WOLF THEISS

LEGAL OPINION REGARDING THE ENFORCEABILITY OF CLOSE-OUT NETTING AND THE VALIDITY AND ENFORCEABILITY OF COLLATERAL AGREEMENTS, AND OTHER RELATED ISSUES, UNDER THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY

December 2020

European Federation of Energy Traders

Amstelveenseweg 998 am
The Netherlands
1081 JS Amsterd

EFET General Agreement Concerning the Delivery and Acceptance of Electricity

Dear Sirs,

We have been asked to give an opinion on the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity ("**General Agreement**") and the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement ("**Credit Support Annex**") as well as other related issues outlined in your instruction letter ("**Instruction Letter**"). These issues include the validity and enforceability of other provisions of the EFET General Agreement in respect of issues such as Limitation of Liability and Force Majeure and their respective consequences ("**General Enforceability**"), the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation or other non-written documentation to be eligible for evidencing a legally binding Individual Contract ("**Confirmation Practices**"), the validity and enforceability of the EFET General Agreement and how this may be affected when certain provisions are modified by the parties ("**Core Provisions**"), the 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 the existence of specific licensing requirements or currency exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("**Regulatory Regime**").

This opinion (the "**Opinion**") discusses the issues outlined above in substantially the same order as shown in the Instruction Letter.

The Opinion does not relate to any Individual Contract under the General Agreement and does not give an opinion on any tax, accounting, regulatory or related matters other than to the extent we express an opinion hereunder.

Sincerely, Sokol Nako

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EXECUTIVE SUMMARY

On the basis of the assumptions and subject to the limitations set out in this Opinion, and particularly in point B (page 8), this is an executive summary of the opinions expressed in this Opinion. This executive summary does not form part of this Opinion and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having and interpretative effect on the opinions in this Opinion.

Enforceability of Close-out Netting

(a) Close-out netting in a pre-insolvency scenario is generally enforceable (please refer to points C.I and C.I.2 of this Opinion on pages 12 and 18).

(b) Early termination by notice in the event of insolvency will in most cases be upheld by the Albanian courts (please refer to point C.I.1.1 (a) on page 14). However, automatic termination triggered by the fact that bankruptcy proceedings have been opened by the insolvency court in relation to the debtor (please refer to C.I.1.3 of this Opinion on page 16) is considered invalid under the Insolvency Act. It is important, however, that where Automatic Termination could trigger the termination of the Agreement, this may not necessarily result in the enforceability of the netting provisions, as although the effects of netting could be achieved through set-off, set-off is, however, not automatic. The net claim can only be made due and payable once notified to the debtor, and if no objections are raised.

(c) Enforceability of the netting provisions of the EFET General Agreement (the netting of all positive and negative Settlement Amounts in determining the Termination Amount) in the event of insolvency depends on the date that the netting (set-off) becomes effective. The netting provisions of the EFET General Agreement will only be enforceable if the netting (set-off) statement is delivered to the other Party, and is accepted by that Party before the commencement date of the bankruptcy proceedings (please refer to point C.I.1.4(a) of this Opinion).

Collateral

(a) Albanian law does not stipulate a transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex. Such a transfer would only be possible if assets (including cash) are transferred based on a sale, donation or other similar contract which transfers title over assets. Hence in our view the EFET Credit Support Annex does not enable a transfer of ownership over the various forms of Eligible Credit Support. Instead, the various forms of Eligible Credit Support would be re-characterized as creating a security interest.

(b) The right to substitute collateral shall be mainly exercisable under Albanian laws.

(c) The rights of the party to whom collateral has been provided shall be generally enforceable irrespective of the insolvency of the party who transferred the security in respect to all types of collateral. However, the transfer, substitution or withdrawal of collateral during the "suspect period" preceding insolvency proceedings may be subject to challenge.

General Enforceability and Core Provisions

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, we understand that

- **(a)** the documents listed in point A are generally enforceable under the laws of Albania (please refer to point C.IV.1 of this Opinion on page 27); and

- **(b)** none of the elections as suggested in the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) would change the substance of our conclusions reached in respect of the Enforceability of Close-out Netting (please refer to point C.VI of this Opinion on page 30).

A. DOCUMENTS CONSIDERED

For the purpose of this Opinion the following documents were considered in accordance with the Instruction Letter.

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

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

- EFET Credit Support Annex to the General Agreement (Version 2.0, published May 2010);

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

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

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

- EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version2.1, published 20 December 2000),

- 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);

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

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

- 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)

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

For the purpose of Part C.V (Confirmation Practices) only:

- EFET Electronic Confirmation Agreement (published 28 June 2005);

- Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2)) to the Allowances Appendix to the EFET Power Master Agreement (Version 2.0, published 3 April 2012);

For the purpose of Part C.VI (Core Provisions) only:

- EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005);
- EFET Master Netting Agreement (Version 1.0, published June 2010);
- 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);
- EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master agreement (Version 1.0, published 23 June 2003), and
- EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011).

B. SCOPE OF REVIEW

B.I ASSUMPTIONS

B.I.1 General Assumptions

The general assumptions on which the Opinion is based are the following, in accordance with the Instruction Letter.

- Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organised or has its centre of main interest in Albania ("**Party A**").
- Party A is a corporation, or other entity as further described in Appendix A.
- The relevant EFET General Agreement is governed by the laws of Albania.
- Each EFET General Agreement and of the above Annexes (including the Credit Support Annex) is enforceable under the laws of any jurisdiction (other than the laws of Albania) and each counterparty has duly authorised, executed and delivered, and has the capacity to enter into, each document.
- On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of individual Contracts which include all of the Individual Contracts described in Appendix B.
- The Individual Contracts provide for the physical delivery of commodities, certificates or emission rights in exchange for cash.

In accordance with the Instruction Letter additional assumptions are set forth in the relevant part of the Opinion in relation to the specific issue analysed.

B.I.2 Further assumptions

In addition to the assumptions given in the Instruction Letter, the opinions in this Opinion are given on the basis of the assumptions and are subject to the limitations set out under this point below in each case in their entirety. The opinions given in this Opinion are strictly limited to the matters expressly stated under point C (*Issues and Additional Assumptions*, page 12) below and do not extend to any other matters.

The opinions set out in this Opinion have been made on the assumptions:

(a) That the EFET General Agreement and the Individual Contracts are legally binding and enforceable against both Parties under the laws by which they are expressed to be governed, if not the laws of this jurisdiction and that none of the opinions expressed below will be affected by the laws (including, without limitation, the insolvency laws and the public policy) of any jurisdiction outside Albania.

(b) That no Material Reason for termination as outlined in § 10.5 (Definition of Material Reason) with respect to a Party has occurred and is continuing when entering into this EFET General Agreement.

(c) That the EFET General Agreement and any Individual Contracts under it are entered into prior to the formal commencement of any insolvency proceedings against either Party.

(d) That both Parties have all licenses, authorisations, consents and approvals required by any applicable laws to enter into the EFET General Agreement and any Individual Contracts and that the EFET General Agreement and any Individual Contracts comply with the electricity and financial sector legislation and regulations in all relevant jurisdictions.

(e) That the EFET General Agreement and Individual Contracts are mutual between the Parties in the sense that each is personally and solely liable for its own account as regards obligations owing by it and is the sole beneficial owner of obligations owed to it.

(f) That the EFET General Agreement and all Individual Contracts under it were entered into, and each delivery and payment made thereunder were made at arm's-length so that no element of gift or undervalue from one Party to the other Party is involved and without any intention of a Party to prefer the other Party in the event of its insolvency.

B.II LIMITATIONS

The opinions set out in this Opinion are subject to the following limitations:

B.II.1 Limitations regarding the enforceability of claims

(a) In this Opinion "enforceable*"* means that an obligation is of a type which the Albanian courts enforce. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the relevant Agreement. In particular:

(1) enforcement of the obligations under an Agreement may be limited by the general principle of good faith. Courts may not grant enforcement in the event they take the view that a right has not been exercised in good faith or that it has been exercised in such a manner as to constitute an abuse of rights;

(2) enforcement may be limited by the provisions of Albanian law applicable to agreements held to have been frustrated by events happening after their execution;

(3) enforcement may be further refused by Albanian courts, if the recognition of the enforceability of the obligation would manifestly be contrary to Albanian public order (in Albanian: "*rendi publik"*), or it would be irreconcilable with an earlier judgement rendered by Albanian courts in a dispute between the same parties on the same basis; or if the jurisdiction of the other court rendering the judgement the enforcement of which is sought in Albania is in conflict with Albanian rules pertaining to special or exclusive jurisdiction; and

(4) claims may become barred under statutory limitations or may be or become subject to a defence of set-off or counterclaim.

(b) A party to an agreement may be able to avoid its obligations under that agreement (and may have other remedies) where it has been induced to enter into that agreement by a misrepresentation and the Albanian courts will generally not enforce an obligation if there has been fraud.

(c) Under the court practice in Albania, where any Party is vested with discretion or may determine a matter, that discretion needs to be exercised or determination be made reasonably. Any provision in the EFET General Agreement providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any Party thereto. The courts of this jurisdiction may regard any calculation, determination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified.

(d) Under the laws of this jurisdiction, unless the agreement stipulates otherwise, a party to an agreement is not entitled to terminate it upon default by the other party of obligations or covenants which are merely accessory or complementary to the main payment and/or delivery obligations or upon the occurrence in respect of the other party of any event other than an event which may adversely and materially affect the creditworthiness of such other party or its ability to comply with its obligations under the relevant agreement.

B.II.2 Other limitations

(a) We express no opinion as to matters of fact.

(b) We express no opinion as to the validity and enforceability of any provisions of any master trading agreements other than the EFET General Agreement. We express no opinion as to the validity and enforceability of any provisions of the EFET General Agreement other than those to which express reference is made in this Opinion.

