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LEGAL OPINION

EFET

EUROPEAN FEDERATION OF ENERGY TRADERS

on

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

Podgorica, 20 October 2020

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

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

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

The Opinion is governed by and shall be construed in accordance with Montenegrin law as it is enacted and interpreted by Montenegrin courts at the date of the Opinion ("Montenegrin Law").

The competent courts of Serbia shall have exclusive jurisdiction over all disputes arising out or in connection with the Opinion.

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A INTRODUCTION

A.1 Subject-Matter and Scope of the Opinion

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

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

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

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

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

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

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

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

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

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

(i) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007)[1];

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

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

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

(iv) EFET Credit Support Annex to the General Agreement (Version 5 April 2002);

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

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

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

(viii) EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1., published 20 December 2000),

(ix) 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),

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

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

(xii) 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).

3. The EECS Certificates Master Agreement and Appendix will not be treated within the scope of this Opinion as Montenegro has not yet fully implemented the rules regarding the issuance and trading of EECS certificates.

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

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

(ii) Confirmation of Allowance Transactions (including AEUA, EUA, CER & ERU Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period

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

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

(Phase 2)) to the Allowances Appendix to the EFET Power Master Agreement (Version 2.0, published 3 April 2012), and

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

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

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

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

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

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

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

A.2 Exclusions

7. The Instructions intended for the opinion to include, *inter alia*, the EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000). However, because Part I of the Italian Electricity Appendix is a customization of the General Agreement to the Mandatory Provisions of Italian law, while Part II is meant to subject the entire General Agreement to Italian law, we exclude the EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 24 June 2004) from the scope of our Opinion.

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

A.3 Limitations

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

10. This Opinion is to be construed in accordance with Montenegrin Law, as it stands at the date of this Opinion.

11. Our engagement is governed by the Serbian law.

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

basis ("**BDK Persons**").

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

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

A.4 **Definitions**

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

16. In this Opinion:

Association of Local Government, if Party A, means an entity jointly established by the Montenegrin political sub-divisions (*jedinice lokalne samouprave*) pursuant to the Montenegrin Local Self-Government Act[3].

Bank means, if Party A, a joint-stock company organized pursuant to the Banking Act[4], which has the license issued by the Central Bank of Montenegro **("Central Bank**") and engages in deposit taking and granting credit, and may perform other activities in accordance with the law. Banks and MFIs are the only types of credit institutions in Montenegro.

MFI means, if Party A, a company licensed by the Central Banka as a micro-credit finance institution under the Act on Financial Leasing, Factoring, Purchase of Receivables, Microcredit and Credit-Guarantee Operations[5].

Corporation means, if Party A, a legal entity organized pursuant to the Montenegrin Companies Act[6], as a limited liability company (*društvo sa ograničenom odgovornošću* or *DOO*) or a joint-stock company (*akcionarsko društvo* or *AD.*).

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[3] Zakon o lokalnoj samoupravi, "Official Gazette of Montenegro", Nos. 02/18, 34/19, and 38/20

[4] Zakon o bankama, "Official Gazette of Montenegro", Nos. 17/08, 44/10, 40/11 and 73/17

[5] Zakon o finansijskom lizingu, faktoringu, otkupu potraživanja, mikrokreditiranju i kreditno-garantnim poslovima, "Official Gazette of Montenegro", Nos. 73/17 and 44/20

[6] Zakon o privrednim društvima, "Official Gazette of Montenegro", No. 65/20

Insurance Company means, if Party A, a joint-stock company organized pursuant to the Montenegrin Insurance Act[7], which has the license issued by the Montenegrin Insurance Supervision Agency and carries on insurance business.

Investment Fund Management Company means, if Party A, a legal entity organized pursuant to the Montenegrin Investment Funds Act[8], which has the license issued by the Montenegrin Capital Market Commission and engages in management of investment funds.

Investment Services Provider/Investment Firms means, if Party A, a legal entity organized pursuant to the Capital Markets Act[9], which has the license issued by the Montenegrin Capital Market Commission and engages in providing investment services to third parties, i.e. which performs one or more investment activities on professional basis.

Municipality means, if Party A, a local self-government unit in Montenegro, including municipaltities (*opštine*), Podgorica Capital City (*Glavni grad Podgorica*) and the Old ROyal Capital Cetinje (*Prijestonica Cetinje*) Montenegro, that is duly established pursuant to the Montenegrin Local Self-Government Act.

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

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

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[7] Zakon o osiguranju, "Official Gazette of the Republic of Montenegro", No. 78/06 od 22.12.2006, 019/07, "Official Gazette of Montenegro", Nos. 53/09, 73/10, 40/11, 45/12, 06/13, 055/16

[8] Zakon o investicionim fondovima, "Official Gazette of Montenegro", Nos. 54/11 and 13/18

[9] Zakon o tržištu kapitala, "Official Gazette of Montenegro", No. 01/18

B EXECUTIVE SUMMARY

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

  (a) Upon the court decision on opening of insolvency proceedings against Party A, the following particular consequences arise as per Montenegrin insolvency law to the EFET General Agreement which is not an Eligible Contract:

    (i) There is a risk that close-out netting under Individual Contract would not be enforceable. This is because the calculation of the Termination Amount could be understood to involve a set-off between individual Settlement Amounts (Montenegrin law in general conflates set-off and netting).. According to Article 84 paragraph 1 of the Insolvency Act, set-off may be exercised after the opening of insolvency proceedings over Party A only if the right to set-off was "acquired" prior to the filing of the petition for opening the insolvency proceedings. On the other hand, the opening of insolvency proceedings over Party A does not affect enforceability of close-out netting when the Early Termination Date has occurred at any time before the filing of the petition. However, this is of no help as Party B may not be in a position to anticipate the petition.

    (ii) Individual Contracts which are not effectively terminated prior to the opening of insolvency proceedings against Party A are subject to the right of the insolvency administrator to decide whether to assume or repudiate such transactions. In any event, even if the EFET General Agreement and the Individual Contracts are effectively terminated before the opening of insolvency proceedings albeit after the filing of the petition (there is a risk that the close-out netting pursuant to such termination would not be enforceable (see point (ii))

    (iii) Close-out netting is only enforceable, although there has been no precedents yet in practice, in relation to the contracts covered by the Financial Collateral Act, i.e. the financial collateral contracts entered into between the parties deemed to be eligible parties within the meaning of the Financial Collateral Act (mainly financial institutions). This means the safe harbour provisions would not extend to a great majority of Individual Contracts under the EFET General Agreement as those would not be between Eligible Parties.. Also, even when Individual Contract is between Eligible Parties, it enjoys protections of the Financial Collateral Act only if the EFET Credit Support Annex is entered into together with the EFET General Agreement. In the light of the above, we conclude that close-out netting as per §11 of the EFET General Agreement is not enforceable under common energy market transactions with counterparties such as Elektroprivreda Crne Gore A.D.

    (iv) In order to avoid or lower the risk associated with enforcement of close-out netting in the event of insolvency of Party A, we recommend to elect Automatic Termination under § 10.4 of the EFET General Agreement, to be triggered by the filing of the Petition against Party A, and deemed effective immediately prior to the filing of Petition. In that case, no grace period should be made applicable in § 10.5.(c)(iv). The proposed Automatic Termination clause could read as follows:

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

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

(v) The Individual Contracts, including the Eligible Contracts, are not excluded from the application of the insolvency rules on avoidance as preference.

