Адвокат
Дијана Пејић Шиник

BDK Advokati

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

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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 the laws and regulations of Bosnia and Herzegovina (excluding the laws and regulations of Brčko District) as they are enacted and interpreted by the courts in Bosnia and Herzegovina at the date of the Opinion. The competent courts of Republika Srpska 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 the Scope of the Opinion

1. We have been instructed by EFET to review and express an opinion under the laws of Bosnia and Herzegovina 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 specific 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 binding Individual Contract ("**Confirmation Practices**");

   (vi) the validity and enforceability of the EFET General Agreement that has been 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) ("**Enclosure 1**")[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

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

(iii) EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010) ("**Enclosure 3**")[2]

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

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

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

(vii) EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1., published 20 December 2000) ("**Enclosure 7**");

(viii) 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) ("**Enclosure 8 to 10**");

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

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

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 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.

(xi) 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) ("**Enclosure 13**");

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

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

4. For purposes of Part E.5 (Confirmation Practices) only, we have asked to consider the following documents:

(i) EFET Electronic Confirmation Agreement (published 28 June 2005)("**Enclosure 15**")

(ii) Confirmation of Allowance Transactions (including AEUA, EUA, CER & ERU Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2)) to the Allowances Appendix to the EFET Power Master Agreement (Version 2.0, published 3 April 2012)("**Enclosure 16**"), and

5. For purposes of Part E.6 (Core Provision) only:

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

(ii) EFET Master Netting Agreement (Version 1.0, published June 2010) ("**Enclosure 18**");

(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) ("**Enclosure 19 and 20**");

(iv) EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master agreement (Version 1.0, published 23 June 2003) ("**Enclosure 21**"); and

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

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 Bosnia and Herzegovina in force and as interpreted as of the date of this Opinion, except for the laws and regulations of Brčko District which, in agreement with EFET as our client, have not been taken into account ("**B&H Law**"). We do not undertake to inform you of any relevant changes to the B&H Law or its interpretation which may hereafter come to our attention, unless expressly instructed to do so.

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

11. 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, including attorney-at-law Dijana Pejić Šinik ("**BDK Persons**").

12. 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.

13. The total aggregate liability of all 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

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

15. In this opinion:

Association of Local Government, if Party A, means an entity jointly established by the sub-sovereign' political sub-divisions (*jedinice lokalne samouprave*) pursuant to the Republika Srpska Local Self-Government Act[3] (*Zakon o lokalnoj samoupravi Republike Srpske*) or, as the case may be, Federation

[3] *Zakon o lokalnoj samoupravi*, Official Gazette of Republika Srpska, nos. 97/16 and 36/19

B&H Local Self-Government Principles Act[4] (*Zakon o principima lokalne samouprave Federacije BiH*).

Bank means, if Party A, a joint-stock company organized pursuant to the RS Banking Act (*Zakon o bankama Republike Srpske*) or, as the case may be, FB&H Banking Act (*Zakon o bankama Federacije BiH*), which has the license issued by the Banking Agency of Republika Srpska ("**RS Banking Agency**"), as the case may be, Banking Agency of Federation B&H ("**FB&H Banking Agency**"), and engages in deposit taking and granting credit, and may perform other activities in accordance with the law.

Canton means, if Party A, a federal unit established pursuant to the Constitution of FB&H[5] and pursuant to the Federal Units (Cantons and Counties) Act[6] (*Zakon o federalnim jedinicama (Kantonima-Županijama*).

Corporation means, if Party A, a legal entity organized pursuant to the RS Companies Act[7] (*Zakon o privrednim društvima Republike Srpske*) or, as the case may be, FB&H Companies Act[8] (*Zakon o privrednim društvima Federacije BiH*), as a limited liability company (*društvo sa ograničenom odgovornošću* or *d.o.o.*) or a joint-stock company (*akcionarsko društvo* or *a.d.*) (public (listed) or private (not listed)).

Insurance Company means, if Party A, a joint-stock company organized pursuant to the RS Insurance Act[9] (*Zakon o društvima za osiguranje Republike Srpske*) or, as the case may be, FB&H Insurance Act[10] (*Zakon o osiguranju Federacije BiH*), which has the license issued by the Insurance Agency of Republika Srpska or, as the case may be, Insurance Agency of Federation B&H, and carries on insurance business.

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[4] *Zakon o principima lokalne samouprave*, Official Gazette of Federation B&H, nos. 49/06 and 51/09

[5] *Ustav Federacije BiH*, Official Gazette of Federation B&H, no. 1/94, Amandman I, Official Gazette of Federation B&H, no. 13/1997 - Amandmani XXV i XXVI, 16/2002 - Amandmani XXVII-LIV, 22/2002 - Amandmani LVI-LXIII, 52/2002 - Amandmani LXIV-LXXXVII, 60/2002 - ispr. Amandmana LXXXI, 18/2003 - Amandman LXXXVIII, 63/2003 - Amandmani LXXXIX-XCIV, 9/2004 - Amandmani XCV-CII, 20/2004 - Amandmani CIII i CIV, 33/2004 - Amandman CV, 71/2005 - Amandmani CVI-CVIII, 72/2005 - Amandman CVI i 88/2008 - Amandman CIX)

[6] *Zakon o federalnim jedinicama* (kantonima-županijama), Official Gazette of Federation B&H, no. 9/96

[7] *Zakon o privrednim društvima*, Official Gazette of Republika Srpska, nos. 127/08, 58/09, 100/11, 67/13, 100/17, and 82/2019

[8] *Zakon o privrednim društvima*, Official Gazette of Federation B&H, no. 81/15

[9] *Zakon o društvima za osiguranje*, Official Gazette of Republika Srpska, nos. 17/05, 1/06., 64/06, 74/10, 47/17, and 58/2019

[10] *Zakon o osiguranju*, Official Gazette of Federation B&H, no. 23/17

Investment Fund Management Company means, if Party A, a legal entity organized pursuant to the RS Investment Funds Act[11] (*Zakon o investicionim fondovima Republike Srpske*) or, as the case may be, FB&H Investment Funds Act[12] (*Zakon o investicijskim fondovima Federacije BH*), which has the license issued by the Securities Exchange Commission of Republika Srpska ("**RS SEC**") or, as the case may be, Securities Exchange Commission of Federation B&H ("**FB&H SEC**") and engages in management of investment funds.

Investment Services Provider/Investment Firm means, if Party A, a legal entity organized pursuant to the RS Securities Markets Act[13] (*Zakon o tržištu hartija od vrijednosti Republike Srpske*) or, as the case may be, FB&H Securities Market Act[14] (*Zakon o tržištu vrijednosnih papira Federacije BiH*), which has the license issued by the RS SEC or, as the case may be, FB&H SEC and engages in providing investment services to third parties, i.e. which performs one or more investment activities on professional basis.

