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MEMORANDUM
STRICTLY PRIVATE AND CONFIDENTIAL

To	EFET- European Federation of Energy Traders
Subject	**Legal Opinion regarding Master Netting and related Cross-Product Support Documentation**
From	DLA Piper UK LLP
Date	7 April 2021

1 Instructions / Scope

We have been asked by EFET to provide a legal opinion on, among other things, the enforceability of the close-out netting and collateral provisions of the following documents:

- The Cross Product Master Agreement published in February 2000 by the Bond Market Association (the "**CPMA Form**") as further modified by Version 1.0 of the European Commodities Schedule published on 23 June 2003 by EFET/ International Energy Credit Association ("**IECA**") (the "**Schedule**") (collectively, the CPMA Form as modified by the Schedule is referred to as the Cross Product Master Agreement (the "**CPMA**"),
- the Cross-Product Credit Support Annex to the CPMA published by EFET on 23 June 2003 (the "**CPMA CSA**"),
- the Master Netting Agreement published by EFET in June 2010 (the "**MNA**") (collectively, the CPMA and the MNA are referred to as the "**Master Agreements**"), and
- the Credit Support Annex to the MNA published by EFET in February 2011 ("**MNA CSA**") (collectively, the CPMA CSA and the MSA CSA are referred to as the "**CSAs**").

The Master Agreements and the CSAs, with the elections as set forth in each of the Model Master Agreements are together referred to as the "**Agreements**".

The Agreements provide for inclusion of certain master agreements eligible of election as well as uncovered transactions and additional netted agreements. We have not reviewed any of these master agreements or other transaction documents or agreements for the purposes of this legal opinion. Accordingly, we render no opinion in relation to these agreements.

In detail, the questions to be opined on are outlined in Section 6 below.

2 Status of opinion

2.1 This opinion is addressed exclusively to EFET and its members who have subscribed to the EFET Legal Module, is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other persons without EFET's prior written approval.

2.2 This opinion relates only to the laws of Germany as they exist and are interpreted at the date of this letter. We do not assume any obligation to update this letter and we express no opinion as to the laws of any other jurisdiction and none is to be implied. We express no opinion on European Union law as it affects any jurisdiction other than Germany.

2.3 In this letter German legal concepts are addressed in the English language and not in their original German terms which may not be identical in their respective legal understanding. Where a German translation has been added to an English term, such translation shall prevail throughout this letter.

2.4 We assume no obligation (a) to advise you of any change in law occurring or taking effect after the date of this letter which may or may not change any opinion expressed below in this letter or (b) to update this opinion.

2.5 We have rendered our opinion on the Default Elections, selected Underlying Agreements and assumptions set forth in Section 4. Where individual counterparties choose to move away from the model form of relevant documentation upon which the opinion is based, it will be up to them to satisfy themselves (by obtaining their own supplemental opinions or otherwise) that their particular form of Master Agreement and/or relevant CSA is still valid and enforceable.

3 List of abbreviations

Agreements	the Master Agreements and the CSAs
Additional Netted Agreement	shall have the meaning as given to such term in the MNA
Banking Act	the German Banking Act (*Kreditwesengesetz* - KWG)
Capital Investment Act	the German Capital Investment Act (*Kapitalanlagegesetzbuch* – KAGB)
Cash	shall have the meaning as given to such term in the CSAs
Civil Code	the German Civil Code (*Bürgerliches Gesetzbuch* - BGB)
Code of Civil Procedure	the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO)
Core Provision	those contractual provisions indicated in Section 4.10
CPMA	the Cross Product Master Agreement published in February 2000 by the Bond Market Association (the "**CPMA Form**") as further modified by Version 1.0 of the European

	Commodities Schedule published on 23 June 2003 by EFET/ International Energy Credit Association ("**IECA**") (the "**Schedule**")
CPMA Form	the Cross Product Master Agreement published in February 2000 by the Bond Market Association
CSAs	the CPMA CSA and the MNA CSA
Default Elections	the Schedule / Election Sheet elections and specific Underlying Agreements as further specified in Annex B of this opinion letter
EFET	the European Federation of Energy Traders
IECA	the International Energy Credit Association
Insolvency Adminstrator	a court appointed insolvency administrator in case of regular insolvency proceedings as well as a court appointed trustee in case of debtor-in-possession proceedings.
Insolvency Code	the German Insolvency Code (*Insolvenzordnung* - InsO)
Insurance Supervisory Act	the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz* - VAG)
ISDA	the International Swaps and Derivatives Association
Letter of Credit	shall have the meaning as given to such term in the MNA
Master Agreements	the CPMA and the MNA collectively
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MNA	the Master Netting Agreement published by EFET in June 2010
MNA CSA	the Credit Support Annex to the MNA published by EFET in February 2011
Schedule	Version 1.0 of the European Commodities Schedule published on 23 June 2003 by EFET/ International Energy Credit Association

Section	refers to a section of this opinion letter
Uncovered Transaction	shall have the meaning as given to such term in the CPMA
Underlying Agreement	the designated Principal Agreements/Netted Agreements under the CPMA respectively the MNA as indicated in the Default Elections

Capitalised terms used without definition in this opinion letter have the meanings given to those terms in the Agreements.

4 Assumptions

For the purposes of our analysis, we have assumed the following:

4.1 Only those Underlying Agreements as indicated in the respective Default Elections and the commodities/financial instruments commonly traded thereunder will be covered by the relevant model Master Agreement. On the basis of the terms and conditions of the relevant Master Agreement, the relevant Underlying Agreement (if applicable) and other relevant factors, and acting in a manner consistent with the intentions stated in the relevant Master Agreement and the relevant Underlying Agreement (if applicable) the Parties over time may enter into a number of transactions that are intended to be governed by the Master Agreement either as transactions entered into under the relevant Underlying Agreement or as Uncovered Transactions/Additional Netted Agreements (where such Uncovered Transactions/Additional Netted Agreements will only include long form confirmations incorporating, in substantially their original form, the terms and conditions of the Underlying Agreements in either Division 1, Part 1, Section A of the Default Elections of the CPMA or in the Additional Netted Agreement Rider at Part III of the MNA Election Sheet). The transactions entered into will include any or all of the transactions described in Annex A hereto. We have not considered whether any other agreements and or commodities will be included in or covered by the model Master Agreement for purposes of our opinion.

4.2 Each of those Underlying Agreements and each Uncovered Transaction/ Additional Netted Agreement is valid, binding and enforceable in accordance with its own respective terms and conditions save in respect of Sections 6.2.9 and 6.2.18. lit. d) as indicated below.

4.3 Each Close-Out Event specified as applicable pursuant to: (i) in respect of the CPMA, the Election for Division 1, Part II, Section A of the model Schedule; or (ii) in respect of the MNA, the Election for Section 3.1, Part I of the Election Sheet is an effective and valid Event of Default under the applicable Underlying Agreement.

4.4 CSA Assumption: Each CSA, upon which we were asked to opine, only contemplates the use of Cash or Letters of Credit (including bank guarantees) as Eligible Credit Support and the scope of our opinion is limited accordingly. We have therefore assumed that Eligible Credit Support provided under each CSA will only take the form of either Cash or Letters of Credit. When addressing any questions relating to the rights of a transferor to retrieve collateral from an insolvent entity, we have assumed that the insolvent entity is incorporated or organized under the laws of Germany. We have also assumed that Cash collateral is denominated in a freely convertible currency and is held under the control of the transferee.

4.5 Each CSA and Master Agreement are entered into by two entities, at least one of which is a corporation (including a bank or other similar financial institution) duly incorporated or organized under the laws of Germany (or has its center of main interest in Germany).

4.6 Multi-branch assumptions: (i) For the purposes of addressing the multi-branch issues at Section 6.4.1 below, we have assumed that a counterparty is incorporated or organized in Germany but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered overseas offices in other jurisdictions; and (ii) For the purposes of addressing the multi-branch issues at Section 6.4.2 and 6.4.3 below, we have assumed that an overseas counterparty is incorporated or organized outside Germany but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered offices in Germany.

4.7 Where the Agreements refer to certain provisions of the Underlying Agreements, we have for the purpose of our analysis relied upon relevant industry opinions on the Underlying Agreements (e.g. those available from EFET and ISDA).

4.8 Scope of counterparty types: We have considered the enforceability of each Master Agreement and CSA against: (i) a corporation; (ii) a bank/credit institution (as defined under Article 4(1) of the Capital Requirements Regulation; and (iii) an investment firm (as defined under Article 4(1) MiFID II, each registered under the laws of Germany.

4.9 We have rendered our opinion on the basis of the Schedule / Election Sheet elections and specific Underlying Agreements ("**Default Elections**") as further specified in Annex B which together form a 'model' CPMA respectively a 'model' MNA.

4.10 Any provisions of each Master Agreement (other than those elections and provisions set forth above) that we deem crucial to our opinion (each such provision a "**Core Provision**") have not been altered in any material respect. We have considered the following provisions as Core Provisions:

- In respect of the MNA: § 2.1, § 2.3, § 4, § 6, § 7 and § 8 and all defined terms relevant for such provisions.

- In respect of the CPMA: section 2, section 3 and section 4, section 10.6 and all defined terms relevant for such provisions.

In addition to the general assumptions above, together with the specific assumptions referred to in Section 6 below, which originate from the instruction letter of EFET dated 2 July 2020, we have assumed the following:

4.11 The Master Agreements provide in a number of provisions that the Underlying Agreements shall be amended in line with certain provisions of the Master Agreements (see e.g. § 4 no. 1 and § 7 no. 3 of the MNA). We do not opine on whether or not the Underlying Agreements are validly amended by the Master Agreements as this is a matter to be verified under the terms of the relevant Netted Agreements.

5 Executive Summary

The following summary does not form part of the opinion and is given for the purposes of convenience only.

- The legal concept of close-out netting is recognized under German law.

- Contractual termination based on non-insolvency related termination events will generally be enforceable if exercised prior to the opening of insolvency proceedings.

- Termination rights based on insolvency related termination events should generally be enforceable with respect to privileged transactions falling in the scope of section 104 of the Insolvency Code, i.e. transactions being either a fixed date transaction or a financial transaction.

- Privileged transactions can be terminated in case of an insolvency related termination event either by notice or by automatic early termination.

- Privileged transactions which will neither be terminated by notice nor by automatic early termination will end upon the opening of insolvency proceedings due to statutory law.

- Non-privileged transactions will not per se be terminated in case of the opening of insolvency proceedings but will become subject to the Insolvency Administrator's right of choice, i.e. the right to choose whether to perform or to refuse performance of a mutual contract. Where the Insolvency Administrator chooses to refuse performance of a contract, the respective creditor will become creditor of the insolvency estate ranking *pari passu* with other (unsecured) creditors (to the extent any granted security (i.e. Cash or Letter of Credit) does not entirely cover its outstanding claims).

- With respect to transactions falling in the scope of section 104 of the Insolvency Code, the determination of the Final Net Settlement Amount should generally be enforceable in case of an insolvency.

- Notwithstanding the above, a number of legal elements in the context of close-out netting could still be subject to challenge rights by the Insolvency Administrator in the meaning of sections 129 et seqq. of the Insolvency Code where these acts would be disadvantaging to other creditors.

6 Legal Opinions and Legal Analyses

6.1 Netting / Set-off Absent An Insolvency

Model CPMA / Model MNA

6.1.1 Your opinion on whether a transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement would be validly included in each model Master Agreement, assuming either a choice of English or German law as governing such documents (save of the trading terms and conditions of the 2015 NBP Master which is governed by English law)? Please elaborate if your analysis depends on whether or not the relevant transaction: (i) was concluded before or after the execution of each Master Agreement; or (ii) makes explicit reference to a Master Agreement or the relevant Underlying Agreement.