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

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

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

(e) Physical Settlement Netting and Cross-Product Payment Netting provisions of the Allowance Appendix are enforceable.

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

(g) The Financial Collateral Act, which applies to financial collateral arrangements between Eligible Parties, requires that these arrangements be evidenced in writing (whereas "writing" includes recording by electronic means and any other durable medium which allows the unchanged reproduction of the information stored).

(h) Once the Transferee under an Eligible Contract acquires ownership in a collateral, the Montenegrin Law imposes no requirement to take any further action to ensure that the title continues.

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

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

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

(l) §23.1 of the EFET General Agreement, allowing the Parties to record their telephone conversations in relation to this agreement, does not substitute for the consent of the recorded person(s) when such consent is required. Namely, telephone recording cannot be used as evidence in criminal proceedings in Montenegro if the recorded party did not give its consent to the recording, unless there is another person's voice in the same recording and that person consented to the recording. Also, there is no explicit rule on whether the recording made without the consent of the recorded persons is admissible as evidence in civil litigation. It remains unclear whether the absence of such consent would be deemed a breach of public policy that could prevent enforcement of a foreign judgment or foreign arbitral award based on a telephone recording of a person who had not consented to the recording.

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

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C GENERAL QUALIFICATIONS

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

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

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

22. The EFET General Agreement has been drafted to afford the parties flexibility and may accordingly be widely amended and specified not only by selecting from pre-defined optional provisions but also by inserting specifically negotiated changes in the Election Sheet. It is impossible to render an exhaustive and final legal opinion that would cover customized provisions that the Parties could draft via Election Sheet on top of the elections explicitly envisaged by the Election Sheet attached to the form EFET General Agreement (which are fully covered by wording of this Opinion).

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

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

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

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

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

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

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

30. .

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

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

D GENERAL ASSUMPTIONS

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

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

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

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

(iv) On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B of the Instructions.

(v) The Individual Contracts provide for the physical delivery of commodities in exchange for cash, however, some of them may also provide for cash settlement.

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

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

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E ISSUES AND ADDITIONAL ASSUMPTIONS

E.1 ENFORCEABILITY OF CLOSE-OUT NETTING

E.1.1 Winding-Up, Insolvency or Attachment

E.1.1.1 Additional Assumptions

36. The following additional assumptions apply to this Section:

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

(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 Montenegro and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") Individual Contracts for the insolvent counterparty.

E.1.1.2 The Financial Collateral Act

37. 'Financial collateral agreement' under the Financial Collateral Act is "an agreement under which a collateral provider transfers ownership of financial collateral to a collateral taker, or creates security interest in the financial collateral in favour of the collateral taker, for the purpose of securing the performance of the relevant financial obligation", provided that each contractual party is an eligible party, i.e. falls under one of the following categories:

Party B

(a) EU entities considered as public entities under regulations of their respective jurisdictions, including the entities in charge of public debt;

(b) central banks of the EU member states;

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

(d) EU financial institutions subject to prudential supervision, including credit institutions and the financial institutions, investment services providers/investment firms, insurance companies, UCITS and UCITS management;

(e) central counterparties, settlement agents or clearing houses, including institutions operating on the futures, options and derivatives markets in the EU;

(f) other legal entities representing an entity from (a) to (e) above, or acting in the name of or representing one or more persons holding bonds or other debt securities of those entities;

Party A

(g) a public body in charge of public funds;

(h) the Central Bank of Montenegro;

(i) a bank, a microcredit financial institutions, a credit-guarantee fund (credit-guarantee provider);

(j) the Central Clearing and Depositary Company;

(k) the Health Insurance Fund of Montenegro, the Fund for Pension and Disability Insurance of Montenegro,

(l) the Investment Development Fund of Montenegro:

(m) an insurance company, an investment funds, an investment funds management company, and an investment firm licensed under the capital markets legislation

("**Eligible Contract**" and "**Eligible Party**").

38. 'Relevant financial obligation' is defined in the Financial Collateral Act as "an obligation the performance of which is determined by the financial collateral and which gives a right to cash settlement or delivery of collateral instrument…".

39. 'Enforcement event' with respect to financial collateral is defined in Article 14 of the Financial Collateral Act as "an event of default or another event as agreed between the parties or as stipulated in a statute on the occurrence of which the collateral taker is entitled to sell or appropriate the collateral instrument or perform the contractually agreed set-off for the purpose of early termination of financial collateral (close-out netting provision)".

40. 'Close-out netting provision' is defined in Article 15 of the Financial Collateral Act as "a provision of a financial collateral agreement or a statutory rule by which, on the day of the occurrence of [an enforcement event], the obligations of the parties are accelerated so as to become immediately due and are expressed as an obligation to pay an amount representing the current estimated value of the collateral instrument or are terminated and replaced by an obligation to pay the relevant amount or the due obligations are offset and the party from whom the larger amount is due to the other party is obliged to pay the difference". Close-out netting provision, as defined above, can take effect notwithstanding commencement or continuation of insolvency or liquidation proceedings or by imposition of reorganization measures on the collateral provider or collateral taker.

41. Article 18 of the Financial Collateral Act provides that a financial collateral agreement and the rights acquired thereunder, including the right to realise a collateral instrument under a security financial collateral arrangement, are not affected by the commencement or continuation of insolvency or liquidation proceedings nor by imposition of the measures of reorganisation on the collateral provider or collateral taker.

42. It follows that insolvency-related protections and provisions of the Financial Collateral Act upholding title transfer arrangements would not extend to a great majority of Individual Contracts under the EFET General Agreement as those would not be between Eligible Parties. Also, even when Individual Contract is between Eligible Parties, it enjoys protections of the Financial Collateral Act only if the EFET Credit Support Annex is entered into together with the EFET General Agreement.

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

43. Termination by notice under § 10.3 of the EFET General Agreement for Material Reasons referred to under § 10.5 (c) is enforceable under Montenegrin law, yet the close-out netting may be limited as explained in the paragraph 44.

44. Individual Contracts which are not deemed Eligible Contracts (see paragraph 37) and which are not effectively terminated prior to the opening of insolvency proceedings against Party A are subject to the right of the insolvency administrator to decide whether to assume or repudiate such transactions. This follows from Article 96 of the Montenegrin Insolvency Act, which regulates legal consequences of the opening of insolvency proceedings on bilateral contracts which have not been fully performed by the date of the opening of insolvency proceedings ("**Executory Contracts**").[10.] In the absence of specific statutory protection for non-Eligible Contracts in the context of Party A's insolvency, there is a risk that the insolvency administrator may "cherry-pick" and assume in-the-money contracts while repudiating out-of-money contracts despite the single agreement clause in the EFET General Agreement. Such risk exists if no Automatic Termination is stipulated in the Election Sheet or the EFET General Agreement is not effectively terminated by notice prior to the court's decision on the opening of insolvency procedure. However, in order to preserve close-out netting, Early Termination of non-Eligible Contracts would have to occur as of immediately prior to the filing of the Petition (see Section E.1.2.1). If the EFET General Agreement and/or any of the Individual Contracts happen to remain effective after the judgment on the opening of insolvency proceedings over Party A is entered, Party B may invite Party A’s insolvency administrator to pronounce whether he/she intends to uphold those contracts. The administrator has 15 days to respond. If the insolvency administrator of Party A elects to perform an Executory Contract but Party A later fails to perform, Party B shall be deemed a priority creditor. It is unclear what is the status of an Executory Contract if the insolvency administrator does not respond within the statutory deadline. If the administrator repudiates the Executory Contract, Party B may register in insolvency proceedings its claim against Party A stemming from such repudiation, but at this point close-out netting under the EFET General Agreement which is not an Eligible Contract would not be enforceable. See paragraph 51 below.

