 1999 No. 9595. This act is not relevant in relation to the EFET General Agreement, and will not be discussed further in this context.

In light of the uncertainty relating to the enforceability of close-out netting under general Norwegian insolvency law, we would advise parties to consider whether the EFET General Agreement and the Individual Contracts they enter into are covered by a safe-harbour, as described further below.

B. Safe-Harbour No. 1 – "commodity derivatives"

Section 18-2 of the STA provides a safe-harbour from the main provisions in general Norwegian insolvency law for, inter alia, "derivatives" (Nw: *derivater*)[2] as defined in Section 2-4 (7), cf. Section 18-1, of the STA.

The category of financial instruments defined as "derivatives" in Section 2-4 (7) of the STA will in our view also cover the sub-category of "derivatives" qualifying as "commodities derivatives" pursuant to Section 2-4 (8) of the STA which in our view is the relevant category when assessing whether Safe-Harbour No. 1 is available for the Individual Contracts.

The term "commodity derivatives" pursuant to STA corresponds to the definition of "commodity derivatives" contained in art. 2 (1)(30) of the MiFIR which refers to financial instruments referred to in points (5), (6), (7) and (10) of Annex I to the MiFID II.

A definition of the term "commodity" with respect to "commodity derivatives" is set out in art. 2(6) of the Commission Delegated Regulation 2017/565/EU ("**COMREG**"), which includes "energy such as electricity", and consequently a derivative contract relating to electricity might be deemed a "commodity derivative", provided the derivative contract fulfils certain specific requirements laid down in no. (5), (6), (7) and (10) of Section C of Annex I.

According to these provisions, there are three cases in which an Individual Contract relating to a commodity shall be deemed to be a commodity derivative:

(i) Where the derivative contract *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).[3] If cash settlement is provided for, the derivative contract will be deemed to be a "commodity derivative".

(ii) If the contract can or must be physically settled, it will nevertheless be deemed to be a "commodity derivative" if it is *traded at a regulated market or a MTF, except for*

[1] As amended by Directive 2009/44/EC and Directive 2014/59/EC

[2] Foreign exchange contracts (spot) are also covered, even though such contracts are not deemed to be such financial instruments as listed in Section 2-4, Subsection 7 of the STA.

[3] This follows from Annex I Section C No. 5 to the MiFID II.

wholesale energy products traded on an OTF that must be physically settled.[4] If the EFET-contract is traded at a regulated market or at an MTF or an OTF, the safe-harbour in Section 18-2 of the STA thus applies. The term "MTF" refers to a multilateral system, while OTF refers to an organized trading facility, both operated by an investment firm or a market operator (i.e. a person who manages and/or operates a regulated market), which brings together multiple third-party buying and selling interests in financial instruments in the system.[5] The term does not connote the operator of such systems. Therefore, the term does not – in our opinion – apply to ancillary services provided by an investment firm operating an MTF or an OTF. For example, an investment firm operating an MTF or an OTF for other derivatives than the EFET-contracts may also organise bilateral trading in the EFET-contract as an ancillary service (outside its MTF or OTF platform). This arrangement will not make the EFET-contract a "commodity derivative" as the EFET-contract itself is not traded on the MTF or OTF.

(iii) If the contract provides for physical settlement and is not traded at a regulated market, an MTF or an OTF, it will nevertheless be deemed to be a "commodity derivative" if all the following conditions are met:[6] it is not a spot contract[7], it is not for commercial purposes[8] and it has "the characteristics of other derivative financial instruments". [9]

As for "having the characteristics of other derivative financial instruments", this criterion will be met if the contract is "*standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates*" c.f. art. 7 (1)(b) of the COMREG, **and** meets one of three alternative criteria set out in art. 7 (1) (a) of the COMREG:

a. it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF;

b. it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue; or

c. it is equivalent to a contract traded on a regulated market, an MTF, an OTF or such a third country trading venue, with regards to the price, the lot, the delivery date and other contractual terms

In our opinion, Individual Contracts as defined in Appendix B of the Instruction Template will not fulfil the criteria set out in art. 7 (1)(a) of the COMREG as we assume that the contracts are *not* traded on platforms outside the EEA, they are *not* expressly stated to be traded on a regulated market/MTF/OTF within the EEA and they

[4] This follows from Annex I Section C No. 6 to the MiFID II. The precise content of the term "physically settled" for this purpose is set out in art. 5 of the COMREG.
[5] See art. 4 (1) No. 15 of the MiFID.
[6] This follows from Annex I Section C No. 7 of the MiFID II.
[7] As defined in art. 7 (2) of the COMREG.
[8] As defined in art. 7 (4) of the COMREG.
[9] As described in art. 7 (1) of the COMREG.

do *not* include any references to being equivalent to such contracts. Consequently, it is not relevant to consider whether the contracts are spot contracts or whether the contracts are of commercial purposes.

In the following, we will assess whether the contract types listed in Appendix B of the Instruction Template will be deemed to be commodity derivatives according to the above criteria (i) and (ii), and thus fall within a safe-harbour from general Norwegian insolvency law.

a) Commodity Forward:

A Commodity Forward is defined as follows in Appendix B of the Instruction Template:

"A transaction in which one party agrees to purchase a specified quantity of a Commodity at a future date at an agreed price 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."

In our view, a Commodity Forward which (1) requires the contract to be settled in cash or (2) gives the holder a right to settle in cash, will be deemed to be a "commodity derivative" according to Section 2-4, Subsection 8, cf. Section 18-1, of the STA and thus covered by Safe Harbour No. 1 (see criteria (i) above).