(c) We express no opinion as to whether the method for settling the claims arising from the Individual Contracts under the EFET General Agreement is acceptable and recognised on the market for transactions set out in Appendix B to the Instruction Letter and this Opinion, <u>or whether it is eligible for recognition for risk-reducing or other similar purposes.</u>

(d) Based on the Instruction Letter we were not requested to analyse, and therefore we do not express opinion on the application of the terms of the EFET General Agreement if termination is triggered by insolvency of a Party's Credit Support Provider.

(e) The opinions given in this Opinion are governed by and relate only to Albanian law as applied by the Albanian courts as at today's date. We express no opinion on and consider the impact or application of any laws and regulations other than Albanian law (as applicable), even where, under Albanian law, any foreign law falls to be applied. In this Opinion Albanian legal concepts are expressed and described in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying Albanian law concepts. Therefore, this Opinion is issued and may only be relied upon the express condition that any issues of interpretation or liability arising hereunder will be governed by and construed in accordance with Albanian law and all disputes in relation to this Opinion will be brought before the courts of Albania.

(f) We express no opinion regarding financial instruments including emission allowances.

B.III POTENTIAL PARTIES

Trading in electricity (that is for-profit business operations involving the purchase and sale of electricity and the related capacity for purposes other than own use, as defined by the Electricity Act) is an activity subject to licence in Albania. From a corporate law viewpoint this limits the scope of potential counterparties to those types of entities (corporations, and partnerships)) which are eligible for obtaining the necessary licence (please refer to point C.VIII (*Regulatory Regime*), on page 32).

Moreover, municipalities are also allowed to undertake energy trading activities and be licensed by ERE. However, these entities are excluded from the application of insolvency proceedings and considering the lack of legislation in this respect we are unable to provide some of the answers required under this Opinion in respect to these entities.

However, with respect to this some of the types of parties listed in Appendix A they are already excluded from the scope of potential parties (i.e. associations of local government, and quasi-governmental entities) (publicly-owned corporations are principally treated in the same way as ordinary corporations).

Also, investment service providers/investment firms, investment fund management companies/other financial institutions may in theory undertake activities involving trading in electricity. However, due to the underdeveloped investment markets, in practice investment firms are quite rare in Albania, with quite sporadic or quite limited activity, and to our best knowledge none of such companies undertakes electricity trading activities or perform the Transactions under the EFET General Agreement described in Appendix B.

On the other hand, under the Banking Act, banks and credit institutions are expressly excluded to perform activities such as trading of electricity. Hence, banks and credit institutions can not undertake the transactions under the EFET General Agreement envisaged in Appendix B. The same goes also with respect to insurance companies.

Hence, we have excluded from the scope of this Opinion associations of local government, and quasi-governmental entities; banks and credit institutions; and investment service providers/investment firms, investment fund management companies.

Finally, it is important to emphasise that further to the requirements of the Licensing Regulation Party A is required to be an entity incorporated under the laws of Albania. As further detailed under point C.VIII (*Regulatory Regime*, page 32), foreign entities may not engage in trading in electricity in Albania without having a permanent establishment in Albania. Therefore, Party A may not be an entity incorporated under a foreign law.

B.IV PRODUCT COVERAGE / COMMODITY TRANSACTIONS

We were required to assume that the Parties enter into such types of Commodity Transactions under the EFET General Agreement as described under Appendix B. The following transactions are listed in Appendix B: Commodity Forward, Commodity Option, Commodity Swap and Physical Commodity Transactions.

By way of introduction, we would like to mention that the transactions described in Appendix B, with the exception of physical commodity transactions, are not customary between Albanian electricity traders at all. Moreover, in Albania commodity derivatives such as commodity forward, options and swaps are not transacted. On the other hand, the Capital Markets Act fails to provide a definition of such instruments. Also, in Albania emission allowances are not applicable and not regulated under the Albanian legislation.

Finally, the Capital Market Act does not have provisions regulating close-out netting. Hence, the provisions of the Insolvency Act are applicable.

C. ISSUES AND ADDITIONAL ASSUMPTIONS

On the basis of the assumption and subject to the limitations respectively set out in point B.I (page 8), we are of the following opinion.

C.I ENFORCEABILITY OF CLOSE-OUT NETTING

As a general concept and with a view of achieving the same end effect, netting may be viewed as a set-off action from a civil law perspective, by which mutually consenting parties agree on settling their mutual obligations.

Articles 514 – 517 of the Civil Code regulate set-off as follows:

"When two persons are obliged towards each other in money or things which are of the same sort and which are replaceable and if their obligations are matured, detailed and determined in amount or quantity, the obligations of both parties are annulled, by compensating each other. The obligations are annulled up to the amount or quantity of the smallest obligation.

The compensation annuls both obligations starting from the day they were joined. The compensation is done by means of a declaration which one party sends to the other. The declaration cannot be done with a time limit or with a condition.

When the declaration concerning the compensation given by one party is not accepted by the other party, this party is obliged to give immediately a notice to the party who has sent the declaration, by expressing the reasons of refusal.

Hence, based on the above provisions of the Civil Code, a party is entitled to set-off its due and payable claim of the same type (monetary or other type) against its debt by a statement addressed to its counterparty, which is not objected by the counterparty. Obligations cease to exist up to the value of the set-off.

In addition, there are some general rules in the Insolvency Act regarding the ordinary set-off. In case of bankruptcy proceedings, the claims of the creditor and counter claims of the bankruptcy debtor may be set-off if such entitlement precedes the date of the opening of the insolvency procedure. However, the set-off cannot take place if a claim is matured after the opening of the insolvency proceedings, an insolvency creditor has acquired the set-off right from another creditor after the opening of the insolvency procedure, or the insolvency estate has a claim against a secured creditor.

In our opinion, in order for the set-off regulated under the Insolvency Act to work the provisions of the Civil Code should also be taken into account. In this respect, each Party must detail his claims due from the other Party to set off his debt by a statement addressed to the other Party, which will result in a single payment obligation for one Party (§ 10.3 (c)). Set-off is only completed when the Parties have exchanged their respective statements, and the statements remain unobjected.

Subject to the limitations set out in the Opinion and as further detailed below, the civil law interpretation of close-out netting enables the Parties to the Agreement to enforce the netting provisions of the Agreement against each other under the laws of Albania, subject to each Party having delivered the set-off statement to the other Party, and no objections having been raised by a Party to the statement of the other Party.

SPECIFIC QUESTIONS

For the purpose of this section we have made the following additional assumptions in accordance with the Instruction Letter:

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

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

Since Party A is a party incorporated, organized or having its centre of main interest in Albania, the courts of Albania will have jurisdiction to open insolvency proceedings and will proceed in accordance with the Albanian insolvency laws.

We further assumed that Party A is not classified as a municipality or administrative unit with respect to which bankruptcy or liquidation proceedings do not apply.

C.I.1.1 ***Assuming you recommend Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the EFET General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of Albania or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party?***

According to the Civil Code, parties to an agreement are free to determine conditions upon which their agreement terminates. However, based on Article 702 of the Civil Code the termination shall have effect form the moment that the terminating party has given notice to the other party for the termination of the contract. Apart from the fact that § 10.4 of the EFET General Agreement should be amended to reflect that the Terminating Party shall need to send to the other party a notice designating an Early Termination Date, we are of the opinion that the insolvency-based Material Reasons as set out in § 10.5 (c) of the EFET General Agreement qualify as legal, except for automatic termination triggered by the fact that bankruptcy proceedings have been opened in relation to the debtor (please refer to C.I.1.3 of this Opinion on page 16). Such automatic termination is considered invalid under the Insolvency Act.

In addition to the above the following has to be noted. Albanian courts may eventually treat events triggering the Automatic Termination of the Agreement as conditions subsequent, the occurrence of which result in the termination of the agreement’s effect. The Civil Code expressly provides that as long as a condition is pending, neither party is entitled to do anything acting in bad faith that would infringe or violate the other party's rights upon the occurrence (or frustration) of the condition, and the party who has actionably caused the occurrence (or frustration) of a condition is not entitled to establish any right thereupon. This means in practice that if, for instance, the institution of insolvency proceedings is defined as a condition subsequent, and one of the Parties submits in bad faith a petition for insolvency proceedings against itself, based on the above it could be argued that the occurrence of the condition subsequent is a result of that Party’s conduct, in which case it should be deemed as the condition has not occurred, and accordingly the Agreement remained in effect.

C.I.1.2 ***Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the EFET General Agreement) upon the occurrence of an event described in § 10.5(c) of the EFET General Agreement:***

C.I.1.2.1 ***Would it be necessary or recommendable to modify the scope of termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would permit the Terminating Party to terminate and/or (ii) adding other Material Reasons upon the occurrence of which it should be entitled to terminate)?***

Apart from the fact that § 10.4 of the EFET General Agreement should be amended to reflect that the Terminating Party shall need to send to the other party a notice designating an Early Termination Date, in our opinion it is not recommendable to elect Automatic Termination in the event listed in § 10.5(c) letter (vi) of the EFET General Agreement, for as long as this provision relates to insolvency based events, as the Insolvency Act expressly prohibits the termination of an agreement due to the opening of bankruptcy proceeding. We recommend to modify the scope of the events listed in § 10.5(c) letter (vi) by it, and removing any references to events referring to appointment of an insolvency administrator or similar, which implies that a court decision for the opening of bankruptcy proceeding has been issued.

C.I.1.2.2 ***Are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of Albania or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?***

(a) Enforceability of termination rights

The provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement upon an insolvency-based Material Reason will not always be enforceable under the laws of Albania, as the Insolvency Act contains an express limitation regarding the termination of agreements by one party upon the commencement of the insolvency proceedings of the other party.