45. Insolvency administrator may not exercise its powers under Article 96 in respect of Individual Contracts which are Eligible Contracts.

46. Montenegrin Law distinguishes between (a) termination for breach of an obligation under the contract (non-performance), which has to be by notice, except in fixed-term contracts when it is automatic unless the creditor upholds the contract, and (b) termination of contract upon the occurrence of an event or circumstance (terminating condition, *raskidni uslov*), which is an automatic termination. Material Reasons under § 10.5 (c) of the EFET General Agreement, though they represent events related to Party A, do not represent a failure to *perform* the Agreement.

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

However, irrespective of the differences under Montenegrin law between events of default and terminating conditions, we think that the principle of freedom of contract permits the Parties to stipulate in their EFET General Agreement that a particular event or occurrence will represent a Material Reason entitling the party not affected by the relevant event or circumstance to terminate the Agreement by giving a notice to the other Party. We do not see any public policy reasons for restricting party autonomy in this respect.

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

48. The Obligations Act[11] expressly regulates automatic termination in two contexts: fixed term-contracts and contracts subject to terminating conditions. According to Article 69 (1) of the Obligations Act, a contract is concluded under a condition (*"uslov"*) if its commencement or termination depends on an uncertain fact. According to Article 69 (3) of the same law, a contract entered into under a terminating condition (*"raskidni uslov"*) automatically ceases to be in effect upon the occurrence of the condition. The Montenegrin law does not expressly regulate whether the parties may stipulate that the contract shall be deemed terminated before or after a certain period of time after the occurrence of the terminating condition. To our knowledge, the courts have not made a pronouncement on any of these issues. Nevertheless, we think that the foregoing falls within the legitimate realm of party autonomy.

49. With respect to the Individual Contracts which are Eligible Contracts (see paragraph 58), the election of Automatic Termination is not required or recommended. With respect to the Individual Contracts which do not qualify as Eligible Contracts (see paragraph 58), the election of Automatic Termination is recommended for reasons explained in paragraph E.1.1.4.3.

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

E.1.1.4.1 When the Individual Contract is not Eligible Contract

50. Article 84 of the Insolvency Act[12] provides:

"If the creditor acquired the right to set-off its claim against the insolvency debtor with a claim of insolvency debtor against that creditor prior to the filing of the petition for initiation of insolvency proceedings, the opening of the insolvency proceedings does not affect the set-off right.

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

51. There is a risk that close-out netting under Individual Contract which is non-Eligible Contract

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[11] Zakon o obligacionim odnosima, "Official Gazette of Montenegro", Nos. 47/08, 4/11 and 22/17

[12] Zakon o stečaju, "Official Gazette of Montenegro", Nos. 1/11, 53/16, 32/18 and 62/18

would not be enforceable in the event of Party A's insolvency. This is because the calculation of the Termination Amount could be understood to involve a set-off between individual Settlement Amounts. Montenegrin law in general conflates set-off and netting.

52. According to Article 84 paragraph 1 of the Insolvency Act, set-off may be exercised after the opening of insolvency proceedings over Party A only if the right to set-off was "acquired" prior to the filing of the Petition. In this case, Party B as creditor has to register in insolvency proceedings its gross claim and a set-off notice, before the expiry of the deadline for claims registration.[13] This provision apparently does not have in mind automatic set-off. When set-off is automatic and not by notice, the distinction between the moment of "acquisition" of the set-off right and the completion of the set-off becomes irrelevant. In any event, the question is when the right to set-off is deemed to be "acquired" in the context of close-out netting provisions of the EFET General Agreement. Under the general set-off provisions of the Obligations Act, one can extinguish one's own obligation to the counterparty by offsetting it against the counterparty's claim, if both claims are for money, ascertained and due and payable.[14] Under the EFET General Agreement, the Termination Amount is ascertained on, or as soon as reasonably practicable after, the Early Termination Date. This means that, when the Parties elect Automatic Termination, the right to effect a set-off in the context of close-out netting under the EFET General Agreement can be said to be acquired on the Early Termination Date. When Early Termination is by notice pursuant to § 10.3, the right to effect a set-off can be said to be "acquired" either on the date the Early Termination notice is received by the terminated Party or on the Early Termination Date.

53. Consequently, the opening of insolvency proceedings over Party A does not affect enforceability of close-out netting when the Early Termination Date has occurred at any time before the filing of the Petition. Under a more liberal interpretation (not yet confirmed by any authority), the right to set-off can be said to be "acquired" when the Early Termination notice is served on Party A, in which case the close-out netting should also be enforceable if the Early Termination notice has been served prior to the filing of the Petition. In contrast, Article 84 of the Insolvency Act would not support close-out netting when Early Termination notice is served after the filing of the Petition.

E.1.1.4.2 When the Individual Contract is between Eligible Parties

54. It is clear that the Financial Collateral Act and thus the insolvency-related safeguards thereunder do not apply to the EFET General Agreement which is not supplemented with the EFET Credit Support Annex, even when the Individual Contract is between the Eligible Parties (see Section E.1.1.2). The question is whether §11 of the EFET General Agreement is enforceable even when the Individual Contract is secured and is between Eligible Parties.

55. Unlike the definition of the close-out netting provision from the Financial Collateral Directive, which refers to both a financial collateral arrangement and an arrangement of which a financial collateral arrangement forms part, the close-out netting provision of the Financial Collateral Act does not refer to the underlying secured transaction but is restricted to financial collateral

[13] This deadline is 30 days from the date of the publication of the notice on the opening of insolvency proceedings .See paragraph 9 of the Annex to this Opinion.

[14] Article 344 *et seq*.

agreements. Nevertheless, we think that there is a room for interpretation that where the EFET General Agreement is supplemented by the EFET Credit Support Annex, the EFET General Agreement and the Individual Contracts concluded thereunder are covered by the notion of 'financial collateral agreement' from the Financial Collateral Act, because the EFET Master Agreement, the Individual Contracts and the EFET Credit Support Annex (and other EFET annexes and documents, as the case may be) constitute a single agreement.

56. A further problem is a rather incomprehensible definition of close-out netting contained in Article 15 of the Financial Collateral Act, which is apparently a result of a sloppy translation of the Financial Collateral Directive (see paragraph 40). As a reminder, 'close-out netting provision' is "a provision of a financial collateral agreement or a statutory rule by which, on the day of the occurrence of [an enforcement event], the obligations of the parties are accelerated so as to become immediately due and are expressed as an obligation to pay an amount representing the current estimated value of the collateral instrument or are terminated and replaced by an obligation to pay the relevant amount or the due obligations are offset and the party from whom the larger amount is due to the other party is obliged to pay the difference". The first prong of the definition – "a provision … by which…the obligations of the parties are accelerated so as to become immediately due and are expressed as an obligation to pay an amount representing the current estimated value of the collateral instrument" - does not make sense. The second prong – "a provision … by which…the obligations of the parties are terminated and replaced by an obligation to pay the relevant amount", if isolated, could be understood to be broad enough to cover the close-out netting operation embodied in § 11 of the EFET General Agreement.