MCO means, if Party A, a non-depositary financial organization which has the license issued by the RS Banking Agency or, as the case may be, FB&H Banking Agency and whose core activity is microcredit lending.

Municipality means, if Party A, a municipality (*opština*) in Bosnia and Herzegovina that is duly established pursuant to the Republika Srpska Local Self-Government Act or, as the case may be, Federation B&H Local Self-Government Principles 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 sovereign or a sub-sovereign entity (*pravno lice sa državnim kapitalom*).

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[11] *Zakon o investicionim fondovima*, Official Gazette of Republika Srpska, nos. 92/06, 82/2015, and 94/2019

[12] *Zakon o investicijskim fondovima*, Official Gazette of Federation B&H, nos. 85/08 and 25/17

[13] *Zakon o tržištu hartijama od vrijednosti*, Official Gazette of Republika Srpska, nos. 92/06, 34/09, 8/12, 30/12, 59/13, 86/13, 108/13, and 4/17)

[14] *Zakon o tržištu vrijednosnih papira*, Official Gazette of Federation B&H, nos. 85/08, 109/12, 86/15, and 25/2017

B EXECUTIVE SUMMARY

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

(i) Foreign exchange regulations applicable in Bosnia and Herzegovina do not permit cross-border payments and set-offs under commodity derivatives which do not involve physical settlement.

(ii) Subject to narrow exceptions, Early Termination for a Material Reason described in § 10.5(c) is enforceable under B&H Law only if the effective date of termination falls prior to the court's decision on the opening of preliminary insolvency proceedings against Party A for examination of insolvency reasons referred to in the petition for insolvency. Upon the decision on the opening of insolvency proceedings, Early Termination for an insolvency-related Material Reason is permitted but may be prevented if the insolvency administrator affirms one or more Individual Contracts. We therefore recommend the election of Automatic Termination under § 10.4 of the EFET General Agreement as follows:

"Automatic Termination shall apply to Party A and shall be triggered by a court decision on the opening of preliminary insolvency proceedings over Party A or, if no preliminary insolvency proceedings are conducted over Party A, by a court decision on the opening of insolvency proceedings over Party A, with the termination deemed effective immediately prior to such decision. The decision on the opening of preliminary insolvency proceedings or, as the case may be, the decision on the opening of insolvency proceedings, shall be considered Material Reason within the meaning of § 10.5.(c)."

However, we cannot exclude that the courts may disregard the foregoing Automatic Termination provision as circumvention of the mandatory provisions of the RS/FB&H Insolvency Act banning termination upon the opening of preliminary insolvency proceedings or, as the case may be, banning set-off of claims created after the filing of the insolvency petition.

(iii) Individual Contract which is not effectively terminated prior the opening of preliminary insolvency proceedings or, as the case may be, prior to the opening of insolvency proceedings over Party A, is subject to the risk of insolvency administrator cherry-picking whether to assume or repudiate it.

(iv) 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 in the event of Party A's insolvency, because the relevant insolvency legislation restricts set-off upon the opening of insolvency proceedings.

(v) The principle of freedom of contract permits the Parties to stipulate in their EFET General Agreement that a particular event or circumstance affecting one Party (e.g. insolvency related material reason) will represent a Material Reason entitling the Party not affected by the relevant event or circumstance to terminate the Agreement by notice to the other Party or result in automatic termination of the Agreement upon the occurrence of such event or circumstance.

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

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

(viii) Close-out netting in case of Early Termination for non-insolvency related Material Reasons is enforceable under B&H Law.

(ix) In the absence of specific regulation of financial collateral in general and title transfer arrangements in particular, the enforceability of the EFET Credit Support Annex against Party A cannot be confirmed.

(x) The provisions of EFET General Agreement governing the non-performance due to Force Majeure (§ 7 of the EFET General Agreement) are enforceable under B&H Law.

(xi) The provisions of EFET General Agreement governing the remedies for non-performance (§ 8 of the EFET General Agreement) are enforceable under B&H Law.

(xii) The provisions of EFET General Agreement governing the limitation of liability (§ 12 of the EFET General Agreement) are enforceable under B&H Law, subject to certain limitations and qualifications contained in Section E.4.3

C GENERAL QUALIFICATIONS

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

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

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

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

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

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

23. To our knowledge, B&H 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 B&H Law or another law, and whether in an insolvency or in a non-insolvency context. Where no court decision is available on a specific subject, the possibility cannot be excluded that the courts would not rule in accordance with an opinion or a conclusion expressed herein.

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

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

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

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

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

29. A determination, designation, calculation, notification, opinion, certificate or the like by any Party to the EFET General Agreement to a matter provided for therein may, in certain circumstances, be held by a B&H 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 B&H court may not recognize records of one Party as conclusive evidence of the existence and accuracy of an external event, circumstance or fact.

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

D GENERAL ASSUMPTIONS

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

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

    (ii) Party A is a corporation, financial institution or other entity as further described in Appendix A to the Instructions;

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

    (iv) Each EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) is enforceable under the laws of any jurisdiction for purposes of private international law (other than the laws of Bosnia and Herzegovina) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

    (v) 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.

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

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

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

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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

34. The following additional assumptions apply to this Section:

(i) The relevant EFET General Agreement is governed by any law (including English or German law or B&H Law).

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

E.1.1.2 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.

35. Early Termination pursuant to § 10.3 or § 10.4 for a Material Reason described in § 10.5(c) is enforceable under B&H Law only if the effective date of termination falls prior to the court's decision on opening of preliminary insolvency proceedings against Party A for examination of insolvency reasons referred to in the petition for insolvency.

36. Pursuant to Article 59 (1) of the RS Insolvency Act/Article 17(1) of the FB&H Insolvency Act, during the preliminary insolvency proceedings (see paragraph 5 of the Annex to this Opinion), a creditor cannot cancel a permanent contractual relationship with the insolvency debtor. It follows that if no Expiration Date is specified in the Election Sheet, the EFET General Agreement cannot terminate during the preliminary insolvency proceedings of Party A.

37. When the insolvency petition contains all financial documentation making it clear that an insolvency reason exists, the insolvency judge may decide to open insolvency proceedings without conducting preliminary proceedings. Cancellation of executory contracts upon the formal opening of insolvency proceedings, if so provided by the contractual terms, is not formally prohibited but the cancellation right can be forfeited if the insolvency administrator exercises its right to assume executory contracts before they are cancelled by the counterparty (see paragraph 42).

38. It follows that Early Termination for a Material Reason described in § 10.5(c) of the EFET General Agreement is enforceable only if the Early Termination notice is served upon Party A, or Automatic Termination becomes effective prior to the court decision on the opening of preliminary insolvency proceedings, or, in cases where no preliminary insolvency proceedings are conducted, prior to the court decision on the formal opening of insolvency proceedings.