Under German law, where relevant transactions entered into under an Underlying Agreement or Uncovered Transactions / Additional Netted Agreements are intended by the contracting parties to be governed by a model Master Agreement, those transactions would be validly included in the relevant model Master Agreement. In this respect, it does not make any difference whether the transaction concerned was concluded before or after the execution of the relevant model Master Agreement. An explicit reference to a Master Agreement or the relevant Underlying Agreement would not be a strict legal requirement for the inclusion of a transaction in the model Master Agreement. However, for the purposes of legal certainty and evidence, it seems advisable to include explicit reference in the individual transaction to the relevant Underlying Agreement at least (which could e.g. be done by making use of a sample Confirmation attached to a relevant Underlying Agreement).

However, as far as Underlying Agreements or Uncovered Transactions / Additional Netted Agreements are not governed by German law, the law governing the respective agreements/transactions would also determine the circumstances under which such contract may be included in the relevant model Master Agreement.

6.1.2 Your opinion regarding the legality, validity and enforceability of each model Master Agreement (absent an insolvency of either party) to the netting and set-off of obligations due between the parties:

a. under one or more physically settling transactions involving the same commodity or product,

b. under one or more physically settling energy transactions involving two or more different classes or types of commodity or product, and

c. under a combination of physically and financially settling transactions (transacted under two or more Underlying Agreements);

German law generally recognises contractual close-out netting agreements and set-off of obligations due as stipulated in the model Master Agreements (subject to certain limitations described in Section 6.1.4 below).

The netting provisions as indicated in the model Master Agreements can be understood as an agreed legal concept to create a set-off situation insofar as all rights and obligations of outstanding, i.e. not fully settled, transactions covered by the respective netting agreement are converted into mutual payment claims of similar nature. Absent an insolvency situation, due to such conversion into payment claims, it should be of no relevance whether such payment claims actually derive from transactions relating to the same commodity/product or relating to different classes or types of commodity/product or whether such payment claims derive from physically or financially settled transactions or a combination thereof.

We express no opinion on this as far as English law would be specified to govern the respective model Master Agreements.

6.1.3 An analysis and your opinion regarding the necessity or efficacy of performing any due diligence (i.e., lien searches, filings etc.) prior to a party entering into each model Master Agreement.

Engaging in due diligence activities prior to entering into any trading agreement with a counterparty (e.g. regarding a potential insolvency, creditworthiness etc.) seems reasonable. We do however not see any special due diligence requirement prior to entering into a model Master Agreement.

6.1.4 A general discussion of, and your opinion regarding, your jurisdiction's laws relevant to the concepts of close-out netting and set-off of claims between parties, combinations of accounts or such other terminology as is employed in your jurisdiction to address such issues.

a) Set-off

Set-off is a legal instrument under German statutory law which allows for the discharge of two corresponding obligations of the same nature. The general statutory rules governing the prerequisites, consequences and restrictions of set-off are contained in section 387 et seqq. of the Civil Code.

Section 387 of the Civil Code stipulates that where two persons owe each other performance that is substantially of the same nature, each party may set-off its claim against the claim of the other party as soon as it can claim the performance owed to it and effect the performance owed by it. Accordingly, a set-off is only possible in case of the existence of a so-called set-off situation (*Aufrechnungslage*) which again requires that the following four preconditions are fulfilled:

- Two parties have claims against each other (mutuality - *Gegenseitigkeit*),
- the relevant claims are of similar nature (similarity - *Gleichartigkeit*),
- the claim of the party declaring set-off is valid, due and enforceable (*Durchsetzbarkeit der Gegenforderung*), and
- the claim of the other party, against which set-off is to be effected, may be fulfilled (*Erfüllbarkeit der Hauptforderung*).

Set-off is effected by declaration to the other party (*Aufrechnungserklärung*) which may not be made subject to a condition or a stipulation as to time (section 388 of the Civil Code).

Pursuant to section 389 of the Civil Code, the effect of set-off is that the claims, to the extent that they correspond, are deemed to expire at the time when they are set against each other as being appropriate for set-off (whereby this should practically refer to the earliest point in time at which the requirements for a set-off situation outlined above have been fulfilled).

There are a number of statutory exemptions in which set-off shall not be possible. Relevant legal exemptions specifically include the inadmissibility to set-off against damages relating to tort (see section 393 of the Civil Code) or the limitation to set-off against the equity injection obligation of a shareholder (see section 19 para. 2 of the German Limited Liability Companies Act).[1]

b) Close-out netting

Close-out netting can be understood as a contractually agreed mechanism to reduce the exposure in trading relationships by way of discharge of mutual obligations. It is not to be understood as distinct legal or statutory concept under German law but rather consists of a number of legal elements, i.e. the

[1] Furthermore, a number of statutory provisions may limit set-off with respect to certain entities such as insurance companies (see section 130 para. 2 of the Insurance Supervisory Code) and investment management companies (see section 93 para. 6 of the Capital Investment Code).

termination of outstanding and not yet due transactions, the determination of the values of such transactions respectively the calculation of respective compensation claims and the netting/set-off of such claims.

Close-out netting deviates from the statutory concept of set-off insofar as the (original) obligations subject to close-out netting do not necessarily have to be due or of similar nature. Instead, a major element of close-out netting is to create a set-off situation by way of converting outstanding and not yet due obligations into mutual due payment claims.

CPMA CSA / MNA CSA

6.1.5 Your opinion on whether the laws of your jurisdiction characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that such transfer would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under each CSA. If so, please opine on whether there is any way to minimize such risk and the consequences of such a re-characterization to ensure the valid transfer of each type of Eligible Credit Support created by the providing party under each CSA.

In the case of a Letter of Credit, no ownership (in assets) is being transferred. Instead, a Letter of Credit rather encompasses only a contractual obligation of a bank to make a specified Cash payment to the transferee, provided that certain specified preconditions are fulfilled, in order to secure the payment obligations of the transferor towards the transferee. Accordingly, the transferee is still exposed to counterparty risks regarding the provider of the Letter of Credit until it has actually received relevant Cash payments claimed under the Letter of Credit.

The following shall therefore merely refer to a situation where Eligible Credit Support in the form of Cash is transferred.

According to section 3 of the CSAs, the transferor is obliged to provide Eligible Credit Support in the form of Cash by transfer into the account of the transferee as specified in section 13 of the CPMA CSA and in section 14 of the MNA CSA. In this respect, it should be noted that the CSAs only provide for a contractual obligation to transfer Eligible Credit Support but not for the actual transfer (*Verfügung*) itself. Accordingly, when providing Eligible Credit Support, it will still need to be ensured that all preconditions for a transfer in title in relevant assets will take place.

The transfer of title is subject to mandatory conflict of law provisions. Where the ownership in Cash shall be transferred or where a security interest in Cash shall be created, and where the Cash is held in a bank account, the German conflict of law rules refer to the law governing the account relationship between the bank and the payee.

Cash credited to a bank account is legally represented by the repayment claim of the relevant account holder against the bank. Therefore, under German law, a security interest in respect of Cash credited to a bank account would generally be created by a security interest in the relevant repayment claim of the account holder against the relevant account bank. However, where the relevant account is held in the name of a secured party, any Cash transferred into such account *prima facie* constitutes an asset of the secured party. Accordingly, where Cash is transferred into an account opened by the transferee, this should rather be treated as a transfer of ownership (*Vollrechtsübertragung*) than as a security interest.

Specifically, although there would generally be different methods available to create security over assets, sections 7 no. 1 of the CSAs stipulate that each party agrees that all rights, titles and interest in and to any Eligible Credit Support which it transfers to the other Party under the relevant CSA will vest in the transferee, free and clear of any liens, claims, charges or encumbrances or any other interest of the transferor or of any third person. Besides, according to section 7 no. 3 of the CSAs, nothing in the CSAs is intended to create or does create in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Cash transferred by one party to the other.

Accordingly, the payment of Cash by the transferor into an account of the Transferee under the CSAs should in our view neither qualify as a pledge nor as a transfer for security purposes but as a "transfer of ownership" in the Cash.

However, please note again that if the bank account to which the Cash has been transferred is held in a jurisdiction other than Germany, the laws of that other jurisdiction should be analysed in order to ensure that there is no re-characterisation of the transfer having any adverse effects.

6.1.6 Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, your opinion on whether it will need to take any subsequent action to ensure that its title in the Eligible Credit Support continues. Your opinion should include whether there are any requirements in your jurisdiction necessary or advisable, including any filing registration, notification, stamping, notarization or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval together with any 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.

In the case of a Letter of Credit, no assets are being transferred (see Section 6.1.5 in this respect).

As regards a transfer of Cash, no further actions are required under German law to enforce or continue ownership. However, where the bank account to which the Cash has been transferred should be held in another jurisdiction, local law requirements of that jurisdiction should also be checked in order to confirm that no further action is required to enforce or continue such ownership interest.

6.1.7 Your opinion on the effect, if any, under the laws of your jurisdiction of the right to a providing party incorporated or otherwise organized under your jurisdiction to exchange Eligible Credit Support (for example, by swapping Cash for a Letter of Credit) pursuant to Section 6 of each CSA. Does the presence of consent to substitution by the receiving party have any bearing on this question.

Sections 6 of the CSAs state that, subject to the approval of the transferee, the transferor may replace, in whole or in part, any Eligible Credit Support provided under the respective CSA by Eligible Credit Support of the same or higher value. The transferee shall thereby have no obligation to transfer the Eligible Credit Support which it holds until it has received the replacement Eligible Credit Support.

Accordingly, where the transferee has approved the replacement of any Eligible Credit Support, the transferor may exchange Eligible Credit Support under the respective CSA. Once the transferor has effected the provision (including the *in rem* transfer, if applicable) of such further Eligible Credit Support, the transferee is contractually obliged under the CSA to re-transfer the Eligible Credit Support which is to be replaced. We note however that only a contractual obligation of the transferee to re-transfer Eligible Credit Support arises from such circumstance. The actual *in rem* re-transfer is a distinct and separate legal act under German law. Accordingly, in order to render the re-transfer effective, the transferee would still need to perform its corresponding contractual obligation which – where the transfer of Eligible Credit Support itself is governed by German law - will especially require an additional agreement on the *in rem* re-transfer of the relevant Eligible Credit Support. In practice, such additional agreement between the parties on the *in rem* re-transfer is usually considered to be made implicitly in the context of the relevant transfer.

6.1.8 Your opinion on whether the parties' agreement on the governing law of each CSA and their submission to jurisdiction would be upheld in your jurisdiction, and what would be the consequences if they were not.

a) Choice of law

An express choice of law to govern the CSAs (respectively the MNA/CPMA including their Annexes) will be upheld by German courts. According to Art. 3 no. 1 lit. b) of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch* – "**EGBGB**") and Art. 3 para. 1 of Regulation (EC) No 593/2008 of the European Parliament and of the Council, dated 17 June 2008 on the law applicable to contractual obligations (Rome I), parties are free to choose the applicable law.

The recognition of the choice of law governing relevant contracts by the German courts is however subject to certain mandatory rules of the German conflicts of laws (*Internationales Privatrecht*), in particular the Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), and a German court may apply compelling provisions (*zwingende Bestimmungen*) of another jurisdiction if the underlying facts only relate to such jurisdiction. In particular with reference to contractual obligations the choice of law would not be recognised to the extent that the laws of the chosen governing law would be in conflict with:

1. the mandatory laws of that jurisdiction in which all other elements relevant to the situation at the time of the choice of law are located;

2. overriding mandatory provisions (*Eingriffsnormen*) of the jurisdictions of the court deciding on the matter at hand (*lex fori*) or overriding mandatory provisions of the law of the place of performance; or

3. the applicable public policy (*ordre public*).

Where the choice of law to govern the CSAs relates to non-contractual obligations (*außervertragliche Schuldverhältnisse*) the courts in Germany will determine the governing law in accordance with Article 14 of the Regulation (EC) No. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

b) Arbitration

If an action is brought with a German court, the German court will uphold an arbitration agreement subject to Article II para. 3 of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**"New York Convention"**) and section 1032 para. 1 of the Code of Civil Procedure, providing in particular that at the request of one of the parties the parties shall be referred to arbitration, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

The recognition and enforcement in Germany of an arbitral award is subject to the New York Convention and sections 1061 et seq. of the Code of Civil Procedure. Pursuant to Article V of the New York Convention recognition and enforcement may be denied in particular if:

1. the arbitration agreement is invalid;

2. the respondent was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

3. the subject matter of the dispute was not covered by the arbitration agreement; or

4. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such

agreement, was not in accordance with the law of the country where the arbitration took place;

5. the arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;

6. the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought;

7. the recognition or enforcement of the arbitral award would be contrary to the public policy of that country.