57. Finally, the already problematic definition of close-out netting provision from the Financial Collateral Act is complicated even further by no-less-problematic definition of 'enforcement event' which can trigger close-out netting provision (see paragraph 39). If it is to have any meaning whatsoever in the context of title transfer collateral arrangements, the definition of 'enforcement event' should not be read as written but the emphasized words "an event of default or another event …on the occurrence of which the collateral taker is entitled to …*perform the contractually agreed set-off for the purpose of early termination of financial collateral (close-out netting provision)*" should be read as follows: "*perform the contractually agreed netting resulting from early termination of financial collateral agreement (close-out netting provision)*".

58. To conclude, under our foregoing interpretation, which goes beyond the wording of the relevant Montenegrin legislation, the insolvency proceedings against Party A should not affect the close-out netting under the EFET General Agreement if:

(i) the parties entered into the EFET Credit Support Annex; and

(ii) both Party A and Party B are Eligible Parties.

59. This conclusion is qualified as explained immediately below and there is a risk that 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 would not be enforceable under the laws of Montenegro even in case of secured Eligible Contracts.

E.1.1.4.3 Automatic Termination

60. For the reasons explained in Sections E.1.1.4.1-E.1.1.4.2, Party B to an Individual Contract which

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

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

61. We think that it is within legitimate realm of party autonomy to agree that termination is to be deemed to have taken place immediately prior to the occurrence of the designated termination event. However, this view has not yet been confirmed by any authority in Montenegro. We therefore cannot exclude that the courts may disregard such provision as circumvention of the mandatory provisions of the Insolvency Act.

E.1.1.5 Qualifications to our statements regarding enforceability Early Termination and close-out netting under Eligible Contracts in insolvency context

62. Party B may be prevented from enforcing its rights stemming from termination of the EFET General Agreement (which is not an Eligible Contract) during preliminary bankruptcy proceedings if security measures are imposed by the court (see paragraph 4 of the Annex to this Opinion) over Party A which is not a Bank or Insurance Company (insolvency proceedings involving Banks and Insurance Companies do not involve a preliminary stage, see Section V of the Annex to this Opinion).

63. According to Article 85 of the Insolvency Act:

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

(1) the creditor acquired the right to set-off after the filing of the petition for commencement of insolvency proceedings;

(2) the creditor has obtained the claim within the period of 6 months prior to the filling of the petition for commencement of insolvency proceedings while the creditor knew or should have known that the debtor is insolvent or overindebted;

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

Exceptionally, set-off of claims referred to in paragraph 1, item 2 of this Article is permitted if it involves a claim acquired in connection with performance of executory contracts or a claim to which legal effect has been restored in the proceedings for refuting a legal transaction or other legal action of a bankruptcy debtor."

64. Although this has not yet been confirmed by courts, we think the foregoing provision does not authorize the insolvency administrator to avoid set-offs completed automatically by way of a contract prior to the opening of insolvency proceedings over Party A, because the avoidance claims

are regulated separately in the Insolvency Act and the relevant provisions do not extend to set-off. The foregoing provision, in our view, restricts the exercise of set-off after the opening of insolvency proceedings, i.e. it derogates the general provision of Article 84 of the Insolvency Act which states that set-off is effected by reporting to the insolvency administrator a gross claim and a set-off notice. In that sense, it may, for example, prevent Party B from offsetting its claim for the Termination Amount owed to Party B against a Party A's claim if the claim to the Termination Amount was acquired by Party B: (i) after the filing of the petition for Party A's insolvency; or (ii) within the period of six months prior to the filing of the petition for Party A's insolvency and if Party B knew or ought to have known at the time that Party A was unable to meet its payment obligations or was insolvent. In this case, set-off will nevertheless be permitted if "*it involves a claim acquired in connection with performance of executory contracts*". However, the meaning of this exception is unclear and we cannot confirm whether it covers a termination claim.

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

66. Article 119 of the new Act on Resolution of Credit Institutions[15] ("**Bank Resolution Act**"), which becomes applicable on 1 January 2021 and which implements BRRD, provides that the application of a crisis prevention measure or a crisis management measure against a credit institution subject to that law, including any event directly linked to the application of such measure, cannot be considered of itself an event giving right to realisation of financial collateral in accordance with the Financial Collateral Act, provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed. However, in an apparent contradiction to Article 199, Article 70 of the Bank Resolution Act provides that the application of the resolution tools automatically derogates the provisions of the law governing financial collateral related to, *inter alia*, enforcement of financial collateral arrangements, recognition of title transfer financial collateral arrangements and close-out netting.

67. The provisions of the Financial Collateral Act and our conclusions on the enforceability of the close-out netting of financial collateral agreements that qualify as Eligible Contracts have never been tested before the Montenegrin courts. Our conclusions in that respect are subject to a further qualification that the relevant provisions of the Financial Collateral Act are a bad translation of the counterpart provisions of the Financial Collateral Directive and their meaning is to a large extent obscure. Our interpretation in favour of enforceability of close-out netting under Eligible Contracts in the event of Party A's insolvency is creative and driven by the need to assign some rather than no meaning to the provisions of the Financial Collateral Act. We cannot confirm that a Montenegrin insolvency administrator or judge would share are activist approach in interpreting the Financial Collateral Act. There is therefore a risk that 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 would not be enforceable under the laws of Montenegro even in case of Eligible Contracts.

[15] *Zakon o sanaciji kreditnih institucija*, Official Gazette of Montenegro Nos. 72/19 and 82/20

68. Furthermore, enforcement of close-out netting clauses has never been tested in Montenegro. It is believed that insolvency administrators received no special training on the concept of close-out netting under master agreements. One cannot therefore exclude the risk of a Montenegrin insolvency administrator challenging the calculation of the Termination Amount as incorrect or unreasonable or simply because of unfamiliarity with the concepts under the EFET General Agreement.

69. Enforceability of automatic termination deemed to have taken place immediately prior to the occurrence of a designated termination event has not yet been confirmed by any authority in Montenegro. We therefore cannot exclude that the courts may disregard such provision as circumvention of the mandatory provisions of the Insolvency Act.

70. If the insolvency administrator challenges a claim in the insolvency proceedings, the creditor will be directed to initiate litigation to obtain a declaratory judgment determining its claim. Montenegrin court has exclusive competence in such litigation. This would mean that the choice of forum clause from the EFET General Agreement would not be enforceable with respect to litigation initiated after the insolvency administrator has challenged the creditor's claim. This conclusion is based on Article 44 of the Civil Procedure Act[16], which provides that the exclusive venue for resolution of all disputes that arise in the course of and in connection with insolvency proceedings is the court within whose territory the insolvency court is located.

71. Article 112 of the Insolvency Act stipulates that the claims against the insolvency debtor that are expressed in foreign currency (*i.e.* not in Euro) are to be registered in that currency, while Article 83, paragraph 3 provides that the claims in foreign currencies are converted into euros by applying middle exchange rate on the day of opening of insolvency proceedings. This means that Party B is permitted to register its claim resulting from Early Termination of the Agreement in the currency of the Agreement, however, the amount of the claim will be converted into Euro on the date of the opening of insolvency proceedings against Party A. No mechanism is foreseen to protect foreign creditors from adverse changes to the exchange rate from the date of the opening of insolvency proceedings until the settlement date.

72. Individual Contracts are subject to general avoidance rules under the Insolvency Act, and the insolvency administrator or any of the creditors may contest a transaction of the insolvency debtor undertaken prior to the opening of insolvency proceedings which undermines pro rata settlement of creditors, damage creditors or favour certain creditors over the others. Eligible Contracts are not exempted from the application of the avoidance rules either.