39. Given that there is no public registry of insolvency petitions, and that it would be in any event difficult to monitor such register on a daily basis even if it existed, there is a risk Party B would not be able to timely exercise its right to Early Termination by notice. Accordingly, Party B should consider stipulating for Automatic Termination, to be triggered by the decision on the opening of preliminary insolvency proceedings or, as the case may be, insolvency proceedings, and to be deemed effective immediately prior to the relevant decision. 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 a court decision on the opening of preliminary insolvency proceedings over Party A or, if no preliminary insolvency proceedings are conducted over Party A, by a court decision on the opening of insolvency proceedings over Party A, with the termination effective immediately prior to such decision. The decision on the opening of preliminary insolvency proceedings or, as the case may be, the decision on the opening of insolvency proceedings, shall be considered Material Reason within the meaning of § 10.5.(c).*"

40. B&H 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 termination is automatic upon the expiry of the hard deadline, unless the creditor upholds the contract, and (b) automatic termination of contract upon the occurrence of an event or circumstance (terminating condition, *raskidni uslov*). Material Reasons under § 10.5 (c) of the EFET General Agreement, though they represent events related to Party A, do not represent a breach of the Agreement. However, irrespective of the distinction under B&H 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 or agree conditions under which the Agreement shall automatically terminate. We do not see any public policy reasons for restricting party autonomy in this respect.

41. We also think that it should within the legitimate realm of party autonomy to agree that automatic termination is to be deemed to have taken place immediately prior to the occurrence of a designated termination event. However, this view has not yet been confirmed by any authority in Bosnia and Herzegovina. We therefore cannot exclude that the courts may disregard such provision as a circumvention of the mandatory provisions of the RS Insolvency Act/FB&H Insolvency Act prohibiting cancellation during preliminary insolvency proceedings and more broadly, mandatory provisions restricting set-off upon insolvency. An argument that automatic termination for the reason of the opening of preliminary insolvency proceedings or direct opening of insolvency proceedings, with the effect immediately prior to these events subverts the insolvency administrator's right to assume contracts profitable for the bankruptcy estate is also conceivable.

42. 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. This follows from Article 119 of the RS Insolvency Act/Article 65 of the FB&H Insolvency Act, which regulate 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.[15.] In the absence of specific statutory protection for Party B in the context of Party A's insolvency, and in the absence of any case law upholding the single agreement concept in the context of a master agreement, 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 preliminary insolvency proceedings or, as the case may be, insolvency proceedings (see paragraph 35). If the EFET General Agreement and/or any Individual Contract remains effective after the judgment on the opening of insolvency proceedings over Party A and the insolvency administrator has not already communicated its decision whether it will assume or repudiate a contract which has not yet been consumed, Party B may invite Party A’s insolvency administrator to pronounce whether he/she intends to uphold those contracts. The insolvency administrator has 15 days to respond. If he fails to respond within the 15-days deadline, the administrator shall not be entitled to request performance of the contract. Presumably, although the relevant provision does not explicate this, a failure to respond means not only that the insolvency administrator cannot claim performance from the counterparty but that he is no longer obliged to perform. If the administrator repudiates a contract upon the invitation by the counterparty to proclaim whether he upholds the contract, Party B is an insolvency creditor for the claim stemming from such contract repudiation. In any event, at this point close-out netting under the EFET General Agreement would not be enforceable because of the restrictions on set-off upon the opening of insolvency proceedings (see paragraph 45). If the EFET General Agreement survives the opening of insolvency proceedings and the insolvency

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

administrator of Party A elects to perform one or more or all Insividual Contracts, but later fails to perform, Party B shall be deemed a priority creditor.

E.1.1.3 Enforceability of Close-out Netting in the context of Party A's insolvency

43. 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 in the event of Party A's insolvency. This is because the calculation of the Termination Amount involves set-off of gains and losses on cancelled Individual Contracts, whereas the relevant insolvency legislations in B&H restrict set-off upon the opening of insolvency proceedings. The B&H Law does not explicitly recognize netting as a concept distinct from set-off and in all likelihood those two concepts would be conflated by the competent authorities.

44. Article 132 of the RS Insolvency Act/Article 78 of the FB&H Insolvency Act provides:

"(1)If a creditor had, in the period of the opening of the insolvency proceedings, a statutory or a contractual right to set-off its monetary claim, the opening of the insolvency proceedings shall not affect the exercise of such right.

(2) If the monetary claim is in the period of the opening the insolvency proceedings subject to a condition precedent, its set-off shall occur when the condition is fulfilled.

(3) A creditor who has a claim subject to a condition precedent may oppose the collection of the counterclaim by the insolvency administrator by providing adequate security.

(4)Set-off of a monetary claim is not prevented by the fact that the monetary claims are expressed in different currencies or accounting units, if the currencies or accounting units are freely convertible at the place where payment of the counterclaim which is to be offset is due.

(5) Conversion is made according to the exchange rate valid at the place of payment at the time of the receipt of the set-off statement."

45. Furthermore, Article 133 of the RS Insolvency Act/Article 79 of the FB&H Insolvency Act provides that set-off of monetary claims is, *inter alia,* prohibited "*if the obligation owing by the insolvency creditor to the bankruptcy estate has been created after the opening of insolvency proceedings*".

46. The reference in Article 132 paragraph 1 of the RS Insolvency Act/Article 78 of the FB&H Insolvency Act to 'the period of the opening of the insolvency proceedings' is unclear given that the opening of the insolvency proceedings is a moment rather than a period. In our opinion, that expression should be read to refer to period before the rendition of the formal judgment on the opening of insolvency proceedings over Party A. The question arises whether Article 132 paragraph 1 of the RS Insolvency Act/Article 78 of the FB&H Insolvency Act should be read to mean that set-off is possible after the opening of insolvency proceedings if the conditions for the set-off existed prior to that cut-off moment or if the transaction giving rise to the set-off existed prior to that cut-off moment. Because Article 132 paragraph 1 of the RS Insolvency Act/Article 78 of the FB&H Insolvency Act refers to the existence of 'statutory or contractual right to set-off', and because Article 133 of the RS Insolvency Act/Article 79 of the FB&H Insolvency Act do not allow

set-off of claims created post opening of insolvency proceedings, we conclude that in order for set-off to be exercisable post opening of insolvency proceedings, all the conditions for the set-off must exist before that cut-off date (formal opening of insolvency proceedings occurs on the date, hour and minute indicated in the court decision on the opening of the insolvency proceedings).

47. Under the general set-off provisions of the RS/FB&H Obligations Act[16] (*Zakon o obligacionim odnosima*), 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[17]. Under the EFET General Agreement, the Termination Amount is ascertained on, or as soon as reasonably practicable after, the Early Termination Date. Ascertainment of the Termination Amount involves set-off of gains and losses resulting from the cancellation of the Individual Contracts.