However, we have been informed that the Commodity Forward contracts may also be settled by way of physical delivery. Commodity Forward contracts that are settled through physical delivery will only qualify as a "commodity derivative" and thus Safe Harbour No. 1 if such contracts meet the requirements described in Section B. (ii) and/or (iii) above. With regards to such requirements, we note the following:

- The Instruction Template does not specify a delivery period for Commodity Forward contracts, and we cannot therefore conclude on whether a Commodity Forward contract in general would be deemed as a "spot contract" pursuant to art. 7 (2) of the COMREG;
- Similarly, whether a Commodity Forward contract is entered into for "commercial purposes" pursuant to art. 7 (4) of the COMREG will depend on the parties to and circumstances of the individual transaction, which we cannot provide any general comments on;
- Further, we assume that the Commodity Forward contracts are neither traded on platforms outside the EEA, expressly stated to be traded on a regulated market/MTF/OTF within the EEA, nor do they include any references to being equivalent to such contracts. As such, the Commodity Forward contracts would not meet the first leg of the definition of "having characteristics of other derivative financial instruments", cf. art. 7 (2) of the COMREG.

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- As to the second leg of the definition in art. 7 (2) of the COMREG, the Commodity Forward contracts would in our view be deemed as "standardised" to the extent that the terms of the individual contract is set with reference to published prices, standard lots or standard delivery dates.

b) Commodity Option:

A Commodity Option is defined as follows in Appendix B of the Instruction Template:

""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.""

In our view, a commodity option which (1) requires the contract to be settled in cash if the option is exercised or (2) gives the holder a right to settle in cash if the option is exercised, will be deemed to be a "commodity derivative" according to Section 2-4, Subsection 8, cf. Section 18-1, of the STA and thus covered by the safe-harbour in Section 18-2 of the STA.

A Commodity Option whereby the holder takes *physical delivery* of the commodity upon settlement (i.e. if the option is exercised), will in our opinion not be deemed to be a "commodity derivative" unless the contract is traded on a regulated market, an MTF or an OTF, see further discussions under (ii) above.

We cannot conclude definitely whether a Commodity Option will be deemed to be a "commodity derivative" according to these criteria, as it depends on a concrete assessment of the contract in question and how it is traded.

c) Commodity Swap:

A Commodity Swap is defined as follows in Appendix B of the Instruction Template:

"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."

In our view, a Commodity Swap which (1) requires the contract to be settled in cash or (2) gives the holder a right to settle in cash, will be deemed to be a "commodity derivative" according to Section 2-4, Subsection 8, cf. Section18-1, of the STA and thus covered by the safe-harbour in Section 18-2 of the STA.

A Commodity Swap whereby the holder takes *physical delivery* of the commodity upon settlement, will in our opinion not be deemed to be a "commodity derivative" unless the contract is traded on a regulated market, an MTF or an OTF, see further discussions under (ii) above.

We cannot conclude definitely whether a commodity swap will be deemed to be a "commodity derivative" according to these criteria, as it depends on a concrete assessment of the contract in question and how it is traded.

d) Physical Commodity Transaction

A Physical Commodity Transaction is defined as follows in Appendix B of the Instruction Template:

"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."

A Physical Commodity Transaction whereby the holder takes *physical delivery* of the commodity upon settlement, will in our opinion not be deemed to be a "commodity derivative" unless the contract is traded on a regulated market, an MTF or an OTF, see further discussions under (ii) above.

We cannot conclude definitely whether a Physical Commodity Transaction will be deemed to be a "commodity derivative" according to these criteria, as it depends on a concrete assessment of the contract in question and how it is traded.

e) Commodity:

A Commodity is defined as follows in Appendix B of the Instruction Template:

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

According to Section 2-2 (11) of the STA, emission allowances pursuant to the definition set out in the Norwegian Act on Emission Allowances are deemed to be financial instruments. Nevertheless, only derivatives on such contracts are covered by the safe-harbor set out in Section 18-1 of the STA, provided they fulfil the general requirements for "commodity derivatives" as discussed further above.[10] Emission allowance rights (as opposed to commodity derivatives with emission allowances rights as the underlying) will therefore not be deemed to be a "commodity derivative", and will fall outside the safe-harbour.

If the contract in question is deemed to be a "commodity derivative" and consequently is within the safe-harbour, the issue arises whether the calculation of the Termination Amount according to Section 11 of the EFET General Agreement is in accordance with the valuation provisions in Section 18-2 of the STA. Section 18-2 of the STA provides that all derivative transactions covered by a netting agreement shall be credited or debited at "market value" when netted. "Walk away"-clauses where the Defaulting Party shall not receive market value are thus not

[10] See comments in Ot.prp. nr. 34 (2006-07) page 53.

enforceable under Norwegian law. Section 18-2 does not provide for further guidelines on how market value shall be calculated, and the legislator has not set out any specific guidelines in the preparatory works. In general, it is our opinion that the calculation of the Termination Amount (which requires gains and losses to be calculated in a "commercially reasonable manner") will fulfil Section 18-2 of the STA, provided the market value is calculated in accordance with commercial reasonable assessments and the principle of arm's-length transactions is applied.

It should be noted that if the Termination Party fails to comply with a market price valuation requirement in accordance with Section 18-2 of the STA, such failure will not impact the enforceability of the netting provisions.

C. Safe-Harbour No. 2 – the Financial Collateral Act

Section 6 of the FCA provides for an additional safe-harbour for certain close-out netting provisions falling within the scope of the FCA. The FCA implements Directive 2002/47/EC on Financial Collateral Arrangements (the "**FCA Directive**") and the provision in Section 6 of the FCA meets the requirements stated in art. 7 of the FCA Directive to ensure that a close-out netting provision can take effect in accordance with its terms under certain specified circumstances.

Only "financial collateral arrangements" fall within the scope of the FCA. A "financial collateral arrangement" is an arrangement under which a collateral provider provides "*financial collateral*" to a collateral taker for the purpose of securing the performance of relevant "*financial obligations*". The arrangement can either take the form of a full title transfer of the collateral provided (as is the case in Section 7 of the Credit Support Annex to the EFET) or through a more traditional security arrangement.

The EFET General Agreement provides the parties with an opportunity to provide each other with Eligible Credit Support according to the terms of the Credit Support Annex.[11] The question in the following is whether the Credit Support Annex provides for "financial collateral" as defined in the FCA.