73. Transactions representing a regular settlement (settlement of a creditor's claim or providing security to the creditor where there was a pre-existing entitlement of the creditor to such claim or security) which took place within six months before the filing of the Petition may be avoided if the insolvency debtor was insolvent at the time of the transaction, and the creditor was or ought to have been aware of the debtor's insolvency. Any person related to Party A at the time the action

[16] *Zakon o parničnom postupku*, "Official Gazette of the Republic of Montenegro", Nos, 22/204, 28/05, and 76/06 and "Official Gazette of of Montenegro", Nos. 47/15, 48/15, 51/17, 75/17, 62/18, 34/19 and 42/19

or transaction was carried out would be deemed to have known about the insolvency or the petition to open insolvency proceedings. The aforementioned transactions can be contested also when undertaken after the filing of the Petition, if the creditor was or ought to have been aware of the debtor’s insolvency or was aware of the filing of the Petition.

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

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

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

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

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

76. Legal transactions entered into with the intent of damaging one or more creditors may be challenged if undertaken within the period of five years prior to the filing of the Petition or thereafter, provided that the debtor’s counterparty knew of such debtor’s intent.

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

E.1.2 Non-Insolvency Related Material Reasons

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

78. The rights of the Terminating Party to terminate and close-out an Individual Contract which is not an Eligible Contract for non-insolvency related Material Reasons is enforceable under Montenegrin Law, subject to the below qualifications and comments.

79. The Obligations Act provides that the agreement cannot be terminated for a failure to perform a neglectable portion of an obligation. The "materiality" test should be applied when the

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

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

E.1.2.2 When the Individual Contract is an Eligible Contract

81. The rights of the Terminating Party to terminate and close-out an Individual Contract which is an Eligible Contract for non-insolvency related Material Reasons is enforceable under Montenegrin Law. Article 14 and 15 of the Financial Collateral Act provide that the close-out netting can be triggered in the event of *failure to meet contractual obligations or another event agreed [between the parties] or determined by statute* (emphasis added). Having in mind the broad right given under tis clause to parties to mutually agree termination reasons, as well as general principle of party autonomy, we think that termination for any non-insolvency related Material Reason under the EFET General Agreement is enforceable.

E.2 **MULTIBRANCH PARTIES**

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

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

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

E.2.1 Montenegrin Multibranch Party

E.2.1.1 Additional Assumptions

83. The following additional assumptions apply to this Section, in addition to the assumptions already

outlined in Part D:

(i) Party A has entered into Individual Contracts under the EFET General Agreement through offices in Montenegro 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 Act of Montenegro.

E.2.1.2 Analysis

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

85. According to Article 14 of the Insolvency Act, Montenegrin court has jurisdiction over a debtor if the debtor's registered seat is located in Montenegro. Article 103 provides that the bankruptcy estate is comprised of entire assets of the insolvency debtor, irrespective of whether those assets are located in Montenegro or abroad. According to Article 107 of the Insolvency Act, the insolvency administrator takes possession of and administers "entire assets" forming the bankruptcy estate. Admittedly, the Insolvency Act does not specify how liabilities of the insolvency debtor are to be treated in order to establish bankruptcy estate. It is, in our view, reasonable to conclude that liabilities of the debtor "located" abroad should be treated in the same manner as assets located abroad.

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

E.2.2 Foreign Multibranch Party

E.2.2.1 Additional Assumptions

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

(i) A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than Montenegro 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 Montenegro ("**Montenegrin Branch**").

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

(iii) Party F has both its seat and centre of main interest in country H. (Montenegrin Insolvency Act claims the competence of Montenegrin courts in insolvency matters if the debtor's seat is in

Montenegro. Therefore, if Party F had its seat in Montenegro but its centre of main interest was in Country H, Montenegrin courts would be competent to conduct insolvency proceedings irrespective of the fact that Party F's centre of main interests is in Country H.)

E.2.2.2 Analysis

88. Enforcement of close-out netting in the insolvency context has not yet been tested in practice, let alone in a multibranch setting. Nevertheless, we think that there would be no separate proceedings in Montenegro with respect to the assets and liabilities of the Montenegrin Branch located in Montenegro, upon the start of the insolvency proceeding for Party F in Country H. The relevant authorities in Montenegro would defer to the proceedings in Country H, so that the assets and liabilities of the Montenegrin Branch would be handled as part of the proceedings for Party F in Country H, and in accordance with the insolvency rules of the Country H. After recognition of the foreign proceedings Montenegrin court may render legal aid to the foreign administrator.

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

90. The same opinion as expressed above applies if Party F has no Montenegrin Branch but has assets in Montenegro.

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

91. Montenegro regulated a national scheme of greenhouse gas emission allowances under the Act on Protection from Adverse Effects of Climate Changes[17] and the Decree on Activities Emitting Gases with Greenhouse Effect for which the Greenhouse Gas Allowance is Issued[18]. The scheme provides for the rules of, *inter alia*, award of emission allowances, their usage, transfer and registration. These rules, however, apply only to the allowances issued in Montenegro and registered with the Montenegrin Fund for Environmental Protection[19] and do not extend to emission allowances, or related derivative instruments, traded in the EU market. Therefore, the rules do not restrict the Party A to purchase or sell the emission allowances traded in the EU market.

92. Any qualification or limitation expressed herein in respect of the EFET General Agreement as applied to Individual Contracts for and concerning the delivery and acceptance of electricity also apply to the EFET General Agreement as modified and amended by an Allowances Appendix and as applied to Allowances Transactions.

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[17] *Zakon o zaštiti od štetnih uticaja klimatskih promjena*, "Official Gazette of Montenegro", No. 73/19

[18] *Uredba o aktivnostima odnosno djelatnostima koje emituju gasove sa efektom staklene bašte za koje se izdaje dozvola za emisiju gasova sa efektom staklene bašte*, No. 08/20

[19] *Fond za zaštitu životne sredine*

E.3.1 Physical Settlement Netting (§ 4.3 of the Allowances Appendix) and Cross Product Payment Netting (§ 13.3.1 of the Allowances Appendix)

93. Montenegrin foreign exchange rules do not impose any restrictions on cross-border sett-off or netting of mutual claims, and hence the Physical Settlement Netting as provided for under § 4.3 and the cross product payment netting clause under 13.3.1 of the Allowances Appendix fall within legitimate aim of party autonomy and are valid and enforceable.

E.4 **COLLATERAL**

E.4.1 Additional Assumptions

94. The following additional assumptions apply to this Section:

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

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

E.4.2 The Applicability of the Financial Collateral Act

95. The Financial Collateral Act applies to contracts for financial collateral, as defined in that legislation, only if it is between Eligible Parties (see paragraph 37). Accordingly, Party A which is a Corporation, Partnership, Association of Local Government, publicly-owned Corporation or Quasi-Governmental Entity is not capable of providing a valid financial collateral within the meaning of the EFET Credit Support Annex. If, hypothetically, such non-Eligible Party were to enter into the EFET Credit Support Annex, the issues raised in the Instructions could only be discussed taking into account the general legal rules, which are inadequate for financial collaterals. For that reason, the enforceability of the EFET Credit Support Annex entered into by Party A which is a non-Eligible Party under the Montenegrin Law cannot be confirmed. The answers to specific questions related to the Cash collateral provided by non-Eligible Parties in this Section E.4 are academic only

96. The Financial Collateral Act applies to the following types of financial collateral: (i) cash, i.e. money credited to a payment account in any currency, excluding banknotes; (ii) negotiable financial instruments (shares and equivalent securities; bonds and other debt securities; securities traded on the market which give right to acquire shares, bonds, or other securities, by means of registration, purchase or exchange, or which give right to cash settlement, including shares in collective investment schemes, money market instruments and claims related to rights arising from financial instruments); and (iii) credit claims, i.e. transferable receivables arising from the loan agreements with banks or other credit institutions. It does not apply to the collateral in form of the Letters of Credit.