48. The terminating Party acquires the right to effect a set-off certainly not earlier than on the Early Termination Date and most likely after the Termination Date, on the date of the calculation statement when gains and losses arising from cancellation of Individual Contracts are ascertained (see *Revenue and Customs Commissioners v Enron Europe Ltd. [2006] BVC 368*). Given that the Individual Contracts under the EFET General Agreement with Party A who is a Corporate cannot be cancelled during the preliminary insolvency proceedings, it follows that the Early Termination Date must occur no later than immediately prior to the opening of preliminary insolvency proceedings for the close-out netting to be potentially enforceable.

49. With respect to cases where insolvency proceedings are opened without prior conduct of preliminary insolvency proceedings, for reasons specified in paragraph 37, Early Termination Date should occur immediately prior to the opening of insolvency proceedings for the close-out netting to be potentially preserved.

50. Furthermore, if Party A is a Bank subject to resolution proceedings, Party B may be prevented from enforcing its rights stemming from the termination of the EFET General Agreement for Material Reason under § 10.5(c) of the EFET General Agreement.

51. A general qualification should be added that local insolvency administrators are not familiar at all with the concept of close-out netting under master agreements.

52. 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. B&H 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 by Party B if the insolvency administrator challenges Party B's claim. This conclusion is based on Article 45

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[16] *Zakon o obligacionim odnosima Republike Srpske*, Official Gazette of SFRY, nos. 29/78, 39/85, 45/89, and 57/89 and Official Gazette of Republika Srpska nos. 17/93, 3/96, 37/01, 39/03, and 74/2004; *Zakon o obligacionim odnosima Federacije BiH*, Official Gazette of SFRY, nos. 29/78, 39/85, 45/89, and 87/89, Official Gazette of RB&H, nos. 2/92, 13/93, and 13/94, and Official Gazette of Federation B&H, nos. 29/03 and 42/11

[17] Article 336 of the RS/FB&H Obligations Act

of the RS/FB&H Civil Procedure Act[18] which provides that the court located at the place of the insolvency court is the exclusive venue for resolution of all disputes that arise in the course of and in connection with insolvency proceedings.

53. Pursuant to Articles 90 and 169 paragraph 2 of the RS Insolvency Act/Articles 36 and 110 of the FB&H Insolvency Act, a creditor with a claim expressed in foreign currency must convert the claim to local currency (convertible mark) at the exchange rate applicable at the time of the opening of insolvency proceedings in the place of the payment of such claim. The legislation does not specify what is to be considered as the "place of payment" of a claim. Given that pre-commencement claims can be settled only within the insolvency proceedings, the relevant exchange rate would be the one applicable at the place of Party A (B&H).

54. In Republika Srpska, if Party A is subject to restructuring proceedings (see section V of the Annex to this Opinion), any claim of Party B resulting from the close-out netting would have to be reported in the restructuring proceedings and would be governed by the provisions of the restructuring plan if such plan is accepted by creditors and confirmed by the court.

E.1.2 Non-Insolvency Related Material Reasons

The rights of the Terminating Party to terminate the EFET General Agreement and close-out netting in case of Early Termination for non-insolvency related Material Reasons is enforceable under B&H Law, subject to the below qualifications and comments.

55. The RS/FB&H 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 Bosnia and Herzegovina on whether the foregoing provision constitutes part of Bosnian public policy and we cannot exclude the risk of it being deemed in potential recognition proceedings part of Bosnian public policy.

56. Under § 10.5 (a) of the EFET General Agreement, a Party may terminate the Agreement not only for non-performance of the counterparty, but also for a failure of the counterparty's Credit Support Provider, when required, to make a payment, deliver a Performance Assurance or perform any other material obligation under a Credit Support Document (after giving effect to any applicable notice or grace period thereunder). The Credit Support Provider is a third-party to the Agreement and a Credit Support Document is not part of the Agreement. According to § 10.5 (b) of the EFET General Agreement, if an election is made to that effect, a Party may also terminate the Agreement for cross-default of the other Party, its Controlling Party or its Credit Support Provider. B&H 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, despite the fact that B&H Law

[18] *Zakon o parničnom postupku*, Official Gazette of Republika Srpska, nos. 58/03, 85/03, 74/05, 63/07, 105/08, 45/09, 49/09, and 61/2013) and *Zakon o parničnom postupku*, Official Gazette of Federation B&H, nos. 53/03, 73/05, 19/06, and 98/15.

makes distinction 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 notice to the other Party.

E.2 MULTIBRANCH PARTIES

57. 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 Bosnia and Herzegovina" to refer to separate insolvency proceedings in Bosnia and Herzegovina.

E.2.1 B&H Multibranch Party

E.2.1.1 Additional Assumptions

58. 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 Bosnia and Herzegovina as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the Insolvency Acts in Bosnia and Herzegovina.

E.2.1.2 Analysis

59. 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.

60. According to Article 16 of the RS Insolvency Act, court in Republika Srpska has jurisdiction over insolvent debtor with registered seat in Republika Srpska. In addition, according to Article 255 of the RS Insolvency Act, the court in Republika Srpska has exclusive jurisdiction to conduct insolvency proceedings against a debtor 'whose business activity is in the territory of Republika Srpska'. "Business activity of the debtor' is considered to be in the place where its organizational part is registered. If it is proved that 'the organizational part' of the insolvency debtor is abroad but the debtor's seat is registered in Republika Srpska, the court in Republika Srpska is exclusively competent to conduct insolvency proceedings against that insolvency debtor providing that according to the law of the country where the insolvency debtor 'has its organizational part', the insolvency proceedings may not be opened on that basis. The insolvency proceedings in that case include all debtor's asset regardless of their location (main bankruptcy procedure). When the registered seat of the insolvency debtor is located abroad, and its organizational part is in the Republika Srpska, the relevant court in Republika Srpska has exclusive jurisdiction in the

insolvency proceedings. The RS Insolvency Act apparently misleadingly uses the term 'organizational part' to actually describe what is in the UNCITRAL Model Law on Cross-Border Insolvency referred to as 'centre of main interests'. The literal interpretation of the statutory language would lead to an absurd conclusion that the courts of Republika Srpka pretend to have exclusive jurisdiction to conduct insolvency proceedings over a foreign company solely because the company a branch in Republika Srpska.

61. According to Article 84 of the RS Insolvency Act, bankruptcy estate is comprised of the entire assets of the insolvency debtor. The RS Insolvency Act does not specify how liabilities of the insolvency debtor are to be treated in order to establish the 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.

62. In Federation B&H, Article 7 of the FB&H Insolvency Act provides that a court in Federation B&H has jurisdiction over a debtor if the debtor's registered seat is located in Federation B&H. Pursuant to Article 195 of the FB&H Insolvency Act, if it is proved that the centre of debtor's main business operations (main interests) is abroad but the debtor's seat is registered in the Federation B&H, the court in the Federation B&H has exclusive jurisdiction to conduct insolvency proceedings over such insolvency debtor providing that according to the law of the country where the insolvency debtor has the centre of its business operations, the insolvency proceedings may not be opened on that basis.