Eligible Credit Support may consist of either (i) cash transferred to the account of the transferee or (ii) a letter of credit, see Section 3 No. 2 Letter a) and b) of the Credit Support Annex. Under the FCA, "financial collateral" is defined as "*cash deposits, financial instruments and credit claims*".[12] Cash deposits are "*money credited to an account in a credit institution*" or "*similar claims for the repayment of money*". "Financial instruments" is defined in Section 2-2 of the STA, Subsection 1, and corresponds to the definition of financial instruments set out in MiFID II. Credit claims are "*money claims which arise as a result of a credit institution granting credit in the form of a loan to a debtor*". Loans to a consumer are only deemed as credit claims if the security taker or provider is a central bank or development bank mentioned in Section 1, Subsection 3 (b) of the STA.[13]

As for *letters of credit*, we are of the opinion that such instruments in general will neither be deemed to constitute cash deposits nor financial instruments (as they are normally not

[11] Version 2.0 May 2010.
[12] Section 2 of the FCA.
[13] Section 2 Paragraph Letter g) of the FCA. Please note that the definition of financial collateral implements the FCA Directive into Norwegian law.

negotiable in the capital markets).[14] Letters of credit may thus not be regarded as "financial collateral" under these alternatives in the FCA .

However, the question arises on whether or not letters of credit are deemed to be viewed as credit claims as defined in the FCA. At the outset the wording "credit claims" (Nw: *gjeldsfordring*) does not exclude Letters of Credit (as defined in Appendix 1 to the CSA). However, the Section 2, Paragraph 1, Letter g) of the FCA expressively states that a credit claim is a "*money claim arising as a result of a credit institution providing credit in the form of a loan*". Furthermore, if the purpose was to include also Letters of Credit as collateral under the FCA Directive it is likely that it would have been specified in the Directive 2009/44/EC, either in art. 2, Subsection 4, Letter c) or at least in the recital. The preparatory works of the FCA are silent on the matter, there is no legal theory addressing the question and the issue has not yet been considered by the Norwegian courts. Based on the definition in Section 2, Paragraph 1, Letter g), of the FCA, our view is that a court would not consider Letters of Credit to be "credit claims" under Section 2 of the FCA. Our conclusion is therefore that Letters of Credit may not serve as "financial collateral" under the FCA.

As for the *cash* alternative, this will in our opinion also fall outside the definition of "financial collateral" in FCA. It is only security created through assignment of a deposit (e.g. a bank account) which is covered by the definition of cash deposits, and only security created through the assignment of a money claim held against a borrower as a result of a loan which is covered by the definition of credit claims. These conditions are not fulfilled in our case, since the transaction only involves a simple transfer of funds from the transferor to the transferee, rather than an assignment of a deposit or a credit claim. Consequently, it is our opinion that the EFET General Agreement executed with a Credit Support Annex as it is currently drafted will not fall within the safe-harbour of the FCA.

On page 26 below, we will provide guidance on how this issue might be addressed. However, as the CSA is currently drafted, the arrangement will in our opinion fall outside the scope of the FCA and the safe-harbour. Therefore, it is not relevant to discuss the other conditions that need to be fulfilled for this safe-harbour to apply.

D. Consequences of splitting-up/segregation of the portfolio of Individual Contracts

If two parties have entered into Individual Contracts of different categories (e.g. one being a commodity derivative and one not being a commodity derivative), only the contracts deemed to fall within the safe-harbours will receive a favourable treatment with regard to netting provisions in Insolvency Proceedings. Other individual contracts will be treated according to general Norwegian insolvency law.

If any provision of the Agreement or the different individual contracts is held to be unenforceable, the severance of such provisions from the remaining provisions of the Agreement or individual contracts will be subject to the exercise of the discretion of a Norwegian court. In our view, however, the unenforceability of any netting provision in an individual contract subject to general Norwegian insolvency law will not affect the enforceability of netting provisions in individual contracts covered by the safe-harbour in Section 18-2 of the STA (in relation to Commodity Derivatives).

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E. The Insolvency Estate's right of continuation - distinction between different stages of Insolvency Proceedings

The Insolvency Estate has a general right to continue mutually binding contracts that are in force at the time the bankruptcy proceedings or debt negotiations are initiated. If the creditor gives a notice of termination that is valid under the contract, and this notice is received by the debtor before Insolvency Proceedings are initiated (Nw: *"konkursåpning"* – the time of the court ruling), the Insolvency Estate will not have a right of continuation (as there is no valid contract to continue). If the debtor itself applies for bankruptcy, the court would normally open the bankruptcy, without further notice to the creditors, on the same day as the petition for bankruptcy is filed before the court. If one of the debtor's creditors files for the bankruptcy of the debtor, the length of the period between the time of the filing of the petition and the court's decision, will vary. In practice, the period would generally be at least of one week.

F. General description of limitations on set-off (not related to insolvency)

a) Limitations on set-off between parties of claims arising under the EFET General Agreement

Payment Netting (Section 13.3) and Close-Out Netting (Sections 10.3 and 11) constitute valid and legally binding provisions and are enforceable in accordance with their terms, subject only to general limitations applicable to set-off in general (such as i.a. correct valuation). Reference is also made to Part I 1. H. d) below where the main requirements for set-off under Norwegian insolvency law are described in more detail.

b) Limitations on set-off between Parties of claims arising outside the EFET General Agreement if contractually provided for in an amendment to the EFET General Agreement.

A mutually agreed set-off of claims arising outside the EFET General Agreement constitutes valid and legally binding provisions and is enforceable in accordance with its terms, subject only to the general limitations applicable to set-off in general (see above).

c) Limitations on set-off between Affiliates of Credit Support Providers of Parties if contractually provided for in an amendment to the General Agreement

A mutually agreed set-off by all involved parties constitutes valid and legally binding provisions, that are enforceable in accordance with their terms, subject only to the general limitations set out above.

d) Relationship between early-termination, set-off and close-out netting

Under Norwegian law, early termination, set-off and close-out netting are in principle legally distinct and separate rights. In practice, however, they are closely related rights as close-out netting normally presupposes both a right of early termination and a right of set-off.