(b) Right to challenge contracts

The Insolvency Act does grant additional rights to the insolvency administrator to challenge the debtor’s contracts which have been entered into prior to the commencement of the bankruptcy proceedings and are not at arm's length.

Based on the assumption that the Agreement was entered into, and each payment and delivery made thereunder was made at arm’s-length so that no element of gift or undervalue from the insolvent debtor Party A to the other party is involved and without any intention of the insolvent debtor Party A to prefer the other party in the event of its insolvent liquidation, the liquidator will not have the right to challenge the entering into the Agreement.

The above assumption is necessary, because in the event of liquidation proceedings Section 79 of the Insolvency Act sets forth the grounds on which certain contracts can be challenged.

Accordingly, in liquidation proceedings any creditor, or the insolvency administrator may challenge any agreement entered into or commitment made by the debtor within two years preceding the filing of the liquidation petition or any time thereafter, if it has caused a material damage to the debtor or has afforded unjustified preference to a creditor. The damage may be established if the debtor has entered into agreements which are not at arm's length. The damage is presumed in the following cases: (i) a gifting of debtor's assets without any compensation has occurred; (ii) the debtor fulfils a unsecured obligation unmatured before the start of the insolvency proceedings; (iii) gifts have benefited individuals related to the debtor, in case the debtor is an individual, and related companies in case the debtor is a juridical person; (iv) security has been granted to secure an existing obligation, or a new obligation replaces a previous obligation which was unsecured, or the security is of low value.

C.I.1.3 ***Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or recommendable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in § 10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in § 10.5(c)(iv) of the EFET General Agreement?***

Apart from the fact that § 10.4 of the EFET General Agreement should be amended to reflect that the Terminating Party shall need to send to the other party a notice designating an Early Termination Date, we do not recommend to elect Automatic Termination to apply upon a Material Reason as currently described in § 10.5(c) (vi), with respect to the appointment of an administrator - but only if it refers to a insolvency administrator - considering that under the Insolvency Act if a party is subjected to an the appointment of an insolvency administrator, it means that the insolvency proceedings have already been started by the insolvency court, at which point the contracts the debtor is a party to cannot be terminated.

We furthermore, recommend to refrain from specifying, a certain grace period as contemplated in § 10.5(c)(iv) of the EFET General Agreement.

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

Not applicable.

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

Subject to what has been previously explained, it is our view that the optimal timing for Automatic Termination is to take effect after the Terminating Party sends to the other party a notice designating an Early Termination Date. Nevertheless, this timing should be short as it is risked that the court may start insolvency proceedings in which case the termination could be annulled.

C.I.1.4 ***Are the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Albania or is there a risk that such determination could be challenged by a liquidator, receiver or third party?***

The enforceability of the netting provisions of the EFET General Agreement under the laws of Albania are subject to the provisions of the Civil Code and the Insolvency Act.

Under the Civil Code if two parties have reciprocal obligations of the same kind (such as for example monetary obligations) and these obligations are matured, and well defined in quantity or amount, these obligations can be set-off against each other. However, in order for the set-off to be effective the set-off parties must each sent to the other a statement proposing and/or accepting the set-off.

Moreover, based on the Insolvency Act set-off can apply for obligations matured until the day the insolvency proceedings are started. However, the set-off cannot take place if a claim is matured after the opening of the insolvency proceedings, an insolvency creditor has acquired the set-off right from another creditor after the opening of the insolvency procedure, or the insolvency estate has a claim against a secured creditor.

Thus, if the set-off statement is delivered following the commencement of the liquidation proceedings, the netting entitlement under the Agreement will be deemed to have occurred after the commencement of the liquidation proceedings and thus will not be enforceable.

Moreover, if the claims of the Terminating Party would be secured under the Credit Support Annex the terminating Party would not be entitled to set-off.

On the other hand, the invalidity of the netting statement, if so, will not affect the validity of the rules of the EFET General Agreement on the calculation of the Settlement Amount of each Individual Contract. Therefore, even if the liquidator of the insolvent Party refuses the netting statement (report of the net claim), subject to the correctness of the calculation, it will be obliged to rank the claims of the Terminating Party arising from each Individual Contract in line with the calculation method set out in § 11 of the EFET General Agreement, and to enforce against the Terminating Party its claims (if any) arising from the termination of each Individual Contract in the amount as calculated in accordance with § 11 of the EFET General Agreement. The above practically means that if the Individual Contracts do not meet the requirements to be eligible for close-out netting and the commencement date of liquidation occurs prior to the delivery of the netting statement, the creditor will not be entitled to report the net claim, but will have to file the aggregate of the claims under Individual Contracts and have them confirmed with the liquidator.

C.I.1.5 ***Do the laws of Albania recognize that the close-out netting provisions in § 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.***

The close-out netting provisions in § 10 to 11 of the EFET General Agreement apply to all Individual Contracts, as long as the netting requirements (as set out in C.I.1.4) are fulfilled. Hence the close-out netting provisions in § 10 to 11 of the EFET General Agreement apply to all Individual Contracts, unless they would be explicitly excluded by the specific Individual Contract (in which case such exclusion would apply only to that specific Individual Contract).

C.I.1.6 ***Is the insolvent counterparty obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Albania or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?***

The Civil Code specifically allows the parties of a contract to determine the currency they wish to apply in their contractual relationship. This is also confirmed by court decisions. Also, we have not found any provision in the Insolvency Act that would prevent Party B to request the insolvent debtor Party A to pay the amount of any compensation claim in Euro, GBP, USD (as agreed between the parties under the Agreement). Furthermore, no specific provisions are set out by the Insolvency Act according to which the calculation or demand of such amount in a foreign currency could be challenged by a liquidator, administrator, receiver or third party.

C.I.1.7 ***Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party based in your jurisdiction are dependent upon, or otherwise affected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?***

Not applicable. Under the laws of Albania, termination and close-out rights in case of opening of insolvency proceedings are regulated only in respect of corporations and partnerships. Municipalities are not subject to insolvency proceedings regulated under the Insolvency Act. Moreover, the insolvency of these institutions in not regulated by law.

C.I.2 Non-insolvency related Material Reasons

The opinions expressed under this section C.I.2 regarding the specific questions below relate to termination for non-insolvency related Material Reason in a non-insolvency scenario. In case of termination for non-insolvency related Material Reason in an insolvency scenario, unless otherwise provided in relation to a specific question, the same shall apply as expressed under point D.II.1 (page 35).

As introduced under C.I and subject to the limitations set out in the Opinion and as further detailed below, the civil law interpretation of close-out netting enables the Parties to the Agreement to enforce the netting provisions of the Agreement against each other under the laws of Albania. The netting effect is achieved through the application of a civil law set-off.

According to Articles 514 - 423 of the Civil Code, an obligor is entitled to set-off its due and payable claim of the same type against its debt by a statement addressed to the oblige, and if no objections are raised. The statement cannot be made time conditional or subjected to specific conditions. Obligations cease to exist up to the value of the set-offs.

No set-off can be made against claims for life annuity, or accident and death benefits, as well as tax credits. Also, set-off cannot apply if it's made in detriment of third parties that have stipulated in their interest pledge or usage rights over the credits of a party to the set-off.

Notwithstanding the above restrictions, the general requirements for two claims to be set off against each other are that both claims must be of the same type and must be matured, due and payable. Furthermore, set-off occurs by delivering the set-off (netting) statement to the other party, and this remains unobjected. No set-off can occur without such statement being delivered; this is a precondition to the effectiveness of the set-off. We believe such a requirement cannot be waived.

Similarly, the set-off of claims between the Parties arising outside the EFET General Agreement contractually provided for in an amendment to the EFET General Agreement would be subjected to the same requirements under the laws of Albania in a non-insolvency scenario. On the other hand, in our view, the set-off of claims between Affiliates or Credit Support Providers of Parties contractually provided for in an amendment to the EFET General Agreement will not be enforceable, and courts will render largely unenforceable bilateral triangular (cross-affiliate) set-off provisions that provide for set-off among different entities in corporate groups. This is because set-off generally requires the mutuality of the claims (i.e. that they are due to and from the same person). Set-off may be used only in respect of counterclaims between the same parties (i.e. the Parties to the Agreement) and third party claims (i.e. claims of Affiliates) could be included in the set-off only with the prior consent of the third party (which practically means the assignment of the claim of the Party’s Affiliate to the Party concerned). Contracting Parties could resort instead to multilateral agreements, which may provide the necessary mutuality.

C.I.2.1 ***Please discuss and advise on the issue outlined under point C.I.1.5 in the context of non-insolvency related Material Reason.***

Taking in consideration the relevant provisions under the Civil Code, we are of the opinion 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 are enforceable under the laws of Albania in the context of non-insolvency related Material Reason on a civil law basis, provided that the netting statements have been exchanged between the Parties and these are endorsed by the Parties.

C.I.2.2 ***Please discuss and advise on the issue outlined under point C.I.1.6 in the context of non-insolvency related Material Reason.***

As noted under point C.I.1.6 (page 18), according to the general practice, recognised also by the courts of Albania, the parties are basically free to determine the currency they wish to apply in their contractual relationship. Therefore, we believe that in the context of non-insolvency related Material Reasons under the laws of Albania nothing prevents the Parties to the EFET General Agreement to pay the amount of any compensation claim in Euro, USD, GBP (or as agreed between the Parties in the Agreement) and further to seek enforcement of such provision.

C.I.2.3 ***Please discuss and advise on the issue outlined under point C.I.1.7 in the context of non-insolvency related Material Reason.***

According to the Civil Code, the parties to an agreement are free to determine the material reasons upon which their agreement terminates, provided that the non-performance by a party is not of minor relevance to the terminating party (Article 699 of the Civil Code). Apart from the above, there are no specific provisions for the types of counterparties discussed under this opinion which may restrict the rights of these entities to determine the material reasons upon which their agreement terminates in an non-insolvency context.