63. 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 B&H Law is concerned, to the insolvency proceedings taking place in B&H. 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

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

    (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 Bosnia and Herzegovina 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 Bosnia and Herzegovina ("**B&H 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.

E.2.2.2 Analysis

65. Foreign companies may not conduct activity of trading electricity in Bosnia and Herzegovina through a branch but would have to set up a separate legal entity so multibranch scenario involving Bosnia and Herzegovina would not be applicable where a subject matter of the Individual Contract under EFET General Agreement is electricity.

66. Furthermore, a foreign bank may not conduct business in Bosnia and Herzegovina via branch but must set up a legal entity. Therefore, multibranch scenario involving Party B who is a bank company is not applicable either.

67. Upon commencement of insolvency proceeding for Party F in Country H, the competent court in Republika Srpska/Federation B&H may open separate insolvency proceedings over a local branch only with respect to local assets.

68. Local creditors of the local branch should not be able to initiate separate insolvency proceedings in Bosnia and Herzegovina. In fact, local creditors would not be regarded under B&H Law as creditors of the branch, but as creditors of Party F, because the branch does not have separate legal existence.

69. Close-out netting provisions have not yet been applied in practice, let alone in a multibranch setting.

70. The same opinion as expressed above applies if Party F has no B&H Branch but has assets in Bosnia and Herzegovina.

E.2.3 General Validity of the EFET General Agreement As Modified And Amended By the Allowances Appendices

71. Bosnia and Herzegovina has not implemented any rules regarding the issuance emission allowances or their trading. In principle, Party A may purchase and sell emissions allowances issued and traded in the EU market. The legal nature of emission allowances is not defined in the B&H Law. We think that the emission allowance, representing the right to emit one tonne of carbon dioxide (C02) equivalent during a specific period, is technically neither "goods" nor "services", but a sui generis right.

72. Unless specifically stated to the contrary in the following paragraphs 73 -74, any qualification or limitation expressed herein in respect of 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.

E.2.4 Physical Settlement Netting (§ 4.3 of the Allowances Appendix)

73. In the absence of specific rules on the cross-border trade with allowances, we cannot confirm enforceability of physical netting provisions.

E.2.5 Cross Product Payment Netting (§ 13.3.1 of the Allowances Appendix)

74. Payment in relation to Physical Commodity Transactions could be netted only if the emission allowances could qualify as goods or services (which we cannot confirm). However, if the emission allowances do not qualify as goods and services, but as a right *sui generis*, which is in our opinion more likely outcome, the netting of payments in relation to Allowances Transactions would not be permitted by foreign exchange rules.

E.3 COLLATERAL

E.3.1 Additional Assumptions

75. 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. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

E.3.2 Overview

76. There are no laws governing financial collateral in Bosnia and Herzegovina and the enforceability of the EFET Credit Support Annex under B&H Law cannot be confirmed. The answers to specific questions related to the Cash collateral in this Section E.3 are academic only.

77. In any event, cross-border cash transfers for the purpose of providing collateral under financial derivative transactions are not permitted (see Section E.8).

E.3.3 Questionnaire

E.3.3.1 Under the laws of Bosnia and Herzegovina, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?

78. The matter of applicable law in international context is regulated by the Act on Resolving Conflict of Laws with Laws of Foreign Countries[19]("**PIL Act**") applicable in both Republika Srpska and Federation B&H. Article 18 states that ownership issues are governed by the law of the country in which the asset is located and if the asset is in transit, by the law of the country of the destination. Under the B&H Law, transfer of ownership requires actual or constructive delivery of the asset to the transferee. There is no case law in Bosnia on what constitutes constructive delivery of cash via wire transfer. We note that the EFET Credit Support Annex does not define when the delivery of

[19] *Zakon o rješavanju sukoba zakona sa propisima drugih zemalja*, "Official Gazette of SFRY", nos. 43/82 and 72/82 and Official Gazette of RB&H, nos. 2/92 and 13/94.

cash is deemed to be made. It seems to be implied in § 3.2 of the EFET Credit Support Annex that the obligation to make a transfer is deemed to be fulfilled at the moment the Transferor initiates transfer with its bank (otherwise, it may not be always possible to perform an international banking transfer by the close of business on the Business Day following the request).

79. This question is inapplicable to Letters of Credit since the provision of this form of Eligible Credit Support does not entail a "transfer of ownership".

E.3.3.2 Would the laws of Bosnia and Herzegovina 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?

80. In the absence of specific legislation confirming the validity of financial collateral provided on the title transfer basis, there is a risk that the cash transaction may be perceived as a simulated contract. Both the RS Obligations Act and FB&H Obligations Act state 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[20]. Accordingly, the EFET Credit Support Annex could be re-characterized by Bosnian court as pledge agreement and title transfer as security interest. This would further lead to potential invalidity of such security interest as incompatible with B&H Law, primarily because the subject-matter of the pledge is not sufficiently defined. Furthermore, according to the RS Insolvency Act[21], any security right over debtor's asset acquired within 90 days before the date of the filling Petition or thereafter terminates by the opening of the insolvency proceedings. According to the FB&H Insolvency Act[22], any security acquired over debtor's assets within 60 days before the date of filing Petition or thereafter terminates by the opening of the insolvency proceedings.

E.3.3.3 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 Bosnia and Herzegovina 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?

81. The B&H Law does not regulate transfer of title to cash as collateral so the question of whether it imposes any requirement to take any further action to ensure that the title continues is moot.

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[20] Article 66 of the RS/FB&H Obligations Act.

[21] Article 111 of the RS Insolvency Act.

[22] Article 57 of the FB&H Insolvency Act.

E.3.3.4 What is the effect, if any, under the laws of Bosnia and Herzegovina 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?

82. 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.

E.3.3.5 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 Bosnia and Herzegovina 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"?

83. On the assumption that § 11 of the EFET General Agreement is valid and enforceable in Bosnia and Herzegovina insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, § 11 of the EFET Credit Support Annex would also be valid.

E.3.3.6 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?

84. If the cash transfer was re-characterized as creation of security interest in cash provided by Party A but was not invalidated as incompatible with B&H Law, Party B would be secured creditor but enforcement of this security interest would generally be suspended because in the insolvency proceedings it is the insolvency administrator who liquidates the collaterals and pays the proceeds to the secured creditor.

E.3.3.7 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?

85. Under the RS/FB&H Insolvency Act, the insolvency administrator or creditors (if the insolvency administrator has not initiated the litigation contesting a transaction within 30 days following creditor's request in that regard), may contest a transaction of the insolvency debtor undertaken prior to the opening of the insolvency proceedings which undermines pro rata settlement of creditors, damage creditors or favour certain creditors over the others.