G. Discussion of specific issues in relation to the enforceability of close-out netting (questions a-h)

The discussion of the issues in Letters a) to h) below rests on the following additional assumptions (i.e. in addition to the general assumptions mentioned above):

- The relevant EFET General Agreement is governed by any law (including English, German or Norwegian law).
- 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 law of Norway and, subsequent to the commencement of the insolvency, either Party A or the Insolvency Estate seeks to assume the confirmations representing profitable Contracts for the insolvent counterparty.

a) *Automatic Termination:*

aa. *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) by 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*

In our view, the election of Automatic Termination to apply upon a Material Reason described in Section 10.5 (c) (or upon events not specified therein) would not be recognized under Norwegian law, as the arrangement would be deemed to constitute a retroactive termination. Retroactive terminations are not allowed under the Recovery Act.

Adding, deleting, modifying or any other fixation of the Material Reasons, including the scope of such reasons, will in general not have an effect on the enforceability of automatic termination under Norwegian law. A grace period, including the length of any period of time required by a party to have Insolvency Proceedings dismissed or terminated, will in our opinion not influence the assessment of these legal issues.

With respect to the option of specifying a grace period, as long as the arrangement is considered an automatic termination and thereby a retroactive termination, its legal status under Norwegian law will, in our view, not vary depending on the timing for the termination to take effect.

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 [jurisdiction] or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party?*

In our opinion, there is a risk that the provisions of the EFET General Agreement terminating the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in Section 10.5(c) of the EFET General Agreement, will not be enforceable under the general insolvency laws of Norway.

The key issue under general Norwegian insolvency law is whether Automatic Termination upon a Material Reason described in Section 10.5(c) will be deemed to constitute a valid "pre-insolvency termination", which is the case if the creditor gives a notice of termination that is valid under the contract and the notice is received by the debtor before insolvency proceedings are initiated. In such a case, the Insolvency Estate does not have a right of continuation.

The issue of whether an Automatic Termination will be deemed to constitute a valid termination has not been decided upon by Norwegian courts. Our best estimate would be that a court would be likely to decide in favour of an Insolvency Estate that claims to have a right of continuation under a contract terminated according to Automatic Termination, as such a clause would be a retroactive termination deemed to constitute a formal construction whose main justification would be to limit the Insolvency Estate's general right of continuation. In our view the wording of the provisions itself is not relevant when assessing whether such provisions are enforceable.

Again, it should be noted that commodity derivatives and financial collateral arrangements enjoy a safe-harbour from the Insolvency Estate's general right of continuation, and that the provisions on Automatic Termination therefore will be enforceable in relation to these contracts, see further details above.

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)?

Adding, deleting, modifying or any other fixation of the Material Reasons, including the scope of such reasons, will in general not have an effect on the enforceability of the termination provisions under Norwegian law.

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 [jurisdiction] 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?

THOMMESEN

In our opinion, there is a risk that 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 Section 10.5(c) of the EFET General Agreement, will not be enforceable under the laws of Norway.

The Insolvency Estate's right of continuation does, however, not apply in relation to "commodity derivatives",[15] see further details above on safe-harbours.

The Insolvency Estate has a general right to continue mutually binding contracts, regardless of any contractual provisions to the contrary between the debtor and the counterparty.[16] This right to continue contracts does not apply if the insolvency provides a cause to terminate the contract "due to the nature of the agreement", i.e. where the counterparty's solvency is considered a dominating premise for the agreement. It is unclear under Norwegian law whether or not such mutually binding contracts as listed in Appendix B would fall within this latter category. The issue has not been dealt with by the Norwegian courts, and legal theory is divided. Our best estimate would in general be that a court would be likely to decide in favour of an Insolvency Estate that claims to have a right of continuation under these contracts.

It should be noted that the Insolvency Estate's general right of continuation does not apply to contracts that are validly terminated prior to the opening of the Insolvency Proceedings, see further above.

c) *Are the provisions in § 11 of the EFET General Agreement enforceable under the laws of Norway or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?*

Unless the contracts in question are "commodity derivatives" or "financial collateral arrangements", and thus would fall within the safe-harbours described above, there is in our view a risk that the provisions of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount could be challenged by the Insolvency Estate.

Under general Norwegian insolvency law, a creditor retains the same right of set-off (netting) against the Insolvency Estate during the insolvency proceedings as the creditor had against the debtor under Norwegian contract law immediately prior to the commencement of the Insolvency Proceedings, with certain modifications and extensions.[17] The main requirements for set-off in this context are (i) the commensurability requirement and (ii) the mutuality requirement. Both these requirements raise problems in relation to close-out netting provisions. These problems arise even if the Insolvency Estate should be deemed to have a right of continuation in situations as described under question a) and b) above.

The *commensurability requirement* means that the claim of the debtor (the "claim") and the claim of the creditor (the "counterclaim") must be settled with identical means of payment or deliverables. Therefore, claims and counterclaims in different currencies

[15] Sections 2-4, Subsection 7 cf. 18-1, and 18-2 of the STA.
[16] Section 7-3 of the Recovery Act.
[17] Section 8-1 of the Recovery Act.

cannot – as a main rule – be set-off against each other. There is an exemption available where the counterclaim is in a foreign currency (e.g. EUR) and the claim is in NOK, as all the claims against the debtor/Insolvency Estate shall be converted into NOK and may be set-off against NOK claims of the Insolvency Estate. However, the fact that all claims against the debtor/Insolvency Estate are converted into NOK, does not exclude set-off rights related to claims commensurable before Insolvency Proceedings were initiated. If the claim of the Insolvency Estate is in EUR and the counterclaim is NOK, the commensurability requirement would in our opinion not be fulfilled, and no set-off would be allowed.