6.1.9 Your opinion as to whether under local law of your jurisdiction, each CSA complies with any mandatory margining requirements applicable under the laws of your jurisdiction.

As far as we can see, German law does not provide for any specific mandatory margining requirements.

6.1.10 Your opinion on whether there are any other local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a providing party incorporated or otherwise organized under your jurisdiction.

There are no other specific German law considerations that a recipient of Eligible Credit Support in the form of Cash or of a Letter of Credit would need to consider in connection with taking and realizing upon the Eligible Credit Support provided by a party incorporated or otherwise organized in Germany.

Model CPMA combined with the CPMA CSA / Model MNA combined with the Model CSA

6.1.11 The transferee's right in relation to the transferred Eligible Credit Support upon the occurrence of a Close-Out Event will be governed by: (i) in the case of the CPMA, Section 4 of the CPMA (see Section 11 of the CPMA CSA); and (ii) in the case of the MNA, Section 8 of the MNA (see Section 12 of the MNA CSA). Assuming that Section 4 of the CPMA / Section 8 of the MNA is valid and enforceable in your jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount by either party on the termination of Underlying Agreements, your opinion on whether Section 11 of the CPMA CSA / Section 12 of the MNA CSA is also valid to the extent that it provides for the Base Currency Equivalent of all the Eligible Credit Support provided under each CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount. In other words whether, contractually, the right of a party to apply collateral to a Settlement Amount is enforceable.

The inclusion of the Base Currency Equivalent of Eligible Credit Support provided under each CSA in the calculation of the Final Net Settlement Amounts pursuant section 4.4 of the CMPA respectively section 8 of the MNA would be recognized under German law. Due to the principle of freedom of contract, the parties are - subject to general statutory limitations on contractual netting and set-off (see Section 6.1.4 above) - free to agree on which claims shall be included in a netting agreement and in which currency they are to be included.

6.1.12 Your opinion on whether the opinions that you have expressed on: (i) the CPMA and the CPMA CSA; and (ii) the MNA and MNA CSA would change in the event that the parties agree to place the Eligible Credit Support with an independent third party collateral agent rather than a party to each Master Agreement and relevant CSA.

Relevant contractual agreements are currently not designed for the involvement of a third party collateral agent and would therefore need to be amended for such an involvement. Besides, additional arrangements between the respective parties and the third party collateral agent would be required. In principle, the contracting parties are free to place the Eligible Credit Support with an independent third party collateral agent. However, it would need to be considered on the basis of the (amended) contractual agreements and subject to the specific design of the third party involvement, whether the opinions above would apply accordingly.

6.2 Netting / Set-off in the Context of an Insolvency

For the purpose of answering the following questions, it is assumed that after entering into a transaction and prior to its maturity, an entity incorporated in Germany becomes the subject of voluntary or involuntary insolvency proceedings in Germany and, subsequent to the commencement of the insolvency proceedings, either that entity or an insolvency official seeks to assume the confirmations representing profitable transactions for the insolvent party and reject the confirmations representing unprofitable transactions for the insolvent party.

Model CPMA / Model MNA

6.2.1 Assuming the parties have <u>not</u> selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule to the CPMA / Section 6.1 of the MNA Election Sheet) and/or none of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in your jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of your jurisdiction.

6.2.1.1 General principles

Absent an insolvency situation, contracting parties are generally free to agree on (extraordinary) termination rights. However, in case of an insolvency situation, the following will be of relevance:

As a basic principle, following the opening of insolvency proceedings, mutual contracts which have not yet been completely fulfilled prior to the opening of the proceedings are subject to the Insolvency Administrator's so-called right of choice (*Insolvenzverwalterwahlrecht*) governed in section 103 of the Insolvency Code.

Specifically, according to section 103 of the Insolvency Code, the Insolvency Administrator has the right to choose whether to perform or to refuse performance of a mutual contract which has not yet been entirely fulfilled by either party to the contract prior to the opening of an insolvency proceeding. Such decision will in practice basically depend on the question whether an individual contract is profitable or unprofitable for the insolvency estate. In case the Insolvency Administrator chooses the continuation of a contract, the contract will be carried on as if insolvency had not occurred[2] and the claims under such contract will become debts incumbent on the insolvency estate, and the creditor will therefore be treated preferentially by the insolvency estate (see section 53 and 55 of the Insolvency Code). Where the Insolvency Administrator refuses performance of a contract, the obligations pursuant to the relevant contract are suspended and the corresponding claims will turn into normal insolvency claims, i.e. without any preferential right to settlement.

According to section 119 of the Insolvency Code, contractual agreements made in advance to exclude or limit the rights of the Insolvency Administrator according to section 103 of the Insolvency Code are held void.

However, section 104 of the Insolvency Code provides for an exception of the Insolvency Administrator's right of choice which is applicable to financial transactions and fixed date transactions (as further described under Section 6.2.1.2 below). Where the relevant preconditions under section 104 para. 1 of the Insolvency Code are met, these transactions will in case of the opening of insolvency proceedings be terminated by statutory law and converted into monetary compensation claims. To the extent that section 104 of the Insolvency Code applies, it supersedes the above Insolvency Administrator's right of choice. Consequently, within the scope of section 104 of the Insolvency Code there is no need for protection of the Insolvency Administrator's right of choice as granted under section 119 of the Insolvency Code.

[2] Once the Insolvency Administrator has chosen to continue the contract, he is bound to the terms and conditions of the contract. In particular, any non-payment after the opening of insolvency proceedings would be subject to the contractually agreed termination rights.

6.2.1.2 Section 104 of the Insolvency Code[3]

a) Preconditions

In order to benefit from the legal privilege of section 104 para. 1 of the Insolvency Code, the relevant contracts must qualify as financial transactions or fixed date transactions and fulfil certain additional requirements.

i. Financial transaction

Section 104 para. 1 sent. 3 of the Insolvency Code contains a non-exhaustive list of contracts falling within the scope of financial transactions. In particular, such list includes all contracts which constitute financial instruments under MiFID II. In addition, financial securities within the meaning of section 1 para. 17 of the Banking Act fall under the definition of financial transactions.

ii. Fixed date transaction

Fixed date transaction in the meaning of section 104 para. 1 of the Insolvency Code will cover both, relative and absolute fixed date transactions.[4] A transaction is deemed to be a relative fixed date transaction if compliance with a precisely defined performance time is an essential part of the contractual obligations and the transaction "stands and falls" with the timely performance. An absolute fixed date transaction is a transaction where performance at a specific time is decisive for the performance per se and any delay would render the performance of the obligation impossible.

Whether transactions qualify as fixed dated transactions has to be assessed on the level of the relevant transactions and depends upon the intention of the parties, the economic and physical characteristics of the underlying product and the contractual provisions, in particular with regard to primary delivery and acceptance obligations and the contractual remedies for respective failure.

iii. Further requirements

Besides the above requirement of a financial transaction or a fixed date transaction, section 104 of the Insolvency Code is further only applicable to contracts of mutual nature not fully settled until the opening of insolvency proceedings, or due thereafter, and which are either financial transactions or relate to commodities having a market or exchange price.

NB: It shall be noted in this respect that Individual Contracts under the EFET General Agreements concerning the delivery of electricity respectively gas are,

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[3] Please find the wording of section 104 of the Insolvency Code including an English convenience translation attached hereto as Annex C.
[4] *Knof* in: Uhlenbruck, Insolvenzordnung, 15th edition 2019, section 104, margin no. 37 et seqq; *Fried* in: Münchener Kommentar zur Insolvenzordnung, 4th edition 2019, section 104, margin no. 103.

subject to any provisions to the contrary in the Individual Contracts, generally considered as fixed date transactions within the scope of section 104 of the Insolvency Code.[5] As regards the classification of Individual Contracts under the EECS Certificate Master Agreement, the corresponding legal position is still to be analysed.

b) Legal consequences

Where the relevant preconditions under section 104 of the Insolvency Code are met, these transactions will, in case of the opening of insolvency proceedings, according to section 104 para. 1 of the Insolvency Code be terminated by statutory law and will be converted into monetary compensation claims as further stipulated in section 104 para. 2 of the Insolvency Code. The non-defaulting party may, however, assert the claim for non-performance only as an insolvency creditor (see section 104 para. 5 of the Insolvency Code).

Section 104 para. 3 of the Insolvency Code further stipulates that, where transactions pursuant to section 104 para. 1 of the Insolvency Code are by means of a master agreement or the rules of a central counterparty[6] combined into a uniform contract which provides that the included transactions can for specific reasons only be terminated uniformly, the entirety of the included transactions shall be deemed to be one single transaction within the meaning of section 104 para. 1 of the Insolvency Code. This shall also hold true if other transactions not captured by section 104 para. 1 of the Insolvency Code are included in that single contract; nevertheless, for those transactions, the general provisions shall apply.

In addition to the above, section 104 para. 4 of the Insolvency Code expressly allows for deviations from the statutory rules laid down in section 104 of the Insolvency Code by way of contractual arrangements. In particular, it allows contracting parties to agree on early trigger events so that the effects of section 104 para. 1 of the Insolvency Code shall occur even before the opening of proceedings, e.g. if a contracting party files a petition for the opening of insolvency proceedings against its own assets or if there is a reason for the opening of insolvency proceedings (section 104 para. 4 sent. 2 no. 1 of the Insolvency Code). Furthermore, contracting parties may agree that contractual termination may encompass also those transactions pursuant to section 104 para. 1 of the Insolvency Code in respect of which the claim for delivery of the

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[5] For further details in this respect, please refer to the EFET Legal Opinion Regarding the Enforceability under German Law of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas and its Collateral Arrangement of 7 June 2019 (p. 18 et seq.) and the EFET Legal Opinion Regarding the Enforceability under German law of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements of 24 May 2019 (p. 17 et seq.). The respective Annexes III of the aforementioned legal opinions furthermore contain information of the classification of certain other transaction types under section 104 of the InsO.

[6] Within the meaning of section 1 paragraph 31 of the Banking Act.

goods or the performance of the financial transaction becomes due prior to the opening of the insolvency proceeding, but after the event that triggers contractual termination (section 104 para. 4 sent. 2 no. 2 of the Insolvency Code). Contracting parties may also to some extent deviate from the calculation method regarding the calculation of the monetary compensation claims as indicated in section 104 para. 2 of the Insolvency Code (section 104 para. 4 sent. 2 no. 3 of the Insolvency Code). In any case, the contractual arrangements deviating from the provision of section 104 of the Insolvency Code must be compatible with the fundamental principles applicable to the relevant statutory provision which is to be amended (section 104 para. 4 sent. 1 of the Insolvency Code.).

6.2.1.3 Conclusion

Considering the above, the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Agreements) and all the transactions concluded under them in case of an insolvency event would (even where automatic early termination does not apply) in our view be in line with the fundamental principles as indicated in section 104 of the Insolvency Code and therefore be enforceable under German law as far as the transaction concerned fall within the scope of section 104 of the Insolvency Code.

However, section 104 of the Insolvency Code would have no effect on those obligations which fall outside its scope. Where transactions concerned are not in the scope of section 104 of the Insolvency Code, relevant termination rights would generally be in breach of the Insolvency Administrators right of choice and insofar be held void under section 119 of the Insolvency Code.

NB: Notwithstanding the above, it is widely practiced and in our view also advisable from a practical perspective to select for Automatic Close-Out to apply, e.g. triggered upon the filing for insolvency proceedings. This would release the relevant market participants from the need for due and ongoing monitoring activities regarding their counterparties and ensure that the early trigger events are applied to avoid continuation of trading when the counterparty is already insolvent.