86. According to Article 135 of the RS Insolvency a transaction enabling settlement or security to creditor may be contested if it took place: (i) within 12 months before the filing the insolvency petition and the insolvency debtor was insolvent, or the creditor was aware of the debtor's insolvency or due to its gross negligence was not aware of debtor's insolvency; (ii) after the filing of the insolvency petition and the creditor was or should have been at the time of the transaction aware of the petition or the debtor's insolvency.

87. Article 81 of the FB&H Insolvency Act provides that a transaction enabling settlement or security to creditor may be contested if: (i) it took place within six months before the filing of the insolvency petition while the insolvency debtor was insolvent, or (ii) at the time when the creditor was or should have been aware of the debtor's insolvency; or (iii) after the filing of the insolvency petition and the creditor was or should have been at the time of the transaction aware of the petition or the debtor's insolvency.

88. A transaction involving settlement or security to which the creditor was not entitled to is vulnerable under the RS Insolvency Act if it was undertaken: (i) within 90 days before the filing the petition and thereafter; (ii) within six months before the filing the petition if at the time of the transaction the debtor was insolvent. Under the FB&H Insolvency Act, such transaction is vulnerable if undertaken: (i) within the month preceding the filing of the petition or thereafter; (ii) during third or second month preceding the filling of the petition if the insolvency debtor was insolvent.

89. Legal transactions of the insolvency debtor entered into with the intent of damaging creditors may be contested if undertaken within the period of five years preceding the filing of the petition or thereafter provided that the debtor's counterparty knew of such debtor's intent.

90. A legal transaction undertaken at no value or at undervalue may be contested except in the case if the transaction took place five years before the filing the Petition.

91. We think that substitute collateral and additional collateral would be regarded as stand-alone transactions for the purpose of the application of avoidance rules.

E.3.3.8 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 Bosnia and Herzegovina 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?

92. Assuming title transfer of cash as collateral is enforceable under B&H Law (which cannot be confirmed, see paragraph 77), there would be no further requirements other than actual delivery, physical or constructive, of Cash.

E.3.4 Letter of credit as collateral

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

E.4 GENERAL ENFORCEABILITY

E.4.1 Non-performance due to Force Majeure (§ 7 of the EFET General Agreement)

94. The provisions of §7 of the EFET General Agreement are enforceable under B&H Law.

95. We note that the concept of *force majeure* under B&H 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.4.2 Remedies for non-performance (§ 8 of the EFET General Agreement)

96. The provisions of § 8 of the EFET General Agreement are enforceable under B&H Law.

E.4.3 Limitation of liability (§ 12 of the EFET General Agreement)

97. The exclusion of liability as per § 12 is enforceable under B&H Law, subject to the following comments below.

98. Under B&H Law, liability for fraud, gross negligence and intentional wrongdoing cannot be excluded. Although this has not been confirmed by court, this provision could be regarded as part of public policy.

99. 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.

100. 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.

101. 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.5 CONFIRMATION PRACTICES

E.5.1 Additional Assumptions

102. 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).

103. 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.5.2 Binding Individual Contract

E.5.2.1 Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization)?

104. B&H 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 cross-border wholesale electricity trading are not subject to written form or any other form requirement.

E.5.2.2 At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable?

105. 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.5.2.3 Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?

106. The RS/FB&H 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.5.2.4 Is the reference to the relevant EFET General Agreement sufficient for the inclusion of the Individual Contract in the Agreement?

107. 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.5.3 Means of evidence

E.5.3.1 Tape recordings

108. The RS/FB&H 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.

109. The B&H Law does not criminalize recording of conversation directed to the party making the recording. However, telephone recording cannot be used as evidence in criminal proceedings if the recorded party did not give its consent to the recording. There is no explicit rule on using such recording in civil litigation. 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 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 Bosnian 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.

110. *Witness statements*

111. The civil procedure laws of both RS and FB&H do not recognize witness statement as an admissible form of evidence but require oral testimony.

E.5.3.2 E-mail or other electronic message or transaction entry system; facsimile

112. The civil procedure laws of both RS and FB&H do 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.6 CORE PROVISIONS

E.6.1 Additional Assumptions

113. Additional assumptions set forth in Sections E.1.1.1 and E.2 apply mutatis mutandis to this Part E.6.

E.6.1.1 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[23]*. (Enforceability of Close-out Netting)?*

114. It is impossible to assess the variety of possible changes to the EFET 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

[23] In our Opinion relevant conclusions are in Part E.1 and E.2.

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.6.1.2 Considering conclusions reached under Part C.I or C.II[24]. (Enforceability of Close-out Netting), what are the provisions of the EFET General Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "Core Provision"). We believe that the following provisions are Core Provisions § 1, § 10.3 (a), the second sentence of § 10.3 (b), § 10.3 (d), § 10.5 (c)(iv), § 11 and related definition contained Annex 1 to the EFET General Agreement?

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

E.6.1.3 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 C.I or C.I.

116. No changes in our conclusions.

E.7 GOVERNING LAW, ARBITRATION, AND JURISDICTION

E.7.1 Additional Assumption

117. The relevant EFET General Agreement is governed by the laws of a jurisdiction other than Bosnia and Herzegovina (including English or German Law).

E.7.2 Validity of Choice of Law and Jurisdiction Clauses

118. According to the PIL a foreign party and a Bosnian party may subject their contract to a foreign law. However, the choice of foreign law would not be applicable before the Bosnian courts if the effects of the application of the chosen foreign law would be contrary to the "foundations of social and political order as determined in the Constitution" (public policy)[25]. It is not clear under B&H Law what exactly constitutes "foundations of social and political order as determined in the Constitution. Unless otherwise mentioned elsewhere in this Opinion, we do not think that any provision of the EFET General Agreement which is within the limits of the scope of this Opinion offends Bosnian public policy.

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[24] In our Opinion relevant conclusions are in Part E.1 and E.2.

[25] Article 4 of the PIL

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

120. Party A and Party B may also stipulate for foreign arbitration such as the one in § 22 of the EFET General Agreement.

121. However, once Party A is in insolvency proceedings, any claim for declaration of the creditor's right has to be litigated in a Bosnian court. See paragraph 60 and 62.

122. Foreign judgments are generally recognized in Bosnia. The recognition and enforcement in Bosnia 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) Bosnian court has exclusive jurisdiction in the relevant subject-matter (inapplicable to the disputes under the EFET General Agreement);

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

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

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

123. Bosnia and Herzegovina is party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

E.8 REGULATORY REGIME

E.8.1 Foreign exchange restrictions

124. Due to the restrictions under the relevant foreign exchange regulations in Bosnia and Herzegovina, cross-border payments under the Commodity Forward, Commodity Swap and Commodity Option are not permitted.