C.I.2.4 ***Are the rights of the Terminating Party to terminate and close-out the EFET General Agreement enforceable in accordance with the terms of the EFET General Agreement, irrespective of the insolvency of Party A?***

The rights of the Terminating Party in the context of non-insolvency related Material Reason are principally enforceable, based on the principle of freedom of contract under the Civil Code. Notwithstanding this, termination rights of a Party triggered by the Non-Performance of the other Party are restricted during the moratorium in the bankruptcy proceedings in relation to the other Party as follows.

Also, in our interpretation of the applicable law the right of a party to terminate an agreement due to the debtor's failure to pay during the bankruptcy proceedings is not restricted, as the Insolvency Act does not make any provisions to the contrary.

C.II MULTIBRANCH PARTIES

According to the Instruction Letter, under this section we are asked to make a distinction between (1) a Multibranch Party incorporated, organized or having its centre of main interest in Albania (*Albanian Multibranch Party*) and (2) a Multibranch Party incorporated, organized or having its centre of main interest <u>outside</u> Albania, but operating through one or more branches in Albania (*Foreign Multibranch Party*).

However, a Multibranch Party incorporated, organized or having its centre of main interest <u>outside</u> Albania, but operating through one or more branches in Albania (*Foreign Multibranch Party*) would not be applicable as based on the applicable legislation only an entity established in Albania would be entitled to obtain a electricity trading licence. Hence, our answers in the following pertain only to a Multibranch Party incorporated, organized or having its centre of main interest in Albania (*Albanian Multibranch Party*).

C.II.1 Albanian Multibranch Party

For the purpose of this section (*Albanian Multibranch Party*) our opinion is based, in accordance with the Instruction Letter, on the following additional assumption:

Party A has entered into Individual Contracts under the EFET General Agreement through a subsidiary in Albania. 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 laws of Albania.

C.II.1.1 ***Would there be any change in your conclusions reached under C.I or C.I.2 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?***

We are of the view that the fact that Party A has conducted business under the EFET General Agreement on a multilateral branch basis prior to its insolvency would not change our conclusions under points C.I and C.I.2 above (page 12 and 18).

According to the Insolvency Act all fixed assets and current assets, as defined under accounting laws concerning the Party A, must be subject to the insolvency proceedings. In our view this includes assets held by the branches of Party A outside Albania, since Albanian law treats branches of Albanian business entities as part of that business entity, unless the law of the country where the branch of Party A provides otherwise. Accordingly, we believe that the Albanian liquidator will seek to collect, as far as possible and practicable, all assets of Party A worldwide. Certainly, there could be limitations arising under the principles of private international law (including international treaties or state of reciprocity) on the ability of the Albanian liquidator to recover assets located outside Albania.

C.II.1.2 ***Would the EFET General Agreement be treated as a single unified agreement by the Albanian receiver under the laws of Albania, regardless of the treatment of the EFET General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?***

Based on our conclusion under point C.II.1.1 (page 21), we are of the view that the EFET General Agreement will be likely treated as a single unified agreement by the Albanian receiver under the laws of Albania.

C.III COLLATERAL

For the purpose of this section (*Collateral*), we based our opinion on the following additional assumptions provided in the Instruction Letter:

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

The counterparties agree that Eligible Credit Support will include cash, Letters of Credit and Parent Company Guarantee (PCG). 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.

Furthermore, in order to be able to provide more explicit answers and eliminate ambiguity to the extent possible, we further assumed the following:

- Letters of Credit may have the form of a (a) bank guarantee (in Albanian: *“garanci bankare”*); (b) standby letter of credit (in Albanian: *“leter kredie stand-by”*).

- Parent Company Guarantee means the undertaking of the parent company of Party A to pay to Party B any amounts due pursuant to the terms of the EFET General Agreement upon the request of Party B preceded by the default of payment of those amounts by party A.

Furthermore, we understand that among Eligible Credit Supports a distinction is to be made under the laws of Albania between the transfer of Cash, the Letters of Credit, and Parent Company Guarantee. Therefore, the answers to the questions of the present point are, where necessary or practicable, split accordingly.

C.III.1 *Under the laws of Albania, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex.*

At the outset, please note that Albanian law does not stipulate a transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex. Such a transfer would only be possible assets (including cash) are transferred based on a sale, donation or other similar contract which transfers the title over assets. Hence in our view the EFET Credit Support Annex does not enable a transfer of ownership over the various forms of Eligible Credit Support. Instead, the various forms of Eligible Credit Support would be re-characterized as creating a security interest.

With respect to the law chosen by the Parties please note that under the Albanian law the Parties choice of law will be upheld in Albania on the basis of the IPL Act, if one of the parties to the agreement is a foreign entity. If, however all the parties to an agreement are Albanian persons Albanian law shall mandatorily govern the agreement.

Subject to the above, the law applicable to the EFET General Agreement will also govern the EFET Credit Support Annex in the absence of an explicit and clear choice of law in the Credit Support Documents (or later) by the Parties. The reason for this is the accessory nature of the EFET Credit Support Annex to the EFET General Agreement. If the Parties have not either chosen the law applicable to the EFET General Agreement, the international private law rules of the court investigating the EFET General Agreement and the EFET Credit Support Annex will determine which law the EFET General Agreement and thus, the EFET Credit Support Annex is governed by.

C.III.2 *Would the laws of Albania 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?*

C.III.2.1 Cash

Under the Albanian law, a transfer of cash from a bank account of Party A to the bank account of Party B for purpose of security could be interpreted in two ways, as advanced payment to secure the performance of obligations (*in Albanian:* "*kapar*") or as pledge on the movable assets (*in Albanian:* "*peng*").

If the transfer of cash is considered as advanced payment to secure the performance of obligations, the Civil Code (Article 602) provides that in case of failure to fulfil its obligations the party which advances the payment loses the advance payment. Whilst if the party that receives the advance payment fails to fulfil its obligations, it shall be obliged to pay back double the amount of the advance payment.

If the transfer of cash is considered as pledge on the movable asset, then rules of the Civil Code apply. Pursuant to the Civil Code movable properties, including cash, afford their possessor a presumption of ownership of such movable property. However, if cash is granted as collateral by Party A to Party B, based on an written agreement such transfer of cash would not constitute a transfer of ownership over the transferred cash. The pledge on movables can be either established by the transfer of the movable asset to the pledgee (in Albanian: *"peng")* or in a way that pledged movable assets are retained by the pledgor (in Albanian: *"barre siguruese"),* in which case the agreement must be registered with a public registry. However, any agreement between the parties on the transfer of ownership of the pledged asset if the secured obligation becomes due is null and void. Hence a creditor may not acquire ownership of the collateral without enforcement proceedings.

However, we understand pursuant to §7(3) of the Credit Support Annex that the provisions of the Credit Support Annex are not intended to create mortgage, lien, charge, pledge, encumbrances and other security interest in cash. Hence, in our view the Credit Support could be interpreted as transfer of cash, i.e. advance payment, which implies an unconditional transfer of ownership in the cash transferred. However, we believe provisions of the Credit Support Annex should better reflect this understanding.

C.III.2.2 Letters of Credit

Our below analysis is based on the assumption that Letters of Credit under the EFET Credit Support Annex are without exception issued for the benefit of the Transferee with respect to the uncovered exposure concerned of the Party B and the provision of a Letter of Credit cannot be effected by way assignment of an (in favour of the Transferor) already issued Letters of Credit.

(a) Bank guarantee

As a principle, the creditor may transfer the right of enforcement of the guarantee without the guarantor's consent, unless otherwise provided in the terms of the bank guarantee. Even more so, if the wording of the bank guarantee contains that the guarantee is freely transferable, assignable, the transfer of the guarantee is valid. However, a notification of the transfer to the issuer of the bank guarantee is mandatorily required.

However, the transfer of the bank guarantee does not amount to a transfer of ownership. Further to this, we have to note that under the Civil Code a bank guarantee would constitute to be a security interest.

(a) Standby letter of credit

Our analysis below is based on the assumptions that

- Letters of Credit under the EFET Credit Support Annex are without exception issued for the benefit of the Transferee with respect to the uncovered exposure of Party B, and
- the provision of a Letter of Credit is not affected by way of an assignment of any Letter of Credit already issued in favour of the Transferor.

Based on §3(2)(b) of the EFET Credit Support Annex, the Letters of Credit are provided for the benefit of Party B.

By issuing the Letter of Credit in favour of Party B, Party B shall become the sole beneficiary of the relevant Credit Support Document. As a principle, the creditor may transfer the entitlements under the Letter of Credit without consent of the debtor (i.e. guarantor), however the creditor must notify the debtor.

(b) Parent Guarantee

The Parties may generally agree on a right of Party A to substitute the Parent Company Guarantee. This however requires the approval of Party B. Under a Parent Company Guarantee, the parent company's obligation to pay the secured amount to Party B is limited to the amounts arising from the EFET General Agreement and the Individual Contracts arising thereunder.

If the Parent Company Guarantee would be considered as abstract and independent guarantee similar to a bank guarantee, the Parties may generally agree on a right of Party A to substitute the Parent Company Guarantee. However, Parent Company Guarantee creates the abstract obligation of the parent company to pay out to Party B; parent company therefore has a genuine obligation towards Party B. Therefore, the obligation of the parent company may only be amended or terminated by the agreement between Party A, the parent company and Party B.

However, please note that the transfer of the Parent Guarantee does not amount to a transfer of ownership. Further to this, please note that under the Civil Code a Parent Guarantee would constitute a security interest (i.e. surety).

C.III.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 Albania 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?***

Assuming that Party B acquires absolute ownership in the cash (received as an advanced payment) basically no further steps appear to be required under the laws of Albania to ensure that the ownership title of Party B in the cash continues.