6.2.1.a Supposing that there were some non-privileged transactions and deliveries from both sides have been effected after the opening of insolvency proceedings until the time the administrator refuses performance what would happen with those transactions? Could they be set-off or would they be mandatorily unwound and the non-defaulting party has to pay all received deliveries and is subject to the quota with its claims? Is section 10.5 of the CPMA / § 6.4 of the MNA appropriate and enforceable to have those transactions invoiced according to the contract?

According to section 91 of the Insolvency Code, after the opening of insolvency proceedings, rights in assets forming part of the insolvency estate cannot validly be acquired without the consent of the Insolvency Administrator. In this respect, the refusal of performance of a contract by the

Insolvency Administration under section 103 of the Insolvency Code has retroactive effect back to the time of the opening of insolvency proceedings. Accordingly, once the Insolvency Administrator has refused performance of a contract, the contractual rules under section 10.5 of the CPMA respectively § 6.4 of the MNA will not apply in relation to the period following the commencement of final insolvency proceedings.

However, under statutory law, any payments and respective deliveries made or effected by either party after the opening of insolvency proceedings appear to be made without legal ground and could hence be claimed for return by the relevant party. To the extent the insolvent party has delivered commodities following the opening of final insolvency proceedings, the Insolvency Administrator would be entitled to have the commodities returned (or at least the same amount and kind) and to the extent this is not possible the receiving party would usually be obliged to pay an objective market value as of the time of delivery from the insolvent party (that again the receiving party should usually be entitled to set off with its own repayment claim of the purchase price paid for the received commodities following opening of final insolvency proceedings).

To the extent the insolvent party has paid for received commodities following the opening of final insolvency proceedings, the Insolvency Administrator would be entitled to reclaim the payment. In return the other party would be entitled to the return of the delivered commodities (or at least the same amount and kind - please see the preceding paragraph).

6.2.2 Assuming the parties have selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule / Section 6.1 of the MNA Election Sheet) and/or all of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in your jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of your jurisdiction.

Our findings under Section 6.2.1 apply correspondingly also for automatic early termination.

6.2.2.a It may happen that deliveries from both parties after the trigger event (in case of automatic termination) are effected until the non-insolvent party finds out that its partner is insolvent. Would it be possible and enforceable to invoice those already effected deliveries according to the conditions (e.g. price) as stipulated in the contract because section 10.5 of the CPMA respectively § 6.4 of the MNA (which were intended to cover such cases) is applicable or would it be mandatory to rewind those transactions? From the date at which the deliveries from the non-defaulting party have been stopped, all other

transactions would be calculated as stipulated in section 4 CPMA respectively § 8 of the MNA.

Where the trigger event occurs prior to the opening of final insolvency proceedings (for example in case of an application for the opening of insolvency proceedings), the said contractual provisions should apply. Hence, it should be possible and enforceable to invoice those deliveries already effected. Any deliveries made following the commencement of final insolvency proceedings will not be included in the close-out mechanism for privileged transactions pursuant to section 104 of the Insolvency Code but would need to be rewound (please refer to Section 6.2.1.a).

6.2.3 Your opinion on whether the provisions of each model Master Agreement which provide for the calculation of a single Final Net Settlement Amount (see Sections 3 and 4 of the CPMA / Section 7 and 8 of the MNA) upon the insolvency of a counterparty would be enforceable in an insolvency of a party that is organized under the laws of your jurisdiction.

Under the MNA, for each of the Netted Agreement terminated in case of a Close-Out Event, a Settlement Amount will be determined in accordance with the Netted Agreement's terms (see § 7.1 of the MNA) and, to the extent necessary, converted into the Base Currency (see § 7.2 of the MNA). If on the Early Termination Date both Parties owe one or more Settlement Amounts under two or more Underlying Agreements, such Settlement Amounts are aggregated and netted and only the difference, if any, between the two offsetting aggregate amounts, i.e. the 'Final Net Settlement Amount', shall be owed by the Party with the larger aggregate obligation (see § 8.1 of the MNA).

Correspondingly, also under the CPMA, for each of the Netted Agreements terminated in case of a Close-Out Event, a Settlement Amount will be determined in accordance with the Netted Agreement's own terms (see section 3.1 of the CPMA) and, to the extent necessary, converted into the Base Currency (see section 3.2 of the CPMA). If after termination both Parties owe one or more Settlement Amounts under two or more Underlying Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts, i.e. the 'Final Net Settlement Amount', shall be owed by the Party with the larger aggregate obligation (see section 4 of the CPMA).

As described above (see Section 6.2.1), if the respective Master Agreement and the Underlying Agreements thereunder (and individual transactions) are terminated for insolvency-related events, such termination would only be valid and enforceable with respect to privileged transactions within the meaning of section 104 para. 1 of the Insolvency Code. For other transactions not captured by section 104 para. 1 of the Insolvency Code, the general provisions, i.e. in particular the Insolvency Administrator's right of choice, will apply.

Based on the single agreement concept as stipulated in § 2.3 of the MNA and, if so agreed to apply in Part VIII section 10.6 of the Commodities Schedule, we hold the view that the respective Master Agreements (providing that the covered transactions may, upon the occurrence of certain events, only be terminated in their entirety) would qualify as master agreements in the meaning of section 104 para. 3 of the Insolvency Code.

Such qualification would have the consequence that all of the transactions within the meaning of section 104 para. 1 of the Insolvency Code that are covered by the respective Master Agreement shall be deemed to be a single transaction within the meaning of section 104 para. 1 of the Insolvency Code. Accordingly, the netting of the Settlement Amounts in line with the Master Agreements would rather be considered as an arithmetical process for determining the amount of the single claim for non-performance of those transactions covered by the Master Agreement than as a set-off of several claims.[7] As far as the Master Agreements deviate from the statutory methodology for the determination of the termination amount, this should in our view still be in line with permissible deviations as outlined under section 104 para. 4 of the Insolvency Code and therefore be enforceable.

We note however that relevant legal literature appears to be not to fully clear on the circumstance whether master netting agreements combining several master agreements (so-called "*master-master agreements*"), as the CPMA and the MNA at hand, are covered by section 104 para. 3 of the Insolvency Code. It has been noted in legal literature that the German legislator did not have in mind such master-master agreements in the context of the revision of section 104 of the Insolvency Code but that the legislative reasoning only refers to mere master agreements.[8] However, since master netting agreements in respect of transactions fulfilling the prerequisites of section 104 para. 1 of the Insolvency Code are covered, from our perspective, it is likely that also master-master agreements fulfilling relevant requirements are considered to be captured by section 104 para. 3 of the Insolvency Code.

To the extent master-master agreements would not be captured by section 104 para. 3 of the Insolvency Code, the Settlement Amounts resulting from the respective Underlying Agreements would not be subject to netting as privileged by section 104 of the Insolvency Code, but would need to be offset against each other under the general statutory rules. The same applies to master-master agreements which themselves stipulate that the single Settlement Amounts are to be set-off against each other.

In this respect, German insolvency law generally recognizes the set-off of claims that arose prior to the opening of insolvency proceedings (such as various single Settlement Amounts) also outside of the scope of section 104 of the Insolvency Code, subject however to certain statutory restrictions, e.g. where the creditor acquired the opportunity to set off his claim by a transaction which could be challenged by the Insolvency Administrator (see section 96 para. 1 of the Insolvency Code). To the extent set-off is not possible, any

[7] *Fried* in: Münchener Kommentar zur Insolvenzordnung, 4. Auflage 2019, § 104, Rn. 215; *Berberich* in: BeckOK InsO, 20. Ed. 15.7.2020, § 104, Rn. 43.
[8] *Fried* in: Münchener Kommentar zur Insolvenzordnung, 4. Auflage 2019, § 104, Rn. 229.

Settlement Amount owed to the defaulting party will need to be settled in full to the insolvency estate under the German insolvency regime, whilst any Settlement Amount owed to the non-defaulting party will be treated as an insolvency claim on which usually only a small amount can be recovered in the insolvency proceedings over the defaulting party.

6.2.3.a Would it be possible to include other credit support as stated in § 9.1 of the MNA respectively section 10.7 of the CPMA in the calculation of the Final Net Settlement Amount? Could you please insert your opinion on the enforceability of § 9.1 of the MNA respectively section 10.7 of the CPMA?

According to § 9.1 of the MNA respectively section 10.7 of the CPMA, if a Party to whom a Settlement Amount is payable under any Closed-Out Agreement has the benefit of Credit Support under any Closed-Out Agreement or the respective Master Agreement, then such Party shall include the Settlement Amount within its process of netting, but shall only be entitled to apply such Credit Support against the Final Net Settlement Amount.

We understand these provisions to affect amendments to relevant collateral agreements in relation to Credit Support provided under the Closed-Out Agreements. Subject to the limitations referred to under Section 6.2.4, § 9.1 of the MNA respectively section 10.7 of the CPMA would in our opinion be enforceable under German law.

6.2.4 Your opinion on whether or not early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are voidable, challengeable or in any way vulnerable to deletion by a liquidator or any third party if insolvency procedures are later opened against a party that is organized under the laws of your jurisdiction.

Under German law, legal acts (*Rechtshandlungen*) made prior to the opening of insolvency proceedings and disadvantaging other creditors of the insolvent party may, subject to certain challenge periods, be challenged by the Insolvency Administrator pursuant to section 129 et seqq. of the Insolvency Code.

In this respect, the term ‘legal act’ is interpreted widely. It comprises acts within the scope of contractual agreements, e.g. the execution of a declaration of intent (*Willenserklärung*), such as a declaration to terminate, but also other factual acts e.g. in the context of in rem transfers and assignments. It is generally not relevant whether the relevant legal act is attributable to the debtor or a third party, e.g. a creditor (while we note that a number of challenge rights only provide for the challenging of legal acts by the debtor).

Also the requirement of a ‘disadvantage’ is interpreted widely. A relevant disadvantage exists if the satisfaction of the insolvency creditors is reduced, defeated, made more difficult, endangered or delayed. It must therefore be established that the satisfaction of the creditors would have been more advantageous if the contested act had not been performed.[9]

As there is no specific exemption from the application of the challenge rights with respect to netting arrangements, a number of legal elements in the context of close-out netting, e.g. the entering into the model Master Agreements itself, the termination of Underlying Agreements and transactions thereunder, the calculation of Settlement Amounts and the determination of the Final Net Settlement Amount and its payment, could be considered as 'legal act' in the meaning of sections 129 et seqq. of the Insolvency Code, and therefore be challenged during relevant challenge periods where these acts would be disadvantaging to other creditors and subject to the preconditions as set out below.

However, where the completion of a legal act is subject to a condition precedent outside the control of the parties on the date of its occurrence, for example in case of an automatic termination for specific predefined circumstances, the occurrence of such circumstance, respectively condition precedent, is not considered as legal act subject to challenges (section 140 para. 3 of the Insolvency Code).

Besides, where the parties agree on automatic occurrence of close-out netting in line with the Agreements, in our view the better arguments support the view that the calculation of the Final Net Settlement Amount merely constitutes a factual determination of a claim resulting from the netting of Settlement Amounts, which as such can therefore not be challenged separately. However, given that the determination of the Final Net Settlement Amount includes the discharge of claims of both parties, it cannot be fully excluded that such determination could also be considered as legal act in the meaning of the challenge right of the Insolvency Administrator.

It is therefore to be considered on the basis of the circumstances of the individual case, whether any circumstance qualifies as legal act in the meaning above and whether it is disadvantageous and therefore subject to the risk of being challenged. For such purpose, challenge rights will be examined in respect of each separate legal act and not on the basis of the wider (commercial) transaction. Also challenge periods will be determined in respect of each legal act separately. Specifically, indirect consequences of a legal act which may even have positive effect on the assets of the insolvent party need not to be taken into account.