125. The RS Foreign Exchange Act[26] regulates permissible cross-border payments, including by way of set-off. It permits, under certain conditions, cross-border payments under the so-called current transactions (transactions which do not involve transfer of capital, e.g. cross-border sale of goods

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[26] *Zakon o deviznom poslovanju*, "Official Gazette of Republika Srpska", nos. 96/03, 123/06, 92/09, 20/14, and 20/2018

or services). It is, however, silent on cross-border payments and set-off/netting under non-standardized (OTC) financial or commodity derivatives such as Commodity Forward, Commodity Option, and Commodity Swap referred to in Appendix B to the Instructions. Such transactions cannot be classified as current transactions. These contracts are not covered by the provisions on cross-border payments under capital transactions either, because the RS Foreign Exchange Act exhaustively enumerates capital transactions and the list does not include OTC financial or commodity derivatives. The authorities of Republika Srpska have been interpreting the RS Foreign Exchange Act as prohibiting all types of cross-border payments that are not specifically authorized by that legislation.

126. The relevant provisions of the FB&H Foreign Exchange Act[27] and FB&H Securities Market Act are substantially similar to the provisions of the respective laws in Republika Srpska. FB&H Foreign Exchange Act provides in Article 7 that a bank may not execute a payment order for a transfer abroad if such payment i.e. transfer is not allowed by that legislation.

127. Furthermore, it is questionable whether the RS Foreign Exchange Act allows automatic set-off/netting of cross-border payments under Physical Commodity Transactions. The dilemma arises because the relevant provisions of RS Foreign Exchange Act stipulates that discharge of payment obligations under current (trade) transactions in the cross-border space by way of "set-off, assignment of receivables, debt assumptions and other forms of payment" requires a separate written agreement which must indicate "contractual parties, data on the legal basis for the claims and debts, data on the creditor and the debtor, and data on the currency and the amount of the claims and debts which are the subject-matter of that agreement". Even though the provision requiring a separate written contract with the foregoing mandatory content technically refers not only to assignment of receivables and debt assumption, but also to set-off, it actually does not make sense when applied to set-off. Unlike assignment of receivables or debt assumption, set-off is not a contractual transaction but a manner in which one's payment obligation is extinguished. As such, set-off is effected either automatically based on the provisions of the underlying contract, or unilaterally based on a set-off statement issued by the party effectuating the set-off. Furthermore, all the mandatory content requirements cited above are arguably already either determined in or determinable under the underlying contract which gives rise to claims and debts being offset. Consequently, we think it is reasonable to conclude that despite the language of the RS Foreign Exchange Act, cross-border automatic set-off of claims and debts under Physical Commodity Transactions should not be considered prohibited.

E.8.2 Licensing

128. The licensing regime for electricity trading in B&H is governed on the state level by the Transmission, Regulator and Operator of the Electricity System Act[28], as well as on the level of

[27] *Zakon o deviznom poslovanju*, "Official Gazette of Federation B&H", no.47/10

[28] *Zakon o prenosu, regulatoru i operatoru sistema električne energije u Bosni i Hercegovini*, "Official Gazette of Bosnia and Herzegovina", nos. 7/02, 13/03, 76/09, and 1/11

each entity: in Republika Srpska by the Energy Act of Republika Srpska ("**RS Energy Act**")[29] and Electricity Act of Republika Srpska ("**RS Electricity Act**")[30]; in Federation B&H, by the Electricity Act of Federation Bosnia and Herzegovina[31]. Licensing Rules[32] defines the international electricity trading as purchase, sale or delivery of electricity where one of the locations of purchase, sale or delivery is outside B&H.

129. Party A has to have a license to engage in international electricity trading and additionally needs to have a license for production, trade, or supply of electricity in domestic market.

130. License for international electricity trading is issued by the State Electricity Regulatory Commission of Bosnia and Herzegovina ("**SERC**") and is issued for a period ranging from 5 up to 40 years, whereby the current practice of SERC is to issue these licences for a period of five years. Only an entity registered in Bosnia and Herzegovina may obtain an international trading license from SERC. A prerequisite for obtaining the international trading licence is that the applicant already holds a license for production, trade, or supply of electricity in domestic market, issued by the Regulatory Commission for Energy of Republika Srpska ("**RERS**") and Regulatory Commission for Energy in Federation of Bosnia and Herzegovina ("**FERK**"), for those operating in Republika Srpska or Federation B&H, respectively.

131. License for international electricity trading is transferable but prior approval of SERC is required. SERC is entitled to temporarily suspend the license for international electricity trading if the holder breaches the Transmission, Regulator and Operator of the Electricity System Act, Licensing Rules or the terms of license. If the breach is not remedied within a given deadline, the license may be revoked, and such holder may not apply for a new license for the next five years. The decision revoking the license is the final act in the administrative proceedings and may not be appealed. Only a lawsuit against the SERC's decision may be filed to the Court of Bosnia and Herzegovina (judicial authority of the roof state) within 60 days following the receipt of the SERC's decision.

132. Cross-border sale and purchase transactions involving passage of power to, from or through Bosnia and Herzegovina require that appropriate cross-border power transmission capacities for the transaction are acquired on the auctions carried out by neighboring TSO, auction agencies, and the Independent System Operator of Bosnia and Herzegovina ("NOS"). NOS is in charge for daily auctions on Bosnia and Herzegovina -Serbia borders and for intra-day auctions on Bosnia and Herzegovina – Montenegro and Bosnia and Herzegovina -Serbia borders. Annual, monthly and daily auctions on the borders of Bosnia and Herzegovina - Montenegro and Bosnia and

[29] *Zakon o energetici*, Official Gazette of Republika Srpska", no.49/09

[30] *Zakon o električnoj energiji, Official Gazette of Republika Srpska*, nos. 8/2008 – revised text, 34/2009, 92/2009 i 1/2011

[31] *Zakon o električnoj energiji*, Official Gazette of Federation B&H, nos. 66/2013, 94/2015, and 54/2019

[32] *Pravilnik o licencama*, Official Gazette of Bosnia and Herzegovina, no. 63/16-revised text

Herzegovina - Croatia is carried out by the "Coordinated Auction Office in South Eastern Europe" ("SEE CAO").

133. Given the licensing requirements and the specific nature of their registered business activities, Bank, Insurance Company, Investment Fund Management Company, Investment Services Provider, MCO, Municipality, County, and Association of Local Government would not be Party A in Physical Commodity Transactions.

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ANNEX

OVERVIEW OF BOSNIAN INSLOVENCY PROCEEDINGS

I INTRODUCTION

1. Insolvency (*stečaj*) of commercial companies in Bosnia and Herzegovina is governed by the RS Insolvency Act[33] ("**RS Insolvency Act**") with respect to the companies with their registered seat in Republika Srpska and by the FB&H Insolvency Act[34] ("**FB&H Insolvency Act**") with respect to companies with their registered seat in the Federation of Bosnia and Herzegovina. Special provisions on insolvency of banks and insurance companies in Republika Srpska and the Federation B&H are found in the RS/FB&H Banking Act[35] and laws governing insurance companies.