C.III.4 ***What is the effect, if any, under the laws of Albania 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?***

Albania law is silent in respect to the right to substitute the collateral, hence the parties are free to stipulate their own terms in this respect.

C.III.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 Albania 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"?***

We understand that assuming that § 11 of the EFET General Agreement is valid and enforceable in Albania 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 will also be valid and enforceable to the extent that it provides for the value of the collateral provided (i.e. the Letter of Credit) to be included in the calculation of a net amount payable under § 11 of the EFET General Agreement as "other amounts payable".

C.III.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 ?***

C.III.6.1 Bankruptcy proceedings

(a) Cash

As mentioned, the outright transfer of ownership over Cash would be recognised by the laws of Albania if such a transfer would constitute an advance payment, but not a collateral.

However, if the cash would be treated as collateral and if it would have already been provided to Party B (i.e. the handover has occurred prior to the commencement date of the bankruptcy proceedings), in the case of the insolvency of Party A, basically the rights of Party B are those of a secured creditor (i.e. the creditor has a right of separation, and the claim of a secured creditor is satisfied with precedence over the collateral).

(b) Letter of Credit

In the case that Party A will draw against Letter of Credits which it was provided with, Party B should be discharged in an amount equal to such drawings pursuant to § 11 of the EFET Credit Support Annex.

Notwithstanding the generality of the foregoing we are of the view that in general if a Letter of Credit is issued directly and expressly for the benefit of Party B as beneficiary (under the EFET Credit Support Annex), then under Albanian law this will constitute a direct legal relationship between the issuing party and Party B. Accordingly, we understand that such Letter of Credit will be valid and enforceable according to its terms and conditions regardless of the commencement of any bankruptcy proceeding concerning Party A.

(c) Parent Company Guarantee

If a Parent Company Guarantee is issued directly and expressly for the benefit of Party B as beneficiary, then under Albanian law this will constitute a direct legal relationship between the issuing party and Party B. Accordingly, we understand that such Parent Company Guarantee will be valid and enforceable according to its terms and conditions regardless of the insolvency of Party A.

C.III.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?***

Under the Insolvency Act, the conclusion or performance of the contracts in the previous 24 months before the initiation of the bankruptcy proceedings may be contested in the insolvency procedure and be invalidated, if a material damage has been caused to the debtor, and an unjustified preference has been afforded to the creditor. In this case the court may decide to return to the insolvency estate any properties that have exited the estate, or annul any entitlements made.

C.III.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 Albania 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 C.III.3 above?***

As previously mentioned, the Civil Code does expressly prohibit the outright transfer of ownership in the collateral to Party B. Any form to circumvent such a prohibition would be null under Albanian Law.

C.III.9 ***Do you have other specific recommendations on the subject of collateral that EFET and its members need to be aware of ? If yes, please provide detailed answer.***

We note that the provisions of the EFET Credit Support Annex pertaining to the Independent Amounts under Section § 5 Subpar. 3 could not necessarily be enforceable, if the Independent Amount is apparently disproportionate (i.e. significantly higher compared) to the Exposure that it intended to cover. Additionally, during the liquidation of Party A other creditors of Party A or the liquidator have the right to challenge such agreements if entered within 24 months before the commencement of the liquidation.

Furthermore, we suggest to remove § 7.1 (*Transfer of Title*) of the EFET Credit Support Annex considering that as per the provisions of the Civil Code it is not applicable.

Furthermore, as the Civil Code the transfer in possession of cash or other property for security purposes is seen as a security interest, and in order to achieve the classification of cash collateral under the EFET Credit Support Annex as an enforceable "*security deposit*" under Albanian law, we suggest that § 7.3 (*No Security Interest*) of the EFET Credit Support Annex is replaced as set out below.

“3. Security Interest: This Annex is intended to create or does create in favour of either party a pledge pursuant to the Albanian civil code in any cash or other property transferred in possession by one Party to the other Party under this Annex.”

C.IV GENERAL ENFORCEABILITY

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

Based on the assumptions and subject to the limitations and opinions set out in this Opinion, the documents listed in point A are generally enforceable under the laws of Albania.

C.IV.1 Non-performance due to Force Majeure (§ 7 of the EFET General Agreement)

Even though the Civil Code does not specifically define force majeure, it is widely used in contractual relations. Under the Albanian law the Parties are free to agree on the terms of their agreement and may depart from the provisions relating to their rights and obligations with mutual consent, unless prohibited by the Civil Code. Thus, the Parties may agree that a force majeure occurrence will result in release from certain obligations and therefore we are of the opinion that § 7 of the General Agreement is valid and enforceable under Albanian law.

We note that the Civil Code regulates the *“impossibility of performance”*, a concept similar to force majeure. According to Article 526 of the Civil Code *“An obligation is cancelled if its fulfilment is made impossible without the fault of the debtor…"*. The reason of the impossibility must occur after the conclusion of the agreement and has to make the performance impossible finally. However the performance of the obligation may also be made impossible partially, and in such a case the obligation for performance rests for the part that can be fulfilled. If performance has become impossible for a reason that cannot be attributed to either of the parties, the monetary value of the services provided before the time when the contract was terminated shall be compensated.

We understand that Force Majeure provisions in § 7 of the EFET General Agreement are deviations from the referred provision of the Civil Code based on the Parties’ freedom of contract.

C.IV.2 Remedies for non-performance (§ 8 of the EFET General Agreement)

Considering the fact that § 8 of the EFET General Agreement regulates the contractually agreed consequences of delivery and acceptance failures on mutual grounds for the benefit of both parties with the same remedy and compensation method, we are of the view that § 8 of the EFET General Agreement, and claims based thereon, will be most likely enforceable and upheld by Albanian courts.

Furthermore, an Albanian court would most likely accept that in case of early termination of the Agreement due to breach of one party, if the object of sale has a daily price, the other party may demand the difference between the price included in the agreement and daily price on the day, when the agreement has been terminated. This based also on the provision of Article 754 which provides that: "*Where the contract has been terminated and as long as, reasonably and within a reasonable time of such termination, the purchaser has made a replacement purchase or the seller has resold the property items, the party seeking the indemnity may seek the difference between the price provided for in the contract and the price of the replacement purchase, …*"

C.IV.3 Limitation of liability (§ 12 of the EFET General Agreement)

According to the Civil Code (Article 479), the limitation or exclusion of liability for damages cannot be contractually agreed in advance, especially for any harm that is caused intentionally or by gross negligence. However, the Civil Code further provides that the parties may provide for a penalty clause on the basis of which the contractual parties can calculate the damages in case of a breach of contract, thus aiming to cap the damages. However, the penalty clause would be valid only if the so capped damages are not obviously disproportionate to actual damage caused.

The existing wording of § 12.3 of the EFET General Agreement does not fully correspond to the relevant provisions of the Civil Code, which invalidates any provisions limiting liability.

C.IV.4 Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be made aware of regarding the general enforceability, from a legal stand point, of the EFET General Agreement and its Credit Support Annex.

§ 13.3 of the EFET General Agreement

The respective provision provides for the payment netting in normal circumstances i.e. during validity of the contract. However, under Albanian law netting is very much similar to set-off as governed by the Civil Code. Under the Civil Code, set-off is not automatic, since it is subject to notification of one party to the other.

§ 19 of the EFET General Agreement

Under the Civil Code assignment of obligations to a third party can be done only with the approval of the other contractual party. Moreover, the assignment of rights to a third party can be done by providing a notification of the assignment to the other contractual party. This means that the rights and obligations under the EFET General Agreement could be validly assigned only with the notification or approval of the other party.

C.V CONFIRMATION PRACTICES

For the purpose of this point, the following additional assumptions were given in the Instruction Letter.

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 posting matching service or other means of electronic transmission).*

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

C.V.1 Binding Individual Contract

C.V.1.1 ***Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization) under the laws of your jurisdiction?***

As a general rule, Albanian law does not require any specific form of communication for entering into an agreement. Therefore, agreements can be concluded either orally or in writing. Moreover, the intent to conclude a contract may also be expressed by conduct that implies such intent. Nevertheless, irrespectively of the form of the agreement, the Parties are obliged to agree on all essential terms of the relevant transaction.

Following from the general principle that there are no formality requirements regarding the conclusion of Individual Contracts, the signature is also not necessary. However, this is highly recommended as under the Civil Code unwritten agreements cannot be proven by witnesses. Hence, putting the Individual Contract in writing is, in any case, highly advisable in order to avoid later disputes regarding the content of the agreement. Similarly, a signature (electronic or otherwise) may help to demonstrate the authenticity and integrity of the agreement and could serve as evidence in case of a dispute.

Moreover, the relevant sublegal acts relevant to electricity trading have provisions which imply indirectly that written contracts are required. For example the electricity market rules provide that the participant to the electricity market is required to indicate the person authorised to sign trading contracts. Consequently, in our opinion the Individual Contract is required to be in writing.

The contract is however not required to be notarised, nevertheless as a matter of general local practice the signatories to the contract should sign each page of the contract.

C.V.1.2 ***At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction?***

An Individual Contract agreed orally becomes legally binding and enforceable as from the time the essential terms of the agreement have been concluded and confirmed in writing.

C.V.1.3 ***Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of your jurisdiction? If so, is there a relevant time period per the laws of your jurisdiction that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?***

Yes, failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms. There is no relevant time period per the laws of Albania that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still.

C.V.1.4 ***Is the reference to the relevant EFET General Agreement made in the relevant written confirmation exchanged (post trade) between the parties sufficient for the inclusion of the Individual Contract in the EFET General Agreement?***

We are of the opinion that a reference to the relevant EFET General Agreement entered into between the Parties is <u>not</u> sufficient for the inclusion of the Individual Contract in the Agreement.