The most relevant challenge rights of the Insolvency Administrator are the following:

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[9] *Borries/Hirte* in: Uhlenbruck, Insolvenzordnung, 15th edition 2019, § 129 no. 160

6.2.4.1 Challenge right according to section 130 para. 1 of the Insolvency Code

According to section 130 para. 1 sent. 1 of the Insolvency Code, a legal act can be challenged if it gives or facilitates an insolvency creditor a security or satisfaction (i) where it was made during the last three months prior to the application to open insolvency proceedings, if the debtor was unable to pay its debts due at the time of the legal act, and if the creditor was aware of such inability to make payments at such time, or (ii) where it was made after the application to open insolvency proceedings, and if the creditor was aware of the debtor's inability to make payment at the time of the legal act, or of the application to open insolvency proceedings.[10]

This shall however not apply where the legal act is based on a security agreement containing the obligation to provide a financial collateral, to replace financial collateral by other financial collateral or to provide additional financial collateral within the meaning of section 1 subsection (17) of the Banking Act in order to reinstate the ratio between the value of the secured obligation and the value of the collateral as set out in the security agreement (margin security - *Margensicherheit*) (see section 130 para. 1 sent. 2 of the Insolvency Code). Cash transfers under a CSA should be captured by such exemption provision and not be subject to challenge rights if the provision of margin is owed under the CSA to restore the balance between the secured exposure and the collateral already provided.

6.2.4.2 Challenge right according to section 131 para. 1 of the Insolvency Code

Section 131 para. 1 of the Insolvency Code provides for a challenge right regarding legal acts which give or facilitate to an insolvency creditor a security or satisfaction to which the creditor has no right or no right to claim in such manner or at such time. Such legal acts are subject to challenge, if the legal act was made (i) in the last month prior to the application to open insolvency proceedings or after such application, or (ii) within the second or third month prior to the application to open insolvency proceedings and the debtor was unable to make payments at the time of the legal act, or (iii) within the second or third month prior to the application to open insolvency proceedings, and the creditor was at that time aware of the disadvantage to the insolvency creditors arising from such legal act transaction.[11]

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[10] Knowledge of circumstances that compel the conclusion as to the pending inability to make payments or of the application to open insolvency proceedings are considered equivalent to actual knowledge of the inability to make payments or of the application to open insolvency proceedings, see section 130 para. 2 of the Insolvency Code.

[11] As regards item (iii), according to section 131 para. 2 of the Insolvency Code, knowledge of circumstances that compel the conclusion that a legal act is disadvantageous to other creditors is equivalent to actual knowledge of such detriment.

6.2.4.3 Challenge right according to section 132 para. 1 of the Insolvency Code

According to section 132 para. 1 of the Insolvency Code, a legal act of the insolvent party that is directly disadvantageous to the creditors is subject to challenge (i) if it was made within the last three month prior to the application for the opening of insolvency proceedings, if the insolvent party was unable to pay its debts when due at the time of the legal act and if the other party had knowledge of such inability to make payments at such time; or (ii) where it was made after the application for the opening of insolvency proceedings and the other party had knowledge of the inability of the insolvent party to make payments or of the application for opening of insolvency proceedings at the time of the legal act.

Furthermore, according to section 132 para. 2 of the Insolvency Code, a legal act which results in the insolvent party losing a right, or pursuant to which the insolvent party is no longer able to claim such right, or which results in a property claim against the insolvent party being maintained or becoming enforceable shall be equivalent to a legal act that is directly disadvantageous to the creditors.

6.2.4.4 Challenge right according to section 133 para. 1 of the Insolvency Code

According to section 133 para. 1 sent. 1 of the Insolvency Code, a legal act made by the insolvent party during the last ten years prior to the application to open insolvency proceedings, or subsequent to such request, with the intention to disadvantage his creditors may be challenged if the other party was aware of the debtor's intention on the date of such legal act. Such awareness will be assumed if the other party knew of the imminent inability of the insolvent party to make payments when due, and that the legal act constituted a disadvantage for the creditors (see section 133 para. 1 sent. 2 of the Insolvency Code). The "suspect period" of 10 years is by law reduced to four years if the counterparty's claims have been secured or settled by the act of the insolvent party.

6.2.4.5 Privilege for cash transaction according to section 142 of the Insolvency Code

Cash transactions are generally privileged in respect of challenge rights of the Insolvency Administrator under section 142 para. 1 of the Insolvency Code. Specifically, a performance on the part of the insolvent party in return for which the insolvent party’s property benefits from an equivalent consideration may only be challenged if such performance was made with the intention to prejudice the creditors. However, the privilege of cash transactions is not applicable in the light of the netting provisions under the Agreements as the offsetting of claims respectively netting is not considered to be a cash transaction.

6.2.5 "Cross Category Netting" – since the model Master Agreements contemplates the inclusion of various types of master agreements and other trading documentation covering both physical and financial trading, your opinion on any applicable issues that need to be considered as to the enforceability of netting between physical and financial transactions or various categories of physical products (see Annex A for potential categories).

Your opinion should include a discussion of your jurisdiction's insolvency laws as they would apply to the close-out and netting via each model Master Agreement of obligations under different categories or types of traded products, and

a. if any distinctions are applicable based on whether these products are traded under one or more Underlying Agreements,

b. if any distinctions are applicable when attempting to use a model Master Agreement to net / set-off physically settled transactions when these involve the purchase, sale and/or optioning of different commodity types or categories (e.g. the netting obligations related to gas, power and coal trading) ("Cross Product Netting"), and

c. if any distinctions are applicable based on whether both financially settled swaps, swaptions and derivative transactions and physically settled forwards and options are traded under one or more Underlying Agreements with respect to each Master Agreement.

The netting provisions under the model Master Agreements have the effect that the transactions covered by the respective model Master Agreement (irrespective of the kind of type or nature of the transactions) will in case of a close-out event be converted into mutual payment claims in order to create a set-off situation.

The individual transactions included in the close-out netting procedure under a Master Agreement do not need to originate from similar kind of transactions. In particular, section 104 para. 3 of the Insolvency Code in our view allows for master agreements which combine close-out netting for various types of transactions – i.e. for example physical and financial transactions or also transactions re. various categories of physical products – with the consequence that close-out netting uniformly applies to all those transactions, provided however that all relevant transactions are in scope of section 104 para. 1 of the Insolvency Code. In this respect, it should even be harmless where transactions not in scope of section 104 para. 1 of the Insolvency Code would also be included in the respective Master Agreement. However, for those transactions the general rules such as section 103 of the Insolvency Code will apply (see section 104 para. 3 sent. 2 of the Insolvency Code).

6.2.6 Assuming that the parties have selected a Base Currency (Division 1, Part VI of the CPMA Schedule and section 8.3(C) of the MNA Election Sheet) other than the legal currency of your jurisdiction in which the insolvent party is organized, your opinion on whether payment of the Final Net Settlement Amount in that currency would be enforceable under the laws of your jurisdiction.

According to section 45 sent. 2 of the Insolvency Code, in case of insolvency proceedings, payment claims expressed in a foreign currency shall be converted into the local currency. Conversion shall take place according to the exchange value applicable at the time of the opening of the proceedings at the place of payment. The final distribution to the insolvency creditor will also be made in Euro.

6.2.7 Your opinion on whether the rights of a party are enforceable in accordance with the terms of each model Master Agreement, irrespective of the insolvency of the entity incorporated in your jurisdiction.

In our opinion, and save for our discussions and limitations in Sections 6.2.1 to 6.2.4, the rights of the non-defaulting party in relation to close-out netting are enforceable in accordance with the terms of each model Master Agreement (such as e.g. applying close-out netting, having the Final Net Settlement Amount accepted to the insolvency estate and recovering the Final Net Settlement Amount from any security realisation), irrespective of the insolvency of a counterparty incorporated in Germany. However, upon the commencement of insolvency proceedings in relation to the defaulting party, the non-defaulting party will need to assert its rights in the context of relevant insolvency proceedings. No enforcement against the defaulting party for payment of the Final Net Settlement Amount is possible any longer.

6.2.8 Your opinion on whether the parties' agreement on governing law of each model Master Agreement and submission to jurisdiction will be upheld in your jurisdiction, and the consequences if it were not.

The parties' agreement on governing law of each model Master Agreement and submission to jurisdiction will in principle be upheld in Germany. Please refer to Section 6.1.8 above for details.

6.2.9 Your opinion on whether, pursuant to the EU Parliament and Council Regulation No. 2015/848 of 20 May 2017 (the "EU Insolvency Regulation") most provisions of which became directly applicable in all Member States as from 26 June 2017, a bankruptcy court in your jurisdiction would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement if they differ from the analogous insolvency laws of your jurisdiction. In addition, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, your opinion on whether the close-out

netting and/or set-off provisions under each Master Agreement would nevertheless become valid by operation of the EU Insolvency Regulation.

Subject to Art. 9 of the EU Insolvency Regulation a German insolvency court would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement.

Where one or more Underlying Agreements is/are not valid, binding and enforceable in accordance with its own respective terms and conditions, the close-out netting and/or set-off provisions under each Master Agreement would not be affected. However, since under those Underlying Agreements no Settlement Amounts would validly be created that could be netted by means of the relevant Master Agreement and since the relevant Master Agreement does not provide for a mechanism itself to net the individual transactions under the Underlying Agreements, the close-out netting and/or set-off provisions under each Master Agreement would not be effective in relation to those Underlying Agreements.

6.2.10 A general discussion of, and your opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of the model Master Agreement.

The mere application to open insolvency proceedings and/or interim insolvency proceedings do generally not yet affect the creditor's rights. Instead, the decisive event regarding the creditor's rights in view of insolvency claw back rights (as described in Section 6.2.4 above) and in view of the fate of ongoing and/or continuing contracts (as described in Section 6.2.1 above) is the point in time of the decision by the court to open the insolvency proceedings (i.e. the point in time of the formal commencement of respective insolvency proceedings).

6.2.11 An analysis and your opinion regarding the advisability in your jurisdiction of using each model Master Agreement to impose uniform default events across all types and categories of trades (effectively superseding the default terms of underlying master agreements or deal documentation) as opposed to allowing such underlying default provisions to operate for their respective categories of trades even if to do so might permit close-out and set-off of some trades governed by the relevant Master Agreement, but not others.

Where the model Master Agreements would not impose uniform default events across all types and categories of trades, but the default provisions of Underlying Agreements would operate for their respective trades (whereby this could have the effect that close-out and set-off could apply to only certain but not all trades governed by a relevant Master Agreement), this should have the consequence that the relevant Master Agreement would not be considered as a master agreement within the meaning of section 104 para. 3 of the Insolvency Code (which must provide that all transactions covered by a master agreement shall close-out uniformly).

It is therefore advisable from our perspective that the model Master Agreements provide for a global close-out of all transactions covered by the respective Agreements.

CPMA CSA / MNA CSA

6.2.12 Your opinion on whether an entity duly organized or incorporated under the laws of your jurisdiction (or its administrator, provisional liquidator, receiver, trustee or other similar official) will be able to recover any transfer of Eligible Credit Support made to the transferee during a certain "suspect period" preceding the date of the insolvency that makes the recovery vulnerable to being treated as preferential or otherwise suspect (or other similar treatment) by such official and therefore subject to avoidance. If such a "suspect period" exists, please give your opinion on whether the substitution of Eligible Credit Support by a counterparty during this period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing. Please also include an analysis of the relevant time-period(s) surrounding the insolvency.

The transfer of Eligible Credit Support in the form of Cash qualifies as legal act within the meaning of section 129 of the Insolvency Code and is therefore subject to general challenge rights of the Insolvency Administrator according to section 129 et seqq. of the Insolvency Code, subject however to an exception for margin collateral (see Section 6.2.13).

Accordingly, the transfer of Eligible Credit Support in line with the provisions of the CSAs could be challenged by an Insolvency Administrator during the insolvency challenge periods as described in Section 6.1.4 above. Depending on the specific circumstances and the applicable challenge right, such "suspect period" may cover a time period up to ten years from the legal act to be challenged.

Also the substitution of Eligible Credit Support is to be considered as transaction consisting of various legal acts (such as the conclusion of the collateral agreement providing for collateral substitution, the withdrawal of particular securities and the replacement of securities with other securities) each of which could generally be subject to challenge by an Insolvency Administrator. However, the substitution of collateral with collateral of no greater value should generally not be considered as being detrimental to the interest of other creditors (which would be a further precondition for any challenge rights).