The *mutuality requirement* means that the claim and the counterclaim must exist between the same parties. One might question whether this excludes the creditor from setting off counterclaims against the Insolvency Estate, if the counterclaim relates to contracts continued by the Insolvency Estate. It can be argued that the claims arising from contracts continued by the Insolvency Estate shall be regarded as being established at the point in time when the Insolvency Estate sends a notice of continuation (i.e. after the opening of the Insolvency Proceedings), and that the claims and counterclaims related to the continued contracts cannot be deemed to exist at the time of the opening of the Insolvency Proceedings. This interpretation would allow the Insolvency Estate to continue favourable contracts (to the extent the Insolvency Estate has a right of continuation, see question a) above on this issue), and leaving the remaining contracts for dividend payments only (so-called "cherry-picking"). This issue is not settled by the courts, and it is a matter of dispute in legal theory. In our view, it is presupposed by the provisions and principles of the Insolvency Estate's right to enter into and continue the debtor's contracts, particularly Section 7-4 of the Recovery Act, that a subsequent right to set-off following the Insolvency Estate's continuation is excluded. Please note that the issue only arises in the instances that the Insolvency Estate is allowed to continue the contract, and the commensurability requirement is fulfilled.

Please note that these issues relating to the general conditions of netting in insolvency proceedings do not arise in relation to commodity derivatives and financial collateral arrangements which fall within the safe-harbours. These contracts can be set-off according to Section 11 of the EFET General Agreement.

d) Further questions

- *Do the laws of Norway recognize that the close-out netting provisions in Section §§ 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?*

  Yes, from a contractual point of view. Please note, however, that the enforceability of these close-out netting provisions is uncertain, see further details above.

- *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?*

  In our view, the single agreement concept is not relevant when assessing the enforceability of close-out netting provisions. The key issues to consider are whether the Insolvency Estate has a right of continuation or not, and (if it has such a right) whether the conditions for set-off are fulfilled or not. The concept of a single agreement would in our view not be relevant in these assessments, as it is likely that it would in any event be deemed to constitute a formal construction aimed at ensuring enforceability of the close-out netting provisions.

- *If the single agreement concept is particularly important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the General Agreement following a previous Partial Close-Out.*

The single agreement concept is not particularly important in Norway. If any provision of the Agreement or of the different Individual Contracts is held to be illegal, invalid or unenforceable, the severance of such provisions from the remaining provisions of the Agreement or Individual Contracts will be subject to the exercise of the discretion of a Norwegian court. In our view, however, the unenforceability or illegality of any netting provision subject to general Norwegian insolvency law will not affect the validity and enforceability of netting provisions in Individual Contracts covered by the safe-harbour of Section 18-2 of the STA (commodity derivatives) or the FCA.

e) *Is the insolvent counterparty's 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 Norway or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?*

As a main rule, claims and counterclaims in different currencies cannot be set-off. Reference is made to question d) above for further details (regarding the commensurability requirement). These restrictions do not apply in relation to the safe-harbours mentioned above (commodity derivatives and/or financial collateral arrangements).

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

In general, the regulatory or legal status of the concerned parties is not relevant in assessing the enforceability of close-out netting provisions, neither in respect of general Norwegian insolvency law nor in respect of the safe-harbour available for "commodity derivatives".

The safe-harbour in Section 18-2 of the STA depends on the legal classification of the contract type, and not on the legal classification of the counterparties to the contract. Derivative contracts with physical delivery will, however, never be deemed to be a "commodity derivative" if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and the contract is necessary to keep in balance the supply and consumption of energy at a given time.

As for the availability of the safe-harbour for financial collateral arrangements of Section 6 of the FCA, this provision requires that either both or one of the parties (provided the other party is a legal person) fall within a specified category of institutions. However, as we have concluded that this safe-harbour is not available as the Credit Support Annex is currently drafted, we will not discuss this further.

We would like to emphasise that we have *not* assessed whether the different counterparties listed in Appendix A will have legal capacity to enter into commodity derivative contracts or not. For example, insurance companies, investment funds and municipalities are subject to regulatory limitations on their asset management which may limit their ability to act as counter-parties in the EFET General Agreement.

Non-insolvency related Material Reasons

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

If Party A is not subject to Insolvency Proceedings, the netting provisions will be enforceable by the terminating party according to their terms. The commensurability and the mutuality requirements do not apply in a non-insolvency related scenario, if the parties have entered into a contract which sets out the conditions of netting. Please note that according to general provisions under Norwegian law contract terms that are deemed to be "unreasonable" might be invalidated by the courts. In our view, there is, however, no major risk for the netting provisions in the General Agreement to be invalidated on this basis.

In light of the above, neither of the issues outlined under d), e) or f) are deemed relevant.

II. Multibranch Parties (questions i-m)

In addition to the additional assumptions that apply for Letters a) to -h), the discussion of the issues in Letter i) to j) also rests on the following additional assumptions:

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

1 Norwegian Multibranch Party

i) *Would there be any change in your conclusions reached under C.I.1 or C.I.2 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?*

No, Norwegian insolvency law is based upon the principle of universality. Please note, however, that all assets outside Norway can only be seized through the assistance of the debtor and/or foreign execution authorities/courts.

j) *Would the EFET General Agreement be treated as a single unified agreement by the Norwegian receiver under the laws of Norway, 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?*

The enforceability of the netting provisions of the EFET General Agreement under Norwegian law would not be affected by the treatment of those provisions under foreign law.

2 Foreign Multibranch Party

The discussion of the issues in Letter k) to m) rests on the following additional assumptions:

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

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

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

Insolvency Proceedings instituted abroad do not, as a main rule, have immediate and direct effect on the debtor's assets in Norway. Even though the commencement of foreign insolvency proceedings does not have immediate and direct legal effect on the debtor's assets located in Norway, a foreign Insolvency Estate may be recognised in Norway to the extent the procedure instituted abroad is (i) comparable to the competence of a Norwegian Insolvency Estate and (ii) not contrary to Norwegian public policy considerations.

An exemption from the main principle described above follows from the Nordic Bankruptcy Treaty of 1933 whereby Insolvency Proceedings instituted in Sweden, Denmark, Finland and Iceland will have immediate and direct legal effect on the debtor's assets in Norway. The EU Insolvency Regulation (Regulation (EU) No. 2015/848) is not applicable in Norway.