C.V.2 Means of Evidence

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

Under the general rules of Albanian civil procedures, on the one hand, there is no restriction on admissible means of evidence, and the Parties may use any means of evidence which they deem suitable for proving their claim. However, certain types of documentary evidence have increased probative value. Public documents (both paper form and electronic documents) issued by the court, public notary or other authority within their scope of competence in a standard form have direct and primary evidentiary status and probative value. As such, a public document is a true record of the measures, resolutions, facts or declarations asserted or recorded within. Presenting evidence against public documents is limited to the extent permitted by law. Public documents are presumed valid until evidence to the contrary is presented. Private documents with full probable force fully prove that the issuer of the document has made or accepted the declaration contained therein or accepted to be bound by it, as long as the contrary is not evidenced. In order for a document to qualify as a private document with full probable force it needs to meet certain formality requirements (e.g. the document issued by a business association within the scope of its business activity is duly signed by its representatives; alternatively, signature of the issuer is notarized; the electronic document is signed by a qualified electronic signature). Thus, for instance, a facsimile of a Confirmation duly signed by the authorised representative of a party may qualify as a private document with full probable force.

We note that recording telephone conversations is deemed a collection of personal data for the purpose of the data protection law, which requires the prior permission of the person concerned.

C.VI CORE PROVISIONS

Would any of the selections contemplated by the EFET General Agreement or any of the mentioned Annexes (including the EFET Credit Support Annex) change the substance of your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting) above? As far as the EFET Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent. Based on the assumptions and subject to the limitations and opinions set out in this Opinion, we understand that none of the elections as suggested in the EFET General Agreement or any of the above Annexes (including the EFET Credit Support Annex) would change the substance of our conclusions reached under parts C.I or C.II (Enforceability of Close-out Netting). As far as the

EFET Credit Support Annex is concerned, the potential effect of electing to allow substitution with or without consent of Party is indicated in point C.III.4 (page 24) above.

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

We agree that § 1, § 10 and § 11 of the EFET General Agreement are so essential that a material alteration thereof could affect our conclusions reached in respect of the Enforceability of Close-out netting. Beyond this, we believe that § 4 and § 5 determining the subject of the Agreement and the primary rights and oblations of the Parties to the Agreement are also essential, and material alteration thereof could affect our conclusions reached in this Opinion.

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

If we assume that the master netting agreement meets the requirements set out in this legal opinion in Parts C.I and C.II for close-out netting agreements, then our conclusions reached in Parts C.I and C.II will apply appropriately.

On the other hand, due to the lack of any relevant court precedent relating to close-out netting agreements we are not in the position to opine whether or not the referred master netting agreements would qualify for the protection of the Insolvency Act.

C.VII GOVERNING LAW, ARBITRATION AND JURISDICTION

For the purpose of the opinions under this point, we have made the following assumption further to the Instruction Letter.

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

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

The Parties choice of law will be upheld in Albania on the basis of the IPL Act, if there is a foreign element in their legal relationship.

The Parties' agreement on the submission to arbitration or jurisdiction will be upheld in Albania. The resolutions of foreign courts and arbitration tribunals (foreign resolution) are executed on the basis of and to the extent provided by law, international convention or reciprocity, including the provisions of the Albanian Code of Civil Procedure and United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

C.VIII REGULATORY REGIME

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

C.VIII.1 Energy law requirements

As mentioned above in point B.III (page 11) of this Opinion, operations involving the purchase and resale of electricity within Albania or abroad (that is trading in electricity according to the definition of the Electricity Act) require a licence in Albania. The Electricity Act entitles among other traders of electricity to obtain a trader's license.

The holder of a trading licence is required to maintain a permanent office in Albania. Entering into Individual Contracts for the sale and purchase of electricity within Albania without the contracting parties holding the necessary licence from the ERE could result on that contract being declared unlawful based on the Civil Code. Moreover, there is a remote risk that the enforcement of a foreign judgement with respect to the Agreement might be refused by the Albanian courts on the grounds that the entering into the Agreement in violation of the Electricity Act is in contravention of fundamental Albanian laws and thus is against the public order.

C.VIII.2 Foreign exchange requirements

The transfer of funds and other financial assets abroad is generally unrestricted. Although residents and non-residents[1] may transfer funds within and into the territory of Albania without any restrictions, fund transfers outside of the territory of Albania are subject to certain documentary requirements (*e.g.*, a request explaining the reasons of transfer, a contract in fulfilment of which the funds are transferred, and eventually a declaration stating the source of the creation of the funds).

C.IX OTHER PROVISIONS

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

We do not have other recommendations.

[1] For the purpose of the relevant regulation, a "resident" is defined as, *inter alia*, a legal or physical person with permanent headquarters in the Republic of Albania. A "non-resident" consequently is any physical or legal person who is not a "resident".

D. ADDRESSEES, FORM AND TENOR, EXECUTIVE SUMMARY AND OTHER ISSUES

D.I ADDRESSEES

This Opinion is addressed exclusively to EFET and is for the sole benefit of EFET and its Legal Committee members and any other subscribing entities, and may not be relied upon by, or disclosed to, any other person or legal entity without the prior written approval of EFET or Faludi Wolf Theiss, and may be made available by EFET members to the appropriate regulatory authorities. Furthermore, this Opinion be made available by each EFET member to the professional chartered auditor engaged by that EFET member, but exclusively on a non-reliance basis, hence this Opinion may not be relied upon by any such auditor.

D.II EXECUTIVE SUMMARY

Please refer to page 6 of this Opinion.

* * *

Yours faithfully,

Sokol Nako
Wolf Theiss Sh.p.k.

DEFINED TERMS AND INTERPRETATION

Unless otherwise specified in the Opinion, terms defined in the General Agreement and in the Instruction Letter have the same meaning in this Opinion and for the purpose of this Opinion:

"**Banking Act**" means Law 9662/2006 on Banks in the Republic of Albania.

"**Capital Markets Act**" means Law no. 62/2020 on the Capital Markets.

"**Civil Code**" means Law 7850/1994 on the Civil Code in the Republic of Albania.

"**Companies Act**" means Law 9901/2008 on Entrepreneurs and Commercial Companies.

"**Electricity Act**" means Law 43/2015 on Electric Energy Sector.

"**ERE**" means the Albanian Energy and Public Utility Regulatory Authority.

"**Insolvency Act**" means Law 110/2016 on Bankruptcy.

"**Investment Firms Act**" means Law 56/2020 on Undertaking of Collective Investments.

"**IPL Act**" means Law 10428/2011 on International Private Law.

"**Multibranch Party**" means a Party which operates for the purpose of the General Agreement with two or more branches and in two or more jurisdictions.

"**Party**" means a party to the Agreement.

"**Licensing Regulation**" means the Regulation issued by ERE on the procedures and timelines for the issuance, amendments, transfer, renewal and termination of licenses in the energy sector.

INSOLVENCY APPENDIX

Overview of Insolvency Proceedings

D.II.1 Winding-up, Insolvency or Attachment

General Overview

D.II.1.1 *Short overview of the relevant insolvency proceedings, laws and terminology*

Unless otherwise specified, this point D.II.1 describes the relevant insolvency proceedings, laws and terminology applicable to Party A, which is incorporated or organised or has its main centre of interest in Albania.

The rules governing the insolvency proceedings under Albanian law are primarily regulated in the Insolvency Act. The Insolvency Act applies if a party is not an insurance undertaking, credit institution, investment firm or fund, pension fund, and other financial firm or institution, or a public administrative body. Additional specific provisions applicable in the event of insolvency of financial institutions, investment firms/service providers, insurance companies, and investment funds are provided respectively in specific laws regulating banks, insurance companies, and investment firms. Public administration is not subject to insolvency proceedings.

Under Albanian law, the commencement of insolvency proceedings is compulsory for the debtor, and the commencement of the proceedings by the debtor must be done within 60 days from the date the debtor knew or should have known to have become illiquid. The commencement of the proceedings must be done by the members of the management board of the debtor and if they fail to comply with this precept, they face personal exposure to claims by creditors and potentially also other sanctions up to criminal prosecution.

A debtor is under obligation to commence insolvency proceedings without culpable delay once its financial condition meets the statutory criteria for insolvency. Under Albanian law corporate entities are deemed insolvent if they are over-indebted, which means, using a basic formula, that the book value of the company's assets is less than the amount of its liabilities. Alternatively, both corporate entities and any other form of debtor, including individuals, are deemed insolvent if they become illiquid, i.e. unable to pay its debts when due.

The petition to open the insolvency proceedings may be filed by the debtor but also by the creditor if the creditor may establish the insolvency of the debtor.

The Insolvency Act recognizes for business insolvencies three kinds of insolvency proceedings:

- Bankruptcy proceedings (*Procedura e falimentimit me likuidim*), which aim to collectively reimburse the creditors by liquidating the assets of the debtor and distributing the insolvency estate;

- Reorganization plan (Plani i riorganizimit), which aims to preserve and continue the debtor’s business on the basis of a plan for reorganization;

D.II.1.2 Commencement and Handling of Insolvency Procedures.

D.II.1.2.1 The Insolvency Courts

Insolvency proceedings are conducted by the commercial sections of the district court (“hereinafter the Insolvency Court or only the court”), in which the debtor has its legal seat or residence (in case of natural persons). While the powers of oversight, appointment and confirmation placed in the hands of the insolvency judge reflect the court's dominant role in any insolvency, in practice the insolvency administrator is the far more prominent actor in any insolvency.

D.II.1.2.2 Voluntary Commencement

Upon receipt of any petition for the commencement of insolvency proceedings from the debtor itself, the court has to verify that the petition contains sufficient allegations to indicate that the debtor, *prima facie*, appears to be in a state of insolvency (in the technical sense of the word)2 and that there are no formal grounds, including a complete lack of assets, to dismiss the petition.