After the opening of insolvency proceeding, any transfer of Eligible Credit Support is invalid, subject to an exception applicable to financial collateral in the meaning of section 1 para. 17 of the Banking Act which is transferred on the day on which the insolvency proceedings are opened (see section 81 para 3 of the Insolvency Code).

6.2.13 Your opinion on whether the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each CSA during any applicable "suspect period" described above is subject to avoidance, either because it will be considered to relate to an antecedent or pre-existing obligation or for some other reason.

The transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions should generally qualify as legal acts subject to the challenge rights of the Insolvency Administrator (see Section 6.1.4 and 6.2.12 above). This would only be excluded if the privilege for cash transactions according to section 142 of the Insolvency Code applies (see Section 6.2.4.5 above). Taking subsequent security in relation to any antecedent or pre-existing obligation will however not be covered by such privilege.

However, the provision of margin collateral is privileged under section 130 para. 1 sent. 2 of the Insolvency Code. According to such provision, the challenge right according to section 130 para. 1 of the Insolvency Code shall not apply where the legal act is based on a security agreement containing the obligation to provide a financial collateral, to replace financial collateral by other financial collateral or to provide additional financial collateral within the meaning of section 1 subsection (17) of the Banking Act in order to reinstate the ratio between the value of the secured obligation and the value of the collateral as set out in the security agreement (margin security – *Margensicherheit*). As stated above, Cash transfers under a CSA should be captured by such exemption provision and not be subject to challenge rights if the provision of margin is owed under the CSA to restore the balance between the secured exposure and the collateral already provided.

6.2.14 A general discussion of, and your opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of each CSA.

As described in Section 6.2.10 above, the mere application to open insolvency proceedings and/or interim insolvency proceedings do generally not affect the creditor's rights. Instead, the decisive event regarding the creditor's rights in view of insolvency claw back rights (as described in Section 6.2.4 above) and in view of the fate of ongoing and/or continuing contracts (as described in Section 6.2.1 above) is the point in time of the decision by the court to open the insolvency proceedings (i.e. the point in time of the formal commencement of respective insolvency proceedings).

6.2.15 An analysis of local law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in your jurisdiction, with the provider of the Eligible Credit Support being an entity based outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can bolster or re-

characterize the nature of the providing party's rights to that Eligible Credit Support.

a. What rights does the providing party have against such an asset located in your local jurisdiction upon the insolvency of the recipient party?

b. Are there other steps that the providing party should be taking to minimize its risk and best protect such an asset?

Lit. a)

To the extent the transferred asset is not being clearly marked as being an asset of the providing party and is further not held separated from other assets of the receiving party, the providing party will only have a simple insolvency claim for repayment as per the underlying Credit Support Annexes which will take part *pari passu* with other unsecured creditors and on which usually only a small recovery can be collected at the end of insolvency proceedings. (This risk also applies to a provider of the Eligible Credit Support being an entity based in Germany.)

Lit. b)

To protect the transferred asset in case of insolvency proceedings of the receiving party it is recommendable in case of Cash being provided that the receiving party holds it in a German bank account marked as open trust account and not mingled with any other liquid assets of the receiving party.

However, for the avoidance of doubt, as Eligible Credit Support in the form of Cash will be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee (see § 12 of the MNA CSA and § 11 of the CPMA CSA), relevant risks for the Transferor of Eligible Credit Support should basically only apply to amounts that exceed the amount that can be netted-off in the context of the calculation of the Final Net Settlement Amount. Having said that, a practical solution for the Transferor to minimize risks would be to limit the transfer of cash collateral (if not going to an open trust account) to amounts that can be netted-off in the Final Net Settlement Amount.

6.2.16 An analysis of the rights and obligations of an insolvent party organized in your jurisdiction with respect to Eligible Credit Support held by a recipient party organized outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can undermine or re-characterize the nature of the recipient's rights to that Eligible Credit Support?

Subject to any risk of challenge outlined above in relation to the granting of any Eligible Credit Support, a bankruptcy court in Germany cannot undermine or recharacterize the nature of the recipient's rights to that Eligible Credit Support.

Model CPMA combined with the CPMA CSA / Model MNA combined with the MNA CSA

6.2.17 Your opinion on whether the rights of the transferee of Eligible Credit Support would be enforceable in accordance with the terms of: (i) the model CPMA and the CPMA CSA; and (ii) the model MNA and the MNA CSA, irrespective of the insolvency of the providing party incorporated or otherwise organized under your jurisdiction.

Following the commencement of final insolvency proceedings, the transferor (other than any court appointed insolvency practitioner) cannot provide any Eligible Credit Support any longer.

The transferee's rights to liquidate any Eligible Credit Support in case of a claim for payment of any termination amount would be enforceable even if insolvency proceedings have been commenced in relation to the providing party (however, a certain percentage from the Eligible Credit Support might need to be paid to the insolvency estate by law; and unless the granting of the Eligible Credit Support can validly be challenged).

6.2.18 A general discussion of, and your opinion regarding, your jurisdiction's insolvency laws, and any relevant terminology with an emphasis on law and precedent applicable to the concepts of close-out netting and set-off of claims between parties, and:

a. how generally applicable statutory or common law set-off (or similar) rights could interact with the contractual netting and set-off rights contained in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA;

b. applicable law which might have an impact on the respective priorities assigned to such rights by a court in your jurisdiction; and

c. specifically, whether the EU Insolvency Regulation affects local jurisdiction conflict of law rules such as overruling local jurisdiction insolvency laws if the parties to the Master Agreement have opted for a jurisdiction other than the jurisdiction relevant to the insolvent party. In particular, your opinion on whether or not a bankruptcy court in your jurisdiction would apply the EU Insolvency Regulation to close-out netting and/or set-off such that it would apply the governing law of the Master Agreement or CSA as the law applicable to close-out netting and/or set-off or whether it would seek to apply local law in its stead;

d. whether, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, the close-out netting and/or set-off provisions under each Master Agreement when combined with the relevant CSA would nevertheless become valid by operation of the EU Insolvency Regulation; and

e. whether the laws of your jurisdiction consider set-off and close-out netting as separate or similar rights.

Lit. a)

As pointed out in Section 6.2.1.2, as regards transactions not captured by section 104 para. 1 of the Insolvency Code, instead of any contractual provision stipulated in the MNA and/or CPMA as potentially modified by the respective CSAs, the general provisions of the Insolvency Code (in particular the Insolvency Administrator's right of choice) will apply. Statutory set-off rights might be applied to those non-privileged transactions accordingly. However such (statutory) set-off rights will otherwise not interact with the contractual netting and set-off rights contained in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA, which applies to those fixed date transactions and/or financial transactions being covered by section 104 para. 1 of the Insolvency Code.

Moreover, to the extent master-master agreements would not be covered by section 104 para. 3 of the Insolvency Code, the Settlement Amounts would need to be offset against each other with the respective effects as per German insolvency law. The same applies to master-master agreements which themselves stipulate that the single Settlement Amounts are to be set off against each other (and not netted) (see Section 6.2.3).

Lit. b)

Where the reference to "priorities" is made in relation to the claim for payment of the Final Net Settlement Amount, such payment claim against the insolvent party might only be deemed subordinated in German insolvency proceedings of the insolvent party if the transactions under the Underlying Agreement were made (i) between affiliated entities and (ii) not made on an arm's length basis.

Lit. c)

Please refer to Section 6.2.9.

Lit. d)

Please refer to Section 6.2.9.

Lit. e)

As described above, close-out netting is not to be understood as distinct legal or statutory concept under German law but rather consists of a number of legal elements, i.e. the termination of outstanding and not yet due transactions, the determination of the values of such transactions respectively the calculation of respective compensation claims and the netting/set-off of such claims.

The concept of close-out netting deviates from the statutory set-off especially insofar as the corresponding obligations that may be subject to close-out netting do neither need to be of the same nature nor to fall due at the same time.

6.3 Cross Affiliate Netting and Set-off

Since the versions of the model CPMA and model MNA you are reviewing do not address this topic and are not intended for these purposes, but because this issue may be of use to some EFET members, only to the extent that there is established law in your jurisdiction on the subject, a summary of such law and a review of the different risk considerations involved in choosing to add multiple parties to each model Master Agreement.

The statutory rules only provide for set-off to take effect between two parties which hold against each other mutual claims of similar nature (see Section 6.1.4).

By way of contractual agreement, contracting parties may to some extent deviate from statutory requirements of set-off and e.g. waive the requirement of mutuality.[12] For example, so-called group settlement clauses (*Konzernverrechnungsklauseln*) usually provide that either a group entity (as debtor) is entitled towards its counterparty to settle its debt by set-off with a claim of an affiliated group entity against the counterparty and/or that the group entity (as creditor) is entitled towards its counterparty to settle its claim with a debt which another affiliated group entity is obliged to pay against the counterparty. Accordingly, such group settlement clauses would generally allow for set-off in situations where the mutuality requirement is not fulfilled.[13] However, group settlement clauses may not be enforceable in insolvency situations. For example, the German Federal Supreme Court decided that a set-off according to a group settlement clause with claims not owned by the offsetting party but by its affiliate is ineffective where the set-off is declared after the opening of insolvency procedures (as the preconditions of section 94 of the Insolvency Code regarding the preservation of the right to set-off in insolvency proceedings had not been met).[14]

6.4 Multi-branch Parties

In the case of a counterparty that has entered into transactions under a Master Agreement as a multi-branch party, it is clearly necessary to obtain enforceability opinions from each country where a branch of that counterparty is located that has entered into one or more transactions under that Master Agreement. In this regard, please provide your opinion on the following:

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[12] *Schwahn,* Konzernverrechnungsklauseln in der Insolvenz, NJW 2005, 473; *Bernd/ Wermeckes* in: Dauner-Lieb/Langen, BGB-Schuldrecht, 3. Aufl. 2016, § 387 Rn. 6-9.
[13] *Schlüter* in: MünchKomm BGB, 8th edition 2019, § 387, no. 51.
[14] BGH of 15 July 2004, IX ZR 224/03.

1. ***whether there would be any change in your conclusions expressed in paragraph III.B*** (Section 6.2 herein) ***above concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA (given the assumption in paragraph II.F.(i)*** (Section 4.6 (i) herein) ***above);***

2. ***whether separate proceedings could be brought in your jurisdiction with respect to assets and liabilities of the overseas branch located in your jurisdiction of a counterparty organized or incorporated outside your jurisdiction upon the commencement of insolvency proceedings against the counterparty in that outside jurisdiction. Your opinion should include how the relevant authorities in your jurisdiction would treat the proceedings in an outside jurisdiction by, for example, deferring to them so that the assets and liabilities of the branch would be treated as part of the proceedings against the counterparty. Please also include whether or not in your opinion local creditors of the branch would be able to initiate separate proceedings in your jurisdiction even if the relevant authorities did not do so; and***

3. ***in the event that proceedings are brought in your jurisdiction with respect to the assets and liabilities of the branch located in your jurisdiction, whether or not the administrator, provisional liquidator, receiver, trustee or other similar official and/or the courts in your jurisdiction would include the counterparty's position under its Underlying Agreements or underlying transactions among the assets of its branch and, if so, recognize their respective close-out and netting provisions in accordance with their terms (you may assume that the close-out netting provisions under the relevant Underlying Agreements or underlying transactions would be enforceable in the proceedings against the counterparty brought outside your jurisdiction).***

No. 1)

To the extent German insolvency law applies on the branch there would not be any change in our conclusions.

No. 2)

Separate insolvency proceedings, so-called secondary insolvency proceedings, could in principle be brought in Germany in relation to the overseas branch located in Germany of a counterparty organized or incorporated outside Germany upon the commencement of the so-called main insolvency proceedings against the counterparty in that outside jurisdiction. Such secondary insolvency proceedings are possible pursuant to EU Insolvency Regulation in case of main insolvency proceedings commenced in another EU member state or pursuant to the Insolvency Code as to jurisdictions outside the application of the EU Insolvency Regulation.