A Norwegian branch of a foreign entity cannot be subject to separate Norwegian insolvency proceedings. Please note, however, that branches of foreign banks may be subject to liquidation under public administration in Norway on certain conditions.[18]

l) *If there were separate proceedings in Norway with respect to the assets and liabilities of the Norwegian Branch, would the receiver or liquidator in Norway and the Norwegian 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 Norway and, if so, would the receiver or liquidator and the Norwegian 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 Norwegian receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Norwegian Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Norwegian Branch to the liquidator or receiver of the Norwegian 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.*

This is not a relevant issue, as there will not, as a main rule, be any separate proceedings in Norway with respect to the assets and liabilities of the Norwegian Branch.

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

This would not make a difference, as no separate Insolvency Proceedings can be initiated in Norway in this case.

III. Collateral (questions n-v)

The discussion of the issues in Letter n) to v) rests on the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Credit Support Annex[19] and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral.

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

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[18] Norwegian branches of foreign financial undertakings may in accordance with Section 21-1 of the Norwegian Financial Undertakings Regulations (regulations of 25 November 2011), be subject to liquidation under public administration if either (i) the financial institution is not covering its liabilities in Norway as they fall due, but is covering its liabilities in its country of incorporation as they fall due, or (ii) the mitigating measures implemented by the resolution authority in its country of incorporation to ensure that the financial undertaking continue its operations is not effective for the financial institution's Norwegian branch. If the Norwegian branch of a foreign financial undertaking is made subject to liquidation under public administration pursuant to Section 21-1 of the Norwegian Financial Undertakings Regulations, the liquidation will only cover the branch's assets and liabilities in Norway.

[19] Version 2.0 May 2010.

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

In general, transfer of ownership in the various forms of Eligible Credit Support (including cash accounts in credit institutions) may in principle be re-characterized by the courts as creating a security interest with the legal consequence that the validity and the legal protection/perfection (Nw: *"rettsvern"*) of the arrangement is governed by the Mortgage Act of 8 February 1980 No. 2.

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

Under Norwegian law, the distinction between transfer of ownership and creating a security interest (other than a pledge) does not have any relevance in this context. Therefore, there are no consequences of such a re-characterization. Hence, it is not relevant how the law or the courts characterise the transfer, the reason being that an assignment for security purposes and a transfer are subject to the same perfection requirements, and that the Mortgage Act validates the relevant pledges.

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

Both agreements regarding transfer of ownership and the creating of a security interest must be perfected. A transfer of the title to Norwegian financial instruments and the creation of the security interest in such instruments would be perfected in the Norwegian system by registration in the paperless securities register effected by a notice that a transfer/or a security interest has been created.

q) *What is the effect, if any, under the laws of Norway 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?*

Pursuant to Section 6 of the Credit Support Annex the Transferor may replace, in whole or in part, any Eligible Credit Support or Interest Amount of the same or higher value. Provided that the value of this new collateral does not exceed the value of the collateral subject to substitution, the arrangement will not have any legal consequences. However, the excess value may in our opinion constitute providing collateral for older debt (Nw: *pant for eldre gjeld*) and can thus, in the event of insolvency of the Transferor, be set aside under Section 5-7 of the Recovery Act provided it has been substituted within three months before the petition to open insolvency proceedings was filed. This is, however, not an issue for arrangements within the scope of Safe-Harbour No. 1, cf. Part I 1 above.

r) *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 Norway insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?*

Yes, provided the arrangement falls within one of the safe-harbours described in Part I 1 above.

s) *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?*

In our view, the rights of Party B will be enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A, provided a safe-harbour applies. Please note, however, the general provisions on "suspect period" described in t) below.

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

There is an "objective" suspect period of three months before the petition to open Insolvency Proceedings was filed. The provisions apply to i.a. the providing of collateral for older debt. This suspect period does in our view, however, not apply to transactions which fall within the safe-harbours (see q) above).

Furthermore, there is a general "subjective" suspect period of ten years for transactions that i.a. improperly give preference to one creditor at the expense of the others, and the other party to the transaction knew or should have known of the debtor's financial difficulties and the circumstances that made the transaction improper.[20] If a transaction falls within the latter category, it will be void even if it falls within the safe-harbours.

[20] Section 5-9 of the Recovery Act.

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u) *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 Norway 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?*

In our view, the EFET Credit Support Annex is an appropriate form to create the intended transfer of ownership in the collateral to Party B. No other requirements than those already mentioned above need to be observed.

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

In our view, it is insufficient to provide for collateral only in the form of a plain cash transfer as provided for in Section 3 No. 2 Letter a) of the Credit Support Annex. The parties to the EFET General Agreement could instead consider to provide collateral in the form of cash deposits with a credit institution and/or collateral in the form of credit claims arising as a result of a credit institution providing credit in the form of a loan, in order for the close-out netting provisions to enjoy the safe-harbour from general insolvency law provided by Section 6 of the FCA, see further details in I 1 above. Furthermore, provided that the parties have agreed on collateral as suggested above, the parties to the EFET General Agreement should in addition supplement the Agreement with a provision explicitly stating that the parties deem the Agreement to constitute a financial collateral arrangement covered by the scope of the FCA. Please note that even if cash is transferred to a credit institution (i.e. a bank) it must still be *secured* as explained above under paragraph C (*Safe-Harbour No. 2 – the Financial Collateral Act*) on page 10.

IV. Parent Company Guarantee (questions w-x)

The two questions below concern the enforceability of a Credit Support Document (as defined in the General Agreement), which is a Parent Company Guarantee, are based on the following additional Assumptions:

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

- *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 1 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 General Agreement;*

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

- *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.*

- *The liability of the Guarantor under the guarantee is limited to that of the Principal Obligor under the General Agreement and any cap set out in the guarantee document.*

- *The guarantee is provided in the form of a written document signed by an authorised representative of the Guarantor.*

- *The guarantee is governed by Norwegian law and any disputes in connection with or claims under the guarantee are to be referred to and resolved by the courts of Norway.*

- *The Guarantor has provided an address that the Guarantor can be served at in Norway but is not necessarily established in Norway.*

w) *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?*

x) *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?*

No, there are no specific statutory formalities that are required for a Parent Company Guarantee in Norway. We note that such a guarantee will constitute a conditional payment guarantee (Nw. *betalingsgaranti*) (which is a secondary obligation and contingent on the obligation of the principal on the principal) and not an on demand guarantee/demand bond (which imposes a primary obligation on the guarantor to pay the beneficiary on first demand for payment). In respect of the latter, the Norwegian Supreme Court has stated that it is important that on-demand guarantees are clear to the fact that the guarantee is a primary obligation and that there is no legal link to the primary obligation of the principal.