II PETITION AND PRELIMINARY INSOLVENCY PROCEEDINGS

2. Insolvency proceedings are initiated by a creditor or the insolvency debtor itself (in case of Banks, only by the regulator), by 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, just as any other court filing.

3. Subject to certain exceptions[36], following the receipt of a formally valid Petition, the court opens preliminary insolvency proceedings. The specific deadline for the judge to decide on the Petition is not prescribed by the RS Insolvency Act but the general deadline for the activities of the court in the insolvency proceedings is 30 days. Under the FB&H Insolvency Act, the insolvency court should decide on the Petition within 15 days following the receipt the Petition. The aim of preliminary insolvency proceedings is to determine whether any ground for the opening of insolvency proceedings exists. When Petition is filed against a Bank, there is no preliminary stage.

4. The insolvency judge seized of preliminary insolvency proceedings may order various security measures in order to prevent Party A from disposing of its assets, *inter alia*: appointment of

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[33] *Zakon o stečaju*, Official Gazette of Republika Srpska, nos. 16/2016

[34] *Zakon o stečajnom postupku*, Official Gazette of FB&H, nos. 29/03, 32/04, 42/06, 4/17, and 52/18

[35] *Zakon o bankama*, "Official Gazette of Republika Srpska", nos. 4/17, 19/18, and 54/19 and *Zakon o bankama*, Official Gazette of Federation B&H, no. 27/17.

[36] Under the RS Insolvency Act, preliminary insolvency proceedings will not take place if (i) the Petition is filed by a liquidation administrator: (ii) the Petition is filed by a creditor in possession of a final enforcement resolution which has not been settled 90 days; (iii) in the case of unsuccessful restructuring court proceedings: (iv) if the Petition is accompanied with all required documents. Under the FB&H Insolvency Act, preliminary insolvency proceedings will not take place if: (i) the Petition is filled by a liquidation administrator; or (ii) the Petition is filed by a creditor in possession of a final enforcement resolution which has not been settled 90 days. Insolvency proceedings over Banks do not involve this preliminary stage.

provisional insolvency administrator; prohibition of enforcement over Party A's assets; subjecting the disposal by Party A of its assets to the prior consent of the insolvency judge. Imposition of security measures on Party A in preliminary insolvency proceedings may thus impact Party B's ability to enforce or receive payments under the EFET General Agreement while the measures are subsisting.

5. After the commencement of preliminary insolvency proceedings, the counterparty of the insolvency debtor cannot cancel a contract concluded for indefinite period of time.

6. The insolvency judge examines whether any of the insolvency reasons is present and decides by a formal decision on the opening of insolvency proceedings. If it finds that no insolvency reason exists, the judge shall dismiss the Petition.

7. If Parties want to include grace period in the Election Sheet, as contemplated by § 10.5.(c)(iv) of the EFET General Agreement, such grace period should be 30 days (if Party A is from Republika Srpska) and 15 days (if Party A is from Federation B&H). 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) in § 10.5.(c) (iv) are not withdrawn, dismissed, discharged, stayed or restrained within [30][15] days from their institution*."

8. However, if Automatic Termination is elected, no grace period should be elected. See the Opinion, paragraph 39.

III OPENING OF INSOLVENCY PROCEEDINGS

9. Insolvency proceedings are formally opened pursuant to a court decision, which should be rendered within three days following the closure of the hearing for the examination of insolvency reasons. By virtue of this decision, insolvency administrator (*stečajni upravnik*) is appointed over the insolvency debtor.

10. Insolvency proceedings are deemed opened on the date and at the time specified in the decision on the opening of insolvency proceedings. If the time of the opening is not specified in the decision, then the moment of the opening is 12 p.m. of the day the decision is rendered. In Republika Srpska, the insolvency judge must publish the decision at the court's notice board, electronic court's notice board, in the Official Gazette of Republika Srpska and at the APIF's web page. In the Federation B&H, the judge must publish the decision on the opening of the insolvency proceedings on the day the decision is rendered, at the court's notice board and the Official Gazette of Federation B&H.

11. After the opening of insolvency proceedings, unless Party A is put into reorganization (*reorganizacija*), its assets are liquidated to settle the claims of its creditors and Party A is ultimately deleted from the Commercial Register. In Republika Srpska only, as an exception to liquidation of assets, Party A can be sold as a going concern, in which case it continues to exist as a legal entity free of any pre-sale liabilities.

IV REORGANIZATION

12. Insolvency debtor may file Petition together with a proposal of a reorganization plan. It may also file a reorganization proposal after the formal opening of the insolvency proceedings, subject to the approval of the assembly of creditors. After the opening the insolvency proceedings, a reorganization plan may be proposed by insolvency administrator.

13. If the reorganization plan is accepted by the debtor's creditors and confirmed by the court, the insolvency proceedings are terminated although the insolvency remains under the supervision with respect to the implementation of the plan. If so envisaged by the reorganization the plan, certain transactions by the insolvency debtor may require a prior consent of the insolvency administrator. A confirmed reorganization plan binds all creditors (including those who did not vote for the plan).

V RESTRUCTURING

14. Special restructuring proceedings exist only in Republika Srpska and not in the Federation B&H.

15. The aim of these proceedings is to recover debtor's financial and operational position in the case of threatening insolvency or if the debtor is late in settling the assumed financial obligations for up to 60 days.

16. Threatening insolvency exists if a debtor will not be able to settle the assumed payment obligations in the upcoming 12 months.

17. The restructuring proceedings are initiated by the debtor. A debtor's creditor is also entitled to initiate the restructuring proceedings if the debtor agrees with such petition. The main and mandatory part of the petition is a plan for operational and financial restructuring of the debtor. Following the examination of the petition and documents accompanying the petition, the court may reject the petition[37] or open the restructuring proceedings over the debtor. If the court opens the restructuring proceedings, the court appoints a restructuring administrator, all creditors are invited to report their claims, the hearing for the examination of the reported claims is scheduled, the restructuring plan is adjusted following such examination and put to vote.

18. As of the date of the restructuring petition until the date of the court decision confirming the restructuring plan and restructuring proceedings or rejecting the restructuring plan, the debtor is allowed to make only the payments in the ordinary course of its business operations. The debtor is prohibited from transferring or pledging its assets. For all legal transactions, the debtor must obtain a prior written consent of the court or the restructuring administrator. Any payment order issued prior to the opening of the restructuring proceedings cannot be effected during the restructuring proceedings.

[37] If the restructuring is already pending, if as of the fulfilment of the obligations under the last restructuring proceedings two years period has not been expired, if the petition is submitted by an unauthorized applicant, etc.

19. There is no special public registry of petitions for restructuring.

20. Legal consequences of the opening of the restructuring proceedings occur on the day on which the decision on the opening of the restructuring proceedings is published on the court's notice board. Such date is specified in the decision.

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