Whilst the EU Insolvency Regulation requires a branch as per Art. 2 No. 10 of the EU Insolvency Regulation that is located in Germany, the commencement of secondary insolvency proceedings under the Insolvency Code would generally also be possible if only assets of that counterparty were located in Germany, however, it being required that sufficient assets are located in Germany to cover the proceedings' costs. Either the insolvency receiver of that outside jurisdiction or creditors of the counterparty are entitled to file for secondary insolvency proceedings, however, in case of no branch but only assets being available in Germany, a creditor requires an extraordinary interest in secondary insolvency proceedings being commenced such as in particular (but not limited to) if that creditor has security rights under German law in the domestic assets that would not be accepted in the foreign main insolvency proceedings, or operations of the foreign jurisdiction can significantly be doubted.

No. 3)

Generally, the counterparty’s position under its Underlying Agreements or underlying transactions would be included among the assets of its branch and, hence, their respective close-out and netting provisions in accordance with their terms would be recognized in Germany.

6.5 CSA Specific Permutations

In relation to each of the questions in paragraph III.B (herein Section 6.2) ***above, the assumption is that the providing party is a counterparty incorporated or otherwise organised in your jurisdiction. Please consider your answer to each question and indicate how your answer would be different, if at all, assuming instead that:***

(a) The providing party is a branch located in your jurisdiction of a bank organised outside your jurisdiction;

(b) The providing party is neither incorporated nor otherwise organised in nor a branch located in your jurisdiction, but has assets in your jurisdiction;

(c) None of the above applies to the providing party (that is, it has no connection with your jurisdiction), but the margin was issued by the government of your jurisdiction or comprises Cash in the lawful currency of your jurisdiction.

Lit. a)

Assuming the term "bank" refers to a credit institution, territorial insolvency proceedings can neither be initiated pursuant to the EU Insolvency Regulation nor pursuant to the Insolvency Code against any branch located in Germany of a bank organised outside Germany. Accordingly, any close-out netting and financial collateral related questions would not be governed by German law in this situation.

Lit. b)

The response given under lit. a) above is also true for any assets located in Germany of a bank organised outside Germany.

Lit. c)

Again, the response given under lit. a) above is also true for any margin issued by the German government or Cash comprised in the German currency.

6.6 General Validity of each CPMA and each CSA and the Choice of Law and Jurisdiction

6.6.1 Given your above stated assumptions, are the: (i) CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA legal, valid and binding under the laws of your jurisdiction?

In our view, the CPMA and the CPMA CSA and the MNA and the MNA CSA should generally be legal, valid and binding under the laws of Germany, however subject to the assumptions, qualifications and discussions in our expressed opinions in this opinion letter and the following:

6.6.1.1 Statutory prohibitions

According to section 134 of the Civil Code, legal transactions that violate a statutory prohibition are void (unless the relevant statutory rule indicates otherwise). In respect of such provision, in particular contractual agreements and the performance of obligations to the benefit of corporations or individuals sanctioned by the EU or the UN may – where these sanctions have been implemented in Germany – be considered to be illegal and render the relevant contract void.

6.6.1.2 Hardship

Under section 314 of the Civil Code, each party to a contract relating to continuing obligations (*Dauerschuldverhältnis*) can terminate such contract for material reason without observing any notice period. Such material reason exists if – taking into account all the circumstances of the individual case and weighing the interests of both parties – the terminating party cannot be expected to continue the contractual relationship until the agreed termination or until a period of notice has expired.

Section 313 of the Civil Code provides for the principle of frustration of the underlying basis of a contract (*Wegfall der Geschäftsgrundlage*). Such principle applies, whenever circumstances which have become the basis of a contract have changed in a way which makes it unbearable for one party to perform its obligations under the unadjusted terms of the contract, provided that the changes to the circumstances were neither within the control of the parties nor foreseeable by the parties at the time they entered into the contract. In such case, the party affected has the right to claim an amendment of the contract or to withdraw from or terminate the contract if the contract cannot be adjusted or if it would be unreasonable to do so.

According to section 138 of the Civil Code, a legal transaction which is contrary to public policy (*Verstoß gegen die guten Sitten*) is held void. In particular, a legal transaction shall be held void where a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

6.6.1.3 Risks related to general terms and conditions

As in the case of other EFET (or similar business) standard documentation, there is a general risk that the documentation may be considered as standard terms and conditions (*Allgemeine Geschäftbedingungen*) in the meaning of the Civil Code. If that would be the case, the terms and conditions would be subject to a review of the limitations and restrictions that apply to such standard terms and conditions under sections 305 to 310 of the German Civil Code. Terms and conditions which are not in compliance with those restrictions could be regarded void and instead of such void provisions generally statutory provisions would apply.

However, regularly, market participants rely on the argumentation that respective standard terms and conditions e.g. provided by industry associations, are not to be considered as standard terms and conditions (*Allgemeine Geschäftsbedingungen*) in the meaning of the Civil Code given that they are not provided/imposed unilaterally by one party to/on the other party. Instead, there are two users (*Verwender*) of the respective terms. Unfortunately, there is however a risk that this lien of argumentation may not be upheld where one party is less experienced with the relevant business and/or the standard terms, so that again, the other party may be considered a user of such terms providing/imposing such terms unilaterally on the other less experienced party.

6.6.2 Are there any applicable limitations on the courts in your country with regard to upholding a choice of local law and submission to the jurisdiction of local courts?

Please refer to Sections 6.1.8 and 6.2.8 above.

6.7 Other Provisions

1. ***Are there any other provisions of either Master Agreement or either CSA that, given a choice of your local law, either:***

(*a) need to be revised in order to be enforceable in your jurisdiction; or*

(b) the legal efficacy of which could be materially improved upon or optimized with different wording (given such provision's apparent intent)?

Please provide suggested revisions.

In general, from our perspective, neither provisions of either Master Agreement nor of either CSA need to be revised in order to be enforceable under German law. Where we have made reservations that the enforceability under German law could be at risk, we have advised on this in this opinion letter.

7 Recent & Pending Developments

A new law that has come into force on 1 January 2021 is the implementation of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 ("Directive on restructuring and insolvency").

It was initially intended that in case a debtor enters into restructuring proceedings pursuant to the new law a competent court (in the absence of a court appointed Insolvency Administrator) should be allowed to terminate contracts that would be governed by section 103 of the Insolvency Code upon respective application by the debtor. However, pursuant to the draft law (i) any transactions that can be subject to close out netting pursuant to section 104 para. 3 and 4 of the Insolvency Code as well as (ii) any agreements on close out netting governed by the same provisions, were excluded from such termination permission.

The concept of the termination permission for contracts governed by section 103 of the Insolvency Code has, however, not been implemented in the new law at the end what is heavily discussed in legal literature.

However, we cannot exclude that this concept might be implemented at a later stage by means of review and amendment of the new law and might then also include close-out netting pursuant to section 104 of the Insolvency Code.

*   *   *

ANNEX A

Transactions entered into under the Underlying Agreements[15]
(provided by EFET)

A. Energy Transactions

Commodity Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of commodity (e.g., base metals, gas, oil, electricity, emission rights or freight) in exchange for payment of a specified price, which becomes due on the same day, two days later or on another agreed future date. The transaction may be settled by physical delivery of the quantity of commodity in exchange for the specified price or may be cash settled based on the difference between the market price of the commodities on the settlement date and the specified price.

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

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as base metals, gas, oil, electricity, emission rights or freight, or a futures contract on a commodity (e.g., Brent Crude Futures on the ICE Futures Europe Exchange); all calculations are based on a notional quantity of the commodity.

B. Energy Related Transactions

Emissions Allowance Transaction. A transaction, structured in the form of a swap, cap, collar, floor or some combination thereof, in which one party agrees to buy from or sell to the other party a specified quantity of a right to emit one tonne of carbon dioxide (CO_2) or other emissions product such as Nitrogen Oxide ("NOx") or sulfur dioxide ("SOx") during a specified period valid only for the purposes of meeting the requirements of applicable law and which is

[15] Some of the transactions provide for an exchange of cash by both parties and others for the physical delivery of commodities, shares or bonds in exchange for cash.

capable of being transferred from the seller to the buyer under a trading system established pursuant to applicable law.
Renewable Energy Certificates (“RECs”) Transaction. A transaction in which one party agrees to buy from or sell to the other party one or more fungible renewable energy certificates, each evidencing the production of 1MWhr of renewable energy and which is capable of being issued, evidenced, traded and redeemed in accordance with international standard practices such as the European Energy Certificate System. .

Weather Transaction. A transaction, structured in the form of a swap, cap, collar, floor, or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

Weather 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 receive a payment determined by reference to the amount by which a particular release of statistical data on weather conditions, which may include heating, cooling, precipitation and wind either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike level.

C. Other Transactions

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate or floating commodity price payer on the cap and the other party is the floating rate or floating commodity price payer on the floor.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor) or commodity price (in the case of a commodity floor).

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis on a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and in the case of silver, platinum and palladium, a troy ounce.

Equity Index Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of shares of an issuer or a basket of shares of several issuers for payment of a specified price for settlement either on a "spot" or two-day basis or a specified future date. The transaction may be settled by physical delivery of the agreed quantity of shares in exchange for the specified price or may be cash settled based on the difference between the index value on the settlement date and the specified index value.

Equity Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of shares included in an equity index for payment of a specified price for settlement either on a "spot" or two-day basis or a specified future date. The transaction may be settled by physical delivery of the agreed quantity of shares in exchange for the specified price or may be cash settled based on the difference between the market price of the shares on the settlement date and the specified price.

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) shares of an issuer or a basket of shares of several issuers at a specified strike price. The option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity or Equity Index Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security to the other party (in consideration for the original cash payment plus a premium).

Credit Protection Transaction.[16] A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (e.g., bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. Credit protection transactions may also be physically settled by payment of a specified fixed amount by one party against delivery of specified Reference Obligations by the other party. A credit protection transaction may also refer to a "basket" of two or more Reference Entities.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

[16] Some market participants may refer to credit protection transactions as credit swaps, credit default swaps or credit default options.

Economic Statistic Transaction. A transaction, structured in the form of a swap, cap, collar, floor, or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to statistical data on macro economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Economic Statistic 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 receive a payment determined by reference to the amount by which a particular release of statistical data on macro economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike level.

Foreign Exchange Transaction. A transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date. The transaction may be settled by physical delivery of the agreed currency or unit of account in exchange for payment of the agreed other currency or unit of account, or may be cash settled based on the difference between the market price of the agreed other currency or unit of account on the settlement date and the specified price.

Interest Rate 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 receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities from such other party at a future date.

Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower's obligation to replace the securities at a defined date with identical securities.

Annex B

Elections to be assumed in respect of each of the model Master Agreements (provided by EFET)

The model Master Agreements, upon which we have opined, have the following characteristics:

Underlying Agreements

- CPMA: Division 1, Part I, Section A / MNA: Section 2.1, Part I of the Election Sheet – The Underlying Agreements selected shall be the GTMA, EFET Power Agreement (Version 2.1(a)/September 21, 2007), EFET Gas Agreement (Version 2.0(a), May 11, 2007), EECS Certificate Master Agreement (Version 1.0/14 December 2013), ISDA Master Agreement (either the 1992 or the 2002 versions). Each of the Underlying Agreements is governed by either English or German law save in respect of the ISDA Master Agreement which is governed by either English, New York, Irish or French law.

Excluded Agreements

- **CPMA: Division 1, Part I, Section B / MNA: Section 2.1, Part I of the Election Sheet** – There shall be no Excluded Agreements.

Uncovered Transactions / Additional Netted Agreements

- **CPMA: Division 1, Part I, Section C / MNA: Part III of the Election Sheet -** Uncovered Transactions / Additional Netted Agreements should be included but all such transactions will be long form confirmations incorporating, in substantially their original form, the terms and conditions of one of the Underlying Agreements identified above save that an Uncovered Transaction / Additional Netted Agreement shall also include confirmations incorporating the short term flat NBP 2015 trading terms and conditions which have not been amended and are therefore not subject to an NBP Master.