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V. General Enforceability (questions y-z)

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

If Party A is not subject to any insolvency proceedings, the netting provisions will be enforceable according to its own terms. Please note, however, that according to general provisions under Norwegian law contract terms that are deemed to be "unreasonable" might be invalidated by the Courts. In our view, there is no significant risk for the netting provisions in the EFET General Agreement to be invalidated on this basis.

z) *Do you have other recommendations going to the topic of general legal enforceability that you would like EFET members to consider?*

No.

VI. Confirmation Practices (questions aa-dd)

The discussion of the issues in Letters aa) to dd) rests on the following additional assumptions:

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

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

Binding Individual Contract

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

No.

bb) *At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable?*

When the orally binding agreement is entered into, unless otherwise is agreed between the parties.

cc) Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? 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*?

A failure to object to incorrect terms in a received Confirmation may constitute "acceptance" of those terms, but there are no explicit statutory time periods for this effect to take place. Whether or not acceptance is deemed to have taken place, will depend on an individual assessment, where i.a. the nature of the error would be relevant (including whether or not the "accepting party" knew or should have known the error).

dd) 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?

Yes.

Means of Evidence

ee) Assuming there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in court: (i) taped recording; (ii) witness' statement; (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?

All of the above-mentioned means of evidence will in general be permissible in a dispute with respect to the existence or the content of the terms and conditions of an Individual Contract.

VII. Core Provisions (questions ff-hh)

The discussion of the issues in Letter ff) to hh) rests on the additional assumptions that applied to the issues discussed under Letters a)-m).

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

None of the elections contemplated by the EFET General Agreement would change the substance of our conclusions reached under Part C.I or C.II. Please note, however, that we have suggested an amendment to the terms of the EFET Credit Support Annex.

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

The amendments of particular provisions of the EFET General Agreement would not affect our assessment that the parties should ensure that the Agreement is covered by one or both of the relevant safe-harbours.

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

Not applicable.

VIII. Governing Law, Arbitration and Jurisdiction (question ii)

The discussion of the issues in Letter ii) rests on the following additional assumption:

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

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

In our opinion, Norwegian courts will uphold the Parties' agreement on the governing law, and the submission to arbitration or jurisdiction.

IX. Regulatory Regime (question jj)

jj) *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?*

There are no currency or exchange control laws in Norway which may affect the EFET General Agreement.

As regards license requirements, any provision of investment services relating to commodity derivatives will as a starting point trigger a licensing requirement under the STA, which implements MiFID II. The term "Investment services" includes, but is not limited to, the dealing in such derivatives on own account. The licensing requirement is only triggered for investment services provided "in Norway". It should be noted that there are a number of derogations from the licensing requirement in relation to commodity derivatives, including a derogation for persons "*dealing on own account in commodities derivatives and/or emission allowances*". This qualifies as an "ancillary activity" to the main business of the relevant undertaking (or the group it forms a part of, if applicable).

However, in our view the enforceability of the relevant EFET General Agreement or the Individual Contracts will not be affected, even if the above-mentioned license requirements are not complied with.

Trading electricity on the wholesale market is not subject to license in Norway

X. Other Provisions (question kk)

kk) *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 your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter.*

As mentioned under v) above, the parties to the EFET General Agreement could instead consider to provide collateral in the form of a cash deposit and/or credit claims (and thus amend Section 3 of the Credit Support Annex), in order for the close-out netting provisions to enjoy the safe-harbour from general insolvency law provided by Section 6 of the FCA. Provided that the parties have agreed such collateral as suggested above, the parties to the EFET General Agreement should also supplement the Agreement with a provision explicitly stating that the parties deem the Agreement to constitute a financial collateral arrangement covered by the scope of the FCA.

RESERVATIONS

The opinions given above are subject to the following reservations:

a) The validity and enforceability of the rights and obligations under the Agreement will be subject to general provisions in Norwegian law in respect of invalidations and revision of unfair contract terms;

b) Section 18-2 of the STA provides that all derivative transactions covered by the netting agreement shall be credited or debited at "market value" when netted. "Walk away"-clauses where the Defaulting party shall not receive market value are thus not enforceable under Norwegian law. Section 18-2 of the STA does not provide further guidelines on how market value shall be calculated;

c) Section 8 of the FCA states that terms with regard to realisation (sale, right to use, netting) and valuation of the financial collateral, as well as the calculation of the financial obligations, shall be undertaken on commercially reasonable conditions. The legislator has not given any guidelines as to which terms will be commercially reasonable. Whether terms are commercial or not shall be decided considering the purpose of the FCA, market needs and the interests of other creditors. Where a party to an agreement is vested with discretion or may determine a matter at the party's opinion or discretion, the requirement of commercial reasonableness provisions may

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require that such discretion be exercised reasonably. The Norwegian courts' discretion applies also to the determination as to whether provisions which are regarded as unfair and unreasonable can be severed from the remainder of the contract with the consequence that the remainder of the contract provisions will be valid and enforceable;

d) We express no opinion as to tax and VAT issues that might arise nor the general fiscal treatment of any of the transactions contemplated under the Agreement under Norwegian law;

e) We express no opinion as to whether specific performance or injunctive relief would necessarily be available in respect of any of the obligations under the Agreement. The availability in Norwegian courts of discretionary remedies, such as injunction and specific performance, is restricted under Norwegian law;

f) Norwegian courts may reject the right to take proceedings in Norway if and to the extent proceedings which have led or may lead to a judgment which is enforceable in Norway have already been taken in another court of competent jurisdiction within or outside Norway;

g) Norwegian courts may award a judgment in currencies other than NOK, but a debtor is nevertheless entitled to pay the amount awarded by such judgment in NOK at the rate of exchange prevailing at the date of payment;

h) Claims may become time barred under the Norwegian Limitations Act of 18 May 1979 No 18;

i) If any provision of any Agreement is held to be illegal, invalid or unenforceable, the severance of such provision from the remaining provisions of such Agreement will be subject to the exercise of the discretion of a Norwegian court;

j) This opinion is confined to and is given on the basis of Norwegian law as it exists at the date hereof, and we assume no obligation to update or supplement this opinion to reflect any facts or circumstances which may hereafter come to our attention, or to advise you of any changes in Norwegian law after the date hereof;

k) This opinion is to be construed in accordance with Norwegian law. It is strictly limited to the Agreement and the transactions contemplated thereby, and it is not to be extended by implication to any other matter; and

l) This opinion shall be governed by Norwegian law and be subject to the exclusive jurisdiction of the courts of Norway.