The petition can be filed by any shareholder, member of the board of directors or any other officer of the financially distressed company. A petition contains typically a schedule of the debtor’s assets as well as a list of the creditors. If the assessment during the preliminary proceedings has proven satisfactory to the judge, the insolvency court issues a formal order for the opening of the insolvency proceedings and also appoints an Administrator. In case of voluntary commencement, the court is directed to issue its order without delay, however no later than 30 days from the filing.

D.II.1.2.3 Involuntary Commencement

In the event that a creditor attempts to put the debtor into involuntary insolvency, the petitioning creditor must make a showing that the insolvency criteria are met. A creditor’s petition is admissible only if he has a legal interest in the opening of the insolvency proceedings. If the petition is admitted, the court ought to schedule a hearing in order to give the debtor an opportunity to be heard. Tax authorities may also file a petition for the commencement of the insolvency proceedings.

D.II.1.2.4 Preliminary Proceedings

Albanian insolvency proceedings are divided into two key phases, particularly preliminary proceedings and opened proceedings. The preliminary proceedings commence once the petition for the initiation of the insolvency proceedings has been filed with the relevant court. During the preliminary proceedings the court has to take all the necessary measures for the avoidance of any detriment to the financial status of the debtor. For instance, the court is entitled to impose a prohibition to prevent the debtor to dispose any of its assets. Most importantly, during the preliminary procedure the court may appoint a preliminary insolvency administrator (not to be confused with the Administrator). The rights and duties of the preliminary administrator depend on whether the court has imposed the general prohibition to prevent the debtor for disposing its

[2] If not all of the managing directors entitled to represent a corporation sign the petition, the court may conduct further instigations to ascertain whether the debtor is, in fact, insolvent.

assets. If so, the preliminary administrator has the right to administer and transfer the debtor's assets. He will manage the debtor's business and provide the court with a report on whether (i) there are reasonable grounds for the opening of the insolvency proceedings, (ii) the debtor's assets cover the costs of the insolvency proceedings, (iii) it is necessary to impose any restrictions on the transfer of the debtor's assets, and (iv) it is possible for the continuation of the debtor's activity.

D.II.1.2.5 Opened Proceedings

Having examined the preliminary administrator's report, the court must rule to open the insolvency proceedings if the insolvency criteria set out above are met. Nevertheless, the court may refuse to open the insolvency proceedings if there are insufficient assets to cover the costs of the proceedings. A refusal for lack of assets typically leads to the dissolution of the debtor's company. In the event that the insolvency proceedings are opened, the court will appoint a permanent administrator (hereinafter the Administrator) who will become responsible for the insolvency estate. The court may appoint the same person who acted as preliminary administrator to be the Administrator, and the decision for the opening of the proceedings is registered with the real estate registration office.

The decision of the court to either open or not open bankruptcy proceedings may be challenged by the debtor or the creditor that has requested the opening with the court of appeals. If the bankruptcy proceeding is closed based on the decision of the court of appeals the actions of the Administrator or of third parties up to the date of the decisions remain valid.

D.II.1.2.6 Assets and the insolvent estate

The insolvency estate includes all present and future property of the debtor, with the exception of that portion of the debtor's property and income that is needed by the debtor and his dependents to cover their living expenses. Any person with property rights over assets included in the insolvency estate may ask for a separation of such property from the estate.

The insolvency administrator may challenge any actions or omissions that affect the right to distributions from the insolvency estate. Transactions up to two years before the opening of the insolvency proceedings could be challenged if they grant security or privileged rights to a creditor, are detrimental to the creditors, are intentionally harmful, or represent debtor's gratuities and cash transactions. Not at arm's length transactions would be challenged as such.

Persons related to the debtor are presumed to be aware of the debtor's inability to pay and of the detrimental effects on insolvency creditors.

D.II.1.2.7 Set-off

Set-offs are primarily governed by the Civil Code and are possible in cases involving mutual claims that are due and payable. Provided that a set-off situation existed based on the law or an agreement that was in place prior to the opening of the insolvency proceedings, the respective creditor remains entitled to declare his set-off after such opening. A set-off is excluded if an insolvency creditor (i) becomes a debtor of the insolvency estate after the opening of the insolvency proceedings, (ii) acquires the claim from another creditor following the opening of the insolvency proceedings, (iii) the insolvency estate has a claim against a secured creditor (no secured creditor is entitled to set-off his claim against a direct claim from the insolvency estate).

D.II.1.3 Effects of the opening of the insolvency proceedings on contracts

As a general rule the opening of insolvency procedures does not affect contracts under which both the debtor and the other party do have unperformed obligations. Moreover, the Insolvency Act expressly provides that contract provisions setting forth the automatic termination of a contract due to the opening of insolvency procedures are void.

There are, however, some contracts that an insolvency administrator may not continue, such as contracts referring to fixed-time transactions, the delivery of goods and financial activities[3], etc. Such contracts will be considered terminated and claims for non-performance can be asserted against the insolvent estate. The same applies also with respect to any financial exchange with market price or stock exchange.

Contracts that may continue include rent contracts for immovable property that benefit the insolvent estate. If the debtor is the lessor, the lessee cannot terminate the contract after the opening of insolvency proceedings for claims preceding the opening of the insolvency proceedings. Possible claims regarding obligations preceding the insolvency proceeding's start date will be satisfied from the insolvent estate. On the other hand, claims of the lessee with respect to the rent after the opening of the insolvency proceedings are considered administrative expenses. Also, the lessee can terminate the contract is rent is not paid after the opening of insolvency proceedings.

D.II.1.4 Court Proceedings and Executions

Following the opening of insolvency proceedings, an automatic stay of any enforcement actions involving assets belonging to the estate comes into effect. However, pending court proceedings may continue until final decisions are rendered.

D.II.1.5 Bodies in the insolvency proceedings

D.II.1.5.1 The Administrator – Appointment and Responsibilities

The Administrator appointed by the court in its order for the opening of insolvency proceedings assumes a central oversight and management function in any type of insolvency proceedings. In a generic insolvency case the court's order for the opening of the proceedings cuts off the debtor's (management's) authority to represent the bankrupt entity and to make any dispositions in respect of its assets and liabilities and the Administrator steps in the shoes of the debtor. By contrast, in the event of Self-administration where debtor will be in possession of the estate, the administrator's role (there called Supervisor) is limited to supervising the debtor (approving or vetoing certain transactions), as the debtor retains a limited legal capacity to act on behalf of the insolvent entity.

Under the Albanian Insolvency Act, the Administrator must be a natural person with particular experience in business affairs and independent from the debtor and creditors. In particular, the Administrator must be certified as a jurist, notary public or economist. Typically, Administrators are recognized by the courts and their peers for their expertise in insolvency matters and a certain degree of business experience. Administrators are personally liable in case of malfeasance or negligence. The Administrator's compensation is determined by the court by means of an order.

3 Financial activities include activities with precious metals, securities (but not shares) and any kind of payments.

Relevant factors are the value and volume of the estate and the degree of difficulty faced by the Administrator throughout the insolvency proceeding.

The main duties of the Administrator in bankruptcy proceedings include:

- the preparation of a statement of affairs, listing the assets and liabilities of the debtor as per the date of the order initiating the bankruptcy proceedings;
- the evaluation the financial situation of the debtor and the compilation of a short report to court and the creditors (creditors' committee, if one is established) on the debtor's financial status and the possibility to continue the debtor's business, even if only temporarily;
- the recording of all creditors' claims in the insolvency schedule;
- the discharge of all statutory duties as the employer of the debtor's employees;
- the liquidation of the debtor's estate;
- the challenging of any transactions concluded prior to the commencement of bankruptcy proceedings which may be challenged based on the right of avoidance (see below);
- the reporting of any matters relating to the debtor's business to the court; and,
- the representation of the estate in and out of court.

By contrast, a reorganization plan do not deprive the debtor of its authority to carry out transactions with respect to the estate, provided that these powers are shared with the Administrator in the sense that there are certain transactions and measures reserved for the Administrator (e.g., bringing a preference action). However, if the conditions for reorganization are not met or the reorganization is terminated, the regular regime with the Administrator being in charge will apply uniformly.

D.II.1.5.2 The Creditor's Committee

The court may initially appoint at its own discretion a creditor’s committee, composed between three and five members. It represents the interests of insolvency creditors, except for subordinated creditors. The creditor's meeting may at any time replace the members of the creditor’s committee. Additionally, the committee might comprise a representative of the debtor’s employees if the debtor has more then 20 employees and the representative is entitled to a vote only if he or other employees of the debtors are creditors.

The creditor’s committee shall monitor and support the Administrator’s management of the insolvency proceedings. The committee can require information on the progress of the business affair, have the books and the business documents inspected and the monetary transactions and available cash verified. Moreover, the committee is accountable to inspect the creditor’s rights to participate in the proceedings and to ensure that the Administrator exercises his powers and duties in conformity with the statutory provisions. Members of the committee are liable for any damages occurred if they wrongfully failed to perform the abovementioned duties.

D.II.1.5.2.1 Creditors' Meeting

The creditors’ meeting is the most important body once the insolvency proceedings are opened. The meeting pursues the interest of the creditors in relation to the debtor, the Administrator and the court. The creditors’ committee is entitled to determine and enforce the joint interests of the creditors. The first creditor's meeting is convened by the court. All creditors with a right to separate satisfaction, the insolvency creditors, the members of the creditor’s committee, Administrator and the debtor are entitled to attend the creditors’ meeting. In principle, the meeting is responsible to make the main decisions in regard to the insolvency proceedings that are commonly binding for the Administrator. Its primary function is to approve or reject a plan of reorganization.