E.4.3 Questionnaire

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

97. The Financial Collateral Act does not state which law governs the transfer of ownership in cash under the Individual Contract between Eligible Parties. The matter of applicable law in international context is regulated by the Act on International Private Law[20] ("**IPL Act**"). Article 27 states that governing law for acquisition or cessation of real rights over movable assets is the law of the country where the assets were located at the moment when the action was taken, or when the circumstances occurred, on the grounds of which such real right is acquired or ceases. If the assets are in transit, this matter is governed by the law of the country of destination. Under the Montenegrin law, transfer of ownership on the basis of a legal transaction requires actual or constructive delivery of the asset to the transferee. According to Article 7 of the Financial Collateral Act, cash is deemed transferred "at the moment of its transfer on a specific bank account", but does not further specify when cash is deemed to be transferred on a designated bank account. There is absolutely no case law in Montenegro on what constitutes constructive delivery of cash via wire transfer. Although the EFET Credit Support Annex does not define when the delivery of cash is deemed to be made, it seems to imply in §3.2 that the obligation to make a transfer is deemed to be fulfilled at the moment the Transferor initiates transfer with its bank (otherwise, it may not be always possible to perform an international banking transfer by the close of business on the Business Day following the request).

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

E.4.3.2 Would the laws of Montenegro 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?

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

100. When the EFET Credit Support Annex is not between Eligible Parties, there is a risk that the cash transaction may be perceived as a simulated contract. The Obligations Act states that a simulated agreement has no legal effect as between the parties and that if the contract hides another agreement, that other agreement will be valid, provided the conditions for its validity are satisfied.[21] Accordingly, the EFET Credit Support Annex could be potentially re-characterized by Montenegrin court as pledge agreement and title transfer as security interest. This would further lead to potential invalidity of such security interest as incompatible with Montenegrin Law, primarily because the subject-matter of the pledge is not sufficiently defined. Furthermore, according to the Insolvency Act, any security acquired within 60 days before the date of the opening of the insolvency proceedings automatically ceases and the holder of such security is not deemed secured creditor.

[20] *Zakon o međunarodnom privatnom pravu*, "Official Gazette of Montenegro, No. 01/14, 06/14, 11/14, 14/14 and 47/15

[21] Article 59 of the Obligations Act.

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

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

102. When the EFET Credit Support Annex is entered into between Eligible Parties, the Transfer is subject to perfection requirements. The financial collateral is deemed perfected once it is taken by the collateral taker, which has to be evidenced in writing (whereas "writing" includes any record or durable medium which is appropriate to prove the existence of the financial collateral). The collateral will be deemed "taken" when transferred or otherwise designated so as to be in the possession or under the control of the collateral taker or a person acting on behalf of the collateral taker. A confirmation that the cash has been credited to a particular account of the Party B would constitute sufficient evidence that this particular type of financial collateral was provided. The Financial Collateral Act does not impose any requirements in Montenegro necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval that must be obtained or established, to continue the ownership interest. If an enforcement occurs, Party B will be entitled to appropriate cash provided as collateral, i.e. it would not be required to return this or equivalent collateral to Party A.

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

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

104. The Financial Collateral Act provides that Eligible Contract may: (i) oblige the transferor to top up collateral; (ii) entitle the transferor to withdraw excess collateral; and (iii) entitle the transferor to substitute posted collateral with another collateral of at least equal value in which case new collateral must be provided at least simultaneously with the withdrawal of the original collateral. New or, as the case may be, additional collateral is governed by the terms of the financial collateral contract which pertains to the original collateral. Withdrawal or substitution of collateral is without prejudice to the transferee's rights under the contract for financial collateral. The Financial Collateral Act does not require that the withdrawal or substitution of collateral be subject to the consent of the transferee.

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

105. Because it is our conclusion that §11 of the EFET General Agreement, insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, would not be valid and enforceable in Montenegro except in the narrow context of Eligible Contracts, § 11 of the EFET Credit Support Annex would also not be valid and enforceable.

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

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

107. When the EFET Credit Support Annex is entered into between Eligible Parties, in general, no freeze or stay on enforcement applies to enforcement of rights in the event of Party A's insolvency. However, after 1 January 2021 and entry into force of the Bank Resolution Act, the enforcement of Party B's rights may be suspended in case Party A is a Bank subject to resolution tools (see paragraphs 66 – 66).

E.4.3.7 Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

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

108. When EFET Credit Support Annex is not entered into between Eligible Parties, under the general Insolvency Act, the insolvency administrator or any of the creditors may contest a transaction of the insolvency debtor undertaken prior to the opening of insolvency proceedings which undermines pro rata settlement of creditors, damage creditors or favour certain creditors over the others. See paragraphs 72-77.

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

110. If Party A is a Bank (but the Individual Contract is nevertheless not an Eligible Contract), the avoidance of legal transactions would be subject to rules under Article 34 of the Act on Insolvency and Liquidation of Banks which provides for a broad right of the insolvency administrator and creditors to challenge any legal transaction of the Bank that was undertaken to the detriment of the Bank's creditors within three years prior to the date of publication of the notice on the opening of insolvency proceedings. In certain instances the bankruptcy administrator is obliged to file the avoidance claim, and that would be the case if the transaction was entered into with a related party and under preferential terms, or if it is a fictitious transaction intended to prevent settlement of the Bank's creditors. The creditor or the administrator of the insolvent Bank may file the avoidance claim within six months from the date of the publication of the said notice.

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

111. Article 15 of the Financial Collateral Act stipulates that initiation or continuation of insolvency proceedings and liquidation or implementation of reorganization measure against the collateral provider or taker does not affect enforceability of the close-out netting. Furthermore, Article 18 prescribes that the financial collateral agreement and the rights acquired thereunder, including the right to enforce collateral instrument, remain valid after opening of insolvency or initiation of liquidation proceedings and after application of the reorganization measures against the collateral provider or taker. However, neither the Financial Collateral Act nor the Insolvency Act exempt the financial collateral agreements from the application of the avoidance rules, so the EFET Credit Support Annex would be subject to general avoidance rules on any grounds.

E.4.3.8 Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Montenegro 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?

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

E.4.4 Letter of Credit as collateral

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

114. The foreign exchange regulations do not provide for any restriction that a Montenegrin resident, Party A, instructs a foreign bank to issue a Letter of Credit to Party B as security for the performance of the EFET General Agreement.

E.5 GENERAL ENFORCEABILITY

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

115. The provisions of §7 of the EFET General Agreement are enforceable under Montenegrin Law.

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

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

117. The provisions of § 8 of the EFET General Agreement are enforceable under Montenegrin Law.

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

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

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

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

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

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

E.6 **CONFIRMATION PRACTICES**

E.6.1 Additional Assumptions

123. 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).