This opinion is addressed exclusively to EFET, the members of the EFET Legal Committee and any other subscribing entities, and may not be relied upon, or disclosed to, any other person or legal entity without EFET's or our prior written approval, but may be made available by EFET members to the appropriate regulatory authorities.

Yours sincerely
Advokatfirmaet Thommessen AS

Tore Mydske

Contact names: Kristoffer Hegdahl and Tore Mydske
Contact e-mail addresses: keg@thommessen.no and tmy@thommessen.no

ANNEX 1 – GENERAL OVERVIEW OF NORWEGIAN INSOLVENCY PROCEEDINGS

Norwegian insolvency law provides for several types of insolvency proceedings that may apply to a party that has entered into a transaction under the EFET General Agreement ("**Insolvency Proceedings**"). These are:

a) Bankruptcy

All individuals and legal entities (other than certain financial institutions, see Letter d) below, counties, municipalities and certain government enterprises[21]) may be declared bankrupt by a Norwegian court if they are found to be insolvent, cf. Section 60 of the Bankruptcy and Debt Settlement Proceedings Act of 8 June 1984 No. 58 (the "**Bankruptcy Act**"). A motion for bankruptcy may be filed by a creditor or by the debtor himself. If the debtor is a legal entity, the bankruptcy proceedings will, unless the relevant entity is found to be solvent during such proceedings, or a forced composition with the creditors is adopted by the courts (see below), result in a full and final liquidation of the entity.

Upon the institution of bankruptcy proceedings, all the debtor's assets are seized and converted into money for distribution to the creditors. The debtor is deprived of all rights to make any dispositions with respect to its assets from the time of opening of bankruptcy proceedings. The administration of the debtor's assets is conferred to an Insolvency Estate with the power to administer the debtor's business, collect all assets, examine the creditor's claims and sell the debtor's business piecemeal or in its entirety.

b) Debt settlement proceedings

Insolvent individuals and legal entities may apply to a Norwegian court for debt settlement proceedings to be commenced.[22] Debt settlement proceedings are aimed at reaching a voluntary settlement between the debtor and all its creditors.

c) Compulsory composition

A debtor being subject to debt settlement proceedings or bankruptcy proceedings may apply for a compulsory composition with its creditors, provided that the composition proposal involves the payment of a minimum of 25% of the outstanding debt and the application is supported by at least 3/5 or 3/4 of the creditors (depending on the dividends proposed) representing at least 3/5 or 3/4, as the case may be, of the debt which will not be paid in full.[23] An unsecured creditor may, thus, be overridden by a decision of the majority of creditors pursuant to the said provisions of the Bankruptcy Act.

[21] Certain state-owned enterprises which are organised as separate legal entities, e.g. state corporations (Nw: *Statsforetak*) such as Statkraft SF, may, however, be declared bankrupt.

[22] See Section 1 of the Bankruptcy Act.

[23] See Sections 30 and 123 of the Bankruptcy Act.

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d) Reconstruction

Pursuant to the Provisional Act on Restructuring of 7 May 2020 no. 38 (the "**Restructuring Act**"), the Norwegian rules on debt settlement proceedings and compulsory composition are from 11 May 2020 to 1 January 2022, subject to certain exceptions, temporarily suspended and replaced by the restructuring regime set out in the Restructuring Act, which is a provisional measure adopted to mitigate adverse economic effects of the Covid-19 pandemic. The main amendments proposed through the Restructuring Act are as follows:

(i) The institution of restructuring proceedings shall not be conditional upon the debtor being unable to pay its debts when due;

(ii) Creditors may, on certain conditions, file a petition for institution of restructuring proceedings;

(iii) Provisions to ensure funding of the debtor's operations during the restructuring period;

(iv) Improved prospects for converting debt into equity in connection with restructuring;

(v) The current requirements for equal treatment of creditors upon voluntary composition and a minimum dividend upon compulsory composition are abolished; and

(vi) Amendments to the provisions on adoption of a restructuring proposal.

e) Public administration of financial undertaking

Financial undertakings, including banks, finance companies, mortgage credit institutions, certain investment firms and insurance undertakings may not be declared bankrupt or apply for debt settlement proceedings. Such institutions will instead be made subject to crisis resolution measures or placed under public administration in accordance with chapter 20 and 21 of the Act on Financial Undertakings of 10 April 2015 No. 17 (the "**Financial Undertakings Act**").

f) Common issues

The Creditor's Recovery Act of 8 June 1984 No. 59 (the "**Recovery Act**") governs, inter alia, the status of a debtor's contracts and a creditor's right of set off in insolvency proceedings/compulsory compositions, as well as several other relevant issues. The Recovery Act applies to bankruptcy and debt settlement proceedings and, pursuant to Section 20-30 (1)(f) of the Financial Undertakings Act, also to the liquidation under public administration of financial institutions.

Consequently, the legal difference between standard bankruptcy proceedings, debt settlement proceedings, compulsory composition proceedings and public administration of financial institutions is in general not material to the issues discussed in this opinion.

The term "**Insolvency Proceedings**" will in this Opinion apply to all the above-mentioned categories of proceedings unless otherwise explicitly stated.

The term "**Insolvency Estate**" used herein includes both bankruptcy and debt settlement estates as well as financial institutions under public administration.