D.II.1.6 Ranking of creditors

Creditors in a insolvency proceeding are classified into: (i) creditors of the insolvency proceedings and (ii) insolvency creditors.

Creditors of the insolvency proceedings are those creditors who have claims related to expenses made in the insolvency proceedings such as court expenses, temporary administrator or Administrator fees, approved expenses related to the members of the creditors committee, living expenses covering essential needs of the debtor if an individual during the insolvency proceedings, financial loans afforded to the debtor or amounts owned by the debtor for obligations approved by the Administrator and undertaken after that the start of the insolvency proceedings, and similar amounts.

Insolvency creditors are the following:

- Secured creditors who have secured their obligations based on mortgages, pledge, and securing charge agreements, or other forms of securitisations;

- Preferred creditors who have a claim from the termination of their employment agreement up to three months before the filing of the petition for the start of the insolvency proceedings but not exceeding ALL 500,000; living expenses covering essential needs of the debtor if an individual before the start of the insolvency proceedings; health claims of the employees of the debtor; indemnifications owned by the debtor due to damages caused to the life or health caused to third persons before the start of the insolvency proceedings; tax obligations due up to one year before the start of the insolvency proceedings.

- Unsecured creditors are juridical entities or individuals having claims which can not be classified as claims of secured, preferred or subordinated creditors; and

- Subordinated creditors with claims regarding sanctions on late payments claimed before the start of the insolvency procedure, penalties issued based on the provisions of the Civil Code, administrative and penal legislation, payment of debts to persons related to the debtor, if the lender was related to the debtor at the time of the creation of the debt; and loans for which the creditor and the debtor have agreed to be subordinated.

Payment of the creditors of the insolvency proceedings take priority over other creditors and should be mad when the payment is due.

Insolvency creditors' claims will be satisfied from the insolvent estate in the proper order of priority, starting with secured creditors (i.e. those who have pledges or rights over collateral that guarantees their credits, such as a mortgage). The claims of so-called preferred creditors will be satisfied next, followed by unsecured and lastly subordinated creditors. Creditors of the same rank are paid proportionately.

D.II.1.7 Procedure for filing claims

The court's decision on the opening of insolvency proceedings will request that all creditors present their claims to the insolvency administrator within a prescribed period of time of 45 days. In the meantime, the court can take security measures to avoid worsening the debtor's financial state.

The Insolvency Act does not prohibit any class of creditors from filing claims in insolvency proceedings. The status and amounts of all claims will be examined by the Administrator, which and presented within twenty days after the deadline for filing claims. Secured creditors should provide detailed information on the collateral and origin of the claim.

If the insolvency administrator the debtor or a creditor opposes any claim, such claims will be subject to further consideration and will be dealt with individually in the insolvency court. If the court's decision is favourable to the disputed claim, the claim will be added to the insolvency schedule. All undisputed claims are registered in the insolvency schedule and thereby provide an enforceable instrument for execution against the insolvency administrator and creditors..

D.II.1.8 Reorganisation Plan

Insolvency proceedings may result in a reorganisation plan (the "Plan"), which is an agreement intended to fulfil the claims of creditors and/or reorganise, rescue, liquidate, preserve the activity of the insolvent company, or offer an alternative to liquidation, when possible.

The Plan may be proposed by the debtor or by the insolvency administrator, but no later than at the final meeting of creditors. The creditors' meeting may also assign the insolvency administrator with the task of preparing a reorganisation plan that reflects the comments of all interested parties.

The Plan must set forth the measures undertaken after the start of insolvency proceedings and the effects it will have. It must also address the satisfaction of claims, without affecting the rights of secured creditors (whose satisfaction would not be part of the insolvency proceedings, unless otherwise provided by the Plan). The Plan must satisfy creditors' claims as provided by the Insolvency Law (i.e. secured creditors, if their rights are affected by the plan, followed by insolvency creditors, and then subordinated creditors).

The Plan requires court approval, which will not be granted if, *inter alia*, it was not initiated by the persons authorised to do so (the debtor and the insolvency administrator), there is little chance that it will be approved by the creditors, it is opposed by the majority of secured creditors, etc.

In the meantime, any distribution or disposal of insolvency assets that adversely affects the reorganisation plan may be suspended by the court if so requested by the debtor or the insolvency administrator, and in a later stage can be reinitiated at the request of the insolvency administrator with the approval of the Creditors' Committee or Meeting.

The Plan and its schedules should be kept with the insolvency court and may be freely reviewed by the interested parties. The Creditors Meeting should discuss the Plan and voting rights of creditors on the date fixed by the court. At the conclusion of the meeting, the court bailiff shall list all the creditors with voting rights. This date is also made public and some interested parties are individually notified.

The creditors with voting rights are invited to vote on the plan and each group of creditors votes separately. In each group, the majority of creditors with voting rights and the creditors representing more than half of the claims' value must approve the plan in order for it to be approved. The Insolvency Law provides certain cases that make it difficult for creditors to block a fair Plan. The plan also requires the debtor's consent and must be finally approved in a court decision, which is appealable. If the Plan provides for conditions, it cannot be approved until such conditions are fulfilled.

The implementation of the Plan is directly supervised by the insolvency administrator and certain actions by the debtor may require the approval of the insolvency administrator as agreed to in the Plan, but the Creditors' Committee and the court will also continue to have an active role and may ask to be kept informed by the insolvency administrator of the Plan's present or future implementation.

During the period of supervision, the debtor can continue to obtain new loans, subject to the approval of the insolvency administrator, up to the value that its assets permit satisfaction of all insolvency and new creditors. The new creditors will rank higher than other creditors of the insolvency estate, if the Plan so provides. Creditors' whose rights arise from contracts entered into during the supervisory period will have priority over other creditors, even if new insolvency proceedings are initiated during the supervisory period.

The supervisory period is terminated by a court decision and such decision is made public if the supervision is no longer needed because the claims are satisfied or secured, or if no other insolvency proceedings petition has been filed three years after closure of the insolvency proceeding.

Voluntary dissolution proceedings (in Albanian: *"likujdim vullnetar"*)

Voluntary dissolution proceedings of a solvent entity are regulated in the Companies Act. The purpose of such proceedings is to satisfy the creditors before dissolving the solvent entity upon the voluntary decision and request of the members of the entity.

Although the initiation or institution of voluntary dissolution proceedings does not have direct adverse effect on creditors' rights, for practical reasons we are of the view that it is advisable to link early termination right also to the occurrence of voluntary dissolution proceedings. In this way creditors can better ensure the satisfaction of their claim without risking that the voluntary proceedings turn into insolvency proceedings. This happens if in the course of the voluntary dissolution proceedings it turns out that the company's assets are insufficient to cover creditors' claims, and the members fail to supply the necessary funds. In this case voluntary dissolution proceedings turn into insolvency proceedings.

APPENDIX A

Types of Counterparties

The Instruction Letter required us to base our opinion on the assumption that Party A is an entity of the following types:

- Corporations (e.g., a limited liability company, stock corporation)
- Partnerships (e.g., a general or limited partnership)
- Banks/Credit Institutions
- Investment Service Providers/Investment Firms
- Insurance Companies
- Investment Fund Management Companies
- Other Financial Institutions
- Municipalities or Counties
- Associations of Local Government
- Publicly-owned Corporations
- Quasi Governmental Entities

As further analysed in point B.III (*Potential Parties*, page 11) of this Opinion, based on the Electricity Act's broad definition of trading in electricity, which does not narrow the scope solely to physical trading in electricity, we can conclude that any type of trading in electricity, let it be physical or cash-settled, requires the trading licence from the ERE. Consequently, the scope of potential parties is limited to those parties, who are eligible for obtaining the electricity trading licence. Trading in electricity (that is for-profit business operations involving the purchase and sale of electricity and the related capacity for purposes other than own use, as defined by the Electricity Act) is an activity subject to licence in Albania. From a corporate law viewpoint this limits the scope of potential counterparties to those types of entities (corporations, and partnerships)) which are eligible for obtaining the necessary licence (publicly-owned corporations are principally treated in the same way as ordinary corporations).

Moreover, municipalities are also allowed to undertake energy trading activities and be licensed by ERE. However, not so associations of local government, and quasi-governmental entities. However, these entities (including municipalities) are excluded from the application of insolvency proceedings and considering the lack of legislation in this respect we are unable to provide some of the answers required under this Opinion in respect to these entities.

Also investment service providers/investment firms, investment fund management companies/other financial institutions may in theory undertake activities involving trading in electricity. However, due to the underdeveloped investment markets, in practice investment firms are quite rare in Albania, with quite sporadic or quite limited activity, and to our best knowledge none of such companies undertakes electricity trading activities or perform the Transactions under the EFET General Agreement described in Appendix B.

On the other hand, under the Banking Act, banks and credit institutions are expressly excluded to perform activities such as trading of electricity. Hence, banks and credit institutions can not undertake the transactions under the EFET General Agreement envisaged in Appendix B. The same goes also with respect to insurance companies.

Finally, it is important to emphasise that further to the requirements of the Licensing Regulation Party A is required to be an entity incorporated under the laws of Albania. As further detailed under point C.VIII (*Regulatory Regime*, page 32), foreign entities may not engage in trading in electricity in Albania without having a permanent establishment in Albania. Therefore, potential parties may not be entities incorporated under a foreign law.

Summarising the above, this Opinion is solely given in respect of

- corporations incorporated, organised or established in Albania in accordance with the laws of Albania in the form of a general partnership, limited partnership, limited liability company or stock corporation;

- Albanian subsidiaries of foreign entities.

APPENDIX B

Transactions under the EFET General Agreement

Commodity Forward

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

Commodity Option

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

Commodity Swap

A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity. The swap may either be settled by physical delivery of the quantity of Commodity or it may provide for cash settlement.

Physical Commodity Transaction

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

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