Close-Out Events

- **CPMA: Division 1, Part II, Section A / MNA: Section 6.1, Part 1 of the Election Sheet: -** 'Close-Out Event' means any events that entitle close-out under the Underlying Agreements.

Excluded Events

- **CPMA: Division 1, Part II, Section B / MNA: Section 3.2, Part 1 of the Election Sheet: -** 'Excluded Events' – the first three boxes will be checked.

Automatic Close-Out of Underlying Agreements

- **CPMA: Division 1, Part II, Section C / MNA: Section 6.2, Part 1 of the Election Sheet:** – In respect of the CPMA, we have assumed the box is checked and that the rewrite of this provision contained in the Schedule is operative. In respect of the MNA, we have assumed the box is unchecked.

- **CPMA: Division 1, Part III / MNA: Section12.1, Part 1 of the Election Sheet: -** Additional Acknowledgements and Representations – none.

- **CPMA: Division 1, Part IV / MNA: Section 12.2, Part 1 of the Election Sheet: -** Governing Law **-** English and German law applies, in the alternative.

- **CPMA: Division 1, Part VII / MNA: Section 12.2, Part 1 of the Election Sheet: -** Assignment. In respect of the CPMA, no election, Section 7 applies but is amended as set out at (a) and (b) of the Election Sheet. In respect of the MNA, Section12.5(A) shall be operative in respect of Party A and Party B.

- **The following** shall apply:

	CPMA: Division 1, Part VIII	**MNA: Election Sheet**
Set-off of Final Net Settlement Amount	10.1	Section 10.1(A)
No Waiver	10.2	Automatically included (see Section 10.8 of the MNA)
Suspension	10.4	Section 10.1(B)
Automatic Early Termination & Adjustment for Bankruptcy	10.5	Section 6.4
Benefit of Credit Support	10.7	Section 9.1
Withholding Final Net Settlement Amount	10.8	No equivalent

- **CPMA: Division 1, Part X / MNA:** Part II of the Election Sheet **-** no additional terms.

- **CPMA only:** Division 2, to apply as set out in the Schedule.

Annex C

Section 104 of the Insolvency Code

(German) legal wording and (English) convenience translation

§ 104 **Fixgeschäfte, Finanzleistungen, vertragliches Liquidationsnetting**	**§ 104** **Fixed Date Transactions, Financial Transactions, contractual close-out netting**
(1) War die Lieferung von Waren, die einen Markt- oder Börsenpreis haben, genau zu einer festbestimmten Zeit oder innerhalb einer festbestimmten Frist vereinbart und tritt die Zeit oder der Ablauf der Frist erst nach der Eröffnung des Insolvenzverfahrens ein, so kann nicht die Erfüllung verlangt, sondern nur eine Forderung wegen Nichterfüllung geltend gemacht werden. Dies gilt auch für Geschäfte über Finanzleistungen, die einen Markt- oder Börsenpreis haben und für die eine bestimmte Zeit oder eine bestimmte Frist vereinbart war, die nach der Eröffnung des Verfahrens eintritt oder abläuft. Als Finanzleistungen gelten insbesondere	(1) In the event that a particular time or period was agreed upon for delivery of goods with a market or exchange price, and such time occurs or such period lapses after the opening of insolvency proceedings, specific performance may not be demanded, but rather only a claim for non-performance may be asserted. This also applies to financial transactions which have a market or exchange price, and for which a particular time or period was agreed which only occurs or expires after the opening of insolvency proceedings. Financial transactions shall include in particular
1. die Lieferung von Edelmetallen,	1. delivery of precious metals,
2. die Lieferung von Finanzinstrumenten oder vergleichbaren Rechten, soweit nicht der Erwerb einer Beteiligung an einem Unternehmen zur Herstellung einer dauernden Verbindung beabsichtigt ist,	2. delivery of financial instruments or comparable rights, except where there is an intention to acquire an interest in another enterprise with the aim of establishing a long-term association with that enterprise,
3. Geldleistungen	3. payments of money
a) die in ausländischer Währung oder in einer Rechnungseinheit zu erbringen sind oder	a) which are to be made in a foreign currency or in a mathematical unit, or
b) deren Höhe unmittelbar oder mittelbar durch den Kurs einer ausländischen Währung oder einer Rechnungseinheit, durch den Zinssatz von Forderungen oder durch den Preis	b) the amounts of which are calculated, directly or indirectly by referencing to the exchange rate of a foreign currency or a unit of account, to the interest rate for

anderer Güter oder Leistungen bestimmt wird,	borrowings or to the price of other goods or services,
4. von Nummer 2 nicht ausgeschlossene Lieferungen und Geldleistungen aus derivativen Finanzinstrumenten,	4. deliveries and payments from derivative financial instruments not excluded pursuant number 2 above,
5. Optionen und andere Rechte auf Lieferungen nach Satz 1 oder auf Lieferungen, Geldleistungen, Optionen und Rechte im Sinne der Nummern 1 bis 5,	5. options and other rights to demand delivery pursuant to sentence 1 or for delivery, payment or options and rights within the meaning of numbers 1 to 5 above,
6. Finanzsicherheiten im Sinne des § 1 Absatz 17 des Kreditwesengesetzes.	6. financial collateral within the meaning of section 1 para 17 KWG.
Finanzinstrumente im Sinne von Satz 3 Nummer 2 und 4 sind die in Anhang I Abschnitt C der Richtlinie 2014/65/EU des Europäischen Parlaments und des Rates vom 15. Mai 2014 über Märkte für Finanzinstrumente sowie zur Änderung der Richtlinien 2002/92/EG und 2011/61/EU (ABl. L 173 vom 12.6.2014, S. 349; L 74 vom 18.3.2015, S. 38; L 188 vom 13.7.2016, S. 28; L 273 vom 8.10.2016, S. 35), die zuletzt durch die Richtlinie (EU) 2016/1034 (ABl. L 175 vom 30.6.2016, S. 8) geändert worden ist, genannten Instrumente.	Financial instruments within the meaning of sentence 3 numbers 2 and 4 are those instruments listed in Annex I Section C of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ. L 173 of 12.6.2014, p. 349; L 74 of 18.3.2015, p. 38; L 188 of 13.7.2016, p. 28; L 273 of 8.10.2016, p. 35), as last amended by Directive (EU) 2016/1034 (OJ. L 175 of 30.6.2016, p. 8).
(2) Die Forderung wegen Nichterfüllung bestimmt sich nach dem Markt- oder Börsenwert des Geschäfts. Als Markt- oder Börsenwert gilt	(2) The amount of any claim for non-performance shall be determined on the basis of the market or exchange value of the transaction. The market or exchange value is deemed to be
1. der Markt- oder Börsenpreis für ein Ersatzgeschäft, das unverzüglich, spätestens jedoch am fünften Werktag nach der Eröffnung des Verfahrens abgeschlossen wird, oder	1. the market or exchange price for a replacement transaction which is concluded without undue delay, but no later than on the fifth business day after the opening of insolvency proceedings, or
2. falls kein Ersatzgeschäft nach Nummer 1 abgeschlossen wird, der Markt- oder Börsenpreis für ein Ersatzgeschäft, das am zweiten Werktag nach der Verfahrenseröffnung hätte abgeschlossen werden können.	2. if no replacement transaction is entered into in accordance with number 1, the market or exchange price for a replacement transaction, that could have been concluded on the second business day after the opening insolvency proceedings.

Sofern das Marktgeschehen den Abschluss eines Ersatzgeschäfts nach Satz 2 Nummer 1 oder 2 nicht zulässt, ist der Markt- und Börsenwert nach Methoden und Verfahren zu bestimmen, die Gewähr für eine angemessene Bewertung des Geschäfts bieten.	To the extent that the market conditions do not allow for the conclusion of a replacement transaction pursuant to sentence 2 numbers 1 or 2, the market or exchange value is to be determined by way of methods and procedures allowing for an adequate assessment of the value of the transaction.
(3) Werden Geschäfte nach Absatz 1 durch einen Rahmenvertrag oder das Regelwerk einer zentralen Gegenpartei im Sinne von § 1 Absatz 31 des Kreditwesengesetzes zu einem einheitlichen Vertrag zusammengefasst, der vorsieht, dass die einbezogenen Geschäfte bei Vorliegen bestimmter Gründe nur einheitlich beendet werden können, gilt die Gesamtheit der einbezogenen Geschäfte als ein Geschäft im Sinne des Absatzes 1. Dies gilt auch dann, wenn zugleich andere Geschäfte einbezogen werden; für letztere gelten die allgemeinen Bestimmungen.	(3) Where transactions pursuant to paragraph 1 are combined in a master agreement or the rules of a contractual counterparty within the meaning of Section 1 paragraph 31 of the German Banking Act, which provides that the covered transactions may, upon the occurrence of certain events, only be terminated in their entirety, then the whole of such covered transactions shall be deemed to be a single transaction within the meaning of paragraph 1. This shall also apply, if other transactions are covered by such agreement or rules; such transactions shall be subject to the general provisions.
(4) Die Vertragsparteien können abweichende Bestimmungen treffen, sofern diese mit den wesentlichen Grundgedanken der jeweiligen gesetzlichen Regelung vereinbar sind, von der abgewichen wird. Sie können insbesondere vereinbaren,	(4) The parties to the contract may agree deviating provisions as long as these are compatible with the fundamental principles applicable to the relevant statutory provision which is to be amended. They may in particular agree that,
1. dass die Wirkungen nach Absatz 1 auch vor der Verfahrenseröffnung eintreten, insbesondere bei Stellung des Antrags einer Vertragspartei auf Eröffnung eines Insolvenzverfahrens über das eigene Vermögen oder bei Vorliegen eines Eröffnungsgrundes (vertragliche Beendigung),	1. the effects of paragraph 1 may apply prior to the opening of proceedings, in particular upon the application by a party to the contract for the opening of insolvency proceedings over its assets or upon the existence of a reason for the opening for proceedings (contractual termination),
2. dass einer vertraglichen Beendigung auch solche Geschäfte nach Absatz 1 unterliegen, bei denen die Ansprüche auf die Lieferung der Ware oder die Erbringung der Finanzleistung vor der Verfahrenseröffnung, aber nach dem für die vertragliche Beendigung vorgesehenen Zeitpunkt fällig werden,	2. that a contractual termination will encompass also such transactions pursuant to paragraph 1) in respect of which the claim for delivery of the goods or the performance of the financial transaction becomes due prior to the opening of proceedings, but after the point in time agreed for the contractual termination,

3. dass zwecks Bestimmung des Markt- oder Börsenwerts des Geschäfts	3. that for the purposes of the determination of the market or exchange value of the transaction
a) der Zeitpunkt der vertraglichen Beendigung an die Stelle der Verfahrenseröffnung tritt,	a) the point in time of the contractual termination applies instead of the point in time of the opening of insolvency proceedings,
b) die Vornahme des Ersatzgeschäfts nach Absatz 2 Satz 2 Nummer 1 bis zum Ablauf des 20. Werktags nach der vertraglichen Beendigung erfolgen kann, soweit dies für eine wertschonende Abwicklung erforderlich ist,	b) the entering into of the replacement transaction pursuant to paragraph 2, sentence 2, number 1 may occur until the 20th business day after the contractual termination, if this is required to ensure that the unwinding of the transaction is performed in a manner that will maximise value,
c) anstelle des in Absatz 2 Satz 2 Nummer 2 genannten Zeitpunkts ein Zeitpunkt oder Zeitraum zwischen der vertraglichen Beendigung und dem Ablauf des fünften darauf folgenden Werktags maßgeblich ist.	c) instead of the point in time specified in paragraph 2 sentence 2, number 2 a point in time or a period between the contractual termination and the expiry of the fifth business day following such termination shall apply.
(5) Der andere Teil kann die Forderung wegen Nichterfüllung nur als Insolvenzgläubiger geltend machen.	(5) The other party may assert the claim for non-performance only as an insolvency creditor.