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

E.6.2 Binding Individual Contract

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

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

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

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

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

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

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

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

E.6.3 Means of Evidence

E.6.3.1 Tape recordings

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

130. The Montenegrin Law does not criminalize recording of conversation directed to the party making the recording. However, telephone recording cannot be used as evidence in criminal proceedings if the recorded party did not give its consent to the recording, unless there is another person's voice in the same recording and that person consented to the recording. There is no explicit rule on using such recording in civil litigation. It is not clear whether the courts would not admit telephone recording as evidence if recording was made without the consent of the person recorded. On the

one hand, one may argue that in the absence of a specific rule, any evidence capable of assisting the court in establishing the facts should be admitted irrespective of how it was obtained. On the other hand, courts could consider such evidence contrary to the general principle of litigation, according to which the courts should not allow parties' actions that are contrary to public policy, public morals or good customs. This may mean that the consent of the recorded employees and other staff of the counterparty may be required by Montenegrin court in order for the telephone recording to be admissible in evidence. It remains unclear whether the absence of such consent would be deemed a breach of public policy that could prevent enforcement of a foreign judgment or foreign arbitral award based on a telephone recording of a person who had not consented to the recording. Provision of §23.1 of the EFET General Agreement does not substitute the consent of the recorded person in this context.

E.6.3.2 Witness statements

131. The Montenegrin law of civil procedure does not recognize witness statements as type of evidence but require oral testimony.

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

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

E.7 **CORE PROVISIONS**

E.7.1 Additional Assumptions

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

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

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

E.7.3 Considering conclusions reached under Part E.1 or E.2 (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 E.1 or E.2 (each such provision a "Core Provision")?

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

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

E.7.4 Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting 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") change the substance of your conclusions reached under Part E.1 or E.2 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?*

137. The conclusions would not change solely because of such inclusion.

E.8 GOVERNING LAW, ARBITRATION, JURISDICTION

E.8.1 Additional Assumptions

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

E.8.2 Validity of Choice of Law and Jurisdiction Clauses

139. In accordance with the IPL Act, the parties involved in a transaction with international element may subject their contract to a foreign law. However, the choice of foreign law would not be applicable before the Montenegrin courts if the effects of the application of the chosen foreign law would be contrary to the "public order of Montenegro" (public policy).[22] It is not clear under Montenegrin law what exactly constitutes "public order" but the Supreme Court of Montenegro held that the concept is a narrower category than the sum of imperative norms and includes only those domestic norms that protect the most basic values of the Montenegrin order.[23] Unless otherwise mentioned elsewhere in this Opinion, we do not think that any provision of the EFET Agreement which is within the limits of the scope of this Opinion offends Montenegrin public policy.

140. According to Article 104 of the IPL Act, the parties may agree on jurisdiction of foreign courts to the extent the matter is not within the exclusive competence of the Montenegrin court and provided that the subject transaction involves an international element. Even two Montenegrin parties can agree on foreign court jurisdiction as long as there is international element involved, but there is no criteria on what constitutes (sufficient) international element with that respect.

141. Party A and Party B may agree to submit their disputes to arbitration such as in §22 of the

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[22] Article 9 of the IPL Act

[23] Decision of the Supreme Court of Montenegro, Rev IP 8/2015

EFET General Agreement.

142. However, once Party A is in insolvency proceedings, any claim for declaration of the creditor's right has to be litigated in a Montenegrin court. See paragraph 70.

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

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

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

(iii) the foreign court established its international jurisdiction on facts which the Montenegrin Law does not recognize for the establishment of international jurisdiction of the Montenegrin court for resolving the same dispute;

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

(v) the effect of recognition of the foreign judgment would obviously be contrary to the public order (see above) (which includes the possibility for review of the merits).

144. Montenegro is party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

E.9 **REGULATORY REGIME**

E.9.1 Additional Assumptions

145. The transactions entered into under the Allowances Appendix do not relate to the allowances issued under the Montenegrin scheme for greenhouse gas emission allowances.

E.9.2 Foreign Exchange Regulations

146. The Central Bank of Montenegro can restrict the cross-border transactions temporarily in cases the movement of capital seriously jeopardizes or threatens to jeopardize the Montenegrin monetary policy or financial system. Such measures have never been imposed so far.

E.9.3 Licensing

147. Party A can engage in trade with Electricity without a license if the trade is intended for further resale and provided that it does not include the sale to end buyers who have no balance responsibility or does not include the services of intermediaries or representation on the electricity market.

148. Cross-border sale and purchase transactions involving passage of power to, from or through Montenegro require that appropriate cross-border power transmission capacities for the transaction are acquired on the auctions carried out by the "Coordinated Auction Office in South Eastern

Europe" ("**SEE CAO**") based in Podgorica, Montenegro, on the interconnectors with Italy, Bosnia and Herzegovina, and Albania, or on the auctions carried out by the Montenegrin transmission system operator "Crnogorski Elektroprenosni Sistem" ("**CGES**") on the interconnector with Serbia (the capacity auctions for the Montenegro-Serbia border are split between CGES and the Serbian transmission system operator "Elektromreže Srbije", so each party auctions 50% of the total capacity). Both SEE CAO and CGES award cross-border transmission capacities in annual, monthly, and daily auctions.

E.9.4 Ability of certain types of Montenegrin counterparties to enter into certain types of Individual Contracts

149. Party A which is a Bank cannot enter into (i) Physical Commodity Transactions, or (ii) Individual Contracts which involve the purchase of capacity rights (forward, option), or uses any of them as a benchmark (swap). This follows from Article 6 of the Banking Act, which enumerates the activities a Bank may pursue and in that context, *inter alia*, refers to "trading with financial derivatives". The Banking Act does not define financial derivatives, but the Capital Market Act lists and defines "financial instruments" and further lists derivatives as one of the sub-categories of financial instruments. In line with the Directive 2014/65/EU (MiFID II), the definition of derivatives encompasses, *inter alia*:

"Options, futures, swaps, forward rate agreements and any other derivative financial instruments relating to securities, currencies, interest rates or yields, emission allowances, or other derivative financial instruments, financial indices or financial measures which may be settled physically or in cash;" and

"Options, futures, swaps, forwards and any other derivative financial instruments relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;"

150. Commodity Forward and Commodity Swaps are derivative contracts that must be settled in cash, while the Commodity Options are derivative contracts that may be settled either physically or in cash at the option of one party, so they fit within the above definitions and qualify as derivative financial instruments under the Capital Market Act. However, the definition of "commodity" in the Capital Market Act refers to "any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy". We therefore conclude that the capacity rights do not fit within this definition and that Bank cannot enter into an Individual Contract with the capacity rights as underlying assets.

151. Physical Commodity Transactions is not a derivative financial instrument but a commodity sale contract.

152. Party A who is an Investment Fund Management Company cannot enter into any Transaction from Appendix B, with exception of "specialized investment funds" which are permitted to enter into transactions qualified as financial instruments under the Capital Market Act (see paragraphs 149-151). Therefore, specialized investment funds may enter into Individual Contracts other than (i) Physical Commodity Transactions, or (ii) Individual Contracts which involve the purchase of capacity rights (forward, option), or uses any of them as a benchmark (swap).

BDK Advokati / Attorneys at Law AOD

Tijana Kojović

Luka Popović

ANNEX

OVERVIEW OF MONTENEGRIN INSOLVENCY PROCEEDINGS

I INTRODUCTION

1. Insolvency (*stečaj*) of commercial companies in Montenegro is regulated by the Insolvency Act[24] ("**Insolvency Act**"). Insolvency of insurance companies is regulated by the Act on Liquidation and Insolvency of Insurance Companies.[25] ("**Act on Insolvency of Insurance Companies** ") as *lex specialis*, whereby the provisions of the general Insolvency Act apply to insurance companies as well to the extent the special legislation does not regulate certain issue differently. Insolvency of banks is entirely regulated by a special legislation, the Act on Insolvency and Liquidation of Banks[26] ("**Bank Insolvency Act**").

II PETITION AND PRELIMINARY INSOLVENCY PROCEEDINGS

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

3. Subject to certain exceptions[27], preliminary insolvency proceedings are initiated by insolvency judge *ex officio*, within three days following the receipt of a formally valid Petition. The aim of preliminary insolvency proceedings is to determine whether any ground for the opening of insolvency proceedings exists.

4. Along with the decision on the opening of preliminary insolvency proceedings, the insolvency judge may order various security measures in order to prevent Party A from disposing of its assets if there is a danger that this party may dissipate its assets or destroy financial documentation prior to the formal opening of insolvency proceedings. The security measures may, *inter alia*, include: appointment of provisional insolvency administrator (insolvency administrator is regularly appointed only upon the opening of insolvency proceedings – see sub-paragraph iv below); moratorium on payments from Party A's account without the consent of the insolvency judge or

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24 *Zakon o stečaju*, "Official Gazette of Montenegro", Nos. 1/2011, 53/2016, 32/2018, and 62/2018

25 *Zakon o likvidaciji i stečaju društava za osiguranje,* "Official Gazette of Montenegro" No. 42/2015

26 *Zakon o stečaju i likvidaciji banaka*, "Official Gazette of the Republic of Montenegro" No. 47/2001, "Official Gazette of Montenegro" Nos. 62/2008, 44/2010 and 72/2019

27 Preliminary insolvency proceedings will not take place if (i) the Petition is filed by the debtor, (ii) the Petition is filed by a creditor and the debtor admits the insolvency reason alleged in the Petition or (iii) the Petition is filed by a creditor in possession of an enforcement title (e.g. judgment creditor) if the creditor proves that it was not able to enforce the title against the debtor in enforcement proceedings.

the provisional insolvency administrator, moratorium on disposal of Party A's assets (absolute or without the consent of the insolvency judge or the provisional insolvency administrator); imposition of a stay or temporary deferral of enforcement or other forced collection proceedings against Party A etc.

5. Subject to the decision on initiation of preliminary insolvency proceedings, a hearing for the examination of insolvency reason(s) alleged in the Petition shall be held no later than within 30 days from the receipt of the Petition. At the hearing, the judge either dismisses the Petition or renders a decision on the opening of insolvency proceedings (see paragraph 7). In practice, the instructive 30-day deadline is often exceeded.

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

   "§ 10.5.(c) (iv) shall apply only if such proceedings (as are referred to in § 10.5.(c) in § 10.5.(c) (iv) are not withdrawn, dismissed, discharged, stayed or restrained within:30 days from their institution, in case of insolvency proceedings instituted against Party A by virtue of a petition for commencement of insolvency proceedings being filed with the competent court;"

III OPENING OF INSOLVENCY PROCEEDINGS

7. Opening of insolvency proceedings occurs pursuant to a court decision rendered at the hearing for the examination of insolvency reasons. By virtue of this decision, insolvency administrator (*stečajni upravnik*) is appointed.

8. Legal consequences of the opening of insolvency proceedings occur "at the beginning of the day on which the notice on insolvency proceedings is published on the court's notice board".[28] An inherent flaw of this solution is that the date when the notice is posted on the court's notice board is not easily identifiable. The Insolvency Act provides that the insolvency judge shall prepare the notice "promptly after rendering the decision on the opening of insolvency proceedings". However, the legislation does not stipulate the deadline for the actual publication of the notice on the court's notice board. The Insolvency Act also provides that the court shall forward the decision on the opening of insolvency proceedings, on the day when such decision is rendered, to the Commercial Register, the petitioner, Real Estate Authority, Pledge Registry and the Tax Authority. The notice on the opening of insolvency proceedings is also to be published in the Official Gazette of Montenegro[29] The Insolvency Act fails to stipulate the deadline for this publication, but the spirit of the law mandates that the publication of the notice on the opening of insolvency proceedings on both the court's notice board and in the should be done promptly upon the decision on the opening of insolvency proceedings. The court is also obliged to publish the decision on the court's website

[28] Article 75 of the Insolvency Act

[29] Article 73 of the Insolvency Act

within 24 hours from posting it on the notice board. Finally, the court may (but it is not mandatory) publish the notice in domestic or international media.

9. The creditors are invited to register their claims within 30 days from the publication of the decision on the opening of insolvency proceedings. Although insolvency administrators in practice tend to calculate this deadline from the day of posting the notice on insolvency on the court's notice board, it is correct to calculate it from the eight day from being published in the Official Gazette of Montenegro as that is the date when the court decisions are deemed published in accordance with the Insolvency Act[30].

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

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

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

IV REORGANIZATION

13. The Material Reason under §10.5 (c) (iii) is known under Montenegrin law as "adoption of a reorganization plan". A proposal of a reorganization plan can be submitted by Party A, the insolvency administrator, creditors or the debtor's shareholders. The debtor can submit the reorganization plan either along with the Petition (in case the Petition is submitted by the debtor) or later on within the deadline of 60 days from opening of the insolvency, while the others can submit it within the said 60-day deadline.

14. The bankruptcy judge is obliged to hold the hearing for examination of the reorganization plan and voting within 20 days from submission of the plan. This deadline is usually exceeded in practice, as very often it takes more than one hearing to complete the process.

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

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[30] Article 17 of the Insolvency Act

V SPECIFIC FEATURES OF INSOLVENCY OF BANKS AND INSURANCE COMPANIES

16. Insolvency proceedings involving Banks and Insurance Companies do not have a preliminary stage in which the court examines the existence of the reasons for the opening of insolvency proceedings.

17. Insolvency over a Bank is opened by a decision of the Central Bank of Montenegro, if it determines that the statutory reasons for the insolvency proceedings are satisfied. The Central Bank appoints a bankruptcy administrator and to handle the process in general (there is no court involvement). A notice on the opening of insolvency proceedings is posted on the Central Bank's notice board, and published in the Official Gazette, in national media, and on the Central Bank's website. The creditors are invited to register their claims within 30 days from publishing the notice in the Official Gazette, whereby the claims existing in the bank's business records are deemed already registered.

18. Insolvency over an Insurance Company may be initiated before the competent court by the Agency for the Insurance Supervision or by the liquidator (in case the liquidation procedure was initiated first). The court issues the decision on opening of the insolvency proceedings within three days from the submission of the Petition. A notice on opening of the insolvency proceedings is posted on the court's notice board, on notice boards and web sites of the Company Registry, the Agency for Insurance Supervision and the debtor, and is published in the Official Gazette. A specific feature of this insolvency procedure is that the bankruptcy administrator is obliged to send the notice on opening of insolvency to every known creditor of the insurance company.

19. Unlike in the general insolvency proceedings, insolvency proceedings over Bank or Insurance Company cannot involve sale of these entities as going concerns. Instead, sale of assets followed by liquidation takes place. There is no reorganization either.

BDK Advokati / Attorneys at Law AOD

Tijana Kojović

Luka Popović